

Meijers Committee

standing committee of experts on international immigration,
refugee and criminal law

CM2105 **Frontex and pushbacks: obligations and accountability**

April 2021

1. Introduction

At the end of 2020, a joint investigation conducted by Bellingcat, Lighthouse Reports, Der Spiegel, ARD, and TV Asahi revealed that the European Border and Coast Guard Agency (Frontex) had been involved in pushback operations at the Greek maritime border.¹ This triggered closer scrutiny of Frontex's role during the reported incidents, but also led to a broader discussion of the agency's obligations and its accountability more generally. In this context, several questions remain unanswered.

First, how should the reported incidents be legally appraised? In particular, are they compatible with the prohibition of collective expulsion and the prohibition of *refoulement*? Second, how does the EU's legal framework for border controls at sea relate to these obligations? Third, what obligations do those involved in Frontex operations have to report human rights violations they become aware of? Fourth, what obligations does Frontex have when human rights violations are brought to its attention and how can it meet them in practice? And fifth, how is Frontex to be held legally accountable?

These unclaritys were noted by the internal Working Group of the Frontex Management Board tasked with investigating the allegations of pushbacks in the Aegean Sea to have contributed to its difficulty in reaching a definite conclusion.² With a view to the ongoing investigations of the European Parliament, OLAF and the European Ombudsman into Frontex, the Meijers Committee takes the opportunity to address each of these questions and outline the obligations of Frontex and the Member States towards migrants found at sea. We hope that our comment will contribute to a better embedding of EU and international legal standards in maritime Frontex operations. The Meijers Committee recommends that future Frontex operational plans incorporate a set of clear procedural standards that are based on the Schengen Borders Code and the case law of the European Court of Human Rights. We also recommend strengthening the accountability mechanisms available against Frontex.

2. The report provides clear evidence of violations of human rights law

The Meijers Committee welcomes that the Frontex Management Board decided to scrutinize a number of incidents that were reported to it but regrets that no firm conclusions on these incidents were drawn. Four of the five incidents were brought to the attention of Frontex by national officers participating in the Frontex operations. Although the Greek authorities disputed some of the allegations that were made by officers of coast guards of other Member States, including the Swedish and Danish coast guards, it becomes apparent from the report that in at least four of these incidents, the Greek coast guard actively tried to prevent migrant vessels from reaching Greek territory. In one incident, it was not disputed that migrants were brought on board of a Greek coast guard vessel that handed over the migrants to Turkish authorities.³ In two incidents, a migrant vessel was escorted (or

¹ Bellingcat, 'Frontex at Fault: European Border Force Complicit in 'Illegal' Pushbacks', <https://www.bellingcat.com/news/2020/10/23/frontex-at-fault-european-border-force-complicit-in-illegal-pushbacks/>, 23 October 2020.

² Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea, Final Report of the Frontex Management Board Working Group, 1 March 2021.

³ Incident of 18/19 April 2020.

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towed) to Turkish territory by a Greek coast guard vessel.⁴ In two other incidents, the Greek coast guard seemingly tried to block further passage to a migrant vessel by engaging in dangerous manoeuvres involving high speed or the creation of large waves.⁵

The Working Group's report does not provide a full legal appraisal of these incidents by testing them against standards developed in human rights law or safeguards laid down in the Schengen Borders Code and/or the Frontex Sea Borders Regulation.⁶ Instead, it cites multiple potential justifications that would render the Greek conduct lawful. One is that the migrants did not ask for asylum. Another one, apparently advanced by the Greek authorities, is that the operations were a "prevention of departure operation" - presumably inside Turkish territorial waters, therefore not triggering any legal obligations on the part of Greece.

