

# REFORMING FRONTEX

A HUMAN RIGHTS - BASED REVIEW

# IMPRINT

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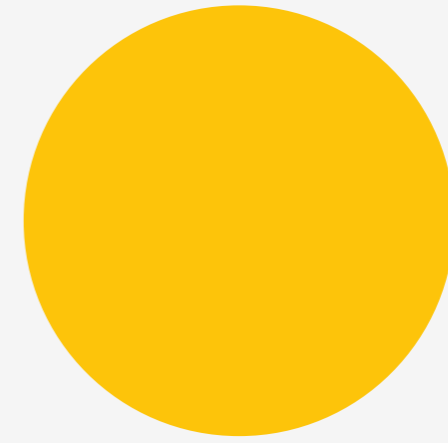
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# **LIST OF ABBREVIATIONS**

<b>AFET</b>	Committee on Foreign Affairs (European Parliament)
<b>AFIC</b>	Africa-Frontex Intelligence Community
<b>ARIO</b>	Articles on the Responsibility of International Organizations
<b>BVMN</b>	Border Violence Monitoring Network
<b>CEAS</b>	Common European Asylum System
<b>CFR</b>	Charter of Fundamental Rights of the European Union
<b>CFSP</b>	Common Foreign and Security Policy
<b>CJEU</b>	Court of Justice of the European Union
<b>CO</b>	Coordinating Officer
<b>COM/EC</b>	European Commission
<b>CPT</b>	Committee for the Prevention of Torture (Council of Europe)
<b>CSDP</b>	Common Security and Defence Policy
<b>DG</b>	Directorate-General
<b>DPO</b>	Data Protection Officer
<b>DROI</b>	Subcommittee on Human Rights (European Parliament)
<b>EBCG</b>	European Border and Coast Guard
<b>EBCGA</b>	European Border and Coast Guard Agency (Frontex)
<b>ECA</b>	European Court of Auditors
<b>ECB</b>	European Central Bank
<b>ECHR</b>	European Convention on Human Rights
<b>ECRE</b>	European Council on Refugees and Exiles
<b>ED</b>	Executive Director
<b>EDPS</b>	European Data Protection Supervisor
<b>EEAS</b>	European External Action Service
<b>EES</b>	Entry/Exit System
<b>EFA</b>	European Free Alliance
<b>EIBM</b>	European Integrated Border Management
<b>EP</b>	European Parliament
<b>EPPO</b>	European Public Prosecutor's Office
<b>EU</b>	European Union
<b>EUAA</b>	European Union Agency for Asylum
<b>EUBAM</b>	European Union Border Assistance Mission
<b>EUNAVFORMED</b>	European Union Naval Force Mediterranean
<b>EURODAC</b>	European Asylum Dactyloscopy Database
<b>EUROSUR</b>	European Border Surveillance System
<b>FRA</b>	European Union Agency for Fundamental Rights
<b>FRM</b>	Fundamental Rights Monitor
<b>FRO</b>	Fundamental Rights Officer
<b>FSC</b>	Frontex Situation Centre
<b>FSWG</b>	Frontex Scrutiny Working Group
<b>GAMM</b>	Global Approach to Migration and Mobility
<b>GDPR</b>	General Data Protection Regulation
<b>HRC</b>	UN Human Rights Council
<b>ICC</b>	International Criminal Court
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICM</b>	Individual Complaint Mechanism
<b>ILC</b>	International Law Commission

<b>ILO</b>	International Labour Organization
<b>IMO</b>	International Maritime Organization
<b>IOM</b>	International Organization for Migration
<b>JHA</b>	Justice and Home Affairs
<b>LGBTIQ+</b>	Lesbian, Gay, Bisexual, Transgender, Intersex and Queer
<b>LIBE</b>	Committee on Civil Liberties, Justice and Home Affairs (European Parliament)
<b>MB</b>	Management Board
<b>MEP</b>	Member of the European Parliament
<b>MFF</b>	Multiannual Financial Framework
<b>MMSTs</b>	Migration Management Support Teams
<b>MRCC</b>	Maritime Rescue Coordination Centre
<b>MSC</b>	Maritime Safety Committee (IMO)
<b>MSF</b>	Médecins Sans Frontières
<b>NGO</b>	Non-Governmental Organization
<b>OHCHR</b>	Office of the United Nations High Commissioner for Human Rights
<b>OJ</b>	Official Journal of the European Union
<b>OLAF</b>	European Anti-Fraud Office
<b>OP</b>	Operational Plan
<b>OPCAT</b>	Optional Protocol to the Convention Against Torture
<b>PACE</b>	Parliamentary Assembly of the Council of Europe
<b>PeDRA</b>	Project on Processing Personal Data for Risk Analysis
<b>SAR</b>	Search and Rescue
<b>SI</b>	Serious Incident
<b>SIR</b>	Serious Incident Report
<b>SOLAS</b>	International Convention for the Safety of Life at Sea
<b>SOP</b>	Standard Operating Procedure
<b>SRR</b>	Search and Rescue Region
<b>TEU</b>	Treaty on European Union
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>UN</b>	United Nations
<b>UNCLOS</b>	United Nations Convention on the Law of the Sea
<b>UNHCR</b>	United Nations High Commissioner for Refugees
<b>UNSCR</b>	United Nations Security Council Resolution
<b>WA</b>	Working Arrangement
<b>WG</b>	Working Group
<b>WG FRaLO</b>	Working Group on Fundamental Rights and Legal Operational Aspects of Operations



# **EXECUTIVE SUMMARY**



**For the past couple of years, the European Border and Coast Guard Agency (Frontex) has been confronted with structural shortcomings in terms of fundamental rights, accountability, management and oversight, leading to violations at the external borders and a number of institutional inquiries into the Agency. Most notably, the European Parliament, the EU Ombudsman, the European Anti-Fraud Agency (OLAF) and the Working Group on Fundamental Rights and Legal Operational Aspects of Operations have scrutinized the Agency and issued recommendations. This study builds on these institutional reports, and advances eight clusters of recommendations for the upcoming reform of the EBCG Regulation, directed at closing the structural gaps that have allowed Frontex to operate with insufficient accountability, inadequate fundamental rights safeguards, and limited judicial oversight since its inception.**

## **1. GOVERNANCE AND CHAIN OF COMMAND: CLARIFYING THE RESPONSIBILITY REGIME**

The new Regulation should impose a mandatory pre-operational duty allocation on Frontex and national authorities, specifying responsibilities at each operational stage. This allocation must be a pre-requisite to Frontex's participation and cannot be left to the discretion of the parties negotiating the launch of a joint activity. Current Article 7 should be redrafted to introduce joint and several liability as the default rule, drawing on the Europol Regulation, so that individuals harmed in Frontex-coordinated operations may seek full reparation from any actor involved. Breaches of the duty allocation should trigger disciplinary liability at the individual level and suspension of financing under Article 46 at the operational level. The Coordinating Officer's instructions on fundamental rights compliance should be binding on all participants, including the power to halt specific operational actions where immediate and irreversible harm is foreseeable. Standing Corps deployment should be conditional on an operational plan complying with the duty allocation requirements. Disciplinary outcomes should be transmitted to the FRO, included in the SIR record, and made available to affected individuals for use in subsequent judicial proceedings.

## **2. OPERATIONAL PLANS: TRANSPARENCY AND DISCLOSURE**

Transparency should be the default rule for operational plans, with confidentiality as a narrow exception requiring specific justification, in line with Articles 41 and 47 CFR. The public security exception under Regulation (EU) 1049/2001 should not apply to information on the distribution of responsibilities between Frontex and national authorities. The new Regulation should specify the minimum content of operational plans, including: responsibilities at each phase; the identity of the Coordinating Officer; procedures for persons in need of international protection and unaccompanied minors; SAR response procedures, including conditions for issuing a Mayday relay; and complaint procedures in languages individuals can understand; and the consequences of non-compliance, including the disciplinary measures applicable to individual officials and the criminal liability mechanisms applicable to perpetrators of fundamental rights violations. Compliance with minimum content requirements should be a condition for the lawful launch, continuation, and financing of any operation. The FRO and fundamental rights monitors must have unrestricted access to all assets and operational areas as a condition for deployment. Where a Member State refuses such access, Frontex should suspend operational support. A dedicated parliamentary access channel to operational plans should be established, not conditional on access to documents requests.

## **3. OBLIGATIONS AT SEA AND IN RETURNS**

The new Regulation should make explicit that Frontex bears direct and autonomous SAR obligations wherever it coordinates operations in which a distress situation arises, irrespective of concurrent Member State duties. Cooperation with third country authorities must be strictly conditional on compliance with the prohibition of *refoulement*, the right to asylum, and the requirement to disembark rescued persons in a place of safety on EU soil. Cooperation with authorities that systematically return rescued individuals to countries where they face persecution, arbitrary detention, or torture should be strictly prohibited. Against that backdrop, all forms of current cooperation, both direct and indirect and including communication, with Libyan authorities should be ceased without further delay. A mandatory human rights assessment by the FRO in consultation with the Consultative Forum should precede any cooperation arrangement with a third country. The role of SAR NGOs should be explicitly recognised and their obstruction prohibited. In the field of returns, forced-return monitoring should be assigned to a genuinely independent body, structurally separate from Frontex. Frontex participation in return hubs and third-country-to-third-country transfers should be excluded, given the significant legal objections and questionable feasibility to implement in a fundamental rights-compliant manner. In the event that the co-legislators nonetheless decide to proceed with this possibility, a binding ex ante FRO assessment must confirm the availability of EU-equivalent safeguards, that an independent EU monitoring mechanism is operational, and individual remedies with automatic suspensive effect are available in law and in practice.

## 4. COOPERATION WITH THIRD COUNTRIES

All informal cooperation with third countries should be prohibited. All operational engagements, including intelligence sharing, capacity building, and data exchange, should take place exclusively within legally binding instruments. Frontex staff deployment to third countries should be conditional on a status agreement. Status agreements should be concluded only with countries party to the 1951 Refugee Convention and its 1967 Protocol, the International Covenant on Civil and Political Rights, and the Convention Against Torture, and without real risks of *refoulement*. Working Arrangements should be replaced with binding instruments and used only to implement pre-existing hard law commitments. Strict continuous human rights conditionality should be a non-derogable principle across all instruments, with mandatory risk assessments before and during implementation and immediate suspension and reporting to the European Parliament, the FRO, and the Management Board where violations occur. Immunity provisions should be interpreted narrowly, with waiver procedures transparent and subject to the control of the CJEU, with the FRO assigned a substantive role in immunity waiver determinations.

## 5. DATA PROTECTION

Debriefing interviews require an explicit legal basis incorporating full procedural safeguards: informed consent, the right not to participate, availability of legal assistance and interpretation throughout, and a prohibition on default data sharing with law enforcement without a case-by-case documented necessity assessment. Any transfer of personal data to Europol or other law enforcement authorities must be based on an individualised necessity assessment; automatic or bulk data sharing is prohibited. Individuals whose data has been shared with law enforcement must be promptly informed and given access to effective remedies. The sharing of operational intelligence, including vessel geolocation data and surveillance imagery, with authorities in countries where *refoulement* risks exist should be explicitly prohibited. A mandatory independent human rights impact assessment should be required prior to any transfer of surveillance technology or training to third country authorities. The new Regulation should resolve the ambiguity in controllership allocation between Frontex and Member States in joint operations, specifying the responsible entity for each category of processing. The EDPS should be assigned enhanced supervisory powers, including unannounced audits and binding suspension orders.

## 6. MONITORING AND ACCOUNTABILITY

The FRO's opinions should be made binding in all matters of fundamental rights compliance. The FRO should be empowered to act *ex officio*, initiate serious incident investigations, and request information from Member State authorities. No deployment should take place without a fundamental rights monitor assigned to it. The capacity assessment mechanism should be inverted, with the FRO rather than the Executive Director determining monitoring needs. The SIR mechanism should be reformed to: subject initial assessments to independent FRO review; assign Category 1 and 2 incident investigations to the FRO; establish minimum procedural rights for affected individuals, including the right to submit information, receive the outcome, and seek judicial redress; and impose hard deadlines with a single time-limited extension. Member State cooperation with SIR investigations should be made legally binding, with failure to cooperate constituting a ground for

suspension of Frontex support under Article 46. The individual complaint mechanism should be reformed to allow appeal to the EU Ombudsperson and to empower civil society organisations to lodge complaints on behalf of affected individuals. A dedicated permanent parliamentary scrutiny structure for Frontex should be re-established with binding reporting obligations.

## 7. ARTICLE 46: SUSPENSION AND TERMINATION OF OPERATIONS

The FRO's role in Article 46 procedures should be strengthened through one of the two models proposed. Under the first, the Consultative Forum should be empowered to refer potential Article 46 situations to the FRO, whose resulting formal Opinion would be binding on the Executive Director. Under the second, the FRO's Opinion would remain non-binding, but the Executive Director should be required to act within 15 days of receiving it and, where departing from the FRO's assessment, to provide written reasons within the same deadline, made publicly available. This is to ensure compliance with Article 41 CFR. In this line, the current subjective activation threshold should be replaced with objective legislative criteria, drawing on the substantive guidance already developed in Article 46 SOP, including the concept of "administrative practice" from ECtHR case law and the indicators of gravity and persistence listed in Article 46(6). A mandatory due diligence procedure should govern escalation, specifying a threshold at which corrective measures are deemed exhausted, and escalation becomes obligatory. Affected individuals should have minimum procedural rights in Article 46 proceedings, including the right to submit relevant information, to be informed of the outcome, and to access independent review where activation is refused despite a formal FRO opinion. Ex ante remedies with automatic suspensive effect should be made available.

## 8. LEGAL REMEDIES

The new Regulation should operationalise Articles 263 and 265 TFEU in the border management context. Reviewable acts should include: decisions to launch, continue, or refuse to suspend operations; decisions refusing access to operational plans or SIR reports; decisions on Working Arrangements with third countries; and any (*de jure* or *de facto*) measure affecting the legal position of individuals in the context of border management. A refusal by the Executive Director to activate Article 46 following a formal FRO Opinion should constitute a reviewable act under Article 263 TFEU. The new Regulation should specify the circumstances in which Frontex inaction constitutes *ipso jure* a failure to act under Article 265 TFEU, including failure to activate Article 46 where objective criteria are met and failure to disclose operational plan information to which an individual has a right of access. Standing under Article 263(4) TFEU should be reformed: individuals affected by Frontex-coordinated activities should have standing to challenge the identified categories of acts, and the FRO, the Consultative Forum, and recognised civil society organisations should be granted standing without being required to demonstrate individual concern under the *Plaumann* formula. An ex-ante suspensive remedy should be created, enabling individuals or bodies acting on their behalf to obtain emergency interim relief where an operational action would cause irreversible harm to an absolute right, with decisions required within a very short timeframe. Joint and several liability should be codified as the default rule for harm caused in the course of joint operations, with internal allocation governed by the pre-operational duty allocation framework.



# INTRODUCTION

## 1. PURPOSE AND RATIONALE

The European Border and Coast Guard Agency (EBCG or Frontex) is today the best-funded agency in the European Union (EU) and one of its most operationally powerful. Established in 2004 as a modest coordination body to assist Member States in managing the external borders of the Schengen Area,<sup>1</sup> Frontex has been progressively transformed by successive legislative reforms into an institution of a fundamentally different nature. The 2019 EBCG Regulation,<sup>2</sup> currently in force – the core legal instrument examined in this study, endowed the Agency with an expanded mandate, a permanent Standing Corps projected to reach 10,000 operational staff by 2027, executive powers including the authority to carry and use weapons, a rapidly growing budget, and an operational footprint extending from EU territory into third countries across three continents. Frontex today coordinates joint operations at sea, on land, and conducts border surveillance through drones and satellite imagery; processes personal data on a grand scale; supports Member States in return operations; and deploys staff outside the EU, including to carry out joint border control, migration management and surveillance missions. What has not grown at the same pace is an awareness of the continued application of fundamental rights obligations and related accountability mechanisms. The gap between operational reach and legal accountability pathways constitutes the object of this study.

**The scale and simultaneity of these investigations, spanning the European Parliament, the Ombudsperson, and OLAF, were without precedent in the Agency's history**

This accountability deficit did not emerge suddenly. Under the former Executive Director (ED) Fabrice Leggeri, the Agency became the subject of unprecedented levels of scrutiny from multiple institutional actors. Beginning in late 2020, investigative media consortia, including *Der Spiegel*, *Le Monde*, and partner outlets, documented serious allegations of Frontex's involvement in pushbacks in the Aegean, and of the Agency's use of its own reporting system.<sup>3</sup> These findings triggered a cascade of institutional responses. In November 2020, the Management Board established an internal Working Group on Fundamental Rights and Legal Operational Aspects of Operations (WG FRaLO) to examine the specific incidents raised by the journalistic investigation. The WG FRaLO's final report issued in 2021 a series of recommendations to the Agency concerning its reporting system, the systematic monitoring of the Serious Incident Report (SIR) mechanism, and the protection of whistle-blowers, but left five of the thirteen examined incidents unresolved.<sup>4</sup>

<sup>1</sup> Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349/1, 25.11.2004. For a reconstruction: Violeta Moreno-Lax, *Accessing Asylum in Europe* (Oxford University Press, 2017) ch 6.

<sup>2</sup> Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, OJ L 295/1, 14.11.2019.

<sup>3</sup> Bellingcat, Lighthouse Reports, Der Spiegel, ARD, TV Asahi, '[Frontex at Fault: European Border Force Complicit in "Illegal" Pushbacks](#)', 23 October 2020.

<sup>4</sup> Frontex Management Board, Conclusions of the Management Board's Meeting of 5 March 2021 on the Report of its Working Group on Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea (WG FRaLO Final Report), 5 March 2021.

In January 2021, OLAF, the EU's anti-fraud office, opened a formal investigation into allegations of pushbacks, internal harassment, and misconduct within Frontex's senior management.<sup>5</sup> Concurrently, in January 2021, the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) established the Frontex Scrutiny Working Group (FSWG) to conduct a fact-finding investigation into alleged fundamental rights violations. The FSWG's final report concluded that the Agency had systematically failed to follow up violations committed by Member States' authorities during Frontex-coordinated operations, that the Executive Director had not cooperated adequately with the Agency's own compliance mechanisms, and that the Management Board had adopted a passive role in the face of persistent fundamental rights risks.<sup>6</sup> The European Ombudsperson conducted a parallel inquiry into the effectiveness, accessibility, and independence of Frontex's complaints mechanism, identifying significant structural shortcomings, including delays in implementing the 2019 Regulation, the absence of appointed fundamental rights monitors, and insufficient independence of the Fundamental Rights Officer (FRO).<sup>7</sup> A subsequent strategic inquiry by the Ombudsperson, opened in March 2021, further examined the transparency of Frontex's joint operations and its monitoring of return operations, resulting in additional recommendations on the publication of operational plans and fundamental rights training.<sup>8</sup> OLAF finalised its investigation in February 2022, finding irregularities concerning the witnessing and concealment of illegal pushbacks, the exclusion of Fundamental Rights Officers from reporting lines, and the intimidation and harassment of staff members.<sup>9</sup> It was following the disclosure of OLAF's preliminary conclusions that Executive Director Leggeri resigned on 29 April 2022; the Management Board accepted his resignation on the same day and determined that disciplinary proceedings were no longer necessary.<sup>10</sup> The scale and simultaneity of these investigations, spanning the European Parliament, the Ombudsperson, and OLAF, were without precedent in the Agency's history and reflected a pattern that this study identifies as structural: the growth of Frontex's operational powers without a corresponding consolidation of accountability mechanisms.

On 31 July 2025, the European Commission launched a call for evidence for an impact assessment in view of a forthcoming proposal for new legislation to update Regulation (EU) 2019/1896.<sup>11</sup> The envisaged reform aims at reinforcing the Agency and expanding its mandate further. The proposal to expand the Standing Corps to 30,000 did not originate from an evidence-based assessment of operational need. It entered the European political agenda as an electoral commitment of the European People's Party, which included the pledge to triple Frontex staff to 30,000 and equip the Agency with expanded implementing powers in its manifesto for the June 2024 European Parliament elections.<sup>12</sup> Subsequently, Commission President Ursula von der Leyen incorporated this commitment into her Political Guidelines for 2024–2029, announcing the intention to expand the EU Border and Coast Guards to 30,000 and to provide the Agency with state-of-the-art

<sup>5</sup> OLAF Investigation, Olaf.03(2021)21088, CASE No OC/2021/0451/A1, Brussels.

<sup>6</sup> European Parliament, LIBE Committee, Frontex Scrutiny Working Group (FSWG), Report on the Fact-Finding Investigation on Frontex concerning Alleged Fundamental Rights Violations, 14 July 2021.

<sup>7</sup> European Ombudsman, Decision in OI/5/2020/MHZ on the Functioning of the European Border and Coast Guard Agency (Frontex) Complaints Mechanism, 15 June 2021.

<sup>8</sup> European Ombudsperson, Strategic Inquiry OI/4/2021/MHZ concerning Frontex's Compliance with its Fundamental Rights Obligations in the Course of its Activities.

<sup>9</sup> OLAF Investigation, Olaf.03(2021)21088, CASE No OC/2021/0451/A1, Brussels.

<sup>10</sup> Frontex Management Board, Extraordinary Meeting of 28–29 April 2022: Acceptance of Resignation of Executive Director Fabrice Leggeri, 29 April 2022.

<sup>11</sup> European Commission, Call for Evidence, Impact Assessment, European Border and Coast Guard, update of EU rules, 31 July 2025.

<sup>12</sup> European People's Party, EPP Manifesto 2024: Our Europe, a Safe and Good Home for the People (2024), p. 6.

surveillance technology.<sup>13</sup> This political commitment was adopted despite the Commission's own evaluation of the 2019 Frontex Regulation had expressly concluded that "there is no immediate need for a revision of the EBCG Regulation or its annexes," noting in particular that the full implementation of the 2019 framework was not foreseen to be completed until 2027.<sup>14</sup> No impact assessment, proportionality analysis, or evidence base was provided to justify the tripling of the Standing Corps or to explain why an expanded mandate would be necessary to better ensure the European Integrated Border Management (EIBM) system. The call for evidence for an impact assessment, launched by the Commission on 31 July 2025,<sup>15</sup> post-dates the political commitment by over a year, raising serious questions about the direction of travel: the conclusion in favour of legislative reform appears to have been reached before the assessment of its necessity. This study submits that the pattern is familiar. Each previous reform cycle of the Agency has followed the same logic of politically driven mandate expansion outpacing legal and accountability frameworks. The forthcoming revision risks reproducing and deepening that pattern at a moment when right-wing political actors, emboldened by their gains in the 2024 elections, are seeking to use the legislative process to dismantle existing fundamental rights safeguards rather than strengthen them.

This context makes the present study both timely and necessary. The expansion of Frontex's powers without a corresponding strengthening of accountability mechanisms has been the consistent pattern of every previous reform cycle. If the forthcoming revision follows the same logic, it risks compounding an already serious accountability deficit at a moment when the Agency's operational footprint, its budget, and the legal consequences of its conduct have never been greater. This study was commissioned by Tineke Strik, Member of the Greens/EFA Group in the European Parliament, precisely to ensure that fundamental rights and accountability are not left behind in the legislative process.

Against this background, this study is addressed, in the first instance, to EU decision-makers, the European Parliament, the Council, and the Commission, and pursues two complementary objectives. First, the study aims to map, synthesise, systematise, and critically assess all relevant proposals, evaluations, and analyses already produced by EU actors in relation to Frontex and Regulation (EU) 2019/1896 that are likely to shape the upcoming negotiations. Second, building on this baseline, it anticipates the likely directions of the forthcoming reform and formulates concrete, legally sound recommendations for amendments to the future Regulation, with a view to strengthening fundamental rights protection and accountability.

<sup>13</sup> European Commission, Political Guidelines for the Next European Commission 2024–2029, 18 July 2024.

<sup>14</sup> European Commission, Report on the Evaluation of Regulation (EU) 2019/1896 on the European Border and Coast Guard, including a Review of the Standing Corps, COM(2024) 75 final, 2 February 2024. The quoted language appears in the Annex to the report, SWD(2024) 75 final. See also Tineke Strik, 'Frontex's Expanding Mandate: Has Democratic Control Caught Up?' (2024) 30 European Law Journal 217, 218.

<sup>15</sup> European Commission, DG Home Affairs, European Border and Coast Guard: Update of EU Rules, Public Consultation, opened 21 August 2025, closed 27 November 2025.

These objectives are pursued in light of the broader legislative and jurisprudential context. Special attention is given to the proposal for a new Return Regulation,<sup>16</sup> the revised rules on safe third countries, the New Pact on Migration and Asylum,<sup>17</sup> and the forthcoming revision of the EU Facilitation Directive,<sup>18</sup> insofar as relevant for the mandate and activities of Frontex, including its cooperation with Europol.

The Commission's own evaluation of Regulation (EU) 2019/1896,<sup>19</sup> published in February 2024, identified a series of internal coherence weaknesses in the current framework: persistent uncertainties in the allocation of responsibility between Frontex and national authorities during joint operations; vagueness in the provisions governing the use of force and personal data protection; and a lack of clarity and uniform application of key return-related concepts. This study takes that diagnosis as the starting point but argues that the required solutions must be structural. The accountability deficit in the EBCG framework cannot be overcome through better implementation of the existing provisions or through internal operational guidance. It is embedded in the foundational design of the Agency itself and requires legislative reform of commensurate depth.

**The expansion of Frontex's powers without a corresponding strengthening of accountability mechanisms has been the consistent pattern of every previous reform cycle**

<sup>16</sup> Proposal for a Regulation of the European Parliament and of the Council establishing a common system for the return of third-country nationals staying illegally in the Union, and repealing Directive 2008/115/EC, Council Directive 2001/40/EC and Council Decision 2004/191/EC, COM(2025) 101 final, 11 March 2025.

<sup>17</sup> In particular Regulation (EU) 2024/1356 of 14 May 2024 introducing the screening of third-country nationals at the external borders, OJ L 2024/1356, 22.5.2024; and Regulation (EU) 2024/1349 of 14 May 2024 establishing a return border procedure, OJ L 2024/1349, 22.5.2024.

<sup>18</sup> Proposal for a Directive of the European Parliament and of the Council laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, COM(2023)755 final, 28 November 2023.

<sup>19</sup> Commission staff working document, Evaluation Accompanying the document Report from the Commission to the European Parliament and the Council on the evaluation of Regulation (EU) 2019/1896 on the European Border and Coast Guard, including a review of the Standing Corps, COM(2024) 75 final, 2 February 2024 .

## 2. SCOPE AND STRUCTURE

The study examines the EBCG framework across seven thematic dimensions, each constituting a separate chapter, and organised around a common three-step analytical sequence: a synoptic mapping of institutional positions and proposals; a structured summary of the main issues emerging from these materials; and a legal analysis assessing the main issues in light of the current regulatory framework, relevant case law, and the objectives of the upcoming reform.

Chapter 1 analyses the governance architecture and chain of command of the EBCG framework. It examines the allocation of responsibilities between Frontex and the Member States under Article 7 of the EBCG Regulation, the multi-layered decision-making structure running from the Management Board through the Executive Director and the Coordinating Officer to deployed staff, and the role of operational plans as the central instruments governing the conduct of joint activities. Chapter 2 examines the substantive obligations arising from the Agency's mandate, with particular attention to search and rescue (SAR) at sea and to return operations, domains where the consequences of accountability failure may be irreversible. Chapter 3 analyses the legal framework governing Frontex's cooperation with third countries, covering status agreements, working arrangements, pilot projects, technical assistance, and the extensive informal cooperation that operates entirely outside any of these instruments. Chapter 4 examines the Agency's data processing activities, with a focus on the European Data Protection Supervisor (EDPS) audit findings. Chapter 5 maps the internal and external monitoring and accountability mechanisms: the role of the Fundamental Rights Officer, the Serious Incident Reporting system, the individual complaints mechanism, the Consultative Forum, and the parliamentary discharge procedure. It also identifies the structural limitations that have made each of them insufficient. Chapter 6 analyses Article 46 of the EBCG Regulation, the suspension and termination mechanism, its procedural architecture, and the reasons why it has been activated on fundamental rights grounds only once in over two decades of Agency activity. Chapter 7 confronts the question of legal responsibility and judicial remedies: the shared responsibility framework, as an obstacle to attribution; the inaccessibility of the action for annulment and the failure to act route; and the significance and limits of the CJEU rulings in *Hamoudi20* and *WS and Others v Frontex*.<sup>21</sup>

<sup>20</sup> Case C-136/24 P, *Hamoudi v. Frontex*, ECLI:EU:C:2025:977.

<sup>21</sup> Case C-679/23 P, *WS and Others v. Frontex*, ECLI:EU:C:2025:976.

## 3. SYSTEMIC APPROACH

Across all seven chapters, a single diagnosis emerges. The EBCG framework rests on a model of shared responsibility between Frontex and the Member States that is regulatorily blurred and operationally underspecified. Article 7(1) of the EBCG Regulation establishes shared responsibility as the general rule. Article 7(4) provides that the Agency is fully answerable for the decisions it takes and activities for which it is solely responsible, without identifying which decisions or activities fall within this category, and without defining how the boundary between shared and sole responsibility is to be drawn in any concrete operational situation. The Commission has itself acknowledged that uncertainties persist regarding the allocation of responsibility between Frontex and national authorities during joint operations.<sup>22</sup> Those uncertainties are not accidental: they are the predictable consequence of a Regulation that assigns overlapping functions to multiple actors without specifying, in legally clear and operationally actionable terms, who bears which obligation, under which circumstances, and to which extent.

This foundational indeterminacy permeates every dimension of the Agency's mandate. The Coordinating Officer exercises authority that is formally advisory but functionally decisive, without clear legal grounding for either its binding or non-binding character.<sup>23</sup> Operational plans, the central instruments governing joint operations, are classified by default, rendering the chain of command, the allocation of tasks, and any fundamental rights procedures invisible to those most affected by operational conduct.<sup>24</sup> The Serious Incident Reporting system entrusts the assessment of potential violations to the same institutional actors whose conduct is under scrutiny.<sup>25</sup> The Article 46 suspension mechanism concentrates sole decision-making authority in the hands of the Executive Director, who may or may not activate the provision on an entirely discretionary basis, to the point that termination of a joint operation on fundamental rights grounds has occurred only once in over two decades of Agency activity,<sup>26</sup> despite thoroughly documented malpractices in relation to a plethora of interventions.<sup>27</sup> The Fundamental Rights Officer issues opinions and recommendations with no binding force that may be, and routinely are, ignored without consequence.<sup>28</sup> The Consultative Forum has been progressively marginalised.<sup>29</sup> The European Parliament's democratic oversight is structurally insufficient: its discharge denial in respect of the 2020 budget produced no operational or financial consequence.<sup>30</sup>

<sup>22</sup> Commission Staff Working Document, Evaluation Accompanying the Report on the evaluation of Regulation (EU) 2019/1896, SWD(2024)75 final, 2 February 2024, p. 18.

<sup>23</sup> EBCG Regulation, Article 43(2) (3).

<sup>24</sup> EBCG Regulation, Articles 38(3), Article 92.

<sup>25</sup> SIR SOP, Sections 3.4, 3.6, and 4.2.2.

<sup>26</sup> Decision of the Executive Director No R-ED-2022-12 of 25 January 2022, Standard Operating Procedure (SOP); FSWG Final Report, 14 July 2021, section 3.D; Case C-808/18, *Commission v. Hungary*, EU:C:2020:1029.

<sup>27</sup> OLAF Report, Olaf.03(2021)21088; European Parliament, Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations, LIBE Committee, 14 July 2021; EU Ombudsman, Case 01/4/2021/MHZ; European Court of Auditors, Special Report 08/2021.

<sup>28</sup> The FRO's Opinions do not have binding effects: EBCG Regulation, Article 109(2) and (4).

<sup>29</sup> Consultative Forum on Fundamental Rights, Sixth Annual Report, p. 21; EBCG Regulation, Article 109(4), which limits the FRO's reporting obligation to the Management Board, without equivalent obligation toward the Consultative Forum.

<sup>30</sup> European Parliament Decision of 4 May 2022, P9\_TA(2022)0171; Second Report on discharge, 7 October 2022, 2021/2146(DEC).

In third countries, the Agency sometimes operates through unspecified informal arrangements that fall entirely outside any oversight mechanism,<sup>31</sup> while Standing Corps members deployed under Status Agreements enjoy immunities that, in practice, translate into impunity.<sup>32</sup>

Chapter 4 on data processing reveals that this structural opacity has concrete individual consequences. Debriefing interviews are conducted without a clear legal basis, in coercive circumstances, and without the procedural safeguards that data protection law requires. The EDPS found that the Agency characterised as “anonymous” data that was in fact personal, and that it automatically shared debriefing data with Europol without the necessity assessments required by law;<sup>33</sup> yet, the resulting formal reprimand has not translated into an overhaul of the Agency’s data handling practices. Intelligence sharing with Libyan authorities is known to facilitate pullbacks to conditions that UN investigators have characterised as amounting to crimes against humanity.<sup>34</sup> Surveillance technology and border control equipment have been transferred to third countries with weak or non-existent legal safeguards, and without the intermediation of human rights impact assessments.

Chapter 7 on legal remedies closes the circle and reveals the depth of the accountability problem. The action for annulment under Article 263 TFEU is, as currently interpreted, practically non-available because Frontex’s conduct in joint operations rarely takes the form of formally adopted acts producing binding legal effects on specific persons deemed directly and individually concerned. The failure to act route, under Article 265 TFEU, is equally practically inaccessible due to the prevailing narrow understanding of its terms. Non-contractual liability under Articles 268 and 340(2) TFEU has emerged, following the rulings in *Hamoudi* and *WS*, as the only potential avenue of judicial protection against Frontex violations before the EU courts. These judgments are an important advance: they establish that Frontex bears autonomous obligations independent of Member State competences; that concurrent liability with Member States is legally possible; and that evidentiary rules and power asymmetries cannot be permitted to defeat arguable claims. Yet non-contractual liability alone cannot remedy the deeper structural problems affecting the design of the EBCG accountability regime. It is an entirely ex post remedy and, as such, requires the occurrence of potentially irreversible harm before it can be activated. As any ex post remedy, it cannot prevent violations; at best, it may compensate for them, if the claimant has survived and possesses or can access *prima facie* evidence.

<sup>31</sup> Statewatch and Transnational Institute, ‘Exporting Borders: Frontex and the Expansion of Fortress Europe in West Africa’, 10 July 2025.

<sup>32</sup> European Commission, Model Status Agreement as referred to in Regulation (EU) 2019/1896, COM(2021) 829 final, 21 December 2021, Article 12, which lists the privileges and immunities of team members, including civil and criminal liability. On the risk that these immunities translate into impunity in practice: European Parliament, Report on a recommendation concerning negotiations on a status agreement between the EU and Mauritania, A9-0358/2023, which found that the immunity provisions in the model agreement are “excessively broad, posing a significant risk of fostering impunity”; and SHARED project Joint Guidelines on Shared Responsibility for European Integrated Border Management (“SHARED Guidelines”) <<https://www.gmul.ac.uk/law/media/law/docs/news/Joint-Guidelines-on-Shared-Responsibility-for-eibm.pdf>>, SHARED Guidelines 62 to 65.

<sup>33</sup> EDPS, Audit Report on the European Border and Coast Guard Agency (Frontex), Case number 2022-0749, May 2023; EDPS, Press Release, ‘EDPS reprimands Frontex for non-compliance with Regulation (EU) 2019/1896’, 8 January 2025.

<sup>34</sup> UN Human Rights Council, Independent Fact-Finding Mission on Libya, Report, A/HRC/52/83, March 2023, which found reasonable grounds to believe that crimes against humanity were committed against migrants in Libya, and that EU support to the Libyan Coast Guard aided and abetted the commission of those crimes. On Frontex’s specific role in intelligence sharing facilitating interceptions and pullbacks: Human Rights Watch and Border Forensics, ‘Airborne Complicity: Frontex Aerial Surveillance Enables Abuse’, 12 December 2022.

What this study demonstrates, in aggregate, is that the accountability deficit flows from political choices reflected in the legislative design of the EBCG Regulation, comprising: the vagueness of the responsibility regime, the concentration of discretionary power in the hands of the Executive Director, the confidentiality of operational plans, the non-binding character of fundamental rights oversight, and the absence of ex ante remedies and effective judicial protection. No amount of operational diligence, internal guidance, or Management Board recommendations can fully redress the situation. The Commission’s own evaluation has identified the problem, yet without proposing solutions adequate to its scale.

## 4. METHODOLOGY AND SOURCES

The study draws on a comprehensive range of primary sources: the EBCG Regulation and its legislative history; the Frontex Scrutiny Working Group’s report on its fact-finding mission;<sup>35</sup> the Commission’s 2024 evaluation report and its accompanying staff working document;<sup>36</sup> Management Board decisions, Standard Operating Procedures, and the internal governance instruments adopted under the Regulation;<sup>37</sup> the reports of the Management Board’s WG FRaLO, including its reports on operations in the Aegean Sea;<sup>38</sup> decisions and recommendations of the EU Ombudsman across multiple inquiries;<sup>39</sup> audit and supervisory opinions and decisions of the EDPS;<sup>40</sup> reports of the European Court of Auditors;<sup>41</sup> OLAF’s report on Frontex;<sup>42</sup> opinions and annual reports of the Fundamental Rights Officer and the Consultative Forum;<sup>43</sup> relevant case law of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR); UN and Council of Europe sources on the treatment of migrants at sea and in

<sup>35</sup> European Parliament, LIBE Committee, Frontex Scrutiny Working Group (FSWG), European Parliament resolution of 14 December 2023 on Frontex building on the fact-finding investigation of the LIBE Working Group for Frontex Scrutiny (2023/2729(RSP)).

<sup>36</sup> Report from the Commission to the European Parliament and the Council on the evaluation of Regulation (EU) 2019/1896 on the European Border and Coast Guard, including a review of the Standing Corps, COM(2024) 75 final; Commission Staff Working Document, Evaluation Accompanying the Report, SWD(2024) 75 final, 2 February 2024.

<sup>37</sup> Many Frontex own acts will be referred to, including: Executive Director Decision No R-ED-2021-51 of 19 April 2021 on the Standard Operating Procedure on Serious Incident Reporting; Management Board Decision 12/2021 of 14 February 2021 adopting the Fundamental Rights Strategy; Management Board Decision 6/2021 of 20 January 2021 adopting special rules to guarantee the independence of the Fundamental Rights Officer; Management Board Decision 19/2022 of 16 March 2022 adopting the Agency’s rules on the complaints mechanism.

<sup>38</sup> Frontex Management Board, Conclusions of the Management Board’s Meeting of 20–21 January 2021 on the Preliminary Report of its Working Group on Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea (WG FRaLO Preliminary Report), 21 January 2021; Frontex Management Board, Conclusions of the Management Board’s Meeting of 5 March 2021 on the Report of its Working Group on Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea (WG FRaLO Final Report), 5 March 2021.

<sup>39</sup> For illustration: EU Ombudsman, Case OI/4/2021/MHZ on Frontex’s compliance with fundamental rights obligations; Case 1473/2022/MHZ on human rights risk assessments prior to assistance to non-EU countries; Case 1452/2022/MHZ on debriefing interviews; Case 652/2023/VB on access to an FRO report on a Frontex operation in Albania.

<sup>40</sup> These include, for example, EDPS, Audit Report on Frontex, Case number 2022-0749, May 2023; EDPS, Reprimand Decision, 8 January 2025.

<sup>41</sup> European Court of Auditors, Special Report 08/2021: Frontex’s support to external border management: not sufficiently effective to date.

<sup>42</sup> OLAF Report, Olaf.03(2021)21088.

<sup>43</sup> For illustration: FRO Annual Report 2022, 2023, 2024; Consultative Forum on Fundamental Rights, Sixth Annual Report.

detention, including reports and resolutions of the Parliamentary Assembly of the Council of Europe (PACE) and the Commissioner for Human Rights.<sup>44</sup> The study also draws on the Joint Guidelines on Shared Responsibility for European Integrated Border Management produced by the SHARED research project,<sup>45</sup> a collaborative research initiative on shared responsibility for human rights at the EU external borders led by Professor Violeta Moreno-Lax and co-coordinated by Dr. Mirentxu Jordana and Dr. Laura Salzano, which brought together more than twenty researchers, practitioners, NGO representatives, and policy experts, including the offices of six Members of the European Parliament across political groups, and resulted in a set of guidelines elaborating the legal content and operational implications of “shared responsibility” under the EBCG framework, taking Article 7 of the EBCG Regulation as the primary reference point.

The study is further informed by interviews conducted with experts in EU constitutional and migration law, the Agency’s fundamental rights obligations, and institutional accountability mechanisms, whose insights have contributed to the identification and assessment of the main issues examined across the seven chapters. The analysis also draws on reports by civil society organisations and investigative journalists that have documented operational practices not reflected in official sources,<sup>46</sup> including intelligence sharing with Libyan authorities,<sup>47</sup> the conduct of debriefing interviews,<sup>48</sup> and the provision of surveillance technology to third countries.<sup>49</sup> These sources are cited throughout as relevant, specially where they provide the only or main available evidence of operational realities. To a certain extent, this serves to compensate for the opacity deriving from the Agency’s confidentiality framework.

44 For illustration: UN Human Rights Council, Independent Fact-Finding Mission on Libya, Report A/HRC/52/83, March 2023; UN Special Rapporteur on the human rights of migrants, relevant reports on pushbacks and detention conditions; PACE, Resolution 2299 (2019) and Recommendation 2161 (2019), ‘Pushback Policies and Practice in Council of Europe Member States’, adopted 28 June 2019; PACE, Resolution 2462 (2022), ‘Pushbacks on Land and Sea: Illegal Measures of Migration Management’, rapporteur P-A Fridez, Doc 15604, adopted 12 October 2022; PACE, Resolution 1932 (2013), ‘Frontex: Human Rights Responsibilities’, adopted 25 April 2013; Council of Europe Commissioner for Human Rights (Dunja Mijatović), *Pushed Beyond the Limits: Four Areas of Urgent Action to End Human Rights Violations at Europe’s Borders* (Recommendation), CommDH(2022)14, 28 April 2022.

45 SHARED Guidelines <<https://www.qmul.ac.uk/law/media/law/docs/news/Joint-Guidelines-on-Shared-Responsibility-for-eibm.pdf>>.

46 For illustration: Lighthouse Reports, ‘Frontex Complicit in Pushbacks’, 23 October 2020; Human Rights Watch and Border Forensics, ‘Airborne Complicity: Frontex Aerial Surveillance Enables Abuse’, 8 December 2022; Statewatch and Transnational Institute, ‘Exporting Borders: Frontex and the Expansion of Fortress Europe in West Africa’, 10 July 2025.

47 Human Rights Watch and Border Forensics, ‘Airborne Complicity’, 8 December 2022; ECCHR, Communication to the ICC concerning interceptions of migrants and refugees at sea, November 2022.

48 EDPS, Audit Report on Frontex, Case number 2022-0749, May 2023; EU Ombudsman, Case 1452/2022/MHZ on debriefing interviews; Solomon investigative report, ‘Frontex unlawfully shared thousands of people’s personal data with Europol’, 7 July 2025.

49 Statewatch and Transnational Institute, ‘Exporting Borders: Frontex and the Expansion of Fortress Europe in West Africa’, 10 July 2025; Statewatch, ‘Analysis: Violence at a distance: Frontex’s increasing role outside the EU’, 9 February 2025.

## 5. THE FORTHCOMING REFORM

The forthcoming revision of the EBCG Regulation presents the legislative opportunity to confront the structural causes of the accountability deficit presented in this report. The recommendations set out in the final chapter are addressed to the Commission, the European Parliament, and the Council as co-legislators. They are organised thematically, reflecting the analytical structure of the seven preceding chapters, and they share a common premise: that effective fundamental rights protection in the context of EIBM requires not merely clearer rules, but rules that are accessible, enforceable, transparent, and capable of preventing irreversible harm *before* it occurs. The introduction of a detailed “shared responsibility” regime, expanding and clarifying the terms of Article 7 of the EBCG Regulation, modelled on the rules governing joint and several liability of Recital 57 of the Europol Regulation, is proposed as the most adequate way forward so as to comply with the right to good administration and to an effective remedy under Articles 41 and 47 of the EU Charter of Fundamental Rights (CFR).





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# GOVERNANCE AND CHAIN OF COMMAND ISSUES



Subsection	Sources
1.1 Allocation of Responsibilities	COM: <a href="#">Annex to the Report on the Evaluation of the EBCG Regulation</a> (p. 2: inefficient command and control structures of Standing Corps; point 2.1, p.4: communication with national authorities)COM: <a href="#">Report on the Evaluation of the EBCG Regulation</a> (§ 4.1.1, p. 18: unclear allocation of responsibility/shared responsibility/vagueness of provisions on use of force; p. 25: organizational structure not aligned with the mandate/allocation of tasks is unclear) <a href="#">EU Ombudsperson CASE 01/3/2023/MHZ</a> on fundamental rights at sea. <a href="#">Sea Borders Regulation</a> on allocation of interdiction and rescue tasks during joint operationsCouncil: <a href="#">Future of standing corps</a> <a href="#">Joint Guidelines on “Shared Responsibility” for European Integrated Border Management</a> European Parliament resolution of 14 December 2023 on Frontex building on the fact-finding investigation of the LIBE Working Group for Frontex Scrutiny ( <a href="#">2023/2729(RSP)</a> ) European Parliament, Resolution of 10 May 2023 with observations forming an integral part of the decision on discharge in respect of the implementation of the budget of the European Border and Coast Guard Agency for the financial year 2021 ( <a href="#">P9_TA(2023)0165</a> )
1.2 Decision-making pathways	<a href="#">MB Decision 4/2025 on the use of weapons</a> COM: <a href="#">Report on the Evaluation of the EBCG Regulation</a> (§ 4.1.2.1, pp. 23, 28: decision-making is not efficient; point 2.1: MS representative in the MB do not represent national authorities on return) <a href="#">ED Decision No R-ED-2023-90 on adopting horizontal rules on the creation and operation of Frontex Working Groups and continuation of existing Working Groups</a> <a href="#">ANNEX 1 to ED Decision No R-ED-2023-90: Horizontal rules on the creation and operation of Frontex Working Groups</a> <a href="#">ANNEX 2 to ED Decision No R-ED-2023-90: Standard rules of procedure for Working Groups and sub-groups</a> <a href="#">ANNEX 3 to ED Decision No R-ED-2023-90: Tree of Working Groups</a> <a href="#">MB Decision 43/2022</a> adopting the rules for the Executive Director and the MB to inform the Consultative Forum of the follow-up to its recommendations and to ensure that action is taken with regard to recommendations of the Fundamental Rights Officer EBCGA: <a href="#">Technical and Operational Strategy for EIBM</a> . <a href="#">MB Decision 11/2017 on adopting the Rules of Procedure of the MB</a> <a href="#">Joint Guidelines on “Shared Responsibility” for European Integrated Border Management</a> European Parliament, Resolution of 10 May 2023 with observations forming an integral part of the decision on discharge in respect of the implementation of the budget of the European Border and Coast Guard Agency for the financial year 2021 ( <a href="#">P9_TA(2023)0165</a> ) European Parliament, Resolution of 11 April 2024 with observations forming an integral part of the decision on discharge in respect of the implementation of the budget of the European Border and Coast Guard Agency for the financial year 2022 ( <a href="#">A9-0113/2024</a> )
1.3 Operational Plans	COM: <a href="#">Annex to the Report on the Evaluation of the EBCG Regulation</a> (§26, point 5.1: operational plan and FRO; §29, point 6: role in Operational plans/fundamental rights/art. 46) <a href="#">EU Ombudsperson, Case 01/4/2021/MHZ</a> 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. <a href="#">EU Ombudsperson, Decision in 01/5/2020/MHZ</a> on the functioning of the European Border and Coast Guard Agency’s (Frontex) complaints mechanism for alleged breaches of fundamental rights and the role of the Fundamental Rights Officer <a href="#">EU Ombudsperson, Decision in 1558/2024/NH</a> on the refusal by the European Border and Coast Guard Agency (Frontex) to provide full public access to documents related to Joint Operation Opal Coast European Parliament resolution of 13 July 2023 on public access to documents – annual report for the years 2019-2021 ( <a href="#">2022/2015(INI)</a> ) <a href="#">Joint Guidelines on “Shared Responsibility” for European Integrated Border Management</a> .European Court of Auditors, <a href="#">Special Report 08/2021</a> , ‘Frontex’s Support to External Border Management: Not Sufficiently Effective to Date’ European Parliament, Resolution of 10 May 2023 with observations forming an integral part of the decision on discharge in respect of the implementation of the budget of the European Border and Coast Guard Agency for the financial year 2021 ( <a href="#">P9_TA(2023)0165</a> ) European Parliament, Resolution of 10 May 2023 with observations forming an integral part of the decision on discharge in respect of the implementation of the budget of the European Border and Coast Guard Agency for the financial year 2021 ( <a href="#">P9_TA(2023)0165</a> )

## 1.1 ALLOCATION OF RESPONSIBILITY

Under Article 1 of Regulation (EU) 2019/1896, the EBCG is entrusted with ensuring the good functioning of EIBM at the external borders of the Union, “with a view to managing those borders efficiently in full compliance with fundamental rights and to increasing the efficiency of the Union return policy”.<sup>50</sup> The EBCG is composed of the competent national authorities of the Member States responsible for border management and return, together with the European Border and Coast Guard Agency (Frontex). EIBM is conceived of as a multi-layered framework, structured around a four-tier access control model of the external borders of the EU.<sup>51</sup> This encompasses, inter alia, border control measures at the external borders themselves; search and rescue (SAR) operations; cooperation with third countries, EU Member States, and other EU Agencies and institutions; risk analysis activities and the use of large-scale information systems; as well as measures implemented within the Schengen area, including returns.<sup>52</sup>

Pursuant to Article 7(1) of Regulation (EU) 2019/1896, Frontex and the competent national authorities share responsibility for implementing the EIBM system, while the Member States retain “primary responsibility” for managing their sections of the external borders. At the same time, Article 7(4) provides that the Agency is fully responsible and accountable for any decision it takes and for any activity for which it is “solely responsible” under the Regulation.

Additionally, Regulation (EU) 2019/1896 sets out an extensive list of tasks assigned specifically to Frontex.<sup>53</sup> These tasks include monitoring migratory flows and carrying out risk analysis covering all aspects of integrated border management, as well as monitoring the operational needs of Member States related to the implementation of return activities, including through the collection of operational data. The Agency is also tasked with monitoring compliance with fundamental rights in all of its activities at the external borders and in return operations,<sup>54</sup> and with supporting the development and operation of the European Border Surveillance System (EUROSUR).<sup>55</sup> Frontex is further mandated to assist Member States in situations requiring increased technical and operational support at the external borders, notably by coordinating and organising joint operations, while taking into account that certain situations may involve humanitarian emergencies and SAR operations at sea, in accordance with Union and international law. The Regulation also entrusts Frontex with the deployment of the Standing Corps within the framework of border management teams, migration management support teams, and return teams, both in the context of joint operations and rapid border interventions, as well as in return operations and return interventions.<sup>56</sup> To support these activities, the Agency is responsible for setting up and managing a technical equipment pool, including a rapid reaction equipment pool, to be deployed in operational contexts.<sup>57</sup>

<sup>50</sup> EBCG Regulation, Article 1.

