

# DEPORTATION UNION

**Rights, accountability, and the EU's push  
to increased forced removals**



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## Sources for figures and tables

The original source for all data used in the tables and figures in this report is Frontex (either through open sources or access to documents requests), although that data has been compiled by *Statewatch*, apart from: Figure 1: eu-Lisa; Figure 9: Eurostat/Frontex; Table 1: Statewatch based on European Commission proposal; Table 3: Regulation 2019/1896, Annex I; Table 4: Council of the EU.

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## Abbreviations and acronyms used in this report

AMIF	Asylum, Migration and Integration Fund
CFR	EU Charter of Fundamental Rights
CIR	Common Identity Repository
CJEU	Court of Justice of the European Union
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRO	Collecting return operation
EASO	European Asylum Support Office
ECA	European Court of Auditors
ECHR	European Convention on Human Rights
ECRet	European Centre for Returns
ECtHR	European Court of Human Rights
EDPS	European Data Protection Supervisor
EES	Entry/Exit System
ERRIN	European Return and Reintegration Network
eu-Lisa	European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice
EURINT	European Integrated Return Management Initiative
EURLO	European Return Liaison Officers Network
Europol	European Union Agency for Law Enforcement Cooperation
EUROSUR	European Border Surveillance System
EUTD	EU Travel Document
FAR	Frontex Application for Return
FRA	EU Agency for Fundamental Rights
FRO	Fundamental rights officer
Frontex/EBCGA	European Border and Coast Guard Agency
FWC	Framework contract
IRMA	Irregular Migration Management Application
JPSG	Joint Parliamentary Scrutiny Group
JRO	Joint return operation
LIBE	European Parliament Committee on Civil Liberties, Justice and Home Affairs
MEP	Member of the European Parliament
NGO	Non-governmental organisation
NRO	National return operation
OMS	Organising member state
ORD	Operational Response Division
PMS	Participating member state
PRAS	Pre-Return Assistance Sector
RECAMAS	Return Case Management System
ROS	Return Operations Sector
SIS	Schengen Information System
UNHCR	United Nations High Commissioner for Refugees
VIS	Visa Information System

## Executive summary

The power available to states to deport non-citizens deemed unwanted, undesirable or unnecessary – the ‘deportation power’ – is, in historical terms, relatively recent, having only come into being around the turn of the 20<sup>th</sup> century.<sup>1</sup> Nevertheless, like many other punitive inventions of that era, it remains with us and continues to morph and expand in novel and dangerous ways. European nation-states have developed extensive sets of laws, policies, norms, practices and institutions concerned with regulating deportations, which are seen as a key part of contemporary migration policies. In recent years, such developments have taken on increasing prominence at EU level – the subject of this report.

*Deportation Union* provides a critical examination of recently-introduced and forthcoming EU measures designed to increase the number of deportations carried out by national authorities and the European Border and Coast Guard Agency, Frontex. It focuses on three key areas: attempts to reduce or eliminate rights and protections in the law governing deportations; the expansion and interconnection of EU databases and information systems; and the increased budget, powers and personnel awarded to Frontex.

There has long-been coordinated policy, legal and operational action on migration at EU level, and efforts to increase deportations have always been a part of this. However, since the ‘migration crisis’ of 2015 there has been a rapid increase in new initiatives, the overall aim of which is to limit legal protections afforded to ‘deportable’ individuals at the same time as expanding the ability of national and EU authorities to track, detain and remove people with increasing efficiency.

Changes to the law have a key role. In 2008, the EU ‘Returns Directive’ came into force despite significant opposition from campaigners, civil society organisations, social movements and critical MEPs, who opposed the EU-level legitimisation of an 18-month detention period and entry bans of up to five years for those who were deported. A decade later, the European Commission proposed a ‘recast’ of the Directive – which is currently being debated by the Council of the EU and the European Parliament – which would lower standards even further. No evidence has been provided to demonstrate the need for a harsher regime, suggesting the proposal is little more than an attempt to placate the xenophobic and racist tendencies in European society and politics at the expense of migrants’ rights.

Of particular concern in the proposal to recast the Returns Directive are plans to increase the possibilities for pre-deportation detention. An impact assessment carried out for the European Parliament’s civil liberties committee – which was requested following the Commission’s failure to conduct its own – found no evidence that increased detention would increase the number of deportations. Further measures under discussion include an increase in entry bans, limitations on appeal rights and a reduction in the possibilities for so-called

‘voluntary’ returns. While the MEPs responsible for guiding the file through the European Parliament have proposed some welcome amendments to the proposal that would better protect individual rights, it would be better to discard such harmful, unnecessary legislation in its entirety.

The political decision to step up expulsions from the EU has also led to the transformation of EU systems for the tracking and monitoring of migrants. Alterations to existing databases have been introduced or are under discussion and new systems will be developed in the coming years. The intention is to ensure the biometric registration of all migrants in, removed from or denied entry to the EU, and the systematic availability of that information to national authorities and EU agencies so that, where deemed necessary, individual movement can be controlled and restricted.

Changes to the Schengen Information System, for example, will require the systematic registration of expulsion orders in that database to try to ensure their mutual recognition by all EU states, while the proposed changes to the Returns Directive would vastly increase the number of entry bans stored in the system – ‘get out and stay out’ is the message. Changes proposed to Eurodac, the EU’s database on asylum-seekers, would transform it into a ‘deportation database’ holding an extended set of data on any ‘irregular’ migrant in the EU apprehended by the authorities, as well as all asylum-seekers. Changes to the Visa Information System – designed to help enforce the EU’s common visa policy – would see new data on travel documents stored in the system with the explicit aim of assisting with expulsions. Both these systems would also begin to hold data on children as young as six. Meanwhile, personal data stored in new databases currently under construction (the Entry/Exit System and the European Travel Information and Authorisation System) will be made available to immigration authorities to make it simpler to identify individuals subject to removal measures.

These vast increases in the collection of personal data and the repurposing of existing databases have been heavily-questioned by fundamental rights experts. Undermining the key data protection principle of purpose limitation – according to which data should not be used for purposes other than that which it was initially collected – is fundamental to the EU’s ‘interoperability’ agenda, which will see a range of policing and migration databases interconnected for the intermingled purposes of dealing with migration and security issues.

Frontex, the EU’s border control agency, has also been provided with new powers to implement and develop databases for the facilitation of expulsions, alongside a host of other new and expanded powers. The agency’s new activities will include developing information systems to monitor of the “stocks and flows” of persons in the member states liable for deportation, as well as providing means to

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<sup>1</sup> Nicholas de Gevona, ‘The deportation power’, *Radical Philosophy*, December 2018, <https://www.radicalphilosophy.com/article/the-deportation-power>;

Daniel Wilsher, *Immigration Detention – Law, History, Politics*, Cambridge University Press, 2012, pp.ix-xv

coordinate the authorities and personnel required to remove them.

Since Frontex was established in 2004, its role in coordinating and organising deportations from member states has increased significantly. From one return operation deporting eight people in 2008, to 140 operations deporting over 6,000 people in 2018, the aim in the coming years is for the agency to coordinate the deportation of 50,000 people a year. Achieving this goal would mean Frontex assisting with the removal of almost as many people annually as the total of 53,000 people the agency helped to deport between 2007 and 2018, the period covered in this report.<sup>2</sup>

Frontex is now able to engage in the “collection of information necessary for issuing return decisions” and to assist with the identification of individuals subject to a removal order. While it is not responsible for taking the decision to order somebody’s deportation, its assistance in the implementation of those decisions, taken by national authorities, raises serious concerns. For example, given the disparity between national asylum procedures in the EU, refugees could be sent back, via Frontex-coordinated operations, to places where they are at risk of being tortured or persecuted. By engaging with and assisting in the implementation of dysfunctional national law and policy, it is complicit in unfair and unjust procedures that may violate fundamental rights.