The Meijers Committee questions the merits of those justifications. In the leading case about migrant interdiction at sea, *Hirsi Jamaa and others v Italy*, the European Court of Human Rights (ECtHR) found a violation of the prohibition of collective expulsion (Art. 4 Protocol 4 ECHR), because the migrants had not been subjected to any identification procedure by the Italian authorities.⁷ The ECtHR noted that the personnel aboard the military ships were not trained to conduct individual interviews and were not assisted by interpreters or legal advisers. Furthermore, the ECtHR found a violation of Art. 3 ECHR because the Italian authorities failed to assess possible risks in Libya or the risk of arbitrary repatriation from Libya.⁸

It is clear from the Working Group's report that these standards were not met by the Greek coast guard in several of the reported incidents. Even if the migrants did not ask for asylum, the Greek officers were under the obligation to establish the identities of the migrants and to provide interpreters or legal advisers before returning the migrants to Turkey. Furthermore, by failing to register the identities and not taking into consideration the nationalities of the migrants, the Greek authorities failed to comply with their positive obligation to ensure that no migrant was at risk of *refoulement*. The argument of the Greek authorities that no obligations arose because the migrants did not ask for asylum displays an oversimplified and incorrect understanding of relevant human rights standards. It is disturbing that the Frontex Management Board did not challenge this.

Neither should it be considered relevant for the applicability of human rights obligations in what maritime zone the operations took place. In *Hirsi*, the ECtHR made clear that "the special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording them the enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction."⁹ Even though that case concerned interception at the high seas, there is no indication that different standards would apply to interceptions in the territorial sea of a third country - the quotation rather points to the contrary conclusion.

The Meijers Committee further questions the suggestion in the report that the recent judgment in *N.D. and N.T. v Spain*¹⁰ would somehow reverse the standards and obligations that were established in the

⁴ Incidents of 5 August 2020 and 30 October 2020.

⁵ Incidents of 27 July 2020 and 21 November 2020.

⁶ Regulations 2016/399 and 656/2014.

⁷ ECtHR *Hirsi Jamaa and others v Italy*, 23 February 2012, no. 27765/09.

⁸ *Ibid*, paras. 156-158, 185.

⁹ *Ibid*, para. 178.

¹⁰ ECtHR *N.D. and N.T. v Spain*, 13 February 2020, nos. 8675/15 and 8697/15.

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Hirsi case. The report asks the European Commission to clarify to what extent “the key messages of the [...] *N.D.* and *N.T.* judgment [...] can be applied at the maritime border.”¹¹

The Meijers Committee makes two comments about this request. First, the European Commission is not competent to authoritatively interpret or explain the ECHR. If Frontex wants to have more clarity about the meaning and implications of the *N.D. and N.T.* judgment, the appropriate course of action would be to ask the Member States, in their capacity as members of the Committee of Ministers of the Council of Europe, to request the ECtHR to give an advisory opinion on the matter in accordance with Art. 47 ECHR. Alternatively, the European Commission could decide to bring an infringement case against Greece before the CJEU for failure to respect Article 19(1) of the Charter which prohibits collective expulsions. As these two European Courts were created precisely to answer the sort of legal questions that are raised in the report, the Meijers Committee would recommend EU institutions and the Member States to have recourse to them. Legal questions ought to be answered ultimately by courts instead of political bodies or executive agencies.

Second, as is also observed in the legal opinion of the European Commission, there are no clear indications that the *N.D. and N.T.* judgment was meant to reverse the standards set out in *Hirsi*. On the contrary, the *N.D. and N.T.* judgment builds explicitly on the *Hirsi* judgment in so far as it confirms the wider meaning of “expulsion” (the term also covering border situations¹²) and underscores the rationale that all migrants, before being returned, must be granted a genuine and effective opportunity to submit claims against their return.¹³ The *N.D. and N.T.* judgment further stresses - repeatedly - that Contracting States must create effective opportunities for asking for asylum at their external borders.¹⁴ There is no evidence cited in the Frontex report that the Greek authorities did provide for such opportunities. Finally, as the *N.D. and N.T.* case concerned expulsions at a land border while *Hirsi* dealt with expulsions at sea, the latter should, until explicitly reversed, be considered leading in sea operations.

3. Inconsistencies between the EU legal framework and basic rights and principles

The Working Group’s report correctly points to several inconsistencies in the EU legal framework that apply to Frontex maritime operations and that need to be resolved. It appears, in particular, that the Frontex sea borders regulation (Reg. 656/2014) was designed to circumvent obligations established in human rights law and the Schengen Borders Code. The report asks how the possibility laid down in the Frontex sea borders regulation to order vessels found at sea to alter their course to a destination other than the Member State’s border relates to (i) the obligation to identify migrants and allowing them to bring arguments against their expulsion before returning them and (ii) the provisions on a refusal of entry in the Schengen Borders Code.