<sup>51</sup> Council of the European Union, Integrated Border Management; Strategy deliberations, 21 November 2006, ST 13926/3/06 REV 3, p. 2.1.

<sup>52</sup> EBCGA Regulation, Article 48 et seq.

<sup>53</sup> EBCG Regulation, Article 10.

<sup>54</sup> EBCG Regulation, Articles 1 and 80.

<sup>55</sup> EBCG Regulation, Article 18 et seq.; and Commission Implementing Regulation (EU) 2021/581 of 9 April 2021 on the situational pictures of the European Border Surveillance System (EUROSUR), OJ L 124/3, 12.4.2021.

<sup>56</sup> EBCG Regulation, Articles 10 (1)(j), 32(4).

<sup>57</sup> EBCG Regulation, Article 36(2)(d).

Frontex may further deploy operational staff and technical equipment to assist Member States in activities such as screening, debriefing, identification, and fingerprinting.<sup>58</sup> Finally, the Agency is empowered to cooperate with third countries in relation to the areas covered by Regulation (EU) 2019/1896, including through the possible operational deployment of border management teams in third countries.<sup>59</sup>

Taken together, this framework reveals a layered and complex governance structure. While EIBM is entrusted to the European Border and Coast Guard as a whole and implemented as a shared responsibility between the Agency and the Member States, the Regulation simultaneously assigns a significant set of tasks exclusively to Frontex. On the one hand, Member States retain “primary responsibility” for border management and return within their respective jurisdictions. On the other hand, Frontex is assigned tasks that shape operational priorities, structure operational implementation, and condition the conduct of joint activities on the ground. As a result, the distribution of responsibilities between Frontex and the competent national authorities is only vaguely articulated but functionally intertwined, giving rise to persistent uncertainty as to the allocation of responsibility in concrete operational contexts. The **European Commission** has explicitly identified this issue. In its first evaluation of Regulation (EU) 2019/1896, the Commission has noted that, “in the context of shared responsibility, uncertainties persist as regards the allocation of responsibility between Frontex and national authorities during joint operations”.<sup>60</sup>

Article 7(4) of Regulation (EU) 2019/1896 introduces additional complexity by providing that the Agency is to be fully responsible and accountable for any decision it takes and for any activity for which it is “solely responsible” under the Regulation. Read together with Article 7(1), this provision establishes a dichotomous framework in which shared responsibility constitutes the general rule, while individual responsibility of the Agency applies only in relation to specific decisions or activities falling exclusively within its remit. In practice, however, the scope of activities for which Frontex may be regarded as solely responsible appears limited. The implementation of EIBM results from a multi-layered governance and decision-making process involving, at a minimum, the European Commission, the Member States, and the Agency itself, as better described in the following paragraph. In this context, it is difficult to conceive of the implementation of EIBM as an activity for which Frontex alone could be held responsible, unless it can be demonstrated that a specific operational measure implemented on the ground was decided upon and executed exclusively by Agency staff – which is rare. Functions for which the Agency is solely responsible must therefore be distinguished from the core elements of EIBM as defined in Article 3 of the Regulation.

A different consideration may apply to the “decisions” taken by the Agency within the meaning of Article 7(4). Although decision-making in the field of border management is likewise characterised by composite procedures, certain expressions of intent attributable to the Agency may be more readily isolated. This could include, for example, decisions concerning the handling of public access to documents (PAD) requests, which, under Regulation (EU) No 1049/2001,<sup>61</sup> require the Agency to assess whether one of the exceptions provided for in that Regulation applies, as

<sup>58</sup> EBCG Regulation, Article 10.

<sup>59</sup> EBCG Regulation, Article 73.

<sup>60</sup> Commission Staff Working Document Evaluation Accompanying the Report from the Commission to the European Parliament and the Council on the evaluation of Regulation (EU) 2019/1896 on the European Border and Coast Guard, including a review of the Standing Corps, SWD(2024)75 final, 2 February 2024, § 4.1.1., p. 18.

<sup>61</sup> Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145/43, 31.5.2001, Article 4.

well as decisions which, under the EBCG Regulation, fall within the exclusive competence of the Executive Director or the Management Board.

As examined in more detail in Chapter 7, this complicates the identification of a single responsible actor in cases of fundamental rights violations arising in the context of Frontex-coordinated actions and operations. The composite nature of operational arrangements, combined with overlapping tasks and functions, makes the attribution of responsibility especially challenging.

A particularly critical area in this respect is the implementation of border surveillance actions in situations requiring the initiation of SAR operations. In this context, the allocation of responsibilities between Frontex and the Member States remains exceptionally unclear, notwithstanding the potentially irreversible consequences of operational failures, namely the loss of life at sea. These shortcomings were brought into sharp relief by the shipwreck that occurred during two Frontex-coordinated joint operations, which prompted the **European Ombudsperson** to open an inquiry into the Agency’s compliance with its fundamental rights obligations at sea.<sup>62</sup> Her inquiry confirms how structural ambiguity in the allocation of responsibilities may translate into concrete accountability gaps in high-risk operational contexts. In order to prevent such an undetermined governance structure from resulting in serious fundamental rights violations, she recommended that Frontex adopt internal guidelines clarifying roles and responsibilities in operational contexts.<sup>63</sup> This approach is also reflected in the **SHARED Project Guidelines on Shared Responsibility** (SHARED Guidelines),<sup>64</sup> which call for the adoption of overarching rules clearly delineating the distribution of responsibilities across all aspects of the Agency’s mandate, including operational activities, use of force, search and rescue, data processing, and return operations, and for these rules to be concretely specified in operational plans and related operational arrangements.<sup>65</sup>

Another problematic aspect of this framework concerns the newly formed body of the Agency’s Standing Corps. These are deployed to hotspot areas to provide technical and operational assistance to the Member States and may also be deployed in third countries.<sup>66</sup> While the Standing Corps is growing significantly in number and operational relevance, expected to reach 10,000 operational staff by 2027,<sup>67</sup> with the forthcoming revision widely anticipated to expand that figure to 30,000,<sup>68</sup> the **European Commission** has identified shortcomings in the command and control structures applicable to its deployment. It found that the existing framework remains inefficient,<sup>69</sup> and suggested developing clear reporting lines and swift implementation of decisions by the Standing Corps, as well as establishing clear roles and communication channels between the Agency’s headquarters and deployed staff.<sup>70</sup>

<sup>62</sup> Case 01/3/2023/MHZ - Decision 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 particular the Adriana shipwreck.

<sup>63</sup> Case 01/3/2023/MHZ, Suggestion for improvement C).

<sup>64</sup> SHARED Guidelines <<https://www.qmul.ac.uk/law/research/research-centres/study-of-borders-and-migration/research/>>.

<sup>65</sup> SHARED Guidelines 15–29 on “Specification of Obligations and Distribution of Ex Ante ‘Shared Responsibility’”.

<sup>66</sup> EBCG Regulation, Articles 54 and 73.

<sup>67</sup> EBCG Regulation, Annex I.

<sup>68</sup> See above, section “Introduction”.

<sup>69</sup> ANNEX I to the Report from the Commission to the European Parliament and the Council on the evaluation of Regulation (EU) 2019/1896 on the European Border and Coast Guard, including a review of the Standing Corps, COM(2024) 75 final, Brussels, 2.2.2024, §3, p.2.

<sup>70</sup> ANNEX I to the Report from the Commission to the European Parliament and the Council on the evaluation of Regulation (EU) 2019/1896 on the European Border and Coast Guard, including a review of the Standing Corps, COM(2024) 75 final, Brussels, 2.2.2024, §3.1 and §3.2, p.2.

## 1.2 DECISION-MAKING PATHWAYS



Decision-making within Frontex is structured across multiple levels, combining policy orientation, strategic coordination, and the concrete operational implementation of EIBM, and integrating input from a range of institutional actors. This multi-layered structure contributes to the complexity of identifying where decision-making authority lies in practice.

Before any operational deployment can be launched, a series of sequential steps must be completed within the multiannual strategic policy cycle. The European Commission is responsible for preparing the multiannual strategic policy for EIBM, drawing in particular on the risk analysis produced by the Agency.<sup>71</sup> Only afterwards, Frontex, acting on a decision of its Management Board taken following a proposal by the Executive Director and in close cooperation with the Member States and the Commission, establishes a technical and operational strategy for EIBM.<sup>72</sup> Finally, the Member States are required to adopt their national strategies for EIBM, which must be consistent with both the Commission's strategic policy and the Agency's technical and operational strategy, which shapes and constraints national plans.<sup>73</sup>

The concrete implementation of this strategic framework is further structured through the integrated planning process.<sup>74</sup> This comprises the operational planning process, contingency planning – developed at the national level in line with national strategies – and capability development planning. Together, these instruments translate strategic objectives into operational priorities and deployment decisions.

<sup>71</sup> EBCG Regulation, Article 8(4).

<sup>72</sup> EBCG Regulation, Article 8(5).

<sup>73</sup> EBCG Regulation, Article 8(6).

<sup>74</sup> EBCG Regulation, Article 9.

### 1.2.1 MANAGEMENT BOARD AND WORKING GROUPS

Within the Agency, strategic decision-making is primarily exercised by the Management Board (MB), which constitutes the central governance body,<sup>75</sup> composed of senior professionals in the field of border control meeting at least twice a year. It gathers one representative from the competent border authorities of each Member State and two representatives of the European Commission, all of whom have voting rights. An expert from the European Parliament may be “invited” to attend meetings as an observer.<sup>76</sup>

The Management Board's responsibilities are extensive and encompass the adoption of key decisions shaping both the Agency's mandate and its operational functioning. These include the appointment and potential dismissal of the Executive Director (ED), the selection of Deputy Executive Directors and the Fundamental Rights Officer (FRO), decisions concerning the establishment of antenna offices, the extension of operations, the definition of mandatory information exchanges with national authorities, and the adoption of procedural and operational guidelines. The MB also plays a central role in approving **working arrangements** with third countries, responding to internal and external audits, including those conducted by OLAF, and adopting key documents such as annual reports. However, the **European Commission** has noted structural gaps in the current governance architecture. In particular, it has found that return is not yet fully integrated into the existing MB structure, with national return authorities being only represented to a certain extent.<sup>77</sup>

The MB may be assisted by an executive board, composed of four members of the MB, including its chairperson and a representative of the European Commission. This body may be entrusted with preparing decisions, programmes, and activities, and with adopting provisional decisions in urgent cases.<sup>78</sup> In addition, the MB is supported by several informal operational structures, including ad hoc Working Groups, which act as consultative bodies, provide expertise on specific issues, and can assist the MB with its decision-making.<sup>79</sup> Established following a decision of the ED,<sup>80</sup> such bodies are organised around several thematic clusters and include, inter alia, risk analysis and intelligence networks (covering air border risk, maritime intelligence, and European document fraud risk), a Working Group on the Boarding of Vessels, the EUROSUR framework network, a roundtable on returns, and technical expert groups providing input on maritime surveillance.<sup>81</sup>

<sup>75</sup> EBCG Regulation, Article 100(1).

<sup>76</sup> EBCG Regulation, Article 104(7).

<sup>77</sup> Commission Staff Working Document Evaluation Accompanying the Report from the Commission to the European Parliament and the Council on the evaluation of Regulation (EU) 2019/1896 on the European Border and Coast Guard, including a review of the Standing Corps, SWD(2024)75 final, 2 February 2024, § 4.1.2, p. 22.

<sup>78</sup> EBCG Regulation, Article 100(7).

<sup>79</sup> Rules of Procedures of the Management Board, adopted with Management Board Decision 11/2017 of 30 March 2017, Article 15(2).

<sup>80</sup> Decision of the Executive Director, No R-ED-2023-90 on adopting horizontal rules on the creation and operation of Frontex Working Groups and continuation of existing Working Groups.

<sup>81</sup> See the Tree of the EBCGA Working Groups <<https://statewatch.org/wp-content/uploads/2026/04/frontex-dia-gram-working-groups-10-23.pdf>>.

Among them, the High-Level Working Group on EIBM plays a key role in overseeing the coordination and implementation of the technical and operational strategy, despite being explicitly excluded from the category of formal working groups under the Agency's Rules of Procedure.<sup>82</sup> These bodies feed analytical and technical input into the Agency's strategic and planning processes. However, they operate with limited transparency, making it difficult to assess the extent of their contribution to the MB's deliberations and to determine whether, and to which extent, they exercise any concrete decision-making authority.

<sup>82</sup> EBCGA, Technical and Operational Strategy for the European Integrated Border Management, p. 24.

### 1.2.2 EXECUTIVE DIRECTOR

Within this governance framework, the ED occupies a central position. As the head of the Agency, s/he enjoys a high degree of independence and is not subject to instructions from the Member States in the performance of his/her duties.<sup>83</sup> The ED exercises wide-ranging powers, including proposing, preparing, and implementing all strategic decisions adopted by the MB, overseeing the day-to-day functioning of the Agency, drafting the single programming document, proposing and coordinating operational deployments, ensuring the implementation of operational plans, following up on audit findings,<sup>84</sup> as well as authorizing Frontex staff to carry and use weapons.<sup>85</sup> The ED is also the legal representative of the Agency and is accountable to the MB. Finally, as will be further discussed in Chapter 6, the decision to trigger Article 46 of the EBCG Regulation, thus to suspend, defund, or terminate a Frontex-coordinated operation, rests exclusively with the ED.

<sup>83</sup> EBCG Regulation, Article 106(1).

<sup>84</sup> EBCG Regulation, Article 106 (4).

<sup>85</sup> MB Decision 4/2025 of 26 March 2025 adopting rules for the Executive Director to authorise statutory staff to carry and use weapons, including on mandatory cooperation with the competent national authorities and ensuring that the conditions for issuing such authorisations continue to be met by statutory staff.

### 1.2.3 COORDINATING OFFICER

At the operational level, the figure of the Coordinating Officer plays a crucial role in the decision-making architecture of Frontex-coordinated operations on the ground. Appointed by the ED as the Agency's representative on the territory of the host Member State, the Coordinating Officer is tasked with acting on behalf of the Agency in all aspects of the deployment of operational teams.<sup>86</sup>

The mandate of the Coordinating Officer is extensive. It includes overseeing the implementation of the operational plan, ensuring compliance with fundamental rights, cooperating with fundamental rights monitors, and reporting regularly to the ED. The Coordinating Officer is also required to report situations in which instructions by national authorities diverge from the operational plan and may recommend that the ED activate the mechanism provided for in Article 46 of the Regulation<sup>87</sup> – which has not happened to date.

<sup>86</sup> EBCG Regulation, Article 44(2)(3).

<sup>87</sup> EBCG Regulation, Article 44(2)(3)(a)(b)(c)(d).

Notwithstanding these responsibilities, the legal nature of the Coordinating Officer's authority remains ambiguous. The Regulation refers to the Coordinating Officer's "views" rather than "orders", suggesting that his/her interventions are formally non-binding. Publicly available operational plans do not provide further clarity, largely reproducing the ambiguity embedded in the Regulation. While Member States formally retain responsibility for issuing instructions and directing the teams, the Coordinating Officer may be authorised by the ED to resolve disagreements regarding the execution of the operational plan and the overall deployment. In practice, this suggests that the Coordinating Officer may exercise decisive influence over operational conduct, blurring the distinction between coordination and command. This ambiguity at the operational level mirrors the broader uncertainty identified in the allocation of responsibilities and contributes to the difficulty of tracing decision-making authority in Frontex-coordinated operations. The European Commission thus found a need to make strategic decision-making and oversight more efficient.<sup>88</sup>

**Finally, as will be further discussed in Chapter 6, the decision to trigger Article 46 of the EBCG Regulation, thus to suspend, defund, or terminate a Frontex-coordinated operation, rests exclusively with the ED.**

<sup>88</sup> Commission Staff Working Document, Evaluation Accompanying the Report from the Commission to the European Parliament and the Council on the evaluation of Regulation (EU) 2019/1896 on the European Border and Coast Guard, including a review of the Standing Corps, SWD(2024) 75 final, 2 February 2024, p.23.

## 1.3 OPERATIONAL PLANS



Operational plans constitute the central instrument governing the implementation of Frontex-coordinated operations. The ED drafts them and identifies the resources required for joint operations, including assets co-financed with the Member States, assets financed and managed entirely by Frontex, and national assets eligible for co-financing when deployed in the framework of a joint operation.<sup>89</sup>

These documents are jointly agreed upon by the Agency and the Member States concerned, including both the host Member State and any participating Member States. Once adopted, they are binding on all parties involved and serve as the comprehensive blueprint governing the conduct of the joint operation.<sup>90</sup> In substantive terms, they encompass a wide range of essential elements. They define the geographical scope and operational area of the joint operation, detail its *modus operandi*, and specify the logistical framework for implementation. They include a comprehensive list of all parties involved and a roster of the border and coast guards deployed, identified by name and rank, together with a detailed description of their assigned tasks, including tasks involving the exercise of executive powers. In fact, operational plans structure the chain of command and control and must identify the competent authorities and officials responsible for command, control, coordination, and incident reporting. They must further specify the composition of the deployed teams and the respective responsibilities of Frontex and the participating national authorities.<sup>91</sup>

A particularly significant component of operational plans concerns the safeguarding of fundamental rights. Operational plans are required to include instructions on fundamental rights compliance in joint operations, lay down procedures applicable to persons in need of international protection or in vulnerable situations, and establish mechanisms for receiving and transmitting complaints concerning the conduct of any person participating in the operation.<sup>92</sup> They must also facilitate the identification of the official or officials designated as responsible for monitoring and ensuring adherence to fundamental rights obligations.<sup>93</sup> In the case of joint maritime operations, operational plans must include additional elements reflecting the specific legal and operational context. In particular, they are required to contain information on jurisdiction, applicable law, and references to relevant national, Union, and international legal frameworks governing interception, search and rescue, and disembarkation. They must also include provisions relating to SAR operations and disembarkation procedures, in line with the Sea Borders Regulation.<sup>94</sup> However, the evidence accumulated prior to the *WS* case suggests that the Agency did not sufficiently live up to these obligations in practice.

<sup>89</sup> EBCG Regulation, Article 38.

<sup>90</sup> EBCG Regulation, Article 38(2)(3).

<sup>91</sup> EBCG Regulation, Article 38(3).

<sup>92</sup> EBCG Regulation, Article 38(3)(d)(m).

<sup>93</sup> EBCG Regulation, Article 38(3)(d).

<sup>94</sup> EBCG Regulation, Article 38(3)(j).

Multiple institutional inquiries identified a pattern of structural failures in the integration of fundamental rights safeguards into the operational planning and implementation cycle, as better shown below. The **FSWG** concluded in its July 2021 report that, although risk assessments, vulnerability assessments, and the situational picture formed the primary basis for decisions to launch joint operations, none of these instruments incorporated a fundamental rights analysis, creating gaps that hampered the possibility of establishing adequate criteria and conditions in operational plans from the outset.<sup>95</sup> The FSWG further found that the FRO was not consulted prior to the decision to launch joint operations, as required by the applicable framework, and that, since 2017, had not been sufficiently involved in the handling of Serious Incident Reports generated during those operations.<sup>96</sup> The **OLAF** investigation confirmed that the FRO had been deliberately denied access to operational information and that incidents had been classified incorrectly to prevent proper involvement.<sup>97</sup> The **European Ombudsman** further found that operational plans were treated as fully confidential documents to which neither the FRO, the Consultative Forum, nor external actors had meaningful access; she also concluded that the Fundamental Rights Due Diligence Procedure, which should have served as a preventive tool upstream of operational planning, was applied inconsistently and without adequate transparency.<sup>98</sup> Similarly, the **Court of Auditors** found that the refusal by Member State authorities to share national information with Frontex team members severely impeded the effective functioning of the Agency during operations.<sup>99</sup>

The centrality of operational plans to fundamental rights compliance has been confirmed by the **Court of Justice** in *WS and Others v Frontex*.<sup>100</sup> The Court recalled that the operational plan must set out in detail the organisational and procedural arrangements necessary for its implementation, including the tasks and responsibilities relating to the respect for fundamental rights. It further held that Frontex is required to ensure the correct implementation of the operational plan in this regard, in particular through the Coordinating Officers appointed by the Executive Director, who are responsible for monitoring compliance with fundamental rights safeguards during its implementation.<sup>101</sup>

Notwithstanding their central importance in structuring Frontex-coordinated operations, operational plans remain confidential.<sup>102</sup> Confidentiality limits access to key information concerning the chain of command, the identity and role of the Coordinating Officer, and other actors involved in joint operations. The restricted accessibility of such information also hinders access to effective protection, particularly where individuals are unable to identify the actors responsible for specific operational decisions or conduct that decisively impacts their fundamental rights.<sup>103</sup>

<sup>95</sup> FSWG Final Report, 14 July 2021, citing ECA Special Report 08/2021 (fn 19 of the FSWG report): “Although the risk assessment, vulnerability assessment and situational picture are the main basis for the decision to launch a Joint Operation or Rapid Border Intervention, they do not include a fundamental rights analysis [...] These gaps hamper the possibility for adequate criteria and conditions in the operational plan.”

<sup>96</sup> FSWG Final Report, 14 July 2021, Recommendation C.

<sup>97</sup> OLAF, Final Report on Frontex, case No. OC/2021/0405/A1, Olaf.03(2021)21088, as cited in Chapter 5 of this study.

<sup>98</sup> European Ombudsman, Strategic Inquiry 01/4/2021/MHZ.

<sup>99</sup> European Court of Auditors (ECA), Special Report 08/2021, ‘Frontex’s Support to External Border Management: Not Sufficiently Effective to Date’.

<sup>100</sup> C-679/23 P, *WS and Others v Frontex*, ECLI:EU:C:2025:976.

<sup>101</sup> C-679/23 P, *WS*, para. 98.

<sup>102</sup> EBCG Regulation, Article 9(2).

<sup>103</sup> EDPS Opinion on Case 2022-0148, paras. 20, 23.

The **FSWG** further identified a related structural gap that operational plans should address directly. The most documented illustration of this pattern is the instruction given to a Frontex surveillance aircraft to move away from an area of the Aegean Sea where pushbacks were being conducted, as revealed by Frontex internal documents and confirmed in the FSWG's fact-finding hearings.<sup>104</sup> Accordingly, operational plans should include, as a binding condition, that the FRO and Fundamental Rights Monitors (FRM) have access to all assets, relevant information, and all parts of the operational area, and that orders to avoid parts of the operational area where pushbacks may be occurring be reported by team members through the reporting mechanism.<sup>105</sup>

While certain limitations may be justified by the need to protect operational effectiveness and strategic decision-making, as reflected in Article 114 EBCG Regulation, such confidentiality should not be extended to the point of undermining the effective protection of fundamental rights, including the rights of access to documents, good administration, and effective judicial protection under Articles 41, 42 and 47 CFR. The **EU Ombudsperson** has noted that the parts of operational plans setting out the precise roles and tasks of all staff involved in joint operations are crucial for determining the extent to which individual staff members may be responsible for potential fundamental rights violations.<sup>106</sup> She has therefore suggested that Frontex publish overviews of the distribution of responsibilities across different categories of operational participants, including information currently contained in handbooks accompanying operational plans, in the form of detailed summaries.<sup>107</sup> In an inquiry concerning the Agency's refusal to grant full access to an operational plan, she reiterated that Frontex should grant access to the parts thereof, along with the Handbook and the Specific Activity Plan that are not covered by the public security exception under Regulation (EU) 1049/2001.<sup>108</sup> Similarly, the **European Parliament** has expressed regret that Frontex's public register contains only a limited number of documents relating to the implementation of joint operations.<sup>109</sup> Actually, it invited the Agency to ensure that documents such as Serious Incident Reports, reports on the use of force, and individual complaints be only classified as restricted where strictly necessary, calling upon Frontex, in this connection, to refrain from seeking to recover the excessive costs of external lawyers from applicants in court proceedings based on access to information requests.<sup>110</sup>

<sup>104</sup> SWG Final Report, 14 July 2021, section 3.B, fn. 27 (SIR no. 12604/2020, 30 October 2020) and fn. 28 (minutes of hearing with a national officer, 8 December 2020, on SIR no. 12604/2020).

<sup>105</sup> FSWG Final Report, 14 July 2021, sections 3.A, 3.B.

<sup>106</sup> 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, Annex I, para.6

<sup>107</sup> Decision in OI/4/2021/MHZ, Annex I, Suggestion for improvement.

<sup>108</sup> Decision in 1558/2024/NH on the refusal by the European Border and Coast Guard Agency (Frontex) to provide full public access to documents related to Joint Operation Opal Coast, para.

<sup>109</sup> P9\_TA(2023)0295 – Public access to documents – annual report for the years 2019-2021 – European Parliament resolution of 13 July 2023 on public access to documents – annual report for the years 2019-2021 (2022/2015(INI)), OJ C, C/2024/4014, 17.7.2024, para. 15.

<sup>110</sup> FSWG Final Report, 14 July 2021, section 3.A; The costs-recovery point reiterates the European Parliament resolution of 21 October 2021 with observations forming an integral part of the decision on discharge in respect of the implementation of the budget of the European Border and Coast Guard Agency for the financial year 2019 (2020/2167(DEC)), P9\_TA(2021)0430.

The **EU Ombudsperson** has also found that, in the context of joint maritime operations coordinated by Frontex, operational plans should include specific provisions governing the response to maritime emergencies.<sup>111</sup> In particular, they should address how to act while awaiting instructions from the competent rescue coordination centre, including with regard to the issuance of Mayday relays.<sup>112</sup> The Ombudsman further recommended that operational plans explicitly clarify how responsibilities in maritime emergency situations and potential SAR incidents be distributed between the host Member State, Frontex, and participating Member States.<sup>113</sup> They should also specify the obligations of each actor involved in joint operations in relation to SAR, including the concrete steps to be taken by Frontex and by staff operating in national coordination centres upon the detection of a maritime emergency situation.<sup>114</sup> In addition, operational plans should set out the conditions governing the use of technical equipment, such as cameras, and provide for appropriate consequences in cases of non-compliance.<sup>115</sup> Finally, they should clearly define the role of the Coordinating Officer in SAR operations within each joint maritime operation.<sup>116</sup> In this regard, the **SHARED Guidelines** recommend that, in principle, the chain of command and the division of tasks and duties be disclosed in all Frontex-led activities, including any changes adopted during the course of an operation, noting that such disclosure does not, as a rule, jeopardise the effectiveness of operational missions.<sup>117</sup>

Operational plans should operate as a tool to strengthen fundamental rights guarantees in practice. In its evaluation of the EBCG Regulation, the **European Commission** recommended that they explicitly establish clear procedures to ensure collaboration between national authorities and the FRO staff, including the fundamental rights monitors deployed in operational areas.<sup>118</sup> A similar proposal is made in the **SHARED Guidelines**,<sup>119</sup> in line with the EU Ombudsperson's suggestion that operational plans consistently include clear provisions governing the handling of complaints concerning alleged fundamental rights violations.<sup>120</sup>

**The chain of command and the division of tasks and duties should be disclosed in all Frontex-led activities**

<sup>111</sup> Decision of Case OI/3/2023/MH, 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 particular the Adriana shipwreck, suggestions.

<sup>112</sup> Decision of Case OI/3/2023/MH, Suggestion D.

<sup>113</sup> Decision of Case OI/3/2023/MH, Suggestion D(i).

<sup>114</sup> Decision of Case OI/3/2023/MH, Suggestion D(ii).

<sup>115</sup> Decision of Case OI/3/2023/MH, Suggestion D(iii).

<sup>116</sup> Decision of Case OI/3/2023/MH, Suggestion D(iv).

<sup>117</sup> SHARED Guideline 31.

<sup>118</sup> Commission Staff Working Document, Evaluation Accompanying the Report from the Commission to the European Parliament and the Council on the evaluation of Regulation (EU) 2019/1896 on the European Border and Coast Guard, including a review of the Standing Corps, SWD(2024) 75 final, 2 February 2024, p. 10.

<sup>119</sup> SHARED Guidelines 80 and 86.

<sup>120</sup> Decision in OI/5/2020/MHZ on the functioning of the European Border and Coast Guard Agency's (Frontex) complaints mechanism for alleged breaches of fundamental rights and the role of the Fundamental Rights Officer, Suggestion 1.



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02

# OBLIGATIONS, TASKS, AND DUTIES



Subsection	Sources
Returns	<p>COM: <a href="#">Annex to the Report on the Evaluation of the EBCG Regulation</a> (§3 on insufficient coordination with the Commission; p.4 on communication with national authorities – point 1.1; p. 23, 28: MS representative in the MB do not represent national authorities on return – point 1.2)</p> <p>COM: <a href="#">Report on the Evaluation of the EBCG Regulation</a> (§ 4.1.1, p. 20 on vagueness of “return-related activities”)</p> <p>COM: <a href="#">Working Party on Integration, Migration and Expulsion (Expulsion)</a></p> <p>COM: <a href="#">2026 European Asylum and Migration Management Strategy</a></p> <p>COM: <a href="#">Towards an operational strategy for more effective returns</a></p> <p>COM: <a href="#">Analytical support document accompanying the Return proposal</a></p> <p>COM: <a href="#">Communication on voluntary returns and integration</a> (to be carried out by Frontex)</p> <p>COM: <a href="#">European Asylum and Migration Management Strategy</a></p> <p>FRO: <a href="#">2024 Annual Report</a> (Chapter 2 on returns &amp; Annex VI monitoring)</p> <p>FRO: <a href="#">Observation to return operations conducted in the first half of 2024</a></p> <p>FRO: <a href="#">Observation to return operations conducted in the second half of 2024</a></p> <p>FRO: <a href="#">Annual report 2024</a> (Chapter 2 on monitoring returns)</p> <p><a href="#">European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on Frontex-led Joint Return Operation</a></p> <p>FRA: <a href="#">2025 Returns monitoring system; data on monitoring operated by MS</a></p> <p>FRA: <a href="#">Opinion on the revised EBCG Regulation and its fundamental rights implications</a></p> <p>FRA: <a href="#">Position on return hubs</a></p> <p>ECRE: <a href="#">analysis of recent developments in EU policy on return of migrants, policy note 9/2017</a>; <a href="#">Comments on Return Proposal</a>; <a href="#">Assessment of monitoring activities</a></p> <p>Council: <a href="#">Schengen Barometer</a></p> <p>Council: <a href="#">Conclusions June 2025</a> (p. 36)</p> <p>FAiR: <a href="#">Return Monitoring Guidelines</a></p> <p><a href="#">Letter of UN Special Rapporteurs expressing concerns on the proposed Return Regulation</a></p> <p><a href="#">Hamoudi v. Frontex</a> (ruling)</p> <p>AG Opinion in <a href="#">WS v. Frontex</a></p> <p><a href="#">WS v. Frontex</a> (ruling)</p>

SAR obligations	<p>COM: <a href="#">Report on the Evaluation of the EBCG Regulation</a> (§ 4.1.1, p. 20 on inconsistencies with Reg. 656/2014)</p> <p>COM: <a href="#">Recommendations on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities</a></p> <p>COM: <a href="#">European Agenda on Migration</a></p> <p>EP Study: <a href="#">EU approach on migration in the Mediterranean</a></p> <p>EP Study: <a href="#">Commission proposal for a revised Facilitation Directive</a></p> <p>EP Resolution <a href="#">2023/2787(RSP)</a> on SAR; <a href="#">P10_TA(2026)0020</a> on use of drones for SAR purposes (p. 43)</p> <p>EU Ombudsperson: <a href="#">CASE 01/3/2023/MHZ</a> on fundamental rights at sea</p> <p>CoE, Commissioner on Human Rights: <a href="#">Externalised asylum and migration policy, Pushed beyond the limits, Lives Saved, Rights Protected, A distress call for human rights</a></p> <p>CoE, PACE: <a href="#">Saving lives at sea (Resolution, Recommendation)</a></p> <p>CoE, PACE: <a href="#">Resolution 1872 (2012), Lives Lost in the Mediterranean Sea: Who is Responsible?</a>, adopted 24 April 2012</p> <p>CoE, PACE: <a href="#">Resolution 1999 (2014), The “Left-to-Die Boat”: Actions and Reactions</a>, adopted 23 January 2014</p> <p><a href="#">2025 Annual Migration Management Report</a></p> <p>IOM: <a href="#">Missing migrants project</a></p> <p>UNHCR: <a href="#">Legal Considerations - Operations involving refugees and migrants at sea</a></p> <p>OHCHR: <a href="#">Lethal Disregard</a></p> <p>FRA: <a href="#">Search and rescue operations in the Mediterranean and fundamental rights</a> (June 2025 update)</p> <p>FRA: <a href="#">Report to European Search and Rescue Contact Group</a> (2023), <a href="#">2024 Annual report</a> (p.91), <a href="#">2025 Annual report</a> (p. 17)</p> <p>MEPs written questions (<a href="#">E-003761/2022</a> on EU-led SAR operation, <a href="#">E-000847/24</a> about Frontex cooperation with Libya, <a href="#">E-247521-2021</a> on Frontex cooperation with Libya, <a href="#">E-003553/2019</a>, <a href="#">E-003554/2019</a>, <a href="#">E-003555/2019</a> on Frontex, SAR and EUROSUR, <a href="#">E-2048/2021</a> on Frontex, SAR and accountability to the EP, <a href="#">E-001372/2023</a> on Frontex drones, <a href="#">P-002629/2025</a> (lodged by Leggeri)</p> <p>Forensic Architecture: <a href="#">Mare Clausum, Blaming the rescuers, Death by rescue</a></p> <p>MSF, Alarmphone, SOS Méditerranée: <a href="#">Deadly Manoeuvres: Obstruction and Violence in the Central Mediterranean</a></p> <p>UNHCR: <a href="#">Rescue at sea: A guide to principles and practice as applied to migrants and refugees, Rescue and interceptions</a></p> <p>IOM: <a href="#">Guidelines on treatment of people rescued at sea</a></p> <p>Human Rights Watch and Border Forensics: <a href="#">Airborne Complicity: Frontex Aerial Surveillance Enables Abuse</a> Red Cross EU Office: <a href="#">Europe in Crisis</a>.</p>
The role of host Member States	<p>EU Ombudsperson, <a href="#">CASE 01/3/2023/MHZ</a> on fundamental rights at sea</p>

## 2.1 RETURNS



The return of third-country nationals staying irregularly on the territory of the Member States is governed by the 2008 Return Directive.<sup>121</sup> It provides that the adoption of a return decision falls within the competence of the Member States.<sup>122</sup> In parallel, the EBCG Regulation explicitly includes return within the scope of the European Border and Coast Guard's mandate,<sup>123</sup> identifying it as an objective of the Agency's activities.<sup>124</sup> Within this framework, Frontex is entrusted with a broad range of tasks in the field of return, including providing technical and operational assistance to Member States at all stages of the return process, coordinating and organising return "operations" and return "interventions", deploying return teams and forced-return monitors, and supporting cooperation between Member States in return-related activities.<sup>125</sup> In practice, Frontex has emerged as a central actor in the implementation of the EU's return agenda,<sup>126</sup> which has increasingly gained political relevance. The **Council** has consistently called for intensified efforts to facilitate, increase, and accelerate return operations, advocating the use of all relevant EU policy instruments to this end.<sup>127</sup>

In 2024 alone, Frontex returned more than 50,000 third-country nationals, representing more than a 40% increase compared to the previous year.<sup>128</sup> Because return operations entail heightened risks for fundamental rights and especially the violation of the principle of *non-refoulement*, the EBCG Regulation establishes a monitoring function for Frontex to ensure respect for fundamental rights in the implementation of such activities,<sup>129</sup> and fundamental rights monitors should act as forced-return monitors.<sup>130</sup> In practice, the same pool of monitors covers both functions, resulting in a monitoring capacity that is structurally insufficient relative to the scale of the Agency's operational activities.<sup>131</sup> As a result, one quarter of Frontex-coordinated deportation charter flights in 2024 did not have a monitor present – still an increase from one fifth five years ago.<sup>132</sup>

<sup>121</sup> Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98, 24.12.2008.

<sup>122</sup> Return Directive, Article 6(1).

<sup>123</sup> EBCG Regulation, Article 3(1)(i).

<sup>124</sup> EBCG Regulation, Article 1.

<sup>125</sup> EBCG Regulation, Article 10(1)(b)(e)(j)(k)(n)(o)(p).

<sup>126</sup> European Commission, Towards an operational strategy for more effective returns, COM(2023) 45 final, 24 January 2023.

<sup>127</sup> European Council meeting, Brussels, 26 June 2025, para. 36.

<sup>128</sup> Frontex 2024 Consolidated Annual Activity Report (CAAR), p. 27; The increase is primarily attributable to the dramatic expansion of so-called "voluntary" returns supported by Frontex, which accounted for 64% of all returns in 2024, compared to 54% in 2023. Frontex's involvement in assisted voluntary returns has grown exponentially since the extension of its mandate in 2019: from 155 people in 2019 to 35,637 in 2024. The increase has been further driven by new accelerated asylum and return procedures piloted by the European Commission under the New Pact, notably in Bulgaria and Romania, and by the expansion of Frontex's return counselling role in detention centres at the external borders. Critics and independent experts have raised serious questions about whether returns organised in the context of detention can ever be genuinely voluntary: Statewatch, "Frontex's European blackmail over migrants' 'voluntary' returns", 11 March 2026; Statewatch, "Deportations: New role for Frontex as EU pushes for more 'voluntary' returns", 13 January 2025; Frontex, Evaluation Report on the results of returns implemented in the second semester of 2024, May 2025.

<sup>129</sup> EBCG Regulation, Article 10(1)(e).

<sup>130</sup> EBCG Regulation, Article 110 (1)(b).

<sup>131</sup> Frontex, Consolidated Annual Activity Report 2024, p. 14.

<sup>132</sup> Statewatch, Frontex and deportation charter flights, 2006–2024, 10 July 2025; Frontex, Evaluation Report on the results of returns implemented in the second semester of 2024, May 2025.

In the context of its monitoring of return operations, the **Fundamental Rights Officer (FRO)** identified several recurring concerns and formulated corresponding recommendations. Instances of excessive use of force were observed in certain Member States, leading the FRO to stress that restraints should not be used as a preventive measure during return operations and to call for appropriate amendments to national legislation to address this issue.<sup>133</sup> The FRO has also emphasised the need for Member States to ensure that returnees are systematically provided with clear and up-to-date information on the Frontex Complaints Mechanism, including through the use of informative leaflets and complaint forms, made available in languages that third-country nationals understand or can reasonably be expected to understand.<sup>134</sup> The observations also insisted on the importance of continued participation in dedicated training on de-escalating violence, recommending that escort officers prioritise de-escalation before resorting to the use of force or coercive measures against returnees.<sup>135</sup> The FRO also recalled that Member States, in cooperation with the Agency, are supposed to fully implement the recommendations of the **European Ombudsperson**, in particular by ensuring that all agents involved in return operations are identifiable.<sup>136</sup> Other recommendations have focused specifically on enhancing the protection of women and children during return operations: ensuring a sufficient number of female escorts and medical staff in operations involving women, and integrating child psychologists or social workers in pre-departure procedures and child-friendly communication training for escort officers.<sup>137</sup> The absence of such safeguards creates conditions in which the heightened vulnerability of these groups is not adequately mitigated, raising concerns under Article 4 CFR and Article 3 ECHR.

Similar concerns and conclusions have also been articulated by the **European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)**,<sup>138</sup> which found that existing safeguards in the context of return operations remain insufficient and require further strengthening to ensure effective protection against *refoulement* and ill-treatment – both during the removal process itself, at the hands of Member State police and escort officers, and upon arrival in the country of return.<sup>139</sup> In particular, it highlighted the need for clearer procedures to prevent the transfer of documents containing sensitive or compromising information on returnees, and for the development of independent post-return monitoring mechanisms.<sup>140</sup> The CPT also identified shortcomings in the notification and preparation of returnees before removal, noting that individuals apprehended shortly before removal were often not afforded adequate time to make necessary arrangements.<sup>141</sup> More broadly, the CPT emphasised the need to reinforce

<sup>133</sup> Observations to return operations conducted in the first half of 2024 by the Fundamental Rights Officer, para. 3, p.9.

<sup>134</sup> Observations to return operations conducted in the first half of 2024, para. 3, p.15.

<sup>135</sup> Observations to return operations conducted in the first half of 2024, para. 7.1, p.22.

<sup>136</sup> 2024 Fundamental Rights Officer Annual Report, para 2.2, p. 24.

<sup>137</sup> Observations to return operations conducted in the first half of 2024, para. 7.1, p.22.

<sup>138</sup> Report to the German Government on the visit to Germany carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 4 to 7 September 2023..

<sup>139</sup> Report, CPT, paras. 36, 39–42, 52, 55, 59 (ill-treatment during removal); paras. 25, 27, 57 (risks upon arrival in the country of return).

<sup>140</sup> Report to the German Government on the visit to Germany carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 4 to 7 September 2023, paras. 25,27.

<sup>141</sup> Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), para. 36; a period for voluntary departure of between seven and thirty days is generally granted to foreign nationals prior to the enforcement of a forced removal order, and the person has the right to appeal the deportation warning during that period. The CPT's concerns regarding insufficient preparation time therefore arise in the context of the enforcement of removal

fundamental safeguards, including access to legal counsel and timely access to mobile devices to this end.<sup>142</sup> The confiscation of mobile phones from the moment of apprehension, preventing returnees from contacting family members or lawyers throughout the removal process, risks placing individuals in circumstances akin to incommunicado detention, which the **Human Rights Committee** has declared incompatible with the prohibition of ill-treatment under Article 7 ICCPR and with the right to liberty and security of person under Article 9 ICCPR.<sup>143</sup> The CPT further underlined the importance of medical safeguards in return operations, calling for systematic pre-removal medical examinations and the establishment of “fit-to-fly” certifications prior to departure,<sup>144</sup> stronger guarantees of medical independence of contracted medical doctors and of medical confidentiality during the removal operation,<sup>145</sup> as well as adequate pre-departure arrangements to ensure continuity of care in the country of return for returnees with serious medical conditions.<sup>146</sup> Finally, the report stressed that the effectiveness of the Frontex complaints mechanism, recommending that all returnees be adequately informed of its existence and provided with complaint forms and information materials.<sup>147</sup> Similar suggestions were also proposed by the EU-funded **research project FAiR** in the 2024 Improved Return Monitoring Guidelines,<sup>148</sup> and by the **SHARED Guidelines**.<sup>149</sup> However, Frontex’s complaint mechanism is not a substitute for effective remedies against ill-treatment. The ECtHR has established that conditions during removal operations can themselves amount to ill-treatment contrary to Article 3 ECHR, giving rise to an obligation to provide an effective remedy under Article 13 ECHR.<sup>150</sup>

As illustrated, significant shortcomings persist in the monitoring of return operations. According to the **Fundamental Rights Agency (FRA)**, this is partly due to the fact that monitoring is not carried out by an entity that is sufficiently independent from the authorities responsible for returns.<sup>151</sup> In this regard, even before the entry into force of 2019 EBCG Regulation, FRA had already recommended assigning responsibility for the management of the pool of forced-return monitors to an independent body, potentially involving an international organisation with recognised expertise in human rights monitoring.<sup>152</sup>

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decisions that have already become final following the exhaustion of available legal remedies. CPT Report, para. 29

142 Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), paras. 42, 60.

143 UN Human Rights Committee, General Comment No. 20, Article 7, UN Doc. CCPR/C/GC/20 (1992), para. 11; UN Human Rights Committee, General Comment No. 35, Article 9, CCPR/C/GC/35 (16 December 2014), para. 35.

144 CPT Report, para. 52.

145 CPR Report, paras. 53,55.

146 CPT Report, paras. 57-58. The CPT’s concern is that adequate arrangements be made before departure rather than establishing a post-arrival obligation on the removing state. This pre-departure obligation is consistent with the procedural requirements established by the ECtHR under Article 3 ECHR in *Paposhvili v Belgium*, App. No. 41738/10, paras. 183-191; also confirmed and extended to mental illness in *Savran v Denmark*, App. No. 57467/15, para. 133: the removing state must assess the availability and accessibility of appropriate treatment in the receiving country before removal and, where serious doubts persist, obtain individual assurances from the receiving state.

147 Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), para. 96.

148 FAiR, Finding Agreement in Return, Improved Return Monitoring Guidelines, pp. 69-79.

149 SHARED Guideline 29.

150 ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, App. No. 13178/03, paras. 69, 113-114.

151 FRA, Forced Return Monitoring Systems – 2025 update, para. 2.1.

152 Opinion of the European Union Agency for Fundamental Rights – 5/2018, The revised European Border and Coast Guard Regulation and its fundamental rights implications, 27 November 2018, Opinion 3.

Reliance on national monitoring mechanisms does not provide a more effective safeguard. Although all Member States are formally required under the Return Directive to establish effective systems for monitoring forced return operations,<sup>153</sup> and despite the fact that national preventive mechanisms set up pursuant to the Optional Protocol to the UN Convention against Torture<sup>154</sup> are mandated under international law to oversee all places of deprivation of liberty, significant implementation gaps persist in practice. In 2024, no return operations were monitored in five Member States, while in a further seven Member States fewer than ten return operations were subject to monitoring, calling into question the effectiveness and consistency of national monitoring frameworks.<sup>155</sup>

**ECRE** has repeatedly raised similar concerns. Since 2017, it has consistently criticised the predominantly quantitative and largely ineffective nature of existing return evaluation practices.<sup>156</sup> More recently, it has observed that oversight of cooperation with third countries in the field of returns is largely limited to the application of the Visa Code Regulation,<sup>157</sup> which assesses cooperation primarily on the basis of return-related performance, while failing to incorporate effective fundamental rights safeguards. This logic appears to be reflected in the newly adopted European Asylum and Migration Management Strategy,<sup>158</sup> which places increasing emphasis on migration diplomacy and Frontex-coordinated return operations, without establishing a corresponding focus on fundamental rights monitoring or protection mechanisms. In practice, this reverses the hierarchy between policy effectiveness and the realisation of policy goals above compliance with fundamental rights obligations, regardless of their primary law status.

Looking ahead, there is no indication that the situation is likely to improve. The proposed Return Regulation does little to address these concerns. **ECRE** observed that it prioritises efficiency and enforcement objectives without introducing corresponding safeguards to address the persistent fundamental rights and accountability gaps identified in existing practices.<sup>159</sup> Especially problematic is the envisaged creation of “return hubs” in third countries, where returnees would be detained, pending the implementation of their return orders by Member State authorities or by Frontex.<sup>160</sup>

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153 Return Directive, Article 8(6).

154 United Nations General Assembly, Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/RES/57/199 (9 January 2003) 2375 UNTS 237.

155 FRA, Forced Return Monitoring Systems – 2025 update, para. 1.

156 ECRE, *Analysis of recent developments in EU policy on return of migrants*, Policy Note 9/2017, p.1.

157 Regulation (EC) No 810/2009 of 13 July 2009 establishing a Community Code on Visas (Visa Code), OJ L 243/1, 15.9.2009.

158 Commission Communication to the European Parliament and the Council, European Asylum and Migration Management Strategy, COM(2026) 45 final, 29 January 2026.

159 ECRE, *Towards a point of no return for fundamental rights? The EC’s proposal for a Return Regulation*, Policy Note 50/2025.

160 Proposal for a Regulation of the European Parliament and the Council establishing a common system for the return of third-country nationals staying illegally in the Union, and repealing Directive 2008/115/EC of the European Parliament and the Council, Council Directive 2001/40/EC and Council Decision 2004/191/EC, COM(2025)101 final, 11 March 2025, Article 17.

Although Frontex remains formally bound by the CFR when operating in third countries,<sup>161</sup> effective access to justice for fundamental rights violations risks to be seriously undermined in practice, as affected individuals will face significant barriers to effective judicial protection.<sup>162</sup> This concern is also shared by **FRA**, which has warned against the threats inherent in such practices, namely the heightened obstacles to effective access to justice and accountability when return-related activities are carried out outside the EU legal territory.<sup>163</sup> More recently, FRA identified, inter alia, the risk that Frontex enforces unlawful return decisions in such contexts. This is because the Agency holds no competence to issue such decisions and typically operates on the presumption that these have been lawfully adopted, relying on the principle of sincere cooperation and the assumption that Member States act in good faith.<sup>164</sup> This cannot be understood as implying a merely passive role in enforcement, as indicated in the *WS* case, in which Frontex carried out return operations in the absence of any formal return decisions, relying solely on an informal document provided by the national authorities.<sup>165</sup> In this regard, the **CJEU** has now unambiguously established Frontex's obligation to verify the existence of an underpinning return decision before proceeding with operational arrangements.<sup>166</sup>

According to **FRA**, in the context of "return hubs", non-compliance with EU law by the Member States should trigger additional on Frontex, including the partial or total suspension of its support under Article 46 EBCG Regulation, in line with its fundamental rights obligations.<sup>167</sup> FRA's concerns are well substantiated. Third countries may be bound by international human rights obligations, in some cases including the European Convention on Human Rights (ECHR), as in the case of Albania. However, they are not subject to the EU *acquis*, so neither the principle of mutual trust nor the presumption of compliance with EU fundamental rights applies in their regard. This, according to FRA, creates a tangible risk that Frontex's support to third-country return activities rely on return decisions that are incompatible with the principle of *non-refoulement* or the prohibition of collective expulsion.<sup>168</sup> To mitigate these risks, FRA considers that cooperation should be strictly conditional on the existence of binding safeguards equivalent to those provided under EU law.<sup>169</sup> Such safeguards should be expressly set out in the agreement establishing the return hub and incorporated into the third country's legal order.<sup>170</sup> Failing this, Frontex risks contributing to *refoulement* when facilitating the onward removal of individuals hosted in the hub, which should preclude its intervention.

**Access to justice for fundamental rights violations risks to be seriously undermined in practice.**

FRA further stresses that an assessment of fundamental rights protection cannot be confined to the *formal* legal framework of the third country, but requires an individualised assessment of the circumstances of each case, and that Frontex must ensure that fundamental rights safeguards are effectively implemented *in practice*.<sup>171</sup> This requires not only a rigorous and independent ex ante assessment of the third country's return system, based on up-to-date, objective and reliable sources, and capable of concluding with sufficient certainty that, as a rule, the risk of *refoulement* or collective expulsion is excluded, but also consideration of the specific circumstances of the person concerned. Such assessments must be carried out *before* Frontex engages operationally and must be subject to regular review, in line with the Agency's obligation under Article 73(1) of the EBCG Regulation to comply with EU law when operating in third countries.<sup>172</sup>

<sup>167</sup> FRA Position Paper 1/2025, Planned Return Hubs in Third Countries, EU Fundamental Rights Law Issues, para. 3, p. 30.

<sup>168</sup> FRA Position Paper 1/2025, para. 4, p. 31.

<sup>169</sup> FRA Position Paper 1/2025, para. 5, p.31.

