

FRONTEx



**EUROPEAN BORDER AND
COAST GUARD AGENCY**

NINTH ANNUAL REPORT

Frontex Consultative Forum On Fundamental Rights 2021



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Frontex
**Consultative Forum
On Fundamental Rights
2021**

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EXECUTIVE SUMMARY



Launch of rapid intervention in Lithuania

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This report provides an overview of the Consultative Forum's activities in 2021. It outlines the main observations and recommendations raised throughout the year with Frontex and its Management Board to strengthen fundamental rights protection in the Agency's activities.

This year the report is structured around two major categories of fundamental rights advice that the Consultative Forum provides to Frontex: Chapter 4, 'Fundamental Rights Advice on Frontex operations and activities', provides insight into the operational dimension of the Consultative Forum's advisory role, while Chapter 5, 'Fundamental Rights Advice on Frontex procedures', explains the advisory work conducted at the strategic level in 2021. Frontex implemented many of the outstanding fundamental rights safeguards of Regulation 2019/1896 in 2021, and the Consultative Forum issued many recommendations to accompany and support this process.

While Annexes 1, 2 and 3 list in detail all activities of the Consultative Forum, Annexes 4-13 present all Consultative Forum recommendations issued in 2021.

Public allegations by investigative media associating Frontex with fundamental rights breaches continued in 2021. This led to the activation of several external oversight mechanisms, which looked more closely into Frontex's activities to better assess the Agency's circumstances and role. The Consultative Forum transparently contributed to these inquiries by outlining its past and present advice to the Agency and by proposing specific measures to address the shortcomings. A broad range of actors such as the Management Board's Working Group on Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea (FRALO), the European Parliament's Frontex Scrutiny Working Group (FSWG), the European Anti-Fraud Office (OLAF), the European Court of Auditors (ECA) and the European Ombudsperson called upon Frontex to

implement those recommendations which they have issued. Some of these recommendations concern fundamental rights and advise the Agency to consider the Fundamental Rights Officer's and the Consultative Forum's recommendations.

While the Agency listed in a table its actions following up on the recommendations made by FRALO, the FSWG, the European Ombudsperson and the ECA, and regularly reports progress to its Management Board, the Agency does not have any methodology for following up recommendations by the Fundamental Rights Officer and the Consultative Forum, even though this obligation is enshrined in Article 109(4) and Article 108(3) of Regulation (EU) 2019/1896.

It will be important for accountability and transparency that external oversight mechanisms including the European Commission, the European Parliament, the ECA and the European Ombudsperson continue observing the implementation of their recommendations and that impact assessments and evaluations of the Agency's activities include fundamental rights.

The Agency devised an internal standard operating procedure for the operationalisation of Article 46 of Regulation (EU) 2019/1896 in 2021. The Consultative Forum contributed observations during drafting. Following its adoption, it will be important to observe how the Agency implements the procedure and the extent to which it considers the Fundamental Rights Officer's advice ahead of decisions. It is also key that decisions whether to suspend are transparent and fully accessible.

To better perform its advisory role, the Consultative Forum resumed observation missions to Frontex operations, which had been suspended due to the restrictions imposed during the Covid-19 pandemic. Consultative Forum representatives visited Lithuania and

Greece and discussed their findings with Management Board members and Frontex Management in restricted Focus Group meetings.

The Consultative Forum presented its 2022 Programme of Work on 17 November 2021. The Ninth Annual Report of the Consultative Forum will be presented upon request to the European Parliament's Frontex Committee on Civil Liberties, Justice and Home Affairs Committee and the Council Working Party on Frontiers.

2 INTRODUCTION

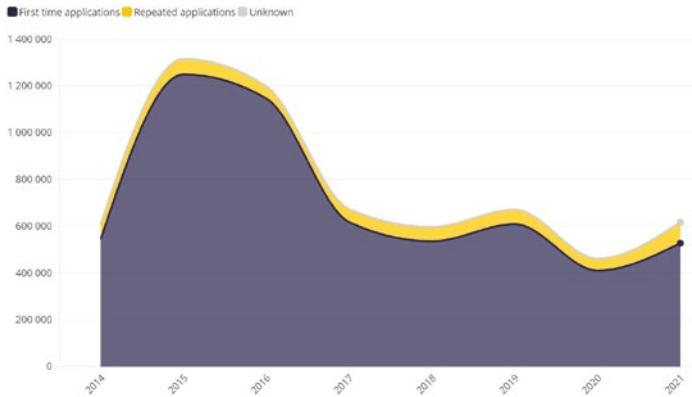


Bulgarian border guards in Evros, 2021

© Frontex

In 2021, the Covid-19 pandemic entered its second year and continued to affect the lives of virtually everyone globally. This was also the year that vaccination against Covid-19, which became widely available in EU countries, gradually contributed to the lifting of most EU border restrictions related to public health matters.

As reported by the European Union Agency for Asylum (EUAA),¹ in 2021 around 617 800 applications for international protection were received in the EU+, an increase of one-third from 2020. Most of the applications were lodged by Afghans and Syrians, with Iraq, Pakistan, Turkey and Bangladesh also featuring among the top countries of origin.



Source: EUAA, Latest Asylum Trends - Annual Overview 2021²

¹ See European Union Agency for Asylum, [Latest Asylum Trends - Annual Overview 2021](https://europa.eu/eu-external-communication/en/latest-asylum-trends-annual-overview-2021) | European Union Agency for Asylum (europa.eu).

² Latest asylum trends, annual overview 2021, European Union Agency for Asylum, available at: <https://euaa.europa.eu/latest-asylum-trends-annual-overview-2021>.

Discussions on the legislative proposals presented under the New Pact on Migration and Asylum, tabled by the European Commission in September 2020, continued throughout 2021 in the Council and the European Parliament. Additionally, the Commission introduced in June its Schengen Strategy, aimed at reinforcing the functioning and governance of the internal free travel area.³ It also tabled a legislative proposal revamping the Schengen Evaluation and Monitoring Mechanism.⁴ The Strategy was complemented by a proposal in December aiming to reform the Schengen Borders Code,⁵ to tackle internal border controls and to address future health-related situations. At the same time, a proposal on addressing situations of ‘instrumentalisation’ of migrants was put forward in response to the mixed migration movements at the EU borders with Belarus,⁶ along the lines of a previous proposal on provisional emergency measures under Article 78(3) of the Treaty on the Functioning of the European Union (TFEU) for Lithuania, Poland and Latvia.⁷ A new EU Strategy on Combatting Trafficking in Human Beings (2021-2025)⁸ was also adopted in 2021 and the European Commission adopted

- 3 Towards a stronger and more resilient Schengen area, press release, 02/06/2021, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2708.
- 4 See proposal for a COUNCIL REGULATION on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing Regulation (EU) 1053/2013, COM/2021/278 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0278>.
- 5 Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, 14/12/2021, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2021%3A891%3AFIN&qid=1639757139340>.
- 6 Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL addressing situations of *instrumentalisation* in the field of migration and asylum, 14/12/2021, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2021%3A890%3AFIN&qid=1639757068345>.
- 7 Proposal for a COUNCIL DECISION on provisional emergency measures for the benefit of Latvia, Lithuania and Poland, 1/12/2021, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2021%3A752%3AFIN&qid=1638547296962>.
- 8 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, on the EU Strategy on Combatting Trafficking in Human Beings, 14/04/2021, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021DC0171>.



the implementing regulation on the situational pictures of the European Border Surveillance System (EUROSUR).⁹

In 2021, Frontex expanded its operational activities in Serbia, following the entry into force of the Status Agreement. This marks an increase of the Agency's cooperation with countries in the Western Balkan region, where it has already concluded working arrangements with Albania and Montenegro.

In July, following a request from the Lithuanian government for increased operational support, Frontex launched a Rapid Border Intervention (RBI) at the border with Belarus through the end of November 2021.¹⁰ Subsequently, Frontex support reverted to its regular Flexible Operational Activities and Focal Points Land 2021 for Lithuania. For the first time, Standing Corps officers of the

⁹ See Commission Implementing Regulation (EU) 2021/581 of 9 April 2021 on the situational pictures of the European Border Surveillance System (EUROSUR), C/2021/2361, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32021R0581>.

¹⁰ Frontex press release, *Frontex launches rapid border intervention in Lithuania*, 12/07/2021, Frontex website: <https://frontex.europa.eu/media-centre/news/news-release/frontex-launches-rapid-intervention-in-lithuania-MwIEXJ>.

Agency carried firearms while patrolling.¹¹ The Consultative Forum followed the activities of the Agency in Lithuania with particular interest amidst concern over the legislative amendments introduced following arrivals of migrants and refugees through Belarus. The state of emergency declared by Lithuania in response to the pressure introduced limitations that hindered access to asylum and increased the practice of detention at the borders, with people being stranded along the frontier for prolonged periods, with limited assistance in precarious conditions. Pushbacks and expulsions were increasingly reported, including through Serious Incident Reports.

Movements of people trying to reach the United Kingdom from France, using small, unseaworthy boats, continued unabated throughout the year.¹² Following loss of lives in the English Channel, Frontex was called to provide surveillance operations to support the authorities in France, Belgium and the Netherlands.

The Agency continued its consolidation and growth with an organisational restructuring. In October 2021, three Deputy Executive Directors (covering the portfolio on Returns and Operations, Standing Corps Management and European Border and Coast Guard Information Management and Processes respectively) were appointed by the Management Board.¹³ Frontex also continued its preparations for the launch of the European

¹¹ Frontex press release, *Frontex and Lithuania agree on service weapons delivered to Frontex standing corps officers*, 09/12/2021, Frontex website: <https://frontex.europa.eu/media-centre/news/news-release/frontex-and-lithuania-agree-on-service-weapons-delivered-to-frontex-standing-corps-officers-y3lVzk>.

¹² *Frontex to support Member States in the Channel and North Sea region* <https://frontex.europa.eu/media-centre/news/news-release/frontex-to-support-member-states-in-the-channel-and-north-sea-region-pZWNYE>.

¹³ *The appointment of the 3 Deputy Executive Directors, Management Board updates*, 22/10/2021, Frontex website: <https://frontex.europa.eu/media-centre/management-board-updates/the-appointment-of-the-3-deputy-executive-directors-9EUq7O>.

Travel Information and Authorization System (ETIAS), foreseen at the end of 2022.¹⁴

The Agency adopted a new Fundamental Rights Strategy¹⁵ as provided for by Article 80(1) of the Regulation, and in November the Management Board approved an Action Plan to implement the Strategy. The Consultative Forum provided its recommendations in this process.¹⁶

In a related development, the reform of the Serious Incident Reporting led to the adoption of Standard Operating Procedures in April 2021¹⁷ to which the CF contributed by issuing a recommendation (see Annex 6). Similarly, the CF contributed with a recommendation to the revision of the Supervisory Mechanism for the Use of Force.¹⁸ It also provided its advice on the ongoing reform of the Individual Complaints Mechanism.

After more than a year when the Fundamental Rights Office had no formally appointed head, in June 2021 Jonas Grimheden took office as Fundamental Rights Officer. At the same time, eight staff as well as 20 Fundamental Rights Monitors were recruited. The recruitment

¹⁴ ETIAS – the European Travel Authorisation and Information System, 13/10/2021, Frontex website: <https://frontex.europa.eu/media-centre/news/news-release/etias-the-european-travel-authorisation-and-information-system-hiltkW>.

¹⁵ Management Board adopts the new Frontex Fundamental Rights Strategy, 15/02/2021, Frontex website: [Management Board adopts the new Frontex Fundamental Rights Strategy \(europa.eu\)](https://frontex.europa.eu/assets/Key_Documents/MB_Decision/2021/MB_Decision_61_2021_adopting_the_Fundamental_Rights_Action_Plan_for_the_implementation_of_the_FRS.pdf).

¹⁶ Management Board decision 61/2021 of 9 November 2021 adopting the Fundamental Rights Action Plan for the implementation of the Fundamental Rights Strategy, available at: https://frontex.europa.eu/assets/Key_Documents/MB_Decision/2021/MB_Decision_61_2021_adopting_the_Fundamental_Rights_Action_Plan_for_the_implementation_of_the_FRS.pdf.

¹⁷ Decision of the Executive Director, Standard Operating Procedure for Serious Incident Reporting of 19/04/2021, available at: https://frontex.europa.eu/assets/Key_Documents/SIR_SOP.pdf.

¹⁸ Management Board decision 7/2021 of 20 January 2021 establishing a supervisory mechanism to monitor the application of the provisions on the use of force by statutory staff of the European Border and Coast Guard Standing Corps, available at: https://frontex.europa.eu/assets/Key_Documents/MB_Decision/2021/MB_Decision_7_2021_on_supervisory_mechanism.pdf.

of another 20 Fundamental Rights Monitors to reach the target of 40 as established by the Regulation was still ongoing by the end of 2021. The Fundamental Rights Officer, however, has already expressed the need to further increase the number of monitors, to match the exponential increase of the Agency's operational activities.

In August 2021 the Frontex Fundamental Rights Officer published his first Annual Report.¹⁹ It provided an update on the status of implementation of fundamental rights in the Agency's activities.

The year 2021 marked a peak in relation to external oversight of Frontex activities. FRALO invited the Consultative Forum to hearings and requested information, following which the Consultative Forum issued an opinion on fundamental rights considerations in the context of search and rescue operations and interception at sea (see Annex 5).²⁰ FRALO closed its inquiry with a final report.²¹

Following the conclusions of the FRALO inquiry, the European Parliament's LIBE Committee set up the Frontex Scrutiny Working Group (FSWG) in February 2021,²² chaired by Member of the European Parliament (MEP) Roberta Metsola. The FSWG initiated a 'fact-finding investigation on Frontex concerning alleged fundamental rights violations' and conducted a series of activities

¹⁹ Frontex press release, *First Frontex fundamental rights office report*, 27/08/2021, available at: <https://frontex.europa.eu/media-centre/news/news-release/first-frontex-fundamental-rights-office-report-SswYWN>.

²⁰ See the Consultative Forum response to request for information received from the FRALO, 24/02/2021, available at: [Consultative Forum letter to FRALO.pdf](#) (europa.eu).

²¹ See the final report of the Frontex management board working group on fundamental rights and legal operational aspects of operations in the Aegean Sea, march 2021, available at: [Agenda Point WG FRALO final report.pdf](#) (europa.eu).

²² See the letter from the Chairman of the LIBE committee on the creation of the FSWG dated 29/01/2021, available at: [Outcomeofwrittenprocedureof29January_EN.pdf](#) (europa.eu).

including hearings with the Consultative Forum. The FSWG published a report²³ which revealed serious shortcomings in transparency, accountability and the protection of fundamental rights in Frontex operations. The European Parliament used its budgetary powers to freeze 12% of the budget allocated to the Agency for 2022 until key changes were made to ensure respect for fundamental rights and strict adherence to the provisions of Regulation 2019/1896 – including through the recruitment of the pending 20 Fundamental Rights Monitors.²⁴

The ECA concluded in its Special Report 08/2021²⁵ that Frontex's support for external border management had not been effective to date, but the report did not look into fundamental rights matters. Special Report 17/2021 (ECA) also pointed to inefficiencies in Frontex support to Member States in the area of returns, but did not consider fundamental rights either.²⁶ The Consultative Forum observed in 2021 that fundamental rights are absent from auditing and evaluation mechanisms, which constitutes an accountability gap.

²³ Final report of the Frontex scrutiny working group of the European Parliament, 14/07/2021, available at: https://www.europarl.europa.eu/cmsdata/238156/14072021%20Final%20Report%20FSWG_en.pdf.

²⁴ European Parliament decision of 21 October 2021 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)), 21/10/2021, available at: https://www.europarl.europa.eu/doceo/document/TA-9-2021-0442_EN.html.

²⁵ European Court of Auditors, Special report 08/2021: Frontex's support to external border management: not sufficiently effective to date, 07/06/2021, available at: <https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=58564>.

²⁶ European Court of Auditors, Special report 17/2021: EU readmission cooperation with third countries: relevant actions yielded limited results, 13/09/2021, available at: <https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=59347>.

The findings of the European Ombudsman resulting from an inquiry launched in 2020 were published in June 2021.²⁷ The inquiry laid out a set of recommendations to make the complaints mechanism effective and address its shortcomings.

Throughout 2021, allegations of fundamental rights violations at the EU's external borders continued to be widely reported, as the UN Special Rapporteur on the Human Rights of Migrants noted in his report on pushbacks on land and sea.²⁸ Frontex cooperation with Libyan authorities continued to be in the spotlight in publications such as 'The Outlaw Ocean',²⁹ and reports by Human Rights Watch³⁰ and Amnesty International.³¹ Media outlets also published information concerning a push-back from Greece to Turkey, affecting an interpreter employed by the Agency.³²

27 Press release, *European Ombudsman opens inquiry to assess European Border and Coast Guard Agency (Frontex) 'Complaints mechanism'*, 12/11/2020, available at: <https://www.ombudsman.europa.eu/en/news-document/en/134739>.

28 Reports on means to address the human rights impact of pushbacks of migrants on land and at sea, report of the Special Rapporteur on the human rights of migrants, Felipe González Morales, 12/05/2021, available at: <https://undocs.org/en/A/HRC/47/30>.

29 The Outlaw Ocean project, available at: <https://www.theoutlawocean.com/investigations/the-secretive-libyan-prisons-that-keep-migrants-out-of-europe/>.

30 *Frontex failing to protect people at EU borders, stronger safeguards vital as border Agency expands*, Human rights watch, 23/06/2021, available at: <https://www.hrw.org/news/2021/06/23/frontex-failing-protect-people-eu-borders>.

31 No one will look for you, Amnesty International, 15/07/2021, available at: <https://www.amnesty.org/en/documents/mde19/4439/2021/en/>.

32 'EU interpreter says Greece expelled him to Turkey in migrant roundup', the New York Times, 01/12/2021, available at: <https://www.nytimes.com/2021/12/01/world/europe/greece-migrants-interpreter-expelled.html>.

Finally, two cases against Frontex were brought before the Court of Justice of the European Union (CJEU). The first case (T-282/21)³³ consists of an action for failure to act under Article 265 TFEU, arguing that the Agency did not withdraw financing, suspend or terminate its activities in Greece despite evidence of repeated serious fundamental rights violations. A second case claiming action for damages (T-600/21) was submitted to the CJEU in September 2021, involving a Syrian family forcibly returned to Turkey on a Frontex-organised return flight, without due assessment of their asylum claims in Greece.³⁴

33 Action brought on 21/05/2021, *SS and ST V Frontex (Case T-282/21)*, Court of Justice of the European Union, available at: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=244444&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=8995094>.

34 <https://curia.europa.eu/juris/document/document.jsf?text=&docid=250302&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=10026777> and related article 'EU Agency Frontex sued for illegal pushbacks', 20/10/2021, available at: <https://www.prakkendoliveira.nl/nl/nieuws/2021/eu-agentschap-frontex-voor-illegale-pushbacks-aangeklaagd>.

3

ROLE AND COMPOSITION



LIPA camp, Bosnia and Herzegovina, January 2021

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The Frontex Consultative Forum was established in October 2012 and has been operational since January 2013. Pursuant to Article 108 of Regulation (EU) 2019/1896, the Consultative Forum provides independent advice to the Agency on the respect, protection, and promotion of fundamental rights in its activities.

The Consultative Forum is an independent fundamental rights advisory body to the Agency. Within the overarching fundamental rights safeguarding architecture, the Consultative Forum's role is complementary to that of the Fundamental Rights Officer³⁵ and the other fundamental rights mechanisms.

Regulation 2019/1896 highlights particular areas³⁶ where the Agency should seek the Consultative Forum's views but also enables the Consultative Forum to work on any matter related to fundamental rights upon request by the Agency, the Management Board or the Fundamental Rights Officer, or at its own initiative.³⁷

The Consultative Forum does not have the mandate to monitor Frontex activities. It is the Fundamental Rights Officer and the Fundamental Rights Monitors who have the competence "to constantly assess the fundamental rights compliance of Frontex operational activities."³⁸

³⁵ References to 'the Fundamental Rights Officer' should be read with respect to the Management Board Decision 13/2019 and Management Board Decision 26/2020 according to which the Associate Fundamental Rights Officer deputized for the Fundamental Rights Officer from 22 February to 23 September and the Advisor to the Fundamental Rights Office was nominated as Fundamental Rights Officer *ad interim* on 24 September for a year unless a Fundamental Rights Officer is recruited before.