The Meijers Committee observes that the legal opinion of the European Commission of 3 March 2021 only partially answers these questions.¹⁵ It does not cover interceptions outside the territorial waters

¹¹ Frontex report, p. 14.

¹² *N.D. and N.T.*, paras. 186-187.

¹³ *Ibid.*, para. 198.

¹⁴ *Ibid.*, paras. 228, 232. On this duty, see also ECtHR *Ilias and Ahmed v. Hungary*, 21 November 2019, no. 47287/15, paras. 133-138 and ECtHR *M.K. and others v Poland*, 23 July 2020, nos. 40503/17, 42902/17 and 43643/17, para. 171-173.

¹⁵ European Commission, The nature and extent of Frontex’s obligations in the context of its implementation of joint maritime operations at the Union’s external sea borders, available at <https://www.tinekestrik.eu/sites/default/files/2021->

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of an EU Member State. Neither does the advice address the issue of whether pushbacks, conducted in whatever maritime zone, should be considered to amount to a refusal of entry in the meaning of the Schengen Borders Code.

In essence, the report examines whether the option of turning back migrants found at sea that was included in the Frontex sea borders regulation may set aside the standards developed in human rights case law as discussed in the previous section and the ordinary procedural guarantees laid down in the Schengen Borders Code. In respect of the first issue, the only possible answer is that as the Frontex sea borders regulation must be applied in conformity with the EU Charter on Fundamental Rights, no returns are possible without first identifying migrants and allowing them to challenge their return.

In respect of the relationship with the Schengen Borders Code, we recall our earlier observations that the Frontex sea borders regulation indeed questionably derogates on a number of points from the Schengen Borders Code.¹⁶ It should be observed in this connection that the Schengen Borders Code allows for border checks on persons to be made during sea crossings or on the territory of a third country upon arrival or departure based on an agreement between a Member State and this third state.¹⁷ For example, par. 1.1.4.3.(a) of Annex VI of the Borders Code states:

International protection: a third-country national who has passed exit control by third-country border guards and subsequently asks Member State border guards present in the third country for international protection, shall be given access to relevant Member State procedures in accordance with Union asylum acquis. Third-country authorities shall accept the transfer of the person concerned into Member State territory.

In the understanding of the Meijers Committee, therefore, the Schengen Borders Code does not allow for a differentiation of procedural standards between the various maritime zones or the state where controls are conducted.¹⁸ It would follow that, in respect of all border controls, the procedural guarantees on border checks and refusing entry (by way of a standardised form, including information on the right of appeal) apply. As these procedural guarantees are meant to ensure that refusals at the border expulsions meet human rights standards, they should also be observed in Frontex maritime operations, even though Reg. 656/2014 fails to specify them.

4. The obligation to report human rights-related incidents

The Working Group's report reaffirms the deficiencies in Frontex's incident reporting system which were already pointed out in its preliminary report. These deficiencies concern in particular the lack of transparent monitoring of the reporting system.

[03/Fundamental%20Rights%20and%20Legal%20Operational%20Aspects%20from%20European%20Commission.pdf](#), 3 March 2021.

¹⁶ Meijers Committee, Note on the Proposal for a Regulation establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex (COM(2013) 197 final), available at <https://www.statewatch.org/media/documents/news/2013/may/meijers-committee-note-surveillance-external-sea-borders.pdf>

¹⁷ See Schengen Borders Code, Annex VI, par. 3.1.1.

¹⁸ This also follows from the reference to fundamental rights in Art. 4 of the Schengen Borders Code. According to Advocate-General Mengozzi, the applicability of Article 13 of the Schengen Borders Code is an open question: Case C-355/10, paras. 68-70.

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The Meijers Committee stresses the importance of a functioning reporting system for Frontex's ability to effectively prevent or react to human rights violations that occur during its joint operations. Two aspects are key to this: First, incidents need to be reported. Second, incidents need to be appropriately followed up.