<sup>170</sup> FRA Position Paper 1/2025, para. 6, p.31.

<sup>171</sup> FRA Position Paper 1/2025, para. 40, p.16.

<sup>172</sup> FRA Position Paper 1/2025, para. 7, p.31.

<sup>161</sup> Art 73, Frontex Regulation is explicit in this regard. In addition, the Charter applies extraterritorially as long as EU law is implemented per Art 51 CFR: Violeta Moreno-Lax and Cathryn Costello, 'The extraterritorial application of the charter: from territoriality to facticity, the effectiveness model', in Steve Peers et al. (eds) *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing, 2014).

<sup>162</sup> The Italy-Albania Protocol cases illustrate the practical barriers to judicial protection arising from offshore detention. Following the first transfer of 16 migrants to the Gjadër detention centre on October 2024, the Tribunale ordinario di Roma refused to validate the detention orders of 12 asylum seekers (Apps. nos. 42251 and 42256/24, 18 October 2024), finding that the accelerated border procedure had been unlawfully applied. Throughout, detainees participated in hearings via video link, represented by lawyers appointed from a list, without physical access to counsel or court. Three transfers between October 2024 and January 2025, totalling 73 persons, produced similar outcomes: Italian courts refused to validate detentions and ordered returns to Italy. In each instance the government responded with legislative intervention designed to overcome judicial objections: Decree-Law No. 158/2024 (converted into Law No. 187/2024) amended the safe country list and transferred jurisdiction to the Corte d'Appello di Roma; the Corte d'Appello in turn refused to validate the detention of 43 persons on 31 January 2025, issuing 43 preliminary references to the CJEU, which became joined cases C-758/24 (*Alace*) and C-759/24 (*Canpelli*). Decree-Law No. 37/2025 subsequently repurposed the facilities as repatriation CPRs, a framework the *Corte d'Appello* also rejected on 19 April 2025. The CJEU Grand Chamber confirmed the Italian courts' position on 1 August 2025 (Cases C-758/24 and C-759/24). Notably, unlike the Italy-Albania model, COM/2025/101 does not clarify which jurisdiction's courts would be competent to review detention in return hubs, sharpening the risk of a judicial protection vacuum: see Andreina De Leo, 'Managing Migration the Italian Way II', *Verfassungsblog*, 27 June 2025.

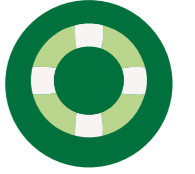
<sup>163</sup> FRA Opinion – 5/2018, Opinion 21. For further analysis and expressing similar concerns in relation to earlier offshoring proposals: Violeta Moreno-Lax, *Europe in Crisis: Facilitating Access to International Protection. (Discarding) Offshore Processing and Alternatives for the Way Ahead*, (Red Cross EU Office, 2016).

<sup>164</sup> EBCG Regulation, Article 11.

<sup>165</sup> Case C-679/23 P., *WS and Others v European Border and Coast Guard Agency*, ECLI:EU:C:2025:976.

<sup>166</sup> *WS v Frontex*, para. 102.

## 2.2 SEARCH AND RESCUE



FRA indicates that such an assessment should be entrusted to an independent European body, distinct from Frontex and with specific expertise in fundamental rights in the context of returns; and that Frontex should provide operational support only where this assessment confirms that the third country's return system contains safeguards sufficient to prevent violations of the right to asylum, prohibition of torture and inhuman or degrading treatment or punishment, and protection in the event of removal, expulsion or extradition as required under the CFR.<sup>173</sup> **Sixteen UN Special Rapporteurs** have expressed similar views. Deeply concerned with the proposed Return Regulation, they have addressed a formal letter to the Commission on the lack of effective safeguards against *refoulement* and the risk of undermining the right to an effective remedy, among other issues.<sup>174</sup>

Article 17 of the proposed Return Regulation introduces this possibility in broad and underspecified terms.<sup>175</sup> FRA has confirmed that primary EU law does not explicitly prohibit Frontex from implementing such removals but warns that they would expose the Agency to a constant risk of violating the principle of *non-refoulement*.<sup>176</sup> This scenario sharpens the concerns identified above, as there would be no Member State court with jurisdiction to review the legality of the transfer and no Frontex-specific legal framework in the current EBCG Regulation governing the Agency's contribution in such operations. In the absence of a specific accountability channel capable of guaranteeing effective judicial protection, Frontex should be precluded from intervening in these situations.

The EIBM also encompasses search and rescue (SAR) activities carried out in accordance with the Sea Borders Regulation<sup>177</sup> and applicable EU and international law.<sup>178</sup> One of the key functions of the Agency is the provision of technical and operational assistance in support of SAR operations.<sup>179</sup> Frontex is expressly tasked with providing such assistance to Member States and third countries for SAR purposes when situations arise in the context of border surveillance operations that it coordinates.<sup>180</sup> The EBCG Regulation does not alter the obligations stemming from international law, including those under the SAR and SOLAS Conventions.<sup>181</sup> The implementation of the Regulation must therefore be undertaken in full compliance with fundamental rights,<sup>182</sup> ensuring that border surveillance and SAR activities are conducted in a manner consistent with international law and the protection of human life at sea.

Article 98 UNCLOS imposes an obligation on States to require the masters of ships flying their flag to render assistance and proceed to the rescue of persons in distress when informed of their need for help. The **International Law Commission** defines distress as a "situation of serious danger", "but not necessarily one that jeopardizes the very existence of the person concerned".<sup>183</sup>

The 2004 amendments adopted to the SAR and SOLAS Conventions further clarify that assistance must be rendered to any person in distress at sea, irrespective of the circumstances leading to that situation. Nowhere in international law can a distinction be found between persons whose distress results from their own actions and those affected by unforeseen events, nor on the legal status of rescued individuals. All persons in distress are entitled to equal treatment under this framework.<sup>184</sup>

The SAR Convention establishes an international system of cooperation to ensure an effective response to distress situations. It defines the concept of "distress" and structures rescue activities around designated SAR regions, coordinated by national Maritime Rescue Coordination Centres (MRCCs) and sub-centres responsible for receiving and managing distress alerts. The Convention requires States to provide SAR services within their regions, including a legal framework.

<sup>173</sup> Ibid., paras. 9–10, pp.31–32.

<sup>174</sup> Mandates of the Special Rapporteur on the human rights of migrants; the Working Group on Arbitrary Detention; the Special Rapporteur on the rights of persons with disabilities; the Special Rapporteur on the right to education; the Special Rapporteur on the right to food; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on the independence of judges and lawyers; the Special Rapporteur on extreme poverty and human rights; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; the Special Rapporteur on contemporary forms of slavery, including its causes and consequences; the Special Rapporteur on trafficking in persons, especially women and children; the Special Rapporteur on violence against women and girls, its causes and consequences and the Working Group on discrimination against women and girls, Letter to the European Commission, the European Parliament and the Council of the European Union, Ref.: OL OTH 166/202, 26 January 2026.

<sup>175</sup> COM(2025)101 final, Article 17; Rhea Kummer, 'Being Rejected is not a Crime: Detention in the EU Return Regulation', *Verfassungsblog*, 11 May 2026.

<sup>176</sup> FRA, 'Planned Return Hubs in Third Countries: EU Fundamental Rights Law Issues', March 2025, p. 1; CFR, Articles 18 and 19.

<sup>177</sup> Regulation (EU) No 656/2014 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, OJ L 189/93, 27.6.2014.

<sup>178</sup> EBCG Regulation, Article(1)(b).

<sup>179</sup> EBCG Regulation, 3).

<sup>180</sup> EBCG Regulation, Article 10(1)(i).

<sup>181</sup> EBCG Regulation, 20).

<sup>182</sup> EBCG Regulation, Article 1.

<sup>183</sup> International Law Commission (ILC), Vol. II (1979), p. 134, (10).

<sup>184</sup> 2004 Amendments to the International Convention on Maritime Search and Rescue, Annex, para. 2.1.10; IMO, Resolution MSC.167(78), Guidelines on the Treatment of Persons Rescued at Sea, para. 6.17; Violeta Moreno-Lax, 'EU External Migration Policy and the Protection of Human Rights', PE 603.512 (European Parliament, 2020), pp. 14–15; Violeta Moreno-Lax, 'Protection at Sea and the Denial of Asylum', in Cathryn Costello, Michelle Foster, and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press, 2021) 483.

designated authorities, operational resources, communication systems, and coordination mechanisms. Additionally, the 2004 Guidelines on the Treatment of Persons Rescued at Sea require the prompt disembarkation of rescued persons in locations where their safety and rights are effectively protected.<sup>185</sup> The obligation, therefore, does not end with retrieval from the water and it is fulfilled only once survivors are brought to a “place of safety”, defined as a location where their lives are no longer at risk and where their basic needs are met in line with *non-refoulement* standards.<sup>186</sup>

SAR obligations are not only grounded in international maritime and human rights law. They also engage Article 18 CFR, which guarantees the right to asylum. The effectiveness of this guarantee cannot be confined to what happens once a person reaches EU territory. It extends beyond EU borders, and its fulfilment requires ensuring that the conditions enabling access to international protection are preserved in practice. The right to asylum is rendered meaningless if those who need it cannot survive the journey to claim it. A SAR system that is deliberately circumvented, or non-existent, thus also strikes at Article 18 CFR itself, by preventing persons in distress from ever reaching the point at which they could claim its protection. Any measure, legislative, administrative, or operational that impedes access to the sea route as an avenue of access to asylum must therefore be assessed not only against *non-refoulement* standards, but also against the EU’s own constitutional commitment to the right to asylum under primary law. The same applies to the right to leave any country including one’s own enshrined in Protocol 4 to the ECHR.<sup>187</sup>

This framework is reflected in the Sea Borders Regulation’s provisions on disembarkation, which require Member States involved in a maritime operation to cooperate with the competent MRCC to identify a place of safety and ensure the prompt and effective disembarkation of rescued persons. To ensure effective compliance, the Operational Plan of the mission must include detailed arrangements for addressing distress situations in accordance with international law.<sup>188</sup> The Sea Borders Regulation expressly provides that participating units must communicate with the MRCC responsible for the relevant SAR zone and place themselves at its disposal for the coordination of rescue operations.<sup>189</sup> It also contains a horizontal obligation concerning safety at sea,<sup>190</sup> which requires that all measures taken in the context of a maritime operation ensure the safety of intercepted or rescued persons, the safety of participating units, and the safety of third parties.

SAR operations at sea remain indispensable, given the persistently high number of lives lost in attempts to reach Europe through maritime routes.<sup>191</sup> The **Parliamentary Assembly of the Council of Europe (PACE)** has repeatedly examined the legal responsibility of States for deaths at sea, calling on Member States to fill the vacuum with responsibility in SAR zones, to adopt clear, binding, and enforceable common standards for SAR operations. It has also suggested to make

<sup>185</sup> International Maritime Organization (IMO), Resolution MSC.167(78), Guidelines on the Treatment of Persons Rescued at Sea.

<sup>186</sup> Resolution MSC.167(78), 6.12.

<sup>187</sup> Violeta Moreno-Lax, *Accessing Asylum in Europe* (Oxford University Press, 2017); and Violeta Moreno-Lax, *EU External Migration Policy and the Protection of Human Rights*, PE 603.512 (European Parliament, 2020), pp. 17-18.

<sup>188</sup> EBCG Regulation, Article 38(3)(j).

<sup>189</sup> Sea Borders Regulation, Article 9.

<sup>190</sup> Sea Borders Regulation, Article 3.

<sup>191</sup> IOM, Missing Migrants Project <<https://missingmigrants.iom.int/region/mediterranean>> (last accessed 15 June 2026): 34,979 dead and missing recorded in the Mediterranean since 2014, of whom 31,980 drowned.

disembarkation fully consistent with international maritime and human rights law, and to ensure that rescue operations are disconnected from subsequent asylum procedures, so that the duty to save lives is not undermined by migration enforcement considerations.<sup>192</sup> According to recent **United Nations High Commissioner for Refugees (UNHCR)** data, thousands of refugees and migrants continue to die or go missing in the Mediterranean each year, with estimates in the tens of thousands over the past decade.<sup>193</sup> These figures make the Mediterranean one of the world’s deadliest migration corridors. This is due to the absence of legal pathways to access EU territory, combined with restrictive border policies.<sup>194</sup>

Against this backdrop, the **Parliamentary Assembly of the Council of Europe**<sup>195</sup> has called for a more proactive, coordinated, and permanent European approach to SAR.<sup>196</sup> The **European Parliament** has, in turn, emphasised the duty of Member States, Frontex, and all vessels operating in the Mediterranean to assist people in distress, promptly relay distress information, and ensure disembarkation in a place of safety that fully respects fundamental rights and the principle of *non-refoulement*.<sup>197</sup> A similar call to strengthen SAR and protect fundamental rights of migrants at sea has recently been made by the **Commissioner for Human Rights of the Council of Europe**, who recommended, inter alia, to ensure that allocation of responsibility between the EU Member States and EU bodies does not result in accountability gaps.<sup>198</sup> This call is just the last of many from the Council of Europe Commissioner for Human Rights that has repeatedly urged States to ensure effective coordination of SAR operations in the Mediterranean.<sup>199</sup> Similarly, the **SHARED Guidelines** call for an effective SAR mechanism with clearly allocated responsibilities.<sup>200</sup>

Particularly problematic in this respect is Frontex’s cooperation with unsafe countries in the context of SAR activities, such as Libya.<sup>201</sup> The Agency’s conduct in the Libyan SAR zone illustrates the accountability gap generated by the absence of any formal legal framework governing its

<sup>192</sup> PACE, Resolution 1872 (2012), *Lives Lost in the Mediterranean Sea: Who is Responsible?*, adopted 24 April 2012; PACE, Resolution 1999 (2014), *The “Left-to-Die Boat”: Actions and Reactions*, adopted 23 January 2014.

<sup>193</sup> Consult UNHCR data at <<https://data.unhcr.org/en/situations/europe-sea-arrivals>>.

<sup>194</sup> See further Violeta Moreno-Lax, ‘The Informalisation of the External Dimension of EU Asylum Policy: The Hard Implications of Soft Law’, in Lilian Tsourdi and Philippe De Bruycker (eds), *Research Handbook on EU Immigration and Asylum Law* (Edward Elgar, 2022) 282.

<sup>195</sup> Parliamentary Assembly of the Council of Europe (PACE), *Saving migrants’ lives at sea and protecting their human rights*, Doc. 15881, 11 December 2023; PACE, *Saving the lives of migrants at sea and protecting their human rights*, Resolution 2612 (2025), 26 June 2025.

<sup>196</sup> For policy options in this regard: Violeta Moreno-Lax and Sarah Wolff, *Saving Lives at Sea: Towards a Common EU Approach to Search and Rescue in the Mediterranean*, Policy Report (Jacques Delors Centre, 2026).

<sup>197</sup> European Parliament, Resolution of 13 July 2023 on the need for EU action on search and rescue in the Mediterranean (2023/2787(RSP)).

<sup>198</sup> Council of Europe Commissioner for Human Rights, *Externalised asylum and migration policies and human rights law*, September 2025, p. 59.

<sup>199</sup> Council of Europe Commissioner for Human Rights, *Pushed beyond the limits: Four areas for urgent action to end human rights violations at Europe’s borders*, April 2022, p. 44; A distress call for human rights, The widening gap in migrant protection in the Mediterranean, March 2021, p. 9; *Lives saved. Rights protected. Bridging the protection gap for refugees and migrants in the Mediterranean*, June 2019, p.11.

<sup>200</sup> SHARED Guidelines 21-24; OHCHR, *Lethal Disregard: Search and Rescue and the Protection of Migrants in the Central Mediterranean Sea*, HR/PUB/18/4, May 2021, p. 13.

<sup>201</sup> The accountability dimension of Frontex’s cooperation with Libya in the SAR context is currently before the General Court in *FM v Frontex* (Case T-511/24), pending, where the applicant alleges that Frontex’s real-time geolocation data sharing with Libyan rescue coordination centres systematically facilitates the interception and pullback of migrant vessels, exposing those on board to torture, arbitrary detention, and other serious violations. See: Athanasiou, G. ‘Hamoudi’s Burden Shifting Precedent and Its Implications for *FM v Frontex*’, *Verfassungsblog*, 13 February 2026.

activities there. Frontex conducts Multipurpose Aerial Surveillance (MAS) over the central Mediterranean, including within the Libyan SAR zone, without any Status Agreement or Working Arrangement with the Libyan authorities – the only instruments under the EBCG Regulation that could provide a basis for such cooperation.<sup>202</sup> A joint investigation by **Human Rights Watch** and **Border Forensics** documented that Frontex-chartered aircraft, operating out of Malta and Italy, systematically transmitted the geolocation of migrant vessels to the Libyan authorities, facilitating interceptions by the Libyan Coastguard and the forced return of survivors back to Libya. In 2021 alone, almost one third of the more than 32,000 persons disembarked in Libya were intercepted following intelligence gathered through Frontex aerial surveillance.<sup>203</sup> Between 2021 and 2023, Frontex transmitted 2,200 communications containing the exact geolocation of refugee vessels to Libyan actors.<sup>204</sup> Migrants in Libya are subjected to “unimaginable horrors,” as observed by the **UN**,<sup>205</sup> including arbitrary detention, inhuman and degrading treatment, and torture. Libya cannot be considered a “place of safety” for the purposes of disembarkation.<sup>206</sup> The **UN Fact-finding Mission in Libya** also found grounds of crimes against humanity being committed against migrants,<sup>207</sup> a conclusion foreshadowed by the ICC.<sup>208</sup> The **Office of the United Nations High Commissioner for Human Rights (OHCHR)** has expressed similar concerns.<sup>209</sup> The **UNHCR** also recommended that disembarkation should never result into a violation of the principle of *non-refoulement*,<sup>210</sup> in line with the 1951 Geneva Convention.<sup>211</sup>

This assessment of Libya is not limited to UN bodies: the **European Court of Human Rights** has held that returns to Libya expose individuals to “foreseeable, personal, present and real risk of torture or ill-treatment”,<sup>212</sup> while the **Italian Supreme Court** has likewise recognised the systemic nature of the abuses suffered by migrants in Libya and the resulting incompatibility of disembarkation

202 The Frontex list of working arrangements does not include any arrangement with Libyan authorities. No status agreement with Libya exists or has been authorised by the Council. The Agency’s cooperation with EUBAM Libya is based on a separate working arrangement with that EU mission, not with Libyan national authorities directly: Working Arrangement between Frontex and EUBAM Libya, January 2021. See Chapter 3 of this study.

203 Human Rights Watch and Border Forensics, *Airborne Complicity: Frontex Aerial Surveillance Enables Abuse*, 12 December 2022.

204 Front-LEX and Refugees in Libya, Legal Notice pursuant to Article 265 TFEU addressed to the Frontex Executive Director, 2024.

205 United Nations Support Mission in Libya, Office of the High Commissioner for Human Rights, *Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya*, 20 December 2018.

206 UNHCR, *Position on the Designations of Libya as a Safe Third Country and as a Place of Safety for the Purpose of Disembarkation Following Rescue at Sea*, September 2020; OHCHR, ‘Libya: A Pattern of Systematic Human Rights Violations and Abuses against Migrants’, February 2026.

207 Human Rights Council, Fifty-second session, 7 February–31 March 2023, Report of the Independent Fact-Finding Mission on Libya, para. 2.

208 The grounds for crimes against humanity against migrants in Libya were first raised publicly by ICC Prosecutor Fatou Bensouda in her statements to the UN Security Council on the situation in Libya: Statement of 9 May 2017, available at: <https://www.icc-cpi.int/pages/item.aspx?name=170509-otp-stat-lib>; Statement of 8 November 2017, available at: [https://www.icc-cpi.int/Pages/item.aspx?name=otp\\_lib\\_unsc](https://www.icc-cpi.int/Pages/item.aspx?name=otp_lib_unsc). See also Human Rights Council, Fifty-second session, Report of the Independent Fact-Finding Mission on Libya, 2023, para. 2.

209 United Nations publication, issued by the Office of the United Nations High Commissioner for Human Rights (OHCHR), *Lethal Disregard Search and rescue and the protection of migrants in the central Mediterranean Sea*, HR/PUB/18/4, 2016; OHCHR & UNSMIL, *Business as Usual: Human Rights Violations and Abuses against Migrants, Asylum-Seekers, and Refugees in Libya*, February 2026.

210 UNHCR, *Rescue at sea: A guide to principles and practice as applied to migrants and refugees*, YEAR? p.13

211 UN General Assembly, 1951 Convention Relating to the Status of Refugees, United Nations Treaty Series, vol. 189, p. 137, 28 July 1951; Article 33.

212 ECtHR, *Hirsi Hamaa and Others v. Italy*, App. No. 27765/09, para. 131.

or return to that country with international and constitutional obligations.<sup>213</sup> Similar stances have been taken by the Agency’s **Consultative Forum**,<sup>214</sup> the **FRO**,<sup>215</sup> and the **European Parliament**.<sup>216</sup> Even Frontex’s own **Executive Director** is aware that Libya cannot be considered a safe place.<sup>217</sup> Yet, despite implications for a *bona fide* implementation of his mandate, cooperation with Libya continues.<sup>218</sup>

The internal operational logic that sustains this practice has been confirmed by expert interviews conducted for this study. The Agency’s interpretation of its mandate structures its SAR obligations in markedly narrow terms. The Sea Borders Regulation 656/2014 is understood internally as applying only within the agreed and officially designated operational area of a joint operation, so that incidents occurring outside it are considered as not covered by its requirements.<sup>219</sup> Aerial surveillance conducted under EUROSUR is characterised as a “service” rather than an operational activity, an interpretation that is understood within the Agency to exclude it from the remit of Regulation 656/2014 altogether, notwithstanding its tension with the Agency’s fundamental rights obligations under Article 80 EBCG Regulation and Article 51 CFR.<sup>220</sup> This narrow construction directly shapes operational practice in relation to Libya. When Frontex officials encounter a situation of distress, they inform the relevant MRCC and, where a vessel is located inside the Libyan Search and Rescue Region, they communicate with the Libyan Coastguard; a general Mayday is launched only if people are already drowning.

However, Frontex’s main responsibility is the coordination of joint operations. This entails, as observed by the **EU Ombudsperson**, that where the FRO identifies persistent violations of fundamental rights by a Member State in the context of responses to maritime emergencies, or where Frontex becomes otherwise aware of such violations, it should consider triggering Article 46 of the EBCG Regulation.<sup>221</sup> Frontex should adopt and publish internal guidelines on how to react to maritime emergencies and should reflect on how best to respond to reports of NGOs with key information on the relevant operations.<sup>222</sup> In addition, the operational plans of Frontex-coordinated missions should clearly establish the allocation of responsibilities between Frontex, host states, and participating Member States, regulate the use of surveillance equipment, and define the role of the Coordinating Officer in SAR situations.<sup>223</sup> Finally, the Ombudsperson has recommended that Frontex condition the provision of EUROSUR aerial surveillance services on the full respect of fundamental rights and on Member States’ cooperation during SAR operations, and that the real-time involvement of Fundamental Rights Monitors in serious maritime incidents be ensured.<sup>224</sup>

213 Corte di Cassazione, Judgment No. 4557, 11 October 2023.

214 CF Annual Report 2019, pp. 9–19, CF Annual Report 2020, pp. 64–70, CF Annual Report 2021, p. 18.

215 In 2023, the Fundamental Rights Officer issued an Opinion on fundamental-rights concerns related to sending alerts to the Libyan Joint Rescue Coordination Centre and on search and rescue operations in the Central Mediterranean: 2024 FRO Annual Report, p.15.

216 European Parliament resolution 2023/2787(RSP).

217 DROI hearing, Meeting 20230907-0900-COMMITTEE-DROI, 07/09/2023, min. 10.43. Recording <[https://multimedia.europarl.europa.eu/en/webstreaming/subcommittee-on-human-rights\\_20230907-0900-COMMITTEE-DROI](https://multimedia.europarl.europa.eu/en/webstreaming/subcommittee-on-human-rights_20230907-0900-COMMITTEE-DROI)>.

218 FRO, Opinions on the Multipurpose Aerial Surveillance (MAS) Services in the Central Mediterranean; European Parliament resolution, P9\_TA(2023)0483.

219 Communication with EU official.

220 Communication with EU official.

221 EU Ombudsperson Decision in Case 01/3/2023/MHZ, Suggestion A.

222 EU Ombudsperson Decision in Case 01/3/2023/MHZ, Suggestion C.

223 EU Ombudsperson Decision in Case 01/3/2023/MHZ, Suggestion D.

224 U Ombudsperson Decision in Case 01/3/2023/MHZ, Suggestion E.

Despite persistently high numbers of deaths and disappearances at sea,<sup>225</sup> NGOs engaged in SAR activities in the Mediterranean increasingly face criminalisation and administrative obstruction.<sup>226</sup> They have also been directly endangered by violent conduct on the part of the Libyan Coastguard, the very authority that the EU and Frontex have funded, trained, and operationally supported through aerial surveillance: in August 2025, the Libyan Coastguard opened fire at the *Ocean Viking*, operated by SOS Méditerranée, for approximately twenty minutes while the vessel carried 87 survivors in international waters; in May 2026, a Libyan patrol boat linked to the Coastguard fired on the *Sea-Watch 5* after it had rescued some 90 migrants, threatening to board the ship when the crew refused orders to sail to Libya. Sea-Watch has documented more than 75 cases of extreme violence committed by Libyan militia forces in the Mediterranean since 2016.<sup>227</sup> Rather than being recognised as essential actors contributing to the fulfilment of States' international obligations to render assistance to persons in distress at sea, SAR NGOs have been subjected to investigations, vessel seizures, port access restrictions, and criminal proceedings.<sup>228</sup> This trend is reinforced at EU level by recent legislative initiatives, notably the proposal to revise the Facilitation Directive,<sup>229</sup> which risks further targeting humanitarian actors by removing the explicit humanitarian exemption that currently protects them, albeit partially, from criminal liability.<sup>230</sup>

Several concrete and implementable measures have been proposed to strengthen compliance with fundamental rights and improve operational effectiveness of maritime responses. The **SHARED Guidelines** propose clarifying and reinforcing Frontex's internal governance and operational frameworks across all areas of intervention. They recommend that the Management Board explicitly define the role, responsibilities, and accountability of the Frontex Coordinating Officer within the command-and-control structure of joint operations, including empowering him/her to act on their own initiative in situations of grave danger or imminent loss of life.<sup>231</sup> The Guidelines further call on the Executive Director to ensure that operational plans clearly identify the search and rescue tasks and functions of all participating actors, detailing roles and coordination mechanisms to guarantee timely and effective life-saving responses.<sup>232</sup>

225 IOM, Missing Migrants Project <<https://missingmigrants.iom.int/region/mediterranean>>.

226 FRA, Search and rescue operations in the Mediterranean and fundamental rights, June 2025 update.

227 SOS Méditerranée, *Statement on the attack on the Ocean Viking by the Libyan Coast Guard*, 25 August 2025, as reported in 'Libya's Coast Guard Fired Upon Rescue Vessel Searching for Boat in Distress', *Al Jazeera*, 25 August 2025; Sea-Watch, *Statement on the attack on the Sea-Watch 5*, 12 May 2026, as reported in 'Aid Group Says Libyan-Linked Vessels Fired on a Migrant Rescue Ship in the Mediterranean', *Associated Press*, 12 May 2026; Sea-Watch, cited in OCCRP, 'Libyan Coast Guard Fired on Migrant Rescue Ship, Charity Says', 13 May 2026.

228 FRA, Search and Rescue Operations in the Mediterranean and Fundamental Rights, June 2025 update; OHCHR, *Lethal Disregard: Search and Rescue and the Protection of Migrants in the Central Mediterranean Sea*, HR/PUB/18/4, May 2021, pp. 25-28; MSF, Alarm Phone, SOS Méditerranée, *Deadly Manoeuvres: Obstruction and Violence in the Central Mediterranean*, 12 June 2025.

229 Proposal for a Directive of the European Parliament and of the Council laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA, COM(2023)755 final, 28 November 2023.

230 Violeta Moreno-Lax, *Commission proposal for a revised Facilitation Directive: Targeted substitute impact assessment*, PE 765.787 (European Parliament, 2025).

231 SHARED Guideline 25.

232 SHARED Guideline 26.

## 2.3 THE ROLE OF HOST MEMBER STATES



Host Member States are those in whose territory or territorial jurisdiction a joint operation or a rapid border intervention, a return operation or return intervention takes place or is launched, or in which a migration management support team is deployed.<sup>233</sup>

Frontex may initiate activities only upon request from a Member State.<sup>234</sup> Such activities include, inter alia, the coordination of joint operations involving one or more Member States; the deployment of standing corps and technical equipment; the organization of rapid border interventions and the deployment of standing corps and technical equipment for that purpose; the deployment of standing corps within the framework of MMSTs to provide technical and operational assistance. The Regulation does not further specify the division of tasks between the host Member State and Frontex. Instead, it entrusts this allocation to operational plans, which must set out a detailed description of the tasks to be carried out, including those involving the exercise of executive powers, along with corresponding responsibilities.<sup>235</sup> In carrying out their respective tasks, the parties must act in good faith and are subject to a duty of sincere cooperation, including an obligation to exchange relevant information.<sup>236</sup>

Member States participating in a joint operation are required to refrain from any action that could jeopardise the attainment of the operation's objectives.<sup>237</sup> Within this framework, Frontex is entrusted with a supervisory and assessment role, including monitoring Member States' compliance with operational plans, in particular fundamental rights.<sup>238</sup> Where Frontex identifies serious or persistent shortcomings in this respect, it is required to assess the situation and, where appropriate, consider the activation of Article 46 of the EBCG Regulation, which provides for the defunding, suspension or termination of the operation – an issue we further explore below.

233 EBCG Regulation, Article 2 (1)(20).

234 EBCG Regulation, Articles 7(2), 36(1).

235 EBCG Regulation, Article 38(3)(d).

236 EBCG Regulation, Article 11.

237 EBCG Regulation, Article 7(5).

238 EBCG Regulation, Articles 7(4), 44(2)(b).



03

# COOPERATION WITH THIRD COUNTRIES

Subsection	Sources
3.1. Legal Instruments Governing Cooperation with Third Countries	<p>COM: <a href="#">Model Status Agreement</a></p> <p>COM: <a href="#">Model Working Arrangement</a></p> <p>COM: <a href="#">Report on the Evaluation of the EBCG Regulation</a> (p. 41, 57-61 on SC) <a href="#">FSWG Report</a> (on fundamental rights impact assessment prior to launching cooperation with third countries)</p> <p>EU Ombudsperson: <a href="#">Case 1473/2022/MHZ</a> on prior human rights impact assessment</p> <p>EP Study: <a href="#">EU Approach on the Mediterranean</a></p> <p>EP Resolution: <a href="#">P9_TA(2023)0483</a></p> <p>EP INI-Report: <a href="#">2023/2087(INI)</a> on Status agreement between Frontex and Mauritania; <a href="#">2023/2086(INI)</a> on Status agreement between Frontex and Senegal (not adopted by plenary).</p> <p><a href="#">GAMM</a></p> <p>Caselaw of CJEU: <a href="#">C-72/15, Rosneft</a>, ECLI:EU:C:2017:236; <a href="#">C-134/19 P, Bank Refah Kargaran</a>, ECLI:EU:C:2020:793 (<a href="#">commentary</a>); <a href="#">C-29/22 P and C-44/22, K.S.K.D.</a>, ECLI:EU:C:2024:725.</p> <p>Statewatch &amp; Migration Control: <a href="#">Outsourcing Border</a></p> <p>Statewatch submission to OHCHR: <a href="#">Externalization of migration</a> (point on lack of formal agreements)</p> <p>Mignex: <a href="#">Comparative experience on third-country cooperation</a></p>
3.2 Immunity of standing corps	<p>COM: <a href="#">Model Status Agreement</a></p> <p>COM: <a href="#">Model Working Arrangement</a></p> <p><a href="#">Annex to the Council decision authorising the negotiations with Senegal</a></p> <p>Caselaw of CJEU: <a href="#">C-72/15, Rosneft</a>, ECLI:EU:C:2017:236; <a href="#">C-134/19 P, Bank Refah Kargaran</a>, ECLI:EU:C:2020:793 (<a href="#">commentary</a>); <a href="#">C-29/22 P and C-44/22, K.S.K.D.</a>, ECLI:EU:C:2024:725</p> <p>Border Violence Monitoring Network: <a href="#">Submission to the Evaluation of Frontex Regulation</a></p>

### 3.1 LEGAL INSTRUMENTS GOVERNING COOPERATION WITH THIRD COUNTRIES



Cooperation with third countries has become an increasingly central tool of migration management in Europe over the last decade. In 2011, the European Commission presented the Global Approach to Migration and Mobility (GAMM) as the overarching framework of the EU's external migration and asylum policy.<sup>239</sup> Although the GAMM proclaimed human rights as a cross-cutting priority and adopted a migrant-centred approach, critical assessment has shown that its actual focus was overwhelmingly on the fight against irregular migration, with limited attention to the situation of forcibly displaced persons and no systematic evaluation of compliance with the rights of third-country nationals in practice.<sup>240</sup> The GAMM's implementation reports listed relevant projects but failed to examine concrete compliance with rights or to engage with the recommendations of the UN Special Rapporteur on the human rights of migrants.<sup>241</sup> It was established to further cooperation with third countries to prevent irregular migration, with implementation supported through the operational capacity and capacity-building activities of Frontex.<sup>242</sup> This expanding role of third-country cooperation has been accompanied by an expansion of Frontex's mandate and operational presence outside EU territory. By October 2023, the Agency had deployed approximately 600 personnel across ten joint operations spanning eight non-EU countries:<sup>243</sup> Albania, Bosnia and Herzegovina, Georgia, Kosovo, Montenegro, North Macedonia, Serbia, and Moldova.<sup>244</sup>

The legal framework governing Frontex cooperation with third countries establishes that it remains bound by the EU *acquis* and shall act within the framework of the external action policy of the Union.<sup>245</sup> This entails adherence to the protection of the universality and indivisibility of human rights and fundamental freedoms, including the principle of *non-refoulement*, respect for human dignity, the principles of equality and solidarity, and the principles of the United Nations Charter and international law.<sup>246</sup> According to Article 51 CFR, the EU Charter, too, applies whenever EU institutions, bodies and agencies exercise their powers, whether within or outside EU territory: the extraterritoriality of an action is immaterial to the Charter's applicability, which follows automatically wherever EU law is engaged.<sup>247</sup> There are therefore no places where powers conferred by EU law on EU organs can be exercised without due regard to fundamental rights.<sup>248</sup>

<sup>239</sup> European Commission, Communication on the Global Approach to Migration and Mobility, COM(2011) 743 final, Brussels, 18.11.2011.

<sup>240</sup> V. Moreno-Lax, 'EU External Migration Policy and the Protection of Human Rights', Study for the DROI Subcommittee, European Parliament, PE 603.512, 2020.

<sup>241</sup> V. Moreno-Lax, 'EU External Migration Policy and the Protection of Human Rights', Study for the DROI Subcommittee, European Parliament, PE 603.512, September 2020, Section 3.1.1, pp. 21-22.

<sup>242</sup> GAMM, para. 1.

<sup>243</sup> Report on the evaluation of Regulation (EU) 2019/1896, COM/2024/75 final, para. 2.

<sup>244</sup> Frontex, Cooperation between Frontex and Third Countries in 2023, p. 11.

<sup>245</sup> EBCG Regulation, Article 73(2).

<sup>246</sup> TEU, Articles 3(5) and 21; EBCG Regulation, Article 73(2).

<sup>247</sup> PE 603.512, pp. 20-21; Moreno-Lax, V., and Costello, C. 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model.' In Peers, S., Hervey, T., Kenner, J., and Ward, A. (eds), *The EU Charter of Fundamental Rights: A Commentary*. Oxford: Hart Publishing. (2014), pp. 1657-1683

<sup>248</sup> PE 603.512, pp. 20-21.

In operational terms, such cooperation must be conducted with the support of, and in coordination with, Union delegations and, where relevant, Common Security and Defence Policy (CSDP) missions.<sup>249</sup> An example of the latter is Operation EUNAVFORMED *Irini*, off the coast of Libya, with which Frontex has maintained a Working Arrangement (WA) since January 2021 on information exchange.<sup>250</sup> Under the current Regulation, the Agency's cooperation with third countries is governed through four specific channels: Status Agreements, WAs, pilot projects, and technical assistance projects.<sup>251</sup>

The exchange of immigration liaison officers (ILOs) between Frontex and third country authorities is explicitly provided for under WAs,<sup>252</sup> and may equally be covered by Status Agreements as the more comprehensive binding instrument (as described below). The EBCG Regulation dedicates a specific provision to liaison officer deployment in third countries,<sup>253</sup> which requires Management Board approval following a prior Commission opinion.<sup>254</sup> The structure of these provisions confirms that ILO deployment presupposes the existence of a formal legal framework governing the cooperation relationship with the third country concerned. The question of whether ILO exchanges can lawfully occur outside these two frameworks, including under pilot projects or technical assistance projects, is not explicitly addressed in the EBCG Regulation and should therefore be answered negatively.

These four instruments listed in Article 73(7) EBCG Regulation do not, however, seem to exhaust the ways in which Frontex does in practice extend its operations into third-country territory. As illustrated by Operation *Hera*, the Frontex-led mission hosted by Spain, joint operations can unfold beyond the territorial waters and airspace of a third country. In that case, the basis was a bilateral agreement concluded between that third country and Spain, without any direct legal instrument concluded between Frontex and the third country concerned. Namely, Spain's pre-existing bilateral agreements with Senegal and Mauritania were deemed to provide the legal authorisation for patrols in their territorial waters, while Frontex acted as the EU coordinator of the joint operation under the host State framework.<sup>255</sup> This pathway, while not specifically prohibited under the current Regulation, operates entirely outside the oversight and fundamental rights safeguards that usually attach to Status Agreements, Working Arrangements, and the other instruments listed in Article 73(7), creating a significant accountability gap.

Against this backdrop, the lack of specific provision for such arrangements should be considered a sign of their exclusion, given the absence of the necessary legal framework regulating their operationalisation in line with EU law. Indeed, while States, as sovereign entities under international law, may be seen as having plenipotentiary powers to engage in any conduct in the international plane that has not been forbidden, Frontex, as an organ of an international organisation, is governed by the principle of conferral and should only be considered as entitled to act when specific legal provision has been made to that effect.<sup>256</sup>

<sup>249</sup> EBCG Regulation, Article 73(2).

<sup>250</sup> Working Arrangement between the European Border and Coast Guard Agency and EUNAVFOR MED IRINI, 15 January 2021.

<sup>251</sup> EBCG Regulation, Article 73(7).

<sup>252</sup> Model Working Arrangement, COM(2021) 830 final, Articles 3.18–3.19

<sup>253</sup> EBCG Regulation, Article 77.

<sup>254</sup> EBCG Regulation, Article 76.

<sup>255</sup> Operation Hera Operational Plan 2015, p. 4, fn. 4.

<sup>256</sup> TEU, Article 5.

### 3.1.1 STATUS AGREEMENTS

Status Agreements are used when Frontex deploys its staff to third countries to carry out executive tasks. Such deployments can only occur under a Status Agreement, which constitutes a legally binding international treaty concluded in accordance with Article 218(6)(a)(v) TFEU. However, more limited forms of presence in third countries are not considered to require a Status Agreement. As noted above, the deployment of ILOs may operate within the framework of a Working Arrangement instead. Similarly, intelligence gathering activities, such as those conducted through the Africa-Frontex Intelligence Community (AFIC) in West Africa, take place through informal cooperation networks that fall outside the four legal instruments listed in Article 73(7), raising the accountability concerns discussed below.<sup>257</sup>

**Such deployments can only occur under a Status Agreement, which constitutes a legally binding international treaty**

<sup>257</sup> Frontex, Cooperation between Frontex and Third Countries in 2023, p. 9 (noting the conclusion of the EU-funded project to strengthen AFIC, providing equipment and training to eight African countries); Violeta Moreno-Lax, *EU External Migration Policy and the Protection of Human Rights*, PE 603.512 (European Parliament, 2020), pp. 52–53.

These instruments are based on the Model Status Agreement drafted by the European Commission,<sup>258</sup> after consulting the Member States, the Agency, FRA, and the EDPS.<sup>259</sup> As these are international agreements, Frontex does not hold an official negotiating role. The key actors in the negotiation process are the Council and, particularly, the Commission, while the Parliament acts under the so-called consent procedure. Under this procedure, the Parliament can either approve or reject the text in its entirety but has no power to influence its content directly. This procedure ensures a modicum of democratic control and is the only tool that allows for some kind of democratic oversight – although it only applies to one of the four mechanisms used by Frontex to cooperate with third countries under the EBCG Regulation.

While the Parliament's formal role in such process is limited, it has nonetheless managed to exercise some informal influence over the Mauritania negotiations through a parallel own-initiative procedure. The rapporteur, MEP Tineke Strik, expressed deep concern about the fundamental rights situation in Mauritania, and considered that a possible Status Agreement would entail a high risk of violations of fundamental rights and international protection obligations of a serious nature and likely to persist.<sup>260</sup> The

<sup>258</sup> Model status agreement as referred to in 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 Regulations (EU) No 1052/2013 and (EU) 2016/1624, COM(2021)829 final, 21 December 2021.

<sup>259</sup> EBCG Regulation, Article 76 (1).

<sup>260</sup> T Strik, 'Frontex's Expanding Mandate: Has Democratic Control Caught Up?' (2024) European Law Journal.

resulting report found that Mauritania has no national legal asylum system in place and that, in the absence of such a system, persons deemed ineligible for UNHCR protection are deported to the Malian and Senegalese borders without individual legal status assessments or formal deportation decisions.<sup>261</sup> It further documented that refugees, asylum seekers, and migrants in Mauritania continuously face systemic and serious human rights violations, including *refoulement*, arbitrary arrests and detention, gender-based violence, torture, exploitation, and abusive collective expulsions.<sup>262</sup> With respect to the Model Status Agreement, it considered that its provisions must be improved to address serious accountability gaps in the event of fundamental rights violations;<sup>263</sup> called on the Commission to ensure that Frontex staff granted immunity vis-à-vis the relevant third-country courts still continue to be held accountable under EU or Member State law, and to adopt guidelines on waiving immunity, including a strong role for the FRO;<sup>264</sup> it also urged the Commission to perform ex ante fundamental rights impact assessments before engaging in negotiations with third countries on Status Agreements, regretting that no such assessment had yet been performed.<sup>265</sup> It further called for the inclusion of clear benchmarks for suspension of activities in the event of persistent and serious human rights violations.<sup>266</sup> A parallel INI report on the Senegal negotiations was prepared but not adopted by the Plenary.<sup>267</sup>

As of 2026, the EU has concluded six Status Agreements under the current Regulation with EU candidate countries: Moldova,<sup>268</sup> North Macedonia,<sup>269</sup> Montenegro,<sup>270</sup> Albania,<sup>271</sup> Serbia,<sup>272</sup> and Bosnia and Herzegovina,<sup>273</sup> all of which are in force. The Council has also authorized the Commission to negotiate Status Agreements with Senegal<sup>274</sup> and Mauritania<sup>275</sup>. However, while negotiations with Senegal remain ongoing, Mauritania opted instead for a non-legally binding migration partnership concluded in 2024.<sup>276</sup>

<sup>261</sup> EP Recommendation 2023/2087(INI), A9-0358/2023, para. 1.

<sup>262</sup> EP Recommendation 2023/2087(INI), A9-0358/2023, recital O.

<sup>263</sup> EP Recommendation 2023/2087(INI), A9-0358/2023, para. 5.

<sup>264</sup> EP Recommendation 2023/2087(INI), A9-0358/2023, para. 6.1(c).

<sup>265</sup> EP Recommendation 2023/2087(INI), A9-0358/2023, para. 6.1(m).

<sup>266</sup> EP Recommendation 2023/2087(INI), A9-0358/2023, para. 7.

<sup>267</sup> Report on the ongoing negotiations on a status agreement on operational activities carried out by the European Border and Coast Guard Agency (Frontex) in Senegal (A9-0032/2024). European Parliament.

<sup>268</sup> Agreement between the European Union and the Republic of Moldova on operational activities carried out by the European Border and Coast Guard Agency in the Republic of Moldova, OJ L 91/4, 18.3.2022.

<sup>269</sup> Agreement between the European Union and the Republic of North Macedonia on operational activities carried out by the European Border and Coast Guard Agency in the Republic of North Macedonia, OJ L 61/3, 27.2.2023.

<sup>270</sup> Agreement between the European Union and Montenegro on operational activities carried out by the European Border and Coast Guard Agency in Montenegro, OJ L, 2025/331, 17.2.2025.

<sup>271</sup> Agreement between the European Union and the Republic of Albania on operational activities carried out by the European Border and Coast Guard Agency in the Republic of Albania, Council Decision (EU) 2024/1169, OJ L, 2024/1169, 18.4.2024.

<sup>272</sup> Agreement between the European Union and the Republic of Serbia on operational activities carried out by the European Border and Coast Guard Agency in the Republic of Serbia, OJ L, 2025/480, 13.3.2025.

<sup>273</sup> Agreement between the European Union and Bosnia and Herzegovina on operational activities carried out by the European Border and Coast Guard Agency in Bosnia and Herzegovina, Council Decision (EU) 2025/1348, OJ L, 2025/1348, 11.7.2025.

<sup>274</sup> Council Decision (EU) 2022/1169 of 4 July 2022 on the authorisation to open negotiations with the Republic of Senegal on a status agreement on operational activities carried out by the European Border and Coast Guard Agency in the Republic of Senegal, OJ L 181/20, 7.7.2022.

<sup>275</sup> Council Decision (EU) 2022/1168 of 4 July 2022 on the authorisation to open negotiations with the Islamic Republic of Mauritania on a status agreement on operational activities carried out by the European Border and Coast Guard Agency in the Islamic Republic of Mauritania, OJ L 181/18, 7.7.2022.

<sup>276</sup> European Commission, Press statement by President von der Leyen with Mauritanian President Mohamed Ould El-Ghazouani and Spanish Prime Minister Pedro Sánchez, 8 February 2024.

The Model Status Agreement developed by the Commission provides a standardized template covering several key areas: the legal basis and scope of operations; command and control structures; jurisdictional immunities; data protection arrangements; and fundamental rights safeguards.<sup>277</sup> Such agreements typically define the types of operational activities that the Agency is allowed to conduct, including support to border management, return operations, and exchange of information.<sup>278</sup> They establish that Frontex personnel remain under the operational command of the Agency's Coordinating Officer, while activities must be carried out in accordance with both EU law and the law of the host third country.<sup>279</sup> The agreements incorporate references to respect for fundamental rights, requiring that all activities comply with the EU Charter and international human rights law.<sup>280</sup>

This tool poses several issues. The biggest challenge relates to the immunity provisions, which are addressed below. Overall, Status Agreements contain limited safeguards to ensure access to remedies for individuals affected by Frontex operations in third countries. While the agreements typically reference fundamental rights obligations, they do not establish independent complaint mechanisms, nor do they provide for compensation procedures, or specify how affected individuals can challenge actions taken during operations.<sup>281</sup> In addition, the Serious Incident Reporting mechanism examined in Chapter 5 may not effectively capture violations occurring in third countries.

**Status Agreements contain limited safeguards to ensure access to remedies for individuals affected by Frontex operations in third countries**

A key structural problem concerns the applicable legal framework governing Frontex deployments under Status Agreements. Under the Model Status Agreement, team members may only perform tasks and exercise powers under instructions from and in the presence of the host country's border management authorities and must comply with the laws and regulations of that country alongside applicable EU and international law. The European Parliament has noted that this constitutes the only operational framework in which EU personnel operate under third-State command.<sup>282</sup> This dual obligation creates a tension where the legal framework of the host country diverges from EU fundamental rights standards. The case of Mauritania illustrates the problem: same-sex relationships are characterised as a criminal offence under Mauritanian law punishable by death, meaning that Frontex officers operating under host-State instructions could in principle be directed to participate in the arrest of LGBTIQ+ persons – an act that is unlawful under EU law

<sup>277</sup> Communication: Model status agreement as referred to in Regulation (EU) 2019/1896, COM/2021/829 final.

<sup>278</sup> Ibid., Article 1.

<sup>279</sup> Ibid., Article 4.

<sup>280</sup> Ibid., Recitals and Article 3.

<sup>281</sup> The template Model Status Agreement lacks provisions on individual complaint mechanisms or compensation.

<sup>282</sup> European Parliament Recommendation 2023/2087(INI), A9-0358/2023, recital J.

by which they remain simultaneously bound.<sup>283</sup> More broadly, the absence of a national asylum system in Mauritania means that officers could be instructed to engage in conduct amounting to *refoulement* without any procedural safeguard intervening.<sup>284</sup> The Model Status Agreement contains no provision allowing deployed officers to deviate from or refuse instructions issued by host-State authorities where those instructions contradict Frontex’s fundamental rights obligations under EU and international law. The European Parliament’s recommendation on the Mauritania negotiations identified this gap explicitly, urging the Commission to include such a safeguard as a condition for continuing negotiations, but no such clause has been incorporated into the Model Agreement to date.<sup>285</sup>

Additionally, the use of force provisions in Status Agreements require strengthening. The **SHARED Guidelines** recommend that “the use of force, including the use of firearms, should be strictly monitored and subjected to tightly defined rules that align with domestic and international legal standards and ensure compliance with fundamental rights by all actors concerned”.<sup>286</sup> The current supervisory mechanism on use of force by statutory staff, including Standing Corps members, “should be revised to unambiguously include deployments with or in third countries, specifying civil and criminal liability provisions, and the conditions under which immunities will be waived”.<sup>287</sup> Operational plans should reflect these arrangements and include actionable guarantees to ensure and enforce compliance.<sup>288</sup>

**This dual obligation creates a tension where the legal framework of the host country diverges from EU fundamental rights standards.**

**Member States** have called for more flexible forms of international cooperation to support the external dimension of migration policy, allowing for limited-scope deployments without negotiating full-fledged Status Agreements.<sup>289</sup> Namely, they propose to deploy Frontex staff at major international airports or specific border crossing points on the basis of pilot projects, with full-fledged Status Agreements to be concluded only at a later stage, following a step-by-step approach. The **SHARED Guidelines** advise against this and propose instead that deployments of Frontex staff be subjected to Status Agreements without exception, to ensure democratic control and oversight of fundamental rights compliance.<sup>290</sup> For this purpose, the Guidelines emphasize that Status Agreements should always be conditional upon human rights risk and vulnerability assessments on a rolling basis.

<sup>283</sup> Ibid., recital N.

<sup>284</sup> Ibid., recital M.

<sup>285</sup> Ibid., para. 6.1(a).

<sup>286</sup> SHARED Guideline 68.

<sup>287</sup> Ibid.

<sup>288</sup> Ibid.

<sup>289</sup> Council of the European Union, Note from the Presidency to the Permanent Representatives Committee (Part 2) on the future of Frontex, Doc. 16714/25, 12 December 2025, p. 4.

