

ANALYSIS

In the literature dedicated to the accountability of international organisations, accountability is understood as “a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences.”²⁴ Accountability mechanisms applicable to international organisations fall in four categories: legal, democratic (political), administrative (internal) and social.²⁵

LEGAL ACCOUNTABILITY

It has traditionally been difficult to enforce legal remedies against Frontex’s actions.²⁶ Reasons for this include external border management being a shared responsibility between the EU and Member States; host Member States being formally in command of a joint operation; the (previous) lack of executive powers frequently highlighted by the Agency; lack of transparency around both joint operations and joint return operations; and the vulnerable position of potential victims (including the lack of access to legal assistance). The expanded competencies and powers granted to Frontex by the 2019 Regulation, especially the executive powers attributed to its statutory staff, widen the basis for attribution of wrongful conduct. However, operational context and blurred dividing lines between command, control and activities of the host Member State and various sorts of deployed personnel (Frontex staff vs personnel seconded by the Member States) make it difficult to establish responsibility for wrongdoing on the part of the Agency and risk leading to dilution of accountability for fundamental rights violations. In this context, the concept of multiple attribution and joint responsibility of multiple actors, developed in academia, seems apt. In practice, however, one of the main reasons for litigation challenges is the difficulty in documenting and proving the violations, given that they tend to occur during border surveillance or return operations.

In terms of fora where legal redress could be sought, domestic litigation could be significant as it would prompt Member States to put pressure on Frontex to ensure that the operations comply with fundamental rights. As the Regulation clarifies, as regards civil liability, the host Member State is liable in accordance with its national law for any damage caused by the members of the teams during their operations. Where such damage is caused by the gross negligence or wilful misconduct of the members of the teams, the host Member State may request the home Member State (in case of seconded or deployed personnel of another Member State) or the Agency (in case of the statutory staff) to reimburse it for any sums that the host Member State has paid to the injured parties or persons entitled to receive such sums on behalf of the injured parties (Art.84).

In terms of criminal liability, members of the teams in the territory of the host Member State should be treated in the same way as officials of the host Member State with regard to any criminal offences that might be committed by them (Art.85). However, in practice, it has been traditionally difficult to hold (national) border and coast guards to account. Arguably, Frontex’s legal framework and culture are based on similar premises. Further, there is a serious accountability gap as regards operations outside the EU and regulated by status agreements. Under the current model status agreements, team members are exempted from criminal jurisdiction of the third country concerned. Arguably, while the staff deployed by the Member States may be prosecuted in their home country, the Agency’s staff would enjoy impunity for crimes committed on the territory of third countries.²⁷

Regarding international tribunals, the CJEU is not well adapted for individual victims of violations committed during Frontex’s operations. Still, a potential avenue may be an action for damages under Art. 268 and 340 of the Treaty of the Functioning of the European Union (TFEU).²⁸ Under this procedure, the CJEU decides on

24. M. Bovens, *Analysing and Assessing Public Accountability. A Conceptual Framework*, *European Governance Papers (EUROGOV) No C-06-0*, 2006, <https://www.ihs.ac.at/publications/lib/ep7.pdf>, p. 9.

25. S.P. Riekmann, “Security, Freedom and Accountability: Europol and Frontex,” in E. Guild and F. Geyer (eds.), *Security versus Justice?: Police and Judicial Cooperation in the European Union*, 2008, p. 23; J. Pollak and P. Slominski, “Experimentalist but Not Accountable Governance? The Role of Frontex in Managing the EU’s External Borders,” *West European Politics* 32(5), 2009, p. 917. See also E. Tsourdi, “EU agencies,” in EPC, *From Tampere 20 to Tampere 2.0: Towards a New European Consensus on Migration*, 2019, https://wms.flexious.be/editor/plugins/imagemanager/content/2140/publications/2_EU_Agencies.pdf

26. L. Karamanidou and B. Kasperek, *Fundamental Rights, Accountability and Transparency in European Governance of Migration: The Case of the European Border and Coast Guard Agency Frontex*, Respond Working Papers, 2020, <https://respondmigration.com/wp-blog/fundamental-rights-accountability-transparency-european-governance-of-migration-the-case-european-border-coast-guard-agency-frontex>

27. ECRE, *ECRE Comments on the Commission Proposal for a Regulation on the European Border and Coast Guard (COM(2018) 631 FINAL)*, 2018, <https://www.ecre.org/wp-content/uploads/2018/11/ECRE-Comments-EBCG-proposal.pdf>, p. 11.

28. *Consolidated version of the Treaty on the Functioning of the European Union*, OJ C 326, p. 47-390, 26 October 2012, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>

claims of damage caused by EU institutions or its servants in the performance of their duties. The impugned conduct should infringe a rule conferring rights on individuals and the breach should be sufficiently serious.²⁹ The accession of the EU to the European Convention of Human Rights (ECHR) would allow the European Court of Human Rights to review Frontex's activities according to the ECHR.³⁰ The 2013 Draft Accession Agreement foresaw a co-respondent mechanism under which complaints could be submitted against both the EU and one or more of its Member States.³¹ Following the assertion that the European Union should be considered an international organisation, it has been argued that its institutions and agencies should be held accountable under the draft articles on the responsibility of international organisations.³²

Recently, judicial accountability in front of international tribunals and bodies have been explored to challenge the Agency's alleged role in illegal returns.³³ In 2019 and 2021, two complaints were submitted to the International Criminal Court.³⁴ In 2021, Front-Lex and Legal Centre Lesvos communicated to the Frontex ED a preliminary action against the Agency for failure to act, requesting the Agency to immediately suspend or terminate its activities in the Aegean Sea (under Article 46(4) of the 2019 Regulation). If the Agency were to fail to respond within two months, the authors considered submitting an action to the CJEU for review of legality under Article 265 TFEU.³⁵ Meanwhile, complaints are pending in front of the UN treaty bodies against Member States' actions or omissions in which Frontex operations are mentioned.

Irrespective of potential (but hard to obtain) legal redress, non-judicial scrutiny mechanisms play a key role in holding international organisations to account. This paper now considers non-judicial scrutiny mechanisms covering Frontex's acts and omissions.

DEMOCRATIC ACCOUNTABILITY

The Management Board

Democratic accountability refers to oversight by the European Parliament ("the Parliament" and national parliaments). The 2019 Regulation strengthens the Parliament's oversight mechanisms yet they remain weak. The Management Board (MB) consists of one representative of each Member State (mainly from the Interior Ministry or police, border police/ guard or immigration agency) and two representatives of the Commission's DG Home (Art.101(1)). The composition falls short of the Common Approach of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, according to which the MB of decentralised agencies like Frontex should include "where appropriate" a member designated by the Parliament.³⁶ Given Frontex's powers and recently received executive prerogative, it would be "appropriate" in this case for the MB to include a representative of the Parliament. According to the 2019 Regulation, an "expert" of the Parliament *may* be invited to meetings of MB (Art.104(7)), while representatives of EASO and Europol *shall* be invited (Art.104(6)). To comply with the Common Approach, the Parliament should be represented in the MB. Until the Parliament receives a seat at the MB, its representatives should be regularly invited to the meetings pursuant to Art.104(7).

29. CJEU, *Bergaderm SA and Goupil v Commission of the European Communities*, C-352-98 P, 4 July 2000, para. 42-43. M. Fink, "The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable", *German Law Journal* Vol.21, p. 532-548.

30. Like any proceedings before the ECtHR, this option would be available once domestic remedies have been exhausted.

31. Council of Europe, *Draft Revised Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 47+1(2013) 008 rev 2, 10 June 2013.

32. International Law Commission (2011), *Draft articles on the responsibility of international organizations*, https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf

33. Development of legal oversight of law enforcement at European level and related shortcomings are detailed here: <https://eumigrationlawblog.eu/the-frontex-push-back-controversy-what-oversight-for-frontex-part-ii/>

34. Syria Justice and Accountability Centre, *Communication to the Office of the Prosecutor of the International Criminal Court: The Situation in Greece: Systematic human rights abuses against refugees on Greek territory and at reception and identification centres on the Aegean islands, 2021*, https://syriaaccountability.org/wp-content/uploads/SJAC_ICC-Communique%CC%81.pdf and O. Shatz and J. Branco, *Communication to the Office of the Prosecutor of the International Criminal Court: EU Migration Policies in the Central Mediterranean and Libya (2014-2019)*, 2019, <https://www.statewatch.org/media/documents/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf>. As of April 2021, the Office of the Prosecutor has yet to decide whether to prosecute.

35. Front-Lex, "The First Legal Action Against Frontex for Human Rights Violations," *Press Release, 15 February 2020*, <https://www.front-lex.eu/english/legal-department/>. As of mid-April, ECRE was unaware whether the ED responded.