As regards the first point, the standard rules in the Operational Plans available to the Meijers Committee provide that all border-related incidents that occur within the operational area during a joint operation are collected and reported daily.¹⁹ Situations of alleged human rights violations are classified as so-called "serious incidents".²⁰ It is important to note that every participant involved in joint operations is under an obligation to immediately report any serious incidents s/he is involved in or otherwise gains knowledge of to the Frontex Situation Centre in Warsaw and the host state authorities. "Immediately" under normal circumstances means within two hours from detection.²¹

Reports are made via specific software, the "Joint Operations Reporting Application" (JORA). Within JORA, incidents can be created, sent, managed, and analysed. Using templates, an authorised host state or deployed officer (the "incident reporter") creates a report for every incident. If participants are concerned that reporting alleged fundamental rights violations via this procedure may have consequences for their integrity, future deployment, or reputation, they can exceptionally make use of any other available channels, including personal reporting.²²

On paper, monitoring and reporting mechanisms have been put in place that allow Frontex to be informed of any possible human rights violations during joint operational activity. However, the extent to which these systems function in practice is questionable. Arguably, the overall number of reports filed is remarkably low, especially when compared to the human rights violations documented by human rights organisations and activists present in the areas where Frontex operates.²³ While there may be multiple reasons why incidents go unreported, it has been suggested, including in the context of the current investigation into pushbacks at the Greek border, that officers are sometimes discouraged - or even actively prevented - from filing claims.²⁴

In light of this evidence, the Meijers Committee emphasises the need to ensure all officers are not only obliged but also have the possibility to report any incidents they are aware of. Robust procedures have to be put in place to ensure they can file reports anonymously and without repercussions. The

¹⁹ Frontex (Operations Division, Joint Operations Unit, Sea Borders Sector), Handbook to the Operational Plan: Joint Maritime Operations, 13 February 2014, 41-42, 50-57. It should be noted that due to the current practice of Frontex to refuse (even partial) access to Operational Plans, the Plans used here were adopted prior to the entry into force of the revised EBCG Regulation in 2019 when partial access was still granted upon request.

²⁰ Ibid. 42, 58-64.

²¹ Ibid. 42.

²² Ibid. 58-64; M. Fink, 'Frontex and Human Rights: Responsibility in 'Multi- Actor Situations' under the ECHR and EU Public Liability Law' (Oxford University Press 2018) 72-73.

²³ According to the Frontex Consultative Forum on Fundamental Rights, in 2018 Frontex received only 3 serious incident reports for alleged fundamental rights violations while having an average of 1500 officers deployed at the EU's external borders, see Sixth Annual Report, Frontex Consultative Forum On Fundamental Rights, 2018; See also the enquiries into serious incident reports done by the NGO *Frag den Staat*, <https://fragdenstaat.de/dokumente/sammlung/56-frontex-serious-incident-reports/>.

²⁴ See for instance: <https://www.spiegel.de/international/europe/missteps-and-mismanagement-at-frontex-scandals-plunge-europe-s-border-agency-into-turmoil-a-d11ae404-5fd4-41a7-b127-eca47a00753f>; see also Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea, Final Report of the Frontex Management Board Working Group, 1 March 2021, p 10.

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observance of the obligation to report has to be strictly monitored and a failure to meet them should trigger consequences.

As regards the second point, the follow-up procedures, the incident reporting system provides that every report is verified at several levels. This involves first a member of the Local Coordination Centre, second a member of the International Coordination Centre, and third the Frontex Situation Centre, located in the Operational Division at Frontex's headquarters in Warsaw, which gives final approval.

The Meijers Committee stresses that to effectively prevent or react to human rights violations, speed is often vital. It is therefore important that operational personnel on the ground - especially the host state officer in command - is immediately made aware of the circumstances to take swift action. In addition, the Fundamental Rights Officer should have a central role in deciding on an appropriate follow-up to reported human rights incidents.

5. Frontex's obligation to take "reasonable measures" when human rights violations occur

As an EU body, Frontex is bound by the EU Charter of Fundamental Rights which requires that in areas where the Charter guarantees the same rights as the ECHR, it must at least offer the same level of protection.²⁵ In the context of the ECHR, the ECtHR has consistently held that public authorities have positive obligations, requiring them to actively ensure the protection of a right, for example by taking practical steps to prevent a person from suffering a human rights violation at the hands of others.²⁶ Frontex's positive obligations are also reiterated in Article 80 EBCG Regulation, which requires the European Border and Coast Guard to guarantee that fundamental rights, including the principle of *non-refoulement*, are complied with. Frontex thus has to take measures to ensure that all participants—not just its own staff—act in conformity with fundamental rights.