³⁶ See the analysis in the *Seventh Annual Report, Frontex Consultative Forum on Fundamental Rights 2019*, https://frontex.europa.eu/assets/Partners/Consultative_Forum_files/Frontex_Consultative_Forum_annual_report_2019.pdf.

³⁷ Article 108(1) and Article 108(3) of Regulation (EU) 2019/1896.

³⁸ Article 110 of Regulation (EU) 2019/1896.

In 2021, the Consultative Forum was composed of 14 organisations, which contributed their expertise and resources on a voluntary basis. UNHCR, EUAA and FRA are statutory members of the Consultative Forum as per Regulation 2019/1896. CoE, IOM, OSCE/ODIHR and the UN High Commissioner for Human Rights (UN Human Rights) Regional Office for Europe were invited to become members.³⁹ Additionally, the Council of Bars and Law Societies of Europe expressed its interest in participating in the Forum and joined in 2021.⁴⁰ The 14 organisations comprise:

Two European Union agencies:

- European Asylum Support Office (EASO);
- European Union Agency for Fundamental Rights (FRA).

Five international organisations:

- United Nations High Commissioner for Refugees (UNHCR);
- Council of Europe (CoE);
- UN Human Rights Office (OHCHR);
- International Organisation for Migration (IOM); and
- Organization for Security and Co-operation in Europe — Office for Democratic Institutions and Human Rights (OSCE/ODIHR).

Seven civil society organisations:

- Amnesty International European Institutions Office (AI EIO);
- Churches' Commission for Migrants in Europe (CCME);
- International Commission of Jurists (ICJ);

³⁹ Management Board Decision 4/2020 of 29 January 2020 amending Management Board Decision 29/2019 of 2 December 2019 on the composition of the Consultative Forum on Fundamental Rights, <https://prd.fronx.europa.eu/document/management-board-decision-04-2020-of-29-january-2020-amending-management-board-decision-29-2019-of-2-december-2019-on-the-composition-of-the-consultative-forum-on-fundamental-rights/>.

⁴⁰ Management Board decision 49/2021 of 21 September 2021 selecting and inviting the proposed civil society organisation to become a member of the Consultative Forum on Fundamental Rights: https://frontex.europa.eu/assets/Key_Documents/MB_Decision/2021/MB_Decision_49_2021_selecting_and_inviting_the_proposed_Civil_Society_Organisation_to_become_a_member_of_the_CF_on_Fundamental_Rights.pdf.

- Jesuit Refugee Service Europe (JRS);
- Red Cross EU Office;
- Save the Children;
- Council of Bars and Law Societies of Europe (CCBE).

UNHCR and FRA co-chaired the Consultative Forum in 2021 with the support of the Consultative Forum Secretariat (which is facilitated by Frontex through the Fundamental Rights Office) until the end of June 2021. The replacement of the Consultative Forum Secretariat staff was pending recruitment until the end of 2021.

For more information contact us: consultative.forum@frontex.europa.eu

Universal Periodic Review (UPR) project ⁴¹

For the second consecutive year, under the project to raise awareness of UPR recommendations relating to border management, UN Human Rights Office (OHCHR) enhanced the capacity of the Consultative Forum via an expert-consultant on migration and human rights working full time for the Forum. The expertise provided under the UPR project contributed in particular to drawing up of the Consultative Forum advice on the development of the policies and procedures required to implement the fundamental rights safeguards introduced by Regulation 2019/1896.

The Consultative Forum supported increased awareness of UPR recommendations addressed to EU Member States related to integrated border management and to the human rights of migrants.

⁴¹ For more details on the UPR, see: www.ohchr.org/en/hrbodies/pages/universalhumanrightsindexdatabase.aspx.

4 FUNDAMENTAL RIGHTS ADVICE TO FRONTEX ON OPERATIONS AND ACTIVITIES



Reception Centre, Samos Island

© Frontex Consultative Forum on Fundamental Rights

In 2021 the Consultative Forum held more than 30 meetings, issued 10 recommendations, submitted 6 requests for information and conducted 2 observation missions to Frontex operations (see Annexes). In 2021 the Consultative Forum held more than 30 meetings, issued 10 recommendations, submitted 6 requests for information and conducted 2 observation missions to Frontex operations (Annexes 1, 2 and 3).

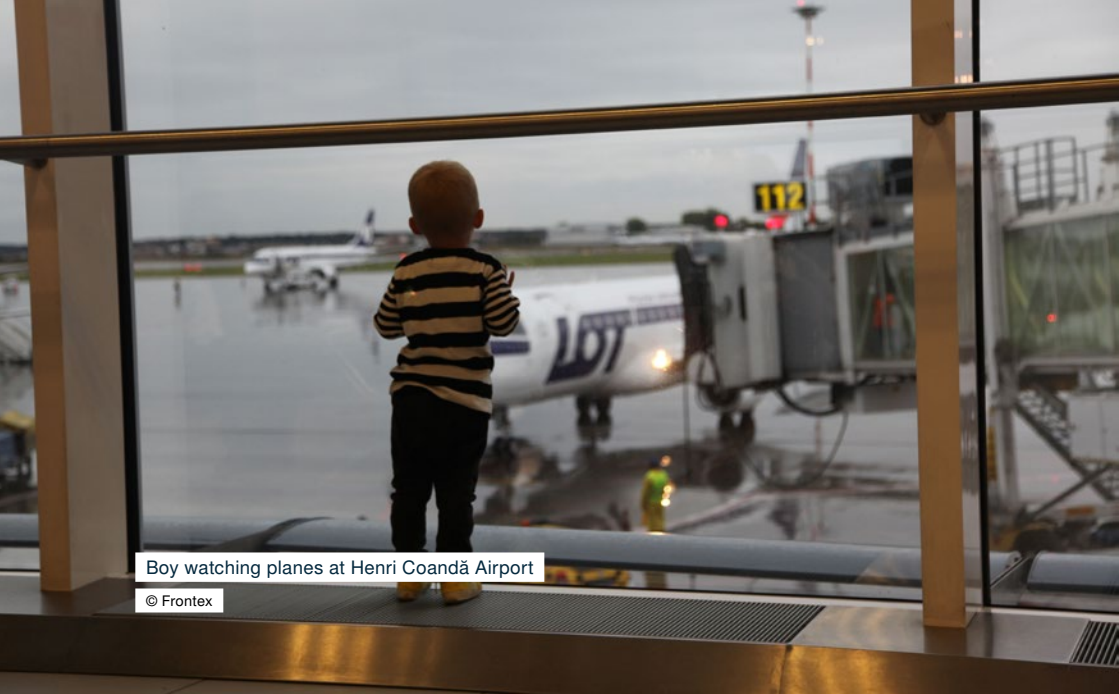
This section outlines the Consultative Forum's operational advice. Such advice is provided either on the spot when Consultative Forum member organisations participate in a Frontex activity such as the VEGA project; when the Consultative Forum issues operational recommendations (see 4.2 and 4.6); in the context of training development; or during focus group meetings with Frontex and Management Board members following observation missions.

The Consultative Forum regularly addressed concerns related to emerging fundamental rights issues. These include the situation at the EU's borders with Belarus, operations in the Aegean Sea and along the borders with Turkey or on aerial surveillance. The Forum inquired about Frontex activities in such environments, through written requests for information (see Annex 2), direct exchanges at meetings and observation missions to Lithuania and Greece.

Chapter 5 outlines advice the Consultative Forum provided on procedures.

4.1 Child protection and safeguarding in Frontex activities

Members of the Consultative Forum participated in VEGA Children land and air activities, in which experts worked together with Frontex Standing Corps and host states' border personnel to identify children who might be at risk of trafficking. Twelve Consultative



Boy watching planes at Henri Coandă Airport

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Forum experts joined Frontex operations in Bulgaria (Kapitan Andreevo) from 1-15 December; Croatia (Terehova, Bajakovo) from 8-22 September; Montenegro from 3-17 November; Romania (Galati) from 8-22 September; and at the airports of Madrid, Tbilisi, Chisinau and Pristina from 6 October to 3 November.⁴² Following the participation in VEGA activities, Consultative Forum experts, in cooperation with the Frontex Operations Division, contributed to child protection training for border personnel, including awareness on how to detect and protect children at risk.

The Consultative Forum welcomed the Agency's efforts to compile and promote good practices from EU Member States aiming at upholding the rights of the child in return procedures through guidance addressed to EU Member States. The Consultative Forum considers that it is key for European Integrated Border Management to ensure that the best interests of the child, in line with international and EU law, are enshrined as a core principle and strictly adhered to so

⁴² See <https://twitter.com/Frontex/status/1442872536921001989>.

that they take precedence over any other consideration, including in the field of return.⁴³ In this regard, the Consultative Forum issued a recommendation that is available in Annex 8.

4.2 Suspension of Frontex operations in Hungary

As a follow-up to the CJEU ruling of 17 December 2020,⁴⁴ at the beginning of 2021 the Fundamental Rights Officer *ad interim* invited the Consultative Forum to submit a recommendation in relation to Article 46 of Regulation (EU) 2019/1896 on the suspension or termination, in whole or in part, of Agency activities in Hungary.

The Consultative Forum reiterated its long-standing opinion that to avoid direct or indirect breaches of EU or international law, operational support by the Agency must be contingent on people arriving at EU borders being treated in full compliance with EU law, including the EU Charter of Fundamental Rights, and international human rights and international refugee law.⁴⁵ These foresee that any decision affecting a person's rights be taken on an individual basis;⁴⁶ that individuals be provided effective access to asylum and informed about their right to seek asylum;⁴⁷ that they be returned

43 See Consultative Forum Annual report 2019, page 54, available at: [Frontex Consultative Forum annual report 2019.pdf \(europa.eu\)](#).

44 Court of Justice of the European Union (CJEU), *Commission v. Hungary*, C-808/18, 17 December 2020 according to which "Hungary has failed to fulfil its obligations under Article 5, Article 6(1), Article 12(1) and Article 13(1) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, under Article 6, Article 24(3), Article 43 and Article 46(5) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, and under Articles 8, 9 and 11 of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection."

45 Hungary committed to ensure that its legal framework and actions concerning asylum seekers, refugees and migrants comply with international human rights obligations, see [UPR recommendation 128.190](#).

46 [Schengen Borders Code](#), Article 4; Return Directive (2008/115/EC) (OJ 2008 L 348/98), Recital (6).

47 [Directive 2013/32/EU](#) of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180, 29.6.2013, pp. 60–95, Articles 6 and 8.



Registration and Identification Spain 2021

© Frontex

only with full respect for the safeguards of the Return Directive (2008/115/EC)⁴⁸ and international human rights law;⁴⁹ and that instances of police abuse and violence be promptly and effectively investigated independently and impartially.

As a result, the Consultative Forum recommended that the Fundamental Rights Officer should advise the Agency to suspend or refrain from launching operations in 2021, in accordance with Article 46(4) and (5) of Regulation (EU) 2019/1896, considering that core national legislation relating to access to asylum is in violation of EU law.

Although Frontex informed the Consultative Forum about the suspension of operations in Hungary, by end of 2021 Frontex continued to carry out return operations from Hungary against the advice of the Fundamental Rights Officer and the Consultative Forum. Mitigating

⁴⁸ Articles 5, 6(1), 12(1) and 13(1) of Directive 2008/115/EC.

⁴⁹ UN convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: shorturl.at/fjKQR.

measures in relation to potential risks concerning the return decisions issued by the Hungarian authorities were not introduced (see the Consultative Forum recommendation in Annex 4). The Forum repeatedly inquired about the Executive Director's decision concerning the suspension of operations in Hungary with the exemption of return activities, but did not get access to it.

4.3 Observation missions

According to Article 108(5) of Regulation (EU) 2019/1896, the Consultative Forum may, "without prejudice to the tasks of the fundamental rights officer, carry out on-the-spot visits to joint operations or rapid border interventions subject to the agreement of the host Member State or the third country, as applicable, to hotspot areas and to return operations and return interventions, including in third countries."

Observation missions allow the Consultative Forum to tailor its recommendations to the operational context.

The Consultative Forum resumed operational visits at the end of 2021, focusing on Frontex's role in Lithuania and Greece.

4.3.1 Lithuania, 15-18 November 2021

The Consultative Forum delegation observed the role of Frontex in the context of the Rapid Border Intervention (RBI) that the Agency activated upon request of the Lithuanian authorities to respond to the increasing arrivals at the border with Belarus. Through meetings with national authorities, Frontex staff and border guards, including at selected border control points, and meetings with the Fundamental Rights Monitors, the Consultative Forum delegation familiarised itself with operational modalities, challenges and risks. The delegation also met civil society organisations.



Launch of rapid intervention in Lithuania

© Frontex

Preliminary observations were shared at a focus group meeting with the Lithuanian members of Frontex Management Board and with Frontex counterparts. On that occasion, the Consultative Forum expressed concerns over Frontex's ability to fulfil its mandated responsibilities under Regulation 2019/1896 in relation to safeguarding fundamental rights.

The Consultative Forum recommended that Frontex conduct a thorough assessment of the fundamental rights situation in the country based on which its terms of engagement are designed, in line with the provisions of Regulation 2019/1896. It is essential that the assessment of operational conditions in such circumstances be conducted regularly in close cooperation with the Fundamental Rights Officer, whose analysis should inform the decision to engage and the modalities of Frontex's support.

4.3.2 Greece, 6-10 December 2021

The Consultative Forum delegation held meetings with authorities in Athens before visiting locations in Samos, as well as in Alexandroupoli and Orestiada, along the land border with Turkey, where it met with Frontex personnel, Hellenic Police and Coast Guard, and civil society representatives. The delegation expressed concerns over insufficient reporting of incidents by the Agency and raised questions over Frontex's role in relation to alleged fundamental rights violations and its ability to fulfil its responsibilities under the Regulation. In line with the opinions and recommendations of the FRO, as well as those of the FRALO WG, LIBE FSWG and ECA recommendations on reporting and due diligence, the Consultative Forum argued that systematic reporting should lead the Agency to review the context against the provisions of Operational Plans and adjust its position and terms of engagement.

As with the Lithuania mission, the Consultative Forum shared its observations with the Greek members of the Management Board and Frontex counterparts in a focus group meeting.

Frontex patrol boats in Samos island, Greece

© Fundamental Rights Office





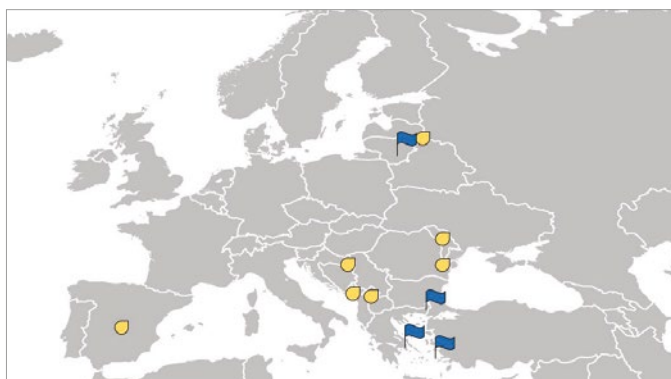
BORDER POLICE

4.4 Fundamental rights safeguards in sea operations

The Consultative Forum published a set of fundamental rights considerations in the context of search and rescue operations and interception at sea in February 2021,⁵⁰ in the context of the FRALO-led inquiry. As expressed in several hearings of the FRALO Working Group, the Consultative Forum recalled that the prohibition of *refoulement* and of collective expulsion, as well as the right to an effective remedy set out in international and EU law, including the Charter of Fundamental Rights, apply irrespective of whether persons have expressed a wish to seek asylum. Wherever individuals are under the jurisdiction of a Member State, and there are substantial grounds to believe that they might wish to seek asylum and/or be at risk of serious violations of human rights upon return to the country of transit or origin, the Member State must inform them how to seek asylum and facilitate access to an independent and effective status determination procedure. In addition, under EU law, “indications” of the intention to seek asylum suffice; in such a case, a Member State must inform how to apply for asylum and facilitate access to the asylum procedure in the EU. In the Aegean context, such indications were clearly present at the time of the inquiry. The practice of ignoring such indications remains a concern. The Consultative Forum further recalled that where persons express the wish to seek asylum, which does not require any formalities whatsoever, they must be disembarked on land and have their applications examined in accordance with the Asylum Procedures Directive.

⁵⁰ Consultative Forum letter, Consultative Forum response to request for information received from the FRALO, 24 February 2021: <https://frontex.europa.eu/media-centre/management-board-updates/conclusions-of-the-management-board-s-meeting-on-5-march-2021-on-the-report-of-its-working-group-on-fundamental-rights-and-legal-operational-aspects-of-operations-in-the-aegean-sea-a-few-slides>.

The Chair of the Frontex Management Board published the Consultative Forum's opinion together with the legal opinion of the European Commission (See Annex 5).



● Consultative Forum members deployed to Frontex VEGA operations

🚩 Consultative Forum on the spot visits

4.5 Training

In 2021, the Consultative Forum reviewed selected material for fundamental rights trainers and for the training of the Standing Corps category 1.

Overall, the Consultative Forum considers that a sound training methodology, including fundamental rights expertise at all stages of the development and delivery of training activities, could significantly enhance the quality of training. The Consultative Forum thus reiterated on various occasions that fundamental rights expertise, including from external, independent sources, should be considered in the design and development of training activities.

Such expertise could include National Human Rights Institutions, EU Agencies and other international and civil society organisations supporting training processes, including the design and delivery of training which include a fundamental rights component. This recommendation is part of the Action Plan of the Frontex Fundamental rights strategy,⁵¹ and its implementation should be monitored by the Fundamental Rights Officer.

⁵¹ Action plan to the Fundamental rights strategy, Activity 35, available at: [MB_Decision_61_2021_adopting_the_Fundamental_Rights_Action_Plan_for_the_implementation_of_the_FRS.pdf \(europa.eu\)](#).

5

FUNDAMENTAL RIGHTS ADVICE TO FRONTEX ON PROCEDURES



Standing corps training, Avila 2021

© Frontex

The table below highlights the safeguards put in place by Regulation 2019/1896, indicating their state of implementation in 2021 and the Consultative Forum's advisory role in the processes.

1. State of play of implementing fundamental rights safeguards of Regulation 2019/1896 in 2021

Safeguards	Consultative Forum's advisory role	State of play in 2021
Recruitment of an independent Fundamental Rights Officer (FRO) with the necessary qualifications, expert knowledge and professional experience.	In 2021, the Consultative Forum was invited by the Frontex Management Board to participate in the selection panel for the recruitment of the Fundamental Rights Officer. In June 2021, Jonas Grimheden was appointed. ⁵²	✓
The development and adoption of rules on the independence of the FRO and his or her staff.	The Consultative Forum issued a recommendation to the Management Board decision adopting "Rules on the independence of the Fundamental Rights Officer and his or her staff." ⁵³	✓ ⁵⁴
The Management Board must ensure that action is taken on the recommendations of the Fundamental Rights Officer. ⁵⁵	The Fundamental Rights Officer and the Consultative Forum highlighted to the Agency, including in the context of the inquiry lead by FRALO and FSWG, that Article 109(4) of Regulation (EU) 2019/1896 is not adequately implemented and that the Agency needs to put in place a procedure for its operationalisation. The FSWG also urged the Management Board and the Executive Director to "ensure that the FRO and CF are included actively from the very start of relevant processes, actively involve the recommendations and opinions from the FRO and CF in their decision-making and justify their follow-up to respective actors." ⁵⁶	✗

⁵² See Frontex website, section on fundamental rights, available at: <https://frontex.europa.eu/accountability/fundamental-rights/fundamental-rights-officer/>.

⁵³ See Chapter 4.1.2 of the Consultative Forum eighth Annual report, 2020, available at: [Frontex Consultative Forum publishes eighth annual report \(europa.eu\)](https://frontex.europa.eu/assets/Consultative_Forum_publishes_eighth_annual_report_europa.eu).

⁵⁴ Management Board Decision 6/2021 of 20 January 2021 Adopting Special Rules to Guarantee the Independence of the Fundamental Rights Officer and his or her staff: https://frontex.europa.eu/assets/Key_Documents/MB_Decision/2021/MB_Decision_6_2021_adopting_special_rules_to_guarantee_the_independence_of_the_FRO_and_his_or_her_staff_.pdf.