The agency is due to be allocated a hugely increased budget in the 2021-2027 period in order to implement its new powers. The lack of transparency of the agency’s operations and the absence of meaningful political accountability are a matter of significant concern. It has consistently expanded its role beyond existing legal boundaries, with new and more permissive legislation following swiftly behind. The most recent reform does introduce some extended accountability mechanisms, but these are insufficient given the expansion of the agency’s role. Equally, while there are some new safeguards around deportations – such as increased monitoring of expulsion flights and a revised complaints mechanism – the independence of both these systems remain compromised. Fundamentally, it remains almost impossible for individuals to hold the agency itself legally accountable.

This report was finalised in the midst of the COVID-19 pandemic, which has seen unprecedented quarantine measures imposed in societies across the globe. Those measures, while drastic and disturbing, have also led to the emergence of hopes and ideas for more equitable, peaceful ways of living, including in the realm of migration policy.

Measures such as the release of people held in detention centres or the granting of residence permits to all migrants<sup>3</sup> show that it is possible to do things differently; that those often deemed unwanted or undesirable may in fact be fundamental to the functioning of our societies.

Such actions are striking precisely because they go beyond the boundaries of what has long-been considered normal or possible. However, there is no indication that states in the EU or elsewhere are aiming for a less restrictive, punitive model of migration management in the long-term; and the introduction of even more restrictions on migration and migrants’ rights remains highly likely, as has been demonstrated by the closure of borders to those seeking asylum and rescued at sea.<sup>4</sup> Meanwhile, any release from detention or reprieve from ‘irregularity’ is intended to be temporary and exceptional. The European Commission, while strongly underlining the need to protect individuals’ health, is placing emphasis on the “continuity” of deportation procedures during the pandemic,<sup>5</sup> while the Spanish government explicitly used the EU’s 2008 ‘Pact on Immigration and Asylum’ to justify its alleged inability to undertake a mass regularisation of undocumented people.<sup>6</sup> The underlying premise is that when all this is over, we can go back to ‘normal’ – but that is neither necessary, desirable, nor perhaps even feasible.

The measures and initiatives being introduced by the EU to scale up deportations will require massive public expenditure on technology, infrastructure and personnel; the strengthening and expansion of state and supranational agencies already-lacking in transparency and democratic accountability; and are likely to further undermine claims that the EU occupies the moral high ground in its treatment of migrants. Anyone wishing to question and challenge these developments will first need to understand them. This report attempts to go some way towards assisting with that task.

<sup>2</sup> The vast majority of the report was drafted in 2018 and 2019. Publication was subsequently delayed due to a number of factors. We will be issuing a future update to include analysis of more recent figures.

<sup>3</sup> Yurema Pallarés Pla, ‘Partial relief: migrant regularisations during the COVID-19 pandemic’, *Statewatch Analysis*, June 2020, <https://www.statewatch.org/analyses/no-363-migrant-regularisations-pandemic.pdf>

<sup>4</sup> Yasha Maccanico, ‘Mediterranean: As the fiction of a Libyan search and rescue zone begins to crumble, EU states use the coronavirus pandemic to declare themselves unsafe’, *Statewatch Analysis*, May 2020, <https://www.statewatch.org/analyses/no-360->

[malta-italy-eu-libya-pushbacks.pdf](#); Eric Reidy, ‘The COVID-19 excuse? How migration policies are hardening around the globe’, *The New Humanitarian*, 17 April 2020, <https://www.thenewhumanitarian.org/analysis/2020/04/17/coronavirus-global-migration-policies-exploited>

<sup>5</sup> European Commission, ‘COVID-10: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement’, C(2020) 2516 final, <https://ec.europa.eu/info/sites/info/files/guidance-implementation-eu-provisions-asylum-retur-procedures-resettlement.pdf>

<sup>6</sup> ‘Partial relief: migrant regularisations during the COVID-19 pandemic’

# Introduction



In May 2019, several hundred people occupied part of the Charles de Gaulle airport in Paris. They were to make demands: that Air France cease assisting with deportations and stop hounding staff who refused to embark would-be deportees. Their fundamental demand, however, was “documents for all!”<sup>7</sup>

They made this demand because they have no residence documents – as *sans-papiers*, the French state wishes to deport them. It aims to do so through a system that the protesters condemned for treating “non-white lives and their management as flows”<sup>8</sup> – nothing more than a homogenous mass to be corralled and controlled.

The demands made by the *Gilets Noirs* (Black Vests, as the protesters refer to themselves) do not just confront the French state, but an EU-wide immigration enforcement system that in recent years has set its sights squarely on less immigration and more enforcement. In the last decade over two million people

have been deported from the EU, the vast majority of them through forced removals.<sup>9</sup>

This number, although enormous, represents less than half of the almost-five million people issued removal orders by EU member states since 2009.<sup>10</sup> A variety of new measures aim to make up the difference. Were this system to function as intended, groups like the *Gilets Noirs* would not have the opportunity to organise and express their demands – they would be subject to “swift, sustainable and effective return using a common EU approach”.<sup>11</sup> But their protests – and the countless other demonstrations and campaigns organised by undocumented people and their supporters across the EU and beyond<sup>12</sup> – raise serious questions that must be addressed in an age of global migration, rampant inequality, political uncertainty and worsening climate change.

<sup>7</sup> ‘Les Gilets Noirs: We are in the airport in France’, *Statewatch News*, 22 May 2019, <http://www.statewatch.org/news/2019/may/fr-gilets-noir-airport.htm>

<sup>8</sup> *Ibid.*

<sup>9</sup> Eurostat, ‘Third country nationals returned following an order to leave - annual data (rounded)’, [https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr\\_eirtn&lang=en](https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_eirtn&lang=en)

<sup>10</sup> Eurostat, ‘Third country nationals ordered to leave - annual data (rounded)’, [https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr\\_eiord&lang=en](https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_eiord&lang=en)

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<sup>11</sup> Council, ‘EU Action on Migratory Pressures – A Strategic Response’, 9650/12, 10 May 2012, <http://www.statewatch.org/news/2012/jun/eu-council-migration-pressure-op-9650-12.pdf>

<sup>12</sup> Maurice Stierl, ‘Migrant Resistance in Contemporary Europe’, *Routledge*, 2019, <https://www.routledge.com/Migrant-Resistance-in-Contemporary-Europe-1st-Edition/Stierl/p/book/9781138576230>; ‘Refugee Movement’, <https://oplatz.net/>; Katrin McGuaran and Kees Hudig, ‘Refugee protests in Europe: fighting for the right to stay’, *Statewatch Journal*, vol 23 no 3/4, February 2014, <http://database.statewatch.org/article.asp?aid=33230>



Deportation is an inherent site of social, political and legal conflict that affects individuals in a wide variety of different situations – those who have stayed longer than their visa permits, those who have had asylum claims rejected, those who have entered a state's territory without permission, and so on. However, the focus by EU and national politicians and officials on the statistics related to removals plays into a 'numbers game' with "little contextual or practical relevance," leading to increasingly outlandish proposals designed to ensure that an increasing number of people are deported, or prevented from arriving in the first place.<sup>13</sup>

The number of deportations in which the EU is involved in one way or another – whether through law, policy, funding or operational activity – has grown significantly in the last two decades, and particularly swiftly in recent years. In 2015, the journalists' consortium *The Migrants Files* estimated that since the year 2000, the EU and its member states had spent at least €11.3 billion on deportations.<sup>14</sup> The next EU budget is likely to provide ample funding for forced removals. While its exact size is yet to be determined, the European Commission's proposal for the 2021-27 Asylum and Migration Fund puts particular emphasis on "promoting effective returns".<sup>15</sup>

The number of people removed on flights coordinated or financed by Frontex, the EU's border agency, tripled from some 3,600 in 2015, to almost 10,500 in 2016, when a new legal regime governing the agency came into force. Ultimately, the goal is to give the agency a central role in the enforcement of expulsion orders and significant work is going into developing the necessary legal regime, systems and procedures. In the words of a Frontex training presentation: "Politics and airlines have to be convinced of the *professionalization* of the product: "Removal", national and international = FRONTEX."<sup>16</sup> The goal is to have Frontex carry out the deportation of at least 50,000 people annually from 2024 onwards.