<sup>290</sup> SHARED Guideline 60.

They recommend that the EU refrain from concluding Status Agreements with non-Parties to the Refugee Convention and with countries whose human rights record has deteriorated or is ostensibly deteriorating, such as Libya or Tunisia. Should those threshold conditions be met, any agreement concluded hence should contain specific provisions on fundamental rights protection, including enforceable remedies and effective procedural guarantees.<sup>291</sup>

<sup>291</sup> SHARED Guideline 61.

### 3.1.2 WORKING ARRANGEMENTS

The Agency resorts to WAs for the purposes of cooperating with the police or border control authorities of a third country directly.<sup>292</sup> Article 73(4)-EBCG Regulation provides that the Agency may act within the framework of WAs on matters related to the management of operational cooperation.<sup>293</sup> While Status Agreements are required for the deployment of border management teams with executive powers,<sup>294</sup> the Agency deploys Frontex Liaison Officers (FLOs) to third countries under Article 77-EBCG Regulation without requiring Status Agreements.<sup>295</sup> FLOs facilitate the implementation of WAs with national authorities and promote cooperation in border management, migration, and cross-border crime prevention.<sup>296</sup> WAs may include provisions concerning the exchange of sensitive non-classified information and cooperation in the framework of EUROSUR.<sup>297</sup> These are based on a model WA drafted by the European Commission,<sup>298</sup> which serves as a template for structuring engagements. The template covers several key areas of cooperation. The main declared purpose is the promotion of an effective implementation of EIBM, protecting external borders, and facilitating return, all supposedly in full respect of applicable international instruments including the 1951 Refugee Convention.<sup>299</sup> This is to be achieved through different means, including information exchange, capacity building, operational response, return and readmission, and exchange of liaison officers.<sup>300</sup> The structure includes specific provisions on fundamental rights,<sup>301</sup> requiring that activities be conducted in full compliance with obligations to respect human dignity, the right to life, *non-refoulement*, and the rights of the child, among others.<sup>302</sup> The Agency’s FRO may monitor compliance and conduct on-the-spot visits to third countries, while fundamental rights monitors assess operational activities.<sup>303</sup>

<sup>292</sup> EBCG Regulation, Article 73(1) refers to “authorities of third countries competent in matters covered by this Regulation”.

<sup>293</sup> EBCG Regulation, Article 73(4).

<sup>294</sup> EBCG Regulation, Article 73(3); Article 3.9 of the Model WA provides that the Agency may deploy staff and standing corps members “without executive powers” in operational activities on third country territory, as defined in specific operational plans.

<sup>295</sup> EBCG Regulation, Article 77; Council of the European Union, Presidency discussion paper on the role of the European Network of Immigration Liaison Officers in the external dimension of migration, Doc. 9374/25, 28 May 2025, p. 8.

<sup>296</sup> Ibid., p. 8.

<sup>297</sup> EBCG Regulation, Article 73(4).

<sup>298</sup> Model Working Arrangement as referred to in 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 Regulations (EU) No 1052/2013 and (EU) 2016/1624, COM(2021) 830 final, 21 December 2021.

<sup>299</sup> Ibid., Article 2.

<sup>300</sup> Ibid., Article 3.

<sup>301</sup> Ibid., Article 4.

<sup>302</sup> Ibid., Article 4.1.

<sup>303</sup> Ibid., Articles 4.3-4.4.

WAs are considered to constitute “solely administrative arrangements at technical level” and to be binding under national or international law.<sup>304</sup> This non-binding character creates several fundamental accountability problems that have been extensively documented in academic literature.<sup>305</sup> The most evident issue is that their soft-law nature raises questions regarding reviewability before the CJEU, as the Court holds jurisdiction only over acts that produce binding effects vis-à-vis third parties.<sup>306</sup> Unlike Status Agreements, WAs are not subject to democratic control or fundamental rights oversight requiring European Parliament consent.<sup>307</sup> While Article 76(4) EBCG Regulation requires the Agency to provide the Parliament with detailed information concerning parties and envisaged content before conclusion, the Parliament has no approval power and cannot block problematic arrangements.<sup>308</sup>

An additional issue is that the enforceability of fundamental rights provisions remains unclear. Article 4 of the Model WA requires activities to be conducted in full compliance with fundamental rights obligations,<sup>309</sup> yet the non-binding nature of these instruments raises the question of how these fundamental rights commitments can be legally enforced. The Model, in addition, provides no mechanism for suspending or terminating cooperation where fundamental rights violations occur, in contrast to Status Agreements, which include explicit provisions allowing the Executive Director to withdraw financing or terminate operations where violations take place.<sup>310</sup> As argued, the assumption underlying the WA framework, that “technical relationships” cannot affect individuals, is fundamentally flawed.<sup>311</sup> As observed by Fink, cooperate in between the spheres of “technical” and “political” cooperation, especially when they provide the basis for involving third countries in joint operations.<sup>312</sup>

WAs can also provide the basis for financial or technical assistance to third countries without adequate human rights conditionality. The Model WA envisages that the Agency “may develop initiatives and implement technical and operational assistance projects to enhance integrated border management capacities” of the third country.<sup>313</sup> They further provide that participation of authorities of those countries may be financed by Frontex with detailed terms left for later agreements on a case-by-case basis.<sup>314</sup> As noted, there is a risk that “rather controversial assistance, for instance the supply of border management equipment to third countries with a less than perfect human rights record, could be channelled through the Agency, without implicating the Commission” or any other form of oversight.<sup>315</sup>

<sup>304</sup> Ibid., Article 13.

<sup>305</sup> Melanie Fink, *Frontex and Human Rights* (Oxford University Press, 2018); Joyce De Coninck, *The EU’s Human Rights Responsibility Gap* (Hart, 2024); Giulia Raimondo, *The European Integrated Border Management* (Hart, 2024).

<sup>306</sup> TFEU, Article 263.

<sup>307</sup> Compare EBCG Regulation, Article 76(4) (WAs) with Article 73(3) and Article 218(6)(a)(v) TFEU.

<sup>308</sup> EBCG Regulation, Article 76(4); Salzano, Laura. “Frontex’s Non-Judicial Accountability: The Fragile Oversight of a Powerful Actor.” In *Migraciones en el siglo XXI: políticas, derechos y desafíos globales*, edited by Elena Conde Pérez and coordinated by Andrés Ramón Torres Rangel. Valencia: Tirant lo Blanch, 2025. ISBN 979-13-7010-840-3; M. Fink, “Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding “Technical Relationships”” (2012) 28 *Merkourios* 20, 20.

<sup>309</sup> Model WA COM(2021) 830 final, Article 4.1.

<sup>310</sup> Compare Model WA COM(2021) 830 final (lacking suspension/termination provisions for fundamental rights violations) with Model Status Agreement COM(2021) 829 final, Article 18(4).

<sup>311</sup> M. Fink, “Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding “Technical Relationships”” (2012) 28 *Merkourios* 20, 20.

<sup>312</sup> Ibid.

<sup>313</sup> Model Working Arrangement, COM(2021) 830 final, Article 8.1(m).

<sup>314</sup> Ibid., Article 3.8.

<sup>315</sup> Violeta Moreno-Lax, *Accessing Asylum in Europe* (Oxford University Press, 2017) 335.

Nonetheless, Frontex has concluded WAs with the police and/or border control forces of multiple third countries.<sup>316</sup> Currently, the Agency has WAs with the border management authorities of 19 States with varying degrees of compliance with fundamental rights and international protection obligations.<sup>317</sup>

In light of the opacity of these instruments, the **SHARED Guidelines** recommend that all forms of cooperation with third countries be subject to legally binding agreements that establish enforceable guarantees for individual legal protection.<sup>318</sup> The Guidelines note that WAs concluded before the EBCG Regulation are misaligned with the applicable legal framework and must be revised. As soft law instruments, they should only be used to implement pre-existing hard law commitments or to facilitate EU law-compliant implementation, rather than to replace or subvert legal protections, especially individual rights to *non-refoulement* and to access international protection.<sup>319</sup> Accordingly, the Guidelines call for rescinding existing WAs and replacing them with legally binding agreements, or alternatively, revising them as implementation instruments of the EBCG Regulation that explicitly include enforceable fundamental rights provisions.<sup>320</sup>

Such arrangements primarily focus on the exchange of information and often employ vague language regarding the kind of details to be shared. As established in the EBCG Regulation, the Agency shall ensure that the third countries to which information is transferred only process it for the purposes for which it was transferred, which can hardly be guaranteed either in law or in practice.<sup>321</sup> The Agency should therefore establish a monitoring mechanism to implement this legal duty, but there is no publicly available information on any mechanism of this kind. Frontex is also required to request a prior Opinion from the EDPS in all cases in which the exchange of personal data is provided for.<sup>322</sup> However, compliance with this obligation has been extremely limited. When the **EDPS** inquired about the Agency’s compliance with this provision back in 2022 through a Public Access to Documents Request, it was revealed that the only for which the EDPS was consulted concerned the arrangement signed with Niger.<sup>323</sup> This failure to systematically request EDPS opinions constitutes a violation of Article 73 EBCG Regulation, yet the European Commission has not initiated any action for failure to act against the Agency.

<sup>316</sup> EBCG Regulation, Article 73(1); Model Working Arrangement, COM(2021) 830 final.

<sup>317</sup> All WAs are publicly available in the Frontex Public Registry of Documents under “Working Arrangements” <<https://prd.frontex.europa.eu/>>. WAs have been concluded with: Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Canada, Cape Verde, North Macedonia, Georgia, Kosovo, Moldova, Montenegro, Nigeria, the Russian Federation, Serbia, Türkiye, Ukraine, the United Kingdom, and the United States.

<sup>318</sup> SHARED Guideline 54.

<sup>319</sup> SHARED Guideline 55.

<sup>320</sup> SHARED Guidelines 55-56.

<sup>321</sup> EBCG Regulation, Article 73(4).

<sup>322</sup> EBCG Regulation, Article 73(5).

<sup>323</sup> More details at <[https://www.dropbox.com/scl/fi/en-wvbfkr5t710j9atxscz/PAD-EDPS.png?rikey=6ekrx-lbfagOokdfu8s34\\_mufb&st=yhxn8eo&dl=0](https://www.dropbox.com/scl/fi/en-wvbfkr5t710j9atxscz/PAD-EDPS.png?rikey=6ekrx-lbfagOokdfu8s34_mufb&st=yhxn8eo&dl=0)>.

### 3.1.3 PILOT PROJECTS AND TECHNICAL ASSISTANCE PROJECTS

Cooperation through pilot projects and technical assistance projects suffers from even greater opacity. The Agency's public registry of documents contains no information on these instruments. The 2024 Annual Report provides only minimal disclosure: technical assistance projects are reported to take place in the Western Balkans (aimed at establishing a dactyloscope database), the Southern Neighbourhood, and West Africa, with no further details concerning their scope, partners, or operational modalities.<sup>324</sup> Namely, the Western Balkans initiative concerns the development of biometric data collection systems modelled on EURODAC to enable future interoperability with EU databases and facilitate the identification of transit through Western Balkan countries for return purposes.<sup>325</sup> Under the Instruments for Pre-Accession Assistance, the EU has funded the procurement of biometric registration equipment and IT infrastructure to enhance registration capacities of both law enforcement and asylum authorities in candidate countries including Bosnia and Herzegovina, Montenegro, Serbia, and Kosovo.<sup>326</sup> These systems are explicitly designed to align with EURODAC technical standards to ensure compatibility with EU systems upon accession,<sup>327</sup> despite the fact that these countries have not yet met fundamental requirements for EU membership including compatibility with the Common European Asylum System.<sup>328</sup> Whether these technical assistance initiatives are covered by an appropriate legal basis in EU law and whether they comply with Frontex's obligations under Article 51 CFR remain open questions.<sup>329</sup>

In light of the risks associated with limited oversight and the potential for fundamental rights violations in third country operations, the **European Parliament**<sup>330</sup> and the **European Ombudsperson**<sup>331</sup> have recommended strengthened safeguards. The **Ombudsperson** has specifically called for systematic *ex ante* fundamental rights assessments prior to launching cooperation with third countries.<sup>332</sup> The Ombudsman specifically proposed to systematically use a due diligence procedure to identify human rights impacts, with mandatory prior assessments when transferring surveillance means or providing capacity building to countries with poor human rights records.<sup>333</sup>

The **SHARED Guidelines** reflect similar concerns. Namely, these insist on strict human rights conditionality,<sup>334</sup> recommending that Frontex does not initiate or continue cooperation with third countries where recurring human rights violations against migrants have been documented, and that targeted risk and vulnerability assessments be conducted before any cooperation begins.<sup>335</sup> If

<sup>324</sup> Frontex 2024 Annual Report, p. 62.

<sup>325</sup> Border Violence Monitoring Network (BVMN), *Decoding Balkandac: Navigating the EU's Biometric Blueprint*, 25 September 2023, pp. 2, 18, 34.

<sup>326</sup> European Commission, Annex 1 of the Commission Implementing Decision on the financing of the individual measure to strengthen border management capacities in favour of the Western Balkans for 2022, 21 October 2022; BVMN, *Decoding Balkandac*, pp. 34, 43-62.

<sup>327</sup> BVMN, *Decoding Balkandac*, pp. 34-35, 45, 47, 50-51.

<sup>328</sup> *Ibid.*, p. 16.

<sup>329</sup> For discussion: Violeta Moreno-Lax, *EU External Migration Policy and the Protection of Human Rights*, PE 603.512 (European Parliament, 2020).

<sup>330</sup> European Parliament, Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations, p. 18.

<sup>331</sup> Case 1473/2022/MHZ, Decision on how the European Border and Coast Guard Agency (Frontex) assessed the human rights impact before providing assistance to non-EU countries for developing surveillance capabilities.

<sup>332</sup> European Parliament, *EU External Migration Policy and the Protection of Human Rights (2020)* PE 603.512, recommendations (a)-(c) and (e)-(f), pp. 31-35; Case 1473/2022/MHZ, Decision (n 2).

<sup>333</sup> Case 1473/2022/MHZ, Suggestions 1-4.

<sup>334</sup> SHARED Guidelines 60-61.

<sup>335</sup> SHARED Guideline 58.

violations occur during implementation, funding should be withdrawn and cooperation suspended or fully terminated.<sup>336</sup>

Frontex's cooperation with third countries reportedly also often occurs beyond the framework of formal agreements, as documented by **Statewatch**.<sup>337</sup> For example, the Agency cooperates with Morocco and another dozen countries through the Africa-Frontex Intelligence Community (AFIC), despite having no formal agreements or even public WAs with the vast majority of the States concerned.<sup>338</sup> This practice of informal cooperation is particularly problematic as it operates entirely outside the limited oversight mechanisms that apply to WAs and Status Agreements.

This practice raises serious legal questions in light of established principles governing EU external action. When analysing the validity of the Memorandum of Understanding (MoU) signed between selected representatives of EU countries and the President of the Commission and Tunisia,<sup>339</sup> the **European Parliament's Legal Service** clarified some points useful to the present analysis.<sup>340</sup> It clarified that even where agreements with third countries do not have binding effects and thus fall outside the scope of Article 218 TFEU, the Commission must still obtain the Council's prior approval in the exercise of its policy-making powers in external relations under Article 16 TEU.<sup>341</sup> The Legal Service emphasized that this requirement stems from the principles of distribution of powers and institutional balance and applies except where agreements are purely technical arrangements for implementing *existing* EU legislation with no policy-making dimension.<sup>342</sup> This position draws on the **CJEU's** position in the *Swiss-MoU* case.<sup>343</sup>

If the Commission, as the institution responsible for representing the Union externally under Article 17(1) TEU, is bound by such procedural requirements when concluding non-binding agreements, it is difficult to justify why Frontex, as an EU agency with significantly more limited powers and no EU representation attributions, should be permitted to engage in informal cooperation with third countries without any formal framework whatsoever. The Agency's informal cooperation arrangements fall entirely outside any oversight mechanism: there is no requirement for Council approval, no consultation with the EDPS, no transparency thresholds, no parliamentary information, and no possibility of judicial review. This creates a complete accountability vacuum where cooperation implicating fundamental rights occurs without any legal framework whatsoever to ensure compliance with EU law and fundamental rights obligations. information, and no possibility of judicial review. This creates a complete accountability vacuum where cooperation implicating fundamental rights occurs without any legal framework compliance with EU law and fundamental rights obligations.

<sup>336</sup> SHARED Guideline 59.

<sup>337</sup> Statewatch, Submission to the UN Special Rapporteur on the human rights of migrants: Externalisation of migration and the impact on the human rights of migrants, 10 June 2025, p. 1.

<sup>338</sup> Statewatch, Submission to the UN Special Rapporteur on the human rights of migrants, p.2.

<sup>339</sup> García Andrade, P., and Frasca, E. (2024). "The Memorandum of Understanding between the EU and Tunisia: Issues of procedure and substance on the informalisation of migration cooperation." *EU Immigration and Asylum Law and Policy* 26 (2024).

<sup>340</sup> European Parliament Legal Service, Opinion on the legal status of the Memorandum of Understanding signed in Tunis on 16 July 2023, SJ-0839/23, 19 December 2023.

<sup>341</sup> European Parliament Legal Service, Opinion on the legal status of the Memorandum of Understanding signed in Tunis, para. 30

<sup>342</sup> European Parliament Legal Service, Opinion on the legal status of the Memorandum of Understanding signed in Tunis, paras. 29-31.

<sup>343</sup> C-660/13, Council v. Commission, ECLI:EU:C:2016:616 ('Swiss MoU'), further analysed in V. Moreno Lax, EU constitutional dismantling through strategic informalisation: Soft readmission governance as concerted disintegration. *European Law Journal*. 2024 Feb;30(1-2):29-59.



### 3.2 IMMUNITY OF STANDING CORPS



The question of responsibility of Frontex's Standing Corps represents one of the most contentious aspects of the Agency's expanding mandate. To date, Frontex has enjoyed *de facto* immunity from legal accountability and has never faced liability for its conduct, even when conclusive evidence of malpractice existed.<sup>344</sup> This accountability gap becomes particularly relevant when the Agency operates outside EU territory, where the difficulty in exercising oversight, the vulnerable situation of those involved, and the complexity surrounding the establishment of jurisdiction amplifies to create significant obstacles to holding Frontex accountable. As Frontex increasingly deploys its Standing Corps in third countries under Status Agreements, the rules governing immunity and the waiver thereof have emerged as problematic.

In the Model Status Agreement, the Commission proposed full immunity for criminal matters for the members of the deployed teams in all circumstances.<sup>345</sup> This provision is in line with the practice according to which staff of international organizations enjoy functional immunity when deployed in third countries, designed to ensure the independence and effectiveness of their operations.<sup>346</sup> Such immunities are typically justified on the grounds that they protect international staff from politically motivated or arbitrary legal proceedings in host States, thereby enabling them to carry out their mandates without interference. In line with this, the current agreements, excluding the one signed with the Republic of Moldova,<sup>347</sup> all establish immunity from criminal, civil, and administrative jurisdiction in respect of all acts performed by the EBCGA's staff in the exercise of their official functions.<sup>348</sup>

However, the functional justification for immunity developed in the context of UN peacekeeping operations is not directly transposable to Frontex operations in third countries. UN peacekeeping missions often take place in conflict zones or hostile settings where personnel may face security risks from local populations, and operations may be authorised by the Security Council without host State consent. By contrast, Frontex joint operations are conducted in cooperative environments with third countries that have voluntarily agreed to host border management activities directed at preventing irregular migration. In these circumstances, where operations do not involve the application of international humanitarian law and personnel are not exposed to comparable risks, the extensive immunities granted to Frontex officers should be considered disproportionate to the aim pursued and incompatible with the original rationale of the immunity regime.<sup>349</sup>

<sup>344</sup> Case C-136/24 P, *Alaa Hamoudi v. European Border and Coast Guard Agency*, ECLI:EU:C:2025:977, regarding CASE No OC/2021/0451/A1, OLAF Final Report on Frontex.

<sup>345</sup> Model Status Agreement, COM(2021) 829 final, 21 December 2021, Article 12.

<sup>346</sup> Convention on the Privileges and Immunities of the United Nations, 1 UNTS 15, Article V, Section 18(a); UN Charter Article 105(2). In UN peacekeeping practice, apart from high-ranking officials, only military personnel from military contingents, performing military tasks, enjoy complete immunity from criminal jurisdiction of the host state.

<sup>347</sup> Agreement between the European Union and the Republic of Moldova on operational activities carried out by the European Border and Coast Guard Agency in the Republic of Moldova, ST/7204/2022/INIT, OJ L 91/4, 18 March 2022, Article 12(3).

<sup>348</sup> Agreement between the European Union and Montenegro on operational activities carried out by the European Border and Coast Guard Agency in Montenegro, ST/8354/2023/INIT, OJ L 140/4, 30 May 2023, Article 12(3); Agreement between the European Union and the Republic of Albania on operational activities carried out by the European Border and Coast Guard Agency in Albania, ST/11944/2023/INIT, OJ L, 2023/2107, 5 October 2023, Article 12(2); Agreement between the European Union and the Republic of North Macedonia on operational activities carried out by the European Border and Coast Guard Agency in the Republic of North Macedonia, ST/12896/2022/INIT, OJ L 61/3, 27 February 2023, Article 12(2).

<sup>349</sup> Interview with Dr Giulia Raimondo, Lecturer and Senior Researcher, University of Fribourg.

This argument acquires particular force when assessed against Article 47 CFR, which guarantees the right to an effective remedy without any territorial limitation, applying wherever EU law is engaged, including when Frontex implements the EBCG Regulation in third countries.<sup>350</sup> Any restriction on that right must not only pursue a legitimate aim but must be proportionate to it and respect its essence.<sup>351</sup> In operations where the rights most frequently at stake are of an absolute character, including the prohibition of torture and inhuman treatment, the prohibition of collective expulsion, and the prohibition of *refoulement*, the immunities as currently structured are difficult to justify as proportionate where the only available alternative is a complaints mechanism that has been found, by the EU Ombudsman and independent observers alike, to lack the independence and impartiality that an effective remedy requires.<sup>352</sup> In addition, insofar as these immunities conflict with *jus cogens* norms, such as the prohibition of torture, the hierarchy of sources under international law makes them legally void.<sup>353</sup>

Frontex's operational context raises distinct concerns that warrant a restrictive approach to immunity. The Agency operates in a particularly sensitive field involving vulnerable individuals in situations of distress, typically seeking international protection, and where the risk of fundamental rights violations is acute. Moreover, legal accountability mechanisms within the EU have proven inadequate: to date, no member of Frontex personnel has ever been held legally responsible for any misconduct.

This accountability vacuum is severe in relation to the Agency's own statutory staff. While Status Agreements generally preserve home Member State jurisdiction over seconded border guards, no equivalent clarity exists regarding Frontex's own personnel. Since the Agency itself has no "home Member State", it remains unclear which authority is competent to initiate and conduct criminal proceedings against statutory staff for conduct occurring in third country deployments. The CJEU's non-contractual liability jurisdiction under Article 97(4) of the EBCG Regulation addresses compensation for damages, not criminal accountability, and accessing it from a third country raises formidable procedural barriers. The result is a jurisdictional void that is incompatible with the requirements of Articles 19 TEU and 47 CFR, and that the revision must address directly by designating a competent forum for all categories of personnel<sup>354</sup> – if the principle of effective judicial protection is to be preserved.

The Agency has also been found to have failed to adequately investigate and address allegations of pushbacks and other illegal actions by Member States during joint operations, at times appearing to facilitate rather than prevent such violations.<sup>355</sup> These concerns are shared by the **Border Violence Monitoring Network** that, in its submission to the evaluation of the Frontex Regulation, insisted that *immunity* provisions must not translate into *impunity* for human rights violations.<sup>356</sup>

<sup>350</sup> Interview with Dr Giulia Raimondo, Lecturer and Senior Researcher, University of Fribourg.

<sup>351</sup> Interview with Dr Giulia Raimondo, Lecturer and Senior Researcher, University of Fribourg.

<sup>352</sup> Interview with Dr Giulia Raimondo, Lecturer and Senior Researcher, University of Fribourg; EU Ombudsman, Decision OI/5/2020/MHZ.

<sup>353</sup> Vienna Convention on the Law of Treaties, Article 53.

<sup>354</sup> Interview with Dr Giulia Raimondo, Lecturer and Senior Researcher, University of Fribourg.

<sup>355</sup> CASE No OC/2021/0451/A1, OLAF Final Report on Frontex, p.33.

<sup>356</sup> Border Violence Monitoring Network, Submission to the Evaluation of Frontex Regulation, 2022, para. 6.

For all these reasons, and in accordance with basic standards and the general principle of effective judicial protection, which require effective remedies for fundamental rights violations,<sup>357</sup> clear and enforceable mechanisms for accountability must be established. Immunity provisions should not translate into impunity. Status Agreements must include robust safeguards ensuring that immunity be waived in cases of serious misconduct, and that victims of fundamental rights violations have access to effective remedies, whether through EU or national judicial mechanisms. These points have been echoed by the **European Parliament**, which stressed that staff granted immunity must remain accountable under EU or Member State law. MEPs called for clear guidelines on waiving immunity, including procedures for handling requests from third-country authorities and a substantive role for the FRO in this regard.<sup>358</sup>

The **SHARED Guidelines** provide specific recommendations. These include establishing a neutral decision-making body, such as a special tribunal or the General Court of the EU, to decide on a case-by-case basis on jurisdictional immunities for Frontex officers and staff.<sup>359</sup> They also recommend that immunity be granted only for conduct performed strictly in discharge of official functions and in line with the relevant provisions, and propose clear procedures for waiving immunity in cases of *ultra vires* action and other serious misconduct. Such procedures and criteria should be set out explicitly in Status Agreements or separate claims agreements, with decisions on immunity waivers made public and misapplication subject to appeal before the CJEU.<sup>360</sup>

The Executive Director's broad discretion over immunity determinations raises a further and distinct constitutional concern under EU institutional law. Under the *Meroni* doctrine,<sup>361</sup> as confirmed in *ESMA*,<sup>362</sup> powers delegated by EU institutions to agencies must be circumscribed by clearly defined substantive and procedural conditions that limit the Agency's discretion and enable institutional supervision.<sup>363</sup> The current Status Agreements, however, vest in the Executive Director the sole authority both to determine whether an act was performed in the exercise of official functions and to decide whether to waive immunity, without specifying the criteria governing either determination, the procedure by which it must be made, or the institutional actor to whom it must be accountable.<sup>364</sup> This absence of any defined limits is not a drafting imperfection but a structural feature: it reproduces at the level of immunity governance the same discretionary concentration of power that characterises the Article 46 mechanism. A decision to classify conduct as falling within official functions, and thereby to preclude both host country and home Member State jurisdiction, directly determines whether any individual affected by

<sup>357</sup> Case C-64/16, *Associação Sindical dos Juizes Portugueses*, ECLI:EU:C:2018:117, paras 36–37, 41. The CJEU held that Article 19(1) TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review to the Member States, and that this provision must be read in conjunction with Article 47 of the Charter, which proclaims the fundamental right to an effective remedy; the principle of effective judicial protection of individuals' rights under EU law is a general principle of EU law.

<sup>358</sup> European Parliament, Recommendation of 22 November 2023 concerning negotiations on a status agreement between the European Union and the Islamic Republic of Mauritania on operational activities carried out by the European Border and Coast Guard Agency (Frontex) in the Islamic Republic of Mauritania (2023/2087(INI)), para. 6.1.c)

<sup>359</sup> SHARED Guideline 64.

<sup>360</sup> SHARED Guideline 65).

<sup>361</sup> Cases 9/56 and 10/56, *Meroni v High Authority*, EU:C:1958:7 and EU:C:1958:8.

<sup>362</sup> Case C-270/12, *ESMA*, EU:C:2014:18, paras 43–45.

<sup>363</sup> Interview with Dr Giulia Raimondo, Lecturer and Senior Researcher, University of Fribourg.

<sup>364</sup> Interview with Dr Giulia Raimondo, Lecturer and Senior Researcher, University of Fribourg.

that conduct has access to a remedy. That determination cannot lawfully rest on unconstrained executive discretion if it is to comply with the *Meroni* and *ESMA* requirements.<sup>365</sup>

The forthcoming revision should address this issue by establishing that the authority to determine whether conduct falls within official functions, and to decide on the waiver of immunity, should rest not with the Executive Director but with a specialised chamber of the CJEU.<sup>366</sup> This approach aligns with the practice of other international organisations: under the Convention on the Privileges and Immunities of the United Nations, the right and duty to waive the immunity of UN officials rests exclusively with the Secretary-General.<sup>367</sup> Applied to Frontex, waiver decisions should require involvement of the specialised CJEU chamber rather than resting with the Executive Director, ensuring that the determination is made by the institution that bears treaty-level responsibility for ensuring compliance with EU law (under Article 19 TEU). The revision should further require that all Status Agreements contain a clear and enforceable definition of what constitutes conduct in the exercise of official functions in the specific context of Frontex border management operations, and should establish that immunity from host State jurisdiction does not and cannot exempt team members from accountability before the legal system of their home Member State, a clarification that should be expressly and consistently included in every agreement rather than left to the discretion of individual negotiations.<sup>368</sup>

The need for robust accountability mechanisms finds further support in recent **CJEU** jurisprudence concerning fundamental rights protection in areas where the Court's jurisdiction is limited. Namely, the Common Foreign and Security Policy (CFSP) is an area where the Court's jurisdiction is, in principle, excluded under Articles 24(1) TEU and 275 TFEU. However, the CJEU has progressively asserted jurisdiction when necessary to protect fundamental rights and uphold the rule of law. This has been the case in *Rosneft*,<sup>369</sup> where the Court held that it had jurisdiction on the validity of CFSP decisions to protect the right to an effective remedy under Article 47 CFR. In the same spirit, in *Bank Refah Kargaran*,<sup>370</sup> the Court extended its jurisdiction to actions for damages arising from CFSP decisions. Most recently, in *KS and KD v Council*,<sup>371</sup> the Court clarified that it retains jurisdiction over operational aspects of CFSP missions where fundamental rights are implicated. From these pronouncements it becomes clear that, even in policy areas where the Treaties expressly limit the Court's jurisdiction, the CJEU has exercised jurisdiction to ensure fundamental rights protection and effective judicial review. Coherently with this case law, with all the more reason must comprehensive accountability mechanisms be ensured in relation to Frontex operations, which do not fall under the CFSP exception.

<sup>365</sup> Cases 9/56 and 10/56; Case C-270/12; Interview with Dr Giulia Raimondo, Lecturer and Senior Researcher, University of Fribourg.

<sup>366</sup> Interview with Dr Giulia Raimondo, Lecturer and Senior Researcher, University of Fribourg.

<sup>367</sup> *Ibid.*; Convention on the Privileges and Immunities of the United Nations, 1 UNTS 15, Section 20; Convention on the Privileges and Immunities of the Specialised Agencies, 33 UNTS 261, Section 22.

<sup>368</sup> Interview with Dr Giulia Raimondo, Lecturer and Senior Researcher, University of Fribourg.

<sup>369</sup> C-72/15, *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others*, ECLI:EU:C:2017:23, paras. 73-75.

<sup>370</sup> Case C-134/19 P, *Bank Refah Kargaran v Council*, ECLI:EU:C:2020:793, paras. 34-37.

<sup>371</sup> Joined Cases C-29/22 P and C-44/22 P, *KS and KD v Council and Others*, ECLI:EU:C:2024:725, paras. 128-133.

A further and practically actionable accountability mechanism, distinct from and complementary to immunity reform, concerns disciplinary liability. Where the third country cannot be relied upon as an accountability actor, for example because it has endorsed the unlawful conduct concerned, ensuring that robust disciplinary mechanisms operate at the EU and Member State level independently of host country cooperation should be embedded as an accountability tool.<sup>372</sup> For Standing Corps members seconded by Member States, the home Member State retains disciplinary jurisdiction and should be required to exercise it actively where the FRO identifies a fundamental rights violation in the course of a third country deployment: a failure to initiate disciplinary proceedings following a documented FRO finding should in itself constitute a breach of the cooperation obligations that the new Regulation should establish as a condition for participation in joint operations.<sup>373</sup> For Frontex's own statutory staff, the Agency's internal disciplinary regime should be reviewed to ensure that it applies with full force to conduct in third country deployments and that the FRO has a formal role in triggering disciplinary investigations, independently of any decision by the Executive Director.<sup>374</sup> These disciplinary mechanisms do not substitute for judicial accountability but constitute a first-order response that operates without requiring host country cooperation. What is more, the new Regulation should establish an explicit connection between disciplinary proceedings and judicial remedies by requiring that the outcome of any disciplinary investigation triggered by a fundamental rights violation in a third country deployment be transmitted to the FRO, included in the SIR record, and made available to affected individuals or their legal representatives upon request, so that the findings of internal proceedings can serve as accessible evidence in subsequent judicial proceedings before the CJEU or national courts.

<sup>372</sup> Interview with EU civil servant 3.

<sup>373</sup> Interview with EU civil servant 3.

<sup>374</sup> Interview with EU civil servant 3.



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04

# DATA PROCESSING





Subsection	Source
4.1. Data Handling	<p>COM: <a href="#">Preparing the next steps in border management in the European Union</a>, COM(2008) 69 final, 13.2.2008</p> <p>COM: <a href="#">Implementing Regulation (EU) 2021/581 of 9 April 2021 on the situational pictures of the European Border Surveillance System (EUROSUR)</a>, C/2021/2361, OJ L 124, 12.4.2021</p> <p>European Court of Auditors: <a href="#">Special Report 8/21</a></p> <p>EDPS: <a href="#">Opinion 02/2016</a> on the European Border Coast Guard Agency Regulation</p> <p>EDPS: <a href="#">2018 Formal Comments on the Proposal for a Regulation on the European Border and Coast Guard</a></p> <p>EDPS: <a href="#">Case 2022-0147</a>, Supervisory Opinion on the Rules on Processing of Operational Personal Data by the European Border and Coast Guard Agency (Frontex)</p> <p>EDPS: <a href="#">Audit Report on Frontex – Processing of Personal Data for Risk Analysis</a>, Executive Summary</p> <p>EDPS, Press Release: “EDPS reprimands Frontex for non-compliance with Regulation (EU) 2019/1896”: <a href="#">2025</a>, <a href="#">2022</a></p> <p>Opinion of the Data Protection Officer - part II, Draft Implementing Rules on Operational Personal Data, Warsaw, 16 November 2021, Reg. No 11364a, <a href="#">Ref: DPO/ /11364a/2021</a></p> <p><a href="#">MB Decision 4/24</a> on Data Protection</p> <p><a href="#">MB Decision 5/24</a> adopting the rules on processing operational personal data by the Agency</p> <p><a href="#">MB Decision 68/2021</a> adopting the rules on processing personal data</p> <p><a href="#">MB Decision 69/2021</a> adopting the rules on processing operational personal data</p> <p>European Ombudsman: <a href="#">Case 1452/2022/MHZ</a>, <a href="#">Decision on how the European Border and Coast Guard Agency (Frontex) ensures respect of the rights of migrants in ‘debriefing’ interviews</a>, 3 July 2023.</p> <p>EU Ombudsman: <a href="#">Case 1473/2022/MHZ</a>, <a href="#">Decision on how the European Border and Coast Guard Agency (Frontex) assessed the human rights impact before providing assistance to non-EU countries for developing surveillance capabilities</a></p> <p>Frontex: <a href="#">Situational Awareness and Monitoring</a></p> <p>Frontex News: <a href="#">Frontex to begin collecting personal data in Greece on suspected criminals</a> Maldusa: <a href="#">Biometric experiments and arbitrary practices on people on the move</a></p> <p>Statewatch: <a href="#">Document collection: Frontex and operational personal data</a></p> <p>Statewatch: <a href="#">Questioning the interviewers: Frontex’s covert interrogations at the Spanish southern border</a></p> <p>Statewatch: <a href="#">Frontex collaboration with Libya: ‘we call them and try to persuade them to take them back’</a></p> <p>Solomon: <a href="#">Frontex unlawfully shared thousands of people’s personal data with Europol</a> Access Now and Privacy International: <a href="#">Complaint to the European Ombudsman: EU facilitates surveillance</a></p>
4.2 Data Sharing	<p>COM: <a href="#">Report on the Evaluation of the EBCG Regulation</a> (p. 20 on outdated agreement with Europol; p. 6 on inappropriate personal data protection))</p> <p>European Court of Auditors: <a href="#">Special Report 8/21</a></p> <p>EDPS: <a href="#">Audit Report on Frontex – Processing of Personal Data for Risk Analysis</a>, Executive Summary</p> <p>Statewatch: <a href="#">Document collection: Frontex and operational personal data</a> N-GO Maldusa: <a href="#">Biometric experiments and arbitrary practices on people on the move</a></p>

## 4.1 DATA HANDLING

The EBCGA operates today as a significant processor of personal data across multiple operational and administrative domains. This transformation represents a fundamental shift in the nature and scope of the Agency’s mandate, with profound implications for the protection of fundamental rights, particularly the right to privacy, access to asylum, and protection from *refoulement*.

The Agency’s authority to process personal data is a relatively recent development. It was only with the adoption of the 2011 revision of its founding Regulation (EU) No 1168/2011 that Frontex was first granted the legal authority to process personal data,<sup>375</sup> marking a decisive expansion in its operational architecture. This initial grant of authority has since been progressively reinforced, particularly following the introduction of the Smart Border Package in 2013,<sup>376</sup> elaborated on a dedicated 2008 Commission Communication aiming at streamlining border surveillance, improving coordination between the Member States, and the use of new technologies for the purposes of border management and migration control.<sup>377</sup>

The operational infrastructure through which the Agency exercises its data handling is the EUROSUR system.<sup>378</sup> EUROSUR constitutes the primary framework for the exchange of situational information between Member States and the Agency in the field of border surveillance. The system is managed jointly by the Agency and the competent national authorities, establishing National Coordination Centres (NCCs) in each Member State, which operate 24/7 and on a near real-time basis.<sup>379</sup> Through the NCCs, national authorities and the Agency contribute to and access a shared situational picture, which is continuously updated to reflect any events unfolding at the external borders.<sup>380</sup>

The scope and granularity of the surveillance capability enabled by EUROSUR are considerable. The Agency maintains continuous monitoring of the situation at external borders and beyond, integrating and analysing intelligence from a wealth of sources, including national border guard authorities, the Agency’s own surveillance assets, and other EU bodies.<sup>381</sup> This integration of data sources provides Frontex with what it describes as a “Europe-wide view” of border control and migration management, enabling the early identification of unwanted arrivals and the coordination of responses thereto.<sup>382</sup>

<sup>375</sup> Regulation (EU) No 1168/2011 of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 304/1, 22.11.2011.

<sup>376</sup> Package comprised three proposals: Regulation of the European Parliament and of the Council establishing an Entry/Exit System (EES), COM(2013)95 final, 28 February 2013; Proposal for a Regulation establishing a Registered Traveller Programme, COM(2013)97 final, 19 February 2013; Proposal for a Regulation amending Regulation (EC) No 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), COM(2011)118 final, 10 March 2011.

<sup>377</sup> Commission Communication, Preparing the next steps in border management in the European Union, COM(2008) 69 final, 13 February 2008.

<sup>378</sup> Commission Implementing Regulation (EU) 2021/581 of 9 April 2021 on the situational pictures of the European Border Surveillance System (EUROSUR), C/2021/2361, OJ L 124/3, 12 April 2021.

<sup>379</sup> EUROSUR Regulation, Article 5.

<sup>380</sup> EUROSUR Regulation, Article 9.

<sup>381</sup> EBCG Regulation, Articles 29, 88, 89.

<sup>382</sup> Frontex, Situational Awareness and Monitoring <<https://www.frontex.europa.eu/what-we-do/monitoring-and-risk-analysis/monitoring-and-risk-analysis/>> (accessed 16 June 2026).

The Agency's Maritime Aerial Surveillance (MAS) service exemplifies the technological dimension of this surveillance architecture. MAS deploys surveillance aircraft and remotely piloted aircraft systems (drones) that stream video and other data from EU and Schengen external borders directly to the Agency's headquarters and to national and European authorities, allowing for real-time monitoring.<sup>383</sup> At the European Monitoring Room in Warsaw, experts continuously monitor incoming information flows.<sup>384</sup> Frontex has therefore evolved from a mere coordination and operational support body into an information hub tasked with the systematic collection, processing, and analysis of personal data, including biometric data, collected at the external borders.<sup>385</sup>

As an EU agency, Frontex is subjected to collect and process personal data in accordance with Regulation (EU) 2018/1725, the data protection framework applicable to EU organs.<sup>386</sup> The Agency may process personal data exclusively for the purposes enumerated in Article 87(1) of the EBCG Regulation, which include: the organisation and coordination of joint operations, pilot projects, rapid border interventions; support to Member States and third countries in pre-return and return activities; the facilitation of information exchange with Member States, the Commission, the European External Action Service (EEAS), and other relevant Union bodies and agencies; the facilitation of information exchange with law enforcement authorities, such as Europol; risk analysis; and the operation of the EUROSUR framework.

**This integration of data sources provides Frontex with what it describes as a 'Europe-wide view' of border control and migration management**

Article 87 of the EBCG Regulation further establishes the conditions governing the processing of personal data within this framework. The entities that provide personal data to the Agency (including Member States and their law enforcement authorities, the Commission, the EEAS, and the relevant Union bodies and international organisations) are responsible for determining the purpose(s) for which the data is to be processed. The Agency may only process personal data for a purpose different from that for which it was originally collected where such processing is compatible with the initial purpose, authorised by the provider of the data, and determined on a case-by-case basis.<sup>387</sup> The Agency is also required to keep written records of all such compatibility assessments.<sup>388</sup> Additionally, data providers may

<sup>383</sup> Frontex, Situational Awareness and Monitoring.

<sup>384</sup> Frontex, Situational Awareness and Monitoring.

<sup>385</sup> Management Board Decision 4/2024 of 18 January 2024 adopting the general rules on the application of the Data Protection Regulation by the Agency.

<sup>386</sup> Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (Text with EEA relevance.), OJ L 295/39, 21 November 2018.

<sup>387</sup> EBCG Regulation, Article 87(2).

<sup>388</sup> EBCG Regulation, Article 87(2).

impose restrictions on access to or use of the data transmitted, including as regards their transfer, erasure, or destruction, whether in general or specific terms. Where the need for such restrictions becomes apparent post-transfer, the provider must inform recipients accordingly, who are then bound to comply with those restrictions.<sup>389</sup>

This framework is complemented by internal governance instruments adopted by the Agency. The most significant of these is Management Board Decision 4/2024.<sup>390</sup> This Decision translates the obligations flowing from Regulation (EU) 2018/1725 into operational rules governing the Agency's day-to-day handling of personal data across all its activities, except for operational personal data processed for law enforcement purposes under Article 87(1)(d), which is separately governed by Management Board Decision 5/2024.<sup>391</sup>

The Decision introduces a structured framework for the internal allocation of data protection responsibilities, which directly bears on the broader question of accountability examined throughout this report. It distinguishes three categories of controllership: *sole* controllership, where the Agency alone determines the purposes and means of a given processing activity; *joint* controllership, where such decisions are taken jointly with Member State authorities, formalised through ad hoc agreements; and processor status, where the Agency processes data on behalf of and under the instructions of a Member State that acts as controller.<sup>392</sup>

**This structural ambiguity has direct implications for the effective protection of fundamental rights and access to remedies**

The allocation of controllership functions is not uniform across the Agency's activities and varies considerably depending on the operational context. In the framework of joint operations, pilot projects, and rapid border interventions, the Agency acts as the *sole* controller, but only with respect to the processing of data relating to its own staff for organisational coordination purposes.<sup>393</sup> By contrast, the processing of personal data of persons crossing the external borders without authorization for border checks, surveillance, screening, and document checks, remains under the *sole* controllership of the host Member State, with the Agency acting as processor on the basis of written instructions contained in the Operational Plan.<sup>394</sup> In the area of return activities, a more complex arrangement applies: the competent authorities of the Member States are controllers for the data they transmit to the Agency, while the Agency itself assumes controllership from the

<sup>389</sup> EBCG Regulation, Article 87(3).

<sup>390</sup> MB Decision 4/2024, Article 24.

<sup>391</sup> Management Board Decision 5/2024 of 18 January 2024 adopting the rules on processing operational personal data by the Agency.

<sup>392</sup> MB Decision 4/2024, Article 3(1)(2).

<sup>393</sup> MB Decision 4/2024, Articles 25(1).

<sup>394</sup> MB Decision 4/2024, Article 25(2).

moment personal data is entered into one of the Agency's return management systems.<sup>395</sup> For risk analysis, the Agency is, again, the *sole* controller,<sup>396</sup> while for EUROSUR activities the Agency and the designated national authorities of the Member States are *joint* controllers.<sup>397</sup> Within Frontex's internal organizational structure, responsibility for data processing is assigned according to a hierarchical cascade: operational decisions are taken at Head of Unit level in the first instance,<sup>398</sup> with authority escalating to higher levels where the processing involves multiple organizational Units or Divisions,<sup>399</sup> and ultimately requiring approval by the Executive Director where multiple Deputy Executive Directors are concerned.<sup>400</sup>

The significance of the controllership framework extends beyond internal governance, as it directly determines who bears legal responsibility when data protection violations occur. The expansion of Frontex's data processing mandate prompted early scrutiny from the **EDPS**, which identified a fundamental structural problem: the lack of clarity regarding the respective responsibilities of the Agency and national authorities in data processing operations.<sup>401</sup> When the EDPS issued its Opinion on the 2015 Proposal for what would become the 2016 EBCG Regulation,<sup>402</sup> it highlighted that the proposal failed to clarify which entity, between the Agency, the host Member State, or the home Member State, bears responsibility for data processing in joint operations. The EDPS emphasized that "joint operations of the Agency and the Member States should not lead to the blurring of responsibilities".<sup>403</sup> The Supervisor warned that this ambiguity would not only undermine data protection compliance but also affect the EIBM more broadly, given that the expanded operational mandate would enable the Agency to more severely impact individuals' fundamental rights.<sup>404</sup>

The **EDPS** reiterated this concern in its Formal Comments on the 2018 EBCG Regulation Proposal.<sup>405</sup> Noting that the European Commission had disregarded its previous recommendations, the Supervisor identified the lack of clarity on responsibilities as the central deficiency of the new text. It posed the critical questions: who does what, according to which procedure, under what conditions, bound by which constraints, and with what remedies available to affected individuals? The EDPS concluded that this ambiguity would ultimately undermine the rights and freedoms of the persons concerned.<sup>406</sup>

395 MB Decision 4/2024, Articles 34, 39(2)(3).

396 MB Decision 4/2024, Article 54.

397 MB Decision 4/2024, Article 64.

398 MB Decision 4/2024, Article 3(3).

399 MB Decision 4/2024, Article 3(4)(5).

400 MB Decision 4/2024, Article 3(6).

401 European Data Protection Supervisor. Opinion on the proposal for a European Border and Coast Guard, 18 March 2016, p. 3.

402 EDPS, Opinion 02/2016 on the European Border Coast Guard Agency Regulation, 18 March 2016.

403 EDPS, Opinion 02/2016, para. 21.

404 EDPS, Opinion 02/2016, para. 19.

405 Formal Comments of the EDPS on the Proposal for a Regulation on the European Border and Coast Guard and repealing Council Joint Action 98/700/JHA, Regulation (EU) 1052/2013 of the European Parliament and of the Council and Regulation (EU) 2016/1624 of the European Parliament and of the Council.

406 Formal Comments, p.3.

More recently, the EDPS's 2022 audit of Frontex concerning the PeDRA Project (Processing Personal Data for Risk Analysis) once again noted that "a clear and precise allocation of data protection responsibilities" is crucial for effectively allocating accountability.<sup>407</sup> Significantly, these concerns were also shared by the Agency's own **Data Protection Officer (DPO)**, who acknowledged that, regarding the practical implementation of joint controllership – the data protection terminology for shared responsibility, "it is still not clear what entity is responsible for what".<sup>408</sup> Despite the formal clarity of the Management Board Decision 4/2024's controllership framework, the underlying problem identified by the EDPS and the Agency's own DPO persists: in multi-actor operational environments, the allocation of responsibility remains ambiguous in practice. This structural ambiguity has direct implications for the effective protection of fundamental rights and access to remedies, questions examined further in Chapter 7.

These findings are corroborated by the expert interviews conducted. The question of controllership in joint operations was not seriously addressed until the launch of the PeDRA project in 2015, before which a significant volume of data processing conducted in the context of joint operations lacked any adequate legal basis.<sup>409</sup> As a matter of fact, both the 2016 and 2019 legislative revisions of the Frontex Regulation failed to resolve the problem: the 2019 Regulation added only a generic requirement to conclude joint controllership arrangements where joint controllership exists, a provision already implied by the pre-existing framework and therefore practically inoperative. The allocation of controllership is not a matter of formal designation but follows from an examination of who in practice decides the purposes and means of processing, and in joint operations that determination points almost invariably to the Member State: it is the Member State that decides whether to register fingerprints, how to conduct asylum procedures, and what patrolling activities to authorise, with the operational plan proposed by the Agency being acknowledged rather than formally accepted by the host country. The mismatch between formal designations and actual ground-level practice creates an accountability gap that is, in the assessment of those responsible for supervising it, very challenging to address at EU level, precisely because responsibilities remain undefined.<sup>410</sup> As the Agency's operational role continues to expand, this problem becomes more acute: a more active operational role for Frontex necessarily entails greater data protection responsibility, and the current framework does not provide the legal clarity needed to give that responsibility effect.<sup>411</sup> On this analysis, the appropriate legislative response is not a generic joint controllership clause but an explicit statutory allocation identifying, for each category of processing activity in joint operations, which entity acts as controller, what the permitted purposes are, and how data subject requests are to be handled, so that every party knows with certainty what it is responsible for, so that what is provided for in law aligns with what actually happens on the ground.<sup>412</sup>

A particularly contentious aspect of the Agency's data collection practices concerns so-called "debriefing interviews" conducted with individuals intercepted while attempting to cross the EU's external borders irregularly. These interviews are conducted by Agency staff deployed in the framework of joint operations, often immediately following interception: for example, at

407 EDPS, Supervisory Opinion on the Rules on Processing of Operational Personal Data by the European Border and Coast Guard Agency (Frontex), Case 2022-0147, paras. 39 ff.

408 Opinion of the Data Protection Officer - part II, Draft Implementing Rules on Operational Personal Data, Warsaw, 16 November 2021, Reg. No 11364a, Ref: DPO/ /11364a/2021.