36. *Common of the European Parliament, the Council of the EU and the European Commission on decentralized agencies*, 19 July 2012, https://europa.eu/european-union/sites/europaefiles/docs/body/joint_statement_and_common_approach_2012_en.pdf. See more broadly, EPRS, *EU Agencies, Common Approach and Parliamentary Scrutiny: European Implementation Assessment*, 2018, [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/627131/EPRS_STU\(2018\)627131_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/627131/EPRS_STU(2018)627131_EN.pdf)

Appointment of the Executive Director

Not being represented in the MB precludes any significant role for the Parliament in appointing or dismissing the ED and his deputies. The ED is appointed by the MB from three candidates proposed by the Commission. Before appointment, the candidates proposed by the Commission are invited to make a statement before the competent committee of the Parliament and answer questions. Following the hearing, the Parliament adopts an opinion with its views and may indicate a preferred candidate. In appointing the ED, the MB should take those views into account. If it decides to appoint a candidate other than the one indicated by the Parliament as its preferred candidate, the MB should inform the Parliament in writing of the manner in which the opinion of the Parliament was taken into account (Art.107(1)-(2)). To properly safeguard the role of the Parliament, this letter should include detailed reasons why the candidate preferred by the Parliament was not appointed. The Parliament is not involved in the dismissal procedure. It is the MB which takes the decision to dismiss the ED, acting on a proposal from the Commission (Art.107(2)).

Overall, ECRE recommends that the ED be subject to thorough scrutiny by the Parliament. Given the wide prerogatives enjoyed by the ED, the Parliament, as a democratic institution, should have a formal role, guaranteed under the Regulation, in appointing and dismissing the ED. For instance, the EP should confirm the candidate. It is noteworthy that recently a number of members of the Parliament called for the current ED to step down; it has also been recognised by some members of the Parliament that the overall culture of the Agency should change.³⁷

Work Programmes and Reporting

The Parliament's *ex ante* control over Frontex by means of annual and multiannual work programmes can be strengthened. By 30 November of each year, the MB should adopt a single programming document containing, *inter alia*, the Agency's multiannual programming and annual programming for the following year, on the basis of a draft put forward by the ED and endorsed by the MB. The single programming document should be adopted taking into account a positive opinion of the Commission. On the other hand, the Parliament is to be consulted only regarding the multiannual programming (and informed of the annual programme). If the MB does not take into account the Parliament's opinion on the multiannual programming, it should provide a thorough justification (Art.102(1)). ECRE proposes that the Parliament's role in the Agency's programming should be considerably bolstered. For example, the MB should be obliged to submit the single programming document to the Parliament and adopt it only if the Parliament issues a positive opinion.

The Parliament's means for *ex post* control means were slightly strengthened in the 2019 Regulation. As regards reporting from the ED, the Parliament may invite the ED to report on the carrying out of her/his tasks. This includes reporting on the activities of the Agency, the implementation and monitoring of the Fundamental Rights Strategy, the annual activity report of the Agency for the previous year, the work programme for the following year and the Agency's multiannual programming and any other matter related to the activities of the Agency. The ED should report regularly to the appropriate bodies and committees of the Parliament (Art.106(2)).

Relying on this provision, the Parliament could request that the ED submit and present the Agency's annual reports to the Parliament. Besides the reports listed in Art.106(2), the Parliament could also systematically request that it receives reports on the number of complaints and serious incidents and the results of investigations. The Regulation further provides that the ED should make a statement before the Parliament if requested and should answer in writing to any question put forward by a member of the Parliament within fifteen calendar days from receipt of such a question (Art.106(2)). ECRE recommends that the Parliament regularly uses these prerogatives to hold Frontex to account, which could also include proactively inquiring about Frontex activities in or cooperation with third country governments and requesting information on compliance with fundamental rights in accordance with Art. 73(7).

In particular, ECRE recommends that Parliament uses its powers under Art.106(2) to review the procedure under Art.46. Given the ED's wide powers, the Parliament should regularly scrutinise the decisions (or lack thereof) to suspend, terminate or abstain from launching operational activities. The Regulation vests these prerogatives entirely with the ED, whereas the FRO is to be merely consulted. When taking such decision, the ED is to take into account relevant information, such as the number and substance of registered complaints that have not been resolved by domestic authorities, SIRs, reports from coordinating officers, relevant international organisations and EU institutions, bodies, offices and agencies (Art.46(6)). Yet, as noted above,

37. See the 2nd meeting of the Frontex Scrutiny Working Group.

despite mounting evidence of widespread fundamental rights violations in Hungary, the ED only decided to suspend the Agency's operations after the CJEU's ruling. Thus, ECRE recommends that Parliament regularly inquires as to the reasons why a decision under Article 46 has or has not been taken when there is evidence of human rights concerns in a particular border area.

Budgetary Control

The key Parliamentary scrutiny power lies in its budgetary control which, as it recently demonstrated, it is ready to use. In the procedure to adopt the budget, the budgetary authority (Parliament and Council) authorise appropriations for the contribution to the Agency from the EU's general budget and adopt the establishment plan for the Agency (Art.115(9)-(10)). In terms of the implementation of the Frontex's budget, Parliament decides on whether to discharge the ED in relation to Frontex's budget (Art.116(11)). The Agency should take all appropriate steps to act on the observations accompanying the Parliament's discharge decision (Regulation 2018/1046, Art.262). In February 2021, the LIBE Committee voted in favour of postponing Frontex's budget discharge and called upon the Budgetary Control (CONT) Committee to include in its decision several suggestions relating to the respect for human rights. The LIBE Committee's decision was based on its view of the need for a full clarification of the alleged violations of fundamental rights at the external borders, for an action plan for improvement of the mechanisms for monitoring and reporting fundamental rights violations and complaints (including the hiring of 40 Fundamental Rights Monitors); and the ongoing OLAF investigation.³⁸ In March 2021, the CONT Committee postponed its vote on the discharge due to the pending inquiries into Frontex activities.³⁹

Interparliamentary Cooperation

One of the novelties in the 2019 Regulation is the possibility of interparliamentary cooperation. The Parliament and national parliaments may cooperate to ensure that the scrutiny functions of the Parliament over the Agency and of the national parliaments over their respective national authorities are effectively exercised (Art.112(1)). When invited by the Parliament and the national parliaments to a meeting, the ED and the chairperson of the MB are obliged to attend such meetings (Art.112(2)).

Unlike the Europol Regulation (Art.51),⁴⁰ the Frontex Regulation does not refer to the establishment of a Joint Parliamentary Scrutiny Group (JPSG) but a scrutiny group of this type could be based on Article 112 of the Frontex Regulation. The Europol JPSG is composed of national parliamentarians and MEPs; it meets twice per year; it can require the Chairperson of the MB, the ED, and the European Data Protection Supervisor to attend the meetings; it should be consulted on multiannual programming and has access to some classified information; and it can also ask questions outside meetings.⁴¹ While it involves national parliaments in scrutiny of Europol, it has no power to sanction Europol.⁴²

ECRE recommends that a Frontex JPSG be established to strengthen scrutiny over Frontex's operational activities as the Frontex-deployed teams consist of both Agency staff and national staff seconded or deployed to Frontex. As such, the Parliament would be in charge of overseeing the Frontex component and national parliaments would be tasked with scrutinising their border guards deployed to Frontex operations. Since the roles of team members are intertwined, and the attribution of conduct is difficult to establish in the operational context, interparliamentary cooperation could help close the accountability gap. This is particularly relevant for operations outside the EU where accountability is even harder to achieve. A Frontex JPSG could build on the achievements of the Europol JPSG but also learn from its limitations. To this effect, it should have an investigative component and use the European Network of Ombudsman's parallel inquiries as an inspiration. Through parallel investigations, the European Ombudsman and members of the ENO investigate questions

38. European Parliament, *OPINION of the Committee on Civil Liberties, Justice and Home Affairs for the Committee on Budgetary Control 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))*, 25 February 2021, https://www.europarl.europa.eu/doceo/document/LIBE-AD-661920_EN.pdf

39. European Parliament, *Amendments 1-85: 2019 discharge: European Border and Coast Guard Agency (FRONTEX) (2020/2167(DEC))*, 5 March 2021, https://www.europarl.europa.eu/doceo/document/CONT-AM-680801_EN.pdf

40. *Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA*, OJ L 135, p. 53-114, 24 May 2016, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016R0794>

41. European Parliament, *Rules of Procedure of the Joint Parliamentary Scrutiny Group on Europol*, 2018, https://www.europarl.europa.eu/cmsdata/211496/RoP%20adopted%20Sofia%20JPSG_19032018_EN.pdf

42. Statewatch, *Deportation Union: Rights, accountability and the EU's push to increase forced removals*, 2020, <https://www.statewatch.org/deportation-union-rights-accountability-and-the-eu-s-push-to-increase-forced-removals/>

involving both EU and domestic administrations.⁴³ A Frontex JPSG could help engage the national parliaments in the Frontex Scrutiny Working Group and other mechanisms aimed at investigating potential violations by national staff, such as those resulting from the SIR and complaints mechanisms.