⁵⁵ Article 109(4) of Regulation (EU) 2019/1896.

⁵⁶ Final report of the Frontex scrutiny working group of the European Parliament, 14/07/2021, page 10, available at: https://www.europarl.europa.eu/cmsdata/238156/14072021%20Final%20Report%20FSWG_en.pdf.

Safeguards	Consultative Forum's advisory role	State of play in 2021
Enhancement of the Frontex complaints mechanism, including its visibility and accessibility. ⁵⁷	<p>Since 2016, the Consultative Forum has regularly invited the Agency to reform the rules on the complaints mechanism to align with procedural changes including the need for independent and effective complaints mechanisms.⁵⁸ In 2021, the European Ombudsperson (EO) launched an inquiry on its own initiative⁵⁹ in which it regretted the delay by Frontex in implementing the changes introduced by Regulation 2019/1896. In this regard, the EO made nine suggestions for improvement, most of which echoed the Consultative Forum's long-standing advice.</p> <p>The Consultative Forum issued a recommendation to Agency on the complaints procedure at the end of 2021 (see Annex 11).</p>	X
Reform of the Serious Incident Reporting mechanism. ⁶⁰	<p>The Consultative Forum considers the SIR mechanism to be a major fundamental rights safeguard in the overall Frontex fundamental rights monitoring mechanism. If well designed, it can support the Agency in identifying potential fundamental rights violations and indicate trends.</p> <p>While the absence of serious incidents reports does not mean that fundamental rights violations do not occur, the existence of reports is a significant indication that violations might be happening, which requires investigation to assess the facts, identify responsibilities and recommend corrective measures.</p> <p>The Consultative Forum issued a recommendation on the Serious Incident Reporting mechanism, which is available as Annex 10.</p>	✓ ⁶¹

⁵⁷ Article 111(10) of Regulation (EU) 2019/1896.

⁵⁸ Regulation (EU) 2019/1896, Article 111(1).

⁵⁹ Website of the European ombudsman, Ombudsman makes suggestions to improve accountability of Frontex work, 17/06/21, See: Ombudsman makes suggestions to improve accountability of Frontex's [work](#) | [News](#) | [European Ombudsman \(europa.eu\)](#).

⁶⁰ As per Article 38(3)(h) of Regulation (EU) 2019/1896.

⁶¹ Decision on the Serious Incident Reporting Standard Operating Procedure was taken by the Executive Director in April 2021.

Safeguards	Consultative Forum's advisory role	State of play in 2021
<p>The recruitment of at least 40 Fundamental Rights Monitors by December 2020; 20 were recruited by the end of 2021.</p>	<p>In 2021, 20 Fundamental Rights Monitors (5 at senior level and 15 at assistant level) were recruited. They received specialized training followed by peer-support training on specific Frontex activities in targeted sessions with Frontex experts and internal entities, as well as on the job training in the assigned field of deployment. They monitored maritime, air and land activities. From 1 June to the end of the year, the FROMs were deployed close to 300 days.</p> <p>The Consultative Forum provided tailored training on human rights monitoring to the Fundamental Rights Monitors.</p> <p>To reach the full number required under Regulation 2019/1896, a vacancy notice was published on 15 October 2021, with a deadline of 16 November 2021. In addition, by the end of 2021, the FRO had around 10 recruitments pending for positions to support the overall functioning of the FRO office.</p> <p>The Consultative Forum is looking forward to the setting up of a fully and adequately staffed Fundamental Rights Office, including the recruitment of all the Fundamental Rights Monitors at appropriate level, and will continue supporting the Fundamental Rights Officer during the establishment and implementation of the monitoring mechanism.</p> <p>For more information on the mandate and role of the FROMs, see the FRO Annual report 2021.⁶²</p>	<p>X</p>
<p>Establishment of a supervisory mechanism to monitor the use of force.⁶³</p>	<p>The Consultative Forum provided a recommendation to the Agency at the end of 2020, which can be found in the eighth Annual Report of the Consultative Forum.⁶⁴ The procedure concerning the supervisory mechanism to monitor the use of force entered into force in 2021.</p>	<p>✓</p>

⁶² The Fundamental Rights Officer Annual report 2021, available at: https://frontex.europa.eu/assets/Key_Documents/FRO_reports/The_Fundamental_Rights_Officer_Annual_Report_2021.pdf.

⁶³ Management Board Decision 7/2021 of 20 January 2021 Establishing a Supervisory Mechanism to Monitor the Application of the Provisions on the Use of Force by Statutory Staff of the European Border and Coast Guard Standing Corps: https://frontex.europa.eu/assets/Key_Documents/MB_Decision/2021/MB_Decision_7_2021_on_supervisory_mechanism.pdf.

⁶⁴ Consultative Forum eighth Annual report, 2020, available at: [Frontex Consultative Forum publishes eighth annual report \(europa.eu\)](https://frontex.europa.eu/assets/Key_Documents/Consultative_Forum_reports/Eighth_Annual_Report_2020.pdf).

Safeguards	Consultative Forum's advisory role	State of play in 2021
<p>The Agency informs the Consultative Forum on the follow-up to its recommendations.</p>	<p>According to Regulation 2019/1896, the Agency must inform the Consultative Forum on the follow-up to its recommendations.⁶⁵ The FSWG of the European Parliament also raised this matter in its report and its recommendations to the Agency.</p> <p>To date the Agency provides no systematic and structured follow-up or information.</p> <p>The timely distribution of the Consultative Forum's recommendations is another requirement to increase transparency. While the Forum has been publishing since 2019 all its recommendations as annexes to its Annual Reports, the FSWG recommended that these recommendations be accessible to them upon their issuance.</p> <p>The Agency should establish a procedure to follow up on the Consultative Forum's and the Fundamental Rights Officer's advice. The Agency should also consider sharing such recommendations upon their issuance with an external oversight mechanism to enhance the Agency's accountability and transparency.</p>	<p>X</p>
<p>Article 46 on the non-launching, suspending and terminating of activities in case of serious or persisting violations of fundamental rights or international protection obligations.</p>	<p>The Agency invited the Consultative Forum to provide its expertise on a "Standard Operating Procedure – setting up the mechanism to suspend, terminate, withdraw the financing or not to launch Frontex activities" in October 2021. The Consultative Forum issued recommendations which are available in Annex 10.</p> <p>Essentially, the Consultative Forum considered that the mechanism for the operationalisation of Article 46 of Regulation (EU) 2019/1896, as presented in the draft, appeared as a reporting system rather than a mechanism outlining a comprehensive due diligence policy to assess and manage the risks of fundamental rights violations arising prior to or during any Frontex activities. The established mechanism is not in line with the recommendation of the FSWG⁶⁶ and not consistent with the discussion during the Consultative Forum's first Steering Group meeting with Frontex.</p>	<p>✓⁶⁷</p>

⁶⁵ Article 108(3) of Regulation (EU) 2019/1896.

⁶⁶ Report of the Frontex Scrutiny working group of the European Parliament's LIBE Committee, see: https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/LIBE/DV/2021/02-04/Outcomeofwrittenprocedureof29January_EN.pdf p.18.

⁶⁷ The Agency sought the advice of the Consultative Forum on a "Standard Operating Procedure – setting up the mechanism to suspend, terminate, withdraw the financing or not to launch Frontex activities" on 20/10/2021 and adopted the SOP on 21/01/2022.

Safeguards	Consultative Forum's advisory role	State of play in 2021
Initiating procedures leading to the establishment of an ETIAS Fundamental Rights Guidance Board within the Agency as per Regulation 2018/1240.	By virtue of Article 10 of the European Travel Information and Authorisation System Regulation (ETIAS), ⁶⁸ the Consultative Forum is required to appoint a member to its Fundamental Rights Guidance Board. The Forum has been following the process of setting up the ETIAS, including early discussions on related fundamental rights challenges in coordination with the Fundamental Rights Office.	✓
Action Plan of the Fundamental Rights Strategy. ⁶⁹	The Consultative Forum provided its recommendations to the Fundamental Rights Strategy ⁷⁰ in 2020 and it also provided detailed advice on the Action Plan in 2021; ⁷¹ most of which was taken into account by the Agency (see Consultative Forum recommendations in Annex 7).	✓

68 Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) 1077/2011, (EU) 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32021R1151#:.:text=Regulation%20%28EU%29%202018%2F1240%20of%20the%20European%20Parliament%20and%20when%20crossing%20the%20external%20borders%20of%20the%20Union>.

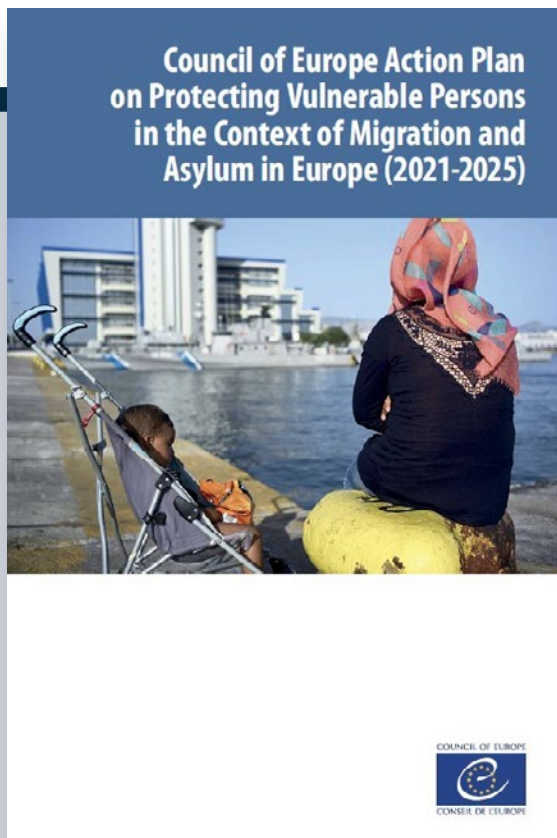
69 Pursuant to Article 80(1) of Regulation (EU) 2019/1896, the Agency shall "draw up, implement and further develop a fundamental rights strategy and action plan, including an effective mechanism for monitoring respect for fundamental rights in all the activities of the Agency."

70 The Fundamental rights strategy was adopted in February 2021; see Management Board decision 12/2021: [MB_Decision_12_2021_on_the_adoption_of_the_Fundamental_Rights_Strategy.pdf \(europa.eu\)](#).

71 The Action Plan of the Fundamental rights strategy was adopted in November 2021; see Management Board decision 61/2021: [MB_Decision_61_2021_adopting_the_Fundamental_Rights_Action_Plan_for_the_implementation_of_the_FRS.pdf \(europa.eu\)](#).

CONSULTATIVE FORUM MEMBERS' PROJECTS AND PUBLICATIONS

In 2021, the members of the Consultative Forum published the following materials which are relevant to the work of the Agency and the FRO:



Red Cross

In 2021, the Red Cross published [Protecting the humanitarian space to access and support migrants – Position – Red Cross EU Office](#).⁷²

International Commission of Jurists (ICJ)

In 2021, the ICJ updated its [practitioner guide number 6 on Migration and international human rights law](#).⁷³

The ICJ continued the implementation of a judicial training project ([FAIR plus](#))⁷⁴ on the rights of migrants and refugees in the EU, with a range of activities including a publication of [training materials on access to justice for migrants](#),⁷⁵ on 29 September, and a [Briefing paper on Detention in the EU Pact proposal](#), on 1 June.⁷⁶ It organised two Transnational trainings: for asylum and immigration judges from Italy and Greece in March and for judges from Ireland and the Czech Republic in October; national training on rights of migrants and refugees for lawyers in Italy in February; a national training for judges and lawyers in Greece in January 2021; and a national training for judges in Czech Republic in March.

As part of the [CADRE project](#)⁷⁷ on alternatives to detention for migrant children, the ICJ led three workshops of exchange among experts between June and November. Seeking to promote the expansion, implementation and improvement of viable and effective alternatives to detention for migrant children with full respect for their rights in the European Union,

⁷² Available at: <https://redcross.eu/positions-publications/protecting-the-humanitarian-space-to-access-and-support-migrants>.

⁷³ Available at: <https://www.icj.org/migration-and-international-human-rights-law-third-edition-of-practitioners-guide-no-6/>.

⁷⁴ Available at: <https://www.icj.org/wp-content/uploads/2019/03/Fostering-Access-to-Immigrants%E2%80%99Rights-PLUS-FAIR-PLUS-Project.pdf>.

⁷⁵ Available at: <https://www.icj.org/europe-training-materials-on-access-to-justice-for-migrants/>.

⁷⁶ Available at: <https://www.icj.org/briefing-paper-detention-in-the-eu-migration-and-asylum-pact-proposals/>.

⁷⁷ Available at: <https://www.icj.org/wp-content/uploads/2021/02/CADRE-Project-Description.pdf>.

the workshops were a useful exchange platform for leading practitioners in the field and the ICJ gathered a number of good practice examples and ideas that were further included in the project's training materials.

Jesuit Refugee Service (JRS)

In 2021 JRS Europe, together with partners in six EU countries (Belgium, Germany, Italy, Malta, Portugal and Romania) published an [analysis of the impact of Covid-19 on the detention of \(rejected\) asylum seekers](#).⁷⁸ In particular, JRS found that the practice of detaining rejected asylum seekers and irregular migrants for the purpose of enforcing returns was maintained in most of the countries under examination, even when returns were not possible in practice and therefore detention was unlawful.

Save the Children

In 2021, Save the Children published the following report:

- Balkans Migration and Displacement Hub data and trend analysis: Refugees and Migrants at the Western Balkans route, Regional overview 2020.⁷⁹

⁷⁸ Available at: <https://jrseurope.org/en/resource/covid-19-and-immigration-detention-lessons-not-learned/>.

⁷⁹ Available at: https://resourcecentre.savethechildren.net/pdf/refugees_and_migrants_balkans_regional_overview_2020_sc_bmdh_data.pdf/.

Amnesty International

- ♦ 10 February, Report: [Europe: Pushback Practices and their Impact on the Human Rights of Migrants and Refugees](#) – Amnesty International Submission to the United Nations (UN) Special Rapporteur on the Human Rights of Migrants.⁸⁰
- ♦ 18 June, Report: [Plan of Action: Twenty Steps to Protect People on the Move Along the Central Mediterranean Route](#).⁸¹
- ♦ 23 June, Report: [Greece: Violence, lies and pushbacks – Refugees and migrants still denied safety and asylum at Europe's borders](#).⁸²
- ♦ 15 July, Report: [“No one will look for you”: Forcibly returned from sea to abusive detention in Libya](#).⁸³
- ♦ 25 August, Press release: [Poland/Belarus: Protect Afghans stuck at border](#).⁸⁴
- ♦ 1 December, Press release: [EU: ‘Exceptional measures’ normalize dehumanization of asylum seekers](#).⁸⁵
- ♦ 2 December, Press release: [Greece: Asylum-seekers being illegally detained in new EU-funded camp](#).
- ♦ 3 December, Press release: [Croatia: Damning new report slams systematic police abuses at country's borders](#).
- ♦ 20 December, Press release: [Belarus/EU: New evidence of brutal violence from Belarusian forces against asylum-seekers and migrants facing pushbacks from the EU](#).

⁸⁰ Available at: <https://www.amnesty.org/en/documents/ior40/3669/2021/en/>.

⁸¹ Available at: <https://www.amnesty.eu/news/plan-of-action-twenty-steps-to-protect-people-on-the-move-along-the-central-mediterranean-route/>.

⁸² Available at: <https://www.amnesty.org/en/documents/eur25/4307/2021/en/>.

⁸³ Available at: <https://www.amnesty.org/en/documents/mde19/4439/2021/en/>.

⁸⁴ Available at: <https://www.amnesty.org/en/latest/news/2021/08/poland-belarus-protect-afghans-stuck-at-border/>.

⁸⁵ Available at: <https://www.amnesty.org/en/latest/news/2021/12/eu-exceptional-measures-normalize-dehumanization-of-asylum-seekers/>.

The Churches' Commission for Migrants in Europe (CCME)

In 2021, CCME member churches have launched the alliance “United4Rescue”,⁸⁶ supporting several humanitarian organisations and boats to undertake search and rescue operations.

Together with the Conference of European Churches it published a ‘Call to Commemorate Persons who lost their lives on their way to Europe’, June.⁸⁷

Mapping Migration in Europe – Mapping Churches’ Responses, May.⁸⁸

International Organization for Migration (IOM)

- IOM’s Policy on the Full Spectrum of Return, Readmission and Reintegration (2021)⁸⁹ guides IOM’s work on return migration through a holistic, rights-based and sustainable development-oriented approach that facilitates safe and dignified return, readmission and sustainable reintegration. It focuses on the well-being of individual returnees and the protection of their rights throughout the entire return, readmission and reintegration process, placing individuals at the centre of all efforts and empowering those making an informed decision to participate in assisted voluntary return programs. At the same time, it recognizes that States have a sovereign prerogative to determine their national migration policies and to govern migration within their jurisdiction, in conformity with international law commitments.
- [The IOM Handbook on Migrant Protection and Assistance | International Organization for Migration](#):⁹⁰ the Handbook presents

⁸⁶ See: <https://united4rescue.org/en/>.

⁸⁷ See: CCME 01/ (ceceurope.org).

⁸⁸ Available at: https://ccme.eu/wp-content/uploads/2021/05/2021-05-20_Mapping-Migration3-2020-PDF-FINAL.pdf.

⁸⁹ Available at: <https://www.iom.int/sites/g/files/tmzbd1486/files/documents/ioms-policy-full-spectrum-of-return-readmission-and-reintegration.pdf>.

⁹⁰ Available at: <https://www.iom.int/iom-handbook-migrant-protection-and-assistance>.

the determinants of migrant vulnerability (DOMV) model for analysing and responding to migrant vulnerability. The DOMV model is specifically designed to address the protection and assistance needs of a specific subset of migrants: those who have experienced or are vulnerable to violence, exploitation and abuse before, during or after the migration process.

- [IOM Guidance on Referral Mechanisms | IOM Publications Platform](#).⁹¹ the practical guidelines contained in this publication provide guidance on how to develop and implement referral mechanisms for the protection and assistance of migrants vulnerable to violence, exploitation and abuse. The objective is to strengthen operational responses and thereby improve protection and assistance at the local, national and transnational levels. The publication should be considered as complementing the IOM Handbook. Protection and Assistance for Migrants Vulnerable to Violence, Exploitation and Abuse (hereafter the IOM Handbook).
- [Reintegration Handbook - Practical guidance on the design, implementation and monitoring of reintegration assistance | IOM Publications Platform](#).⁹²
- [Migrant Protection and Assistance during COVID-19: Promising Practices | IOM Publications Platform](#).⁹³
- [Counter-trafficking in Emergencies: Information Management Guide](#).⁹⁴
- [IOM Guidance on Response Planning For migrants vulnerable to violence, exploitation and abuse](#).⁹⁵

91 Available at: <https://publications.iom.int/books/iom-guidance-referral-mechanisms>.

92 Available at: <https://publications.iom.int/books/reintegration-handbook-practical-guidance-design-implementation-and-monitoring-reintegration>.

93 Available at: <https://publications.iom.int/books/migrant-protection-and-assistance-during-covid-19-promising-practices>.

94 Available at: <https://publications.iom.int/books/countertrafficking-emergencies-information-management-guide>.

95 Available at: <https://publications.iom.int/books/iom-guidance-response-planning>.

European Union Agency for Fundamental Rights (FRA)

- [Search and Rescue \(SAR\) operations in the Mediterranean and fundamental rights](#).⁹⁶

FRA regularly collects data on NGO vessels involved in search and rescue in the Mediterranean. This includes any legal proceedings against them, as well as any difficulties disembarking migrants in safe ports. The International Organization for Migration estimates that from January to 10 December 2021 about 1,654 people died or gone missing while crossing the Mediterranean Sea to reach Europe to escape war or persecution or to pursue a better life. This is an average of more than four people per day. Deadly incidents have also occurred recently in the English Channel (La Manche).

- [European standards on legal remedies, complaints mechanisms and effective investigation at borders](#).⁹⁷

This note sets out human rights standards stemming from both the European Convention on Human Rights and European Union (EU) law that apply to effective remedies for human rights violations at borders, together with those on complaints mechanisms and investigations into complaints of rights violations at borders.