The Meijers Committee draws attention to two important points in relation to Frontex's positive obligations in practice, concerning, first, the relationship between the foreseeability of human rights violations and Frontex's positive obligations and, second, the measures Frontex is required to take.

Knowledge and positive obligations

As regards the first point, a duty to intervene arises when the authorities "knew or ought to have known" of a "real and immediate risk" to the rights of one or more specific individuals, thus when an interference is foreseeable.²⁷ Among the tools Frontex has to get a clear picture of what is going on on-site is not only the above-mentioned duty for everyone involved in the operation to report serious incidents, but also Frontex's obligation to have "eyes on the ground" at all times during the operation.²⁸ In practice, a so-called Frontex Operational Coordinator is permanently deployed throughout the joint operation in the International Coordination Centre, the premises in the host state from which the daily running of an operation is coordinated. His/her duty is to monitor and facilitate the correct implementation of all operational activities. For that purpose, s/he is present during all meetings of the Joint Coordination Board, a body consisting of representatives of the host and participating states

²⁵ CFR, art. 53(3).

²⁶ In the context of Article 3 ECHR see in particular *Opuz*, no. 33401/02, para. 159.

²⁷ ECtHR *Osman v. The United Kingdom*, 28 October 1998, no. 23452/94, para. 116; ECtHR *Opuz v. Turkey*, 9 June 2006, no. 33401/02, para. 129; ECtHR *O'Keefe v. Ireland*, 16 June 2009, no. 35810/09, para. 144.

²⁸ EBCG Regulation, art 44(1).

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in charge of running the operation, and provides the Frontex headquarters with daily situation reports, highlighting cases that need immediate attention.²⁹

The Meijers Committee stresses that through its staff on the ground, in particular the Frontex Operational Coordinator, and the incident reporting mechanism, Frontex should in principle be aware of pushbacks or other human rights violations that occur in an area where it is active. Moreover, the EBCG Regulation actually obliges Frontex to oversee and ensure the correct implementation of the operation, including in relation to fundamental rights.³⁰ Since positive obligations arise not only when an authority actively knows of a human rights violation, but also when it *should have* such knowledge, Frontex cannot rely on the failure of these mechanisms to avoid the obligation under the Charter to take reasonable measures.³¹

What measures are “reasonable”?

As regards the second point, it is important to acknowledge the limits Frontex has due to its role and powers as an EU agency. On the one hand, Frontex is only required to take those measures that are “reasonable”. This is understood to include measures that “might have been expected to avoid that risk”³² or that “could have had a real prospect of altering the outcome or mitigating the harm”³³, as long as they do not “impose an impossible or disproportionate burden” on the authority in question.³⁴ In addition, Frontex’s positive obligations may not exceed the competences Frontex has as an EU agency, meaning that it can only be called upon to step in if and to the extent it can do so with the competences conferred on it.³⁵

In this respect, it is important to note that officers on the ground perform their tasks under instructions from the host state.³⁶ Frontex itself lacks the competence to issue instructions or orders to deployed officers. This means that in a situation where a pushback occurs, the Frontex officer on the ground cannot order the vessels in question to change their course of conduct. However, the Frontex officer on the ground is entitled to request the host state officer in charge to do so. This possibility is enshrined in Article 43(2) EBCG Regulation, according to which the Frontex officer on the ground may communicate his/her views on the host state’s instructions to the host state who “shall take those views into consideration and follow them to the extent possible”. If this can reasonably be considered to “have a real prospect of altering the outcome or mitigating the harm”, the positive obligations Frontex incurs under the Charter require it to make use of this competence. Should the host state ignore that advice, this has to be reported immediately to the agency where the Executive Director must consider suspending or terminating the operation if necessary (see below).³⁷ If these or other measures reasonably available to Frontex are not taken, Frontex is responsible under the Charter for failing to prevent a human rights violation.