409 Interview with EU civil servant 1.

410 Interview with EU civil servant 2.

411 Interview with EU civil servant 2.

412 Interviews with EU civil servants 1 and 2.

docks, when migrants arrive by sea.<sup>413</sup> The stated purpose of debriefing interviews is to collect information about the interviewee's journey, including *modus operandi*, reasons for leaving their country of origin, and other information considered relevant for risk analysis purposes.<sup>414</sup> This practice finds no explicit legal basis in the EBCG Regulation, which does not authorise the Agency to conduct interrogations of third-country nationals at the moment of arrival, nor does it establish procedural safeguards governing such interviews, including legal information and representation. **NGOs** operating at the external borders have documented that the Agency conducts repeated interrogations of unaccompanied minors at arrival points without the prior designation of a guardian, a practice that raises concerns regarding the protection of the best interests of the child.<sup>415</sup>

**The EDPS's main findings reveal systemic deficiencies across multiple dimensions of the Agency's data handling practices**

In May 2023, the **EDPS** published the results of an audit examining the Agency's processing of personal data in the context of debriefing interviews and the PeDRA Project.<sup>416</sup> The audit identified 36 formal findings and resulted in 32 recommendations. The EDPS's main findings reveal systemic deficiencies across multiple dimensions of the Agency's data handling practices.

A central finding concerns the legal characterization of data collected during debriefing interviews. While the Agency maintained that information compiled in debriefing reports is anonymous and, therefore, falls outside the scope of data protection law, the **EDPS** found otherwise. Many debriefing reports contain sufficient biographical detail and distinguishing features to identify individuals, either directly or through the controller's access to additional information.<sup>417</sup> This determination is significant: if the data is personal rather than anonymous, the full range of data protection obligations under Regulation 2018/1725 applies, including requirements for lawful basis, purpose limitation, data minimisation, and the protection of data subject rights. None of these obligations have been systematically implemented by the Agency in its debriefing activities hitherto, which constitutes a grave and persistent violation of fundamental rights.

The absence of a legal basis for debriefing interviews is not a drafting oversight but a structural gap that has persisted through successive legislative revisions. The purpose of debriefing interviews is not described in the current framework, and in practice these interviews are conducted for different reasons, including criminal intelligence gathering, without the legal certainty that data

<sup>413</sup> As reported by several actors: ONG Maldusa News, 'Biometric experiments and arbitrary practices on people on the move', 13 January 2026; Statewatch, 'Questioning the interviewers: Frontex's covert interrogations at the Spanish southern border', 3 August 2022.

<sup>414</sup> EDPS, Audit Report on Frontex – Processing of Personal Data for Risk Analysis, Executive Summary, 24 May 2023, p. 3.

<sup>415</sup> Maldusa News, 'Biometric experiments and arbitrary practices on people on the move', 13 January 2026.

<sup>416</sup> EDPS, Audit Report on Frontex, PeDRA.

<sup>417</sup> EDPS, Audit Report on Frontex, PeDRA, p. 3.

protection law requires.<sup>418</sup> The Screening Regulation,<sup>419</sup> sometimes invoked as a possible legal basis, does not solve the problem: it was not designed to govern debriefing interviews conducted by Frontex and cannot serve as their legal foundation.<sup>420</sup> Member States have consistently lacked a clearly identified legal basis for debriefing activities conducted in the context of joint operations, driven in part by demand for criminal intelligence that the current framework does not lawfully accommodate.<sup>421</sup> More broadly, across the Agency's data processing activities, essential elements remain unspecified in the legislation: data categories, controllership designations, and processing purposes are either absent or defined in terms so broad as to provide no operational guidance. According to the experts consulted, data protection law has not effectively reached the external borders in practice.<sup>422</sup>

The **EDPS** determined that for the data collection phase of debriefing interviews, the host Member State and Frontex operate as joint controllers, as they jointly define the purpose and means of processing.<sup>423</sup> Under data protection law, joint controllers must enter into formal arrangements that clearly delineate their respective responsibilities, particularly regarding the rights of data subjects, and must make the essence of these arrangements publicly available, including for the purpose of allowing for effective remedies. The audit found that no such arrangements typically exist, and those existing were found to be incomplete and incapable of preserving related rights.<sup>424</sup> This absence underscores the persistent accountability gap already identified by the EDPS in its earlier opinions.<sup>425</sup>

The **EDPS** has also raised concerns regarding compliance with the principle of fair processing, a cornerstone of data protection law that requires processing to be transparent, lawful, and respectful of the rights and reasonable expectations of data subjects.<sup>426</sup> Debriefing interviews are conducted in inherently coercive circumstances: individuals who have just been intercepted at the external border are questioned while in situations of deprivation or limitation of liberty, often in conditions of physical and psychological distress. The EDPS found that the interviews do not adequately account for the extreme vulnerability of individuals, and their voluntary nature is not guaranteed.<sup>427</sup> Additionally, interviewees are not informed that data collected may be shared with law enforcement authorities and used for criminal intelligence and possible investigations.<sup>428</sup> Finally, the EDPS found that the process may result in self-incriminating testimony being obtained without the procedural safeguards that apply in a law enforcement context, such as access to legal assistance and representation or warnings about the use of the information provided and its potentially detrimental effect.<sup>429</sup>

<sup>418</sup> Interviews with EU civil servants 1 and 2.

<sup>419</sup> Regulation (EU) 2024/1356 of the European Parliament and of the Council of 14 May 2024 introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, L, 2024/1356, 22.5.2024.

<sup>420</sup> Interview with EU civil servant 1.

<sup>421</sup> Interview with EU civil servant 1.

<sup>422</sup> Interviews with EU civil servants 1 and 2.

<sup>423</sup> EDPS, Audit Report on Frontex, PeDRA, p. 4.

<sup>424</sup> EDPS, Audit Report on Frontex, PeDRA, p. 4.

<sup>425</sup> EDPS, Audit Report on Frontex, PeDRA, p. 4.

<sup>426</sup> EDPS, Audit Report on Frontex, PeDRA, p. 4.

<sup>427</sup> EDPS, Audit Report on Frontex, PeDRA, p. 4.

<sup>428</sup> EDPS, Audit Report on Frontex, PeDRA, p. 4.

<sup>429</sup> EDPS, Audit Report on Frontex, PeDRA, p. 4.

Article 90 of the EBCG Regulation permits the Agency to process operational personal data concerning suspects of cross-border crime, but only where such data has been collected incidentally, while monitoring migratory flows, conducting risk analysis, or in the course of operations carried out for migration management purposes. The **EDPS** found that the Agency has inverted this logic. Rather than migration management activities occasionally producing law enforcement-relevant information, debriefing interviews have been systematically designed and conducted for the purpose of gathering criminal intelligence, thus exceeding the Agency's legal mandate.<sup>430</sup> The Agency should not proactively and systematically collect information about suspects of cross-border crimes, as such collection must be strictly limited to identified needs communicated by Europol, Eurojust, or Member State law enforcement authorities, and must concern only persons about whom those authorities are lawfully permitted to process data.<sup>431</sup>

**This accountability vacuum has enabled systemic violations in the Agency's debriefing practices**

The **EDPS** further questioned whether the processing of data collected through debriefing interviews satisfies the data quality requirements of Regulation 2018/1725, which mandates that personal data be adequate, relevant, and not excessive in relation to the purposes for which they are processed.<sup>432</sup> Data collected from individuals under duress, in situations of detention, without interpretation, legal guarantees or procedural safeguards, is inherently unreliable. Yet this information is integrated into the Agency's risk analysis products, which in turn inform operational decisions and policy development. The EDPS expressed particular concern that the use of low-quality information may result in certain nationalities or groups being disproportionately represented in risk assessments, leading to profiling and discriminatory targeting through operational actions and border control measures.<sup>433</sup> This risk is exacerbated by the absence of clear methodologies for gathering and integrating debriefing data into analytical products and the lack of systematic oversight of data quality.<sup>434</sup>

The **EDPS** audit presents a picture that diverges fundamentally from the formal data protection framework examined in the preceding section. The elaborate architecture of MB Decision 4/2024, with its carefully delineated categories of controllership and detailed procedural requirements, seems to be existing only on paper. In practice, the Agency has been conducting large-scale interrogations of vulnerable individuals without a clear legal basis, characterizing the resulting data as anonymous when it is not, sharing the data systematically with law enforcement authorities in violation of legal requirements,<sup>435</sup> operating without the joint controllership arrangements mandated by law, failing to implement basic data security measures, and lacking even the technical capability to respond when individuals seek to exercise their fundamental rights.

<sup>430</sup> EDPS, Audit Report on Frontex, PeDRA, p. 5.

<sup>431</sup> EDPS, Audit Report on Frontex, PeDRA, p. 5.

<sup>432</sup> Regulation 2018/1725, Article 4(1)(c).

<sup>433</sup> EDPS, Audit Report on Frontex, PeDRA, p. 6.

<sup>434</sup> EDPS, Audit Report on Frontex, PeDRA, p. 6.

<sup>435</sup> Apostolidis, P., 'Frontex unlawfully shared thousands of people's personal data with Europol', Solomon, 9 January 2025. Available at: <https://wearesolomon.com/mag/format/investigation/frontex-unlawfully-shared-thousands-of-peoples-personal-data-with-europol/>.

In 2023, the **EU Ombudsperson** concluded an inquiry into debriefing interviews conducted by Frontex in the context of Joint Operation *Indalo* at the Spanish-Moroccan sea border.<sup>436</sup> She recommended that Frontex provide interviewees with information about their rights, access to interpretation and to an independent complaints mechanism with proper oversight, and that these safeguards be more effectively implemented through access to legal aid.<sup>437</sup> The Ombudsman further indicated to Frontex the need to ensure that consent to participate in debriefings be recorded, that interviewees or their legal representatives review and sign interview records without coercion, and that records be treated confidentially.<sup>438</sup> She also noted that, while the Agency claimed debriefings are voluntary, evidence from the Spanish Ombudsman suggested this can hardly be the case,<sup>439</sup> thereby confirming the findings of NGOs working at the external borders and the EDPS audit results.

The analysis presented reveals a fundamental discrepancy between the Agency's formal data protection architecture and its operational reality. While MB Decision 4/2024 establishes a sophisticated framework of controllership categories and procedural requirements, the findings of the EDPS and the EU Ombudsperson demonstrate that, in practice, the Agency operates with persistent disregard for these obligations. The structural ambiguity regarding the allocation of responsibilities between Frontex and Member States, already identified by the EDPS in 2015 and reiterated in subsequent opinions, remains unresolved. This accountability vacuum has enabled systemic violations in the Agency's debriefing practices: large-scale interrogations without legal basis, the characterization of personal data as anonymous, sharing with law enforcement authorities beyond lawful parameters, and the absence of joint controllership arrangements required by law. The implications extend beyond data protection compliance to the broader protection of fundamental rights, particularly for individuals in situations of extreme vulnerability at the external borders, whose rights to fair processing, non-self-incrimination, and effective remedies are systematically compromised.

<sup>436</sup> Case 1452/2022/MHZ, Decision on how the European Border and Coast Guard Agency (Frontex) ensures respect of the rights of migrants in 'debriefing' interviews, 3 July 2023.

<sup>437</sup> Case 1452/2022/MHZ, Suggestion 1.

<sup>438</sup> Case 1452/2022/MHZ, Suggestion 2.

<sup>439</sup> Case 1452/2022/MHZ, para. 36.

## 4.2 DATA SHARING



The Management Board adopts decisions on lists of mandatory information and data to be exchanged with the Agency by national border management authorities.<sup>440</sup> However, beyond the area of risk analysis, no such decisions have yet been adopted, and the Management Board retains broad discretion as to their scope and timing.<sup>441</sup> As reported by the **European Court of Auditors (ECA)**, significant gaps in exchange practices across key operational areas and structural deficiencies in the reporting infrastructure still exist.<sup>442</sup> These include situational awareness and vulnerability assessment, operational response, return management, and fundamental rights monitoring.<sup>443</sup>

The Agency's data sharing with law enforcement authorities occurs principally through the PeDRA Project,<sup>444</sup> which facilitates the exchange of operational personal data with Europol. This exchange is governed by Article 90 of the EBCG Regulation, which permits the Agency to process personal data for the purpose of identifying suspects of cross-border crime, provided that such data has been collected while monitoring migratory flows, carrying out risk analyses, or in the course of joint operations. In principle, the transmission of personal data to Europol is allowed only if strictly necessary for the performance of Europol's tasks rather than on a general blanket basis.<sup>445</sup>

As shown in the preceding section, the **EDPS** audit uncovered that, in practice, the Agency has established an automatic process whereby all debriefing reports are systematically shared with Europol, without conducting the case-by-case assessments of strict necessity required by Article 90(2)(a) of the EBCG Regulation and in violation of both Regulation 2018/1725.<sup>446</sup> In 2025, following the conclusion of another formal investigation, the EDPS issued a formal reprimand against Frontex for this systematic breach. The EDPS noted that, while Frontex suspended its automatic data sharing with Europol in May 2023, the Agency had been operating in breach of its legal obligations for an extended period, with deep consequences for individuals wrongfully reported as suspects who risked being wrongfully linked to criminal activity across the EU, against presumption of innocence and basic criminal justice guarantees.<sup>447</sup>

<sup>440</sup> EBCG Regulation, Article 100(2)(e)-

<sup>441</sup> Frontex, Explanatory Note on the Proposals on Lists of Mandatory Information and Data to be exchanged with Frontex by National Authorities (Article 100(2)(e) of the European Border and Coast Guard Regulation), GSC/EAU, Section 2, p. 2.

<sup>442</sup> Court of Auditors, Special Report 08/2021, p.22.

<sup>443</sup> Frontex, Explanatory Note, Sections 1-6.

<sup>444</sup> Frontex News. Frontex to begin collecting personal data in Greece on suspected criminals, 22 November 2016.

<sup>445</sup> EBCG Regulation, Article 90(2).

<sup>446</sup> EDPS, Audit Report on Frontex, PeDRA, p. 5.

<sup>447</sup> EDPS, Press Release: EDPS reprimands Frontex for non-compliance with Regulation (EU) 2019/1896, 8 January 2025.

These violations point to a more fundamental structural problem that experts within the EU data protection architecture consider unresolved by the current framework. Frontex exercises powers that are functionally similar to those of a law enforcement agency but is constituted exclusively under the Schengen border management legal basis, not under the police and judicial cooperation chapter of the Treaties.<sup>448</sup> This misalignment creates irresolvable tensions whenever the Agency seeks to process or share data for law enforcement purposes, because the applicable legal framework was not designed for that purpose.<sup>449</sup> Article 90 of the EBCG Regulation, which requires the Agency to conduct proportionality assessments before transmitting personal data to Europol, exemplifies the problem: that type of assessment is proper to law enforcement bodies, and Frontex is structurally not in a position to perform it, as it lacks the law enforcement information necessary to determine what is useful to Europol.<sup>450</sup> The provision would function more coherently if reversed, subjecting law enforcement bodies that seek migration data held by Frontex to the proportionality assessment, rather than placing that burden on an Agency that has neither the mandate nor the informational capacity to discharge it.<sup>451</sup> In its current form, Article 90 is not only technically flawed but risks functioning as an instrument through which the Agency incrementally acquires a *de facto* law enforcement role that its founding legal basis does not authorise.<sup>452</sup> One solution would be the introduction of a dual legal basis for the Agency, analogous to the model adopted for the Schengen Information System, which operates simultaneously under the border management legal basis and the police cooperation chapter in the Treaties, allowing each category of processing activity to be governed by the appropriate legal framework and subject to the corresponding accountability regime.<sup>453</sup> But this would substantially change the nature and function of Frontex overall.

Beyond cooperation with EU law enforcement authorities, the Agency engages in data sharing and operational coordination with actors in third countries, even with those with a long and documented history of fundamental rights violations, including from the perspective of data protection. The Agency's cooperation with Libya is particularly concerning in this regard. Investigative reporting has documented that Agency personnel systematically inform Libyan authorities of the location of vessels carrying migrants departing from Libya, with the explicit end of facilitating their interception and forcible return.<sup>454</sup> This practice directly implicates the Agency in pull-backs to Libya, where individuals face serious risks of arbitrary detention, torture, extortion, and other forms of ill-treatment in detention centres controlled by militias, as extensively documented by the **UN** and human rights organisations.<sup>455</sup>

The Agency's data sharing activities extend to the provision of surveillance technology and training to third-country authorities, again, despite fundamental rights implications. In 2021, investigative research revealed that the Commission and EU agencies, including Frontex, have provided funding and training to non-EU intelligence and security agents in surveillance techniques, wiretapping technology, and biometric identification systems as part of migration

<sup>448</sup> Interview with EU civil servant 1.

<sup>449</sup> Interview with EU civil servant 1.

<sup>450</sup> Interview with EU civil servant 2.

<sup>451</sup> Interview with EU civil servant 2.

<sup>452</sup> Interview with EU civil servant 2.

<sup>453</sup> Interview with EU civil servant 1.

<sup>454</sup> Statewatch, Frontex collaboration with Libya: "we call them and try to persuade them to take them back", 12 June 2024. Available at: <https://www.statewatch.org/news/2024/june/frontex-collaboration-with-libya-we-call-them-and-try-to-persuade-them-to-take-them-back/>

<sup>455</sup> See Chapter 3 of this report.

control programmes.<sup>456</sup> North African countries, including Tunisia, Morocco, and Algeria, have received substantial support, including “state of the art technology” for establishing screening systems at border crossing points, training in mobile phone data extraction, using commercial forensic software, and instruction in the use of anonymous and fake online profiles for intelligence gathering.<sup>457</sup> These technology transfers raise serious fundamental rights concerns.

The data protection dimension of EUROSUR’s operation in relation to third countries compounds these concerns. The purpose provision governing EUROSUR is drafted in terms so ambiguous as to make it practically unworkable: the three stated pillars of border surveillance, combatting illegal immigration and cross-border crime, and contributing to the protection and saving of lives of migrants are not defined as distinct legal purposes, and the relationship between them is left unresolved, raising the question of whether an agency that is not a law enforcement body can lawfully pursue the second pillar at all.<sup>458</sup> The co-legislators do not appear to have recognised that situational pictures shared with third countries through EUROSUR, which include vessel identification numbers, the number of persons on board, and precise geolocation data, constitute personal data for the purposes of data protection law, and no framework has been established to govern their transfer accordingly.<sup>459</sup> The only available instrument for data transfers to third countries in this context is the WA, which must be authorised by the EDPS and accompanied by a transfer impact assessment. In practice, however, third countries frequently seek WAs with Frontex primarily in order to gain access to EUROSUR, creating an incentive structure in which non-binding instruments become the default vehicle for data sharing that should be governed by more stringent legal instruments capable of preserving data protection rights.<sup>460</sup> The EDPS does conduct in-depth assessments of third countries when reviewing proposed WAs and does reject them, but the threshold conditions and the categories of exceptional circumstances under which transfers may nonetheless proceed remain insufficiently specified in the current framework, with the consequence that these go ahead anyway.<sup>461</sup> Once a WA is in place, enforcement of compliance with EU data protection standards depends almost entirely on the threat of terminating cooperation, and the Commission no longer actively monitors whether third countries effectively comply with those standards in practice.<sup>462</sup>

The surveillance tools provided are deployed in contexts where legal safeguards for privacy, data protection, and protection from arbitrary interference with fundamental rights are weak or non-existent, and where they may be used to monitor, intimidate, or persecute individuals seeking to exercise their right to leave any country and/or to seek asylum. In October 2021, a **coalition of civil society organisations** filed a complaint with the European Ombudsman calling for an investigation into the EU institutions’ failure to conduct prior human rights assessments before transferring surveillance tools to third countries.<sup>463</sup> To date, no systematic safeguards have been

<sup>456</sup> Access Now and Privacy International, Complaint to the European Ombudsman: EU facilitates surveillance, 18 October 2021. Available at: <https://www.accessnow.org/press-release/eu-facilitates-surveillance-access-now-pi-demand-an-investigation/>

<sup>457</sup> Access Now and Privacy International investigation.

<sup>458</sup> Interviews with EU civil servant 1, 2.

<sup>459</sup> Interviews with EU civil servant 1, 2.

<sup>460</sup> Interview with EU civil servant 1.

<sup>461</sup> Interview with EU civil servant 2.

<sup>462</sup> Interview with EU civil servant 2.

<sup>463</sup> Case 1473/2022/MHZ, Decision on how the European Border and Coast Guard Agency (Frontex) assessed the human rights impact before providing assistance to non-EU countries for developing surveillance capabilities.



established to prevent the misuse of EU-funded surveillance infrastructure in third countries for purposes incompatible with fundamental rights.

The Agency's data sharing practices reveal a pattern of systematic disregard for the legal and procedural safeguards intended to protect individuals' fundamental rights. Internally, the Agency operated for years in breach of its legal obligations by automatically sharing debriefing data with Europol without necessity assessments. Externally, the Agency engages in operational cooperation and intelligence sharing with authorities in countries where returned individuals face serious risks of persecution, torture, and other forms of ill-treatment, and facilitates the transfer of surveillance technology without adequate human rights guarantees. These practices undermine access to asylum, the principle of *non-refoulement*, as well as rights to privacy and data protection. They also exemplify the broader accountability deficit examined throughout this report: when responsibility is diffused across multiple actors (the Agency, Member States, Europol, third country authorities) and when legal frameworks are systematically circumvented, individuals whose rights are violated are left without effective remedies.

According to the applicable legislation, when personal data are transferred from EU institutions and bodies to controllers, processors, or other recipients in third countries or to international organisations, the level of protection of natural persons ensured by the GDPR must not be undermined.<sup>464</sup> This requirement is not merely procedural but substantive: transfers may only be carried out in full compliance with the GDPR and in respect of the fundamental rights and freedoms enshrined in the EU Charter.<sup>465</sup>

**The Agency's data sharing practices reveal a pattern of systematic disregard for the legal and procedural safeguards intended to protect individuals' fundamental rights**

This obligation acquires particular significance in the context of the Agency's cooperation with Libya and other third countries where individuals face serious risks to their fundamental rights. Article 18 of the Charter guarantees the right to asylum, a right that extends not only to the formal adjudication of asylum claims but to the protection of individuals from practices that would defeat the purpose of the right.<sup>466</sup> The **CJEU** has consistently held that fundamental rights guaranteed by the Charter apply to all situations governed by EU law, and that Member States and

<sup>464</sup> Regulation (EU) 2018/1725, recital 63), Article 46.

<sup>465</sup> Regulation (EU) 2018/1725, recital 63).

<sup>466</sup> For the full argument: Moreno-Lax, *Accessing Asylum in Europe* (OUP 2017) ch 9.

EU institutions must respect those rights when implementing Union policies.<sup>467</sup> Where the Agency facilitates the interception and return of individuals to countries where they face persecution, arbitrary detention, or torture through the sharing of operational intelligence and surveillance data, it engages Charter obligations.<sup>468</sup> The essence of Article 18 cannot be nullified through unlawful data sharing: EU law prohibits not only direct returns to unsafe countries in violation of the principle of *non-refoulement*, it equally prohibits practices, such as the unlawful sharing of data and operational intelligence, that produce the same outcome indirectly.

Regulation 2018/1725 establishes stringent conditions for data transfers to third countries. In the absence of a Commission adequacy decision finding that the third country ensures an adequate level of data protection, transfers may only occur where the controller has provided appropriate safeguards and on condition that enforceable data subject rights and effective legal remedies are available.<sup>469</sup> Derogations from these requirements are allowed only in exceptional circumstances, including where the transfer is necessary for important reasons of public interest recognised in Union law.<sup>470</sup> Critically, such derogations must respect the essence of fundamental rights and be necessary and proportionate in a democratic society.<sup>471</sup> The Agency's systematic sharing of data with Libyan authorities, resulting in pullbacks to serious human rights violations, cannot be justified as a proportionate measure when it directly undermines the right to seek asylum and the prohibition of *refoulement* established in Articles 18 and 19 of the Charter.

This is not merely a theoretical concern. The **CJEU** established in *Schrems II* that the level of protection guaranteed by the Charter must travel with personal data when transferred outside the Union, and that where the legal framework of a third country does not ensure adequate protection, transfers cannot lawfully occur.<sup>472</sup> While that case concerned commercial data transfers, its fundamental principle applies with equal or greater force to data transfers that directly implicate absolute rights to life, asylum, and protection from torture and inhuman treatment. When the Agency shares operational intelligence with authorities in countries where it is proven that returned individuals face serious ill treatment, it transfers data in circumstances where neither the legal framework of the recipient country nor the practical reality of its enforcement apparatus can ensure the level of protection required by EU law. Overall, current data sharing practices therefore appear to be incompatible with both the letter and the spirit of Regulation 2018/1725 and constitute a circumvention of the prohibition of *refoulement* and a violation of the right to asylum through the mechanism of intelligence and operational cooperation.

<sup>467</sup> Case C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105, para. 19.

<sup>468</sup> Art 51 CFR.

<sup>469</sup> Regulation (EU) 2018/1725, Article 48(1).

<sup>470</sup> Regulation (EU) 2018/1725, Article 50(1)(d).

<sup>471</sup> Regulation (EU) 2018/1725, Article 25(1).

<sup>472</sup> Case C-311/18, *Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems*, ECLI:EU:C:2020:559, para. 94.



05

# **MONITORING AND ACCOUNTABILITY**

Subsection	Source
<b>5.1 Internal Monitoring and Accountability Mechanisms</b>	COM: <a href="#">Annex to the Report on the Evaluation of the EBCG Regulation</a> (§24 on fundamental rights strategy not fully implemented; §27 on access to FRM to operational areas; § 28 on ineffectiveness of SIR and Individual Complaint Mechanisms) COM: <a href="#">Report on the Evaluation of the EBCG Regulation</a> (§ 4.1.2.1, p. 22 on effective internal oversight structure) <a href="#">MB Decision 6/21</a> on the Fundamental Rights Action Plan <a href="#">MB Decision 19/2022</a> adopting rules on the complaints mechanism <a href="#">MB Decision 7/2021</a> establishing a supervisory mechanism to monitor the application of the provisions on the use of force by statutory staff <a href="#">MB Decision 43/2022</a> adopting the rules for the Executive Director and the MB to inform the Consultative Forum of the follow-up to its recommendations and to ensure that action is taken with regard to recommendations of the Fundamental Rights Officer <a href="#">MB Decision 56/22</a> on the Internal Audit Capability <a href="#">Letter sent from DG HOME to the former ED of the EBCGA</a>
<b>5.2. External Monitoring and Accountability Mechanisms</b>	COM: <a href="#">Report on the Evaluation of the EBCG Regulation</a> (§ 4.1, p. 24 on EP and art. 112)

## 5.1 INTERNAL MONITORING AND ACCOUNTABILITY MECHANISMS



The EBCG Regulation establishes internal monitoring and accountability mechanisms designed to ensure the Agency’s compliance with fundamental rights and operational standards. The main tools employed to this end are the Serious Incident Reporting (SIR) system, the Joint Operation Reporting Application (JORA) database, the Fundamental Rights Officer (FRO), and the individual complaint mechanism. This section examines these mechanisms in turns and identifies their structural limitations.

**The main tools employed to this end are the Serious Incident Reporting (SIR) system, the Joint Operation Reporting Application (JORA) database, the Fundamental Rights Officer (FRO), and the individual complaint mechanism.**

### 5.1.1 SERIOUS INCIDENT REPORTING (SIR)

Frontex employs JORA as an internal reporting platform for operational information exchange.<sup>473</sup> Within this framework, the Agency operates a SIR procedure governed by a Standard Operating Procedure (SOP) adopted in April 2021.<sup>474</sup> The procedure defines a serious incident as an event that entails a potential violation of EU or international law, particularly fundamental rights and international protection obligations; involves a potential violation of Frontex Codes of Conduct; or has serious actual or potential negative implications on Frontex’s tasks or activities.<sup>475</sup> These incidents are categorized into three types: Category 1 covers potential fundamental rights violations; Category 2 addresses potential Code of Conduct violations; and Category 3 encompasses serious implications on Frontex core tasks.<sup>476</sup> The SOP acknowledges that a single incident may be assigned more than one category, and provides that the FRO is always designated as SI-Handler whenever a fundamental rights dimension is present, regardless of any concurrent categorisation.<sup>477</sup> Nevertheless, this safeguard depends entirely on the correct identification of a fundamental rights dimension at the initial assessment stage: Code of Conduct violations and operational disruptions may well entail fundamental rights breaches without being recognised as such, particularly where the initial assessment is conducted by the Frontex Situation Centre (FSC) rather than the FRO.<sup>478</sup> This creates a structural risk that rights violations go unaddressed within a reporting architecture that does not guarantee independent fundamental rights scrutiny across all categories.<sup>479</sup>

**The threshold deficiency concerns the legal basis of the reporting obligation itself.**

All participants in Frontex activities who learn of, witness, or are involved in potential serious incidents are obliged to report them.<sup>480</sup> The reporting channels vary by category. For Category 1 incidents, participants report directly to the FRO. For Categories 2 and 3, participants report to coordinating staff who then forward the information to the Frontex Situation Centre in Warsaw.<sup>481</sup> Once a report is received, an assessment determines whether the incident qualifies for formal SIR processing. The Frontex Situation Centre conducts this assessment for Categories 2 and 3, while the FRO assesses Category 1 incidents.<sup>482</sup> Where the incident is classified as “serious”, the FRO is assigned as SI Handler for Category 1; for Category 2, the SI Handler is the Head of Task Force

473 “The Joint Operations Reporting Application database from 1st of January 2021 to the 31st of January 2022” can be consulted in the Public Registry of Document of Frontex.

474 Executive Director Decision No R-ED-2021-51 of 19 April 2021, Standard Operating Procedure (SOP) – Serious Incident Reporting.

475 SIR SOP, Section 2.2.

476 SIR SOP, Section 2.2.

477 SIR SOP, Section 2.2; 3.6.

478 SIR SOP, Section 3.4; 4.2.2

479 SIR SOP, Section 3.5; 4.5.

480 SIR SOP, Section 3.1.

481 SIR SOP, Section 4.2.1; Annex 2.

482 SIR SOP, Section 4.2.2.

(TF) Deploy for Standing Corps members, the Head of Human Resources for Frontex staff and seconded national experts, or the Head of the Unit organising the activity for any other participant; for Category 3, it is the Head of Unit responsible for the activity.<sup>483</sup> The SI Handler is responsible for producing a final report within one month, though this deadline can be extended indefinitely through intermediate reports.<sup>484</sup> The final report documents the incident, identifies lessons learned, and may propose follow-up measures, but it neither generates an individual remedy for those affected nor creates an obligation to suspend or terminate the activity in question.<sup>485</sup> From the perspective of the right to good administration under Article 41 CFR, the absence of binding consequences and the absence of a firm deadline raise serious questions about the procedure's capacity to deliver timely and effective responses to fundamental rights violations.

While the SIR framework appears comprehensive on paper, it presents structural flaws that undermine its effectiveness as an accountability mechanism. A threshold deficiency concerns the legal basis of the reporting obligation itself: the duty to report serious incidents is currently governed by internal Agency instruments rather than being directly enshrined in the EBCG Regulation, which means that its scope, triggers, and procedural requirements lack the legislative certainty and external enforceability that a clear legal basis would provide. The forthcoming revision should establish the reporting obligation directly in the Regulation, specifying the categories of incident that must be reported, the actors subject to the obligation, and the consequences of non-compliance. The problems begin at the earliest stages. The discretionary assessment process that determines whether an incident qualifies for formal SIR processing allows incidents to be excluded from formal scrutiny without independent oversight or appeal.<sup>486</sup> This means that incidents may never be investigated, simply because an initial assessment, conducted by the very institution being scrutinized, determines they do not warrant attention. Another issue inherent in this structure is that the assignment of SI Handlers creates institutional conflicts of interest that compromise the integrity of investigations. Across all three categories, the SI Handler is an internal Frontex actor with an institutional stake in the outcome: for Category 1, the FRO, though enjoying a degree of statutory independence,<sup>487</sup> remains structurally embedded within the Agency and lacks the external full autonomy of a judicial or administrative body like the Ombudsperson; for Category 2, the SI Handler is the Head of the Unit that organised the very activity from which the Code of Conduct violation arose; and for Category 3, the Head of Unit responsible for the activity investigates incidents that occurred during its very own operations. The structural incentive to minimize institutional responsibility is evident, yet no external review or independent validation mechanism exists to address this conflict.<sup>488</sup>

<sup>483</sup> SIR SOP, Section 3.6.

<sup>484</sup> SIR SOP, Section 4.2.3.

<sup>485</sup> SIR SOP, Section 4.2.3.

<sup>486</sup> SIR SOP, Section 4.2.2.

<sup>487</sup> EBCG Regulation, Article 109.

<sup>488</sup> SIR SOP, Section 3.6.

The **Commission** acknowledged these problems, noting that the complaints mechanism and the SIR mechanism could “benefit from greater ease of reporting, protection for those submitting reports, and enhanced awareness of the mechanism”.<sup>489</sup> Accordingly, it proposed as a remedial action to review both mechanisms to facilitate access for potential complainants and remove obstacles to reporting.<sup>490</sup> The proposed measures confirm that the existing framework fails to ensure ease of access, effective protection against retaliation for those who report, and basic awareness of the mechanism among deployed personnel, despite the compulsory trainings provided in Article 62 of the EBCG Regulation. Indeed, reports based on the OLAF investigation reveal that staff had been made to understand that reporting incidents involving Agency personnel was “not a route to popularity or promotion” within the Agency, and that incident reporting was “intentionally centralized to be slow, cumbersome and very discreet”.<sup>491</sup> However, even where reporting does occur, the effectiveness of both mechanisms remains contingent on the existence of meaningful follow-up and genuine consequences for violations, neither of which the current framework guarantees.

**Possible insufficient and delayed responses by national authorities are key obstacles to the proper investigations of Serious Incidents**

In line with this, the **SHARED Guidelines**, recommend that the Agency revise its SIR procedure to address not only accessibility, but also its overall functioning. This includes enhancing the FRO's capacity to identify, categorise, investigate, and follow up alleged violations, enabling the FRO to act *ex officio*, protecting whistle-blowers, eliminating disincentives to reporting, and establishing clear timelines for national authorities to cooperate with the FRO and provide redress.<sup>492</sup> Overall, the Guidelines propose that the FRO be able to act of its own motion and raise SIRs autonomously, while access for potential complainants, including children and vulnerable persons, be eased; and that the MB adopt mechanisms to protect whistleblowers effectively and specify concrete timelines and procedures for national authorities to cooperate with the FRO and respond appropriately to conclusions, including through the termination of behaviour found to be incompatible with either EU or international legal standards.<sup>493</sup>

The effectiveness of the SIR mechanism also depends critically on cooperation from Member States, yet such cooperation has been persistently inadequate. In 2022, the MB first requested national authorities to “actively and fully support the Fundamental Rights Officer as he conducts his investigations, in particular by providing, in a timely manner, all relevant information in

<sup>489</sup> European Commission, Evaluation of the EBCG Regulation, COM(2024) 75 final, 2 February 2024, Annex, p. 11.

<sup>490</sup> European Commission, Evaluation of the EBCG Regulation, COM(2024) 75 final, 2 February 2024, Annex, p. 11.

<sup>491</sup> Apostolis Fotiadis, ‘OLAF raided EU border chief’s office over migrant pushback claims’, Ekathimerini, 14.01.2021.

<sup>492</sup> SHARED Guideline 101.

<sup>493</sup> SHARED Guideline 101.

response to his enquiries”.<sup>494</sup> Two years later, little had changed, and the **Commission** noted that Member States react differently to the FRO’s follow-up reports, with expected actions, including investigation, imposition of disciplinary measures, and referral for civil or criminal proceedings, often left unheeded.<sup>495</sup> Accordingly, it suggested that Member States strengthen the effectiveness, independence, and timeliness of investigations into possible fundamental rights violations committed by their own staff, including by developing clear and transparent procedures.<sup>496</sup> It also proposed to both Frontex and the Member States to ensure that operational plans stipulate clear procedures and timelines for cooperating with FRO’s investigations.<sup>497</sup> However, the Commission does not address the structural disincentives to reporting and cooperation, the absence of binding consequences for non-compliant Member States, nor the lack of enforceability of the FRO’s recommendations. Its proposed remedies cannot substitute for the coercive mechanisms necessary to ensure actual compliance. A more structurally adequate response would be to embed cooperation obligations directly in the EBCG Regulation and in operational plans as binding conditions, so that non-cooperation with FRO investigations or the failure to conduct effective follow-up investigations be configured explicitly as a breach of the operational framework. The suspension of funding for specific projects or assets deployed in the context of the relevant joint operation could be one possible consequence of non-compliance, creating a direct operational and financial incentive for Member States to fulfil their cooperation obligations.

The persistence of these problems led the **Management Board** to intervene in 2024, nearly five years after the 2019 Regulation entered into force. The Conclusions acknowledged that, given the joint nature of the operations, most investigations rely on a collection of information from national authorities, with the consequence that a lack of cooperation on their end hampers the functioning of the Serious Incident mechanism.<sup>498</sup> This very reliance constitutes the structural flaw: requiring national authorities to provide information for investigations into the conduct of their own staff conflates the investigator with the investigated, eliminating the basic separation that is a *sine qua non* of any credible sanctioning procedure, whether criminal or administrative. More specifically, the MB identified “possible insufficient and delayed responses by national authorities” as “key obstacles to the proper investigations of Serious Incidents”.<sup>499</sup>

The experts interviewed for this study have pointed to the need for a structural solution. As noted, the main problem is not merely the absence of binding consequences for individual instances of non-cooperation, but the complete disconnection between the Frontex SIR system and national monitoring and investigation systems: there is currently no legal basis, no institutional channel, and no procedural framework through which the FRO’s findings feed into national proceedings or through which national investigation outcomes are communicated back to the Agency.<sup>500</sup> A more structured cooperation between the Agency’s internal accountability mechanisms and national monitoring and supervisory bodies, analogous to the coordinated supervision model that exists between the EDPS and national data protection authorities in the data protection field, would be

494 Frontex Management Board, Conclusions 88th Meeting, January 2022.

495 European Commission, Evaluation of the EBCG Regulation, p. 10; SIR SOP, Section 3.6.

496 Ibid., p. 10.

497 Ibid.

498 Management Board, Conclusions on Ensuring National Authorities’ Active Support and Cooperation in Serious Incident Investigations, 19 June 2024, p. 2.

499 Management Board, Conclusions on Ensuring National Authorities’ Active Support and Cooperation in Serious Incident Investigations, 19 June 2024, p. 2.

500 Interview with EU civil servant 3.

needed. This would require establishing, at minimum, a legal obligation for national authorities to inform the FRO of the outcome of investigations triggered by SIR findings, and a corresponding obligation on the FRO to share relevant findings with competent national bodies. Without such an obligation, institutionalised in the Regulation rather than left to voluntary cooperation, the FRO’s mandate will continue to be stretched beyond what the current framework can sustain, producing recommendations that carry no operational weight at national level and investigations that terminate without consequence.<sup>501</sup>

The Management Board then issued nine specific recommendations to national authorities, covering everything from raising awareness of the SIR mechanism to ensuring proper, efficient, and independent follow-up, including disciplinary and criminal investigations.<sup>502</sup> Yet recommendations, by their very nature, lack binding force, and, as such, cannot compel compliance. The recommendations are quite detailed, specifying, for instance, that authorities should reply to each question separately, elaborate on reasons when information is unavailable, distinguish between facts and assessments, and respond within deadlines.<sup>503</sup> That such basic elements of good faith cooperation require formal MB recommendations five years after the Regulation’s entry into force indicates systematic resistance to FRO investigations by some national authorities and fundamental flaws in the structural design of the mechanism. Recommendation 7’s emphasis on “independent” follow-up tacitly acknowledges that investigations by the same authorities whose officials are implicated in the alleged violations lack credibility and the capacity to deliver outcomes in line with good governance standards per Article 41 CFR.<sup>504</sup>

The **SHARED Guidelines** similarly emphasize the need for a clear allocation of responsibilities, recommending that the model in Article 88 of the EBCG Regulation, requiring transparent determination of data protection responsibilities, should apply to all fundamental rights responsibilities relevant to Frontex operations.<sup>505</sup> They also echo the call for the Management Board to adopt mechanisms to protect whistleblowers and specify timelines, binding rules, and effective procedures for national authorities to cooperate with the FRO.<sup>506</sup>

Another structural deficiency concerns the absence of external oversight and victim participation. The SIR system operates as an entirely internal mechanism with no provision for systematic external monitoring. Affected individuals have no formal standing in the process, no right to be informed that a SIR has been filed concerning them, no opportunity to provide their account of events, and no guarantee of being informed of final outcomes.<sup>507</sup> The SOP provides that SIRs can be disclosed according to Regulation (EC) No 1049/2001<sup>508</sup> (PAD Regulation). This means that access depends on individual document requests rather than proactive transparency, which also requires knowing that a SIR exists in the first place.

501 Interview with EU civil servant 3.

502 MB, Conclusions, pp. 3-4.

503 Ibid., pp. 3-4.

504 Ibid., pp. 4. This concern is illustrated by the Greek National Transparency Authority’s investigation into pushback allegations, which concluded in 2022 that there was no evidence to support them, a finding widely criticised for its lack of independence and transparency. National Transparency Authority (Greece), Investigation Report, Athens, 29 March 2022, as reported in ANSA, 30 March 2022; see also Greek Council of Refugees, Call for Publication of Greek National Transparency Authority’s Pushback Investigation, 2022.

505 SHARED Guideline 17.

506 SHARED Guideline 101.

507 SIR SOP, Section 4.4.

508 SIR SOP, Section 4.9.

The **SHARED Guidelines** address this gap through recommendations for enhanced participation and external monitoring. They call for the individual complaint mechanism to be revised “to improve accessibility, transparency, independence, and effectiveness, introducing elements of legal enforceability and external monitoring”.<sup>509</sup> They also recommend reinforcing the power and capacity of the FRO, including by increasing the number of fundamental rights monitors, with concrete procedures and timelines for responses and the binding obligation to provide for adequate follow up to recommendations.<sup>510</sup> Article 110(3) of the EBCG Regulation already requires at least one fundamental rights monitor to be assigned to each operation, mirroring the permanent presence of a Coordinating Officer; yet this requirement is not consistently implemented in practice, and the views of the FRO carry none of the weight that Member States are expected to give to those of the Coordinating Officer under Article 43(2) of the Regulation. The FRO should be always considered competent to investigate all violations occurring in joint activities, and operational plans should include rules for the Agency and national authorities to engage with and facilitate such investigations in a systematic way.<sup>511</sup> It should not be possible to launch a Frontex activity without there being specific, *in situ* FRO oversight.

Moreover, the SOP establishes no requirements for follow-up action after final reports have been submitted. Reports must include proposals and lessons learned, but no mechanism ensures these are actually implemented or embedded in subsequent operational plans.<sup>512</sup> The SIR procedure is considered formally closed upon submission of the Final Report,<sup>513</sup> meaning that any necessary institutional or operational changes depend entirely on discretionary management decisions. The **Management Board** attempted to address this by recommending that Member States provide updates about ongoing or completed national investigations,<sup>514</sup> yet this creates no binding obligation to do so.



<sup>509</sup> Guideline 98).

<sup>510</sup> Guideline 80).

<sup>511</sup> SHARED Guideline 80.

<sup>512</sup> SIR SOP, Annex 5.

<sup>513</sup> SIR SOP, Section 4.2.3.

<sup>514</sup> MB Conclusions 19 June 2024, p. 4.

## 5.1.2 FUNDAMENTAL RIGHTS OFFICE

The FRO was introduced in the 2011 Regulation recast following continuous reports of questionable practices at external borders.<sup>515</sup> The current Regulation affirms the FRO as an independent staff member, appointed by the Management Board following evaluation of qualifications and expertise, with Consultative Forum consultation.<sup>516</sup> Yet a critical structural change occurred during successive regulatory revisions: the removal of the FRO’s obligation to report to the Consultative Forum has weakened both the FRO’s independence and the Forum’s oversight capacity over the discharge of the office’s mandate.<sup>517</sup>

The FRO’s is, in principle, mandated with extensive responsibilities, encompassing monitoring the Agency’s fundamental rights compliance in all its tasks and activities, advising the Executive Director and Management Board, providing recommendations, liaising with stakeholders, participating in Fundamental Rights Strategy development, and handling individual complaints.<sup>518</sup> Twice a year, the FRO publishes a Fundamental Rights Report documenting concerns and proposing measures. Recommendations, however, are not binding and are habitually ignored by the competent Frontex authorities. For example, the FRO’s repeated recommendation to activate Article 46 to suspend Joint Operation *Poseidon* following the Pylos shipwreck in June 2023, which claimed over 600 lives, was not implemented.<sup>519</sup> Similarly, the Office recommendation to deploy fundamental rights monitors in the surveillance centres to oversee aerial assets went unheeded, despite OLAF findings that Frontex officials had withdrawn from aerial surveillance in Greece to avoid documenting Hellenic Coastguard violations.<sup>520</sup>

Even the **Commission** has acknowledged the serious shortcomings of Frontex’s implementation of its fundamental rights framework. It noted that “the Agency’s Fundamental Rights Strategy has not been fully implemented yet”,<sup>521</sup> which is a remarkable admission of a failure to act on duties set in a Regulation already in force for four years.<sup>522</sup> In line with this finding, the Commission, though notably without launching failure to act proceedings under Article 265 TFEU that would legally compel compliance, recommends that Frontex implement all components of the Fundamental Rights Strategy across all Agency activities.<sup>523</sup> The Commission has further noted that fundamental rights monitors play a crucial role in assessing the fundamental rights compliance of operational activities.

<sup>515</sup> Regulation (EU) No 1168/2011, Article 26a.

<sup>516</sup> EBCG Regulation, Article 109(3).

<sup>517</sup> Article 26a(3) of Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004, OJ L 304/1, 22 November 2011, provided that the FRO “shall report directly to the Management Board and the Consultative Forum.” This dual reporting obligation was not carried forward into Regulation (EU) 2016/1624 or Regulation (EU) 2019/1896. Article 109(4) of the 2019 Regulation limits the reporting obligation to the Management Board alone, with no equivalent obligation toward the Consultative Forum. See also Consultative Forum on Fundamental Rights, Sixth Annual Report, p. 21.

<sup>518</sup> EBCG Regulation, Article 109.

<sup>519</sup> FRO 2023 Annual Report, p.12.

<sup>520</sup> FRO 2022 Annual Report, p.25.

<sup>521</sup> COM(2024) 75 final, Annex, p. 10.

<sup>522</sup> Management Board Decision 12/2021 of 14 February 2021 adopting the Fundamental Rights Strategy.

<sup>523</sup> COM(2024) 75 final, Annex, p. 10.

Yet, in some Member States, they are prevented from accessing certain operational areas, which necessarily restricts their ability to carry out their mandate, which should be enough a reason to suspend or terminate an operation.<sup>524</sup> In the evaluation, it has also suggested that both Frontex and Member States ensure that operational plans guarantee FRM access to all operational areas, including patrolling areas and debriefing interviews.<sup>525</sup>

In any event, despite its formal independence, the FRO's position has been systematically undermined in practice. The 2019 Consultative Forum Annual Report documented how the FRO's independence was seriously compromised by Management Board practices, including the appointment of an Executive Director Cabinet Advisor as FRO *ad interim* during the appointed FRO's sick leave.<sup>526</sup> The OLAF investigation revealed an even more troubling picture: a profound crisis in which the FRO was systematically excluded from processes, with access to key information severely limited or deliberately replaced with incorrect information.<sup>527</sup> The Agency's failure to hire fundamental rights monitors compounded these problems. For over two years following the 2019 Regulation's entry into force, despite the Regulation establishing FRMs as statutory staff, only 20 monitors were hired, and this only after repeated Commission requests for compliance.<sup>528</sup> Following the former Executive Director's resignation in April 2022, the Agency appointed a new FRO and completed monitor hiring. The institutional climate surrounding the FRO's work has significantly improved compared to the period under the former Executive Director, when the office was systematically marginalised and its findings deliberately suppressed: the current FRO operates with greater internal recognition and enjoys a more constructive relationship with the Executive Director. Yet the fundamental problem still remains: the FRO's opinions and recommendations lack binding effect, which means that compliance depends, to a degree that is structurally unsatisfactory, on the goodwill of the very actors subject to its scrutiny.

**Yet the fundamental problem still remains: the FRO's opinions and recommendations lack binding effect, which means that compliance depends, to a degree that is structurally unsatisfactory, on the goodwill of the very actors subject to its scrutiny**

<sup>524</sup> COM(2024) 75 final, Annex, p. 10.

<sup>525</sup> COM(2024) 75 final, Annex, p. 11.

<sup>526</sup> Sixth Annual Report (2018), Frontex Consultative Forum on Fundamental Rights, p. 21.

<sup>527</sup> OLAF Report, Olaf.03(2021)21088.

<sup>528</sup> Letter sent from DG HOME to the former ED of the EBCGA: Ref. Ares(2020)7752158 - 18/12/2020.

On this basis, the **SHARED Guidelines** emphasize that effective internal monitoring requires reinforcing the power and capacity of the FRO, both legally and in practice, including by increasing the number of fundamental rights monitors, to ensure credible oversight.<sup>529</sup> They also call for establishing concrete and binding procedures and timelines for responses and follow-up to recommendations, specifying that the FRO should be considered competent to investigate all violations occurring in all Frontex activities.<sup>530</sup>

The forthcoming revision offers the opportunity to address the structural weaknesses described. The first possible amendment concerns the decision-making process of how many monitors are needed. Currently, it is the Executive Director who assesses whether the number of fundamental rights monitors needs to be increased, in consultation with the FRO.<sup>531</sup> The person responsible for operational management thus controls the assessment of the capacity of the body tasked with scrutinising that management. The revision should invert this logic, placing the assessment and the proposal firmly with the FRO, with the ED required either to transmit the FRO's proposal to the Management Board without modification or to provide written non-binding reasons to both the Management Board and the European Parliament. Additionally, the EBCG Regulation links such choice to "operational needs",<sup>532</sup> framing the monitoring function as a service to operations rather than as an essential requirement of independent oversight. The revision should decouple the two, requiring the FRO's capacity to be assessed against the necessities of effective monitoring across all Frontex activities, including in third countries. Furthermore, once a proposal reaches the Management Board, neither the current Regulation nor the internal rules adopted by the Agency establish any deadline for the MB to decide on it.<sup>533</sup> The revision should remedy this by establishing a binding deadline by which the MB should act on the FRO's proposal. Finally, the rules governing follow-up to FRO recommendations more broadly are currently contained in an internal Management Board decision rather than in the Regulation itself.<sup>534</sup> This means they can be amended or repealed by the Management Board without any legislative procedure and that they bind no one outside the Agency. The same decision also makes publication of FRO recommendations subject to an absolute majority vote of the Management Board and to a broadly worded operational confidentiality exception, which the MB can invoke without the FRO's agreement to block publication.<sup>535</sup> The future EBCG Regulation should establish both the follow-up obligation and a default publication requirement directly in the Regulation, with confidentiality treated as a narrow exception requiring the FRO's concurrence.

<sup>529</sup> SHARED Guideline 80.

<sup>530</sup> SHARED Guideline 80.

<sup>531</sup> EBCGA Regulation, Article 110(6).

<sup>532</sup> EBCGA Regulation, Article 110(6).

<sup>533</sup> MB Decision 43/2022 adopting the rules for the Executive Director and the Management Board to inform the Consultative Forum of the follow-up to its recommendations and to ensure that action is taken with regard to recommendations of the Fundamental Rights Officer.

<sup>534</sup> MB Decision 43/2022.