- [Fundamental Rights Report 2022](#).⁹⁸

Respect for fundamental rights at external borders remained one of the top human rights challenges in the EU. Allegations of pushbacks and violence at the border continued. So did deaths at sea and on land, and delays in finding a safe port for migrants rescued at sea. Asylum and return-related detention persisted, including as part of enhanced containment policies at borders. The EU worked on operationalising new large-scale information technology (IT) systems that include fundamental rights safeguards that are expected to be effectively implemented.

⁹⁶ Available at: <https://fra.europa.eu/en/publication/2021/december-2021-update-ngo-ships-sar-activities>.

⁹⁷ Available at: <https://fra.europa.eu/en/publication/2021/legal-remedies-borders>.

⁹⁸ Available at: <https://fra.europa.eu/de/publication/2022/fundamental-rights-report-2022>.

Organization for Security and Co-operation in Europe — Office for Democratic Institutions and Human Rights (OSCE/ODIHR)

In 2021, OSCE/ODIHR published the following resources:

- ♦ Border Management and Human Rights: Collection, processing and sharing of personal data and the use of new technologies in the counter-terrorism and freedom of movement context, 2021⁹⁹
- ♦ Border Police Monitoring in the OSCE Region: A discussion of the need and basis for human rights monitoring of border police practices, 2021.¹⁰⁰
- ♦ Shaping balanced political discourse and constructive narratives on migration: Guidance and Good Practice from the OSCE Region, 2021.¹⁰¹

UN Human Rights Office (OHCHR)

- ♦ In 2021, the UN Human Rights Office (OHCHR) published a [trainer's guide on human rights at international borders](https://www.ohchr.org/en/documents/tools-and-resources/recommended-principles-and-guidelines-human-rights-international).¹⁰² With this new capacity-building resource OHCHR seeks to support the work of States and frontline border officials to adopt a human rights-based and gender-responsive approach to border governance. Developed collaboratively by UN Human Rights and the Office of Counter-Terrorism, it draws on and complements the [Recommended Principles and Guidelines on Human Rights at International Borders](https://www.ohchr.org/en/documents/tools-and-resources/recommended-principles-and-guidelines-human-rights-international).¹⁰³ It is accompanied by slide presentations and course materials¹⁰⁴ and translated into French, Arabic and Spanish.

⁹⁹ Available at: <https://www.osce.org/odihr/499777>.

¹⁰⁰ Available at: <https://www.osce.org/odihr/486020>.

¹⁰¹ Available at: https://www.osce.org/odihr/shaping_balanced_migration_narratives.

¹⁰² Available at: https://www.ohchr.org/sites/default/files/Documents/Publications/HR_InternationalBorders.pdf.

¹⁰³ Available at: <https://www.ohchr.org/en/documents/tools-and-resources/recommended-principles-and-guidelines-human-rights-international>.

¹⁰⁴ Available at: <https://www.ohchr.org/en/human-rights-international-borders>.

- The Office also continued its advocacy on the importance of having a human-rights based approach to migration governance, including independent mechanisms which can effectively monitor and promote compliance with human rights at international borders. In cooperation with UN entities and regional partners, the Office held a consultation on independent national monitoring mechanisms proposed in the EU Pact on Migration and Asylum¹⁰⁵ and developed guidance¹⁰⁶ on how to establish such independent and effective mechanisms at the national level.

Council of Europe (CoE)

On 5 May 2021, the Committee of Ministers of the CoE adopted [the Council of Europe Action Plan on Protecting Vulnerable Persons in the Context of Migration and Asylum in Europe \(2021-2025\)](#).¹⁰⁷ The Action Plan proposes targeted measures and activities to enhance the capacity of member states to identify and address vulnerabilities throughout asylum and migration procedures. The Special Representative of the Secretary General on Migration and Refugees conducted two fact-finding missions: from 24 to 30 January 2021 to [Bosnia and Herzegovina](#)¹⁰⁸ and from 15 to 26 March 2021 to Turkey.¹⁰⁹

On 9 July 2021, the Council of Europe and the EU Agency for Fundamental Rights (FRA) published their second joint Note entitled “[European standards on legal remedies, complaints mechanisms and effective](#)

¹⁰⁵ Available at: <https://europe.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=2596&LangID=E>.

¹⁰⁶ Available at: <https://europe.ohchr.org/EN/Stories/Pages/National-border-monitoring-mechanism.aspx>.

¹⁰⁷ Available at: <https://rm.coe.int/action-plan-on-protecting-vulnerable-persons-in-the-context-of-migrati/1680a409fc>.

¹⁰⁸ Available at: <https://rm.coe.int/report-of-the-fact-finding-mission-by-ambassador-drahoslav-stefanek/1680a2fd03>.

¹⁰⁹ Available at: <https://rm.coe.int/report-of-the-fact-finding-mission-to-turkey/1680a4b673>.

[investigations at borders.](#)¹¹⁰ This new publication sets out the standards, stemming from both the European Convention on Human Rights and EU law, through which migrants, asylum applicants and refugees can access effective remedies at a national level. The Note provides detailed information on complaints mechanisms and the duty to carry out investigations into alleged violations of rights at European borders.

In November 2021, the Department for the Execution of Judgments of the European Court of Human Rights (ECtHR) issued a [Thematic Factsheet on Migration and Asylum](#).¹¹¹ The factsheet sets out examples of measures adopted by States, in the context of the execution of the ECtHR judgments, concerning notably: access to territory and forced returns; reception and protection of migrants and asylum seekers; protection from discrimination and hate crimes; family life and family reunification; detention of migrants and asylum seekers; victims of trafficking in human beings.

On 31 December 2021, the ECtHR issued its updated [guide on the case-law of the European Convention on Human Rights relevant to immigration](#).¹¹²

In the course of 2021, the CoE Commissioner for Human Rights carried out an [emergency visit](#)¹¹³ in relation to the situation at the border of Poland and Belarus, and undertook regular country visits to [Malta](#)¹¹⁴ and [Austria](#),¹¹⁵ which also covered issues of migration and border control, including

¹¹⁰ Available at: <https://rm.coe.int/european-standards-on-legal-remedies-complaints-mechanisms-and-effect/1680a3187b>.

¹¹¹ Available at: <https://rm.coe.int/thematic-factsheet-migration-asylum-eng/1680a46f9b>.

¹¹² Available at: <https://rm.coe.int/guide-data-protection-eng-1-2789-7576-0899-v-1/1680a20af0>.

¹¹³ Available at: <https://www.coe.int/en/web/commissioner/-/commissioner-calls-for-immediate-access-of-international-and-national-human-rights-actors-and-media-to-poland-s-border-with-belarus-in-order-to-end-hu>.

¹¹⁴ Available at: <https://www.coe.int/en/web/commissioner/-/reforms-needed-to-better-protect-journalists-safety-and-the-rights-of-migrants-and-women-in-malta>.

¹¹⁵ Available at: <https://www.coe.int/en/web/commissioner/-/austria-should-step-up-efforts-to-protect-women-s-rights-and-gender-equality-and-improve-the-reception-and-integration-of-refugees-asylum-seekers-and>.

pushbacks. She addressed in writing situations in [Cyprus](#),¹¹⁶ [Greece](#),¹¹⁷ [Lithuania](#)¹¹⁸ and [France/the United Kingdom](#),¹¹⁹ while publishing further statements on Poland,¹²⁰ [Greece](#),¹²¹ the response of European states to the situation in [Afghanistan](#),¹²² and attempts of different member states to [legalise pushbacks](#).¹²³ She also published her [follow-up report](#)¹²⁴ to her 2019 Recommendation on the Mediterranean, addressing continuing issues around search and rescue, co-operation with Libya and subsequent returns to human rights violations, as well as emerging developments, such as the consequences of the expansion of aerial surveillance.

European Asylum Support Office (EASO)

The European Asylum Support Office (EASO) was an agency of the European Union established by Regulation (EU) 439/2010 of the European Parliament and of the Council of 19 May 2010. On 19 January 2022, following the entry into force of Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021, EASO

¹¹⁶ Available at: <https://www.coe.int/en/web/commissioner/-/cyriot-authorities-should-investigate-allegations-of-pushbacks-and-ill-treatment-of-migrants-improve-reception-conditions-and-ensure-an-enabling-envi>.

¹¹⁷ Available at: <https://www.coe.int/en/web/commissioner/-/greek-authorities-should-investigate-allegations-of-pushbacks-and-ill-treatment-of-migrants-ensure-an-enabling-environment-for-ngos-and-improve-recept>.

¹¹⁸ Available at: <https://www.coe.int/en/web/commissioner/-/lithuania-safeguards-in-asylum-procedures-and-preventing-pushbacks-should-be-central-to-response-to-migration-challenges>.

¹¹⁹ Available at: <https://www.coe.int/en/web/commissioner/-/safe-and-legal-routes-and-protection-of-human-rights-must-take-centre-stage-in-co-operation-between-the-united-kingdom-and-france-on-channel-crossings>.

¹²⁰ Available at: <https://www.coe.int/en/web/commissioner/-/poland-should-take-immediate-action-to-protect-the-human-rights-of-people-stranded-at-its-border-with-belarus> and <https://www.coe.int/en/web/commissioner/-/new-legislation-perpetuates-restrictions-and-obstacles-to-protection-of-the-human-rights-of-migrants-and-refugees-on-poland-s-eastern-border>.

¹²¹ Available at: <https://www.coe.int/en/web/commissioner/-/greece-s-parliament-should-align-the-deportations-and-return-bill-with-human-rights-standards>.

¹²² Available at: <https://www.coe.int/en/web/commissioner/-/in-their-response-to-afghans-seeking-safety-council-of-europe-member-states-should-not-undermine-human-rights-protections>.

¹²³ Available at: <https://www.coe.int/en/web/commissioner/-/european-states-must-stand-up-against-pushbacks-and-the-attempt-to-legalise-them>.

¹²⁴ Available at: <https://www.coe.int/en/web/commissioner/-/european-countries-must-urgently-change-their-migration-policies-which-endanger-refugees-and-migrants-crossing-the-mediterranean>.

was replaced and succeeded by the European Union Agency for Asylum (EUAA). Since this Annual Report on the activities of the Frontex Consultative Forum covers the year 2021, the denomination EASO has been maintained throughout the document.

As the EU Agency tasked to support the implementation of the Common European Asylum System (CEAS) by fostering practical cooperation on asylum and reception and providing technical and operational support to Member States facing migratory pressure, the work of EASO has close interlinkages with the work of Frontex on borders. These are apparent for a number of activity areas, such as operations, situational monitoring and analysis, asylum processes, training and the external dimension. Following is a summary overview of relevant Agency projects/publications in 2021.

Regarding operations, EASO provided operational support in 2021 to eight Member States (Greece, Italy, Cyprus, Malta, Belgium, Lithuania, Spain, Latvia). The Agency continued to provide data analysis and research, often in cooperation with Frontex. Whilst most analytical outputs serve to inform evidence-based policy-making at EU and national levels, some analytical output is publicly available including the [EASO's latest asylum trends](#) webpage¹²⁵ as well as other publications such as the study "[Toward an early warning system for monitoring asylum-related migration flows in Europe](#)."¹²⁶ As part of its research work, EASO launched the pilot phase of the project "Surveys of asylum-related Migrants" in Lesbos, Greece. The project collects direct testimonies from asylum seekers with the aim to improve understanding of the root causes of asylum-related migration and secondary movements within Europe. In 2022 the project will be rolled out in other reception centres of Greece, Cyprus, Italy and Malta. As part of the Agency's work on asylum knowledge, EASO carried out the following projects and publications:

¹²⁵ Available at: <https://euaa.europa.eu/latest-asylum-trends-asylum>.

¹²⁶ Available at: <https://journals.sagepub.com/doi/full/10.1177/01979183211035736>.

- EASO launched the “Let’s speak asylum project” in which Frontex participates notably in the strand on information provision related to access to the asylum procedure. This is of central importance due to the role and powers of Standing Corps Officers who in many cases are the first contact officials encountering those potentially in need of international protection.
- EASO published the [Practical Guide on Registration](#),¹²⁷ which guides registration officers in lodging applications for international protection based on EU legal provisions and national best practices.
- The Agency produced an update to the report on [Age assessment in EU+ countries](#),¹²⁸ presenting an overview of age assessment methodologies and procedural safeguards in Europe.
- EASO published the report [Consultation with Applicants for International Protection on Mental Health](#),¹²⁹ part of its effort to support EU+ countries in identifying and responding to the mental health concerns of applicants for international protection
- EASO released a [Practical guide on the welfare of asylum and reception staff](#),¹³⁰ which aims at supporting national authorities in their duty of care towards professionals working in asylum and reception settings.

¹²⁷ Available at: <https://euaa.europa.eu/publications/practical-guide-registration>.

¹²⁸ Available at: <https://euaa.europa.eu/publications/age-assessment-practices-eu-countries-updated-findings>.

¹²⁹ Available at: <https://euaa.europa.eu/publications/consultation-applicants-international-protection-mental-health>.

¹³⁰ Available at: <https://euaa.europa.eu/sites/default/files/Practical-guide-staff-welfare-part-I-standards-policy.pdf#:~:text=The%20EASO%20Practical%20guide%20on%20the%20welfare%20of,order%20to%20achieve%20long-term%20impact%20on%20staff%20well-being> and video available at: <https://www.youtube.com/watch?v=dE4QHKZIRk0>.

United Nations High Commissioner for Refugees (UNHCR)

- [UNHCR's Recommendations to the 2022 French and Czech Council Presidencies of the Council of the European Union \(EU\)](#)¹³¹

In its recommendations issued at the end of 2021, UNHCR calls on the French and Czech Presidencies of the Council of the EU to prioritise better protection of refugees in Europe and globally.

- [UNHCR Mid-Year Trends Report 2021](#)¹³²

UNHCR's 2021 Mid-Year Trends report reflects on the first six months of this year, providing key statistics and figures on refugees, asylum-seekers, internally displaced persons and stateless persons, as well as their main host countries and countries of origin. The report highlights that the trend of rising forced displacement continued into 2021, with global numbers now exceeding 84 million, as more people fled violence, insecurity and the effects of climate change.

- [UNHCR Education Report 2021](#)¹³³

UNHCR's 2021 Education Report, *Staying the Course: The Challenges Facing Refugee Education*, focuses in particular on secondary education, the crucial yet critically under-resourced stage for refugees towards greater independence and improved prospects in life. The report highlights the stories of young refugees around the world as they try to keep learning in an era of unprecedented disruption caused by the COVID-19 pandemic.

¹³¹ Available at: <https://www.unhcr.org/news/press/2022/1/61dc1f074/unhcr-issues-recommendations-2022-french-czech-presidencies-council-eu.html>.

¹³² Available at: [https://www.unhcr.org/news/press/2021/11/618bec6e4/unhcr-conflict-violence-climate-change-drove-displacement-higher-first.html#:~:text=Nearly%2051%20million%20people%20are,in%20Ethiopia%20\(1.2%20million\).](https://www.unhcr.org/news/press/2021/11/618bec6e4/unhcr-conflict-violence-climate-change-drove-displacement-higher-first.html#:~:text=Nearly%2051%20million%20people%20are,in%20Ethiopia%20(1.2%20million).)

¹³³ Available at: <https://www.unhcr.org/news/press/2021/9/61360ce24/critical-gaps-refugee-education-thirds-refugee-youth-might-secondary-school.html>.

Council of Bars and Law Societies of Europe (CCBE)

The Council of Bars and Law Societies of Europe (CCBE), founded in 1960, is an international non-profit association which since its creation has been at the forefront of advancing the views of European lawyers and defending the legal principles upon which democracy and the rule of law are based. The CCBE represents more than 1 million European lawyers, and works on migration and asylum law through its Migration Committee. The CCBE constantly stresses the right of asylum seekers to have access to free and quality legal assistance and also cooperates with other organisations for specific projects on the subject of migration. For instance, the CCBE contributed to establishing and still supports [European Lawyers in Lesbos](#),¹³⁴ which provides free legal assistance to asylum seekers in Greece and advocates to provide early legal advice to those arriving to the country.

The CCBE Migration Committee monitors European and national developments on migration issues and focuses its work on the protection of migrants' and asylum seekers' fundamental rights. It responds to EU initiatives, most notably concerning the reform of the Common European Asylum System. In this regard, in 2021 the CCBE adopted detailed position papers regarding two proposals from the New Package on Migration and Asylum presented by the European Commission, namely: a [position](#)¹³⁵ on the amended proposal for a Regulation establishing a common procedure for international protection in the Union, and a [position](#)¹³⁶ on the Proposal for a Regulation introducing screening of third country nationals at the external borders.

¹³⁴ Available at: <https://www.europeanlawyersinlesvos.eu/>.

¹³⁵ Available at: https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/MIGRATION/MIG_Position_papers/EN_MIG_20210414_CCBE-position-on-the-amended-proposal-for-a-Regulation-establishing-a-common-procedure-for-international-protection-in-the-Union.pdf.

¹³⁶ Available at: https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/MIGRATION/MIG_Position_papers/EN_MIG_20210414_CCBE-position-screening-procedure.pdf.

The CCBE also regularly reacts to new developments and communicates to the European institutions its considerations, statements and comments. In 2021, to react to the alarming situation in Afghanistan, the CCBE issued a [statement](#)¹³⁷ on the need to guarantee the fundamental rights of all persons requesting international protection at EU borders. In addition, as a reaction to the humanitarian crisis at the EU border with Belarus, the organisation published a [statement](#)¹³⁸ to express its serious concern and reiterate the importance of applying certain principles in the field of migration and asylum, regardless of the difficulties undoubtedly faced by Member States.

The CCBE also collaborates, through its Migration Committee, with the European Lawyers Foundation (<https://elf-fae.eu>), providing training to Bars on EU Asylum and Migration law, focusing last year on children on the move (unaccompanied children) and reception centres (TRALIM and TRAUMA projects). It also works with the HELP program – Council of Europe (European Human Rights Education Program for Legal Professionals) to train lawyers from national bar associations with these courses: “Refugee and Migrant Children” and “Asylum and Human Rights.”

¹³⁷ Available at: https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/MIGRATION/MIG_Statement/EN_MIG_20210923_CCBE-Statement-on-the-situation-in-Afghanistan-and-the-need-to-guarantee-the-fundamental-rights-of-all-persons-requesting-international-protection-at-EU-borders.pdf.

¹³⁸ Available at: https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/MIGRATION/MIG_Statement/EN_MIG_20211215_CCBE-Statement-on-Situation-at-the-EU-border-with-Belarus.pdf.

6 ANNEXES ¹³⁹



Standing corps officers at Larnaca airport

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¹³⁹ On public access to documents: in line with the principle of good administration, the Consultative Forum has no objection to releasing its documents. Frontex is ultimately in charge of releasing documents to applicants, in line with Regulation (EC) 1049/2001.