The Frontex Scrutiny Working Group

In January 2021, the LIBE Committee set up the Frontex Scrutiny Working Group (FSWG).⁴⁴ Composed of fourteen MEPs, the FSWG is tasked with assessing Frontex's activities and organisation, including its reinforced role and resources for integrated border management, the correct application of the EU *acquis*, compliance with fundamental rights, internal reporting, transparency, and accountability towards Parliament. Its meetings are bi-weekly and public. The mandate of the FSWG is open-ended but in the first four months it will gather information on the allegations of push-backs and carry out a fact-finding investigation. ECRE considers it welcome that the FSWG will seek information beyond the Agency's sources by inviting a variety of stakeholders, including from civil society.

ADMINISTRATIVE ACCOUNTABILITY

Administrative accountability typically refers to an oversight by quasi-legal and quasi-independent bodies or mechanisms.

The Fundamental Rights Officer (FRO)

Established by the Regulation 1168/2011, the position of the Fundamental Rights Officer (FRO), is one of Frontex's key internal fundamental rights monitoring and accountability mechanisms. The subsequent Frontex Regulations expanded the FRO's tasks and prerogatives, but these are still not commensurate with the expansion of the Agency's mandate, staff, and resources.

The tasks of the FRO were expanded by the 2019 Regulation and include contributing to the Agency's Fundamental Rights Strategy (including by issuing recommendations for an improvement and endorsing the strategy and action plan), monitoring the Agency's compliance with fundamental rights (including by conducting investigations into any of its activities), advising the Agency (including on its own initiative) on any activity of the Agency without delaying those activities, providing opinions on the operational plans, pilot projects and technical assistance projects in third countries, providing opinions on working arrangements, and informing the ED about possible violations of fundamental rights during activities of the Agency (Art.109(2)). The FRO can also carry out on-the-spot visits to any operation (Art.109(2)), which should be interpreted broadly to allow the FRO to systematically carry out on-the-spot visits to the operations and speak with the people affected by the Agency's activities. Under Article 46, the FRO is to be consulted by the ED prior to withdrawing financing for, suspending or terminating, or deciding not to launch an activity due to serious fundamental rights violations under Article 46 of the Regulation.

The powers of the FRO are rather limited beyond these advisory and monitoring functions. Regarding the follow up to the FRO's reports, the MB should ensure that action is taken with regard to the recommendations of the FRO (Art.109(4)). In addition to this rather vague provision, the ED should reply to the FRO on how concerns regarding possible violations of fundamental rights reported to the FRO by the fundamental rights monitors have been addressed (Art.109(3)). The MB's Decision 6/2021 also provides that where the Regulation provides for a task to, the consultation of, or an opinion by the FRO, the ED should provide the relevant documents and indicate the reasonable timelines necessary for the particular consultation for delivery of such an opinion (Art.2(5)).

Nonetheless, neither the Regulation nor the MB's Decision 6/2021 clarify what actions the MB and ED should take upon the recommendations of the FRO. Indeed, the unclarity of the Regulation allowed a recurring situation whereby the ED and MB failed to act on the FRO's recommendations. Further, under the current rules in Article 46, the ED can disregard the FRO's advice without the need to give any justification.⁴⁵ Under

43. European Ombudsman, "Parallel inquiries and initiatives," *Website*, https://www.ombudsman.europa.eu/en/european-network-of-ombudsmen/parallel-inquiries?utm_source=some_eo&utm_medium=tw_organic&utm_campaign=frontex

44. LIBE Committee, *Frontex Scrutiny Working Group (FSWG) Draft Mandate, January 2021*, https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/LIBE/DV/2021/02-04/Outcomeofwrittenprocedureof29January_EN.pdf

45. As was done for instance in the case of the RABITs launched in Greece in March 2020.

the MB's Decision 6/2021, if the FRO concludes that action taken by the MB or the ED does not sufficiently address his/her recommendations, the FRO should issue another recommendation. If the MB or the ED does not take appropriate action, the FRO should be informed about the reasons (Art.3(2)).

While helpful, these provisions still have shortcomings. To remedy them, ECRE recommends that the MB and ED should respond to FRO's recommendations and opinions within a specific time-line and draw up an action plan to implement the recommendation or, alternatively, explain the specific reasons for rejecting a recommendation and invite the FRO to exchange views on the matter. Also, if the FRO's advice is not followed and no satisfactory reason provided, it should be possible (or mandatory) for the FRO to make such a situation public, at least to the EP.

Investigative Powers of the FRO

The FRO can now conduct investigations into any of the Agency's activities, irrespective of whether they take place inside or outside the EU, as part of her/his monitoring role (Art.109(2)). ECRE recommends that this provision be interpreted broadly and used by the FRO to investigate and inquire into any situation which raises fundamental rights concerns. Particular attention needs to be paid to Frontex activities taking place in third countries. The FRO's investigative powers are not further detailed in the Regulation. According to the MB Decision 6/2021, in consultation with the ED and MB, the FRO should adopt working methods for conducting investigations related to fundamental rights and in relation to these should consult the CF.⁴⁶ To allow the exercise of the FRO's new investigative powers, ECRE recommends that the FRO has dedicated staff for this function. The FRO needs to be able to carry out on-site visits, including outside the EU, interrogate the members of the teams, and access all relevant documents,⁴⁷ access relevant audio-visual material such as recordings of body-cameras, have the possibility to contact home Member States of the officers whose conduct raises questions, and submit conclusions and recommendations to the MB and the ED, and receive a reply from them within a specified time. At the very least, ECRE recommends that a summary of these investigative activities and a follow-up by the Agency should be made public.

Independence of the FRO

The Regulation reiterates the FRO's independence. The FRO is appointed by the MB on the basis of a list of three candidates, after consultation with the CF. The FRO should have the necessary qualifications, expert knowledge, and professional experience in the field of human rights (Art.109(1)). This provision has several weaknesses, notably it does not clarify who prepares the list of three short-listed candidates and requires merely a consultation with the CF. Given that the Parliament is not represented in the MB, it is entirely removed from this process. Until the Parliament receives a seat at the MB, ECRE suggests that a representative of the Parliament should be present at the MB's meeting when the selection takes place. In addition, the consultation of the CF could be formalised by inviting CF representatives to participate in the selection panel.

The Regulation provides that the ED should ensure that the FRO is able to act autonomously and is able to be independent in the conduct of her/his duties (Art.109(5)). Currently, the FRO's reports are not publicly available. It is welcome that under the 2019 Regulation the FRO should publish annual reports on her/his activities and on the extent to which the Agency's activities respect fundamental rights.⁴⁸ These reports are to include information on the complaints mechanism and the implementation of the Fundamental Rights Strategy (Art.109(4)). The FRO reports directly to the MB (Art.109(4)). In its Decision 6/2021, the MB laid down special rules to guarantee the independence of the FRO and her/his staff.⁴⁹ It provides that the MB should take all the necessary steps to ensure that the FRO is independent in the exercise of her/his duties in particular when monitoring the Agency's compliance with fundamental rights. It also ensures that the FRO acts autonomously without any undue influence (Art.1(3)).

46. Frontex, *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, 2021*, 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, Art.5(2).

47. Under Art.109(7), the FRO should have access to all the information concerning respect for fundamental rights in all the activities of the Agency. This provision is detailed in Art.3 of the MB Decision 6/2021. It provides, for instance, that where the access to specified information is refused the ED should provide a justification.

48. FRA, *The revised European Border and Coast Guard Regulation and its fundamental rights implications: Opinion of the European Union Agency for Fundamental Rights*, 2018, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-opinion-ebcg-05-2018_en.pdf, p. 23-24.

49. Frontex, *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, 2021*, 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

ECRE recommends that to ensure transparency on fundamental rights issues and increase the efficiency of the complaints mechanism, information provided by the FRO on complaints should include the status of the proceedings and the delay in the follow-up from the authorities. Further, based on the role of the MB in ensuring the independence of the FRO, ECRE recommends that the FRO should frequently (be invited to) report to the MB and that the MB should invite the FRO for exchanges that also cover any restrictions to her/his independence. Despite these safeguards, while the FRO may have some degree of internal independence, she/he is not genuinely independent as the position is embedded in Frontex's administrative and management structure and she/he is a Frontex employee. To strengthen the independence of the FRO (or at least to support her/his work), ECRE recommends that the FRO should also report to the Parliament. The Regulation does not explicitly foresee reporting to the Parliament, yet it does not prevent the FRO from presenting the annual report to the Parliament relying on Article 109(4) of the 2019 Regulation.