²⁹ Frontex (Operations Division, Joint Operations Unit, Sea Borders Sector), Handbook to the Operational Plan: Joint Maritime Operations, 13 February 2014, 34; Melanie Fink, ‘Frontex and Human Rights: Responsibility in ‘Multi- Actor Situations’ under the ECHR and EU Public Liability Law’ (2018) Oxford University Press, 65.

³⁰ EBCG Regulation, arts 10(1)(e), 44(3)(b).

³¹ M. Fink, ‘The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable’ (2020) 21 German Law Journal 532, 547.

³² *Osman*, no. 23452/94, para. 116; *Opuz*, no. 33401/02, para. 130.

³³ *Opuz*, no. 33401/02, para. 136.

³⁴ *Osman*, no. 23452/94, para. 116; *Opuz*, no. 33401/02, para. 129; *O’Keefe*, no 35810/09, para. 144.

³⁵ CFR, art. 51(2).

³⁶ EBCG Regulation, arts 43(1), 82(4).

³⁷ EBCG Regulation, art 44(3)(d).

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6. Frontex's obligation to suspend or terminate an operation

Article 46 EBCG Regulation regulates the suspension, termination and withdrawal of financial support of activities by the Agency. The Meijers Committee draws attention to the obligation of the Executive Director in paragraph 4 of that Article to suspend, terminate or withdraw financial support of an activity if there are violations of fundamental rights or international protection obligations related to the activity concerned that are serious or are likely to persist. It can be understood that “serious” refers to the gravity of a violation and “likely to persist” to its continued nature or the lack of available remedies.

In addition, paragraph 3 of Article 46 allows (not requires) the Executive Director to withdraw the financing of an activity or suspend or terminate it if the operational plan is not respected by the host Member State. Since the Operational Plan reiterates the obligation to respect human rights and contains detailed Codes of Conduct in Annexes, the Executive Director could also make use of this possibility in the case of human rights violations.

The Meijers Committee notes with concern that Article 46 leaves the decision on suspensions or terminations almost entirely to the Executive Director with practically no safeguards or accountability mechanisms in place. While Article 46(4) does require consultation of the Fundamental Rights Officer, it is unclear what role s/he fulfils in this regard. In addition, decision-making, including the reasons for and against a suspension and the evidence considered, are not transparently communicated to the public.

On 27 January 2021, Frontex announced that it was suspending its operational activities in Hungary – the first time Frontex has ever suspended its activities. Initially, Frontex’s Executive Director Leggeri argued that fundamental rights violations could not be deemed extensive since only three serious incident reports were submitted.³⁸ It was only after a judgment of the Court of Justice of the European Union of 17 December 2020 in which it found Hungary’s practices at the border to violate human rights, that Frontex decided to suspend its operation in Hungary.³⁹ The Meijers Committee notes that suspending/terminating activities only where the Court of Justice condemned violations is too high a threshold for this tool to function as an effective preventive mechanism.

The Meijers Committee acknowledges that a suspension/termination of an operation might not always be successful in preventing human rights violations from continuing to occur. However, the Meijers Committee stresses the important symbolic value of withdrawal in clearly expressing that certain practices are against our shared values and will not be supported by the EU and other Member States.

7. Holding Frontex legally accountable

Even where convincing evidence is presented, it is notoriously difficult to hold Frontex to account for failures to meet these obligations. The atypical and largely *ad hoc* forms of investigation and accountability that are being used in the aftermath of the allegations against Frontex in relation to the pushbacks at the external border in Greece attest to this fact. The Meijers Committee expresses its

³⁸ L. Karamanidou, B. Kasperek, ‘What is Frontex doing about illegal pushbacks in Evros?’, Respond Migration, <https://respondmigration.com/blog-1/what-is-frontex-doing-about-illegal-pushbacks-in-evros>, 1 August 2020.

³⁹ Judgement of 17 December 2020, *Commission v Hungary*, C-808/18, ECLI:EU:C:2020:1029.

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concern regarding the scarcity of accountability mechanisms available against Frontex and makes two comments on this issue.