ANNEX 1: Consultative Forum Activities in 2021

Overview of activities in 2021	
Consultative Forum meeting with the Fundamental Rights Officer	14/01
Consultative Forum co-chairs participated in the meeting of the Working Group on Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea (FRALO)	15/01
Frontex Management Board's consultation of the Consultative Forum prior to the appointment of the Fundamental Rights Officer	17/01
Consultative Forum information meeting on European Travel Information and Authorization System (ETIAS) to update its members on the most recent developments regarding the establishment of ETIAS and the fundamental rights guidance board	28/01
Platform for International Cooperation on Undocumented Migrants (PICUM) withdraws from the Consultative Forum	28/01
24 th Consultative Forum meeting	2-3/02
Consultative Forum meeting on the Universal Periodic Review (UPR) to raise awareness about UPR recommendations relevant for border management	25/02
Consultative Forum co-chairs attended the 84 th Management Board meeting and presented its 8th Annual Report 2020	24-25/03
Consultative Forum meeting with the Fundamental Rights Officer	31/03
Consultative Forum – Frontex first Steering group meeting on the establishment of a Frontex due diligence procedure	13/04
Consultative Forum meeting on ETIAS to update its members on the state of play regarding the establishment of ETIAS and the fundamental rights guidance board	15/04
Consultative Forum – Frontex meeting to exchange on returns and to follow up on the Consultative Forum's return recommendations issued in 2019	28/04
Consultative Forum co-chairs attended the Extraordinary Management Board meeting, which was devoted to fundamental rights	7/05
25 th Consultative Forum meeting	18-19/05
Consultative Forum – Frontex meeting on training to follow-up to the Consultative Forum's training recommendation issued in 2020 and to discuss fundamental rights in Frontex training	26/05
Consultative Forum participation in the hearing of the European Parliament's Frontex Scrutiny Working Group (EP FSWG)	03/06
Consultative Forum co-Chairs attended a hearing of the German Bundestag Committee on Human Rights and Humanitarian Aid	9/06

Overview of activities in 2021	
Consultative Forum meeting with Frontex Forced Return Monitors	9/06
Consultative Forum members' meeting with the EP FSWG	15/06
Consultative Forum meeting with Border Violence Monitoring Network (BVMN) to exchange on frontline findings	22/06
Consultative Forum – Frontex second Steering Group meeting on: <ul style="list-style-type: none"> – the legal framework governing aerial surveillance and operational practices – the suspension/termination/non-launching of operations in Hungary, the respective Executive Director's decision and the continuation of return operations from Hungary 	23/06
Consultative Forum took part in Frontex's 'Development and coordination meeting for fundamental rights trainers', Warsaw	24/06
Consultative Forum participation in VEGA Children Land and Air activities to support the identification of children who may be victims of trafficking in Galati, Terehova, Bajakovo, Kapitan Andreevo, joint operation Montenegro land 2021 and at the airports of Madrid, Tbilisi, Chisinau and Pristina	08/09-15/12
Council of Bars and Law Societies of Europe (CCBE) became a member of the Consultative Forum	21/09
Consultative Forum – Frontex third Steering Group meeting on emerging fundamental rights challenges at EU's external borders including on the rapid border intervention to Lithuania and deployments to Latvia, risk analysis and planning in relation to the situation in Afghanistan and related Frontex activities	24/09
Presentation of the Consultative Forum to the Fundamental Rights Monitors on its mandate, role and on emerging fundamental rights concerns	27/09
Consultative Forum provided training to the Fundamental Rights Monitors on human rights monitoring	27-29/09
Consultative Forum attended the Extraordinary Management Board meeting which was devoted to fundamental rights and audits	6/10
Consultative Forum participation in the VEGA air briefing prior to deployment to joint operation focal points under VEGA Children Land and Air activities	1/10
Consultative Forum preparatory meeting to set up the ETIAS fundamental rights guidance board	7/10
Meeting of the Consultative Forum with the Fundamental Rights Officer	8/10
26 th Consultative Forum meeting	19-20/10
Publication of the Consultative Forum's Annual Report 2020	20/10

Overview of activities in 2021	
Publication of the Consultative Forum's Programme of Work 2022	29/10
Consultative Forum co-chairs' participation in a hearing of the EP FSWG	11/11
Consultative Forum meeting with the Fundamental Rights Officer	15/11
Consultative Forum co-chairs attended the 87 th Frontex Management Board meeting	17/11
Consultative Forum observation mission to Lithuania (Vilnius, Padvarionys, Pabrade, Druskininkai) to increase the understanding of ongoing Rapid Border Interventions, including the operational environment that the Agency is engaged in	15-18/11
Consultative Forum follow-up meeting with Frontex European Centre for Returns (ECReT) in relation to the 'Guide on Best Practices on Returning Minors and Families'	23/11
Consultative Forum participation in the panel on 'Transparency and Independence: An Advisory Board for the Pool of Forced-Return Monitors' organised by the International Centre for Migration Policy Development (ICMPD)	25-26/11
Consultative Forum meeting with Human Rights Watch to discuss its latest report and recommendations ¹⁴⁰	30/11
Consultative Forum observation mission to Greece (Athens, Samos, Alexandroupolis, Orestiada) to increase understanding of ongoing Joint Operations	6-10/12
Consultative Forum attended the annual meeting of Frontex Fundamental Rights Trainers	7-8/12
Consultative Forum consultations by Frontex on the implementation of recommendations issued by FRALO and the EP FSWG	13/08 22/09 20/10 14/12
Consultative Forum contributed to the review of the Extended Basic Training Programme for Standing Corps category 1	08/11- 20/12

Due to the COVID-19 pandemic, most meetings in 2021 took place virtually.

¹⁴⁰ Frontex failing to protect people at EU borders, Human rights watch website, available at: [Frontex Failing to Protect People at EU Borders | Human Rights Watch \(hrw.org\)](#).



Lithuanian crossing border

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ANNEX 2: Requests for information by the Consultative Forum

Requests for information submitted in 2021			
Information requested	Request Date	Response Date	Content of the response ¹⁴¹
<p>Follow-up of Consultative Forum Recommendation on Frontex activities at the Hungarian-Serbian border in light of the ruling of the CJEU Grand Chamber from 17/12:</p> <p>How does Frontex intend to follow up on its recommendation to reconsider its activities in Hungary including return activities?</p> <p>What is the state of play of the due diligence policy?</p>	7/01	22/01	Information provided
<p>The Consultative Forum requested access to:</p> <ul style="list-style-type: none"> – Terms of reference of the interpreters within the currently applicable framework contract. Relevant extracts where the role of interpreters is described from: a. screening and debriefing related standard operating procedures/guidelines; b. operational handbooks; c. operational plans; d. serious incident reports which concerned interpreters/cultural mediators in 2020-2021 – Training or briefing material interpreters undergo prior to their deployment, training material that refer to the role of interpreters. 	4/05	31/05	Information provided
<p>The Consultative Forum requested access to:</p> <ul style="list-style-type: none"> – Model provisions for the exchange of information in the framework of EUROSUR as per Article 76 of the EBCG Regulation including a list of agreements with third countries concerning exchange of EUROSUR data and the content of the agreements; 	4/05	31/05	Information provided

¹⁴¹ The Consultative Forum should receive a response within 15 working days upon submission of a request for information.

Requests for information submitted in 2021			
Information requested	Request Date	Response Date	Content of the response ¹⁴²
<ul style="list-style-type: none"> – List of all <i>ad hoc</i> exchanges of information with third countries under the EUROSUR framework, as defined by Article 92 of the EBCG Regulation, the type of information exchanged and their content; – Type of information provided (including EUROSUR catalogue situational picture definition) to CSDP missions, and regional information exchange networks, as well as information and scope on the use of that information, including its sharing to third country authorities, including a list of those countries; – List of third countries that the Agency has shared EUROSUR situational picture information, including information which was produced by Frontex Aerial Surveillance, including information relating to pre-frontier areas and information relating to situations of distress at sea, the type of information provided as well as channels and means used to provide that information; – Relevant operational plans, EUROSUR Catalogue, EUROSUR operational handbook, standard operating procedures. 	4/05	31/05	Information provided
<p>The Consultative Forum requested access to:</p> <ul style="list-style-type: none"> – Model provisions for the exchange of information in the framework of EUROSUR as per Article 76 of the EBCG Regulation including a list of agreements with third countries concerning exchange of EUROSUR data and the content of the agreements; – List of all <i>ad hoc</i> exchanges of information with third countries under the EUROSUR framework, as defined by Article 92 of the EBCG Regulation, the type of information exchanged and their content; 	4/05	31/05	Information provided

Requests for information submitted in 2021			
Information requested	Request Date	Response Date	Content of the response ¹⁴²
<ul style="list-style-type: none"> – Type of information provided (including EUROSUR catalogue situational picture definition) to CSDP missions, and regional information exchange networks, as well as information and scope on the use of that information, including its sharing to third country authorities, including a list of those countries; – List of third countries that the Agency has shared EUROSUR situational picture information, including information which was produced by Frontex Aerial Surveillance, including information relating to pre-frontier areas and information relating to situations of distress at sea, the type of information provided as well as channels and means used to provide that information; – Relevant operational plans, EURO-SUR Catalogue, EUROSUR operational handbook, standard operating procedures. 	4/05	31/05	Information provided
<p>Following the information visit of the Consultative Forum to the Rapid Border Intervention in Lithuania, the Forum would like to request the following figures regarding the operation in preparation of a focus group meeting with interested members of the Management Board and Frontex:</p> <ul style="list-style-type: none"> – Allocation overview of Frontex patrolling officers to the 1st, 2nd and 3rd line of patrolling per location (section of the green border) from August 2021 to date; Deployment locations and duties of Frontex staff from August 2021 to date; – Apprehension figures reported by FX staff during service from August 2021 to date, including figures on identified vulnerable persons and children. 	23/11	12/01	Information partially provided

Requests for information submitted in 2021			
Information requested	Request Date	Response Date	Content of the response ¹⁴²
<p>Following the completion of RBI and the resumption of Flexible Operational Activities in Lithuania, the Consultative Forum inquired on the following:</p> <ul style="list-style-type: none"> – Is there a decision by the Executive Director for the launching of this operation? If so, is it publicly accessible or could we request to view the decision? – Are the 'Flexible Operational Activities' based on an operational plan? If so, the Consultative Forum would like to receive the operational plan or information about it; – If the 'Flexible Operational Activities' are not based on an operational plan, the Consultative Forum would like to inquire about alternative frameworks governing and outlining these activities including the terms of engagement of Frontex personnel and assets; – Did the Executive Director seek the Fundamental Rights Officer's opinion prior to launching these activities? – Did the Executive Director carry out an assessment as per Article 46 of the Regulation prior to launching these activities? 	1/12	20/12	Information provided
<p>Following the European Border and Coast Guard Agency's decision to launch a rapid border intervention at the border between Lithuania and Belarus on 12/07/2021, the Consultative Forum requested the corresponding Operational Plan.</p>	23/07	9/08	Information provided



ANNEX 3: Consultative Forum Recommendations issued in 2021

Consultative Forum recommendations issued in 2021	
Consultative Forum provided its recommendations to the Frontex Fundamental Rights Officer in relation to the <i>Suspension of operations in Hungary in the context of the Fundamental Rights Officer's assessment of Article 46 of Regulation (EU) 2019/1896</i>	19/01
Consultative Forum issued a legal opinion on <i>Fundamental rights considerations in the context of search and rescue operations and interception at sea to FRALO</i>	24/02
Consultative Forum provided its recommendations to the <i>Standard Operating Procedure on Frontex's Serious Incident Reporting Mechanism</i>	16/03
Consultative Forum provided its recommendations to Frontex's <i>Action Plan to the Fundamental Rights Strategy</i>	4/06
Consultative Forum provided its recommendation to the Frontex's <i>Best Practices on Returning Minors and Families</i>	26/07
Consultative Forum provided its recommendations to Frontex's second draft <i>Action Plan to the Fundamental Rights Strategy</i>	25/08
Consultative Forum provided its recommendations on the <i>Standard Operating Procedure – setting up the mechanism to suspend, terminate, withdraw the financing or not to launch Frontex activities</i>	20/10
Consultative Forum provided its recommendation on the <i>Rules on the Complaints Mechanism</i>	29/11
Consultative Forum provided its recommendations to the <i>Code of conduct for all border control operations and all persons participating in the activities of Frontex</i>	10/12
Consultative Forum provided its recommendations to the <i>Code of conduct for return operations and return interventions coordinated or organised by Frontex</i>	10/12



Reception centre, Greece

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ANNEX 4: Recommendations to the Frontex Fundamental Rights Officer in relation to operations in Hungary in the context of the Fundamental Rights Officer's assessment of Article 46 of Regulation (EU) 2019/1896

1. Pursuant to Article 108 of Regulation (EU) 2019/1896, the role of the Consultative Forum is to “assist the Agency by providing independent advice in fundamental rights matters”. The Agency shall “inform the consultative forum of the follow-up to its recommendations”.
2. Recalling **Article 46 - Decision to suspend, terminate or not launch activities** according to which (4) “The executive director shall, after consulting the fundamental rights officer and informing the Member State concerned, withdraw the financing for any activity by the Agency, or suspend or terminate any activity by the Agency, in whole or in part, if he or she considers that there are violations of fundamental rights or international protection obligations related to the activity concerned that are of a serious nature or are likely to persist.” and (5) “The executive director shall, after consulting the fundamental rights officer, decide not to launch any activity by the Agency where he or she considers that there would already be serious reasons at the beginning of the activity to suspend or terminate it because it could lead to violations of fundamental rights or international protection obligations of a serious nature. The executive director shall inform the Member State concerned of that decision.”

3. Under a new law enacted in June 2020,¹⁴² Hungary immediately removes from its territory any person who crossed the Hungarian border unlawfully and sought asylum. Such persons are escorted to the outer side of the border fence with Serbia, as has been the case since March 2017.¹⁴³ The new procedure will last until 30 June 2021.¹⁴⁴ On 30 October 2020, the European Commission opened an infringement procedure against Hungary.¹⁴⁵
4. Based on the **CJEU ruling of 17th December 2020**,¹⁴⁶ “Hungary has failed to fulfil its obligations under Article 5, Article 6(1), Article 12(1) and Article 13(1) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, under Article 6, Article 24(3), Article 43 and Article 46(5) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, and under Articles 8, 9 and 11 of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.”

¹⁴² Hungary, Act No. LVIII of 2020 on the transitional rules related to the termination of the state of danger and on the epidemiological preparedness (*2020. évi LVIII. törvény a veszélyhelyzet megszűnésével összefüggő átmeneti szabályokról és a járványügyi készültségről*), Arts. 267-275; and Government Decree No. 292/2020 on designating diplomatic missions to receive declarations of intent for lodging asylum applications (*292/2020. (VI. 17.) Korm. rendelet a menedékkjogi kérelem benyújtására irányuló szándéknnyilatkozattal kapcsolatban nagykövetségek kijelöléséről*).

¹⁴³ Hungary, Act No. LXXXIX of 2007 on the State borders (*2007. évi LXXXIX. törvény az államhatárról*), Article 5 (1b).

¹⁴⁴ See Hungary, *Act No. CLXII of 2021*, Article 54.

¹⁴⁵ European Commission, *October infringements package: key decisions*, 30 October 2020.

¹⁴⁶ Court of Justice of the European Union (CJEU), *Commission v. Hungary*, C-808/18, 17 December 2020.

5. In follow-up to the CJEU judgment, the Consultative Forum issued a request for information¹⁴⁷ to enquire how Frontex intends to comply with its legal obligations stemming from Article 46 of Regulation (EU) 2019/1896. The Consultative Forum also requested information on the state of play of the Agency's due diligence policy, a pending policy aiming to support the implementation of the Agency's fundamental rights obligations.
6. The 17 December CJEU judgement clearly states that Hungarian national law is not in compliance with EU law as it relates to border control, return and asylum. The Consultative Forum therefore recommends that the Fundamental Rights Officer should advise the Agency to suspend or refrain from launching operations in 2021 in alignment with Article 46 (4) and (5) of Regulation (EU) 2019/1896, considering that core national legislation relating to access to asylum is in violation of EU law.
7. The Consultative Forum recalls that, in order to avoid direct or indirect breaches of EU or international law, operational support by the Agency must be contingent to people arriving at EU borders being treated in full compliance with EU law, including the EU Charter of Fundamental Rights, and international human rights law and international refugee law.¹⁴⁸ These include that any decision affecting a person's right is taken on an individual basis;¹⁴⁹ that individuals are provided effective access to asylum and informed about their right to seek asylum as required by EU law;¹⁵⁰ that they are only returned in full respect of the safeguards

¹⁴⁷ Request for information issued on 7 January 2021. Deadline for answer 25 January.

¹⁴⁸ Hungary committed to ensure that its legal framework and actions concerning asylum seekers, refugees and migrants comply with international human rights obligations, see [UPR recommendation 128.190](#).

¹⁴⁹ [Schengen Borders Code](#), Article 4; Return Directive (2008/115/EC) (OJ 2008 L 348/98), Recital (6).

¹⁵⁰ [Directive 2013/32/EU](#) of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180, 29.6.2013, pp. 60–95,

of the Return Directive (2008/115/EC)¹⁵¹ and international human rights law;¹⁵² and that instances of police abuse and violence are investigated in an independent and impartial manner.

8. The Consultative Forum also invites the Fundamental Rights Officer to urgently request the adoption of clear and effective rules and procedures on due diligence for the implementation of Article 46 of Regulation (EU) 2019/1896.

Articles 6 and 8.

151 Articles 5, 6(1), 12(1) and 13(1) of Directive 2008/115/EC.

152 UN convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: shorturl.at/qvxSZ.

ANNEX 5: Fundamental rights considerations in the context of search and rescue operations and interception at sea

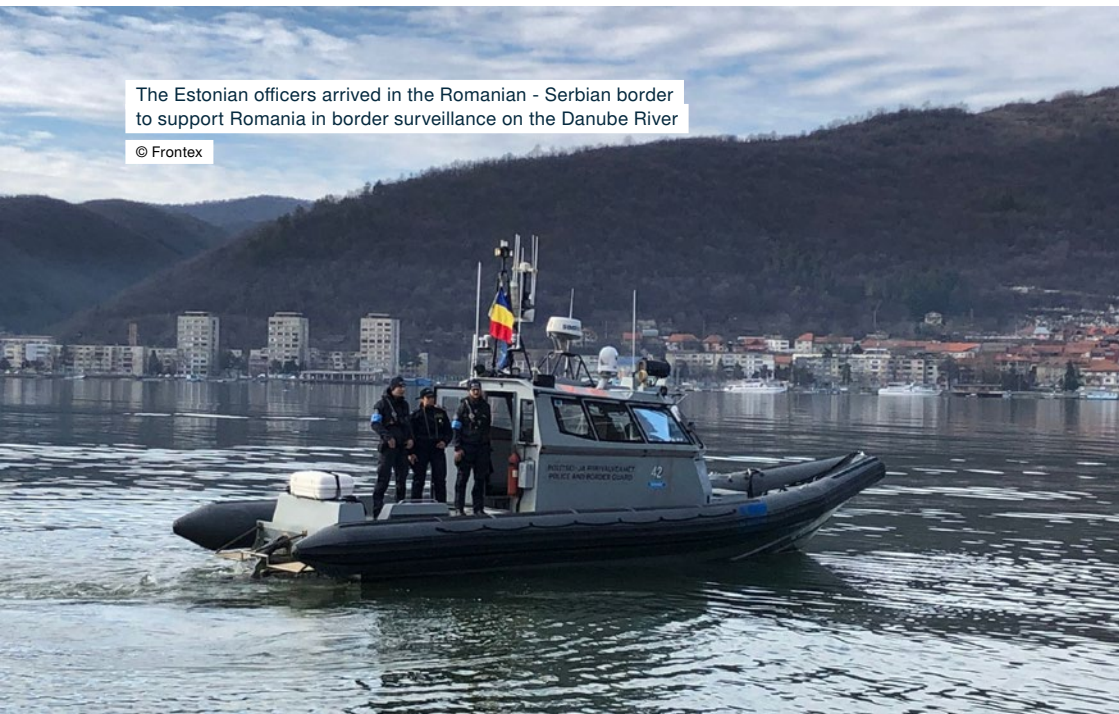
1. SEARCH AND RESCUE (SAR) OPERATIONS

The key points which can be drawn from the information below are:

- ♦ a SAR situation applies whenever a vessel is in distress;
- ♦ a vessel must be considered to be in distress when it is in danger and in need of immediate assistance, or where its operating efficiency is impaired to the extent that such distress is likely; and,
- ♦ in addition to the obligation to deliver persons in distress to a “place of safety”, Member States must comply with applicable EU law, including the Charter of Fundamental Rights.

The Estonian officers arrived in the Romanian - Serbian border to support Romania in border surveillance on the Danube River

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1.1. Definition of distress

Under EU law, a SAR situation is understood as a maritime operation of EU Member States in fulfilling ‘their obligation to render assistance to any vessel or person in distress at sea [...] in accordance with international law and respect for fundamental rights.’¹⁵³

As for the definition of ‘distress’, EU law provides that a ‘vessel or the persons on board shall be considered to be in a phase of distress in particular:

- (i) when positive information is received that a person or a vessel is in **danger and in need of immediate assistance; or**
- (ii) when, following a phase of alert, further unsuccessful attempts to establish contact with a person or a vessel and more widespread unsuccessful inquiries point to the **probability** that a distress situation exists; **or**
- (iii) when information is received which indicates that the **operating efficiency of a vessel has been impaired to the extent that a distress situation is likely.**¹⁵⁴

Under Article 9(2)(f) of Regulation (EU) 656/2014, for the purpose of considering whether a vessel is in a phase of uncertainty, alert or distress, Member States must ‘take into account and transmit all relevant information and observations to the responsible Rescue Coordination Centre including on:

¹⁵³ Regulation (EU) 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 189, 27 June 2014, pp. 93–107, Article 9.