Resources of the FRO

The Regulation provides that the FRO should have sufficient and adequate human and financial resources at her/his disposal necessary for the fulfilment of her/his tasks (Art.109(5)). This provision needs to be implemented in order to solve the long-standing challenge of inadequate resources of the FRO office, repeatedly flagged by the CF and others.⁵⁰ For instance, as of late 2020, the FRO's office employed only ten persons, two of whom deal with complaints.⁵¹ The 2019 Regulation provides for the recruitment of at least 40 fundamental rights monitors by December 2020 (Art.110(6)). These statutory staff will be integrated in the FRO's office and will report directly to the FRO. Besides acting as forced return monitors, they will be tasked with monitoring compliance with fundamental rights and providing advice and assistance on fundamental rights in the Agency's operational activities and other plans and activities, and carrying out visits to and evaluations of operations (Art.110(2)). Specifying the number of fundamental rights monitors to be employed and the timelines is helpful yet, as of May 2021, Frontex has not hired any of the required monitors.

The disregard for these elements of the Regulation, which were strongly supported by the Parliament, is related to issue of budget discharge, discussed above. Even when the 40 fundamental rights monitors are finally hired, their number still looks disproportionately weak compared to 10,000 border guards that the Agency will hire by 2027. ECRE has frequently maintained that the growth of overall staff, and particularly the standing corps, needs to be matched by growth of the staff of the FRO as an element of internal accountability. The Regulation provides that the ED should assess on an annual basis, in consultation with the FRO, whether the number of the fundamental rights monitors should be increased (Art.110(6)). Given the current situation, ECRE does not consider that this assessment can be left to the discretion of the ED. Rather, the MB should adopt a decision, taking into account recommendations from the FRO and the CF, to set an indicative number for the fundamental rights monitors and overall staff in the FRO's office, linked to the number of operational activities per year and the number of the Agency's other statutory staff.

The Individual Complaints Mechanism

An important accountability mechanism, the individual complaints mechanism (ICM) was introduced by Regulation 2016/1624. Although the 2019 Regulation improves the mechanism, it remains ineffective and is not independent, despite explicit provisions to this effect (Art.111(1)). Following its visits to Frontex in early 2020, the LIBE delegation recommended that the ICM be more effective, visible and accessible.⁵²

50. L. Karamanidou and B. Kasperek, *Fundamental Rights, Accountability and Transparency in European Governance of Migration: The Case of the European Border and Coast Guard Agency Frontex, Respond Working Papers, 2020*, <https://respondmigration.com/wp-blog/fundamental-rights-accountability-transparency-european-governance-of-migration-the-case-european-border-coast-guard-agency-frontex>; Frontex Consultative Forum on Fundamental Rights, *Seventh Annual Report: 2019, 2020*, https://frontex.europa.eu/assets/Partners/Consultative_Forum_files/Frontex_Consultative_Forum_annual_report_2019.pdf, p. 17; Frontex Consultative Forum on Fundamental Rights, *Sixth Annual Report: 2018, 2019*, https://frontex.europa.eu/assets/Partners/Consultative_Forum_files/Frontex_Consultative_Forum_annual_report_2018.pdf, p. 16; ECRE, *ECRE Comments on the Commission Proposal for a Regulation on the European Border and Coast Guard (COM(2018) 631 FINAL), 2018*, <https://www.ecre.org/wp-content/uploads/2018/11/ECRE-Comments-EBCG-proposal.pdf>, p. 26;

51. European Parliament, LIBE Committee, Final Mission Report following the LIBE Mission to the European Border and Coast Guard Agency (Frontex) in Warsaw, Poland (24-25 February 2020), 2020, p. 7; European Ombudsman, *Report on the meeting of the European Ombudsman's inquiry team with FRONTEx representatives*, 2021, https://www.ombudsman.europa.eu/en/report/en/139670?utm_source=some_EO&utm_medium=tw_organic&utm_campaign=frontex_complaint_mechanism, para. 20; Frontex, Letter from the European Border and Coast Guard Agency (Frontex) to the European Ombudsman on how it deals with complaints about alleged fundamental rights breaches through its 'Complaints Mechanism', 2021, <https://www.ombudsman.europa.eu/en/correspondence/en/137728>, p. 3.

52. European Parliament, LIBE Committee, *Final Mission Report following the LIBE Mission to the European Border and Coast Guard Agency (Frontex) in Warsaw, Poland (24-25 February 2020)*, 2020, p. 16.

As regards access to the complaints mechanism, any person who is directly affected by the actions or failure to act on the part of staff involved in a joint operation, pilot project, rapid border intervention, migration management support team deployment, return operation, return intervention or an operational activity of the Agency in a third country, and who considers herself/himself to have been the subject of a breach of her/his fundamental rights due to those actions or that failure to act, or any party representing such a person, may submit a complaint in writing to the Agency (Art.111(2)).

ECRE considers that the scope of the mechanism is unduly narrow. First, allowing access solely for persons *directly* affected by action or omissions bars the access to the procedure to persons suffering from violations as a result of, for instance, a failure of the coordinating officer to report to the ED unlawful instructions given by the home Member State. Hence, it should be sufficient for the person to be affected by actions and omission of the staff.⁵³ Second, it is not possible for the submission of complaints in the public interest by third parties. The scope of actors able to submit a complaint should therefore be extended, and the mechanism should be open to any third party to submit a substantiated “public interest complaint” in writing, in particular where it has evidence of a consistent pattern of fundamental rights violations occurring in the context of a Frontex operation.⁵⁴

It is welcome that the new Regulation requires that the Agency ensure that information about the possibility and procedure for making a complaint is readily available, including for vulnerable persons. Also, it clarifies that the standardised complaint form should be made available on the Agency’s website (and be easily accessible including on mobile devices) and in hardcopy during all activities of the Agency in languages that third-country nationals understand or are reasonably believed to understand. Nonetheless, the majority of people whose rights are violated during Frontex operations need legal and linguistic assistance to submit a complaint. To improve the procedure, ECRE recommends that the fundamental rights monitors should provide information on the complaints mechanism and refer persons affected to relevant legal assistance providers.

The low number of complaints submitted is a long-standing concern.⁵⁵ From its inception until end of 2020, only 69 complaints had been received of which merely 22 were admissible. In 2019, out of 18 complaints received, 7 were declared admissible; in 2020 there were also 7 admissible complaints out of 24 submitted. According to the Agency there are three reasons for this: at the outset, the mechanism was not well-known; possible complainants, most of whom are migrants, might fear retaliation if they file a complaint, especially with regard to their asylum applications; and the scope of the mechanism is limited to issues that arise in the context of a Frontex operation (hence excluding, for instance, incidents occurring at the Croatian border with Bosnia and Herzegovina).⁵⁶

ECRE believes that the independence and effectiveness of the complaints mechanism should be improved. Although the role of the FRO within the procedure was extended by the 2019 Regulation, the decision-making powers rest ultimately with the ED. The FRO reviews the admissibility of a complaint, registers admissible complaints, and informs the applicants that the complaint has been registered and the assessment is ongoing. The FRO then forwards the registered complaints concerning Frontex staff to the ED and those against national team members to their home Member State. For the former, the FRO recommends appropriate follow-up, including disciplinary measures to the ED and, where appropriate, referral for the initiation of civil or criminal justice proceedings (Art.111(4)-(5)). However, it is the ED who decides on the merits of the complaints. The ED ensures the appropriate follow-up and report back to the FRO within a “determined timeframe”⁵⁷ and, if necessary, at regular intervals thereafter, covering the findings, the implementation of disciplinary measures, and follow up by the Agency in response to a complaint (Art.111(6)).

The Regulation fails to regulate the details of the follow up to be ensured by the ED or the applicable timelines; it is silent on the criteria to be used by the ED to assess the complaint; and it does not provide for an appeal

53. ECRE, *ECRE Comments on the Commission Proposal for a Regulation on the European Border and Coast Guard (COM(2018) 631 FINAL)*, 2018, <https://www.ecre.org/wp-content/uploads/2018/11/ECRE-Comments-EBCG-proposal.pdf>, p. 22.

54. ECRE, *ECRE Comments on the Commission Proposal for a Regulation on the European Border and Coast Guard (COM(2018) 631 FINAL)*, 2018, <https://www.ecre.org/wp-content/uploads/2018/11/ECRE-Comments-EBCG-proposal.pdf>, p. 22.