First, Frontex's working methods are an obstacle to the effectiveness of those accountability mechanisms that are available. The Meijers Committee acknowledges that operations that involve multiple participants that span different jurisdictions and have different obligations are unavoidably challenging when it comes to allocating responsibility for wrongdoing. However, in the case of Frontex, these challenges are compounded by the secrecy surrounding Frontex's activities. Information on daily activities is scarce, essential documents to establish responsibility are not publicly available (for instance Operational Plans), and material that is shared is highly redacted. While these obstacles may or may not have been intentionally designed to obfuscate the allocation of responsibility, they are surely avoidable.⁴⁰

Second, even though Article 47 CFR requires that everyone has the right to an effective remedy before an independent and impartial tribunal, there are several legal obstacles for individuals to hold Frontex legally accountable. National courts lack the competence to rule on the legality of Frontex's conduct. International courts, the ECtHR in particular, are also not competent because the EU has not submitted itself to their jurisdiction. That leaves the CJEU, where avenues for individuals to initiate proceedings are scarce. While individuals can have certain acts annulled (Article 263 TFEU), human rights violations such as pushbacks do not occur in the form of a legal act that could be annulled. Individuals can also hold Frontex liable under the action for damages (Article 340 TFEU).⁴¹ But due to the CJEU's very restrictive stance on liability, it is difficult to assess the chances of success of such an action beforehand.

In this light, an independent and impartial forum must be provided where individuals can hold Frontex accountable. While the establishment of the individual complaints mechanism according to Article 111 EBCG Regulation was a welcome step in this respect, it is the Executive Director who decides on complaints against Frontex which does not fulfil the requirements of independence and impartiality.

8. Recommendations

The Meijers Committee observes that the complaints mechanism of Frontex is currently being examined by the European Ombudsman. Furthermore, the European Parliament Scrutiny Group for Frontex has appointed MEP Tineke Strik to conduct an inquiry into the allegations of Frontex involvement in pushbacks. The Meijers Committee hopes that these inquiries will result in a stronger embedding of procedural norms pertaining to human rights and the Schengen Borders Code in Frontex operations.

It is most regrettable that in its report, the Frontex Management Board fails to fully grasp the seriousness of the incidents reported to it by individual Frontex officers from different Member States. This puts in to question the effectiveness of the incident reporting mechanism, the genuine nature of Frontex's commitment to the protection of fundamental rights and may dissuade Frontex and/or national participating officers to report such incidents in the future.

⁴⁰ This is based on M. Fink, 'Why it is so Hard to Hold Frontex Accountable: On Blame-Shifting and an Outdated Remedies System' (26 November 2020, *EJIL:Talk!*, available at <https://www.ejiltalk.org/why-it-is-so-hard-to-hold-frontex-accountable-on-blame-shifting-and-an-outdated-remedies-system/>).

⁴¹ M. Fink, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable' (2020) 21 German Law Journal 532.

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The Meijers Committee makes the following recommendations.

1. Ensure that in all Frontex operations at sea, regardless of the maritime zone and regardless of the nature of the operation (interception, prevention of departure, search and rescue), no migrant is returned or dissuaded from entry without full respect for procedural rights established in human rights law and the Schengen Borders Code.
2. This means respect for the following rights: the right to access interpreters and legal assistance, the right to bring arguments against return, the right to appeal, the obligation to identify the migrants and the obligation to refuse entry only by standardised.
3. Ensure that in all Frontex operations at sea, migrants have effective access to opportunities to ask for asylum.
4. Ensure that the recommendations above are included in all Operational Plans of Frontex.
5. Ensure that all officers participating in Frontex operations have the possibility to report human rights-relevant incidents they witness without repercussions to their reputation or career. Ensure that a failure to meet their obligation to report triggers consequences.
6. Ensure that reports of human rights-relevant incidents are treated with priority and include the Fundamental Rights Officer.
7. Ensure that Frontex, especially its personnel on the ground, is trained to take measures when they are made aware of (risks of) human rights violations. Ensure that the measures taken are communicated to and are open to scrutiny by the Fundamental Rights Officer.
8. Ensure a more proactive approach to transparency, including making documents necessary to establish the respective roles and responsibilities of the involved actors, such as (parts of) Operational Plans, publicly available.
9. Ensure that there is a common forum for individuals to lodge complaints about human rights violations that occurred in the context of Frontex operations. Complaints should be assessed by an independent and impartial body that has the competence to impose consequences on the Member States and Frontex itself.