¹⁵⁴ Regulation (EU) 656/2014, Article 9(2)(e) emphasis added. Under international law of the sea, ‘distress’ is defined as follows: ‘A situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance’, 1979 International Convention on Maritime Search and Rescue (SAR Convention), Annex, Chapter 1.3.13.

- (i) *the existence of a request for assistance, although such a request shall not be the sole factor for determining the existence of a distress situation;*
- (ii) *the seaworthiness of the vessel and the likelihood that the vessel will not reach its final destination;*
- (iii) *the number of persons on board in relation to the type and condition of the vessel;*
- (iv) *the availability of necessary supplies such as fuel, water and food to reach a shore;*
- (v) *the presence of qualified crew and command of the vessel;*
- (vi) *the availability and capability of safety, navigation and communication equipment;*
- (vii) *the presence of persons on board in urgent need of medical assistance;*
- (viii) *the presence of deceased persons on board;*
- (ix) *the presence of pregnant women or of children on board;*
- (x) *the weather and sea conditions, including weather and marine forecasts.*¹⁵⁵

Under the international law of the sea – as reflected in Article 9 of Regulation (EU) 656/2014 – ‘distress’ is the highest emergency phase, preceded by the “uncertainty phase” and then the “alert phase”.¹⁵⁶

In determining whether or not a vessel is in distress, the context in the Aegean must be taken into consideration. Deaths at sea in the Aegean have been regularly reported by a range of reputable sources, including during the period under review by the FRALO.¹⁵⁷

¹⁵⁵ Regulation (EU) 656/2014, Article 9(2)(f).

¹⁵⁶ Regulation (EU) 656/2014, Article 9(2)(f).

¹⁵⁷ SAR Convention, Annex, Chapter 1, at 1.3.8 – 1.3.11.

Members of the Consultative Forum have repeatedly expressed concern about loss of life in the Aegean Sea.¹⁵⁸

1.2. Obligations during SAR operations

The international law of the sea provides that states must require the shipmaster of any navigating vessel to render assistance to any person in distress at sea, in so far as s/he can do so without serious danger to the ship, the crew or the passengers.¹⁵⁹ Prompt assistance is an essential element of the integrity and effectiveness of SAR activities. It must remain a top priority for shipmasters, ship-
ping companies and flag States.¹⁶⁰

EU law incorporates the obligation to provide assistance in Article 9 of Regulation (EU) 656/2014, which applies to Frontex-coordinated border surveillance operations carried out by Member States at their external sea borders. According to it:

“Member States shall observe their obligation to render assistance to any vessel or person in distress at sea and, during a sea operation, they shall ensure that their participating units comply with that obligation, in accordance with international law and respect for fundamental rights. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found.”

Under international maritime law and EU law,¹⁶¹ rescued persons must be delivered to a ‘place of safety’. This is a location where rescue

¹⁵⁸ IOM, Missing Migrants Project, see specifically the documented number of deaths in the Eastern Mediterranean, https://missingmigrants.iom.int/region/mediterranean?migrant_route%5B%5D=1377 and See, for example, Frontex Consultative Forum on Fundamental Rights, [Seventh Annual Report](#), 2019, October 2020.

¹⁵⁹ United Nations Convention on the Law of the Sea, Article 98.

¹⁶⁰ International Maritime Organisation (IMO), Guidelines on the Treatment of Persons Rescued at Sea, IMO Doc. Resolution MSC. 167(78), Annex 34, adopted by the Maritime Safety Committee on 20 May 2004, para. 3.1.

¹⁶¹ Regulation (EU) 656/2014, Article 2(12).

operations are considered to terminate, and where: the rescued persons' safety of life is no longer threatened; basic human needs (such as food, shelter and medical needs) can be met; and transportation arrangements can be made for the rescued persons' next or final destination.¹⁶² In delivering a person to such a place of safety, the party responsible for the SAR should take into account the particular circumstances of the case and the guidelines of the International Maritime Organisation (IMO).¹⁶³ IMO's Maritime Safety Committee adopted non-binding guidelines to assist states and shipmasters in this regard.¹⁶⁴ The guidelines:

- ♦ specify that "the responsibility to provide a place of safety, or to ensure that a place of safety is provided, falls on the Government responsible for the search and rescue region in which the survivors were recovered." (at 2.5);
- ♦ clarify the need to avoid disembarkation of asylum seekers and refugees in territories where their lives and freedoms would be threatened (at 6.17); and
- ♦ discourage any screening and status assessment procedures that would unduly delay disembarkation (at 6.20).

The Human Rights Committee noted that States' obligation to respect the right to life under Article 6 of the International Covenant on Civil and Political Rights (ICCPR) includes an obligation to take action in the case of foreseeable threats to the right to life and in life-threatening situations, even where those threats and situations are not caused directly by the State.¹⁶⁵ Moreover, under Article 6(1) read in conjunction with Article 2(3) of the ICCPR, States have "the

¹⁶² As specified further below, as soon as the person is in the territorial waters of an EU Member States, asylum obligations become applicable. See Article 3(1) Asylum Procedures Directive 2013/32/EU.

¹⁶³ SAR Convention, Annex, Chapter 3.1.9 amended by International Maritime Organisation, Resolution MSC. 155(78), Annex 5 adopted on 20 May 2004.

¹⁶⁴ International Maritime Organisation, Guidelines on the Treatment of Persons Rescued at Sea, Maritime Safety Committee, Resolution MSC. 167(78), 20 May 2004.

¹⁶⁵ Human Rights Committee, CCPR/C/GC/36 para. 7.

duty to provide an effective remedy to victims of human rights violations and their relatives”, which includes a “duty to conduct a prompt investigation of the allegations relating to a violation of the rights to life”, including death and disappearance.¹⁶⁶

For Frontex-coordinated sea operations, Article 10 of Regulation (EU) 656/2014 requires the host Member State and the participating Member States to cooperate with the responsible Rescue Coordination Centre to identify a place of safety and ensure that disembarkation of the rescued persons is carried out rapidly and effectively. Under Article 4(1) of the regulation, this must fully comply with fundamental rights.¹⁶⁷ Article 4(4) of the same regulation provides that

“[t]hroughout a sea operation, the participating units shall address the special needs of children, including unaccompanied minors, victims of trafficking in human beings, persons in need of urgent medical assistance, disabled persons, persons in need of international protection and other persons in a particularly vulnerable situation.”

¹⁶⁶ Ibid, para 27; Human Rights Committee, CCPR/C/130/D/3042/2017, paras. 8.6, 8.7, 10.

¹⁶⁷ Regulation (EU) 656/2014, Article 4(1): ‘no person shall, in contravention of the principle of non-refoulement, be disembarked in, forced to enter, conducted to or otherwise handed over to the authorities of a country where, inter alia, there is a serious risk that he or she would be subjected to the death penalty, torture, persecution or other inhuman or degrading treatment or punishment, or where his or her life or freedom would be threatened on account of his or her race, religion, nationality, sexual orientation, membership of a particular social group or political opinion, or from which there is a serious risk of an expulsion, removal or extradition to another country in contravention of the principle of non-refoulement.’



Search and rescue (SAR)

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2. INTERCEPTION AT SEA

The key points which can be drawn from the information below are:

- The duty on Member States to prevent unauthorised border crossings under the Schengen Border Code is subject to respect for international and EU law obligations.
- The principle of *non-refoulement* and the prohibition of collective expulsion require an individual assessment of each person on an intercepted vessel.
- State actors (in this context border guards) must inform sea arrivals about the right to asylum wherever there are indications that they might wish to seek asylum. The context in the Aegean should inform any assessment of whether such indications are present.
- Where there are indications that intercepted person may wish to seek asylum, they must be disembarked on land and have their applications assessed in accordance with the Asylum Procedures Directive 2013/32/EU.

2.1. Fundamental Rights in the Schengen Borders Code

Under the Schengen Borders Code (SBC),¹⁶⁸ Member States have a duty to prevent unauthorised border crossing. However, this obligation is subject to respect for the EU Charter of Fundamental Rights, as clearly stated in Article 4 of the SBC. The Charter obliges EU institutions and Member States when they implement EU law to respect, among other rights, the right to asylum (Article 18 of the Charter), the principle of *non-refoulement* and the prohibition of collective expulsion (Article 19 of the Charter) and the right to an effective remedy (Article 47 of the Charter).

The **principle of *non-refoulement*** prohibits the return of a person in any manner whatsoever to a risk of persecution and other serious harm.¹⁶⁹ The principle of *non-refoulement* not only prohibits the return to a country where a person may be at risk of persecution or other serious harm (direct *refoulement*), but also to countries where individuals would be exposed to a serious risk of onward removal to such a country (indirect *refoulement*).¹⁷⁰ Under Article 15 of the European Convention of Human Rights (ECHR), read together with the case law of the European Court of Human Rights (ECtHR) on

¹⁶⁸ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77, 23 March 2016, pp. 1–52, Article 13.

¹⁶⁹ Charter of Fundamental Rights of the European Union, Articles 18 and 19; see also Treaty on the Functioning of the EU (TFEU), Article 78(1) and CJEU, Joined cases C-411/10 and C-493/10, *N. S. v. Secretary of State for the Home Department and M. E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, 21 December 2011, para. 75. European Convention on Human Rights, Articles 2 and 3 as interpreted by the European Court of Human Rights (ECtHR), in e.g. *Soering v. the United Kingdom*, No. 14038/88, 7 July 1989, para. 91 and *Vilvarajah and Others v. United Kingdom*, Nos. 13163/87 and others, 30 October 1991, para. 107ff; Convention relating to the Status of Refugees (1951), Article 33; United Nations Convention Against Torture (1984), Article 3; International Covenant on Civil and Political Rights (1966), Article 7, as interpreted by the United Nations Human Rights Committee.

¹⁷⁰ ECtHR, *Ilias and Ahmed v. Hungary* [GC], No. 47287/15, 21 November 2019.

Article 3 of the ECHR,¹⁷¹ this principle is absolute and cannot be derogated from even in time of emergency.

The **prohibition of collective expulsion**¹⁷² prevents States from returning third-country nationals in a group, without an individual assessment of their situation and, therefore, without enabling them to put forward their arguments against the measure.

The prohibition of *refoulement* as well as collective expulsion apply also to non-admission and rejection at borders¹⁷³ and on the high seas.¹⁷⁴

The SBC must be applied without prejudice to “the rights of refugees and persons requesting international protection, in particular as regards *non-refoulement*” (Article 3 (b)). Article 4 of the SBC requires that border controls must be carried out:

“in full compliance with relevant Union law, including the Charter of Fundamental Rights of the European Union (‘the Charter’), relevant international law, including the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951 (‘the Geneva Convention’), obligations related to access to international protection, in particular the principle of non-refoulement, and fundamental rights. In accordance with the general principles of Union law, decisions under this Regulation shall be taken on an individual basis.”

¹⁷¹ ECtHR, *M.A. v. France*, No. 9373/15, 1 February 2018; ECtHR, *Saadi v. Italy* [GC], No. 37201/06, 28 February 2008; ECtHR, *Salah Sheekh v. the Netherlands*, No. 1948/04, 11 January 2007, para. 135; ECtHR, *Soering v. the United Kingdom*, No. 14038/88, 7 July 1989; ECtHR, *Vilvarajah and Others v. the United Kingdom*, Nos. 13163/87 and 4 others, 30 October 1991.

¹⁷² Charter of Fundamental Rights of the European Union, Article 19; European Convention on Human Rights, Protocol No. 4, Article 4.

¹⁷³ ECtHR, *N.D. and N.T. v. Spain* [GC], Nos. 8675/15 and 8697/15, 13 February 2020, paras. 185 and 187; ECtHR, *M.K. and Others v. Poland*, Nos. 40503/17, 42902/17 and 43643/17, 23 July 2020, paras. 200 and 204.

¹⁷⁴ ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], No. 27765/09, 23 February 2012; ECtHR, *N.T. and N.D. v. Spain* [GC], Nos. 8675/15 and 8697/15, 13 February 2020, para. 178, 185, 187.

Article 4 of Regulation (EU) 656/2014, quoted above, specifies this obligation for Frontex-coordinated maritime border surveillance operations.

Where physically non-admitting a person would violate the principle of *non-refoulement*, the prohibition of collective expulsion, the right to asylum, or the right to an effective remedy under the Charter and under international human rights law, Member States must refrain from doing so. Rather, in Article 6 (5) (c), the SBC explicitly authorises them to allow entry “because of international obligations”.

2.2. No need for expressly requesting asylum

Pursuant to Article 52(3) of the EU Charter of Fundamental Rights, when Charter rights correspond to rights guaranteed by the ECHR, their meaning and scope must be the same as in the ECHR. Under the case law of the ECtHR, the prohibition of *refoulement* applies also to persons who have not requested asylum, where the risks of ill-treatment that an individual may face as a result of the interception were known *or ought to have been known* to the Contracting State”.¹⁷⁵ If they are aware of factors that could put individuals at risk, authorities must examine such risks on their own motion.¹⁷⁶ As the ECtHR clearly held in *Hirsi Jamaa*, “the fact that the [applicants] had failed expressly to request asylum did not exempt Italy from fulfilling its obligations under Article 3.”¹⁷⁷

Under EU law, Article 4(2) of Regulation (EU) 656/2014 prohibits Member States to disembark, force to enter, conduct to or otherwise hand over an intercepted or rescued person to a third country,

¹⁷⁵ ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], para. 121.

¹⁷⁶ ECtHR, *F.G. v. Sweden* [GC], No. 43611/11, 23 March 2016, para. 127, ECtHR *M.A. and Others v. Lithuania* No. 59793/17, 11 December 2018, para. 81, ECtHR *Hirsi Jamaa and Others v. Italy* [GC], para. 133. ECtHR, *J.K and others v. Sweden* [GC] No.59166/12, para. 98.

¹⁷⁷ ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], para. 133.

where they are “aware *or ought to be aware*” (italics added) of a risk of torture or ill-treatment or other serious violations of human rights in the third country. This obligation applies irrespective of any request for asylum by the individual.

It is important to keep in mind the context in the Aegean Sea when applying the relevant legal framework. Members of the Consultative Forum have repeatedly expressed concern about pushbacks in the Aegean during the period in which the cases under review by the Working Group occurred (April 2020 – November 2020). Members also frequently recalled the need to ensure that asylum applicants are guaranteed access to an individual assessment.¹⁷⁸

The high recognition rate for the main nationalities of persons crossing the Aegean and the fact that persons arriving to the island by boat invariably apply for asylum are also of relevance to determinations of whether persons on rubber boats are likely to be asylum applicants.¹⁷⁹

Article 4 of the SBC recalls that any decisions under its purview must be taken on an individual basis, in accordance with the general principles of EU law.

Under the ECHR, the safeguards for the individual examination differ between risks of violations of Articles 2 and 3 of the ECHR (*non-refoulement*) and risks of collective expulsion under Article 4 of Protocol No. 4 to the ECHR.

¹⁷⁸ See UNHCR, [UNHCR calls on Greece to investigate pushbacks at sea and land borders with Turkey](#); Amnesty International, Human Rights Watch, and 27 other NGOs, [Open letter to Members of the Hellenic Parliament calling for an investigation into border abuses](#); IOM, [IOM Alarmed over Reports of Pushbacks from Greece at EU Border with Turkey](#).

¹⁷⁹ [UNHCR data shows](#) that out of the approx. 10 000 sea arrivals in 2020, – which is down by 84% compared to the approx. 60 000 in 2019 – over 70% came from nationalities which received a high [protection rate in the EU in 2020](#) (mainly Syrians, Somalis, Afghans, and Palestinians).



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2.3. Individual assessment

- (a) Under the ***non-refoulement obligation***, a state must undertake an independent and rigorous scrutiny of any arguable claim entailing a real risk of ill-treatment.¹⁸⁰ The ECtHR will particularly look at whether the applicant had an effective possibility to seek asylum.¹⁸¹ The State has to ascertain that any person under its jurisdiction is not refouled. As the ECtHR has pointed out, it is only by means of a legal procedure resulting in a legal decision that a finding on this issue can be made and relied upon. The expelling State cannot merely assume that the individual will be treated in the receiving third country in conformity with ECHR standards.¹⁸² There will be a violation of the ECHR, if a person is returned without individual assessment.¹⁸³

¹⁸⁰ ECtHR, *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, paras. 288 and 291, ECHR 2011; for an overview of the Court's case-law as to the requirements under Article 13 taken in conjunction with Articles 2 or 3 in removal cases, see, in particular, *ibid.*, paras. 286-322. ECtHR, *Hirsi*, para. 198; ECtHR, *Ilias and Ahmed v. Hungary* [GC], para. 127.

¹⁸¹ ECtHR, *M.K. and Others v. Poland*, Nos. 40503/17, 42902/17 and 43643/17, 23 July 2020, paras. 174-186.

¹⁸² ECtHR, *M.S.S. v. Belgium and Greece* [GC], para. 359; *Ilias and Ahmed v. Hungary* [GC], para. 141.

¹⁸³ ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], paras. 113-115.

- (b) Also under the **prohibition of collective expulsion**, a State must undertake an examination which takes into account the specific situation of the individual. It must identify the person, establish his or her nationality and provide him or her with a genuine and effective possibility of submitting arguments against the expulsion, which must be examined in an appropriate manner by the relevant authorities.¹⁸⁴

In its ruling on the so-called “hot returns” in the Spanish enclave of Melilla, the ECtHR considered that the applicant’s behaviour may play a role in assessing a violation of the prohibition of collective expulsions. It held that a State does not violate the ECHR if the absence of an individual expulsion decision can be attributed to the applicant’s own culpable conduct. The Court set out a two-tier test for compliance with Article 4 of Protocol No. 4 of the ECHR in such circumstances:

1. Firstly, whether the State provided genuine and effective access to means of legal entry, in particular border procedures, to allow all persons who face persecution to submit an application for protection, based in particular on Article 3 of the ECHR, under conditions which ensure that the application is processed in a manner consistent with international norms, including the ECHR.
2. Secondly, where the State provided such access but an applicant did not make use of it, the ECtHR will examine whether there were cogent reasons for not doing so, which were based on objective facts for which the State is responsible. The absence of such cogent reasons could lead to a conclusion justifying the lack of individual identification, this being the consequence of the applicants’ own conduct.¹⁸⁵

¹⁸⁴ ECtHR, *Khlaifia and Others v. Italy* [GC], para. 248.

¹⁸⁵ ECtHR, *N.D. and N.T. v. Spain* [GC], para. 201.

The circumstances which led to the finding of no violation of Article 4 of Protocol No. 4 in that case do not seem likely to apply to situations at sea. Compliance with Article 4 of Protocol No. 4 presupposes that an applicant had a genuine and effective access to means of legal entry in the country (in the “hot returns” from the Spanish enclave of Melilla), the applicants could not show “cogent reasons” why they had not approached the asylum office at the nearby border crossing point). This appears different from the case of border guards in the Aegean Sea being faced with unseaworthy dinghies, where there is no option of turning to a point for legal entry.

Fundamentally, the judgment concerned the prohibition of collective expulsions in Article 4 of Protocol 4 and the applicants did not have an arguable claim under Articles 2 or 3 of the ECHR upon return.

In addition, where the individual has an “arguable complaint” that his or her removal would represent *refoulement*, s/he must have an effective remedy, in practice as well as in law, at the domestic level in accordance with Article 13 of the ECHR, which imperatively requires, *inter alia*, independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Articles 2 or 3 and automatic suspensive effect.¹⁸⁶ The scrutiny should include an assessment of vulnerability and needs of potential victims of human trafficking and of unaccompanied and separated children.

¹⁸⁶ *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, §§ 288 and 291, ECHR 2011; for an overview of the Court’s case-law as to the requirements under Article 13 taken in conjunction with Articles 2 or 3 in removal cases, see, in particular, *ibid.*, §§ 286-322.

2.4. Referral to asylum procedures and the duty to inform

Under EU law, border guards must refer asylum applicants to national asylum procedures.¹⁸⁷ Pursuant to its Article 3, the Asylum Procedures Directive (2013/32/EU) applies to territorial waters. Recital 26 of the Directive clarifies that persons seeking international protection present in the territorial waters of a Member State should be disembarked on land and have their applications examined in accordance with the Directive. Under Article 8(1) of the Asylum Procedures Directive, wherever there are “indications that third-country nationals [...] may wish to make an application”, the border guards must inform them how to do so.