55. ECRE, *ECRE Comments on the Commission Proposal for a Regulation on the European Border and Coast Guard (COM(2018) 631 FINAL)*, 2018, <https://www.ecre.org/wp-content/uploads/2018/11/ECRE-Comments-EBCG-proposal.pdf>; Statewatch, *Deportation Union: Rights, accountability and the EU’s push to increase forced removals*, 2020, <https://www.statewatch.org/deportation-union-rights-accountability-and-the-eu-s-push-to-increase-forced-removals/>

56. European Ombudsman, *Report on the meeting of the European Ombudsman’s inquiry team with FRONTEX representatives*, 2021, https://ombudsman.europa.eu/en/report/en/139670?utm_source=some_EO&utm_medium=tw_organic&utm_campaign=frontex_complaint_mechanism

57. It appears that that time-frame is six months, see Frontex, *Letter from the European Border and Coast Guard Agency (Frontex) to the European Ombudsman on how it deals with complaints about alleged fundamental rights breaches through its ‘Complaints Mechanism’*, 2021, <https://www.ombudsman.europa.eu/en/correspondence/en/137728>, p. 2.

against the ED's decision. ECRE recommends that new rules on the complaints mechanism under Article 111 of the 2019 Regulation that the Agency is currently developing should be used to fill these gaps. ECRE further recommends that, to improve the independence of the mechanism, the FRO should have a formal role in the decisions on the merits of the complaints, should be able to carry out fact-finding, also via the fundamental rights monitors, and be able to issue a binding recommendation to the ED on the findings and the follow up for the Agency.⁵⁸

As of December 2020, all the complaints submitted concerned national staff. As regards the procedure, the FRO forwards those complaints to their home Member State and sends a copy to the national human rights institutions for further action according to their mandate (Art.111(4)). The merits of a complaint are to be assessed by the domestic authorities. According to the FRO, the follow up from the domestic authorities has been inadequate. In fact, the major weakness of the mechanism is that the case can be closed due to the lack of response by the domestic authorities. As of December 2020, none of the complaints against national team members led to the person's removal from the activity of the Agency.⁵⁹

ECRE believes that this procedure should be considerably improved. First, clear timelines for the response from the Member States should be introduced.⁶⁰ Second, if these are not respected, the ED should raise the issue with the MB when a Member State fails to adequately follow up on the complaint received. Third, new provisions in the Regulation should be used to shed light on the lack of response from the Member States. In this regard, under recital 104, the Agency is supposed to report on the complaints mechanism in its annual report, including regarding the number of complaints it has received, the types of fundamental rights violations involved, the operations concerned and, where possible, the follow-up measures taken by the Agency and Member States. To adequately use this new power, the information on the follow up and findings should include the lack of adequate response from the states and information about complaints pending from previous years.⁶¹ Fourth, to further encourage the Member State to assess the complaint within the set timelimits, the Agency should be able to suspend the team member's participation in activities until a final decision has been taken.

Finally, even when the FRO is involved in the decisions on the merits, the complaints mechanism still cannot be considered independent.⁶² To ensure genuine independence of the complaints mechanism, ECRE recommends that it involves an external and independent body competent for receiving complaints lodged by individuals claiming human rights violations during Frontex operations or activities, including those taking place outside the EU. Within the institutional architecture of the EU, the European Ombudsman is empowered to investigate complaints by individuals and organisations concerning maladministration by institutions, bodies and agencies of the Union, including violations of the principle of good administration and of fundamental rights. The scope of this procedure includes any person present on EU territory, irrespective of her/his migratory status. For people already returned or refused entry, their legal representative (including an NGO) could file a complaint. ECRE recommends therefore that the competence to assess the merits of complaints lodged against Frontex staff should be transferred to the European Ombudsman.⁶³

Serious Incident Reporting

A "serious incident" is an event or occurrence, natural or caused by human action, which may affect, or be relevant to a particular Frontex activity, to the safety and security of participants in Frontex activities, to the Agency's mission and reputation, or to any combination thereof, including situations of possible violations of fundamental rights, of the EU *acquis* or international law, particularly related to international protection obligations, and possible violations of the Frontex Code of Conduct and the Code of Conduct for Return

58. ECRE, *ECRE Comments on the Commission Proposal for a Regulation on the European Border and Coast Guard (COM(2018) 631 FINAL)*, 2018, <https://www.ecre.org/wp-content/uploads/2018/11/ECRE-Comments-EBCG-proposal.pdf>, p. 23.

59. European Ombudsman, *Report on the meeting of the European Ombudsman's inquiry team with FRONTEX representatives*, 2021, https://ombudsman.europa.eu/en/report/en/139670?utm_source=some_EO&utm_medium=tw_organic&utm_campaign=frontex_complaint_mechanism

60. FRA, *The revised European Border and Coast Guard Regulation and its fundamental rights implications: Opinion of the European Union Agency for Fundamental Rights*, 2018, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-opinion-ebcg-05-2018_en.pdf, p. 24-25.

61. Frontex, *Consolidated annual activity report 2019, 2020*, https://frontex.europa.eu/assets/Key_Documents/Annual_report/2019/General_Report_2019.pdf, p. 75-77.

62. E. Guild, "The Frontex Push-Back Controversy: Lessons on Oversight (Part I)," *EU Immigration and Asylum Law and Policy*, 19 April 2021, <https://eumigrationlawblog.eu/the-frontex-push-back-controversy-lessons-on-oversight-part-i/>

63. ECRE, *ECRE Comments on the Commission Proposal for a Regulation on the European Border and Coast Guard (COM(2018) 631 FINAL)*, 2018, <https://www.ecre.org/wp-content/uploads/2018/11/ECRE-Comments-EBCG-proposal.pdf>, p. 23; European Parliament, "The European Ombudsman," *Fact Sheet*, <https://www.europarl.europa.eu/factsheets/en/sheet/18/the-european-ombudsman>

Operations.⁶⁴ The Serious Incident Report (SIR) mechanism was mentioned in the preamble to Regulation 1168/2011 (recital 16) as a mechanism to transmit to relevant national public authorities and the MB information concerning credible allegations of breaches during joint operations of, in particular, the Frontex Regulation and Schengen Borders Code, including fundamental rights. The 2019 Regulation does not include this recital and is vague regarding reporting. The reporting procedure is regulated by a Decision of the ED establishing the Standard Operational Procedures (SOPs) which are not publicly available.⁶⁵ Nonetheless, it is still an important mechanism for reporting human rights violations during Frontex's operational activities.

The deployed officers are obliged to report serious incidents, including those related to fundamental rights, in a SIR to the Frontex Situation Centre.⁶⁶ Yet, as the CF has consistently raised in its annual reports, the SIR mechanism is underused, given the low number of reports compared to human rights violations documented by independent observers, including CoE Committee for the Prevention of Torture.⁶⁷ Merely three SIRs related to violations of fundamental rights were lodged in 2018.⁶⁸ Apparently, there are no sanctions for failing to report human rights violations.⁶⁹ ECRE recommends sanctions for a failure to report should be introduced to make it consistent with the obligation to ensure that any act or omission does not result in fundamental rights violations. Ideally, the FRO or the fundamental rights monitors deployed, based on the reports from other sources and investigation of who was on the spot in the given moment, could find out a situation of failure to report.

As regards the scope of the mechanism, among four categories of incidents to report, Category 4 covers situations of suspected violations of fundamental rights.⁷⁰ This includes suspected violation of fundamental rights under EU or international law related to access to international protection and other violations, including of the principle of *non-refoulement*, the right to asylum, liberty, human dignity, and an effective remedy, the rights of the child, and prohibition of torture and ill-treatment. However, there seems to be a lack of clarity, as Category 2 also includes suspected violations of fundamental rights under EU or international law related to access to international protection if they do not involve Frontex staff, members of the European Border Guard Teams and host Member State's border guards. Incidents involving violations of the principle of *non-refoulement* and the use of force by national forces have been reported under Category 2.⁷¹ ECRE recommends that the SOPs under preparation clarify the scope of each of the categories to ensure legal certainty and foreseeability. This should also reflect potential incidents arising from activities in or cooperation with third countries. Given that the SOPs are not publicly available, it is unclear what procedures are included or whether the ED is obliged to justify decisions to the FRO. Likewise, it is unknown what sanctions are applicable to those found at fault and how often sanctions were imposed.

ECRE recommends that a procedure should be in place to activate the sanctions once a specific number of SIRs is received. Above all, the role and decision-making powers of the FRO should be streamlined. The FRO should have formal decision-making role in reports concerning fundamental rights violations (Category 4). The FRO should be involved from the beginning when a SIR related to fundamental rights is submitted and should be able to carry out an independent fact-finding, including with the help of the Fundamental Rights Monitors. A follow up with either the ED or the Member States would increase accountability.

64. Frontex Consultative Forum on Fundamental Rights, *Seventh Annual Report: 2019, 2020*, https://frontex.europa.eu/assets/Partners/Consultative_Forum_files/Frontex_Consultative_Forum_annual_report_2019.pdf, p. 20.

65. *Decision of the Executive Director No 2014/55 of 28 July 2014 on the adoption of the Frontex Standard Operating Procedure on Serious Incident Reporting*.

66. Frontex, *Annex 14: Serious Incident Reporting*, <https://www.statewatch.org/media/documents/news/2016/aug/frontex-serious-incident-reporting.pdf>

67. Frontex Consultative Forum on Fundamental Rights, *Seventh Annual Report: 2019, 2020*, https://frontex.europa.eu/assets/Partners/Consultative_Forum_files/Frontex_Consultative_Forum_annual_report_2019.pdf, p. 25. In 2019, the FRO was acting as the coordinator to nine SIRs on fundamental rights submitted by the participants of the operations and derived from open source reporting on general situations not involving Frontex or domestic staff. It is unclear though whether these nine SIRs were all the fundamental rights related SIR submitted in 2019, see Frontex, *Consolidated annual activity report 2019, 2020*, https://frontex.europa.eu/assets/Key_Documents/Annual_report/2019/General_Report_2019.pdf, p. 17, the LIBE report speaks of nine SIRs received by the FRO in 2019, see European Parliament, *LIBE Committee, Final Mission Report following the LIBE Mission to the European Border and Coast Guard Agency (Frontex) in Warsaw, Poland (24-25 February 2020)*, 2020, p. 8.