This report provides a critical examination of a number of the measures implemented or proposed by the EU in recent years: proposed changes to the law governing standards and procedures for deportations; the transformation of policing and migration databases into systems designed to better-assist with forced removals; and the growth and development of Frontex, the EU's border agency, into an all-round border control, surveillance and deportation agency, for which a revamped legal basis came into force in late 2019.

Those in favour of these new measures insist that they ensure full protection of the fundamental rights that are supposed to underpin European society. A closer examination casts serious doubt on this assertion. New and proposed measures seek to massively expand the use of detention and limit access to judicial remedies; they introduce exemptions to data protection rights that could be crucial for challenging wrongful removals; they will step up the use of entry bans ('get out and stay out'); and they are creating new and 'multi-purpose' information systems, expanding the possibilities for surveillance and discriminatory profiling, despite concerns over the necessity and proportionality of expanding existing databases and setting up new ones.<sup>17</sup>

These changes will further weaken legal protections for people in an already-precarious situation. They will also require massive public expenditure on technology, infrastructure and personnel; the strengthening and expansion of state and supranational agencies already-lacking in transparency and democratic accountability; and they are likely to further undermine claims that the EU occupies the moral high ground in its treatment of migrants.

The desirability and feasibility of this project must be called into question. In self-declared liberal democratic states anchored in respect for human rights and the rule of law, the power to deport individuals should be used sparingly and with intense oversight, when it must be used at all. It has inherent risks for human rights and can have irreversible negative consequences for the individuals affected. Even if the removal of an individual from a state's territory can be justified, there are a vast array of less harmful measures available than detention and forced expulsion.<sup>18</sup> Anti-deportation campaigns also often raise broader questions of justice regarding the treatment of foreign nationals, who are frequently citizens of Europe's former colonies – a can of worms on which many people would prefer to keep the lid tightly shut.<sup>19</sup>

This report examines the deportation machinery being constructed by the EU so that its workings and the risks it poses may be better understood. Deliberate attempts to water down protections for individuals and to increase the powers of state agencies equipped with coercive powers should be of concern to everybody who wishes to defend a free and just society.

<sup>13</sup> Such outlandish proposals include "external processing of asylum claims... linking future intake of refugees to integration outcomes... [and] the creation of deportation camps for failed asylum-seekers in non-EU countries." See: Elizabeth Collett, 'The tyranny of immigration data in Europe', *The Economist*, 27 June 2018, <https://www.economist.com/open-future/2018/06/27/the-tyranny-of-immigration-data-in-europe>. On the latter point, see: 'Presidency discussion paper on Return Centers', Council document 10829/18, 4 July 2018, <http://www.statewatch.org/news/2018/jul/eu-council-migration-return-centers-ST-10829-18.pdf>

<sup>14</sup> See 'The high costs of deportation', *The Migrants Files*, <http://www.themigrantsfiles.com/>

<sup>15</sup> European Commission, Proposal for a Regulation establishing the Asylum and Migration Fund, COM(2018) 471 final, 12 June 2018, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2018:471:FIN>

<sup>16</sup> Frontex training presentation, 'Aircraft Safety and Evacuation', undated, <http://statewatch.org/docbin/eu-frontex-deportations-training-aircraft-safety-evacuation.pdf>

<sup>17</sup> Article 5(1)(b) of the General Data Protection Regulation: personal data must be "collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes".

<sup>18</sup> 'There Are Alternatives', *International Detention Coalition*, <https://idcoalition.org/publication/there-are-alternatives-revised-edition/>

<sup>19</sup> The statement issued by the *Gilet Noirs* during their occupation of the airport also said: "For some Roissy Charles de Gaulle is a place for travel and consumption. Those for whom this comes easy are a minority coming from the bourgeois and/or white worlds. It's this world that colonizes and wages war. The entrance to their fortress is the airport. It is well guarded by the military, police and cameras... In this place we also meet many of our own. Nevertheless, we don't want to see ourselves here."

# Deportations at the heart of EU migration policy

## A long-term priority

Increasing the number of deportations from the EU has been a long-standing policy concern for EU institutions and member states. Common initiatives date back to the early 1990s, with a first attempt to harmonise the treatment of refused asylum-seekers in 1992.<sup>20</sup> By the middle of that decade the Council of the EU (made up of the governments of the member states) had adopted further joint measures on expulsion, including standardised travel documents and readmission agreements, as well as a recommendation on “concerted action and co-operation in carrying out expulsion measures”.<sup>21</sup>

In the intervening years, ‘return’ (a sanitised term for deportation<sup>22</sup>) was a constant issue for politicians and officials. In April 2002, in the wake of the xenophobia, racism and anti-migrant sentiment whipped up in the wake of the 11 September 2001 terrorist attacks in the USA, the European Commission published a green paper setting out options for EU policy in the area. A number of measures were subsequently adopted by the Council, such as a 2004 Directive on the organisation of joint removal flights, shaping the EU’s legal framework for expulsions for years to come.<sup>23</sup> In the same year, the initial legislation establishing Frontex also came into force.<sup>24</sup> Other proposals from the time (such as a common EU list of ‘safe’ countries for return) are still under discussion,<sup>25</sup> while negotiations on plans to revise the 2008 Returns Directive (discussed in the following section) are ongoing.

The introduction of a legal framework at the EU level did not eliminate policy-level discussions on deportations. In 2012 the Council adopted a plan on “migratory pressures”, in which the first priority was “preventing and combating illegal migration by orderly return of illegal migrants”. The paper demanded more

“returns of illegal migrants” and the development of “swift, sustainable and effective return using a common EU approach, including more effective joint return operations.”<sup>26</sup> By this time the member states had started to make fairly regular use of the expulsion machinery operated by Frontex, the EU’s border agency, which was established in 2004. In 2012 over 2,000 people were removed on joint flights to countries such as Colombia, Georgia, Kosovo, Nigeria and Serbia, five times the total number from five years earlier.

Following the large-scale arrival of refugees and migrants in the EU that began in early 2015, a multitude of policy proposals, projects and action plans began to swamp the desks of officials. In April 2015 a “a 10-point plan of the immediate actions to be taken in response to the crisis situation in the Mediterranean” was adopted by the Council. It included a requirement to set up “a new return programme for rapid return of irregular migrants coordinated by Frontex from frontline Member States,”<sup>27</sup> such as Italy and Greece. The following year, Frontex-coordinated flights from Italy to Tunisia began in earnest – 609 people were expelled in 2016, growing to almost 4,000 in 2018. With the entry into force of the EU-Turkey deal in March 2016, Frontex also took on responsibility for ‘readmission’ operations from the Greek islands to Turkey, alongside Greek officials. By February 2020, the deal had led to 2,117 people being taken back to Turkey.<sup>28</sup>

In June 2015 the European Council met to address “the current emergency situation” and demanded the use of “all tools” to carry out expulsions and ensure that those removed would be accepted by destination countries.<sup>29</sup> The Commission was invited to establish “a dedicated European Return Programme”<sup>30</sup> and responded with an EU Action Plan on return, setting out a host of

<sup>20</sup> ‘Draft Recommendation regarding practices followed by member states on expulsion’, <http://database.statewatch.org/e-library/trevi-asylum-19immres.pdf>. From the ‘TREVI Key Texts’ collection in the Justice and Home Affairs Archive, <http://www.statewatch.org/semdoc/jha-archive.html>