There are no formal requirements for an asylum application. As the Court of Justice of the EU (CJEU) pointed out, “making” an application means that an individual declares his or her wish to receive asylum, “without the declaration of that wish being subject to any administrative formality whatsoever”.¹⁸⁸ From the moment the individual has expressed the wish to apply for asylum, he or she enjoys the status of an ‘asylum applicant’.¹⁸⁹ Under Article 9(1) of the Asylum Procedures Directive, applicants must be allowed to remain in the Member State until the relevant authority has made a decision on the asylum application.

To ensure effective access to the asylum procedure, Article 6(1) of the Asylum Procedures Directive also contains the obligation to ensure that border guards receive the necessary level of training which is appropriate to their tasks and responsibilities and instructions to inform applicants as to where and how applications for international protection may be lodged.

¹⁸⁷ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180, 29 June 2013, pp. 60–95. The directive applies in territorial waters, see Article 3(1).

¹⁸⁸ CJEU, *European Commission v. Hungary*, [C-808/18](#), 17 December 2020, para. 97; CJEU, *Ministerio Fiscal v VL*, [C36/20 PPU](#), 25 June 2020, para. 93. See also Asylum Procedures Directive, Article 2(b).

¹⁸⁹ Asylum Procedures Directive, Article 2(c).

3. CONCLUSION

The prohibitions of *refoulement* and of collective expulsion as well as the right to an effective remedy set out in international and EU law, including the Charter of Fundamental Rights, apply irrespective of persons having expressed a wish to seek asylum.

The Consultative Forum recalls that wherever an individual is under the jurisdiction of a Member State, and there are substantial grounds to believe that s/he might wish to seek asylum and/or be at risk of serious violations of human rights upon return, the Member State must inform them how to seek asylum and facilitate access to an independent and effective status determination procedure. Under EU law, “indications” suffice; in such a case, a Member State must inform how to apply for asylum and facilitate access to the asylum procedure in the EU. In the Aegean context, such indications are currently clearly present. The Consultative Forum further recalls that where a person expresses a wish to receive asylum, which does not require any formalities whatsoever, s/he must be disembarked on land and have his or her application examined in accordance with the Asylum Procedures Directive.

ANNEX 6: Recommendation to Frontex on the reform of its Serious Incidents Reporting (SIR) mechanism

Building on the Consultative Forum's long-standing observations on the implementation of the SIR mechanism, on the Fundamental Rights Officer's regular reporting of SIRs and FRALO's recommendations and the Management Board conclusions, the Consultative Forum submits the following general recommendations on the reform of the SIR mechanism. Specific comments inserted directly in the text complement these recommendations.

Reporting potential fundamental rights violations and the role of FRO

The SIR mechanism is a major fundamental rights safeguard in the overall Frontex fundamental rights monitoring mechanism and can be transformed into a strong tool that help the Agency to detect potential violations of fundamental rights.

FRO's role in relation to the categorisation and handling of fundamental rights related SIRs should be further strengthened in all phases of the mechanism, including the possibility to challenge previously made decisions on the categorisation.

- Potential violations of fundamental rights should be one of the main definitions describing a serious incident. The present draft outlines (under 2.1) two areas of primary definitions, whereas potential breaches of fundamental rights appear only as a secondary objective for reporting.
- The standard operating procedure for SIRs should expressly anchor the obligation to report potential violations of fundamental rights in very clear terms under 3.1. The standard operating procedure should also cross reference the Frontex Fundamental Rights Strategy for this (we've proposed a paragraph within

the draft). At the moment there is no such reporting obligation, neither in the Code of Conduct nor in the present draft reform.

- Barriers to lodge a fundamental-rights related SIR have to be removed. Participants in Frontex activities must be allowed to lodge directly a report without a prior assessment by local coordinating officers and by the FSC; in this context, it might be necessary to handle fundamental rights related SIRs differently than the other two categories; for any fundamental rights related SIR there should be no admissibility check.
- A reference to the staff's obligation to cooperate with the FRO in facilitating her access to information concerning relevant SIRs should be added.¹⁹⁰
- It is necessary to acknowledge the need for fundamental rights expertise in all phases of the process. This expertise cannot be compensated by training FSC on fundamental rights. While training for FSC on fundamental rights is a positive development, the identification, categorisation and handling requires the involvement of FRO appointed staff with a sound fundamental rights expertise.
- Although the 'initial' phase of the mechanism was formally removed, the former steps associated with this phase remain. They may impact significantly on whether an incident will be reported. The FSC plays the key role in this pre-assessment. This should not be the case, particularly for fundamental rights related serious incidents. Currently, the margin of discretion associated to the FSC is too large and creates the following risks, which should be avoided:
 - FSC discourages reporting officer from reporting;
 - In the pre-assessment, FSC might not be able to identify the fundamental rights dimension of issues;

¹⁹⁰ Article 109(7) of Regulation (EU) 2019/1896.

- The FSC's efforts to verify and qualify information and to collect additional information in the pre-assessment' might discourage the reporting officer to report;
- The FSC's efforts to verify and qualify information and to collect additional information might miss key fundamental rights issues. There is currently no obligation for the FSC to consult FRO at this stage;
- Since this pre-assessment phase is not clearly outlined, there is a risk that other actors might get involved and hamper the formalisation of reports.
- There needs to be a clearer distinction between the lodging of a SIR and all steps that follow it, such as verification, information gathering, etc. The proposed pre-assessment poses an obstacle to transparent reporting and forms a barrier between the reporting person and the mechanism.
- FSC should provide justification (including listing of sources consulted and actors involved) for their decisions in all steps of the process, and adequately document all steps taken.
- A reference to the complaints mechanism would be welcomed as an Annex to ensure that participants have clarity about both procedures as these are complementary.
- The SIR mechanism should outline how the follow up with the Member States is envisaged and what it entails. Furthermore, the potential consequences upon such follow up and the closing of fundamental rights related SIRs should also be indicated.
- Two entity integrity assurance (second set of eyes principle) needs to be introduced to the SIR mechanism, also based on FRALO's recommendation.

Flanking measures to the Serious Incidents Reporting mechanism

In addition to reforming the SIR mechanism, it is important that the Agency introduces a set of flanking measures to achieve an effective functioning of the SIR mechanism:

- A reform of the current whistleblowing policy should be undertaken in parallel to the reform of the SIR to ensure that protection in case of reporting of non-compliance with fundamental rights obligations is integrated in the policy.¹⁹¹
- Reporting of fundamental rights issues should be encouraged proactively through training and awareness raising measures should be introduced. Training and operational briefings refer to the reporting obligation but should also provide practical guidance on how to report.
- The Code of Conduct should be amended and the obligation to report potential fundamental rights violations (“must be reported”) should be anchored in it.

¹⁹¹ In compliance with Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law and Articles 32 and 33 of the United Nations convention against corruption, to which the EU is a party since 2008 and which guarantees the protection of whistle-blowers, witnesses, experts and victims.

ANNEX 7: First Recommendation to the European Border and Coast Guard Agency on the Action Plan for the implementation of the Fundamental Rights Strategy

- The Agency should ensure that the Action Plan recognizes the Agency's mandate not only in protecting but also in respecting and promoting the fundamental rights of all persons crossing the external borders of the European Union, in all its activities.
- The Fundamental Rights Strategy and its Action Plan should be treated as living documents which need to be regularly assessed and in which lessons learnt should be reflected and emerging recommendations should be considered. The Fundamental Rights Officer can recommend modifications, in line with Article 109(2) & 80(1) of Regulation (EU) 2019/1896. The FRO should always be included to ensure that all activities are being monitored.
- The Action Plan should refer to the Consultative Forum's advisory role and should reflect how the Agency will comply with Article 108(3) according to which "The Agency shall inform the consultative forum of the follow-up to its recommendations."
- The Consultative Forum encourages Frontex to facilitate the identification of persons in situations of vulnerability in its activities (first and second line border checks, interception, screening and debriefing) to ensure that persons in situations of vulnerability are referred to the respective authorities and/ or organi-

sations.¹⁹² The Consultative Forum stands ready to advise the Agency in this respect.

- The Consultative Forum encourages the Agency to consistently mainstream gender and adopt gender sensitive language throughout the Action Plan, in line with the Consultative Forum recommendation on gender mainstreaming in Frontex activities from 2017.
- The Consultative Forum considers that the methodology of the Action plan could be improved towards better integrating objectives, indicators and outcomes in a clear and quantifiable manner and with attached timelines. This would ease the measurability of its implementation and allow for the overall monitoring by the Fundamental Rights Officer.
- Those actions that are outlined in the roadmap following the recommendations of the Fundamental Rights and Legal Operational Aspects of Operations (FRALO) Working Group should be integrated into the Action Plan.
- Concerning the monitoring of the implementation of the Action Plan itself, the Agency should consider making specific references to the reporting obligations incumbent on the Executive Director as per Article 106(2) of the Regulation to facilitate the oversight of the European Parliament and of the Council.

¹⁹² See OHCHR, *Recommended principles and guidelines on human rights at international borders*, https://www.ohchr.org/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf and *Principles and guidelines supported by practical guidance, on the human rights protection of migrants in vulnerable situations*, <https://www.ohchr.org/EN/Issues/Migration/Pages/VulnerableSituations.aspx> as well as case law and resources including *M.S.S [GC]*, no. 30696/09, §§ 232, 251, ECHR 2011; *Popov*, nos. 39472/07 and 39474/07, §§ 91-103, 19 January 2012; *S.F. and Others* no. 8138/16, §79, ECHR 2017; *Orchowski*, no. 17885/04, 22 October 2009, § 120; *O.M.*, no. 9912/15, 5 July 2016, § 53; *B and C*, nos. 889/19 43987/16, 17 November 2020; *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) Factsheet on immigration detention*, CPT/Inf(2017)3, (2017); *Council of Europe factsheet on Protecting the rights of migrant, refugee and asylum-seeking women and girls* (2019). See also "Legal and Practical aspects of effective alternatives to detention in the context of migration", Analysis by the Steering Committee for Human Rights (CDDH), December 2017"; *Council of Europe Committee of Ministers CM/Rec(2019)4 on supporting young refugees in transition to adulthood*; *Council of Europe Gender Equality Strategy (2018-2023)*; *ECHR, Guide on case law of the Convention – Immigration* (version updated on 31 August 2020).

ANNEX 8: Recommendations on the Frontex' Draft on "Best Practices on Returning Minors and Families"

- ♦ While noting Frontex efforts to raise awareness about good practices existing in EU Member States to ensure that the rights of the child are respected and protected during return, the Consultative Forum encourages the Agency to clarify the aim of the document. It would be beneficial to outline the role of Frontex in following the highest standards for border management and ensuring promotion of fundamental rights as per Article 10(1) (a-e) of Regulation (EU) 2019/1896.
- ♦ A reference could be added to the Frontex Fundamental Rights Strategy as it recalls the commitment of the European Border and Coast Guard Agency to ensuring that the best interest of the child is a primary consideration when taking any decisions affecting children. It makes references to the various operationalization of the European Border and Coast Guard commitments to the right of the child to be heard in all procedures, to be informed in a child-friendly manner at all the stages of the return procedure etc.
- ♦ As a good practice, the Consultative Forum encourages Frontex to use consistent human rights sensitive terminology. The term child should be used rather than minor, as already done under VEGA and in Frontex trainings on protecting the rights of the child in migration.
- ♦ The principle of *non-refoulement* should be understood as a general human rights obligation, consistently with international and EU law.¹⁹³
- ♦ The Consultative Forum recommends that the document takes full account of the relevant international and EU legal framework

¹⁹³ According to the EU Charter on Fundamental Rights Article 52(3), 'no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.'

with paying particular attention to the different obligations and procedural aspects depending on the context (forced return, voluntary return). Currently, the document does not properly distinguish separate guidance and procedures for children within families and unaccompanied children despite the fact that safeguards and standards are different (and higher) for the latter.

- As the document aims at promoting good practices, it is suggested that references to detention and use of force are deleted.
- The Consultative Forum advises the Agency to integrate relevant elements from its recommendations on return and on a child protection strategy into the document as relevant. Similarly, the document could benefit from a review of the already existing best practices which have been documented by international organizations, EU agencies and civil society organizations with expertise on the rights of the child. A non-exhaustive list of such complementary sources has been included in the draft paper.
- Various EU Member States have committed to strengthening the rights of the child in return procedures in front of their peers under the auspices of the Human Rights Council through the Universal Periodic Review (UPR) which is a unique process which involves a review of the human rights records of all United Nations Member States. The Consultative Forum recommends that relevant accepted recommendations be mainstreamed into the document to recall such commitments as they constitute good practices. More information on specific UPR recommendations can be found here: [UNIVERSAL HUMAN RIGHTS INDEX - Human Rights Recommendations \(ohchr.org\)](https://www.ohchr.org/en/universal-human-rights-recommendations)

ANNEX 9: Second Recommendation to the European Border and Coast Guard Agency on the Action Plan for the implementation of the Fundamental Rights Strategy

- ♦ The Consultative Forum reiterates its recommendation to the Agency to address the operationalization of Article 46 of Regulation (EU) 2019/1896 as a matter of priority. The Consultative Forum is concerned that the proposed timeline, currently indicating end of 2022 will increase the already existing accountability gap and is not in line with advice that the Agency has received from the conclusions of the working group on Fundamental Rights and Legal Operational Aspects of Operations (FRALO),¹⁹⁴ the recommendations of the European Parliament's LIBE Committee on Civil liberties, Justice and Home Affairs,¹⁹⁵ the European Commission's advice¹⁹⁶ and advice by the Consultative Forum.¹⁹⁷ The Consultative Forum remains available to advise the Agency on the development of such procedure.
- ♦ Overall, the Consultative Forum welcomes the Agency's effort to include timelines for some of the activities and encourages Frontex to consistently include clear timelines (year and Q1, Q2, Q3, Q4) for all the activities to facilitate the monitoring of the implementation of these activities by the FRO.

¹⁹⁴ See the *Conclusions of the Management Board's meeting on 5 March 2021 on the report of its Working Group on Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea*, 05.03.2021 at <https://frontex.europa.eu/media-centre/management-board-updates/conclusions-of-the-management-board-s-meeting-on-5-march-2021-on-the-report-of-its-working-group-on-fundamental-rights-and-legal-operational-aspects-of-operations-in-the-aegean-sea-aFewSI>.

¹⁹⁵ See *Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations*, 14.07.2021, https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/LIBE/DV/2021/07-14/14072021FinalReportFSWG_EN.pdf.

¹⁹⁶ See *European Commission's letter on the nature and extent of Frontex's obligations in the context of its implementation of joint maritime operations and the Union's external sea borders*, 03.03.2021 at https://frontex.europa.eu/assets/Key_Documents/MB_Documents/Agenda_Point_WG_FRALO_final_report.pdf, p.19.

¹⁹⁷ See *Response to request for information received from the FRALO*, 24.02.2021 at https://frontex.europa.eu/assets/Key_Documents/MB_Documents/Consultative_Forum_letter_to_FRALO.pdf.

- The Consultative Forum advises the Agency to complement the means of verification of the outcome of various activities by making full use of the broad range of external fundamental rights expertise including from relevant EU institutions and agencies, international organizations, national human rights institutions, civil society, and/ or academic research.
- The Consultative Forum is of the opinion that those actions that are outlined in the roadmap following the recommendations of FRALO as well as the relevant ones stemming from the final report of the European Parliament's LIBE Committee should be integrated into the Action Plan. Any fundamental rights related recommendation should be integrated into the Action Plan of the FRS, detailing specific activities to achieve the respective objectives.
- The FRS, the Action Plan, overall the implementation of fundamental rights related recommendations and corresponding actions should be regularly evaluated by external experts with a fundamental rights expertise. Such evaluation should be integrated into the Action Plan with timelines.
- The Consultative Forum invites the Agency to ensure that the risk analysis, including the CIRAM methodology, takes into account fundamental rights expertise from the FRO and the Consultative Forum.
- It is advised to ensure that new operational plans always take into account the results of the fundamental rights evaluation of the previous operational cycle, in line with Article 47 of Regulation (EU) 2019/1896 as well as reports from the FRO, the Consultative Forum, in line with Article 80(4). Reports from relevant EU institutions, international organizations, national human rights institutions and civil society organizations should also be taken into account as means of verification. The number of Serious Incident Reports and complaints should also serve as a means of verification. To enhance the quality of the evaluation of the

fundamental rights compliance of operational activities, the Consultative Forum invites the Agency to add indicators which specify the number of follow-up actions taken in the event that serious incident reports and complaints were filled concerning that operational activity. FRO reports on both tools should therefore feature as a means of verification. It is also important to precise that subcontractors including interpreters/cultural experts, as members of the teams, are introduced to the Serious Incident reporting mechanism and have effectively the possibility to submit these directly to FRO.

- ♦ Under Objective VIII, the Consultative Forum welcomes the development of dedicated guidelines on identification and referral of victims of gender-based violence. It is advised that disaggregated information about the number of persons being referred is included as a quality indicator and to include references to VEGA reports from fundamental rights experts as well as relevant reports from international organizations, national human rights institutions and the EU anti-trafficking coordinator as means of verification.

ANNEX 10: Recommendations on the draft “*Standard Operating Procedure – setting up the mechanism to suspend, terminate, withdraw the financing or not to launch Frontex activities*”

Fundamental rights considerations

- Frontex procedures should refrain from re-defining legal provisions of the Regulation but should rather embed the operationalisation of legal provisions into clear procedural *modus operandi*. Article 80(2) of the Regulation provides a comprehensive overview of applicable fundamental rights and therefore the Consultative Forum advises that the procedure refers to Article 80(2) instead of introducing a selective and narrowed scope of applicable fundamental rights provisions and international protection obligations.
- The procedure should offer a sound legal referencing and methodology, allowing the Executive Director to assess the “persistence” and “seriousness” of fundamental rights violations. The criteria for any such assessment should be laid down more clearly in the present procedure.
- The requirements for assessing the ‘seriousness’ and ‘repetitiveness’ of fundamental rights violations should remain separate from above. When one violation is serious, there should be no need of a repetition of such violation to trigger the mechanism. When the violation is repetitive it does not need to be of a serious nature to trigger the mechanism. The current interlinking of both requirements is not in line with the Regulation as it introduces a higher threshold than the Regulation.
- The draft procedure foresees an “initiator”, Frontex staff, who can initiate action by the responsible entity (Director of Operational Response Division for joint operations or the Director of European Centre for Returns for return operations) for the

necessary analysis of the situation with regard to the potential violations of fundamental rights or international protection obligations. The responsible entity is expected to propose a recommendation to the Executive Director to either suspend, terminate or withdraw the financing of the activity, or to set up a Working Group in order to monitor the situation and to prepare detailed assessment with the participation of the Fundamental Rights Officer as advisor to the Working Group. According to Article 46(4) of the Regulation, it is exclusively the responsibility of the Executive Director after consulting the fundamental rights officer and informing the Member State concerned to withdraw the financing for any activity by the Agency, or suspend or terminate any activity by the Agency, in whole or in part, if he or she considers that there are violations of fundamental rights or international protection obligations related to the activity that are of a serious nature or are likely to persist. While acknowledging the coordinating officer's role according to Article 44(3) of Regulation (EU) 2019/1896, according to Article 46(4) and (5) the role of the Fundamental Rights Officer should be enhanced in the proposed SOPs.

Fundamental Rights Officer – Monitoring of fundamental rights

- According to the Regulation, the monitoring of fundamental rights is solely in the Fundamental Rights Officer's mandate, exercised mainly but not exclusively through the Fundamental Rights Monitors. The present draft should strengthen the role of the FRO, including in the foreseen establishment of a working group to monitor the fundamental rights situation. While the Fundamental Rights Officer and the Fundamental Rights Monitors have the overall responsibility to ensure that the Agency's actions comply fully with fundamental rights, tasks which include monitoring the respect of fundamental rights are, as per

the Regulation, mainstreamed and included, for example, in the duties of the coordinating officer, under Article 44 of Regulation (EU) 2019/1896 or the tasks of other staff under Article 55(6) based on which staff should use the SIR mechanism to report any potential violations.