68. Frontex Consultative Forum on Fundamental Rights, *Seventh Annual Report: 2019, 2020*, https://frontex.europa.eu/assets/Partners/Consultative_Forum_files/Frontex_Consultative_Forum_annual_report_2019.pdf, p. 75.

69. L. Karamanidou and B. Kasperek, *Fundamental Rights, Accountability and Transparency in European Governance of Migration: The Case of the European Border and Coast Guard Agency Frontex, Respond Working Papers, 2020*, <https://respondmigration.com/wp-blog/fundamental-rights-accountability-transparency-european-governance-of-migration-the-case-european-border-coast-guard-agency-frontex>

70. Frontex, *Annex 14: Serious Incident Reporting*, <https://www.statewatch.org/media/documents/news/2016/aug/frontex-serious-incident-reporting.pdf>

71. L. Karamanidou and B. Kasperek, *Fundamental Rights, Accountability and Transparency in European Governance of Migration: The Case of the European Border and Coast Guard Agency Frontex, Respond Working Papers, 2020*, <https://respondmigration.com/wp-blog/fundamental-rights-accountability-transparency-european-governance-of-migration-the-case-european-border-coast-guard-agency-frontex>

The SIR mechanism came under fire in the context of the allegations of Frontex's involvement in push-backs carried out by Greece. In its Conclusions on the final report of the working group, the MB pointed to several irregularities in the use of the SIR mechanism, including lack or inadequate follow up by the ED with the host state authorities and the failure to clarify the facts. The MB expressed concern that the reporting systems currently in place are not systematically applied and requested the Agency to make urgent improvements in this respect. The MB recommended that the SIR be revised to ensure that fundamental rights-related SIRs are always reported to and assessed by the FRO. Further, a systematic monitoring of the SIR should be established and whistle-blowers adequately protected. Finally, the MB requested that the ED establish a transparent follow-up process for SIRs on potential fundamental rights violations, in particular the process to establish a Final Serious Incident Report and the proper and transparent procedure to follow-up to such a final report.⁷² ECRE suggests that the SOPs currently under the development should be adapted to reflect the MB's recommendations.

Supervisory mechanism on the use of force

Introduced in the 2019 Regulation, the supervisory mechanism on the use of force by statutory staff is another mechanism for reporting violations of fundamental rights, covering operations in EU Member States. It is crucial, especially in light of new powers to use force and service weapons. Under Art.55(5) (a) of the Regulation, the Agency should set up a supervisory mechanism to monitor the application of the provisions on use of force by statutory staff, including rules on reporting and specific measures, such as those of a disciplinary nature, with regard to the use of force during deployments. Detailed rules have been established in the MB's Decision 7/2021 which builds upon Art.55(5)(a) of the Regulation.⁷³

According to Decision 7/2021, the ED is responsible for the supervisory mechanism (Art.3(1)) and is advised by the Advisory Committee on the Use of Force, the members of which are appointed by the ED (Art.8(1)). Any use of force should be reported to the coordinating officer (Art.10) who conducts an initial assessment as to whether the case qualifies as "incident involving the use of force"⁷⁴ (Art.11). The coordinating officer should carry out this assessment also without receiving a report but rather once she/he becomes aware of any event involving the use of force or upon information received from the FRO or a fundamental rights monitor. If the duty officer who verifies the initial assessment concludes that the use of force qualifies as an "incident involving the use of force," she/he should immediately report it to the ED and the FRO (Art.12). In terms of the roles, it is striking that there is no formal role foreseen for the FRO in the initial assessment or in the verification.

Upon receiving such report, the ED may then initiate an administrative inquiry as well as pre-disciplinary and disciplinary proceedings (Art.5). The ED is to inform the FRO "in a timely manner" of her/his decision of whether to initiate an inquiry and pre-disciplinary or disciplinary proceedings. Upon closing the case, the ED should inform the FRO and the CF of the closure of the case and of the final decision resulting from the investigations (Art. 5 and 9(5)). Under Annex V to the Regulation, all incidents should be reported in the Agency's annual report.

ECRE recommends that to ensure the FRO can play the role foreseen, she/he should also be informed about the reasons behind a decision not to initiate an investigation and have a possibility to comment. Further, to increase the transparency of the mechanism, the annual reports should also include the statistics on the number of "incidents involving the use of force" which led to administrative inquiries and pre-disciplinary or disciplinary proceedings, and the final decisions in these investigations.

Besides being informed by the ED of her/his decision, the FRO has an investigative role in the supervisory mechanism. As clarified in the Annex V to the Regulation, the FRO should ensure that incidents

72. Frontex, *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*, 5 March 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-aFewSI>

73. Frontex, *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*, 2021, https://frontex.europa.eu/assets/Key_Documents/MB_Decision/2021/MB_Decision_7_2021_on_supervisory_mechanism.pdf

74. 'Incident involving the use of force' means the use of force by statutory staff of the Standing Corps, resulting in death or a serious injury, or a significant damage to property, or where the firearm was used (fired or discharged), including warning shots, or where it is reasonable to believe that the use of force by statutory staff of the Standing Corps failed to comply with the applicable operational plan, or the national law of the host Member State or Third Country, or with the core principles and specific rules referred to in Annex V to the Regulation, or with respect for fundamental rights as guaranteed under international and Union law, or with the Agency's code of conduct provisions related to the use of force.

related to the use of force and use of weapons, ammunition and equipment are investigated in accordance with Art.109(2)(b) of the Regulation. Under this provision, the FRO may conduct investigations into any activity of the Agency. Further, the FRO transmits the results of these investigations to the ED, the CF, and the MB (Decision 7/2021, Art.9(1)). To implement these prerogatives, the FRO is supposed to receive reports of the “incidents involving the use of force” (Art.9(2)). As described above, the duty officer should transmit these reports only if she/he qualifies the case as an “incident involving the use of force” (Art.12(3)).

This creates a gap, as the FRO does not receive the reports from the duty officer when they are not considered “incidents involving the use of force.” Art.9(4) of the Decision 7/2021 remedies this shortcoming: the FRO should inform the MB and the ED about any diverging conclusions of her/his investigations and the conclusions of the verification by the duty officer. Hence, by implication, the duty officer should submit any case to the FRO, especially given that the criteria for verification of the initial assessment and qualification of a case as an “incident involving the use of force” are not specified. However, a follow up to the divergent opinions of the FRO and the duty officer is not further clarified. ECRE recommends that to ensure the FRO can fulfil her/his mandate, the duty officer should have to review her/his decision. Further, the fundamental rights monitors should have access to all areas in which the Agency’s operational activities take place and to all the documents relevant for the implementation of the activity (Art.9(3)). Finally, the FRO should report on all incidents in her/his reports. Thus, ECRE recommends that to guarantee transparency, all incidents should be reported, regardless of their description by the duty officer.

SOCIAL ACCOUNTABILITY

Social accountability of international organisations typically means the scrutiny by independent civil society organisations and, more broadly, transparency.

Consultative Forum on Fundamental Rights

Although not an accountability mechanism per se, the Consultative Forum on Fundamental Rights (CF) can strengthen the social accountability of Frontex. Established by Regulation 1168/2011, according to the 2019 Regulation, the CF is an advisory body assisting Frontex (Art.99), tasked with providing independent advice in fundamental rights matters (Art.108(1)). Between 2020 and 2022, the CF counted 13 members, including EU agencies (EASO and FRA), UN agencies or bodies (UNHCR and OHCHR), other inter-governmental organisations (CoE, IOM, and OSCE ODIHR) and six civil society organisations.⁷⁵ Given that civil society organisations constitute around half the CF members, the CF contributes only partially to social accountability of Frontex. Besides three permanent members (EASO, FRA and UNHCR as per Art.108(2)), other members serve on the basis of a three-year mandate, which can be renewed upon expiry. The intergovernmental organisations (CoE, IOM, OSCE) are directly invited by the MB and civil society organisations are selected by the MB, through an open application process, based on a proposal from the FRO made after consulting the ED.⁷⁶ The decisive role of the MB and the ED in the selection process is noteworthy.⁷⁷

There are further impediments to the work of the CF. First, its members contribute expertise on a voluntary basis. For the civil society organisations, activities related to the CF may require considerable resources on their part. Second, according to the CF Working Methods, the CF should strive to adopt its opinions and recommendations by consensus of its members. Only exceptionally, when consensus cannot be reached, opinions and recommendations may be adopted by simple majority (Art.4(4)).⁷⁸ Given the variety of the CF members, consensus may be often difficult to reach. To help the CF work effectively, the Working Methods could be amended to provide for simple majority voting on opinions and recommendations. Third, the powers of the CF are limited. The ED and the MB *may* consult the CF on any matter related to fundamental rights, however, the CF *should* be consulted by the Agency on further development and implementation of the

75. Frontex Consultative Forum on Fundamental Rights, *Seventh Annual Report: 2019, 2020*, https://frontex.europa.eu/assets/Partners/Consultative_Forum_files/Frontex_Consultative_Forum_annual_report_2019.pdf, p. 15-16. For a full disclosure, ECRE was part of the CF between 2011 and 2019.