<sup>21</sup> ‘Monitoring the implementation of instruments adopted by the Council concerning illegal immigration re-admission, the unlawful employment of third-country nationals and co-operation in the implementation of expulsion orders – Summary report of the member states’ replies to the questionnaire launched in 1998’, Council document 7668/1/99 REV 1, 14 June 1999, <http://database.statewatch.org/e-library/1999-07668-rev1-sg1-wp4-082.pdf>

<sup>22</sup> “As a political artefact, [return] is a euphemism for the violence inherent in expulsion, it erases the complexity of migration journeys in which expulsion is rarely synonymous with return, and it ‘naturalises’ return as an inherent part of migration.” See: Clara Lecadet, ‘Deportation, nation state, capital: between legitimisation and violence’, *Radical Philosophy*, December 2018, <https://www.radicalphilosophy.com/article/deportation-nation-state-capital>

<sup>23</sup> *Statewatch* reported on the proposals in detail at the time: ‘EU: “safe and dignified”, voluntary or “forced” repatriation to “safe” third countries’, November 2002, <http://www.statewatch.org/news/2002/nov/14safe.htm>. Key measures adopted were Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003L0110>; Council Decision of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of

individual removal orders, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32004D0573>;

<sup>24</sup> Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004R2007>

<sup>25</sup> ‘International protection: EU common list of safe countries of origin’, procedure 2015/0211 (COD), <https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=&reference=2015/0211%28COD%29>

<sup>26</sup> Council, ‘EU Action on Migratory Pressures – A Strategic Response’, 9650/12, 10 May 2012, <http://www.statewatch.org/news/2012/jun/eu-council-migration-pressure-op-9650-12.pdf>

<sup>27</sup> European Commission press release, ‘Joint Foreign and Home Affairs Council: Ten point action plan on migration’, 20 April 2015, [http://europa.eu/rapid/press-release\\_IP-15-4813\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4813_en.htm)

<sup>28</sup> UNHCR, ‘Returns from Greece to Turkey’, 29 February 2020, <https://data2.unhcr.org/en/documents/download/74370>

<sup>29</sup> This was to be done through readmission agreements and “high-level dialogues with the main countries of origin of irregular migrants,” the use of development policy to “reinforce local capacity-building, including for border control, asylum, counter-smuggling and reintegration,” the reinforcement of Frontex and the coordinated implementation of EU law concerning “safe countries of origin”.

<sup>30</sup> European Council meeting (25 and 26 June 2015) – Conclusions, EUCO 22/15, 26 June 2015,

measures<sup>31</sup> that reflected the Council's priorities but also significantly expanded upon them.<sup>32</sup> It was superseded just 18 months later by a Renewed Action Plan, which argued that there was a need for "more resolute action...to bring measurable results in returning migrants."<sup>33</sup>

This "more resolute action" takes a number of forms and involves new laws, policy changes and operational action both inside and outside of the EU. The sections that follow examine the key changes being implemented within the EU – the proposed

revision of the 2008 Returns Directive, the transformation of EU databases and the super-charging of the European Border and Coast Guard Agency, Frontex. These changes attempt to step up the number of deportations from the EU by lowering legal standards, increasing the ability of the state to track, detect and apprehend individuals, and by providing Frontex with an expanded budget, new powers and more personnel for carrying out expulsions. The risks for fundamental rights and democratic accountability posed by these developments are significant.

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<https://www.consilium.europa.eu/media/21717/euco-conclusions-25-26-june-2015.pdf>

<sup>31</sup> European Commission, 'EU Action Plan on return', COM(2015) 453 final, 9 September 2015, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2015:453:FIN>

<sup>32</sup> The Commission's proposals were divided into two categories, each with five sub-headings. The first category was "increasing the effectiveness of the EU system to return irregular migrants". This covered enhancing voluntary return, stronger enforcement of EU rules, enhanced sharing of information to enforce return, strengthening the role and mandate of Frontex, and an integrated system of return management.

The second category was "enhancing cooperation on readmission with countries of origin and transit". This covered effective implementation of readmission commitments, concluding ongoing and opening new negotiations on readmission agreements, high-level political dialogues on readmission, reintegration support and capacity building, increasing EU leverage on return and readmission.

<sup>33</sup> European Commission, 'Communication on a more effective return policy in the European Union – a Renewed Action Plan', COM(2017) 200 final, 2 March 2017, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017DC0200>

## A revamped Returns Directive: enforcement versus rights

The legal framework for forcibly removing people from the EU is in large part governed by the 'Returns Directive'. This came into force in 2008, despite significant opposition from civil society organisations and citizens, and sets out "common standards and procedures to be applied in Member States for returning illegally staying third-country nationals."<sup>34</sup> Negotiations are ongoing over changes to that Directive. The aim is to enable the swifter deportation of a greater number of individuals. The means for doing so is the elimination or reduction of individual rights.

In September 2017 the European Commission published a recommendation calling for "a more effective implementation" of the 2008 Directive in order to step up the number of forced removals. The move was condemned by over 90 civil society organisations (including *Statewatch*), who accused the Commission of "encouraging member states to interpret the directive in a way that would allow for the lowest possible safeguards to be applied, abandoning positive advances made by a number of member states."

Despite the Recommendation providing no evidence to back up claims that the harsher measures it proposed would be effective,<sup>35</sup> the Commission ploughed ahead. A year later it proposed a new ('recast') Returns Directive seeking to turn many of its recommendations into law, in order to address "the challenges related to the effective return of irregular migrants."<sup>36</sup>

There was no public consultation prior to publication, and the Commission's failure to produce an impact assessment led the

European Parliament's civil liberties committee (LIBE) to produce its own. It drew five conclusions on the proposal:

- there is no clear evidence that it would lead to more effective returns of irregular migrants;
- it complies with the principle of subsidiarity, but raises proportionality concerns;
- it would likely breach fundamental rights (for example, through increased use of detention<sup>37</sup>);
- it would generate substantial costs for member states and the EU;
- it raises questions of coherence with other EU legislation, especially pending legislation [such as measures that are part of the Common European Asylum System].<sup>38</sup>

The initial parliamentary *rapporteur* for the file, Green MEP Judith Sargentini,<sup>39</sup> said in her draft report on the proposal that attempts to increase the effectiveness of the returns system should only be pursued if "the steps taken in that direction are accompanied by unambiguous and enforceable fundamental rights safeguards."<sup>40</sup> The Council, meanwhile, largely sought to maintain the Commission's position, with an occasional preference for even harsher measures and some legal fine-tuning. Frontex also provided input to the Council's negotiations, through a January 2019 'non-paper'.<sup>41</sup> Despite its technical tone, noting how certain provisions could contribute to the agency's tasks, it clearly favours a coercive approach.

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<sup>34</sup> 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, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32008L0115>. Member states retain the possibility to expel non-EU citizens on the basis of other legislation (see Article 2(2)).

<sup>35</sup> For example, while detention is widely-recognised to be inherently harmful to individuals' physical and mental well-being, the 2017 Recommendation describes it as "an essential element for enhancing the effectiveness of the Union's return system". Without a shred of evidence, the paper claimed the maximum duration of detention set out in the Directive (18 months) "is needed to complete the return procedure successfully... short periods of detention are precluding effective removals". See: Commission Recommendation on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council, C(2017) 1600, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32017H0432>

<sup>36</sup> Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), COM(2018) 634 final, 12

September 2018, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0634>

<sup>37</sup> 'Recast Return Directive Foresees More Immigration Detention', *International Detention Coalition*, 9 October 2018, <https://idcoalition.org/news/recast-return-directive-foresees-more-immigration-detention/>

<sup>38</sup> European Parliamentary Research Service, 'The proposed Return Directive (recast) – Substitute Impact Assessment', February 2019, pp.18-19, [http://europarl.europa.eu/RegData/etudes/STUD/2019/631727/EPRS\\_STU\(2019\)631727\\_EN.pdf](http://europarl.europa.eu/RegData/etudes/STUD/2019/631727/EPRS_STU(2019)631727_EN.pdf)

<sup>39</sup> Following the May 2019 European Parliament elections, Sargentini was replaced by another Green, Tineke Strik.