<sup>535</sup> MB Decision 43/2022, Articles 3, 4, and 8.

### 5.1.3 INDIVIDUAL COMPLAINT MECHANISM (ICM)

Under Article 111 of the EBCG Regulation, any person directly affected by the actions or failure to act of staff involved in Frontex activities who considers themselves to have been the subject of a fundamental rights violation may submit a written complaint to the Agency.<sup>536</sup> the FRO is responsible for assessing admissibility, registering complaints, forwarding them to the Executive Director or the relevant home Member State, and ensuring follow-up.<sup>537</sup>

**The internal accountability mechanisms examined in this section share a common structural deficiency: they operate as internal processes with limited independence or external oversight, are contingent on good will implementation by the very institutions under investigation for non-compliance with fundamental rights, and provide affected individuals with no meaningful role or remedy**

Overall, the individual complaint mechanism is also characterised by structural weaknesses. First, the Regulation lacks clarity on consequences after a positive complaint assessment, as Article 111 merely requires the FRO to ensure the follow-up by the Agency or the competent national authority, with no specification of what constitutes adequate measures, no deadlines, and no escalation provisions when follow-up is inadequate or absent.<sup>538</sup> Moreover, complainants must disclose personal data to an entity they may perceive as responsible for the very violations being denounced. While safeguards exist and include limiting access to complainant details to the FRO, these may, however, prove insufficient for ensuring confidentiality and secure communication. Migrants may be unaware that the FRO operates independently, viewing all of Frontex as part of the enforcement apparatus that violated their rights.<sup>539</sup>

Two concrete reforms would materially improve the ICM's effectiveness. First, the new Regulation should include an explicit provision allowing individuals who have lodged a complaint under Article 111 to appeal to the EU Ombudsman, if the outcome is unsatisfactory or if no outcome is produced within a defined period. Such a provision is compatible with the Treaties and would provide the external and independent review layer that the internal mechanism structurally cannot offer.<sup>540</sup> A legislative precedent exists: the European Union Asylum Agency (EUAA) Regulation explicitly provides that the EUAA's activities may be subject to EU Ombudsman inquiries, confirming that

<sup>536</sup> EBCG Regulation, Article 111.

<sup>537</sup> EBCG Regulation, Article 111(4).

<sup>538</sup> EBCG Regulation, Article 111(6).

<sup>539</sup> Management Board Decision 19/2022 of 16 March 2022 adopting the Agency's rules on the complaints mechanism, Article 20.

<sup>540</sup> Interview with EU civil servant 4.

the legislator can and does make such links explicit in agency-specific legislation.<sup>541</sup> Additionally, NGOs with documented field presence at the external borders should be expressly empowered to lodge complaints on behalf of affected individuals who are unable or afraid to do so themselves.<sup>542</sup>

The internal accountability mechanisms examined in this section share a common structural deficiency: they operate as internal processes with limited independence or external oversight, are contingent on good will implementation by the very institutions under investigation for non-compliance with fundamental rights, and provide affected individuals with no meaningful role or remedy. Moreover, any resulting remedial measures remain hortatory. The **Commission** evaluation establishes no enforcement mechanism or compliance verification timeline. The **Management Board** conclusions "recommend" cooperation measures but create no binding obligation or consequence for non-compliance. Most significantly, the remedial measures do not address the fundamental structural flaws and conflicts of interest embedded in the system: the SIR system continues to assign SI Handler responsibilities to the very units under investigation; the individual complaint mechanism continues to depend on FRO independence, despite the documented systematic undermining of it; and national authorities continue to conduct investigations of their own officials. Addressing these issues requires legislative reform in line with Articles 41 and 47 CFR, not merely enhanced cooperation or revised administrative procedures.

A more overarching question concerns whether the structural embedding of the FRO within the Agency's institutional architecture is itself an obstacle to effective accountability. As long as the FRO remains an *internal* body, even if a formally independent one, its effectiveness will depend on the institutional goodwill of the very actors it scrutinises, and it will lack the *external* legitimacy necessary to generate consequences at national level vis-à-vis the Member State concerned.<sup>543</sup> Consideration should be given to a model in which independent external review of fundamental rights compliance at the EU external borders is entrusted to a body that is organisationally separate from Frontex, with a mandate covering the full spectrum of EIBM activities, regardless of whether Frontex is formally involved. With respect to the Management Board's role in accountability, the forthcoming revision should also address a structural gap in its composition and mandate: Member State representatives sitting on the MB should bear an explicit institutional responsibility for ensuring that their national authorities cooperate with FRO investigations and follow up on SIR findings, so that accountability at Agency level and accountability at national level are formally connected rather than operating in parallel tracks and without consequence.<sup>544</sup>

<sup>541</sup> Ibid.; Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum (EUAA), OJ L 468/1, 30 December 2021, Article 7.

<sup>542</sup> Interview with EU civil servant 4.

<sup>543</sup> Interview with EU civil servant 4.

<sup>544</sup> Interview with EU civil servant 4.

## 5.2 EXTERNAL ACCOUNTABILITY MECHANISMS



While internal accountability mechanisms depend on the Agency's institutional will to implement fundamental rights safeguards, external mechanisms provide independent oversight through bodies not subject to the Agency's control. This section examines transparency obligations, the Consultative Forum, the fundamental rights monitoring mechanism established under the new Screening Regulation, and budgetary and discharge procedures as instruments of political and financial accountability.

The new Regulation should establish proactive publication as the default rule.

### 5.2.1 PUBLIC ACCESS TO DOCUMENTS

Transparency constitutes a prerequisite for accountability. Without access to information about the Agency's decision-making, operational conduct, and expenditure, neither affected individuals nor oversight bodies can effectively assess compliance with legal obligations or challenge violations.

Frontex, as an EU Agency, is subject to Regulation (EC) No 1049/2001 regarding public access to documents (PAD).<sup>545</sup> Article 114 EBCG Regulation requires the MB to adopt practical arrangements for implementing such obligations.<sup>546</sup> The Agency's transparency regime has, however, been subject to sustained criticism. The **EU Ombudsperson** has repeatedly recommended revisions to improve access to documents.<sup>547</sup> Civil society organizations have documented systematic obstacles to obtaining information about operational activities, cooperation with third countries, and fundamental rights incidents.<sup>548</sup>

<sup>545</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145/43, 31 May 2001.

<sup>546</sup> EBCG Regulation, Article 114.

<sup>547</sup> EU Ombudsperson, Case 2273/2019/MIG, Case 01/4/2022/PB, Case 1497/2024/ACB.

<sup>548</sup> See, for example, the NGO Access Info, 'Call for Transparency of Frontex', open letter to Frontex Executive Director Fabrice Leggeri, 5 March 2020; The chilling effect of Frontex's approach to access to documents litigation is illustrated by the case of two transparency activists, Luisa Izuzquiza and Arne Semsrott, who brought annulment proceedings before the General Court seeking access to documents relating to the vessels deployed under Joint Operation Triton in the central Mediterranean in 2017. After losing the case, they were presented with a legal bill of €23,700 in external lawyers' fees by Frontex: Case T-31/18, *Izuzquiza and Semsrott v Frontex*, EU:T:2019:815; Order on costs, Case T-31/18 DEP, 26 March 2021, EU:T:2021:175 (reducing the recoverable costs to €10,520). The European Parliament expressly noted that "charging civil society with excessively high legal fees has a chilling effect on civil society's access to justice in the field of access to documents" and called on Frontex to withdraw its demand for the recovery of costs: Decision of 28 April

Several structural deficiencies undermine the effectiveness of the transparency regime. The Agency maintains a reactive rather than proactive approach to transparency. While Regulation 1049/2001, read in conjunction with Article 42 CFR and Article 15(3) TFEU as interpreted by the Court of Justice, requires a proactive approach to transparency, the Agency's practice places the burden on civil society and affected individuals to request specific documents, often without knowledge of whether or which files exist.<sup>549</sup> The Public Register of Documents remains incomplete, with significant gaps in coverage of decision-making, planning, procurement, and projects undertaken by Frontex inside and outside the EU. Access is further limited by nationality and residence restrictions. The Agency conducts extraterritorial activities affecting third-country nationals not resident in the EU, yet access requests are processed based on the requester's EU nationality or residence.<sup>550</sup> This creates an evident asymmetry: individuals most likely affected by operations at external borders or in third countries are systematically excluded from accessing information about those same operations. Exceptions for privacy, commercial interests, court proceedings, inspections, and other grounds are applied broadly, resulting in extensive redactions or complete refusal of access to the necessary details.<sup>551</sup> The Agency itself determines whether exceptions apply, with limited external verification of whether refusals are justified or whether less restrictive alternatives exist. This situation directly contravenes the essence of Article 15(3) TFEU and the configuration of access to documents as a fundamental right in Article 42 CFR.

The Commission's evaluation does not address transparency deficiencies. The **SHARED Guidelines**, however, insist that transparency is the essential pre-condition to accountability. They thus call for revising the Agency's transparency regime, taking into account EU Ombudsman and European Parliament recommendations, specifying that the PAD Regulation should be interpreted and applied in a way that complies with good governance standards, allowing individuals access to the information necessary to effectively exercise their EU rights.<sup>552</sup> The Guidelines also note that the Agency should adopt a pre-emptive approach, including by sharing information with the European Parliament proactively on all activities, expenditure, and interactions with Member States and third parties.<sup>553</sup> They also call for the MB to oversee completion of the Public Register to encompass all documents concerning decision-making, planning, procurement, and projects.<sup>554</sup> They also recommend that access be expanded to all individuals, including third-country nationals not resident in the EU, with requests processed with no reference to the nationality or residency of the requester.<sup>555</sup> Finally, the Guidelines also advocate for an overall restructuring of the competent office dealing with PAD requests, calling for Frontex to establish a separate, independent, and adequately resourced unit with expertise in transparency obligations, EU administrative law, and fundamental rights.<sup>556</sup>

<sup>2021</sup> on discharge in respect of the implementation of the budget of the European Border and Coast Guard Agency for the financial year 2019 (2020/2167(DEC)), P9\_TA(2021)0191. The FSWG Final Report reiterated this call, urging Frontex to refrain from seeking to recover the costs of external lawyers from applicants in court proceedings based on access to information requests: FSWG Final Report, section 3.A.

<sup>549</sup> This issue has been criticised by the EU Ombudsperson in Case 2273/2019/MIG.

<sup>550</sup> Regulation 1049/2001, Article 2 recognises the right to request a document to "Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State".

<sup>551</sup> Regulation 1049/2001, Article 4.

<sup>552</sup> SHARED Guideline 32.

<sup>553</sup> SHARED Guideline 33.

<sup>554</sup> SHARED Guideline 34.

<sup>555</sup> SHARED Guideline 35.

<sup>556</sup> SHARED Guideline 37.

The new Regulation should establish proactive publication as the default rule for the following categories of documents, with confidentiality as a narrow exception requiring specific justification and subject to independent review of the FRO or, alternatively, the Fundamental Rights Agency or the EU Ombudsperson. The following documents should be made public:

- **Operational plans**, in the parts not directly related to strategic operational elements: specifically, the chain of command, the identity of the Coordinating Officer and the officer in charge at any given time, the pre-operational duty allocation, the fundamental rights procedures applicable to the operation, and the SAR provisions. Article 9 and Article 92 of the EBCGA Regulation should be amended expressly to this effect.
- **Comprehensive information on past and current joint operations, rapid border interventions, pilot projects, technical assistance projects with third countries, migration management support team deployments, return operations and return interventions**, including in third countries. Documents concerning past activities dated twelve months or earlier should always be shared unless a specific written justification is provided.
- **Evaluation reports on return operations**, which are already transmitted semi-annually to the European Parliament under Article 50(7) of the EBCGA Regulation but are not proactively published. They should be made publicly available at the same time as they are transmitted to the Parliament.
- **Serious incident reports**, in anonymised and aggregated form, with the FSWG having called on Frontex to ensure that SIRs are only classified as “restricted” where strictly necessary.<sup>557</sup>
- **Individual complaint decisions**, in anonymised form.<sup>558</sup>
- **FRO opinions and recommendations**, following transmission to the Management Board, subject only to a narrow confidentiality exception requiring the FRO’s own concurrence, as proposed above.
- **Management Board decisions and meeting minutes**, which are already partially published but remain incomplete in the Public Register of Documents.<sup>559</sup>
- **The annual needs assessment for fundamental rights monitors**, which feeds into the FRO annual report and should be separately published with the MB’s response.

Other documents, due to their strategic and sensitive content, should be treated confidentially, but should be shared with the European Parliament. The new Regulation should establish a right of the Parliament to receive the following documents within fifteen days of request, with any postponement subject to a prioritisation agreement between the Agency and the Parliament. These include:

- **Unredacted operational plans**, including the classified strategic elements.
- **Unredacted serious incident reports**, including those concerning individual incidents not yet resolved.
- Classified Management Board documents and meeting minutes.
- **Classified correspondence between the Executive Director and Member State authorities** regarding operational conduct, including letters relating to Article 46 procedures.

<sup>557</sup> EU Ombudsperson, Case 1452/2022/MHZ, Suggestion 2; Case 01/5/2020/MHZ, Suggestion 1.

<sup>558</sup> Ibid.

<sup>559</sup> SHARED Guideline 34.

- **FRO opinions** addressed exclusively to the Executive Director or the Management Board that have not yet been transmitted to the Parliament.
- **Transfer impact assessments** conducted by the DPO in relation to data sharing with third countries, including the fundamental rights assessments prepared by the FRO for that purpose.

## 5.2.2 THE CONSULTATIVE FORUM

Article 108 EBCG Regulation establishes the Consultative Forum as an independent advisory body composed of relevant stakeholders: the EUAA, the Fundamental Rights Agency, UNHCR, IOM, and civil society organizations active in fundamental rights and migration.<sup>560</sup> The Forum advises the Management Board and Executive Director on fundamental rights, provides recommendations on operational strategy, and submits observations on the Fundamental Rights Strategy.<sup>561</sup> It represents an attempt to embed civil society and international organizations expertise within Frontex’s governance structures. However, its effectiveness has been limited by structural weaknesses and marginalization.

A critical change occurred during successive regulatory revisions. Initially, under the 2011 Regulation, the FRO reported directly to both the Management Board and the Consultative Forum (CF).<sup>562</sup> Subsequent revisions removed the obligation to report to the Forum, which weakened both bodies: the FRO’s independence was compromised, and the Forum lost direct communication with the only independent body responsible for safeguarding fundamental rights within the Agency.<sup>563</sup> The Forum’s advisory role lacks binding force. It “shall advise” and “may submit observations” but creates no obligation for the Management Board or Executive Director to follow recommendations or even explain why recommendations are ignored.<sup>564</sup>

The **SHARED Guidelines** contemplate revising the Consultative Forum structure in a way that is properly staffed and equipped, and can fulfil external monitoring functions, collecting information, carrying out visits, and providing independent advice on fundamental rights with clear and binding procedures and deadlines to respond to its recommendations in a full and timely manner.<sup>565</sup> This would require a separate body with powers and resources sufficient to ensure effective oversight and able to take action and impose consequences for non-compliance.<sup>566</sup>

<sup>560</sup> EBCG Regulation, Article 108(2).

<sup>561</sup> EBCG Regulation, Article 108(4).

<sup>562</sup> Regulation (EU) No 1168/2011, Article 26a.

<sup>563</sup> Mariana Gkliati, *Systemic Accountability of the European Border and Coast Guard: The legal responsibility of Frontex for human rights violations* [PhD thesis] (Leiden, 2021).

<sup>564</sup> EBCG Regulation, Article 108(4).

<sup>565</sup> SHARED Guideline 85.

<sup>566</sup> SHARED Guideline 82.

### 5.2.3 NATIONAL FUNDAMENTAL RIGHTS MONITORING MECHANISMS

The new Screening Regulation<sup>567</sup> introduces an obligation to establish independent fundamental rights monitoring mechanisms at the Member State level. It requires each Member State to establish an independent mechanism to monitor compliance with Union and international law, including the EU Charter of Fundamental Rights, particularly regarding access to asylum, *non-refoulement*, the best interest of the child, and detention rules during screening.<sup>568</sup> These mechanisms must ensure substantiated allegations of fundamental rights violations are dealt with effectively and without undue delay, trigger investigations where necessary, and monitor investigation progress.<sup>569</sup>

The Regulation establishes requirements to ensure genuine independence. Member States must “put in place adequate safeguards to guarantee the independence of the independent monitoring mechanism”.<sup>570</sup> National Ombudspersons and national human rights institutions, including national preventive mechanisms under OPCAT, shall be included in such an independent monitoring mechanism and be asked to carry out all or part of the tasks involved.<sup>571</sup> By contrast, NGOs “may be invited” to join the mechanism together with public bodies independent from the authorities carrying out the screening.<sup>572</sup>

The mechanism’s powers are wide on paper. Member States must equip it with appropriate financial resources, must allow it to access the centres where the screening of third-country nationals is carried out, and must be allowed to meet individuals and access documents.<sup>573</sup> Each year, the mechanism must issue annual recommendations to Member States, although it is unclear what happens if these are ignored.<sup>574</sup>

The Regulation clarifies that “the mere existence of judicial remedies in individual cases or national systems that supervise the efficiency of the screening is not sufficient to comply with the requirements concerning the monitoring of fundamental rights”.<sup>575</sup> FRA has issued guidance for Member States on establishing mechanisms and ensuring independent functioning.<sup>576</sup> The underlying concern expressed in the Regulation, and in the FRA’s Guidance, is the acknowledgement of a persistent accountability gap: *ex post* judicial review of individual cases does not provide the systematic, preventative monitoring necessary to identify and address patterns of widespread or persistent violations.

As clarified in the Screening Regulation, such an independent monitoring mechanism is to be established without prejudice to the monitoring mechanism for the Common European Asylum

<sup>567</sup> Regulation (EU) 2024/1356 of 14 May 2024 introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, OJ L, 2024/1356, 22 May 2024 (‘Screening Regulation’).

<sup>568</sup> Screening Regulation, Article 10(2)(b).

<sup>569</sup> Screening Regulation, Article 10(2)(b).

<sup>570</sup> Screening Regulation, Article 10(2).

<sup>571</sup> Screening Regulation, Article 10(2).

<sup>572</sup> Screening Regulation, Article 10(2).

<sup>573</sup> Screening Regulation, Article 10(2).

<sup>574</sup> Screening Regulation, Article 10(2).

<sup>575</sup> Screening Regulation, recital 29).

<sup>576</sup> FRA, Monitoring fundamental rights during screening and the asylum border procedure – A guide on national independent mechanisms (2024 edition).

System (CEAS).<sup>577</sup> and to the role of the fundamental rights monitors operating under the EBCG Regulation.<sup>578</sup> This creates a complex relationship between national mechanisms and Frontex fundamental rights monitors. National mechanisms monitor Member State implementation of screening arrangements; Frontex monitors monitor Agency activities. In practice, screening and border management are conducted jointly, with Frontex coordination and Member State implementation creating shared responsibility environments where the allocation of responsibilities is often unclear.<sup>579</sup>

How national mechanisms interact with Frontex operations, and whether they can effectively monitor activities where the Agency plays a coordinating or supporting role, remains unresolved. The concern is that the proliferation of parallel monitoring fora, without clear delineation of mandates and means of coordination, risks fragmenting oversight, thereby undermining the overall effectiveness of fundamental rights monitoring in practice.

The **Commission** evaluation addressed this issue and acknowledged a problem that undermines monitoring effectiveness. It recommended Frontex to “ensure that all operational plans guarantee the access of FRMs to operational areas, including patrolling areas and debriefing interviews”.<sup>580</sup> It also required Member States to enable the access of FRMs to all operational areas.<sup>581</sup> These actions tacitly acknowledge that Member States have prevented monitors from accessing certain areas in the past, restricting their ability to carry out their tasks. Still, the Commission has never launched infringement proceedings against the Member States concerned, nor has it contemplated the possibility of starting actions for failure to act against Frontex, although both of these options are readily available in the Treaties and could have produced effective results.

The **SHARED Guidelines** recommend extending national mechanisms to cover Frontex-coordinated activities. They specify that the launch of operations and the implementation of operational plans should be conditional upon unrestricted access of the internal and external monitoring bodies by the Member States, including of the existing FRMs.<sup>582</sup> Namely, monitors should be allowed to observe debriefing interviews; monitor joint patrolling, surveillance, and return procedures; and collect information to assess the overall fundamental rights situation in which Frontex conducts its activities.<sup>583</sup> If these requirements are not met, Frontex should withhold funding and any other support and refrain from launching or continuing operations. They also call for a specialised fundamental rights monitoring mechanism to be established at the national level to oversee the domestic implementation of EIBM, especially when Frontex is not involved.<sup>584</sup> This would address an important gap: while Frontex monitors have a mandate to monitor Agency activities, there is no systematic external monitoring of Member State border management activities when conducted independently of Frontex coordination and outside joint operations.

<sup>577</sup> Established under the EUAA Regulation: Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, Article 14.

<sup>578</sup> Screening Regulation, Article 10(3).

<sup>579</sup> See Chapters 1 & 2 in this regard.

<sup>580</sup> COM(2024) 75 final, Annex, p. 11.

<sup>581</sup> COM(2024) 75 final, Annex, p. 11.

<sup>582</sup> SHARED Guideline 86.

<sup>583</sup> SHARED Guideline 86.

<sup>584</sup> SHARED Guideline 87.



Several challenges will affect the effectiveness of the monitoring mechanism envisaged by the Screening Regulation. The independence requirement may be undermined if mechanisms are embedded within or closely linked to authorities responsible for border management. While Member states are obliged to include National Ombudspersons and national human rights institutions, they retain discretion in determining the final institutional configuration of their specific monitoring mechanisms.<sup>585</sup>

Additionally, practical access to operational areas may be restricted on security or operational grounds. The Screening Regulation requires access to “all relevant locations” but permits access to “classified information” only for persons “having received the appropriate security clearance issued by a competent authority in accordance with national law”.<sup>586</sup> This will create an opportunity for Member States to restrict access through security clearance requirements or broad classification of information.

The relationship between national mechanisms and Frontex monitors requires clarification in operational plans. The Screening Regulation states that national mechanisms are “without prejudice” to Frontex monitors but does not specify how the two systems should coordinate, exchange information, or address situations where findings diverge.<sup>587</sup> Without clear coordination protocols, there is a risk of duplication, gaps, or conflicting recommendations.

Finally, the power to “issue annual recommendations” creates no binding obligation for Member States to implement them.<sup>588</sup> The Screening Regulation requires the Commission to take account of such findings under horizontal enabling conditions for EU funds.<sup>589</sup> This creates only a possibility for indirect accountability through funding conditionality rather than direct legal consequences and systematic follow up.

<sup>585</sup> Screening Regulation, Article 10(2).

<sup>586</sup> Screening Regulation, Article 10(2).

<sup>587</sup> Screening Regulation, Article 10(3).

<sup>588</sup> Screening Regulation, Article 10(3).

<sup>589</sup> Screening Regulation, Article 10(2), referencing Regulation (EU) 2021/1060, Article 15(1) and Annex III.

## 5.2.4 BUDGETARY AND DISCHARGE PROCEDURES

Budgetary and discharge procedures represent instruments of political and financial accountability through which the European Parliament exercises oversight over the Agency's expenditure. These procedures operate within the "accountability cycle", encompassing budget allocation and assessment of execution.

EU budget allocation follows the special legislative procedure, operating within a Multiannual Financial Framework (MFF) spanning at least five years.<sup>590</sup> The adopted MFF reflects sectors of EU activities through "headings" establishing maximum expenditure for each sector. The Agency's activities fall under Heading IV and Heading VI, the latter covering operations outside EU territory. While the Parliament does not have equal decision-making authority to the Council in budget allocation, it retains significant control over expenditure allocated to the Agency, shaping financial priorities and ensuring budgetary discipline. In this sense, it is worrying that the Council intends to limit the Parliament's involvement in key decisions, thus reducing democratic control.<sup>591</sup>

The budget discharge procedure represents the final stage of the accountability cycle and is primarily political in nature. Governed by the Parliament's Rules of Procedure, it constitutes the Parliament's political assessment of how EU entities executed tasks in implementing the budget.<sup>592</sup> Annex VI of the Rules of Procedure details procedural aspects. The Parliament may approve, postpone, or deny discharge.

The procedure's limitations became evident in the **Parliament's** handling of the Agency's 2020 budget discharge. Following an initial postponement, the Committee on Budgetary Control recommended against granting discharge.<sup>593</sup> Parliament voted against approval.<sup>594</sup> Among the reasons cited, it expressed regret over the Agency's failure to comply with conditions from the previous year's discharge, including fundamental rights considerations.<sup>595</sup> The discharge denial represented the Parliament's strongest available tool for expressing political censure. Yet the Agency's expenditure remained unaffected. No substantive consequences followed. This is because a discharge refusal is not a legally binding sanction: it is a political act whereby Parliament certifies, or refuses to certify, that funds were properly spent, but it carries no automatic legal consequences for the agency's budget allocation, operations, or personnel, which continue unaffected through the separate budgetary procedure.<sup>596</sup> This shows a clear weakness: while the discharge procedure carries significant democratic value as political oversight, it lacks tangible enforcement mechanisms. Parliament's political censure through discharge denial does not result in financial consequences, operational restrictions, or mandatory corrective measures.

<sup>590</sup> TFEU, Article 312.

<sup>591</sup> See the letter sent by the Council to the Commission on 26 February 2026 <<https://www.politico.eu/wp-content/uploads/2026/02/23/CouncilFrameworkAgreementLetter.pdf>> (accessed 15 June 2026).

<sup>592</sup> European Parliament, Rule of Procedure 77.

<sup>593</sup> European Parliament, Decision of 4 May 2022 on discharge in respect of the implementation of the budget of the European Border and Coast Guard Agency for the financial year 2020 (2021/2146(DEC)), Texts adopted: P9\_TA(2022)0171. SECOND REPORT on discharge in respect of the implementation of the budget of the European Border and Coast Guard Agency for the financial year 2020, 7 October 2022 - (2021/2146(DEC)).

<sup>594</sup> SECOND REPORT on discharge in respect of the implementation of the budget of the European Border and Coast Guard Agency for the financial year 2020, 7 October 2022 - (2021/2146(DEC)).

<sup>595</sup> European Parliament resolution of 21 October 2021 with observations forming an integral part of the decision on discharge in respect of the implementation of the budget of the European Border and Coast Guard Agency for the financial year 2019 (2020/2167(DEC)).

<sup>596</sup> Article 319 TFEU; European Parliament Research Service, 'Discharge Procedure for the EU Budget', EPRS\_BRI(2020)649410, May 2020, p. 6; Laura Salzano, 'Frontex's non-judicial accountability: The fragile oversight of a powerful actor', in Elena Conde Pérez (ed.), *Migraciones en el siglo XXI: Políticas, derechos y desafíos globales* (Tirant lo Blanch, 2025).

The **SHARED Guidelines** do not directly address discharge procedures but emphasize the Parliament's democratic control role. They specify the Parliament should use its democratic control prerogatives systematically to regularly evaluate Frontex's activities, through parliamentary questions and inquiries to hold Frontex to account for any involvement in human rights violations.<sup>597</sup> They add that for the Parliament to properly exercise its role, Frontex should provide it with timely, accurate and comprehensive information proactively and at all times when requested.<sup>598</sup> Additionally, they call for implementing the Parliament Frontex Scrutiny Working Group's (FSWG) recommendations in full.<sup>599</sup>

The FSWG was established following OLAF revelations but has since been absorbed by the Schengen Working Group, thereby losing its distinct institutional focus. Given the structural and recurring fundamental rights concerns surrounding the EBCG, there is a strong case for re-establishing a dedicated and permanent structure within the Parliament tasked specifically with monitoring the activities of the EBCG. Institutionalising such oversight would strengthen democratic accountability, ensure sustained scrutiny beyond ad hoc political crises, and provide a stable forum for continuous engagement with the Agency's operational and fundamental rights obligations.

Overall, external accountability mechanisms reveal a pattern of structural limitations mirroring the deficiencies of internal mechanisms. The transparency regime operates reactively, excludes individuals most affected by Agency operations, and lacks independent review of access refusals. The Agency determines what information can be withheld, thus potentially exploiting an obvious conflict of interest. The Consultative Forum has been progressively marginalized. The FRO and the Forum's recommendations lack binding force. There is no requirement for the Management Board or Executive Director even to explain why recommendations are rejected or ignored.

National fundamental rights monitoring mechanisms represent a significant innovation, yet their effectiveness in relation to Frontex operations remains uncertain. The mechanisms face challenges, including potential compromises to independence, restrictions on access through security classifications, unclear coordination with Frontex monitors, and the absence of binding force for recommendations. Indirect accountability through funding conditionality may prove insufficient to compel meaningful change. Budgetary and discharge procedures provide political accountability, yet the 2020 discharge denial demonstrated its practical limitations.

These limitations reflect a deeper structural challenge cutting across internal and external accountability mechanisms: they are fundamentally dependent on the willingness of the Agency and the Member States to facilitate oversight, provide information, grant access, and implement recommendations, without there being any meaningful pathways to compel compliance. Where institutional resistance exists, both internal and external mechanisms face similar obstruction. The persistence of accountability deficits, despite multiple oversight mechanisms, both internal and external, indicates that the enhancement of such mechanisms alone is insufficient. Structural overhaul is necessary to ensure effective fundamental rights protection in the Agency's and Member States' EIBM operations.

<sup>597</sup> SHARED Guideline 88.

<sup>598</sup> SHARED Guideline 89.

<sup>599</sup> SHARED Guideline 90.



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06

# SUSPENSION AND TERMINATION OF OPERATIONS



Section	Source
Suspension and termination of operations	COM: <a href="#">Annex to the Report on the Evaluation of the EBCG Regulation</a> (¶29 on the role in Operational plans/fundamental rights/art. 46 – point 1.3) COM: <a href="#">Report on the Evaluation of the EBCG Regulation</a> (p. 47) Decision of the Executive Director: <a href="#">Standard Operating Procedure – mechanism to withdraw the financing of, or suspend or terminate, or not launch Frontex activities</a> FRO: <a href="#">Opinion on Hungary</a> Frontex Consultative Forum: <a href="#">2021 Annual Report</a> OHCHR: <a href="#">Lethal Disregard Search and rescue and the protection of migrants in the central Mediterranean Sea</a>

## 6.1 SUSPENSION AND TERMINATION OF OPERATIONS: THE RULES



The EBCG Regulation establishes a specific mechanism enabling Frontex to suspend, terminate, or refrain from launching operational activities where the legal or operational conditions for their conduct are not met. Article 46 of the EBCG Regulation governs when and under what circumstances Frontex may or must withdraw financing from, suspend, terminate, or decline to launch its operational activities.<sup>600</sup> The provision may be triggered either by the Executive Director’s own assessment or following a request from a participating Member State, in both cases subject to consultation with the Management Board.<sup>601</sup>

The grounds for activation cover different types of failure. At the broadest level, action may be taken whenever the conditions required to conduct an activity are no longer met, including technical, financial, legal, or security concerns.<sup>602</sup> If the host Member State fails to comply with the operational plan, the Executive Director may act of his/her own motion.<sup>603</sup> Where violations of fundamental rights or international protection obligations are serious in nature or likely to persist, that discretion becomes an obligation: the Executive Director “shall” act, after consulting the FRO and informing the Member State concerned.<sup>604</sup> The same obligation applies before an operation begins,<sup>605</sup> but only where the Executive Director considers that serious grounds already exist. The provision’s mandatory character is thus conditional on a subjective threshold that no external actor, including the FRO, is empowered to trigger or compel. The criteria or the process through which the Executive Director is to reach his/her decision are not spelt out in the Regulation, nor are there indications of any guarantees or checks and balances.

<sup>600</sup> EBCG Regulation, Article 46.

<sup>601</sup> EBCG Regulation, Article 46 (1)(3)(4)(5).

<sup>602</sup> EBCG Regulation, Article 46(1); Decision of the Executive Director No R-ED-2022-12 of 25 January 2022, Standard Operating Procedure (SOP) – mechanism to withdraw the financing of, or suspend or terminate, or not launch Frontex activities, Section 4.1.

<sup>603</sup> EBCG Regulation, Article 46(3).

<sup>604</sup> EBCG Regulation, Article 46(4); SOP, Section 3.5.

<sup>605</sup> EBCG Regulation, Article 46(5).

Yet, the EBCG Regulation explicitly requires that EIBM be implemented in full compliance with fundamental rights,<sup>606</sup> and also assigns to the Agency the responsibility of contributing to the uniform application of the Charter and the broader Union *acquis* on the matter.<sup>607</sup> This commitment runs through the Regulation as a whole: the Agency’s technical tasks, such as border surveillance, monitoring, cooperation with other agencies and third countries, cannot be read in isolation from the legal framework that places fundamental rights at the centre of its mandate.<sup>608</sup>

Article 46 should be considered the operational expression of that commitment. It is the mechanism through which the Agency’s fundamental rights obligations acquire coercive force, translating the Regulation’s general commitments into a concrete power and duty to withdraw. That coercive force, however, is effectively undermined, since the obligation to act under Article 46 is vested in the very same executive authority whose operational decisions it is meant to constrain.<sup>609</sup> The practical effectiveness of this design, therefore depends entirely on the Executive Director’s willingness to act and, as the historical record shows, that willingness has proved highly exceptional and contingent on political factors.<sup>610</sup>

In January 2022, the then Executive Director adopted a SOP to give internal effect to Article 46.<sup>611</sup> The SOP focuses on three elements: it identifies who is responsible for what within the Agency; it sets out the step-by-step process by which a decision under Article 46 is prepared and taken; and it provides substantive guidance on the criteria and information sources relevant to fundamental rights-based decisions under paragraphs (4) and (5).

Under this framework, the Executive Director holds sole decision-making authority under Article 46 and no other actor can substitute for this.<sup>612</sup> The Director of the Division responsible for the activity is the key preparatory actor: it is their job to assess the situation, consult relevant internal actors, and submit a recommendation to the Executive Director.<sup>613</sup> Where a situation is particularly complex, the Executive Director may establish a Working Group, a multi-actor body tasked with producing a detailed assessment, whose output is then channelled to the Executive Director via the specific Division Director.<sup>614</sup>

On the ground, the Coordinating Officer plays a central operational role. Coordinating Officers are deployed in operational activities and are responsible for monitoring the correct implementation of the operational plan, including its fundamental rights dimensions.<sup>615</sup> They are the primary

<sup>606</sup> EBCG Regulation, Article 1.

<sup>607</sup> EBCG Regulation, Article 80.

<sup>608</sup> EBCG Regulation, Article 1, Article 80.

<sup>609</sup> EBCG Regulation, Article 46.

<sup>610</sup> In over two decades of Agency activity, Article 46 has been activated on fundamental rights grounds on a single occasion: the suspension of operations in Hungary in 2021, discussed below. The Commission’s Evaluation noted the limited use of the mechanism: European Commission, Report on the evaluation of the European Border and Coast Guard Regulation, COM(2024) 75 final, p. 47.

<sup>611</sup> Decision of the Executive Director No R-ED-2022-12 of 25 January 2022, Standard Operating Procedure (SOP) – mechanism to withdraw the financing of, or suspend or terminate, or not launch Frontex activities.

<sup>612</sup> EBCG Regulation, Article 46; SOP, Section 3.1

<sup>613</sup> SOP, Section 3.3.

<sup>614</sup> SOP, Section 3.8.

<sup>615</sup> EBCG Regulation, Article 44.

source of real-time field reporting and the most natural initiators of the Article 46 mechanism.<sup>616</sup> Where fundamental rights concerns arise, they are supported by Fundamental Rights Monitors, who report both to the Coordinating Officer and to the FRO.<sup>617</sup>

The FRO occupies a distinct position. Unlike the other actors, the FRO is independent from the Management Board and participates in the mechanism as a mandatory consultee and advisor rather than as a decision-maker.<sup>618</sup> Under Articles 46(4) and (5), the Executive Director must consult the FRO before acting.<sup>619</sup> In any Working Group dealing with fundamental rights concerns, the FRO must always be invited, though without prejudice to their independence.<sup>620</sup> The FRO may also independently bring concerns to the Executive Director's attention at any stage.<sup>621</sup> However, his/her views are not binding and can, *de facto*, be ignored.

**Every case shall be assessed individually according to its particular circumstances**

The SOP establishes separate procedural tracks depending on which paragraph of Article 46 is engaged: For decisions under **Article 46(1)**, concerning termination because conditions are no longer fulfilled, the Division Director conducts an assessment with input from the Coordinating Officer and, where fundamental rights are implicated, the FRO. The Member State or third country concerned is invited to present its views. The Division Director then issues a recommendation to the Executive Director, who takes the final decision and, where termination is envisaged, informs the Member State or third country concerned prior to doing so.<sup>622</sup>

For decisions under **Article 46(3)**, on the lack of compliance with the operational plan by the host State, the process is similar but includes an additional preliminary step. The Coordinating Officer is first authorised to attempt to resolve the disagreement directly with the host authorities.<sup>623</sup> Only if this effort fails does the process escalate to the preparation of a recommendation concerning the withdrawal of financing, suspension, or termination of the activity at stake.<sup>624</sup> In particularly complex situations, a Working Group may be established.<sup>625</sup>

<sup>616</sup> EBCG Regulation, Article 44(3)(b); SOP, Sections 3.4, 3.7.

<sup>617</sup> EBCG Regulation, Article 110; SOP, Section 3.6.

<sup>618</sup> EBCG Regulation, Article 109(5); SOP, Section 3.5.

<sup>619</sup> EBCG Regulation, Article 46(4)(5).

<sup>620</sup> SOP, Sections 3.8, 4.4, and 4.5.

<sup>621</sup> EBCG Regulation, Articles 109(1); SOP, Section 3.5.

<sup>622</sup> EBCG Regulation, Article 46(1); SOP, Section 4.1.

<sup>623</sup> EBCG Regulation, Articles 44(4), Art. 46(3); SOP, Section 4.3.

<sup>624</sup> SOP, Section 4.3.

<sup>625</sup> SOP, Section 4.3.

For decisions under **Articles 46(4) and (5)**, on violations of fundamental rights, the process is more structured. Field reporting from the Coordinating Officer and Fundamental Rights Monitors, combined with information from the sources listed in Article 46(6) and the SOP (see below), feeds into an assessment by the Division Director in consultation with the FRO.<sup>626</sup> A Working Group may be established, which may also engage EU institutions and bodies, such as the Commission, FRA, or EUAA.<sup>627</sup> The Working Group produces a detailed assessment against the criteria in the SOP. The Division Director then recommends one of three courses of action: attempt resolution through the Coordinating Officer; recommend suspension or termination to the Executive Director; or seek further clarification from external bodies.<sup>628</sup> If the Executive Director decides to act, the FRO must be consulted and the Member State informed before the decision is taken. The Management Board must be notified with full justifications.<sup>629</sup>

Across all tracks, the SOP establishes a general principle: corrective or mitigation measures should be considered before resorting to Article 46.<sup>630</sup> These measures may include deploying additional Coordinating Officers or Fundamental Rights Monitors, amending the operational plan, limiting the scope of technical assistance, or increasing information exchange with the host State.<sup>631</sup> This logic reflects the practical objective of ensuring the success of operations. It does, however, create structural space for delay: so long as corrective measures can be proposed, the trigger for Article 46 action may be deferred, and the SOP offers no clear threshold at which the exhaustion of corrective options becomes a precondition for escalation. The SOP states that “every case shall be assessed individually according to its particular circumstances”, but provides no procedural threshold governing when corrective measures should be considered to be exhausted and escalation becomes mandatory.<sup>632</sup>

The opacity of the threshold determination process has attracted external criticism. In its Decision on access to the FRO's Opinion concerning Greece, the **European Ombudsman** underlined that, given the relevance of the FRO's Opinion to Article 46 decisions, Frontex should aim to be as transparent as possible about its reasoning.<sup>633</sup> In particular, the Agency should publicly clarify whether the threshold for suspending, withdrawing, or terminating activities has or has not been met and why.<sup>634</sup> This transparency obligation is in line with the Transparency Regulation,<sup>635</sup> and is not merely procedural, but constitutes a condition of meaningful external oversight of a decision-making process that is otherwise entirely internal to the Executive Director.

<sup>626</sup> EBCG Regulation, Article 46(4), (5); SOP, Section 4.4, which expressly provides that the Executive Director may invite the European Commission, EEAS, FRA, EUAA and other relevant entities to support the Working Group.

<sup>627</sup> SOP, Section 4.4.

<sup>628</sup> SOP, Section 4.4.

<sup>629</sup> EBCG Regulation, Article 46(4)(6), SOP, Section 4.4.

<sup>630</sup> SOP, Section 2.3: “[...] as a general rule, a gradual approach as well as the principle of proportionality should be considered when deciding on the actions to be taken under Article 46. Whenever appropriate, prior to withdrawal of the financing of, suspension or termination of the activity, the mitigation/corrective measures should be put in place [...]”.

<sup>631</sup> SOP, Sections 4.3 (mitigation measures) and 4.4 (corrective measures), which set out non-exhaustive lists of such measures, respectively.

<sup>632</sup> SOP, Section 3.3.

<sup>633</sup> European Ombudsman, Case 1885/2023/ACB on the refusal of Frontex to grant public access to the Fundamental Rights Officer's opinion on operations in Greece, 12 October 2023, para. 33.

<sup>634</sup> European Ombudsman, Case 1885/2023/ACB, para. 33.

<sup>635</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, pp. 43–48, see chapter 5 of this report; European Ombudsman, Case 1885/2023/ACB, para. 38.

For decisions under Articles 46(4) and (5), the SOP draws on ECtHR case-law to define the key threshold concepts.<sup>636</sup> “Seriousness” is interpreted by reference to rights in respect of which States bear absolute obligations under the ECHR, primarily the right to life, prohibition of torture and inhuman or degrading treatment, and the prohibition of forced labour.<sup>637</sup> The EU Charter adds further relevant standards, including *non-refoulement*, the right to asylum, and the rights of the child.<sup>638</sup> Not every violation of these provisions will, however, reach the seriousness threshold,<sup>639</sup> which is problematic considering the nature of the rights concerned.

From a temporal perspective, Article 46 can be triggered if the issue persists and, therefore, it requires more than isolated incidents. Gravity is thus implicitly interpreted as requiring repetition of conduct and recurrence of harm, even if irreparable. Drawing on the ECtHR’s concept of an “administrative practice”, the SOP indeed requires evidence of repetition, defined as an accumulation of analogous acts sufficiently numerous and interconnected to constitute a pattern, and of “official tolerance”, understood as a failure by superior authorities to punish or prevent violations of which they are aware.<sup>640</sup> This is a demanding standard, which the SOP reinforces explicitly by stating that Article 46 action should not be based on a single incident.<sup>641</sup> While this reflects a genuine concern against disproportionate reactions to exceptional events, it also sets a threshold that, in practice, requires a considerable body of evidence to be assembled before any preventative action is taken putting rights at significant risk and discounting the importance of non-derogable guarantees.

The SOP enumerates the key information sources for fundamental rights-based decisions: serious incident reports (particularly Category 1, covering potential fundamental rights violations); reports from Coordinating Officers and Fundamental Rights Monitors; unresolved complaints submitted to the Agency; reports from the Consultative Forum; assessments from EU institutions, FRA, and EUAA; and rulings by the CJEU, ECtHR, or national courts.<sup>642</sup> The explicit inclusion of court rulings is significant: it formally integrates judicial findings, including infringement judgments against Member States, into the Article 46 decision-making process,<sup>643</sup> albeit without according them formal pre-eminence or a trump function.

<sup>636</sup> SOP, Section 5.

<sup>637</sup> SOP, Section 5, drawing on the Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations, adopted by the Committee of Ministers on 30 March 2011 at the 1110th meeting of the Ministers’ Deputies.

<sup>638</sup> SOP, Section 5.

<sup>639</sup> SOP, Section 5.

<sup>640</sup> SOP, Section 5; ECtHR, *Georgia v. Russia (I)* [GC], no. 13255/07, 3 July 2014, paras. 122–124, defining the two constituent elements of an administrative practice, repetition of acts and official tolerance, as elaborated in the case law cited therein.

<sup>641</sup> SOP, Sections 2.3 and 6. See also the Final Report of the Frontex Management Board Working Group on Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea (FRaLO), 1 March 2021, cited in SOP fn. 4, which provided the basis for this interpretive position.

<sup>642</sup> EBCG Regulation, Article 46(6); SOP, Section 6. The list in the SOP is expressly non-exhaustive and expands on the sources enumerated in Art. 46(6), adding inter alia reports from the Consultative Forum and from forced-return monitors.

<sup>643</sup> SOP, Section 6, which lists “rulings by the Court of Justice of the European Union, the European Court for Human Rights or any relevant national court of a Member State concerned by Frontex activities” among the information sources. The reference to infringement judgments is particularly significant in light of the Hungary precedent, where the CJEU ruling in *Commission v Hungary* (Case C-808/18, EU:C:2020:1029, discussed below).

The significance of this evidentiary framework becomes particularly clear when set against the operational reality it is intended to address. In certain areas of Frontex deployment, the evidence of systematic fundamental rights violations is not merely sufficient to meet the threshold under Article 46 and the SOP, it is overwhelming. The ECtHR has characterised pushbacks in the Aegean Sea (where Frontex operates in the context of *JO Poseidon*) as a systemic tool of border control rather than as a string of isolated incidents,<sup>644</sup> a finding that corresponds to the SOP’s own persistence criterion. The situation in the Central Mediterranean has generated a similarly substantial body of documented evidence.<sup>645</sup> Yet the mechanism has not been activated in either context. The reason for such inaction lies in the institutional architecture described so far. All relevant sources of information, field reports, assessments by the FRO, reports of NGOs, feed into a process whose sole output is a recommendation addressed to a single decision-maker. The Executive Director holds the key role within the mechanism. S/he is the bottleneck through which the entire accountability structure must pass. Where s/he does not act, the mechanism produces no operative outcome, whatever the gravity of the situation and even when firm condemnations by competent courts already exist.

The SOP requires evidence of repetition, defined as an accumulation of analogous acts sufficiently numerous and interconnected to constitute a pattern

The **SHARED Guidelines** address this issue and recommend that the FRO be empowered to independently advise the Executive Director to activate the mechanism at any time, thereby positioning the FRO not merely as a reactive consultee but as a proactive participant in initiating proceedings.<sup>646</sup> This aligns with the broader FRO mandate,<sup>647</sup> and gives it greater operational powers in the suspension and termination context. The Guidelines also reinforce that the FRO must always be invited to Working Groups where fundamental rights concerns are at stake and recommend the establishment of concrete procedures and timelines for responses to the FRO’s recommendations. This would provide a safeguard against the procedural marginalisation of the fundamental rights dimension within what are otherwise operationally-driven assessments.<sup>648</sup> The FRO’s direct reporting line to the Management Board and independence from the executive chain of command would make its position stronger.

<sup>644</sup> ECtHR, *G.R.J. v. Greece*, application no. 15067/21, paras. 187–191.

<sup>645</sup> OHCHR, *Lethal Disregard Search and rescue and the protection of migrants in the central Mediterranean Sea*, 2021. Italian courts have consistently held that Libya cannot be considered a safe place of disembarkation and have denied the qualification of Libyan Coast Guard interceptions as genuine search and rescue operations, thereby casting serious doubt on the legality of cooperation with the LYCG: Corte di Cassazione, Judgment No. 4557/2024. Italy, 1 February 2024; Civil Tribunal of Crotone, Judgement No. 348/2024; Corte d’appello di Catanzaro, n. 1253/2024/CC.

<sup>646</sup> SHARED Guideline 80.

<sup>647</sup> EBCG Regulation, Article 109.

<sup>648</sup> SHARED Guidelines 80 and 94; the marginalisation of fundamental rights officers was found by OLAF, that described it in its report: OLAF, Final Report, case No. OC/2021/0405/A1, Olaf.03(2021)21088.

The Guidelines also call for the introduction of a formal due diligence procedure governing the activation of Article 46, to be adopted by the Commission and/or the Management Board, that would establish specific criteria and timelines for decisions, incorporate input from the Consultative Forum, the FRO, and FRA, and distinguish clearly between the steps of mitigation, suspension, and termination.<sup>649</sup> They also address the problem of Executive Director inaction directly: in situations of well-known, grave, or persistent human rights violations, the due diligence procedure should include dismissal as a consequence of the Executive Director's refusal to trigger Article 46 in defiance of advice received.<sup>650</sup> The Guidelines further recommend that risk and vulnerability assessments, which constitute internal monitoring tools available to the Agency, incorporate an evaluation of the human rights implications of all joint interventions, with the consequence that where mitigation is not possible, the activity should be withheld until circumstances allow for compliance with fundamental rights.<sup>651</sup> Finally, in the event of suspension or termination, the Guidelines call for special provisions allowing the continued presence of the FRO alongside external monitoring bodies, to ensure ongoing assessment of the fundamental rights situation on the ground after the decision to withdraw has been taken.<sup>652</sup>

## 6.2 SUSPENSION AND TERMINATION OF OPERATIONS: THE PRACTICE



The suspension of Frontex activities in Hungary in 2021 remains the sole instance in which the mechanism established in Article 46 has been activated on fundamental rights grounds.<sup>653</sup> The circumstances reveal both the mechanism's potential and its structural limitations.

The trigger was the **CJEU's** infringement ruling of December 2020 against Hungary, which found systematic failures in the implementation of international protection obligations and unlawful expulsions in breach of the EU asylum *acquis*.<sup>654</sup> The judgment confirmed what Frontex's own internal reporting, including FRO assessments and coordinating officer accounts, had documented for some time that operations deployed on Hungarian territory were taking place in an environment of systematic, officially tolerated fundamental rights violations. The FRO had in fact recommended suspension as early as November 2016, following a monitoring visit in which it identified potential infringements of the prohibition of collective expulsions, the right to asylum, the prohibition of cruel, inhuman or degrading treatment, the right to life, the prohibition of *refoulement*, and the right to integrity of the person.<sup>655</sup> A second monitoring mission in March 2017 reaffirmed those findings and concluded that the risk of shared responsibility for fundamental rights violations remained very high.<sup>656</sup> The Consultative Forum independently recommended suspension in the same period.<sup>657</sup> By January 2021, the FRO issued a formal Opinion concluding that the criteria for the application of Article 46(4) and (5) were met, supported by a compilation of Serious Incident Reports from operational activities in Hungary dating from 2016 to 2020 and by a recommendation from the Consultative Forum.<sup>658</sup> Only following sustained pressure and several weeks after the CJEU's ruling, Executive Director Leggeri suspended Frontex's operational presence in Hungary in early 2021 – more than 4 years after the initial recommendation of the FRO.

It is worth noting that the immediate trigger was an external judicial ruling, not the internal reporting chain the SOP envisages. The CJEU judgment provided the political and legal leverage that the internal reports had not, by themselves, generated. This suggests that the *de facto* threshold for internal activation of the mechanism is considerably higher than the regulatory text implies and misaligned with international human rights standards. The delay between documented violations and the suspension decision was also substantial, allowing for the continuation of a situation on the ground that had repeatedly been declared incompatible with the EU fundamental rights *acquis* by the FRO. Systematic failures had been visible and reported for years before the ruling precipitated action. The SOP's own requirement that action not be based on a single incident, rather than repeated incidents, had the effect of legitimizing prolonged inaction: what the regulatory framework presented as a procedural safeguard against precipitous decisions became, in practice, a justification for institutional delay.