76. *External Evaluation on the work of the Consultative Forum, 2020*, https://frontex.europa.eu/assets/Partners/Consultative_Forum_files/Frontex_Consultative_Forum_annual_report_2019.pdf, p. 77-78.

77. There has been a case where an NGO application was rejected. In 2019, the application of SeaWatch was rejected as its operational focus apparently did not meet the Agency’s need for advice on fundamental rights issues, hence it did not fulfil the criteria on knowledge and expertise, see the post on Twitter, https://twitter.com/seawatch_intl/status/1204751640156352512

78. Frontex Consultative Forum on Fundamental Rights, *Working Methods of the Frontex Consultative Forum on fundamental rights, 2017*, https://frontex.europa.eu/assets/Partners/Consultative_Forum_files/CF_Working_Methods_2017.pdf

fundamental rights strategy, functioning of the complaints mechanism, codes of conduct and common core curricula (Art.108(3)). Concerns have repeatedly been expressed about Frontex's reluctance to consult the CF,⁷⁹ sometimes the request for input is too late or there is insufficient time to comment.⁸⁰

The Agency is to take into account the reports of the CF (Art.80(4)) and inform the CF of the follow up to its recommendations (Art.108(3)). As the 2019 evaluation of the CF found, its advice was often not implemented and the follow up by Frontex was lacking.⁸¹ The obligation to inform the CF of the follow up to its recommendations is thus a welcome change in the Regulation 2019, yet it still does not require the ED or the MB to follow the CF's advice. The new obligation under the 2019 Regulation does, though, include the need to explain the reasons for rejecting a recommendation. ECRE recommends, as per the evaluation, that the CF should be able to include in its annual reports, besides its opinions and recommendations, information on follow up to recommendations. In addition, recommendations and opinions as well as the Agency's follow-up actions and replies should be published on a more regular basis, for instance via newsletters.⁸²

The CF should be provided with effective access to all information related to the respect of fundamental rights in a timely and effective manner and to that end it can also carry out on-the-spot visits to activities of the Agency (Art.108(5)). In practice, the Agency often did not share information in a proactive manner. Rather, the CF had to request specific information, which required it already knowing what to ask for. Then, it often took a long time to receive the requested information.⁸³ As the 2019 evaluation stressed, to better implement the Regulation, Frontex should proactively facilitate the CF's access to relevant documents, by ensuring the CF is aware of the new developments and receives the necessary information in a timely manner.⁸⁴ (The CF's members are bound by a strict confidentiality clause, potentially triggering criminal liability if they share "sensitive or non-public information.")⁸⁵

Transparency

The lack of transparency and difficulties accessing information by individuals have been long-standing criticisms of Frontex. Internal documents can only be received via a freedom of information request based on the Regulation 1049/2001, which applies only to EU citizens and residents.⁸⁶ Since the people affected by Frontex's activities are often third-country nationals, the Regulation should be amended to support access to information for people who are not EU citizens/ residents. An alternative solution would be for the MB to adopt a decision to this effect. The Agency has often refused to release documents under freedom of information requests on the grounds of security.⁸⁷ To ensure better transparency, any refusal of information on security grounds should be vetted by the FRO's office. In recent years, Frontex started to further limit information released.⁸⁸ The Agency introduced its own online form for submitting freedom of information requests under which internal documents will be available only to the individual making the request,

79. L. Karamanidou and B. Kasperek, *Fundamental Rights, Accountability and Transparency in European Governance of Migration: The Case of the European Border and Coast Guard Agency Frontex*, Respond Working Papers, 2020, <https://respondmigration.com/wp-blog/fundamental-rights-accountability-transparency-european-governance-of-migration-the-case-european-border-coast-guard-agency-frontex>

80. PICUM, "PICUM is no longer part of the Frontex Consultative Forum," *Blog Post*, 29 January 2021, <https://picum.org/picum-is-no-longer-part-of-the-frontex-consultative-forum/>

81. *External Evaluation on the work of the Consultative Forum*, 2020, https://frontex.europa.eu/assets/Partners/Consultative_Forum_files/Frontex_Consultative_Forum_annual_report_2019.pdf, p. 93-94.

82. *External Evaluation on the work of the Consultative Forum*, 2020, https://frontex.europa.eu/assets/Partners/Consultative_Forum_files/Frontex_Consultative_Forum_annual_report_2019.pdf, p. 151-152.

83. European Parliament, LIBE Committee, *Final Mission Report following the LIBE Mission to the European Border and Coast Guard Agency (Frontex) in Warsaw, Poland (24-25 February 2020)*, 2020, p. 10; *External Evaluation on the work of the Consultative Forum*, 2020, https://frontex.europa.eu/assets/Partners/Consultative_Forum_files/Frontex_Consultative_Forum_annual_report_2019.pdf, p. 96-97.

84. *External Evaluation on the work of the Consultative Forum*, 2020, https://frontex.europa.eu/assets/Partners/Consultative_Forum_files/Frontex_Consultative_Forum_annual_report_2019.pdf, p. 97.

85. PICUM, "PICUM is no longer part of the Frontex Consultative Forum," *Blog Post*, 29 January 2021, <https://picum.org/picum-is-no-longer-part-of-the-frontex-consultative-forum/>

86. *Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents*, OJ L 145, p. 43-48, 31 May 2001, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32001R1049>

87. L. Karamanidou and B. Kasperek, *Fundamental Rights, Accountability and Transparency in European Governance of Migration: The Case of the European Border and Coast Guard Agency Frontex*, Respond Working Papers, 2020, <https://respondmigration.com/wp-blog/fundamental-rights-accountability-transparency-european-governance-of-migration-the-case-european-border-coast-guard-agency-frontex>

88. L. Karamanidou and B. Kasperek, *Fundamental Rights, Accountability and Transparency in European Governance of Migration: The Case of the European Border and Coast Guard Agency Frontex*, Respond Working Papers, 2020, <https://respondmigration.com/wp-blog/fundamental-rights-accountability-transparency-european-governance-of-migration-the-case-european-border-coast-guard-agency-frontex>

rather than being released to the public. Letters to individuals requesting information prohibit the person from sharing released documents in any form without a prior authorisation by the Agency.⁸⁹ Again, the Frontex transparency officer should involve an officer from the FRO's office to verify whether the request for information represents an action in the public interest. If that is the case, the individuals should not be prohibited from sharing the information. Finally, any refusal should clearly indicate the available procedure for complaints in front of the European Ombudsman.⁹⁰

89. Ask the EU, "Request for Consultative Forum minutes, FRO reports and SIRs," *Website*, 2019, [https://www.asktheeu.org/en/request/6855/response/22258/attach/4/Lena KaramanidouCMS 2019 00004 0936.pdf?cookie_passthrough=1](https://www.asktheeu.org/en/request/6855/response/22258/attach/4/Lena%20KaramanidouCMS%202019%200004%200936.pdf?cookie_passthrough=1). There has also been a few complaints submitted to the European Ombudsman, see European Ombudsman, *Website*, <https://www.ombudsman.europa.eu/en/search?search=frontex>

90. In 2019, transparency activists challenged Frontex' refusal in front of the CJEU. When the court ruled in favour of Frontex, the Agency requested the activists to pay 23,700 euros legal fees, which appears to aim at deterring future actions by the civil society, see Access Info, "Frontex Legal Bill Risks Chilling Effect on Defence of Transparency", *Website*, 2 March 2020, <https://www.access-info.org/2020-03-02/frontex-legal-bill-risks-transparency/>. In March 2021, the General Court of the EU ruled that Frontex unjustifiably invoiced the costs of a private lawyer and travel expenses and reduced the legal bill to 10,500 euros, see N. Nielsen, "Frontex guilty of inflating legal fees against activists," *EU Observer*, 19 April 2021, <https://euobserver.com/migration/151577>

RECOMMENDATIONS

Although democratic, administrative and social accountability mechanisms have been strengthened by the 2019 Regulation, the improvements are not commensurate with the expanded powers, mandate, and capacities of Frontex following its most recent reform. Thus, the rules and mechanisms are inadequate when it comes to holding Frontex to account and should be further improved. It is not only the existence of the scrutiny tools that counts, but also their diligent use and implementation. Otherwise, they may turn out to have a counter-productive effect as they are frequently referred to by Frontex to demonstrate the Agency's compliance with fundamental rights while not actually serving this purpose. ECRE recommends that:

The EU Member States:

- » strengthen their scrutiny over their deployed or seconded border and coast guards
- » carry out adequate independent investigations into SIRs and complains received from the FRO and ensure timely follow up with the FRO on the precise results of the investigations
- » support legal assistance for victims of violations seeking to use the Frontex complaints mechanism, as well as in initiating judicial proceedings.