<sup>40</sup> Judith Sargentini, Draft report on the proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals, 16 January 2019, [http://www.europarl.europa.eu/doceo/document/LIBE-PR-632950\\_EN.pdf](http://www.europarl.europa.eu/doceo/document/LIBE-PR-632950_EN.pdf)

<sup>41</sup> Frontex, 'Non-Paper: Recast proposal of the Return Directive', 8 January 2019, <http://www.statewatch.org/news/2019/sep/eu-frontex-returns-directive-non-paper-1-19.pdf>

Article	Content	Comparison with Directive 2008/115/EC
6	The risk of absconding	New article laying out 16 “objective criteria” that states must use to establish a risk of absconding, including four criteria that states are obliged to interpret as implying such a risk.
7	The obligation to cooperate	New article obliging states to impose an obligation on third-country nationals to cooperate with authorities at all stages of return procedures, including through the provision of evidence for identification, information on countries of transit and to request travel documents from the country of return.
9	Voluntary departure	Previously Article 7 in the 2008 Directive, the minimum seven-day period for voluntary departure is erased, with only a 30-day maximum specified. Furthermore, <i>permission</i> for States to refrain from granting a period of voluntary departure is changed to an <i>obligation</i> where a risk of absconding is identified, an application for legal stay is manifestly unfounded or fraudulent, or where there is a risk to public policy, public security or national security.
13	Entry bans	Previously Article 11. Member states may now impose entry bans even where no return decision has been issued but “illegal stay is detected in connection with border checks carried out at exit”.
14	Return Management	New article requiring states to “set up, operate, maintain and further develop a national return management system” for processing information on the management of individual cases and return-related procedures. The systems must be technically compatible with Frontex’s central system.
16	Remedies and appeals	Amends Article 13 of the 2008 Directive by limiting applicants for international protection to one opportunity to appeal return decisions if they have already pursued judicial review within the asylum process. Appeals would have to be lodged within five days following a return decision. They would have a suspensive effect on removal proceedings if they concern a potential risk of refoulement, but only where fresh evidence is presented.
18	Detention	Previously Article 15, it adds “the third-country national concerned poses a risk to public policy, public security or national security” as a third justification for detention in addition to the two existing grounds: hampering the preparation of the removal process or risk of absconding, to be determined in accordance with Article 6. It removes the word “only” from the list of provisions, making the list non-exhaustive. It also sets a new ‘minimum maximum’ period of detention of three months.
22	Border procedure	New article on return procedures following negative decisions on applications for international protection at EU borders. It does not allow for a period of voluntary departure unless the individual holds a valid travel document. A maximum of 48 hours is permitted to launch an appeal against a negative asylum decision, which will have suspensive effect where new evidence demonstrates a risk of <i>refoulement</i> , or if the asylum decision was not subject to judicial review. Permits four months of detention to facilitate returns, which may be extended.

Table 1: Comparison of the main proposed changes to the 2008 Returns Directive

## The new proposal: coercion and control

The Commission's proposal put forward a number of measures aimed at reducing or eliminating existing rights and safeguards in order to increase the number of deportations. Key issues include an expanded use of detention through the introduction of new criteria for assessing the risk of absconding; an increase in the use of entry bans; the introduction of an "obligation to cooperate" on the part of those subject to return proceedings; closer links between asylum and return procedures; limiting opportunities for 'voluntary' return; and cutting opportunities for appeals against negative decisions.

To assess whether an individual poses a risk of absconding the proposal put forward a new, non-exhaustive list of 16 factors, four of which must be taken by national authorities as definitively indicating such a risk. This would make it easier for states to justify detention, refuse the option of so-called voluntary return and result in the issuance of a greater number of entry bans.<sup>42</sup> Although the proposed list may not be accessible, precise or foreseeable enough to meet the necessary legal standards,<sup>43</sup> the Council would maintain and extend a number of the criteria<sup>44</sup> and would allow member states to use "additional objective criteria in their national legislation".<sup>45</sup>

The proposal would also extend the maximum permitted period of detention in two EU member states. The upper limit remains unchanged – 18 months, made up of a six-month period, extendable by up to 12 months. However, the proposal would prohibit a national maximum period of detention of less than three months.<sup>46</sup> This would oblige Spain and Portugal to increase their current 60-day time limits on detention.<sup>47</sup> There is no evidence to suggest that shorter detention periods hinder removals,<sup>48</sup> but both Frontex and the Council are in favour of the changes.<sup>49</sup>

The possibility for issuing entry bans would also be expanded by the proposal. An issue of particular concern is their automatic issuance to individuals whose asylum applications have been rejected; because the proposal does not allow for the consideration of future changes of circumstances in the country of return, the ability to claim asylum may be compromised.<sup>50</sup> In order to improve the enforcement of entry bans handed down in accordance with the Returns Directive, the proposal would also make it mandatory for states to enter a corresponding alert on refusal of entry or stay into the Schengen Information System (see 'Databases for deportations').

The proposal would also introduce an "obligation to cooperate" on the part of those subject to removal proceedings. Frontex considered this provision essential to "make returnees more responsible", adding that "it might increase the overall efficiency

<sup>42</sup> Proposed Article 6. The criteria used by member states to determine a risk of absconding must include at least the following (**bold highlights**: the criteria that must be considered as implying a risk of absconding):

- lack of documentation proving the identity;
- lack of residence, fixed abode or reliable address;
- lack of financial resources;
- illegal entry into the territory of the Member States;
- unauthorised movement to the territory of another Member State;
- explicit expression of intent of non-compliance with return-related measures applied by virtue of this Directive;
- being subject of a return decision issued by another Member State;
- non-compliance with a return decision, including with an obligation to return within the period for voluntary departure;
- non-compliance with the requirement of Article 8(2) to go immediately to the territory of another Member State that granted a valid residence permit or other authorisation offering a right to stay;
- not fulfilling the obligation to cooperate with the competent authorities of the Member States at all stages of the return procedures, referred to in Article 7;
- existence of conviction for a criminal offence, including for a serious criminal offence in another Member State;
- ongoing criminal investigations and proceedings;
- **using false or forged identity documents, destroying or otherwise disposing of existing documents, or refusing to provide fingerprints as required by Union or national law;**
- **opposing violently or fraudulently the return procedures;**
- **not complying with a measure aimed at preventing the risk of absconding referred to in Article 9(3);**
- **not complying with an existing entry ban.**

<sup>43</sup> European Court of Human Rights, *Khlaifia and others v. Italy*, application no. 16483/12, paras. 91-92, <http://hudoc.echr.coe.int/eng?i=001-157277>; CJEU, *Al Chodor*, C-528/15, 15 March 2017, para. 38, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62015CJ0528>; Maria Diaz Crego, 'Recasting the Return Directive', *op. cit.*; Fundamental Rights Agency,

'The recast Return Directive and its fundamental rights implications', 10 January 2019, <https://fra.europa.eu/en/opinion/2019/returns-recast>; European Parliamentary Research Service, 'The proposed Return Directive (recast) – Substitute Impact Assessment', *op. cit.*

<sup>44</sup> Council of the EU, Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast) – Partial general approach, document 10144/19, 13 June 2019, <https://data.consilium.europa.eu/doc/document/ST-10144-2019-INIT/en/pdf>. The Council proposed deleting a number of the Commission's proposed criteria, such as lack of documentation, residence or financial resources. However, other criteria are extended, for example through the addition of "apprehension or interception in connection with irregular crossing of a Member State's external borders" to "illegal entry into the territory of the Member States"; or "unauthorised movement to the territory of another Member State" being bolstered by "including following a transit through a third country or the attempts to do so."