<sup>653</sup> Barigazzi, Jacopo. EU border agency Frontex suspends operations in Hungary. Politico Europe, 27 January 2021.

<sup>654</sup> C-808/18, *Commission v Hungary*, ECLI:EU:C:2020:1029, para. 128.

<sup>655</sup> FRO Opinion on Hungary, p.1.

<sup>656</sup> FRO Opinion on Hungary, p. 1, citing Mission Report of the FRO, 13–17 March 2017.

<sup>657</sup> Frontex Consultative Forum 2017.

<sup>658</sup> FRO Opinion on Hungary, 19 January 2021, p. 3: "Taking into consideration the above information, FRO is of the opinion that the criteria for fulfilment of Article 46 (4) and (5) Reg (EU) 2019/1896 are met." Annex 1 of the same document. 2021 Consultative Forum Report.



<sup>649</sup> SHARED Guideline 93.

<sup>650</sup> SHARED Guideline 94.

<sup>651</sup> SHARED Guideline 47.

<sup>652</sup> SHARED Guideline 95.

The Hungary case involved a Member State with a final judicial finding of systemic failure. Whether the mechanism would have been activated in the absence of such external trigger is doubtful, since no other example of suspension or termination exists yet. The extension of the Article 46 logic to SAR contexts sharpens this concern. In its Decision on Frontex's compliance with its fundamental rights obligations in SAR operations, the **European Ombudsperson** recommended that, should the FRO identify persistent violations of fundamental rights by a Member State in responding to maritime emergencies or should Frontex become aware of such serious violations through formal inquiries or court judgments, the Executive Director should consider whether the threshold for suspension, withdrawal, or termination has been reached.<sup>659</sup> Crucially, the Ombudsman specified that this assessment should be made publicly, with Frontex clarifying its reasons regardless of whether it concludes the threshold has or has not been met.<sup>660</sup>

The Central Mediterranean Sea provides the most acute illustration of the mechanism's structural failure. The FRO issued a first Opinion on the Agency's Multipurpose Aerial Surveillance (MAS) services in the Central Mediterranean in June 2022, raising concerns about the practice of sharing sightings with Libyan authorities and the foreseeable risk of migrants being brought to detention centres where systematic torture and crimes against humanity have been documented by the UN Fact-Finding Mission on Libya and the International Criminal Court.<sup>661</sup> A second Opinion followed in July 2023, by which point the FRO had opened five Serious Incident Reports concerning use of force by the Libyan Coastguard during rescue operations, had identified direct and indirect liability risks for the Agency under Article 80 of the EBCG Regulation and the ARIO (International Law Articles on the Responsibility of International Organisations) framework, and had flagged the tragic events at Pylos as a specific indicator of the concerns at stake.<sup>662</sup> The second Opinion explicitly identified the risk that the Agency may be considered to have effectively handed over intercepted migrants to Libyan authorities, a country the FRO confirmed cannot be considered a place of safety, with Frontex's conduct thus possibly amounting to an indirect infringement of the principle of *non-refoulement*. Nonetheless, the FRO did not propose to suspend the aerial surveillance service altogether but instead proposed to adopt mitigating measures.<sup>663</sup> The proposed measures included sharing sightings with NGO vessels, revising parameters for emergency-level assessments, broadening Mayday relay criteria, and requesting Member States to avoid facilitating disembarkations in Libya.<sup>664</sup> The FRO therefore proposed that the Agency condition service provision on Member States' agreement to apply mitigation measures and respect fundamental rights obligations.<sup>665</sup>

<sup>659</sup> EU Ombudsperson, Case 01/3/2023/MHZ, para. 77.

<sup>660</sup> EU Ombudsperson, Case 01/3/2023/MHZ, Suggestion A).

<sup>661</sup> Frontex Fundamental Rights Officer, Opinion on Multipurpose Aerial Surveillance Services – fundamental rights concerns as regards involvement of Libya in Search and Rescue operations, 14 June 2022; UN Fact-Finding Mission on Libya, Report of 24 March 2023; ICC Prosecutor's Report to the UN Security Council pursuant to UNSCR 1970 (2011), November 2022.

<sup>662</sup> Frontex Fundamental Rights Officer, Opinion on Multipurpose Aerial Surveillance Services – Fundamental rights concerns as regards sending alerts to Libyan authorities and SAR operations in the Central Mediterranean (second opinion), 18 July 2023, Internal ref. FRO/O-17/2023, Executive Summary and Sections 2.2, 3.4, and 5.3.

<sup>663</sup> FRO, Opinion on Multipurpose Aerial Surveillance Services, Section 6.

<sup>664</sup> FRO, Opinion on Multipurpose Aerial Surveillance Services (second opinion), 18 July 2023, Section 4.

<sup>665</sup> Ibid. Section 4.

This strategy reflects the structural constraint imposed by the SOP framework, which requires the FRO to propose mitigation before recommending suspension. Yet it leaves the Agency dependent on Member State cooperation to remedy a situation where the FRO has already identified direct and indirect liability risks under Article 80 of the EBCG Regulation and the risk that Frontex conduct amounts to indirect *refoulement* to torture and crimes against humanity. Frontex has so far disregarded the FRO's recommendations, and the MAS service continues to operate in the Central Mediterranean unchanged.

Article 46 is, in principle, the most direct lever available to the Agency to respond to fundamental rights violations in the field. In over two decades of Agency activity, it has been used only once, and solely after an external judicial ruling supplied the political legitimation that years of internal reporting had failed to generate. As described, the decision-making authority under Article 46 is concentrated in a single official who simultaneously carries responsibility for operational continuity. When those two responsibilities pull in opposite directions, as they do whenever suspension is contemplated, continuity seems to prevail.

The mandatory language of Articles 46(4) and (5) creates a legal obligation to act. But its enforcement depends on administrative discretion and the very executive authority that is subject to the obligation. No internal actor, neither the FRO nor the Management Board, currently holds a formal power to compel the Executive Director to exercise his/her powers under Article 46. Judicial review by the CJEU remains available in principle, but the standing and procedural obstacles facing affected individuals make it unfit for purpose. As it stands, the framework concentrates power solely in the hands of the Executive Director without any effective oversight. This consolidates and institutionalizes a conflict of interest with no real checks and balances.

Article 46 tends to be conceived of and applied as a "nuclear option", an all-or-nothing instrument whose activation is politically and operationally too costly to contemplate in most circumstances.<sup>666</sup> This is considered the primary driver of the mechanism's under-use. Article 46 does not, however, require total suspension or full withdrawal: it permits targeted, geographically or operationally circumscribed measures. A suspension of sea operations in a specific operational zone while maintaining activities on territorial borders, or the continuation of SAR operations in one area while restricting others, would fall within the provision's scope and would constitute a proportionate response calibrated to the specific nature and location of the violations identified.<sup>667</sup> Reframing Article 46 as a graduated instrument, rather than as a binary choice between full continuation and full withdrawal, would both lower the political threshold for activation and better align the mechanism with the principle of proportionality that governs all EU administrative action. The SOP should be revised to make this graduated logic explicit and to provide operational guidance on what targeted measures are available at each stage of the escalation process.<sup>668</sup>

<sup>666</sup> Interview with EU civil servant 3.

<sup>667</sup> Interview with EU civil servant 3.

<sup>668</sup> Interview with EU civil servant 3.

This diagnosis does not, however, lead to a single conclusion. Two distinct reform pathways present themselves, and it is important to distinguish between them clearly: The first, and more disruptive, would be to amend Article 46 to introduce a shared decision-making structure in which the Management Board holds concurrent or supervisory authority over the Executive Director's decisions under paragraphs (4) and (5). This approach has been discussed in the context of the forthcoming revision and has attracted some institutional support.<sup>669</sup> In our opinion, however, it should be firmly resisted. Transferring or sharing the Article 46 competence with the Management Board would not remedy the conflict of interest identified above: it would replicate it at a higher level, replacing a single unaccountable decision-maker with a collective body composed of Member State representatives who have an even more direct operational and political stake in the continuation of joint activities. The Management Board is not an independent oversight body. Its composition ensures that the Member States whose conduct is under scrutiny are the same actors who would be called upon to authorise or block the suspension of activities in which they are participating.<sup>670</sup> This would, in effect, institutionalise the conflict of interest at a deeper level rather than resolve it.

The second pathway, which this study recommends, is to improve the practical application of Article 46 as it stands, without legislative amendment. The provision already contains an escalation architecture: it distinguishes between corrective measures, suspension, withdrawal of financing, and termination, and the SOP already operationalises this ladder through separate procedural tracks. What is missing is not the structure but the specific regime regulating its application. Three targeted improvements, achievable through SOPs and operational plan conditions rather than legislative reform, would significantly strengthen the mechanism's implementation.

First, the SOP should be amended to establish a clear and mandatory threshold at which corrective measures are deemed exhausted and escalation to the Executive Director becomes obligatory, rather than discretionary, for the Division Director. The current formulation, which requires individual case assessment without specifying when the corrective phase must end, creates structural space for indefinite deferral. Second, the FRO's involvement should be formalised as a mandatory precondition at each stage of the escalation ladder, not only at the final decision stage. This does not require amending Article 46: it requires an amendment to the SOP and to the standard operational plan template, establishing that the FRO must be notified and consulted whenever the Division Director determines that corrective measures have failed to resolve the situation and that escalation is being considered. Third, the transparency obligation identified by the European Ombudsperson should be operationalised in the SOP: whenever the Executive Director concludes, at any stage of the process, that the threshold for action under paragraphs (4) or (5) has or has not been met, that conclusion and its reasoning should be published, with the FRO's Opinion appended.

These changes would significantly reduce the Executive Director's ability to defer action indefinitely without procedural consequence, ensuring that the FRO's assessment is formally integrated into every stage of the process rather than consulted only at the end.

<sup>669</sup> Interview with EU civil servant 3.

<sup>670</sup> See further Violeta Moreno-Lax, *Accessing Asylum in Europe* (OUP 2017) ch 6.



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07

# RESPONSIBILITY AND LEGAL REMEDIES



Subsection	Source
7.1 Shared Responsibility	NGO Access Now: <a href="#">From cooperation to complicity: meet the companies powering the EU's war on migrants</a> COM: <a href="#">A European Agenda on Migration SHARED Guidelines</a>
7.2 Judicial Avenues	Available legal remedies and procedural routes in <a href="#">TFEU</a> . CJEU: <a href="#">Rules of Procedure</a> General Court: <a href="#">Rules of Procedure</a>

## 7.1 SHARED RESPONSIBILITY



Chapters 1, 2 and 3 have mapped the governance architecture within which Frontex operates: the multi-layered decision-making structure running from the Management Board down through the Executive Director and Coordinating Officer to deployed staff; the web of obligations arising in joint operations at the sea borders from EU law, international law, and the fundamental rights framework; and the extended operational footprint, reaching up to non-neighbouring third countries under Status Agreements, Working Arrangements and informal cooperation channels. Chapter 7 draws on this analysis to confront the question that has run beneath each of those assessments: in cases involving fundamental rights violations, who is legally responsible?

The answer is not straightforward. It is, in fact, structurally obscured, and that obscurity is not accidental. Article 7(1) of the EBCG Regulation establishes that Frontex and the competent national authorities share responsibility for implementing EIBM, while Member States retain “primary responsibility” for managing their sections of the external borders. Article 7(4) introduces a partial qualification: the Agency is “fully responsible and accountable for any decision it takes and for any activity for which it is solely responsible under [the EBCG] Regulation”.<sup>671</sup> The result is a dichotomous framework that, on close examination, raises more questions than it answers. As the **European Commission** has itself acknowledged in its first evaluation of the 2019 Regulation, uncertainties persist regarding the allocation of responsibility between Frontex and national authorities during joint operations.<sup>672</sup> The framework establishes a model of shared responsibility as the general rule but provides no reliable mechanism for identifying, at any given operational moment, where one actor’s responsibility ends and the other’s begins.

This is not a minor technical gap. The strategic framework within which EIBM is implemented is the product of a composite policy cycle to which the Commission, the Member States, and the Agency all contribute: the Commission prepares the multiannual strategic policy, Frontex establishes the technical and operational strategy, and Member States adopt their national strategies in conformity with both.<sup>673</sup> The operational implementation of that framework, however, rests with

<sup>671</sup> EBCG Regulation, Article 7.

<sup>672</sup> COM(2024) 75 final, para. 4.1.1, p. 18.

<sup>673</sup> EBCG Regulation, Articles 8, 9.

Frontex, the Member States, and, as shown in the previous chapters, an expanding range of additional actors, including third countries and private entities.<sup>674</sup> Strategic objectives cascade downward through operational priorities and deployment decisions before being translated into field conduct by a layered cast of actors: national border guards of both the Member States and potentially third countries, national officials on secondment to Frontex, ILOs from the Agency and possibly third countries, Frontex officials from HQ in Warsaw, private contractors, staff from other EU agencies with which Frontex cooperates, Standing Corps members under EU Staff Regulations, Coordinating Officers whose authority is formally advisory yet functionally decisive, and Fundamental Rights Monitors whose reporting feeds into, but does not bind, executive action. In this structure, it is rarely possible to identify a single operational act as falling *exclusively* within the remit of Frontex, let alone to isolate a discrete causal link between that act and a specific harm. The activities for which the Agency may be regarded as solely responsible under Article 7(4) are therefore narrow in practice: they include formal decisions by the Executive Director or Management Board, and actions wholly disconnected from the joint operational framework, such as responses to public access to documents requests.<sup>675</sup> Everything else falls into the zone of “shared responsibility”, therefore making the attribution of legal accountability genuinely difficult, rendering redress nearly impossible.

The **European Commission** has identified this problem directly but proposed no solution. In its latest evaluation of the EBCG Regulation, it identified a series of internal coherence weaknesses that cumulatively generate the accountability deficit: the absence of a clear definition of the Regulation’s objectives; uncertainties in the allocation of responsibility between Frontex and national authorities during joint operations; the vagueness of certain provisions on the use of force and personal data protection; and the lack of clarity and uniform application of key return-related concepts.<sup>676</sup> Taken together, these findings reveal a system that is formally coherent but operationally underspecified, precisely in those areas where specificity matters most for accountability: responsibility, the use of force, and returns. The Commission’s own assessment confirms that the framework leaves significant space for divergent interpretation and application, which in practice means divergent understandings of who bears which obligation when things go wrong.<sup>677</sup>

Article 7(4) adds a further dimension to this already complex picture. It establishes that the Agency is “fully responsible and accountable for any decision it takes and for any activity for which it is solely responsible”, but it goes no further. The provision does not specify which decisions or activities fall within this category, nor does it articulate the criteria by which “sole responsibility” is to be distinguished from “shared responsibility” in any given operational situation. The result is a two-track responsibility regime that runs parallel to each other: shared responsibility as the general rule, and individual Agency responsibility as an exception, but without providing any mechanism to determine, at the operational level, which regime applies when and with which consequences in terms of remedies and reparation. The **SHARED Guidelines** have drawn attention to this gap, calling for overarching rules that clearly delineate the distribution of responsibilities across all aspects of the Agency’s mandate and for these rules to be concretely specified in all operational plans and related operational arrangements before any deployment on the ground.<sup>678</sup>

<sup>674</sup> The NGO Access Now has published a research mapping the EU collaboration with private actors in the context of border management: *From cooperation to complicity: meet the companies powering the EU’s war on migrants*, 11 March 2026.

<sup>675</sup> Transparency Regulation.

<sup>676</sup> COM(2024) 75 final, para. 4.1.1, pp. 18-20.

<sup>677</sup> COM(2024) 75 final, para. 4.1.1, pp. 18-20.

<sup>678</sup> SHARED Guidelines 1-8.

The significance of this gap has been acknowledged by the **Court of Justice** for the first time in case *WS and Others v Frontex*.<sup>679</sup> Therein, the Grand Chamber established that Frontex bears independent obligations entirely distinct from those of the Member States.<sup>680</sup> The Court further clarified that the attribution of liability to the host Member State does not absolutely exclude concurrent liability on the part of Frontex for wrongful acts or omissions of its own staff.<sup>681</sup> These findings directly refute the structural blame-shifting dynamic that the shared responsibility framework has in practice facilitated: Frontex cannot invoke Member State competence as a shield, and cooperation with national authorities cannot be used as a tool to avoid compliance with its own fundamental rights duties.

The very figure of the Coordinating Officer makes this problem evident. Formally, the Coordinating Officer's interventions are framed as exhortatory "views" rather than binding "orders", with Member States formally retaining primary authority over the operations.<sup>682</sup> In practice, the Coordinating Officer may be authorised to resolve disagreements over the execution of the operational plan and represents the Agency in the field in all aspects of the relevant deployment.<sup>683</sup> The Coordinating Officer therefore effectively exercises command, notwithstanding the formal framework's denial of that authority. This is not a drafting accident. It reproduces at the operational level the same indeterminacy that pervades the shared responsibility framework. This is the basis upon which the **European Commission** has recognised the need to make command structures clearer and more efficient.<sup>684</sup>

A related and equally significant gap concerns Frontex's role as coordinator more broadly. The Regulation assigns the Agency a central coordinating function in joint operations and, through EUROSUR, the regulatory regime ensures that it receives, on a near real-time basis, situational information about events unfolding at the external borders.<sup>685</sup> Where a Member State acts in violation of EU law, whether by issuing instructions incompatible with the operational plan or by engaging in conduct that infringes fundamental rights, Frontex, by virtue of its coordinating role and its mandatory access to operational information, will by default be aware of that violation. Yet the Regulation does not clearly specify what obligations flow from such awareness. It merely establishes a duty to report to the Executive Director.<sup>686</sup> Whether further action is taken depends on the Executive Director's own inclination, since the mandatory use of Article 46 powers – triggered only at that stage – hinges entirely on his own individual assessment. The Coordinating Officer's report, therefore, functions merely as a prompt for internal consideration, not as an obligation to act. The most likely result – as discussed in Chapter 6 – is in fact likely inaction at the very point where coordinative conduct most clearly generates responsibility: Frontex may know that a violation is occurring, but the Regulation does not clearly state what that knowledge requires the Agency to do.

<sup>679</sup> C-679/23 P, *WS and Others v Frontex*, ECLI:EU:C:2025:976.

<sup>680</sup> C-679/23 P, paras 102-103.

<sup>681</sup> C-679/23 P, para. 127.

<sup>682</sup> EBCG Regulation, Article 43(2), 7(1).

<sup>683</sup> EBCG Regulation, Article 44(3).

<sup>684</sup> COM(2024) 75 final, p. 60.

<sup>685</sup> EBCG Regulation, Article 7(4), 14.

<sup>686</sup> EBCG Regulation, Article 44(3)(d).

The opacity of operational plans compounds this problem significantly. These documents are the central instruments governing the conduct of joint operations.<sup>687</sup> They are supposed to specify the chain of command, the allocation of tasks between Frontex and participating Member States, the responsibilities of each deployed actor, and the procedures applicable to fundamental rights. In maritime operations, they must also address SAR responsibilities, interception procedures, and the role of the Coordinating Officer in emergencies.<sup>688</sup> Yet operational plans are classified or, when exceptionally published, heavily redacted. This means that the actors responsible for specific operational decisions cannot ordinarily be identified from the outside, and often not from within the existing accountability mechanisms themselves. The **SHARED Guidelines** are explicit on this point: the chain of command and the distribution of tasks should be disclosed as a rule, not withheld by default.<sup>689</sup>

The accountability consequences of this structural opacity are most acute in the context of SAR operations, where operational failures may carry irreversible consequences, including death. However, this difficulty extends beyond the EU's borders, since the Agency operates *with* and *in* third countries.<sup>690</sup> In these contexts, the accountability gap widens further: third countries are not bound by the EU *acquis*; the presumption of compliance with EU fundamental rights standards does not apply; and the affected individuals will typically lack meaningful access to accountability mechanisms. Where Standing Corps members are deployed under a **STATUS AGREEMENT**, their conduct falls under EU law in principle,<sup>691</sup> but in practice the ability to monitor compliance, attribute responsibility, and provide redress is considerably more limited than in EU-territory operations.

The result is a structural paradox. The shared responsibility framework was designed to ensure that border management is implemented by both Frontex and Member States to improve the effectiveness of Member States' actions and save more lives at sea.<sup>692</sup> In practice, the same framework functions as a systemic obstacle to accountability rather than a guarantee of it. Responsibility is shared so thoroughly that, when violations occur, it is difficult or impossible to establish who bore the relevant duty, whether it was breached, and by whose conduct the harm was caused. Establishing attribution and causation, which any legal claim to responsibility requires, becomes extraordinarily difficult to determine in a system built around shared action, composite decisions, and opaque operational arrangements.

<sup>687</sup> EBCG Regulation, Article 38.

<sup>688</sup> EBCG Regulation, Article 38(3).

<sup>689</sup> SHARED Guideline 31.

<sup>690</sup> EBCG Regulation, Article 73.

<sup>691</sup> EBCG Regulation, Article 73.

<sup>692</sup> Communication, A European Agenda on Migration, COM(2015) 240 final, Brussels, 13.5.2015.

A different solution was adopted by the co-legislators in the Europol Regulation, where Recital 57 mentions that Europol and the relevant Member State are jointly and severally liable for damage caused in the context of shared operations.<sup>693</sup> The **CJEU** applied this regime in the case *Kočner v. Europol*,<sup>694</sup> ordering Europol to pay compensation to the applicant for harm resulting from unlawful data processing carried out in the context of a joint operation with Slovak authorities.<sup>695</sup>

The transposition of this model to Frontex is feasible and compelling. Europol staff may participate in joint investigation teams and be physically present during the execution of investigative measures, but are expressly prohibited from executing those measures or exercising any coercive powers of their own.<sup>696</sup> Frontex, in turn, deploys Standing Corps members with full executive authority, including the power to use force and firearms, in joint operations at the external borders.<sup>697</sup> The case for a stringent liability regime is accordingly stronger for Frontex than it is for Europol: the more expansive the executive powers actually exercised on the ground, the more robust the accountability regime must be.<sup>698</sup> Moreover, the word “shared” in Article 7(1) of the EBCG Regulation already points in the direction of joint responsibility: where two or more actors share responsibility for implementing a common framework, the natural reading of that shared obligation is one of joint and several liability, under which each actor answers for the collectively produced outcome.<sup>699</sup>

**The very structure of the remedy is ill suited to prevent death or *refoulement* in the first place**

<sup>693</sup> Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, OJ L 135, 24.5.2016, pp. 53–114, Recital 57).

<sup>694</sup> Case C-755/21 P, *Kočner v European Union Agency for Law Enforcement Cooperation (Europol)*, judgment of 5 March 2024 (Grand Chamber).

<sup>695</sup> Case C-755/21 P, paras. 80–81.

<sup>696</sup> Europol Regulation, Article 5(1).

<sup>697</sup> EBCG Regulation, Article 40.

<sup>698</sup> Interview with Dr. Ana Bobić, Senior Researcher at Jacques Delors Centre, the Hertie School (Berlin).

<sup>699</sup> Interview with Dr. Ana Bobić, Senior Researcher at Jacques Delors Centre, the Hertie School.



## 7.2 JUDICIAL AVENUES

The accountability gaps identified in the preceding section are not solvable through the ordinary operation of the EU system of judicial remedies. On the contrary, the structural features that make shared responsibility analytically elusive translate directly into procedural obstacles that have so far made Frontex effectively immune from judicial scrutiny in practice. Recent developments before the **CJEU**, notably in *WS and Others v. Frontex*<sup>700</sup> and *Hamoudi v. Frontex*,<sup>701</sup> may alter this picture, at least partially, depending on the outcome of the General Court’s reassessment of those cases in light of the CJEU rulings.

The action for annulment established under Article 263 TFEU might seem the most intuitive avenue to address action by the Agency that is incompatible with fundamental rights, but there are serious procedural difficulties that are not easy to overcome. This requires, as a threshold matter, the existence of an “act” that is “intended to produce [binding] legal effects vis-à-vis third parties”, capable of affecting the applicant’s legal position. Frontex’s conduct in joint operations does not ordinarily take that form. When implementing EIBM, the Agency usually does not issue decisions addressed to individuals, nor does it formally adopt any “acts” that can be interpreted as producing, let alone be taken as “intended to produce”, legally binding effects. Most of the Agency’s conduct is factual, procedural, and oftentimes informal. It coordinates, funds, and supports operations whose visible actors on the ground are mostly the border guards and officials of the Member States.<sup>702</sup> The individual who has been pushed back, intercepted at sea, or subjected to a return operation carried out in the absence of a valid return decision cannot point to a Frontex measure taking the form of a legal document that was directed at them, that was “intended to produce” identifiable legal effects on their position, and that satisfies the conditions of direct and individual concern required under the Court’s established case law. This was originally required in *Plaumann*,<sup>703</sup> and subsequently codified in the Lisbon Treaty.<sup>704</sup> Additionally, the legal requirements imposed on individuals as non-privileged applicants under Article 263(4) TFEU, which demand that the s/he be distinguished from all other persons by reason of attributes peculiarly their own, are singularly ill-suited to the collective nature of border management operations, where the harm suffered is precisely the product of general operational practices rather than a measure specifically addressed to the injured party. There is, in short, no identifiable singular “act” to annul under the terms of Article 263 TFEU.

<sup>700</sup> Case C-679/23 P, *WS and Others v European Border and Coast Guard Agency*, ECLI:EU:C:2025:976.

<sup>701</sup> Case C-136/24 P, *Alaa Hamoudi v European Border and Coast Guard Agency*, ECLI:EU:C:2025:977.

<sup>702</sup> EBCG Regulation, Article 10.

<sup>703</sup> Case 25-62, *Plaumann & Co. v Commission of the European Economic Community*, ECLI:EU:C:1963:17.

<sup>704</sup> Art 263(4) TFEU.

There is, however, a procedural opening that has not yet been explored in the context under analysis. In the past, the **General Court** has examined the merits of an action without first ruling on the admissibility of the claim, where doing so was justified by the interests of the proper administration of justice.<sup>705</sup> In *Latombe v. Commission*,<sup>706</sup> the General Court applied this principle to dismiss an action for annulment on the merits without deciding whether the applicant had standing under Article 263(4) TFEU, leaving the admissibility question open.<sup>707</sup> Transposed to the current analysis, this approach could allow the General Court to reach the substance of a case involving alleged fundamental rights violations in the course of a Frontex-coordinated operation even where the applicant's standing is doubtful under the *Plaumann* test, provided the merits are sufficiently clear to permit a determination in the interests of justice and effective protection. This would not resolve the structural standing problem, but it would prevent that problem from operating as an absolute procedural bar in cases where the gravity of the alleged violation and the quality of the evidence make substantive examination both possible and warranted.

The failure to act route under Article 265 TFEU was tested in *SS and ST v. Frontex*,<sup>708</sup> in which the applicants sought to trigger Article 46 powers to suspend or terminate joint operations in the Aegean Sea in response to alleged systemic and systematic fundamental rights violations. The action failed. In dismissing it, the General Court suggested that an action for annulment under Article 263 TFEU might, in principle, be available to challenge Frontex's refusal to suspend or terminate the operation. However, this alternative avenue leads, as just shown, to the same dead end.<sup>709</sup> The action for failure to act collapsed against the legal architecture of Article 46 itself: a provision that confers unfettered discretion to the Executive Director.

This leaves non-contractual liability under Articles 268 and 340(2) TFEU as the primary and, as the Grand Chamber of the **CJEU** itself observed in *Hamoudi*, potentially the "only" avenue capable of ensuring judicial protection before the EU courts against Frontex.<sup>710</sup> The Court's acknowledgement is significant as it finds that the entire weight of judicial accountability for such a powerful Agency, deploying thousands of personnel with executive powers and across multiple jurisdictions, coordinating operations with irreversible consequences for fundamental rights, bearing and using lethal weapons against individuals,<sup>711</sup> rests on a single *ex post* remedy with no preventative capacity. An individual who has survived a pushback, been subjected to a return operation without a valid return decision, or been exposed to ill treatment in the course of a Frontex-coordinated operation can, following *Hamoudi* and *WS*, bring an action for damages. Those who

<sup>705</sup> Case C-23/00 P, *Council v Boehringer Ingelheim Vetmedica GmbH and C.H. Boehringer Sohn*, EU:C:2002:118, paras 51–52, pointed out in Interview with Dr. Ana Bobić, Senior Researcher at Jacques Delors Centre, the Hertie School.

<sup>706</sup> Case T-553/23, *Philippe Latombe v. European Commission*, EU:T:2025:831.

<sup>707</sup> Case T-553/23, para. 15.

<sup>708</sup> T-282/21, *SS and ST v Frontex*, ECLI identifier: ECLI:EU:T:2022:235.

<sup>709</sup> T-282/21, para. 33.

<sup>710</sup> C-136/24 P, *Hamoudi*, para. 103.

<sup>711</sup> Zach Campbell, 'Over the Line: Bulgaria Welcomes Refugees With Attack Dogs and Beatings', *The Intercept*, 2016; see also: *Alkhatib and Others v Greece*, App No 3566/16 on the violation of Article 2 ECHR (Greece was found guilty of fatal shooting of a passenger by Greek Coast Guard fire during a sea border operation near Pserimos, in the course of Joint Operation Poseidon); *Safi and Others v Greece*, App No 5418/15 on the violations of Articles 2 and 3 ECHR (Greece was found guilty of sinking of a boat carrying 27 migrants near Farmakonisi resulting in the death of 11 people, including 8 children and 3 women, during a Greek Coast Guard operation); *Almukhlaf and Al-Maliki v Greece*, App No 22776/18, on the violation of Article 2 ECHR (Greece was found guilty of the killing of a 17-year-old Iraqi national on a yacht carrying 94 migrants near Symi, during an operation involving both Frontex and the Greek Coast Guard under Joint Operation Poseidon); see also the Final SIR Report 3125/2023.

do not survive cannot, though their families may possibly do so in their behalf, if they can access the necessary facilities. This, however, changes nothing about the fundamental limitation of the remedy. The very structure of the remedy is ill suited to prevent death or *refoulement* in the first place. Designed as an *ex-post* remedy, the action for damages actually *requires* the occurrence of (potentially irreversible) harm *before* it can be activated.

The inadequacy of this position is not merely practical but principled. This is why the **SHARED Guidelines** have called for the effective allocation of *ex post* shared responsibility to address situations of breach of obligations, and for the clarification of rules regarding legal accountability, effective remedies, and individual judicial protection by the Commission and the Management Board.<sup>712</sup> The Guidelines further insist that redress avenues for fundamental rights violations in relation to all types of joint interventions need to be clearly designated and made accessible to potential victims, emphasising the need to provide for effective remedies capable of avoiding potentially irreversible harm *before* it occurs.<sup>713</sup> The Guidelines also call for existing limits to be lifted and conditions simplified to make EU and domestic remedies genuinely accessible, including through guarantees of legal representation, interpretation services, and information about rights and obligations within the relevant procedures.<sup>714</sup> Where the EU system does not provide for effective legal protection, the Guidelines call on national judicial mechanisms to play a gap-filling role, in light of the principles of effectiveness and equivalence of domestic remedies and on the basis of Articles 19(1) TEU and 41 and 47 CFR.<sup>715</sup> Read against the remedial landscape mapped above, these recommendations are a clear acknowledgement that the current system falls short: the EU legal order, as currently configured, does not provide effective judicial protection for individuals harmed in the context of shared border management operations.

The *ex-post* character of non-contractual liability is particularly problematic when considered against the rights most frequently at stake in Frontex-coordinated operations. The **European Court of Human Rights**<sup>716</sup> and the **UN Human Rights Committee**<sup>717</sup> have held that monetary compensation alone cannot constitute an effective remedy for violations of absolute rights, such as the prohibition of *refoulement* under Article 19(2) CFR, the prohibition of inhuman or degrading treatment under Article 4 CFR, and the right to asylum under Article 18 CFR. These rights are absolute precisely because their violation causes irreparable harm that no subsequent award can undo: no financial compensation restores the position of a person returned to persecution, nor does it remedy the dignity violated as a result of ill treatment during a forced removal operation, nor can it address the loss suffered by those who perish and reach no court at all.

<sup>712</sup> SHARED Guideline 102.

<sup>713</sup> ECtHR, *Gebremedhin v France*, App No 25389/05, para. 66 (holding that where a person faces a real risk of treatment contrary to Article 3 ECHR upon removal, Article 13 requires a remedy with automatic suspensive effect); ECtHR, *Hirsi Jamaa and Others v Italy*, App No 27765/09, Grand Chamber, paras. 200–207 (finding a violation of Article 13 read in conjunction with Articles 3 and 4 of Protocol No. 4, on the ground that the applicants had no effective remedy available to them before their removal was carried out).

<sup>714</sup> SHARED Guidelines 105–108.

<sup>715</sup> SHARED Guideline 109.

<sup>716</sup> App nos. 42525/07 and 60800/08, *Ananyev and Others v Russia*, Judgment, 10 January 2012, para. 98; see also: App no. 30210/96, *Kudła v Poland*, Judgment (GC), 26 October 2000, paras. 158–159; App. no 51564/99, *Conka v Belgium*, Judgment, 5 February 2002, paras. 79–83.

<sup>717</sup> UN Human Rights Committee (HRC), General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004, paras. 15–16;

The burden of proof problem that the **CJEU** addressed in *Hamoudi* is a further dimension of the same structural inadequacy of the current remedial regime. Before that ruling, the evidentiary asymmetry between Frontex, with full access to classified operational records, incident reports, serious incident reports, and the individual applicant, who typically lacks access to any of this material, rendered actions for damages practically impossible to pursue, even where the substantive conditions for liability were met. The Grand Chamber's holdings that *prima facie* evidence is sufficient to shift the burden of proof to Frontex, that the General Court must exercise its investigative powers proactively, and that the Agency bears a positive duty to cooperate with judicial proceedings by disclosing all relevant documentation, are direct responses to a structural information asymmetry that the EBCG Regulation produces by design.<sup>718</sup> The practical reach of these holdings depends, however, on how stringently the *prima facie* standard will be interpreted in subsequent cases. The evidence presented in *Hamoudi* was exceptional: the applicant could rely on video material documenting the pushback, corroborating press reporting, and an OLAF report referring to the same incident.<sup>719</sup> Few victims of border operations will have access to comparable documentation. If courts require a similarly dense evidentiary foundation before shifting the burden of proof, the standard risks producing a new form of *probatio diabolica*, effectively displacing rather than resolving the asymmetry the Court set out to address. The *prima facie* threshold must therefore be interpreted in a manner consistent with the structural constraints faced by applicants in this context, taking into account that the very opacity of Frontex operations is what makes independent evidence so difficult to obtain. The assessment of what constitutes sufficient *prima facie* evidence will necessarily be case by case, but the judges in the *Hamoudi* hearing took a clear stance: the evidentiary standard cannot be calibrated to what a well-resourced litigant in stable conditions could reasonably produce.<sup>720</sup>

**The evidentiary standard cannot be calibrated to what a well-resourced litigant in stable conditions could reasonably produce**

An additional (and so far largely unexplored procedural tool) is available to address the evidentiary asymmetry at the level of judicial procedure itself. Both the Court of Justice and the General Court have explicit powers under their Rules of Procedure to order measures of inquiry, including the appointment of experts, the hearing of witnesses, and the organisation of dedicated fact-finding hearings on matters of evidence prior to the legal argument stage.<sup>721</sup> Such measure could be activated at the request of the parties, or by the Court on its own motion, to address the specific evidentiary constraints that characterise border management litigation: the Court could, for example, request Frontex to produce all operational documentation concerning a specific incident, or invite investigative journalists, NGOs with documented field presence, or national human rights institutions to participate as sources of factual context.<sup>722</sup> There is a further argument that

<sup>718</sup> C-136/24 P, *Hamoudi*, paras. 106, 129-133.

<sup>719</sup> Case C-136/24 P, *Hamoudi*, para. 149; Violeta Moreno-Lax, "Introduction", ELO Special Issue (forthcoming).

<sup>720</sup> Interview with Dr. Ana Bobić, Senior Researcher at Jacques Delors Centre, the Hertie School.

<sup>721</sup> Rules of Procedure of the CJEU, OJ L 265, 29.9.2012, p. 1, Article 64; Rules of Procedure of the General Court, OJ L 105, 23.4.2015, p. 1, Article 91; Case C-411/10, *NS v Secretary of State for the Home Department*, EU:C:2011:865.

<sup>722</sup> Rules of Procedure of the CJEU, OJ L 265, 29.9.2012, p. 1, Article 64; Rules of Procedure of the

where absolute rights are at stake and the applicant demonstrates a serious likelihood that the *prima facie* threshold is met, the power to order measures of inquiry may become an obligation rather than a discretion, analogous to the logic by which the Court in *NS* converted a sovereign option into a duty where fundamental rights precluded its non-exercise.<sup>723</sup> The General Court, which has significantly expanded its capacity following the doubling of its judges, is well placed institutionally to make use of these powers in a systematic way in cases involving Frontex-coordinated operations.<sup>724</sup>

In this sense, *Hamoudi* adjusts a procedural rule, it acknowledges that the evidentiary consequences of operational opacity should not be allowed to defeat the right to an effective remedy, but if it does not resolve the problem entirely. The **SHARED Guidelines** reach the same conclusion from a different direction, proposing that once *prima facie* evidence has been submitted, the burden of proof should shift to the co-perpetrators automatically,<sup>725</sup> who must then demonstrate that they were not jointly responsible, a standard that the Court in *Hamoudi* has now effectively endorsed at the level of EU judicial practice.

The Guidelines have further proposed that the CJEU reassess its existing test for EU liability in a way that accounts for shared responsibility meaningfully and is reflective of the enmeshed nature of multi-actor collaboration in joint operations. To that end, they point to *Kočner v. Europol* as a model that addresses the attribution and causation difficulties inherent in "many hands" environments, inviting the Court to extend the "joint and several responsibility" reading in that ruling to the framework of Frontex-coordinated interventions.<sup>726</sup> Under a joint and several responsibility regime, each actor is responsible for the collective outcome and individually required to make full reparation to the victim if requested. The injured party may accordingly bring a claim against any one of the responsible actors for the entirety of the harm endured as a result of their wrongful conduct taken as a whole, without having to disentangle the respective contributions of each one of them to the unlawful outcome. The prohibition of double recovery is preserved, and the actor who has provided reparation retains a right of recourse against the other responsible actors for an equitable distribution of liability.<sup>727</sup> Transposed to the Frontex operations, this would mean that a victim of a pushback or unlawful return operation conducted jointly by Frontex and a Member State could sue either actor for the full harm suffered, leaving the apportionment of responsibility between them to be resolved internally. The proposal invites the Court to read Article 7 of the EBCG Regulation in a manner that produces that result, extending the joint and several responsibility logic of *Kočner* to the shared responsibility framework of Frontex-coordinated interventions.

The proposal is directly responsive to the gap that *WS* has only partially closed. What the Grand Chamber's concurrent liability framework does not yet resolve is the causal link problem: in a system of layered, composite, and operationally opaque decision-making, demonstrating that a specific harm resulted from a specific act or omission attributable to Frontex rather than, or in addition to, the Member State concerned remains extraordinarily difficult. The model proposed by the Guidelines offers a more promising avenue for finding proper accountability.

General Court, OJ L 105, 23.4.2015, p. 1, Article 91; Case C-411/10, *NS v Secretary of State for the Home Department*, EU:C:2011:865.

<sup>723</sup> Case C-411/10, *NS v Secretary of State for the Home Department*, EU:C:2011:865; i

<sup>724</sup> Interview with Dr. Ana Bobić, Senior Researcher at Jacques Delors Centre, the Hertie School.

<sup>725</sup> SHARED Guideline 110.

<sup>726</sup> SHARED Guidelines 110-112; C-755/21 P, *Kočner v Europol*, ECLI:EU:C:2024:202

<sup>727</sup> SHARED Guideline 12.

Overall, the picture that emerges from the remedial architecture available to contest Frontex conduct is one of significant but incomplete progress. The Grand Chamber rulings in *Hamoudi* and *WS* dismantle some key barriers that have long rendered the promise of accountability theoretical, and they do so at the level of principle: establishing that Frontex has autonomous obligations under EU law, that those obligations are judicially enforceable, and that evidentiary asymmetries should not be permitted to defeat arguable claims. What they do not and cannot do, within the framework of ex post non-contractual liability, is ensure that violations are prevented rather than compensated. A comprehensive system of judicial protection,<sup>728</sup> adequate to the nature of the rights at stake, requires both dimensions: ex post remedies that are genuinely accessible in law and in practice, and ex ante mechanisms capable of enabling real-time judicial scrutiny of operations before irreversible harm occurs. The EU legal order has, with *Hamoudi* and *WS*, taken a decisive first step toward the former. But the latter remains unaddressed, and, unless a profound re-interpretation of the requirements of Articles 263 and 265 TFEU takes place, are structurally out of reach.

**The Grand Chamber rulings in *Hamoudi* and *WS* dismantle some key barriers that have long rendered the promise of accountability theoretical.**

The question of whether domestic courts could play a more substantial role has been so far overlooked. Article 98 of the EBCG Regulation, which confers jurisdiction on the CJEU for non-contractual liability claims against the Agency, does not by its terms exhaust all possible judicial avenues before national courts: it addresses a specific category of claims and does not establish a general exclusion of national jurisdiction over all aspects of Frontex's conduct.<sup>729</sup> Both the European Public Prosecutor Office (EPPO) and the European Central Bank (ECB) operate substantially through national legal frameworks and are regularly parties in national proceedings, with cases arising in that context reaching the CJEU by way of preliminary reference rather than direct action.<sup>730</sup> The EPPO, for instance, has been a party in national criminal proceedings in Austria and Spain, generating key references to the CJEU on the interpretation of the EPPO Regulation.<sup>731</sup> The connecting principle is that where an EU body works with national law, it should be subject to national courts in relation to that engagement. Frontex, too, works with national law in multiple respects: civil liability of team members in the host Member State is explicitly governed by the law of that State under Article 84 of the EBCG Regulation; criminal liability of deployed staff falls under national law under Article 85; and the Agency operates under the instructions of host Member States in ways that engage national legal frameworks.<sup>732</sup> Protocol No 7 on the Privileges and Immunities of the European Union, sometimes cited as a comprehensive immunity shield, does not in fact exclude national criminal jurisdiction over conduct falling outside the exercise of official functions: it establishes fiscal and certain procedural privileges, but does not confer

<sup>728</sup> Case 294/83, *Parti écologiste "Les Verts" v European Parliament*, ECLI:EU:C:1986:166; Case C-64/16, *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*, ECLI:EU:C:2018:117.

<sup>729</sup> EBCG Regulation, Articles 84 and 85; Protocol No 7 on the Privileges and Immunities of the European Union, OJ C 202, 7.6.2016, p. 266; Interview with Dr. Ana Bobić, Senior Researcher at Jacques Delors Centre, the Hertie School.

<sup>730</sup> See for example: Case C-281/22, *GK and Others (Parquet européen)*, EU:C:2023:1033; Case C-292/23, *EPPO v IRO and FJLR*, ECLI:EU:C:2025:255.

<sup>731</sup> Case C-281/22; Case C-292/23.

<sup>732</sup> EBCG Regulation, Articles 84 and 85.

blanket immunity from national law as a whole.<sup>733</sup> The example of Frontex's former Executive Director being subject to French criminal jurisdiction is a concrete illustration that national courts can and do exercise jurisdiction over conduct connected to Frontex operations, even at the level of its most senior official.<sup>734</sup> This suggests that the remedial landscape at national level is more open than the current text appears to imply, and that the forthcoming revision should explicitly clarify the relationship between Article 98 and national jurisdiction rather than leaving it to ad hoc litigation to resolve.

To confront this issue, the **SHARED Guidelines** have called for a due diligence procedure governing the activation of Article 46 that would incorporate input from the FRO, the Consultative Forum, and FRA, and would establish specific accountability measures for the Executive Director including, in cases of grave and persistent violations, dismissal for refusing to trigger suspension in defiance of the advice received.<sup>735</sup>

Two further procedural reforms deserve consideration in the context of improving the accessibility and effectiveness of judicial protection against Frontex. The first concerns urgency. The current procedural framework provides no dedicated fast-track mechanism for direct actions before the **General Court** in cases involving Frontex, despite the fact that the rights most frequently at stake, including the right to life, the prohibition of torture, and the right not to be returned to persecution, are absolute rights whose violation is by definition irreversible. The urgent preliminary reference procedure (PPU) allows the **CJEU** to react rapidly when the nature of the rights at stake demands it.<sup>736</sup> Under this procedure, stricter deadlines apply and judges must be available anytime if necessary.<sup>737</sup> An analogous urgency track for direct actions against Frontex before the General Court should be considered as part of the forthcoming reform, enabling expedited treatment of cases where the applicant faces an imminent and irreversible risk.<sup>738</sup> The General Court's accelerated procedure, established under Article 151 of its Rules of Procedure, is insufficient for this purpose: it does not impose binding deadlines and functions primarily as a workload prioritisation mechanism rather than a genuine procedural acceleration, meaning that no strict timetable guarantees resolution within a defined period.<sup>739</sup> A dedicated urgency procedure with binding timelines, analogous to the PPU, would require either a targeted amendment to the Statute of the Court of Justice of the European Union or an amendment to the Rules of Procedure of the General Court, both of which are achievable without Treaty revision.<sup>740</sup>

<sup>733</sup> Interview with Dr. Ana Bobić, Senior Researcher at Jacques Delors Centre, the Hertie School.

<sup>734</sup> Interview with EU civil servant 3.

<sup>735</sup> SHARED Guidelines 93-94.

<sup>736</sup> Council Decision 2008/79/EC of 20 January 2008 amending the Protocol on the Statute of the CJEU, OJ L 24, 29.1.2008, p. 42; Protocol on the Statute of the Court of Justice of the European Union, OJ C 202, 7.6.2016, p. 210, Article 23a; Rules of Procedure of the Court of Justice, OJ L 265, 29.9.2012, p. 1, Title III (Articles 107-114); Rules of Procedure of the General Court, OJ L 105, 23.4.2015, p. 1, Article 151.

<sup>737</sup> Interview with Dr. Ana Bobić, Senior Researcher at Jacques Delors Centre, the Hertie School.

<sup>738</sup> Interview with Dr. Ana Bobić, Senior Researcher at Jacques Delors Centre, the Hertie School.

<sup>739</sup> Rules of Procedure of the General Court, Article 151; Interview with Dr. Ana Bobić, Senior Researcher at Jacques Delors Centre, the Hertie School.

<sup>740</sup> Interview with Dr. Ana Bobić, Senior Researcher at Jacques Delors Centre, the Hertie School.



# RECOMMENDATIONS

## 1. GOVERNANCE AND CHAIN OF COMMAND: CLARIFYING THE RESPONSIBILITY REGIME

- The EBCG Regulation should be reviewed to impose a mandatory duty on both Frontex and the competent national authorities to define, in advance of any operational deployment, the specific responsibilities of each actor at each stage of the operation: border surveillance, interception, screening, SAR response, return activities, and any other function falling within EIBM. This **pre-operational duty allocation** must be a pre-requisite to Frontex's participation in any capacity, be it operational or facilitative of border controls, and cannot be left to the discretion of the parties negotiating an operational plan. The new Regulation should establish a legislative template specifying the minimum content of this allocation. This should include the identity of the authority responsible for issuing instructions at each operational phase, the official designated as responsible for fundamental rights compliance at each stage, and the procedure applicable when an instruction conflicts with the operational plan or with fundamental rights obligations. Overall, responsibility must be determined *before* deployment, not contested ad hoc after a violation has occurred.
- Article 7(4) should be substantively redrafted to move beyond the current unworkable distinction between "shared" and "sole" responsibility, which provides no criteria for drawing the line between the two categories. Two complementary reforms are needed. First, the new Regulation should introduce a **clear model of responsibility of the EBCG, drawing on the framework in the Europol Regulation, which establishes joint and several liability as the default rule** in situations of joint controllership of personal data. Embedding and generalizing this model would entitle any individual harmed in the course of a Frontex-coordinated operation to seek full reparation from any of the actors involved, avoiding situations of impunity. Second, and equally importantly, the Regulation should specify the consequences that follow from a breach of the pre-operational duty allocation. These consequences should operate at multiple levels: at the individual level, personal disciplinary liability should attach to the official who failed to discharge a pre-allocated responsibility, with mandatory suspension of his/her functions and automatic reporting to the relevant national authority or, in the case of Agency staff, to the Executive Director; at the operational level, a documented and unaddressed breach by a Member State should trigger suspension of financing and operational support under Article 46.
- **The legal status, powers and responsibilities of the Coordinating Officer (CO) should be clarified and strengthened** in line with this framework. The new Regulation should specify that the CO's instructions on fundamental rights compliance within the allocated responsibility framework are binding on all participants, including national border guards; that the CO is empowered and obliged to act of their own initiative, including by halting a specific operational action, where immediate and irreversible harm to an individual is foreseeable.
- **The command-and-control structures of the Standing Corps** should be brought within this same framework. The new Regulation should establish clear hierarchical reporting obligations running from each Standing Corps member to the CO, and from the CO to the Executive Director, with mandatory response procedures and timelines. Standing Corps deployment must be conditional on the prior adoption of an operational plan that complies with the duty allocation requirements described above. Where no such plan has been adopted, or where the plan fails to meet the minimum legislative template, deployment may not lawfully proceed.
- **The governance framework should further establish an explicit connection between disciplinary proceedings and the operational responsibility chain.** Where a fundamental rights violation occurs in the course of a Frontex-coordinated activity, the outcome of any

disciplinary investigation triggered by that violation should be transmitted to the FRO, included in the SIR record, and made available to affected individuals or their legal representatives upon request, so that the findings of internal proceedings can serve as accessible evidence in subsequent judicial proceedings before the CJEU or national courts.<sup>741</sup> Member State representatives sitting on the Management Board should bear an explicit institutional responsibility for ensuring that their national authorities cooperate with FRO investigations and follow up on SIR findings, so that accountability at Agency level and accountability at national level are formally connected rather than operating in parallel tracks and without consequence.<sup>742</sup>

<sup>741</sup> Interview with EU civil servant 3.

<sup>742</sup> Interview with EU civil servant 4.