- Mitigating measures, such as the deployment of the Fundamental Rights Monitors falls within the sole responsibility of the Fundamental Rights Officer. The Fundamental Rights Officer has the mandate and necessary expertise on fundamental rights to be able to assess, analyse and suggest mitigating measures where fundamental rights are concerned. In this regard, the draft SOP should include instructions to the responsible entity (Director of Operational Response Division for joint operations or the Director of European Centre for Returns for return operations) on the modalities of the Fundamental Rights Officer's engagement beyond her/his participation to the Working Group.
- The procedure should neither duplicate the work of the Fundamental Rights Officer nor undermine his or her mandate. Without prejudice to the Fundamental Rights Officer's independence, he or she shall be included in all the "sub-mechanisms" and procedural steps, as full respect for fundamental rights is a horizontal element of the procedure.
- The procedure should cross reference the Fundamental Rights Officer's comprehensive due diligence procedure. The key objective would be to avoid the introduction of a parallel structure, possibly resulting in double standards.

Transparency, accountability & efficiency

- ♦ Transparency and accountability are key principles of an effective due diligence procedure. The Executive Director's decisions and the underlying assessments, including when deriving from the Fundamental Right's Officer's advice, should be clear and detailed and should be made publicly available. This should also apply when the Executive Director concludes that Fundamental Rights concerns do not justify any action under Article 46. The Consultative Forum reiterates its request to the Executive Director that his decision not to launch operations in Hungary, in line with Article 46 and the respective exception of return operations be made publicly available.
- ♦ The establishment of a Working Group bears the risk of being overly bureaucratic and less operational which could negatively impact the effectiveness, transparency and accountability of the procedure. Accompanying mitigating measures should be introduced when establishing such Working Group.
- ♦ The scope of sources of information should be diversified and broadened. National Human Rights Institutions, National Preventive Mechanisms, international and civil society organisations and trustworthy media outlets are credible sources of data and information. The Executive Director should list all sources of information as an annex to Article 46 decisions.
- ♦ The draft procedure foresees that the Executive Director can depart from the standard operating procedure in case of "situations requiring urgent action." As the terminology remains vague and the determination of the need for urgent action is left to the discretion of the Executive Director, the Consultative Forum proposes to introduce a corresponding safeguard requiring a fully motivated justification for departing from the procedure to be provided in writing to the Management Board.

- The Consultative Forum invites Frontex to re-evaluate the provisions related to non-compliance with operational plans related to fundamental rights and international protection considerations in light of the SOP on SIRs to ensure there is no contradiction or overlap with that procedure. As it currently stands, the Director of Division responsible for the activity or the so-called “initiator” shall notify the Fundamental Rights Officer in the cases referred above, while the SOP on SIRs foresees that the Fundamental Rights Officer be directly informed and take the lead on the follow-up and related advice to the Executive Director.

ANNEX 11: Recommendations on the “*Draft rules on the complaints mechanism*” provided to Frontex within a consultation requested on 12 November 2021

General comments

- Frontex procedures should refrain from re-defining legal provisions of the Regulation but should rather embed the operationalisation of legal provisions into clear procedural *modus operandi*. Article 80(2) of the Regulation provides a comprehensive overview of applicable fundamental rights. Article 3(1) of the present rules refers to applicable fundamental rights in a selective way and therefore the Consultative Forum advises that the rules refer to Article 80(2) instead.
- Article 7(4) of the present rules should contain a cross reference to the Article 46 procedure of the Regulation. This would be important since a certain pattern of complaints in a particular place might ultimately lead to triggering the Article 46 mechanism. Considerations whether the substance of a complaint could lead to activating the Article 46 procedure should fall under FRO's responsibility. This should be stated as part of the present rules when referring to FRO's recommendations.
- The rules should provide guidance to Frontex staff on how to provide information to victims on where and how remedy can be sought.
- After the entry into force, the complaints mechanism should be evaluated.

FRO's role in the complaints procedure

- According to the Regulation it is the Fundamental Rights Officer who has the key role in the complaints procedure and who also has investigative powers. The rules should not introduce an authorization model by the ED who would need to explicitly authorise Frontex staff to provide information to FRO. In particular, the mechanism should set out criteria based on which the ED can declare a complaint unfounded, and the decision should be justified in writing to allow for more accountability.
- FRO's scope of sources of information should be diversified, broadened and its investigative power reinforced. National Human Rights Institutions, National Preventive Mechanisms, international and civil society organisations and trustworthy media outlets are credible sources of data and information where Frontex operates. FRO could legitimately consider these for fact finding and/ or testimony purposes when these are explicitly anchored in the rules; FRO should list all sources of information as an annex to decisions for transparency purposes. FRO should also report about the complaints mechanism as part of the public report that FRO issues annually.
- Article 3 of the present rules should specify that letters, e-mails or other forms of communication reporting potential fundamental rights violations should be redirected to the Fundamental Rights Officer. Such information could build the ground for a complaint.
- The Consultative Forum welcomes the possibility for the FRO to treat any inadmissible complaint as an expression of concern in case it raises issues relevant for the Agency's fundamental rights compliance.

Accessibility of the complaints mechanism

- ♦ The rules should introduce a child friendly mode that enables children especially unaccompanied children to lodge a complaint as contained in the Consultative Forum's recommendation on a child protection strategy issued in 2017.
- ♦ The rules should also specifically refer to vulnerable persons, who might require a different mode for accessing the complaints mechanism. In this context also an 'emergency mode' should be introduced that facilitates the access to the complaints mechanism for people who are collectively exposed to vulnerability as it is the case at present at the EU's external borders with Belarus.
- ♦ Specific measures to lower the threshold to access the mechanism should be outlined since the current threshold poses an obstacle to reporting.
- ♦ An explicit reference to the possibility for migrants to anonymously lodge a complaint should be introduced. Anonymous reporting is an important tool that encourages those who fear retaliation. The respective mode for this should consider easy access and for example a separate form (or other such alternatives). The importance of the possibility for anonymous complaints was also highlighted by the European Ombudsman's report.¹⁹⁸

Interface with the Member States

Various aspects in relation to Frontex interface with the Member States should be outlined in a dedicated Article as part of the rules. Also, some of the EO's recommendations relate to the interface with the Member States and third countries. In the Frontex context this interface might cover a variety of scenarios which the procedure should consider.

¹⁹⁸ European Ombudsman's inspection report form 17 June 2021: <https://www.ombudsman.europa.eu/en/doc/inspection-report/en/139670>.

Admissible complaints might relate to:

- deployed officers from various EU MSs;
- Hosting MSs officers (part of the operation);
- Hosting MSs officers (outside the FX operation);
- Participating MSs officers;
- Third country officers;
- Consultants and sub-contractors (interpreters, cultural mediators or other service providers).

Besides possibly relating directly to Frontex staff. The rules should define this more precisely under Article 2(e) and should stick to this definition throughout the draft. At the moment there are various and inconsistent references to 'Frontex own staff', which is not reflected in the Regulation and which might lead to confusions.

Frontex complaints procedure should cover this set of scenarios and should introduce:

- assurance by MSs on measures (for example of disciplinary nature or criminal investigations);
- examples of possible sanctions for MSs if they do not cooperate with the Fundamental Rights Officer to transparently clear cases;
- information on how the Agency will follow-up if there is no or insufficient response from the concerned MS in line with Article 8(3) of the Regulation *'The Agency shall follow-up on the matter if no report is received from the home Member State'*;
- a shorter deadline for the MSs to respond to FRO's inquiry than the currently foreseen 6 months.

Frontex operational plans should reflect the MSs responsibilities in relation to the handling and clearing of complaints. This is a clear recommendation from the European Parliament's Frontex Scrutiny Working Group report.¹⁹⁹

Raising awareness of the complaints mechanism

- ♦ The rules should outline flanking measures in relation to improving the overall knowledge and skills of Frontex staff concerning the complaints mechanism. Frontex staff should be enabled to inform migrants about the existence, the access modalities and the functioning of the mechanism. Frontex staff should be able to smoothly and swiftly handle and proceed complaints and pass them to FRO.
- ♦ Specific measures to increase the visibility of the complaints mechanism should be introduced and existing ones intensified (such as the distribution of information material in the relevant languages etc.). There needs to be a broad and proactive provision of information on the mechanism to strengthen its effectiveness.
- ♦ The availability of complaints material in different languages and in a child friendly way should be regularly assessed and expanded based on emerging needs.

¹⁹⁹ European Parliament's Frontex Scrutiny Working Group report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations from 14 July 2021: https://www.europarl.europa.eu/cmsdata/238156/14072021%20Final%20Report%20FSWG_en.pdf.



German dog handler in Evros

© Frontex

ANNEX 12: Recommendations on the “Code of Conduct for all Border Control Operations and all Persons Participating in the Activities of Frontex” and “Code of Conduct for Return Operations and Return Interventions Coordinated or Organised by Frontex” provided to Frontex within a consultation requested on 19 November 2021

General comments

- ♦ The Codes should contain a reference to Article 80 of the Regulation, which provides a comprehensive overview of applicable fundamental rights. Such reference could be included under Article 4 of both Codes.
- ♦ The Codes should always cross reference other existing safeguards, such as the supervisory mechanism, the serious incidents reporting mechanism, the complaints mechanism, the fundamental rights monitors, and also the Article 46 procedure. This, to create awareness that the Codes belong to an overall system for fundamental rights protection and monitoring in Frontex. Therefore, also Article 4 of both Codes, Article 18 of the general Code and Article 7 of the Return Code could refer to these.
- ♦ The Codes should more precisely define for whom they are applicable and within such definitions, various categories of Frontex staff, standing corps, deployed officers, seconded national experts, third country observers, interpreters, service providers should be listed, and the definitions consistently used throughout the draft. This would address the inconsistent use of various references to ‘participants’ in the present draft. The mechanisms to safeguard fundamental rights apply to all categories of Frontex staff, deployed officers, service providers etc.

- The Codes should promote fundamental rights sensitive terminology and should therefore throughout replace ‘illegally staying’ with ‘irregularly staying’ and ‘unaccompanied minors’ with ‘unaccompanied children’.
- After the entry into force and following a period of time, the Codes should be evaluated, and their impact assessed.

1. ‘Code of Conduct for all border control operations and all persons participating in the activities of Frontex’

- The Consultative Form welcomes that Article 2(f) ‘Definitions’ lists vulnerable persons. Article 2(f) should indicate that the listed vulnerabilities are not exhaustive²⁰⁰ and that vulnerabilities require an individual assessment, can be multiple and can occur at any time.
- The definition of harassment proposed under Article 2(j) ‘Definitions’ is too limiting in light of the [EU legal framework](#). It should cover any form of unwanted behaviour with the purpose or effect of violating the dignity of the person.²⁰¹
- While Article 3(a) states the mandatory nature of the Code, the introductory letter refers to encouragement and guidance. The language of the letter should be adjusted accordingly.

²⁰⁰ See ‘Provisions for vulnerable persons’ in Article 21 ‘General principle’: “Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation, in the national law implementing this Directive” and Article 22 ‘Assessment of the special reception needs of vulnerable persons’ of EU Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013, laying down standards for the reception of applicants for international protection (recast): [L_2013180EN.01009601.xml](#) ([europa.eu](#)).

²⁰¹ See Article 2 ‘definitions’ of EU Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32002L0073&from=en> and the resolution of the European Parliament on sexual harassment, 2017, point C at: [European Parliament resolution of 26 October 2017 on combating sexual harassment and abuse in the EU \(2017/2897\(RSP\)\)](#) ([europa.eu](#)).

- Article 5(b) 'International Protection' outlines the obligation to refer persons to the responsible authorities for considering their requests. The obligation to report the number of persons referred by Frontex should be part of Article 5(b). Moreover, specific sets of rights pertain to persons subject to border control operations and persons deprived of their liberty and this should be reflected under Article 5 (c) and (d).
- Article 8 'conflict of interest' should specify the procedure to report cases of conflict of interest.
- Article 10 'behavioural standards' could define behavioural standards positively instead of listing in negative terms what they are not.
- Article 18 'Use of force and weapons' should contain a cross reference to the supervisory mechanism which the Agency has set up to safeguard fundamental rights based on the principle of necessity and proportionality. In addition, Annex V(3)b of the Regulation clearly states that use of force shall "respect fundamental rights as guaranteed under international and Union law, including, in particular, under the Charter, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, and the United Nations Code of Conduct for Law Enforcement Officials." A reference to Annex V(3)b of the Regulation should be added, including an explicit reference to international law.

2. *‘Code of Conduct for Return Operations and Return Interventions coordinated or organised by Frontex’*

- Article 3(1)(b) ‘Definitions’ should comprehensively cover all potentially involved staff such as 3rd country observers which are missing in the current list. They should then be used throughout the Code.
- As a basic fundamental rights safeguard, Frontex has introduced the requirement for the Member States to indicate the existence of an enforceable return decision for each returnee. This is included in the Frontex Application for Return – an application used between Frontex and the Member States to request and coordinate return operations. The Code should refer to this requirement, since this is crucial information for all staff that are involved in return operations.
- Article 3(q) should indicate that the listed vulnerabilities do not represent an exhaustive list, that the identification of vulnerabilities require an individual assessment, and that they can be multiple and occur at any time.
- Pursuant to Article 81 of the Regulation, Article 4 ‘Respect for Fundamental Rights’ of the Code should contain a specific paragraph on the identification and needs and of vulnerable persons, including special measures to protect the best interests of the child, especially unaccompanied children. When referring to the termination and suspension of operations pursuant to Article 46(4) and (5) of the Regulation, the requirement to consult the Fundamental Rights Officer prior to taking a decision should be reflected.
- Articles 6 ‘Cooperation with returnees and duty to inform’ and Article 7 ‘Use of force during return operations and return interventions’ should refer to the three core principles of necessity, proportionality and precaution as set out in the Regulation under Annex V.

- Article 6 'Cooperation with returnees and duty to inform' should foresee that the head of the return operation and members of the teams as well as competent authorities of the Member State hosting a return intervention or organizing the voluntary return ensure the availability of information on the complaint mechanism to any person, including children. Article 6 should also highlight that Frontex staff present in the operational area is obliged to collect complaints and forward them to the Frontex Fundamental Rights Officer.
- Article 7 'Use of force during return operations and return interventions' should also spell out that the use of force must be a last resort employed only if necessary. Moreover, the use of force should consider both the individual circumstances as well as the whole context such as the presence of children to uphold fundamental rights of all returnees. Article 7 should further provide a cross reference to the supervisory mechanism and should highlight that the use of coercive measures are regulated by national law. Article 19 'Reporting' should cross reference the reporting for incidents on the use of force as per the supervisory mechanism on the use of force.
- Article 8 'Fitness to travel and medical examination' should contain a provision on the requirement of a 'fit to travel' document for each returnee. Equally important is that a certificate is issued to those that are unfit to travel. In any case, the exchange of medical data through escort leaders may only be done with the agreement of the data subject, in full respect of confidentiality and medical secrecy.
- Article 10 'Referrals' should also contain a reference to those returnees intending to appeal a return decision, who will need to be referred to the respective authority without any delay.
- Article 13 should refer to the General Data Protection Regulation (EU) and include the requirement to expressly request the consent of the returnees if their identity can be determined.

Recording and taking picture of children shall be expressly forbidden.

- Article 16 'Pool of forced return monitors' should mention that forced-return monitors with specific child protection expertise are always present when children are returned.
- Article 21 'Sanctions' should clearly define that violations of the Code of Conduct are applicable to all persons participating in Frontex operational activities, instead of referring to Frontex staff only.

ANNEX 13: Consultative Forum Work Programme 2021

I. Introduction

In accordance with Article 108 of the Regulation on the establishment of a European Border and Coast Guard²⁰² (hereinafter referred to as “Regulation 2019/1896”) the role of the Consultative Forum is to assist the Agency “by providing independent advice in fundamental rights matters”. To this effect, the Consultative Forum may be consulted on any matter related to fundamental rights, including “on the further development and implementation of the fundamental rights strategy, on the functioning of the complaints mechanism, on codes of conduct and on the common core curricula”.

For the purpose of performing its duties, and in line with the Regulation 2019/1896, “the Consultative Forum shall be provided with effective access in a timely and effective manner to all information concerning the respect for fundamental rights, including by carrying out on-the-spot visits to joint operations or rapid border interventions subject to the agreement of the host Member State or the third country, as applicable, to hotspot areas, and to return operations and return interventions, including in third countries”.

With the adoption of its Programme of Work, the Consultative Forum sets its priorities for 2021. The Programme of Work is document also defines specific results the Consultative Forum aims at achieving through its activities.

The Program of Work reflects priorities and activities jointly identified with Frontex and its Management Board and it remains flexible for ad-hoc consultation of the Consultative Forum by the Executive Director of Frontex and the Frontex Management Board in line with emerging needs.

202 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) 1052/2013 and (EU) 2016/1624.

The **priorities of the Consultative Forum in 2021** are:

- A. Implementation of EU Regulation 2019/1896 and its fundamental rights implications**
- B. Fundamental Rights implications of Frontex operational and return activities**
- C. Fundamental Rights implications of Frontex engagement with third countries/ international cooperation**
- D. Establishment of sound capacity building procedures and quality review mechanism**

In the implementation of this program of work, the Consultative Forum will continue working together with and supporting the Frontex Fundamental Rights Officer and her team, while ensuring complementarity with his/her mandate and activities.

From November 2020 until November 2021 a consultant supervised by the co-chairs will support the work of the CF as part of the Universal Periodic Review (UPR) Follow-up Project. This project seeks to advance the implementation of UPR recommendations relating to integrated border management which were accepted by EU Member States via the strengthening of the Consultative Forum on Fundamental Rights to Frontex.

All activities and recommendations of the Consultative Forum will fully respect the right to protection of personal data.

V. Priorities and activities

Priority A: Implementation of EU Regulation 2019/1896 and its fundamental rights implications

In line with its mandate, and building on the priorities that the Consultative Forum outlined in 2020, the Forum will continue offering its support to the Agency in relation to the implementation of the 2019 European Border and Coast Guard Regulation.

Activity A.1: Advise on the recruitment of a Frontex Fundamental Rights Officer and Deputy Fundamental Rights Officer

Output: In line with the Regulation, the Forum will offer its expertise in the recruitment of the Fundamental Rights Officer and Deputy Fundamental Rights Officer. The Forum will also offer its support to the new team in relation to the establishment and functioning of an independent Fundamental Rights Office including the Fundamental Rights Monitors within Frontex.

Activity A.2: Advise on key fundamental rights policies and processes

Output: Advice on the Agency's policies and processes with an impact on fundamental rights including the action plan for the implementation of the Frontex Fundamental Rights Strategy, the procedure on due diligence, the supervisory mechanism and the FRO rules of independence.

Activity A.3: Establishment of an effective system to monitor, investigate and address potential fundamental rights violations

Output: Advice on the revision of existing and new mechanisms to monitor, investigate and address fundamental rights violations in Frontex activities including, but not restricted to the Serious Incident Reporting, Complaints mechanism and rules for the implementation of the Fundamental Rights Officer's responsibility to investigate.

Output: Support to the establishment of the Frontex Fundamental rights monitors.

Activity A.4: Enhance the capacity of the Consultative Forum on Fundamental Rights to advise on human rights compliant policies by Frontex as a follow up to UPR recommendations relating to integrated border management which were accepted by EU Member States.

Output: Increase awareness of UPR recommendations addressed to EU Member States relating to integrated border management and to the human rights of migrants.

Priority B: Fundamental Rights implications of Frontex operational and return activities

Activity B.1: Consultative Forum visit to a Frontex operational activity

Output: If the situation allows, the Consultative Forum visit to a Frontex operational activity followed by a focus group discussion on findings with Frontex and Management Board Representatives.

Activity B.2: Fundamental Rights Implications of Frontex return activities

Output: Ongoing advice and organisation of focus group meetings with the European Centre for Returns to discuss progress in the implementation of the CF recommendation on return and the development of Frontex new mandate areas, including voluntary returns and post return activities.

Activity B.3: Observing the governance of the pool of forced return monitors, which will move from ICMPD to Frontex

Output: Advise to FRO and ECRET on the pool's governance with the ultimate objective to increase the monitoring of return operations.

Priority C: Fundamental Rights implications of Frontex engagement with third countries and international cooperation

Activity C.1: Continue advising Frontex on cooperation with 3rd countries

Output: Advice on anchoring provisions of the CF recommendation on third country cooperation into Frontex work.

Priority D: Support to the establishment of sound capacity building procedures and a quality review mechanism

Output: Advice on the establishment of a Training Quality Assurance System and fundamental rights components in the development and delivery of Frontex training activities.

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