<sup>45</sup> Council partial general approach, proposed Article 6(1)

<sup>46</sup> European Commission, proposed Article 18(5): "Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. Each Member State shall set a maximum period of detention of not less than three months and not more than six months."

<sup>47</sup> Report of the fact-finding mission by Special Representative of the Secretary General on migration and refugees, to Spain, 18-24 March 2018, 3 September 2018, <http://www.statewatch.org/news/2018/sep/coe-sr-migration-report-on-spain-mission-3-18.pdf>; 'Portugal Immigration Detention Profile', *Global Detention Project*, <https://www.globaldetentionproject.org/countries/europe/portugal>

<sup>48</sup> In 2017, Spain had a return rate of 37.2%. States using the maximum permissible detention period had return rates either far lower or only marginally higher than this: the Czech Republic had a return rate of 11.2%, Belgium of 18.2%, Greece of 39.5% and Germany of 46.3%. Maria Diaz Crego, 'Recasting the Return Directive', *European Parliament Briefing*, June 2019, p.6, [http://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637901/EPRS\\_BRI\(2019\)637901\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637901/EPRS_BRI(2019)637901_EN.pdf)

<sup>49</sup> Council partial general approach, proposed Article 19(1)

<sup>50</sup> Maria Diaz Crego, *op. cit.*



## No to the outrageous Directive !

[www.outrageousdirective.org](http://www.outrageousdirective.org)

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of return”.<sup>51</sup> Failing to cooperate is one factor to be considered in assessments of the risk of absconding (meaning that lack of compliance might lead to detention), while the provision of “reintegration assistance” is dependent on compliance with the obligation.<sup>52</sup> However, while the proposal states that “Member States shall inform the third-country nationals about the consequences of not complying with the obligation” to cooperate with return procedures, there is no concrete list of what the potential consequences may be.

While the Returns Directive aims to enforce these obligations upon individuals who are subject to removal orders, the EU now also has the possibility to sanction would-be travellers to the EU who are citizens of states considered uncooperative with the EU’s deportation regime. The recently-revised Visa Code includes a requirement for the European Commission to monitor the cooperation of non-EU states with regard to return and readmission. If their level of cooperation is not considered sufficient, it will be possible to take measures against citizens of that state: raising visa fees, requiring more documents to

accompany visa applications, or slowing down processing times and/or limiting the issue of multiple-entry visas as part of a ‘carrot and stick’ approach.<sup>53</sup>

Asylum and return proceedings would also be more closely linked by the proposal on the Returns Directive, which would require the immediate issuance of an expulsion order following “a decision not granting a third-country national refugee status or subsidiary protection status in accordance with... [the Asylum Qualification Regulation],”<sup>54</sup> a separate piece of legislation that has been under negotiation since 2016. The Sargentini report proposed erasing the entire paragraph for being “disproportionate and counterproductive”, highlighting the need for a “clear distinction” between the legal regimes on asylum and persons subject to removal measures.” Were return decisions to be issued immediately, it would create “confusion over the person’s right to remain on the territory both for the individual concerned and national and local authorities,” at a time when they may have an appeal pending.<sup>55</sup>

On this point, however, the proposal seeks to limit applicants for international protection to one opportunity to appeal return decisions, if they have already pursued judicial review within the asylum process. Appeals would have to be lodged within five days following a return decision. In cases concerning a potential risk of *refoulement*, they would have a mandatory suspensive effect on removal proceedings, although this safeguard would only apply in cases where fresh evidence was presented.

The Sargentini report emphasised that appeals must always have a suspensive effect and that the administrative procedures foreseen by the proposal would not meet the standards necessary to qualify as an effective judicial remedy. As the UK Supreme Court found with regard to the policy of ‘deport first, appeal later’, which applied to foreign nationals convicted of a criminal offence in the UK, “an appeal against a decision affecting a person’s family and private life can only effectively be brought from within the UK, and so only an in-country appeal is an effective remedy in these circumstances.”<sup>56</sup> Sargentini also proposed abolishing the time limit of five days for lodging an appeal against a return decision handed down with a decision rejecting an international protection application, arguing that it contravenes EU case law.<sup>57</sup>

Voluntary return procedures were another target of the Commission’s proposal. The Directive uses the phrase “voluntary return” to refer to compliance with the removal procedure. This is often a last resort to avoid detention, making “voluntary” a somewhat misleading term, but the associated procedures are preferable to detention and forced return.<sup>58</sup> The Commission proposes removing the minimum period for departure – which

<sup>51</sup> Ibid.

<sup>52</sup> Commission proposal, proposed Article 14

<sup>53</sup> Steve Peers, ‘The revised EU visa code: controlling EU borders from a distance’, 17 April 2019, <https://eulawanalysis.blogspot.com/2019/04/the-revised-eu-visa-code-controlling-eu.html>

<sup>54</sup> Commission proposal, proposed Article 8(6)

<sup>55</sup> Sargentini report, Amendment 62

<sup>56</sup> It should be noted that the UK is not bound by the 2008 Returns Directive; nor will it be bound by any future recast of the legislation. Nevertheless, the ruling makes clear the impossibility of there being an effective remedy for persons already removed from the territory of the

state in which they wish to appeal a judicial decision. See: Bronwen Jones, ‘The End of ‘Deport First, Appeal Later’: The Decision in Kiarie and Byndloss’, *Border Criminologies*, 21 March 2018,

<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2018/03/end-deport-first>

<sup>57</sup> Sargentini report, Amendment 10

<sup>58</sup> It might be argued that both “voluntary” and “return” are euphemisms given the fact that ‘voluntary return’ ultimately relies upon the threat of the use of force to be effective. See: Clara Lecadet, ‘Deportation, nation state, capital’, op. cit. fn. 16

could lead to a limit of a single day, or in any case too little time to feasibly arrange departure.

The proposal also limits member states' discretion in granting any voluntary departure period at all. Currently, they *may* grant a period of less than seven days or refrain from granting any period if there is a risk of absconding, an application for legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person in question poses a risk to public policy, public security or national security.<sup>59</sup> Under the proposal, member states would be prohibited from granting any period of voluntary departure when faced with the existence of any of these three grounds, which may be interpreted broadly.

## Fewer rights, more removals

A key mantra for EU officials since the onset of the 'migration crisis' in 2015 has been that the EU must "give protection to those in need" whilst removing "those who have no right to stay in the EU."<sup>60</sup> If this is the case, the wildly differing asylum recognition rates in EU and Schengen member states for many nationalities suggest that reforming national asylum systems should be prioritised.<sup>61</sup> However, it is measures to enforce removals that have made most progress through the EU's legislative process.

The recast of the Returns Directive aims to make expulsion easier by removing rights and safeguards – described by the Commission as "legal and practical obstacles to return".<sup>62</sup>

Even from a viewpoint that agrees with the overall aim of attempting to increase the number of deportations from the EU, the proposal appears counterproductive – alternatives to coercion exist and have been demonstrated to be "more effective in terms of ensuring respect for human rights, compliance and cost efficiency", according to the Council of Europe's Steering Committee on Human Rights.<sup>63</sup> The disregard for these arguments – not to mention a seeming indifference to the negative effects the proposals would have for individual rights – suggest that the proposal is a political exercise to appease anti-migrant rhetoric rather than a serious exercise in policy-making.