The Frontex Management Board:

- » oversee Frontex's activities and their compliance with EU and international human rights obligations
- » regularly invite the Parliament to its meetings as per Art.104(7)
- » adopt an opinion to modify the composition of the MB and accord Parliament a seat in line with the Common Approach
- » in the context of appointing an ED, inform the Parliament about detailed reasons why the candidate preferred by the Parliament was not appointed when this is the case
- » ensure the independence of the FRO, by, inter alia, inviting the representatives of the CF to participate in the selection panel charged with selecting the FRO and regularly inviting the FRO for exchanges on any aspect of her/his work, including restrictions to her/his independence
- » adopt a decision, taking into account recommendations from the FRO and the CF, to set a quantitative indicator for the number of the fundamental rights monitors compared to overall staff
- » follow up on the FRO's recommendations and opinions within a specified timeline and draw up an action plan to implement the recommendation or, alternatively, explain the specific reasons for rejecting a recommendation and invite the FRO to exchange views on the matter
- » publish yearly statistics on which recommendations were rejected and which were implemented
- » verify whether the ED implemented all the MB conclusions related to the SIR mechanism based on the report of its WG on Fundamental Rights and Legal Operational Aspects of Operations and the Aegean Sea
- » ensure that all the 2019 recommendations of the evaluation of the CF are implemented, including proactive sharing of information with the CF by the ED, reinforcing the CF Secretariat, enabling the CF to publish recommendations and opinions on a more regular basis and Frontex's follow up actions
- » ensure training for Frontex focused on the obligation to comply with EU and international human rights obligations and the consequences of a violation
- » adopt a decision to extend the scope of access to documents to third-country nationals.

The European Commission:

- » ensure effective oversight of the correct implementation of the Regulation as the Guardian of the Treaties via its two members at the MB, by raising any concerns about non-compliance with the MB, the ED, and the FRO and ultimately starting the action for annulment in front of the CJEU under Art.263 of the TFEU
- » engage actively with parliamentary scrutiny of Frontex, particularly the work of the LIBE Frontex Scrutiny Group and beyond
- » include the following elements in the next revision of the 2019 Regulation:

- » grant a seat on the MB to the Parliament
- » empower the Parliament to review the decisions (or the lack thereof) of the ED under Art.46
- » require that the MB submits the single programming document to the Parliament and adopt it only if the Parliament issues a positive opinion
- » widen the personal scope of the complaints mechanism by withdrawing the requirement for the person to be directly impacted by the act and omissions of the team members and allow complains by third parties acting in public interest
- » empower the European Ombudsman to review the complaints relating to the Frontex staff
- » provide for a procedure for access to information which is adapted to Frontex, including enabling access to third-country nationals and involving the FRO's office in vetting the refusal of information based on security reasons
- » give organisations the right to make a complaint for an affected person.

The European Parliament LIBE Committee:

- » continue exercising its democratic oversight over Frontex's activities via its budgetary powers
- » request a seat in the MB as per the Common Approach
- » request a formal role in appointing and dismissing the ED
- » request the ED to submit and present the Agency's annual reports and other report, including on the number of complaints and serious incidents and the results of the investigations as per Art.106(2)
- » proactively monitor and request information about compliance with fundamental rights in Frontex operations in third countries in accordance with Art. 73(7)
- » support the FRO's independence by asking the FRO to present her/his annual reports and regularly invite the FRO to hearings
- » strengthen its oversight over the accountability mechanisms by asking the Agency and the FRO to report on SIRs and complaints and on follow up to these
- » set up a joint parliamentary scrutiny group with national parliaments to ensure joint scrutiny of Frontex's activities, vest it with investigative powers, and collaborate with the FSWG
- » propose a clear procedure for access to internal documents involving the FRO in weighing up confidentiality against transparency and ensure that the FRO has adequate capacity for this purpose
- » within the FSWG, formulate recommendations to foster accountability mechanisms, including to:
 - » offer a seat at the MB to the Parliament (and pending this, to regularly invite the Parliament to the MB's meetings)
 - » give power to the Parliament to confirm a candidate for the post of the ED
 - » (in the shorter run) formally involve the FRO in decision-making on the complaints and fundamental rights related SIRs and ensure adequate resources for this purpose
 - » (in the longer run) empower the European Ombudsman to assess the merits of the complaints directed against Frontex staff.

The European Parliament Budgetary Control Committee:

- » refuse budget discharge for the financial year 2019 for as long as the complaints mechanism and SIR mechanism are not improved, while the required 40 fundamental rights monitors are not hired, and while the OLAF investigation is ongoing
- » for the future discharge proceedings, take the LIBE Committee's recommendations into account and attach observations regarding the respect of fundamental rights, transparency and effectiveness of the complaints mechanism and SIR mechanism to its discharge decision.

The Frontex Executive Director:

- » ensure that the annual reports include all the statistics and summary information relating to the complaints submitted, assessed and closed, as well as the number of requests for information received and follow up to them

- » involve the FRO in decision-making on the complaints against Frontex staff and provide a detailed follow-up to her/his recommendation within a reasonable timeline
- » regarding the complains about national staff, if a response is not forthcoming, raise the issue with the MB and, in case of a late reaction from national authorities, suspend the officer from Frontex's activities until the final decision has been taken
- » ensure that the new rules on the complaints mechanism, currently under preparation, provide for the binding nature of the FRO's recommendations, fact-finding visits by the FRO, and details and specific timelines for follow up
- » implement all the MB's recommendations in the new SOPs for the SIR mechanism, currently under preparation, including empowering the FRO to assess fundamental rights-related SIRs, introducing systematic monitoring of the procedure, protection of whistle-blowers, setting up a transparent follow-up process for SIRs and the proper and transparent procedure to follow up on such reports. In addition, ensure that the new SOPs clarify the scope of the four categories of serious incidents and introduce sanctions for falling to report serious incidents
- » take into account the FRO's opinion under the procedure under Art.46 or alternative thoroughly explain why the opinion was not followed
- » ensure that the duty officer transmits any case of the use of force to the FRO, rather than only these which she/he deems "incident involving the use of force"
- » ensure that the annual reports include detailed information on the functioning of the supervisory mechanism on the use of force, including the statistics on the number of "incidents involving the use of force" which led to administrative inquiries and pre-disciplinary or disciplinary proceedings and the final decisions of these investigations
- » follow up on the FRO's recommendations and opinions within a specified timeline and draw up an action plan to implement the recommendations or, alternatively, explain the specific reasons for rejecting a recommendation and invite the FRO to exchange views on the matter.

The Frontex Fundamental Rights Officer:

- » continue supporting Frontex's internal accountability
- » properly train new fundamental rights monitors once they are hired and ensure their independence; extend training on fundamental rights to other staff members
- » alert the LIBE Committee of the Parliament, MB and Commission when the space for independent recommendations is restricted
- » broadly interpret Art.109(4) and MB Decision 6/2021 to require that the ED respond to the FRO's recommendations within a specified timeline and indicate in writing in detail the reason for not following a recommendation
- » broadly interpret Art.109(2) and investigate and inquire into any situation which raises fundamental rights concerns in Frontex's operations inside and outside the EU, including in the framework of the supervisory mechanism on the use of force, and ensure sufficient staff are available for this task
- » ensure that the working methods of conducting investigations, currently under preparation, include access to all relevant documents, access to relevant audio-visual material such as recordings of body-cameras, regular and unannounced on-site visits including outside the EU, interrogation of the members of the team, the possibility to contact home Member States and speak with people subject to Frontex's activities in private, conclusions and recommendations directed to the MB and ED which should be followed-up within a specified time-period and inclusion of the results in the FRO's annual report, as well as reports to the MB and the Parliament
- » widely interpret its prerogatives under Art.109(2) and systematically carry out on-the-spot visits to operations and speak with the people affected by the Agency's activities
- » instruct the fundamental rights monitors deployed to operations to inform the individuals about the complaints mechanism, support them in filling out the complaints, and refer them to the relevant legal assistance providers
- » include detailed information about the complaints procedure in annual reports, including the status of the proceedings and the delay in the follow up from the authorities
- » take up the new role of assessing the fundamental rights-related SIRs, as recommended by the MB, including fact-finding visits, requesting documents, and issuing binding recommendations

to the ED

- » in the context of the SOPs under Article 46 of the Regulation, under preparation, propose a clear procedure for the suspension of an operation which would include the opinion of the FRO and be subject to scrutiny of the Parliament
- » start reporting to the Parliament on a regular basis, including on the instances where the FRO's advice or recommendations was not followed by the ED or the MB.

The European Ombudsman:

- » continue current inquiries in an effective manner and support the strengthening of the complaints mechanism
- » continue considering complaints from the individuals to whom access to information was refused.



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