## 2. OPERATIONAL PLANS: TRANSPARENCY AND DISCLOSURE

- For alignment with Article 41 CFR requirements and to enable the effective exercise of remedies under Article 47 CFR, the new Regulation should establish **transparency as the default rule for operational plans**, with confidentiality as a narrow exception requiring specific and proportionate justification. The new Regulation should provide that the chain of command, the pre-operational duty allocation established under Recommendation 1, the identity and responsibilities of the Coordinating Officer, and the fundamental rights procedures applicable to the operation should be disclosed at the launch of any Frontex-coordinated activity. Disclosure of this information does not per se jeopardise operational effectiveness: the EU Ombudsman and the European Parliament have confirmed this. The public security exception under Regulation (EU) 1049/2001 should not be applied to information concerning the distribution of responsibilities between Frontex and national authorities, since this information is essential for the effective exercise of the right to an effective remedy under Article 47 CFR and the right to good administration under Article 41 CFR.
- The new Regulation should further **specify the minimum content of operational plans** in greater detail than the current Article 38 provides. It should make compliance with that minimum content a condition for the lawful launch of any operation. In particular, operational plans should be required to include: a detailed description of the responsibilities of each participant at each operational phase, in conformity with the legislative template established under the reformed Article 7; the identification and functions of the Coordinating Officer and of the border officers deployed; the procedures applicable to persons in need of international protection or in vulnerable situations, including unaccompanied minors; clear provisions governing the response to maritime emergencies, including the specific steps to be taken upon detection of a distress situation, the conditions under which a Mayday relay should be issued in line with SAR and SOLAS Convention standards, and the role of the Coordinating Officer in SAR coordination; the allocation of SAR responsibilities between the host Member State, participating Member States, and Frontex, with reference to the applicable national and international legal framework; the complaint procedures available to individuals, in languages they can understand; and the consequences of non-compliance, including the disciplinary measures applicable to individual officials and the criminal liability mechanisms applicable to perpetrators of fundamental rights violations.

- Compliance with these minimum content requirements should be a condition for the lawful launch, continuation, and financing of any operation. Where an operational plan fails to meet the minimum legislative template, the Executive Director should be prohibited from authorising deployment. Where non-compliance is identified during an ongoing operation, the Coordinating Officer should be required to flag it immediately to the FRO, and the failure to remedy it within a specified short deadline should constitute a ground for suspension of operational support under Article 46. The FSWG concluded – and the European Parliament formally endorsed this position – **that non-compliance with operational plan conditions related to fundamental rights safeguards should have serious consequences**, including suspension of the funding of certain projects, national assets, or personnel of the host Member State.<sup>743</sup>
- The EU Ombudsperson recommended that Frontex **publish detailed specifications of the distribution of responsibilities across different categories of operational participants**, including information currently contained in handbooks and codes of conduct. The new Regulation should make this a mandatory requirement and should specify that such specifications be published at the commencement of an operation and updated where changes to the chain of command or task allocation occur during its course.
- Operational plans for joint maritime operations should additionally include as mandatory elements: provisions specifying the **conditions governing the use of surveillance equipment**, including detection infrastructure, such as cameras and drones, and the consequences of non-compliance to SAR duties; the obligations of each actor upon the detection of a SAR-relevant event, including where EUROSUR data indicates a vessel in distress; and the procedure for the real-time involvement of fundamental rights monitors in serious maritime incidents. The provision of EUROSUR aerial surveillance services should be made explicitly conditional on Member States' full cooperation in SAR operations and their compliance with fundamental rights obligations.
- Finally, where an affected individual or their legal representative requests **access to the operational plan so as to exercise the right to effective remedies and judicial protection**, the new Regulation should establish disclosure as default, with any refusal subject to independent review. The new Regulation should provide that refusals of access to operational plan information relevant to an individual's claim are subject to review by an independent body, distinct from Frontex, with the power to order disclosure.
- The new Regulation should further establish **a dedicated channel for the European Parliament to access operational plans**, including those relating to ongoing operations, subject only to the security rules applicable to classified information shared with Parliament under the interinstitutional framework. This access should be made available to the dedicated EBCG scrutiny structure proposed in Recommendation 6 and should not be conditional on a specific access to documents request or subject to the ordinary exceptions applicable under Regulation (EU) 1049/2001.<sup>744</sup>
- The new Regulation should close the structural gap that currently allows host Member States to deploy nationally funded assets within the same joint operational area as Frontex, while placing those assets outside the FRO's and FRMs' monitoring reach. **The FRO's and FRMs' oversight mandate should extend to all assets and activities occurring within the operational area**, regardless of how they are financed. Operational plans should accordingly include as a binding condition that the FRO and FRMs have unrestricted access to all assets,

relevant information, and all parts of the operational area. Where a Member State refuses such access, or instructs monitoring personnel to leave or avoid a part of the operational area, the Coordinating Officer should be empowered and obliged to report this immediately through the SIR mechanism and to the FRO, and such refusal should constitute a ground for suspension of operational support under Article 46.<sup>745</sup>

<sup>745</sup> FSWG Final Report, 14 July 2021, section 3.A, pp. 7–8; European Parliament resolution of 14 December 2023, P9\_TA(2023)0483.

### 3. OBLIGATIONS AT SEA AND IN RETURNS

#### Search and Rescue

- Frontex has consistently maintained that it bears no direct SAR obligations and that its activities in this field can only take place in cooperation with Member States. This interpretation is incompatible with the applicable legal framework. The Agency is expressly tasked under the EBCG Regulation with providing technical and operational assistance to Member States and third countries in SAR situations arising in the context of border surveillance operations it coordinates. EUROSUR ensures that the Agency receives, on a near real-time basis, situational information about events unfolding at the external borders, including distress situations. The obligation to initiate SAR operations once a distress situation becomes known is established by UNCLOS, the SAR Convention, the SOLAS Convention, and the Sea Borders Regulation. **The new Regulation should make explicit that Frontex bears direct and autonomous SAR obligations wherever it coordinates operations in which a distress situation arises**, specifying the steps to be adopted to preserve human life at sea, irrespective of whether a Member State has concurrent duties and/or has separately assumed responsibility for SAR coordination in the relevant zone.
- The new Regulation should further provide **that the Agency's cooperation with third countries in the context of border control and SAR activities be made strictly conditional on compliance with international and EU law**, including the prohibition of *refoulement*, the right to leave any country including one's own, the right to asylum, and the requirement to disembark rescued persons in a place of safety, where they do not face a real risk of persecution or ill treatment and can access international protection – which, for the time being, can only be guaranteed on EU soil. Cooperation with authorities that systematically return rescued individuals to countries where they face persecution, arbitrary detention, torture, or other forms of abuse is prohibited.
- The new Regulation should establish **a mandatory human rights assessment by the FRO in consultation with the Consultative Forum of any cooperation arrangement with a third country before its conclusion or renewal**. This should be carried out through an independent procedure, which may conclude that cooperation cannot lawfully proceed where there are foreseeable risks of *refoulement* or ill-treatment or where access to asylum cannot be effectively guaranteed in law and in practice.
- Given their contribution to the fulfilment of States' international obligations to render assistance to persons in distress at sea, the new Regulation should **explicitly recognise the role of SAR NGOs, establish the specific protocols of collaboration with them, and prohibit the use of Frontex-coordinated activities or Frontex-funded resources to obstruct, restrict, or penalise their operations**.

<sup>743</sup> FSWG Final Report, 14 July 2021, section 3.A; European Parliament resolution, P9\_TA(2023)0483.

<sup>744</sup> Interinstitutional Agreement of 12 March 2014 between the European Parliament and the Council concerning the forwarding and handling of classified information, OJ C 95/1, 1 April 2014; EBCG Regulation, Article 92(3).

## Returns

- In the context of return operations, monitoring is not carried out by a sufficiently independent entity: The FRA has long recommended assigning responsibility for the pool of forced-return monitors currently managed by Frontex to an independent body. The new Regulation should implement this recommendation by **establishing a genuinely independent forced-return monitoring mechanism, structurally and operationally separate from Frontex**, with a mandate covering all return operations in which the Agency is involved, whether as coordinator or as operational participant.
- The proposed creation of “return hubs” in third countries, under which individuals would be detained pending implementation of their return orders, raises fundamental rights concerns of an entirely different magnitude from those arising in the context of ordinary third country cooperation. None of the third countries currently being considered as potential hosts of return hubs in the Maghreb or the Balkans offers access to protection equivalent to that available under the EU *acquis*. Since Frontex remains bound by the CFR wherever it acts, the Agency’s participation in return hub operations would, in the overwhelming majority of foreseeable scenarios, place it in direct and irresolvable conflict with its own fundamental rights obligations, including the prohibition of *refoulement*, the prohibition of collective expulsion, and the requirement to ensure access to effective remedies. The concern is not merely theoretical: the CJEU has now established that Frontex bears a positive obligation to verify the existence and lawfulness of return decisions before proceeding with operational arrangements, and that it cannot shelter behind the principle of sincere cooperation to avoid accountability for participation in unlawful returns.<sup>746</sup> In the context of return hubs, where individuals are detained in a third country outside the EU legal order, that verification obligation cannot in practice be discharged, as neither the legal framework of the host country nor the operational conditions of the hub provide the institutional guarantees necessary to ensure compliance. The same applies, with even greater force, to third-country-to-third-country transfers, under which individuals would be moved from one third country to another entirely outside EU territory, under bilateral agreements or arrangements that are subject to no EU fundamental rights scrutiny and no judicial review by any Member State court. The new Regulation should accordingly **deny Frontex participation in return hub operations and third-country-to-third-country transfers**. Where the co-legislators nonetheless determine that a legal framework for such participation must be established, that framework must at minimum require: an independent and binding ex ante assessment by the FRO, confirming that the third country’s legal framework and enforcement practices provide safeguards equivalent to those required under EU law, including effective protection against *refoulement* and collective expulsion and effective access to asylum; those safeguards being expressly incorporated into a legally binding and individually enforceable agreement between the EU and the third country concerned, as per Article 218 TFEU; an independent monitoring mechanism with unrestricted access to the hub being operational before Frontex support commences; and individual remedies being available, accessible in law and in practice, to affected persons to contest their transfer before it takes place, through judicial appeals with automatic suspensive effect. Where these conditions are not met in full, Frontex should be prohibited from providing any form of operational or financial support to return hub activities or third-country-to-third-country transfer operations.
- Finally, **the new Regulation should address the persistent gap in the scope of return monitoring**. In 2024, no return operations were monitored in five Member States, while in a further seven Member States fewer than ten operations were subject to monitoring. The new

<sup>746</sup> Case C-679/23 P, *WS and Others v. Frontex*, EU:C:2025:976.

Regulation should streamline monitoring mechanisms, establishing them as a pre-condition for Member State eligibility for Frontex operational and financial support in the field of returns, requiring the Commission to report annually to the European Parliament on compliance with this requirement and establishing clear consequences for non-compliance, including the automatic withdrawal of Frontex support.

## 4. COOPERATION WITH THIRD COUNTRIES

### *Legal instruments and the prohibition of informal cooperation*

- The current framework allows Frontex to cooperate with third countries, which the Agency has established primarily through four instruments: STATUS AGREEMENTS (formal and legally binding), **WORKING ARRANGEMENTS** (informal and non-legally binding), pilot projects (presumably formal and supposedly legally binding), and technical assistance projects (sometimes taking the form of “service contracts”, following a regime that is not explicitly contemplated, nor has it regulated, in the EBCG Regulation or in any other legal instrument in EU law). In practice, cooperation also occurs outside these instruments, as documented in the case of Morocco and the Africa-Frontex Intelligence Community, where the Agency engages with dozens of countries without any formal agreement or public Working Arrangement. This informal cooperation occurs without Council approval, without EDPS consultation, without compliance with transparency requirements, without parliamentary information, and without any possibility of judicial review. It creates a complete accountability vacuum in an area directly implicating fundamental rights, including liberty, dignity, access to asylum and the prohibition of *refoulement*. The new Regulation **should prohibit informal cooperation with third countries. All operational engagements with third country authorities** – including intelligence sharing, capacity building, technical assistance, and any form of data exchange – **should be required to take place exclusively within the framework of a legally binding instrument**, including remedies to effectively redress violations of EU law. The CJEU has confirmed in its rulings that even non-binding agreements concluded by the Commission require prior Council approval under Article 16 TEU to maintain the principle of institutional balance; the same principle should apply with at least equal force to Frontex, an Agency with significantly more limited powers and subject to the *Meroni* doctrine.

### *Status agreements as the exclusive basis for deployment*

- Status agreements are the only instrument among those currently available that provide for democratic oversight through the European Parliament’s consent procedure. **The new Regulation should establish that the deployment of Frontex staff to third countries, including through liaison officers, should take place exclusively on the basis of a Status Agreement** that explicitly includes enforceable fundamental rights provisions, with their conclusion subject to mandatory EDPS consultation and notification to the European Parliament. The step-by-step approach advocated by some Member States, under which pilot projects or limited deployments precede the conclusion of a full Status Agreement, should be explicitly prohibited, as it circumvents the democratic control that the consent procedure provides, maintaining institutional balance and the constitutional integrity of the EU legal order.
- Status agreements themselves require strengthening. **The new Regulation should provide that Status Agreements be concluded only with countries that are parties to the 1951**

Refugee Convention, the International Covenant on Civil and Political Rights, and the Convention Against Torture, and whose human rights record does not present real risks of *refoulement* or ill-treatment of individuals encountered in the course of Frontex operations. Access to effective international protection should also be guaranteed. Prior to the opening of any negotiating mandate, an independent human rights risk and vulnerability assessment should be conducted, with its findings made public and transmitted to the European Parliament. **Where a country's human rights situation deteriorates significantly after a Status Agreement enters into force, the new Regulation should provide for mandatory review and, where necessary, suspension or termination of the agreement.** Status Agreements should contain specific and enforceable provisions on fundamental rights protection, including access to effective remedies for individuals affected by Frontex operations on the territory of the third country concerned.

#### Working arrangements as enforceable commitments

- Working arrangements are informal soft law instruments whose non-binding nature impedes their reviewability before the CJEU and their capacity to protect individual rights. The new Regulation should require that Working Arrangements concluded before the entry into force of the recast EBCG Regulation be reviewed and replaced with binding Status Agreements to ensure conformity with the applicable legal framework. Going forward, **Working Arrangements should be used exclusively to implement pre-existing hard law commitments and should not be used to establish new forms of cooperation or to facilitate activities that would require a Status Agreement.**

#### Human rights conditionality as a general principle

- Across all instruments, **the new Regulation should establish strict continuous human rights conditionality as a general and non-derogable principle governing Frontex's action**, in line with Article 51 of the EU Charter. This means that the Agency should not initiate or continue cooperation with third countries where recurring human rights violations against migrants, asylum seekers, or other persons encountered in the course of border management activities have been documented by credible international or national bodies. Targeted risk and vulnerability assessments should be conducted before any cooperation begins and reviewed at regular intervals during its implementation. Where violations occur during the implementation of a cooperation arrangement, Frontex should be required to suspend or terminate the arrangement and to report immediately to the European Parliament, the FRO, and the Management Board.
- There should be a new specialised chamber within the General Court dealing with external border control cooperation on the part of EU actors that can launch investigations, either ex officio or at the behest of individual victims, especially in cases of repeated, grave, or persistent violations.

#### Immunity and accountability of the Standing Corps

- Given that the functional rationale underlying immunity regimes for international personnel, developed in the context of UN peacekeeping operations conducted without host State consent in hostile environments, does not transpose to Frontex border control operations in third countries conducted on a cooperative basis under Status Agreements, the new

Regulation should establish the **absence of immunity as the default position for Standing Corps** personnel deployed under such agreements. Where the third country's judicial system is not considered sufficiently reliable to administer justice in respect of conduct occurring on its territory, the appropriate response is to decline cooperation with that third country, not to grant immunity from its jurisdiction.

- To the extent that a Status Agreement nonetheless provides for immunity in respect of conduct performed strictly in the discharge of official functions, the determination of whether specific conduct falls within that scope, and the corresponding decision on waiver, is currently left to the Executive Director's unconstrained discretion, in a manner that is incompatible with the *Meroni* doctrine and its application in *ESMA*.<sup>747</sup> The new Regulation should instead confer this determination on a **specialised chamber of the CJEU**, established for this purpose, deciding on a case-by-case basis and applying substantive criteria for the scope of "official functions" set out directly in the Regulation. The FRO should be assigned a substantive role in these proceedings, including the power to submit observations on whether the conduct in question falls within the scope of official functions. To ensure compliance with the requirements of good administration (Article 41 CFR) and effective remedy standards (Article 47 CFR), procedures should be transparent, with decisions made public subject only to necessary anonymisation.
- The new Regulation should address the jurisdictional vacuum that currently exists in relation to Frontex's own statutory staff deployed under Status Agreements. For seconded personnel, home Member State jurisdiction is generally preserved; for the Agency's own statutory staff, no equivalent clarity exists, since Frontex has no home Member State and the CJEU's non-contractual liability jurisdiction under Article 97(4) of the EBCG Regulation covers damages, not criminal accountability. **The new Regulation should designate a competent forum for all categories of personnel, ensuring that the absence of a home Member State does not produce a complete absence of criminal accountability for statutory staff** conducting operations in third countries, which is incompatible with Articles 19 TEU and 47 CFR.<sup>748</sup>
- As currently structured, the immunities are disproportionate under Article 47 CFR when assessed against the rights most frequently at stake in Frontex operations in third countries, which are of an absolute character, including the prohibition of torture and inhuman treatment, the prohibition of collective expulsion, and the prohibition of *refoulement*. The only available alternative to judicial proceedings for individuals affected by Frontex operations in third countries is the complaints mechanism, which has been found by the EU Ombudsman to lack the independence and impartiality that an effective remedy requires. **The new Regulation should ensure that the immunity regime is proportionate to the legitimate aim it pursues, and should establish that immunity provisions are interpreted narrowly and in a manner consistent with the right to an effective remedy** under Article 47 CFR and the absolute character of the rights at stake.<sup>749</sup>
- Where the host country cannot be relied upon as an accountability actor, **the new Regulation should establish that home Member States are required to exercise disciplinary jurisdiction actively where the FRO identifies a fundamental rights violation in the course of a third country deployment**, that failure to initiate disciplinary proceedings following a documented FRO finding constitutes a breach of the cooperation obligations that the new Regulation should establish as a condition of participation in joint operations. The outcome of any disciplinary

<sup>747</sup> Cases 9/56 and 10/56, *Meroni*, EU:C:1958:7 and EU:C:1958:8; Case C-270/12, *ESMA*, EU:C:2014:18, paras 43–45; Convention on the Privileges and Immunities of the United Nations, 1 UNTS 15, Section 20.

<sup>748</sup> Interview with Dr Giulia Raimondo, Lecturer and Senior Researcher, University of Fribourg.

<sup>749</sup> *Ibid.*; Case C-617/10, *Fransson*, EU:C:2013:105, para 21; Article 47 CFR; EU Ombudsman, Decision OI/5/2020/MHZ.

investigation should be transmitted to the FRO, included in the SIR record, and made available to affected individuals or their legal representatives upon request, so that the findings of internal proceedings can serve as accessible evidence in subsequent judicial proceedings before the CJEU or national courts.<sup>750</sup>

<sup>750</sup> Interview with EU civil servant 3.

## 5. DATA PROTECTION AND DEBRIEFING SAFEGUARDS

### *Debriefing interviews: legal basis and procedural safeguards*

- Debriefing interviews conducted by Agency staff with individuals intercepted at the external borders require an explicit legal basis in the EBCG Regulation that is currently lacking. The EDPS found that the Agency has systematically conducted these interviews without adequate procedural safeguards, in inherently coercive circumstances – immediately following interception, in conditions of deprivation or limitation of liberty – and without informing interviewees of their rights, the purposes for which the information collected would be used, or the possibility that it might be shared with law enforcement authorities.
- This clear and explicit legal basis for debriefing interviews must incorporate the full range of procedural safeguards required by Regulation (EU) 2018/1725 and the Charter and be implemented in a way that allows individuals the effective exercise of their fundamental rights. Otherwise, if compliance with Charter requirements cannot be guaranteed in practice, the new Regulation should prohibit the Agency from conducting such interviews. If debriefing interviews are retained, the new Regulation should require that: (1) interviewees be informed, in a language they understand, of the voluntary nature of the interview and their right not to participate and withdraw consent at any point, the purposes of data collection, and the entities with which data may be shared; (2) consent to participate needs to be explicit and be recorded, with interviewees or their legal representatives given the opportunity to review and sign interview records; (3) legal assistance and interpretation services be made available before and throughout the entire duration of the interview; (4) data collected in debriefing interviews not be shared by default with law enforcement authorities, unless there be proven reasonable grounds to suspect involvement in cross-border crime and a case-by-case necessity assessment has been conducted and documented in conformity with Article 90 of the EBCG Regulation, in full respect of the presumption of innocence, rights of defence, and fair trial guarantees. The EU Ombudsperson has made similar recommendations following her inquiry into Joint Operation *Indalo*, to which the new Regulation should give legislative force.

### *Data sharing with Europol and law enforcement authorities*

- The EDPS has reprimanded Frontex for operating for an extended period an automatic process whereby all debriefing reports were systematically shared with Europol without the case-by-case necessity assessments required by Article 90(2)(a) of the EBCG Regulation. This practice exposed individuals, wrongfully reported as suspects, to the risk of being linked to criminal activity across the EU, in violation of the presumption of innocence and basic criminal justice safeguards. The new Regulation should make explicit that **any transfer of personal data to Europol or other law enforcement authorities requires a documented, individualised necessity assessment, and should establish a prohibition on automatic or bulk data**

**sharing.** The new Regulation should further provide that individuals whose data has been shared with law enforcement authorities should be promptly informed of this transfer and of the reasons motivating it, in a language the person understands and in sufficient detail, and be given access to effective remedies to contest unlawful transfers.

### *Data sharing with third countries*

- **The new Regulation should establish an explicit prohibition on the sharing of operational intelligence**, including vessel location data, surveillance imagery, and any other data capable of facilitating the interception of persons at sea, **with authorities in countries where returned individuals face a real risk of persecution, *refoulement*, or ill-treatment.** The new Regulation should require the establishment of a monitoring mechanism to verify that data is processed only for the purposes for which it was transferred, and should provide for mandatory suspension of data sharing processes where misuse is detected or credibly alleged on a *prima facie* basis, incorporating the *Schrems II* standard and the individual protections deriving from Regulation (EU) 2018/1725 and the CFR.
- The transfer of surveillance technology and training to third-country authorities raises distinct but related concerns. Investigative research has documented that EU-funded programmes, in which Frontex has participated, have provided surveillance tools, biometric identification systems, and training in mobile phone data extraction to North African authorities, without prior human rights impact assessments and in contexts where such tools may be used to monitor, intimidate, or persecute individuals seeking to exercise their right to leave any country and to seek asylum. **The new Regulation should require a mandatory, independent human rights impact assessment prior to and throughout the duration of the operation of any transfer of surveillance technology or provision of surveillance-related training, equipment or other capacity building to third country authorities. It should establish a prohibition on such transfers where the assessment identifies a real risk of misuse against individuals impeding the effective exercise of their fundamental rights as recognized in the EU Charter.**

### *Controllership, accountability, and the role of the EDPS*

- As Chapter 5 reveals, the allocation of data protection responsibilities between Frontex and Member State authorities in joint operations remains ambiguous in practice, notwithstanding the formal clarity of Management Board Decision 4/2024. The Agency's own Data Protection Officer has acknowledged that, regarding **the practical implementation of joint controllership scenarios**, it is still not clear what entity is responsible for what. **The new Regulation should address this ambiguity by incorporating the controllership framework**, specifying, for each category of operational activity, which entity acts as sole controller, which entities act as joint controllers, and what arrangements joint controllers should be required to establish to govern the exercise of data subject rights. These arrangements should be made publicly available, including for the purpose of enabling individuals to identify the appropriate entity against which to exercise their rights or bring a claim.
- The controllership framework established in MB Decision 4/2024 addresses the formal allocation of responsibilities but does not resolve the underlying problem: controllership is a factual determination that follows from who in practice decides the purposes and means of processing. In joint operations, that determination leads invariably to the Member State, regardless of what the formal framework provides. **The new Regulation should therefore go**

beyond formal designation and establish an explicit statutory allocation that identifies, for each category of data processing activity in joint operations, which entity acts as controller, what the permitted purposes are, and how data subject rights are to be handled, ensuring that what is provided in law aligns with what actually happens on the ground.<sup>751</sup>

- **The purpose provision governing EUROSUR should be clarified in the new Regulation to define the three operational pillars as distinct legal purposes with separate legal bases, so that each category of processing activity can be governed by the appropriate legal framework and subjected to the corresponding accountability regime.** The new Regulation should also expressly establish that situational pictures shared with third countries through EUROSUR, including vessel identification numbers, the number of persons on board, and precise geolocation data, constitute personal data for the purposes of Regulation (EU) 2018/1725, and that their transfer to third countries requires a legally binding instrument rather than a Working Arrangement. The threshold conditions and the categories of exceptional circumstances under which transfers may nonetheless proceed should be expressly defined in the Regulation rather than left to implementing instruments. The new Regulation should reinstate an active Commission monitoring obligation to verify that third countries effectively comply with EU data protection standards once is in force.<sup>752</sup>
- The structural tension between Frontex's *de facto* law enforcement activities and its Schengen border management legal basis cannot be resolved through simple interpretive adjustments. Article 90 of the EBCG Regulation, which requires the Agency to conduct proportionality assessments before transmitting personal data to Europol, places an obligation that is proper to law enforcement bodies on an agency that structurally lacks the law enforcement information necessary to discharge it. The provision would function more coherently if reversed, subjecting law enforcement bodies that seek migration data held by Frontex to the proportionality assessment. **The new Regulation should consider introducing a dual legal basis for the Agency, analogous to the model adopted for the Schengen Information System, which operates simultaneously under the border management basis and the police cooperation chapter of the Treaties.** This would ensure that each category of processing activity is governed by the appropriate legal framework and subject to the corresponding accountability regime.<sup>753</sup> This would, however, require a profound review of the nature of Frontex, which would need to be re-conceptualised as a law enforcement body – a categorisation that may necessitate Treaty amendment. Absent such a structural reform, Article 90 should either be substantially rewritten or repealed, as it currently functions as an instrument through which the Agency incrementally acquires a *de facto* law enforcement role that its founding legal basis does not authorise.<sup>754</sup>
- **The EDPS should be assigned enhanced supervisory powers in relation to Frontex's data processing activities,** including the power to conduct unannounced audits, to issue binding orders requiring the Agency to suspend specific data processing activities where serious violations are identified, and to impose proportionate sanctions. The new Regulation should require Frontex to report annually to the EDPS and to the European Parliament on its implementation of its data protection obligations, and should provide that the EDPS's audit findings are transmitted to the Management Board and to the FRO for their prompt remediation.

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751 Interviews with EU civil servant 1 and 2.

752 Ibid.

753 Interview with EU civil servant 1.

754 Interviews with EU civil servant 2.

## 6. MONITORING AND ACCOUNTABILITY: THE FRO, THE CONSULTATIVE FORUM, AND PARLIAMENTARY SCRUTINY

### *The Fundamental Rights Officer*

- **The new Regulation should fundamentally reform the FRO's status and powers.** The FRO's opinions and recommendations addressed to the Executive Director should be binding in all matters concerning fundamental rights compliance in operational activities. The FRO should be empowered to act *ex officio*: to initiate serious incident investigations, to request information from Member State authorities participating in joint operations. Additionally, the FRO should be assigned a mandatory role in all Article 46 procedures. The number of fundamental rights monitors should be significantly increased, and no Frontex operational deployment should take place without at least one fundamental rights monitor assigned to it, in the same way that a Coordinating Officer is assigned to every operation as a matter of course. Operational plans should be required to guarantee the unrestricted access of fundamental rights monitors to all information, documentation and operational areas, including patrolling areas and debriefing interviews, and this guarantee should be a condition for the lawful launch, deployment and continuation of the operation. Where a Member State restricts monitor access, Frontex should be required to suspend its operational support until access is restored.
- The new Regulation should also reform the capacity assessment mechanism under Article 110(6) of the EBCG Regulation. As currently drafted, it is the Executive Director who assesses whether the number of fundamental rights monitors needs to be increased, in consultation with the FRO: the person responsible for operational management thus controls the assessment of the capacity of the body tasked with scrutinising that management. The revision should invert this logic, placing the assessment and the proposal firmly with the FRO, with the ED required either to transmit the FRO's proposal to the Management Board without modification or to justify his/her divergence of opinion. The current Regulation links capacity to operational needs,<sup>755</sup> framing the monitoring function as a service to operations rather than as an independent oversight mechanism. **The revision should require instead that fundamental rights monitoring capacity be determined by reference to what effective monitoring of all Frontex activities requires,** independently of nominal operational volume. The Management Board should be required to decide on any FRO capacity proposal within a binding deadline and to transmit its decision, with reasons, to the European Parliament. MB Decision 43/2022 establishes timelines for follow-up to FRO recommendations but does so at the level of internal governance, where it can be amended or repealed without legislative consequence and binds no one outside the Agency.<sup>756</sup> The follow-up obligation and the publication of FRO recommendations should be established directly in the Regulation, with confidentiality treated as an exception requiring the FRO's concurrence.
- **The forthcoming revision should disentangle the FRO from the Agency's institutional architecture.** As long as the FRO remains an internal body, even a formally independent one, its effectiveness will depend on the institutional goodwill of the very actors it scrutinises, and it will lack the external legitimacy necessary to generate consequences at national level. The revision should make the FRO an independent external review of fundamental rights compliance at the EU external borders, that is organisationally separate from Frontex, with a mandate covering the full spectrum of EIBM activities regardless of whether Frontex is formally involved.<sup>757</sup>

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755 EBCG Regulation, Article 110(6).

756 Management Board Decision 43/2022 of 20 July 2022, Ares(2022)4929432, Articles 3, 4 and 8.

757 Interview with EU civil servant 4.

### The Consultative Forum

- The Consultative Forum has been progressively marginalized. Its recommendations are non-binding, it has no formal standing in operational decision-making, and the Management Board and Executive Director are under no obligation to follow its recommendations, nor even to explain why these are disregarded. **The new Regulation should restore and strengthen the Forum's role.** The Forum's recommendations should be transmitted to the European Parliament as a matter of course, and, in line with Article 41 CFR, the Management Board should be required to provide written reasons where it declines to follow them. The Forum should be given formal standing to submit observations in Article 46 procedures and in any procedure involving the conclusion or renewal with a third country.

### The Serious Incident Report Mechanism

- **The SIR mechanism presents four structural deficiencies that the new Regulation should address.** First, the initial assessment of whether an incident qualifies for formal SIR processing is conducted by the same institution being scrutinised, without any independent oversight; the new Regulation should require that this assessment be subject to review by the FRO in all cases involving potential fundamental rights violations. Second, the assignment of Heads of Unit as SI Handlers for incidents occurring during their own operations' activities creates an institutional conflict of interest that is incompatible with the requirements of good administration under Article 41 CFR; the new Regulation should require that Category 1 and Category 2 incidents be investigated by the FRO. The absence of victim participation means that individuals affected by serious incidents have no formal standing, no right to be informed that a SIR has been filed, and no guarantee of being informed of its outcome, let alone having any violations redressed; the new Regulation should establish minimum procedural rights for affected individuals in SIR procedures, including the right to submit information, to be informed of the outcome, to request reasons where no action is taken, and to a judicial appeal to seek redress. Finally, one-month deadline for completion of SIR investigations is routinely extended and usually for an indefinite period; the new Regulation should establish a hard deadline with the possibility of a single, time-limited extension, after which the FRO should be empowered to assume responsibility for the investigation.
- The legal obligation to cooperate with SIR investigations should be complemented by a structural framework connecting the Frontex SIR system to national monitoring and investigation systems. There is currently no legal basis, no institutional channel, and no procedural framework through which the FRO's findings feed into national proceedings or through which national investigation outcomes are communicated back to the Agency.<sup>758</sup> **The new Regulation should establish, at minimum, a binding obligation for national authorities to inform the FRO of the outcome of investigations triggered by SIR findings, and a corresponding obligation on the FRO to share relevant findings with competent national bodies.** This structural cooperation should be institutionalised in the Regulation itself, analogous to the coordinated supervision model that operates between the EDPS and national data protection authorities, rather than left to voluntary inter-institutional arrangements.<sup>759</sup> Member State representatives sitting on the Management Board should bear an explicit institutional responsibility for ensuring that their national authorities fulfil these cooperation obligations, so that accountability at agency level and accountability at national level are formally connected rather than operating in parallel without consequence.<sup>760</sup>

<sup>758</sup> Interview with EU civil servant 3.

<sup>759</sup> Interview with EU civil servant 3.

<sup>760</sup> Interview with EU civil servant 4.

- **Member State cooperation with SIR investigations should be made legally binding.** The Management Board's June 2024 conclusions acknowledged that lack of cooperation by national authorities is a key obstacle to the proper functioning of the mechanism, yet its nine recommendations to national authorities remain non-binding and have not been implemented so far. The new Regulation should establish a legal obligation on Member States to respond fully and within specified deadlines to FRO information requests arising from SIR investigations, and should provide that failure to cooperate constitutes a ground for suspension of Frontex operational and financial support under Article 46.

### Individual Complaint Mechanism

- The individual complaint mechanism under Article 111 of the EBCG Regulation has produced very limited accountability outcomes in practice. The structural deficiencies are well documented: the mechanism lacks independence, accessibility, and enforceability, and has been found by the EU Ombudsman to fall short of the standards required by Articles 41 and 47 CFR. **Three targeted reforms should be introduced in the new Regulation.** First, it should include an explicit provision allowing individuals who have lodged a complaint to appeal to the EU Ombudsman where the outcome is unsatisfactory or where no outcome is produced within a defined period, providing the external and independent review layer that the internal mechanism cannot structurally offer. A legislative precedent exists: the EUAA Regulation explicitly provides that its activities may be subject to EU Ombudsman inquiries, confirming that the legislator can make such links explicit in agency-specific legislation.<sup>761</sup> Second, the FRO should be empowered to launch *ex officio* inquiries into potential fundamental rights violations identified in the course of Frontex activities, without requiring a formal complaint to have been lodged. This power should be established directly in the Regulation and should apply to all categories of Frontex activity, including in third countries.<sup>762</sup> Third, NGOs with documented field presence at the external borders should be expressly empowered to lodge complaints on behalf of affected individuals who are unable or afraid to do so themselves, removing the structural deterrent that currently prevents precisely those most in need of redress from accessing the mechanism.<sup>763</sup>

### Parliamentary Scrutiny

- The European Parliament's discharge denial in respect of the Agency's 2020 budget produced no operational or financial consequence. The budget discharge procedure carries significant democratic value as a form of political oversight, but its practical limitations are evident: Parliament's political censure does not result in financial consequences, operational restrictions, or mandatory corrective measures. **The new Regulation should provide that a discharge denial in respect of the Agency's budget triggers a mandatory review of the Agency's FUNDAMENTAL RIGHTS strategy.**
- The Frontex Scrutiny Working Group established following the OLAF report revelations has since been absorbed into the Schengen Working Group, losing its dedicated institutional focus. Given the structural and recurring fundamental rights concerns surrounding the EBCG, there is a strong case for **re-establishing a dedicated and permanent scrutiny structure within the European Parliament tasked specifically with monitoring the activities of**

<sup>761</sup> Interview with EU civil servant 4, 2025; Regulation (EU) 2021/2303 (EUAA Regulation), Article 7; EU Ombudsperson, Decisions OI/5/2020/MHZ, and Strategic Inquiry OI/4/2021/MHZ.

<sup>762</sup> Interview with EU civil servant 4.

<sup>763</sup> Interview with EU civil servant 4.

**the Agency.** The new Regulation should require Frontex to provide this body with timely, accurate, and comprehensive information proactively and upon request, and should establish a legal obligation on the Agency to appear before it at regular intervals and whenever serious incidents are under investigation.

- **The Commission should be required to assess whether conditionality measures under Regulation (EU) 2020/2092 are warranted** for the protection of the EU budget wherever Member States persistently fail to cooperate with FRO investigations, grant access to fundamental rights monitors, or follow up on SIR conclusions. This assessment should be conducted bi-annually and its results transmitted to the European Parliament.
- **To avoid conflict of interests, collusion and corruption cases, the new Regulation should establish a post-mandate cooling-off period and a specific incompatibilities regime for the Executive Director, Members of the MB and other high-level officials,** during which s/he should be prohibited from taking up positions, whether elected or appointed, placing him/her in a situation to scrutinise, influence, or benefit from decisions taken during their tenure. This prohibition should extend, at minimum, to membership of the European Parliament and to senior roles in institutions with oversight functions over the Agency, and should be enforceable through the Staff Regulations and, where applicable, through the rules governing the conduct of elected representatives.

## 7. ARTICLE 46: SUSPENSION AND TERMINATION OF OPERATIONS

### *Making FRO opinions binding in Article 46 procedures*

- **The most significant single reform the new Regulation should introduce in relation to Article 46 is the conversion of the FRO's consultative role into a binding one.** Under the current framework, the Executive Director is required to consult the FRO before acting under Articles 46(4) and (5) but is under no obligation to follow the FRO's opinion and need not explain a decision to depart from it. The Hungary precedent illustrates the consequences of this design: the FRO issued a formal Opinion in January 2021 concluding that the criteria for activation of Article 46(4) and (5) were met, yet the Executive Director did not act on it. Action followed only after the CJEU's infringement judgment compelled it in 2021. The new Regulation should provide that where the FRO issues a formal Opinion concluding that the criteria for activation of Article 46(4) or (5) are met, the Executive Director should be required to act within a specified and short deadline.

### *Removing the subjectivity threshold for mandatory activation*

- The mandatory character of Article 46 is currently conditional on a subjective threshold: the provision requires the Executive Director to act where violations are "serious" or "likely to persist", but only where the Executive Director "considers" that such grounds exist, without defining these terms or providing criteria for their specification in particular situations. No other actor, including the FRO, is empowered to trigger or compel activation. **The new Regulation should replace this subjective threshold with objective criteria against which the existence of grounds for mandatory activation can be assessed independently.** These criteria should draw from the substantive guidance already developed in Article 46 SOP, which include the concept of "administrative practice" derived from ECtHR case law, the indicators

of gravity and persistence, and the information sources listed in Article 46(6). The criteria should be elevated from internal operational guidance to legislative requirements mandated by the new Regulation. Where the objective criteria are met, the Executive Director should be bound by the obligation to act and either suspend or terminate the operation, without a prior subjective assessment.

### *A due diligence procedure*

- **The new Regulation should establish a mandatory due diligence procedure governing the preparation of Article 46 decisions in all cases involving fundamental rights concerns.** This procedure should incorporate the graduated logic that Article 46 already contains but that the current SOP fails to operationalise with sufficient clarity: it should specify a mandatory threshold at which corrective measures are deemed exhausted and escalation to the Executive Director becomes obligatory rather than discretionary, ending the structural space for indefinite deferral that the current SOP creates by requiring individual case assessment without specifying when the corrective phase must end.<sup>764</sup> The FRO's involvement should be formalised as a mandatory precondition at each stage of the escalation ladder, not only at the final decision stage: the SOP should be amended to establish that the FRO must be notified and consulted whenever the Division Director determines that corrective measures have failed and that escalation is being considered.<sup>765</sup>

### *Procedural rights of affected individuals*

- The current Article 46 procedure makes no provision for the participation of individuals affected by the violations that trigger, or should trigger, its activation. Affected individuals have no right to be informed that Article 46 proceedings are under consideration, no opportunity to submit information, and no guarantee of being informed of the outcome. This is incompatible with the right to good administration under Article 41 CFR and undermines the effectiveness of the mechanism as a fundamental rights protection tool. **The new Regulation should establish minimum procedural rights for individuals in Article 46 procedures,** including the right to submit relevant information through the FRO or the complaints mechanism, and the right to be informed of the outcome of any procedure directly affecting their situation, which should, in turn, be considered sufficient to form the basis of an Article 263 TFEU action. Where Article 46 is not activated despite a formal FRO opinion that grounds exist, affected individuals should have access to an independent review of that decision.
- The current system only relies on the action for damage, which constitutes an ex-post remedy. **Ex-ante remedies should be made available** in this context (see Recommendation 8 below).

<sup>764</sup> Decision of the Executive Director No R-ED-2022-12 of 25 January 2022, Standard Operating Procedure (SOP); Interview with EU civil servant 3.

<sup>765</sup> Decision of the Executive Director No R-ED-2022-12 of 25 January 2022, Standard Operating Procedure (SOP); Interview with EU civil servant 3; SHARED Guidelines 93 and 94.

## 8. LEGAL REMEDIES

- For the first time, with *Hamoudi* and *WS*, the Court of Justice has established that Frontex bears autonomous obligations independent of those of the Member States, that concurrent liability between Frontex and Member States is legally possible, that evidentiary asymmetry cannot be permitted to defeat arguable claims, and that the Agency bears a positive duty to cooperate with judicial proceedings by disclosing relevant information and documentation. These rulings are a genuine and important advance. They should not, however, be mistaken for a comprehensive solution. The structural features that have made Frontex effectively immune from judicial scrutiny in practice are not fully addressed by judgments operating within the existing framework of *ex post* non-contractual liability. **The new Regulation should go further, introducing legislative reforms capable of ensuring not only that violations are compensated after the fact, but that they are prevented before irreversible harm occurs.** This ensues from the effective remedy obligations that attach to absolute rights, including the right to life, the prohibition of ill treatment and *refoulement*, and the right to asylum, which require pre-emptive remedies with automatic suspensive effect. Such remedies need to be made available to affected individuals, both in law and in practice, not only against the actions and omissions of the Member States but also *vis-à-vis* Frontex' conduct. The enmeshed nature of Frontex-coordinated interventions in multi-actor situations makes it essential that there be an effective route to avoid harm and determine responsibility, at both national and EU level, by the competent courts.

### Operationalising annulment and failure to act in the border management context

- **The new Regulation should provide legislative guidance on how Articles 263 and 265 TFEU operate in the specific context of Frontex-coordinated activities, addressing the structural obstacles that have made both avenues practically inaccessible.** With respect to the action for annulment, the new Regulation should specify which categories of Frontex decisions and acts are subject to review under Article 263 TFEU, including: decisions of the Executive Director to launch, continue, or refuse to suspend or terminate an operational activity; decisions refusing public access to operational plans or serious incident reports; decisions concerning the conclusion or renewal of working arrangements with third countries; and any other measure producing legal effects on individuals in the context of border management operations, understood as comprising all measures adopted, coordinated or supervised by Frontex that interfere with the exercise of EU fundamental rights. *Ultra vires* conduct as well as violations by omission should also be contestable in front of the CJEU, as the appropriate (and sole) forum with jurisdiction to adjudicate on the Agency's discharge of its mandate in accordance with EU law, including Charter provisions. The new Regulation should thus provide that a refusal by the Executive Director to activate Article 46, following a formal FRO Opinion concluding that grounds for activation exist, constitutes a reviewable act for the purposes of Article 263 TFEU, thereby closing the gap exposed by *SS and ST v. Frontex* and ensuring that executive inaction in the face of documented fundamental rights violations is not shielded from judicial scrutiny by the discretionary architecture of Article 46 of the EBCG Regulation.
- **With respect to the action for failure to act, the new Regulation should specify that Frontex is under a legal obligation to act in a defined set of circumstances, so that inaction in those circumstances constitutes *ipso jure* a failure to act in the sense of Article 265 TFEU,** rather than an exercise of discretion immune from review. These circumstances should include, at minimum: failure to activate Article 46 where the objective criteria established under the reformed provision are met; failure to conduct a mandatory human rights impact assessment prior to the conclusion of a cooperation arrangement with

a third country; failure to disclose operational plan information to which an individual has a right of access under the reformed transparency framework; and failure to respond to a formal FRO Opinion within the prescribed deadline. By converting discretionary powers into legally defined obligations in these specific contexts, the new Regulation would ensure that Articles 263 and 265 TFEU operate as genuine remedial avenues rather than procedural dead ends in the border management context.

- Standing requirements under Article 263(4) TFEU present a further obstacle that the new Regulation should address. The condition that an applicant be directly and individually concerned, interpreted restrictively under the *Plaumann* formula, is singularly ill-suited to the collective and systemic nature of border management operations, where the harm to which third-country nationals are exposed and may eventually suffer is the product of generalised operational practices rather than measures specifically addressed to a designated person. **The new Regulation should establish that individuals affected by Frontex-coordinated operational activities have standing to challenge the categories of acts identified above.** Since the absence from Schengen territory typically results from the very conduct being contested, the new Regulation should also provide that the FRO, the Consultative Forum, and recognised civil society organisations with a mandate in the field of fundamental rights have standing to bring annulment actions and failure to act proceedings in the context of Frontex activities without being required to demonstrate individual concern in the *Plaumann* sense. The opposite will perpetuate the current situation of inaccessibility by affected individuals to the "complete system of remedies" established under EU law.
- Two further procedural tools available within the existing framework deserve greater attention and should be actively promoted in the forthcoming revision. The first concerns the evidentiary asymmetry that characterises border management litigation. Both the Court of Justice and the General Court have explicit powers under their Rules of Procedure to order measures of inquiry, including the appointment of experts, the hearing of witnesses, and the organisation of dedicated fact-finding hearings on matters of evidence prior to the legal argument stage.<sup>766</sup> These powers are almost never used in practice, but could be activated at the request of the parties or by the court on its own motion to address the specific evidentiary constraints that characterise border management litigation: the Court could, for example, order Frontex to produce all operational documentation concerning a specific incident, or invite investigative journalists, NGOs with documented field presence, or national human rights institutions to participate as sources of factual context. **The new Regulation should list the circumstances in which the General Court should make full use of these investigative powers** in cases involving Frontex-coordinated operations, and should provide that requests by applicants for measures of inquiry in such cases be processed on an expedited basis.
- The Court of Justice has established that the courts of the European Union are entitled to assess, according to the circumstances of each case, whether the proper administration of justice justifies examining the merits of an action without a prior ruling on its admissibility.<sup>767</sup> The General Court applied this principle in *Latombe v. Commission*, examining the substance of an annulment action before deciding whether the applicant had standing.<sup>768</sup> The argument in the Frontex context runs in a similar direction: where the merits of a case concern violations of absolute rights (including the prohibition of *refoulement*, or the right to life), the principle

<sup>766</sup> Rules of Procedure of the Court of Justice, OJ L 265/1, 29 September 2012, Article 64; Rules of Procedure of the General Court, OJ L 105/1, 23 April 2015, Article 91; Case C-411/10, *NS*, EU:C:2011:865; Dr. Ana Bobić, Senior Researcher at Jacques Delors Centre, the Hertie School (Berlin).

<sup>767</sup> Case C-23/00 P, *Boehringer*, EU:C:2002:118, paras 51–52; Interview with Dr. Ana Bobić.

<sup>768</sup> Case T-553/23, *Philippe Latombe v. European Commission*, EU:T:2025:831, paras 14–15.

of proper administration of justice should justify reading the merits before first resolving the admissibility question, rather than leaving the applicant without any judicial examination of their claim on procedural grounds alone.<sup>769</sup> **The new Regulation should** acknowledge this avenue and encourage its use by **specifying that where an applicant raises an arguable claim of a violation of an absolute right in the context of Frontex-coordinated activities, the merits shall be examined in the interest of justice.**

### **An ex-ante suspensive remedy**

- Given the absolute nature of the rights at stake in Frontex-coordinated interventions, the most significant reform **the new Regulation should introduce** in the field of judicial remedies is the creation of **an ex ante suspensive mechanism, on the basis of Articles 278 and 279 TFEU, to prevent irreversible harm**: This could take the form of a procedural instrument enabling individuals, or bodies acting on their behalf, **to obtain interim relief through the immediate suspension of a specific operational action**, adopted by either Frontex, the Member States, or any third countries with which they may collaborate, **where there is an arguable claim that its execution would result in irreversible harm to a fundamental right protected under the Charter**. This mechanism should be available on an emergency basis, with a decision required within a very short timeframe compatible with the urgency of the situation. Requests should be accessible not only to the directly affected individuals, who may not be in a position to seize the court, e.g. if they are in distress at sea or subjected to a pushback, but also to the FRO, the Consultative Forum, and recognised civil society organisations with a mandate in the field of fundamental rights, acting on their behalf.
- **The new Regulation should specify the conditions for activation of this emergency suspension mechanism**: *prima facie* evidence that the action is incompatible with one or more rights protected under the Charter; and a demonstration that the harm that would result from the contested action is irreversible in nature and/or affects absolute rights. The General Court, as competent forum, should be required to exercise its investigative powers proactively, including by ordering Frontex to disclose relevant operational documentation within hours of an application for interim relief being lodged.
- **A dedicated urgency track for direct actions against Frontex before the General Court should also be considered as part of the forthcoming reform**. The current procedural framework provides no fast-track mechanism for direct actions in cases involving Frontex, despite the fact that the rights most frequently at stake are absolute rights whose violation is irreversible. The urgent preliminary reference procedure is currently established in Article 23a of the Statute of the Court of Justice and Title III of the Rules of Procedure of the Court of Justice.

### **Joint and several liability model**

- The Grand Chamber's recognition in *WS* that concurrent liability between Frontex and the Member States is legally possible is an important step, but it does not fully resolve the causation and attribution problems that remain the central obstacles to effective judicial accountability in multi-actor border management operations. In a system of layered, composite, and operationally opaque decision-making, demonstrating that a specific harm resulted from a specific act or omission that is exclusively attributable to Frontex rather than, or in addition to, the Member State(s) concerned remains extraordinarily difficult. The model of joint and several liability contemplated in the Europol Regulation (already proposed for incorporation into the

reformed Article 7 framework in Recommendation 1) offers a more effective approach. Under this model, an individual harmed in the course of, or as a result of, a Frontex-coordinated operation should be entitled to seek full reparation from any of the actors involved, with the internal allocation of responsibility between Frontex and the relevant Member States governed by the pre-operational duty allocation framework established under the reformed Article 7 regime proposed in this study. **The new Regulation should codify this approach explicitly, providing that Frontex and the Member States participating in a joint operation bear joint and several liability for harm caused to individuals in the course of that operation where the harm results from a failure to discharge the obligations allocated under the operational plan or the legislative template.**

### **Access to justice: legal assistance, interpretation, and information**

- The structural inaccessibility of judicial remedies for individuals at the external border is not only a matter of procedural law. It is also a matter of practical access. Individuals who have been pushed back, intercepted at sea, or subjected to unlawful return operations are typically in situations of extreme vulnerability, without legal representation, without knowledge of their rights and the available remedies, and without access to interpretation services. **The new Regulation should establish a right to legal assistance and interpretation for individuals seeking to exercise their rights under the complaints mechanism, the SIR procedure, or any judicial avenue regarding Frontex-coordinated activities**. This right should not be conditional on the individual having already initiated formal proceedings.
- **The new Regulation should further require Frontex to produce and distribute, in all relevant languages, clear and accessible information on available remedies, including the complaints mechanism, the FRO, and judicial avenues, to all individuals encountered in the course of its operational activities**, including during debriefing interviews. This information should be included as a mandatory element of operational plans and should be made available at all operational locations.
- In relation to Member State conduct, national judicial mechanisms should be available on the basis of Articles 19(1) TEU and 41 and 47 CFR, and **the new Regulation should establish minimum standards for national remedial procedures in the context of Frontex-coordinated activities** to ensure compliance with the principles of effectiveness and equivalence

<sup>769</sup> Interview with Dr. Ana Bobić, Senior Researcher at Jacques Delors Centre, the Hertie School (Berlin).



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