Nevertheless, negotiations are ongoing. In June, the new *rapporteur* for the file, Green MEP Tineke Strik, published a report on the implementation of the Directive as it stands. It criticises the Commission's emphasis, since 2017, on punitive enforcement measures, at the expense of alternatives that have not been fully explored or implemented, despite the 2008 legislation providing for them. It remains to be seen whether the report will be adopted by the Parliament.<sup>64</sup>

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<sup>59</sup> Proposed Article 7(4)

<sup>60</sup> European Commission press release, 'European Agenda on Migration: Commission presents new measures for an efficient and credible EU return policy', 2 March 2017, [https://europa.eu/rapid/press-release\\_IP-17-350\\_en.htm](https://europa.eu/rapid/press-release_IP-17-350_en.htm)

<sup>61</sup> For example, in the last quarter of 2019, the recognition rate in first instance asylum applications ranged from 2% in Portugal to 91% in Switzerland. See: Eurostat, 'Decisions on asylum applications', [https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum\\_quarterly\\_report#Decisions\\_on\\_asylum\\_applications](https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report#Decisions_on_asylum_applications)

<sup>62</sup> Commission Recommendation on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council, C(2017) 1600, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32017H0432>

<sup>63</sup> The Steering Committee has detailed a series of measures that seek to "build trust in asylum and migration procedures", "uphold individualized

case management services", "provide clear and precise information about rights, duties and consequences of non-compliance", and "ensure access to legal assistance from the beginning and throughout the process". Their report cites examples such as temporary residence permits, case-worker support, family-based accommodation, open or semi-open centres or designated residence sites, regular reporting obligations, and return counselling among over 250 alternatives to detention identified from 60 countries. See: 'Trust and support key to effective alternatives to detention', *op. cit.*; 'There Are Alternatives', *International Detention Coalition*, <https://idcoalition.org/publication/there-are-alternatives-revised-edition/>

<sup>64</sup> 'Damning draft report on the implementation of the Return Directive', *Statewatch News*, 15 June 2020, <https://statewatch.org/news/2020/jun/ep-returns-report.htm>



## Databases for deportations

Databases and networked information systems for use by police, judicial and immigration authorities have been key to the construction of the Schengen area and the EU project to create an 'Area of Freedom, Security and Justice'. In recent years, attention has turned to expanding existing systems and introducing new ones as part of a broader project to ensure the biometric registration of almost all non-EU nationals in the Schengen area. Furthermore, under the moniker of "interoperability", the data held in these systems is being interconnected and used in new and controversial ways.

These databases have a key role in the ongoing efforts to step up deportations. As the Commission put it in 2017: "The apprehension, identification and monitoring of irregular migrants are preconditions for effective return," requiring "systematic exchange of information" within and between member states and with EU agencies and institutions. Changes introduced in recent years or currently under discussion seek to assist in detecting those with no legal right to remain and ensuring that, once removed, they 'get out and stay out'. In an attempt to further harmonise and coordinate state action, Frontex has also been given an increasing role in the design and operation of databases used to facilitate expulsions, examined in the section 'A centralised deportations database'.

### Identification and apprehension

EU systems already play a significant role in the storage of data on migrants so that they can be identified and/or apprehended. However, changes proposed and introduced in recent years will see existing databases reformed and new ones introduced to facilitate these processes. Three systems are key to this goal: the Common Identity Repository, the Entry/Exit System and Eurodac.

The Common Identity Repository (CIR) was established by 2019 legislation on the "interoperability" of information systems and is supposed to be in use by 2023. It will be a centralised database of non-EU citizens' identity data, with a capacity of up to 300 million files. Each file will contain basic biographic data – name, nationality, date of birth and information on travel documents – and biometrics – fingerprints, a facial image, or both.<sup>65</sup> This data will be extracted from five existing and forthcoming EU databases

holding data on border crossings, visas, travel authorisations, asylum applications, irregular migrants, and criminal convictions.<sup>66</sup> The primary purpose of the CIR is to facilitate identity checks by national law enforcement authorities, simplifying the process of identifying people who may no longer have the right to remain in the Schengen area.

A report published in November 2019 by *Statewatch* and the *Platform for International Cooperation on Undocumented Migrants (PICUM)* argued that the interoperability initiative represents a fundamental shift in the way personal data is processed at EU level – by taking data gathered for one purpose and using it for another, it undermines the core data protection principle of purpose limitation.<sup>67</sup> The report also highlighted four key problems with the CIR:

- while the legislation contains anti-discrimination safeguards, they are extremely weak and the existence of a new centralised database may encourage racial profiling for identity checks;
- the proportionality of allowing access to the CIR for the broad purpose of "ensuring a high level of security" is dubious – it suggests that non-EU nationals *a priori* constitute a security threat, yet there is no evidence to suggest that they are more likely than EU nationals to be engaged in activities threatening to public security;
- the legislation does not precisely circumscribe the specific offences or legal thresholds that could justify access to the database, contravening EU case law; and
- depending on the way member states implement EU rules on data protection in the criminal justice and law enforcement sector, the CIR could be used to undermine 'firewalls' between public services and immigration enforcement.<sup>68</sup>

It remains to be seen whether the authorities can implement the interoperability project by 2023, given the technical and financial challenges involved.<sup>69</sup> If the system is set up and works as intended, it will provide a powerful new tool for authorities hoping to detect 'irregular' migrants, amongst a variety of other functions.<sup>70</sup> It seems that EU governments and a majority of MEPs have decided that undermining basic data protection

<sup>65</sup> European Commission, 'A Renewed Action Plan', COM(2017) 200 final, p.5, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017DC0200>

<sup>66</sup> Eurodac, VIS, EES, ETIAS and ECRIS-TCN. The ETIAS (European Travel Information and Authorisation System) applies to be people who do not need visas and is essentially a European version of the United States' ESTA. It is a profiling tool to examine whether individuals are a "security, migration or health" risk and will only contain biographic data. Legislation was approved in 2018 and the system is currently under construction. The ECRIS-TCN (European Criminal Records Information System for Third-Country Nationals) is a database holding identity data – biographic and biometric data, primarily fingerprints and potentially photographs – of non-EU citizens who have been convicted in one of the Member States. The database will be used to locate previous convictions, while data on the convictions will still be held at national level. Legislation was approved in early 2019 and the system is also currently under construction.

<sup>67</sup> The purpose limitation principle, as defined in Article 5(1)(b) of the General Data Protection Regulation, states that personal data must be

"collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes".

<sup>68</sup> See 'Interoperability and undocumented migrants: fundamental rights and legal implications' in 'Data Protection, Immigration Enforcement and Fundamental Rights', *Statewatch/PICUM*, November 2019, pp.31-38

<sup>69</sup> In autumn 2019, it was reported that the German interior ministry had "doubts that the project can be implemented by 2023 as originally planned," due to "resource bottlenecks and overloading of the authorities involved," as well as problems in recruiting specialist staff. The response from EU institutions has been to try to set up central coordination mechanisms. See 'Implementation of Interoperability' in the article 'JHA Council, 7-8 October', *Statewatch News*, 7 October 2019, <http://www.statewatch.org/news/2019/oct/eu-jha-council-7-8-oct-19.htm>

<sup>70</sup> A further purpose of the CIR is to facilitate law enforcement agencies' access to data held in migration databases. The rules on 'interoperability' also establish a 'Multiple-Identity Detector' aimed at automated the process of detecting non-EU nationals suspected of using false identities through the bulk processing of biometric and biographic data.

principles and increasing the risk of racial profiling are a price worth paying to achieve that end.

The Entry/Exit System (EES, intended to come into use by 2021) will establish a registry of all border crossings made by non-EU citizens entering the Schengen area with permission, replacing the ink-on-paper charm of stamps in passports with a centralised database. Long-planned and initially proposed in 2013,<sup>71</sup> the project was temporarily shelved before being re-introduced in 2015.<sup>72</sup> The EES will contain both biometric and biographic data and will automatically calculate how long an individual is allowed to remain in the Schengen area. If an exit is not recorded in an individual's file within the required time limit, their details will be transmitted to the relevant national authorities so that they can "adopt appropriate measures."<sup>73</sup> The system also has a number of other purposes, including the possibility of access to the database for law enforcement agencies.

It seems likely that making full use of the information on 'overstayers' held in the EES would require significant further investment in the enforcement personnel and infrastructure needed to track down and expel people,<sup>74</sup> an issue that does not seem to have been fully taken into account by its proponents. The Commission's impact assessment estimated that the system would allow an increase of 33% in the number of return decisions enforced by 2026, but there is no analysis of whether national authorities would be able to cope with the extra workload.<sup>75</sup> Indeed, the proportionality of the system itself is also questionable, given the estimate that just one in every 1,000 people who legally enter the Schengen area will 'overstay'.<sup>76</sup> Nevertheless, the combined data held in the EES and the Visa

Information System (VIS, which holds biometric and biographic data on all short-stay visa applicants), will allow national authorities to "identify any undocumented irregular migrant found within the territory that crossed the external border legally." Whether "this will in turn facilitate the return process," as the Commission has asserted, remains to be seen.<sup>77</sup>

The Eurodac database is also being transformed to facilitate the detection of people who may be expelled from the EU. Initially set up solely to assist with implementing the 'Dublin' rules on determining the state responsible for processing an application for international protection,<sup>78</sup> its purposes have already been altered once, through controversial amendments approved in 2013 that opened the system up to law enforcement agencies.<sup>79</sup> Currently, the central database holds the fingerprints of asylum seekers (known as 'Category 1', whose data is stored for ten years) and individuals apprehended in connection with irregular border-crossings ('Category 2', whose data stored for 18 months).<sup>80</sup>

Proposals put forward in May 2016 would, if approved, alter the system further, adding a host of new data to be used for new purposes. Alongside fingerprints, Eurodac would also store biographic information and facial images, to "prime the system for searches to be made with facial recognition software in the future," provided the "technical feasibility" of doing so can be confirmed. The age limit for data collection would be lowered to six years old (the limit is currently 14). Crucially, under the proposals, data would be stored for five years on "third-country nationals or stateless persons found illegally staying in a member state" (also known as 'Category 3'). Data on this group is

<sup>71</sup> European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing an Entry/Exit System (EES), COM(2013) 095 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52013PC0095>

<sup>72</sup> The law was approved in 2017. See: Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32017R2226>

<sup>73</sup> Article 12, Regulation 2017/2226 establishing an Entry/Exit System.

<sup>74</sup> The next EU budget is likely to significantly increase the money available for new surveillance systems, detention centres and communications infrastructures operated by border and immigration agencies. From 2007-13, the External Borders Fund had a budget of €1.7 billion. It was replaced by the Internal Security Fund – Borders and Visa for the 2014-20 period, with a budget of €3.8 billion. For the 2021-27 period, the Commission's proposal for an Integrated Border Management Fund put forth a budget of €9.3 billion. See: European Commission, 'EU budget: Commission proposes major funding increase for stronger borders and migration', 12 June 2018, [https://europa.eu/rapid/press-release\\_IP-18-4106\\_en.htm](https://europa.eu/rapid/press-release_IP-18-4106_en.htm). On previous and ongoing expenditure, see section 2.3 of the report 'Market forces: the development of the EU security-industrial complex', *Statewatch/TNI*, August 2017, pp.19-23, <http://statewatch.org/analyses/marketforces.pdf>.

<sup>75</sup> It is foreseen that 16% of overstayers will be identified by the EES by 2026, up from 5% estimated for 2020, which it is estimated will bring significant financial and efficiency benefits. However, while the "saved cost of not having to increase immigration enforcement services to identify more overstayers" is estimated, no calculations are included for the extra workload that may be generated by knowing the identity of more overstayers and of enforcing the estimated 33% additional return decisions that will be generated by 2026. See: European Commission, Impact Assessment Report on the establishment of an EU Entry Exit System, SWD(2016) 115, [https://eur-lex.europa.eu/legal-](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016SC0115)

[content/EN/TXT/?uri=CELEX:52016SC0115](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016SC0115). The latter point regarding workload has also been remarked on elsewhere: Dr Julien Jeandesboz et al., 'Smart Borders Revisited: An assessment of the Commission's revised Smart Borders proposal', October 2016, p.30, [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571381/IPOL\\_STU\(2016\)571381\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571381/IPOL_STU(2016)571381_EN.pdf)

<sup>76</sup> Under the heading 'Impact for Immigration Enforcement' in Annex 11, the Commission's impact assessment relies upon a "proportion of overstayers" of 0.1% (1 in every 1,000). This in itself calls into question the proportionality of introducing such a system, given that it is foreseen it will include anywhere up to 83.5 million people, of whom just 83,500 would be overstayers. It is not clear how the 0.1% squares with the suggested "number of overstayers – medium value" of 250,000, and whether this value is constant or cumulative. See: SWD(2016) 115, op. cit.

<sup>77</sup> Proposal for a Regulation of the European Parliament and of the Council establishing an Entry/Exit System (EES), COM(2016) 194 final, 6 April 2016, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0194>

<sup>78</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32013R0604>

<sup>79</sup> 'European Parliament's Civil Liberties Committee adopts proposal giving law enforcement authorities and Europol access to Eurodac', *Statewatch News*, 19 December 2012, <http://database.statewatch.org/article.asp?aid=32044>

<sup>80</sup> Article 9 and Article 14, Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac', <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013R0603>

currently only compared to that held on categories 1 and 2, but not held in the database; by storing it, Eurodac will be transformed into a database “for wider migration purposes.”<sup>81</sup>

The aim of this shift is to “accelerate the procedures for the identification and re-documentation” of individuals initially apprehended in another member state and “allow identifying country of transit of irregular migrants, hence facilitating their readmission in those countries.”<sup>82</sup> The proposals have been heavily criticised by legal experts and NGOs. Steve Peers, Professor of Law at the University of Essex, argued that the proposals were part of the “Orbanisation of EU asylum law”.<sup>83</sup> The *European Association for the defence of Human Rights (AEDH)* accused the Commission of promoting “a security logic of control in its management of migratory flows.”<sup>84</sup> The *European Council on Refugee and Exiles (ECRE)* argued that transforming Eurodac into a system “to control irregular migration and identify migrants for return is not justified on the basis of the evidence provided,” and is “an unlawful interference with the rights to privacy and data protection.”<sup>85</sup> Negotiations on the proposals are ongoing.

## Expulsion and exclusion

The Commission’s Renewed Action Plan on return noted that member states were using the Visa Information System “for identification of irregular migrants to an increasing extent,” but visa application data was not usually accepted as proof of identity by the authorities of countries to which EU member states were attempting to deport people. Thus, as part of a wide-ranging plan to revamp the system – including by introducing an automated profiling system, lowering the age for data collection from 12 to

six years old, as with Eurodac, and introducing biometrics into long-stay visas – proposals were put forward to store a copy of the biographic data page of every short-stay visa applicant’s travel document in the central VIS database.<sup>86</sup>

Under the proposed new rules, “migration and return authorities... would be able to retrieve this [centrally-stored] copy, subject to strict access rules,” avoiding the need to make contact with the embassy or consulate at which the application was made, where copies of travel documents are currently stored. The intention is clear: “to help identify and return irregular migrants.”<sup>87</sup> The VIS would thus become a system not only focused on ensuring the ‘right’ people enter the Schengen area, but one also aiming to get the ‘wrong’ people out.

The necessity, proportionality and desirability of the proposed changes to the VIS have been questioned by data protection and fundamental rights experts.<sup>88</sup> The Fundamental Rights Agency highlighted the need for safeguards over the sharing of data from the VIS with non-EU countries for the purposes of preparing an individual’s expulsion.<sup>89</sup> An issue overlooked in these analyses is that the use of the VIS for ‘return’ purposes is not one of the primary purposes of the system. As a secondary (or “ancillary”) objective,<sup>90</sup> it should not determine the data to be stored in the system – but this is the only reason that copies of the biographic data page of applicants’ travel documents will be stored. As with Eurodac, negotiations on the proposal are ongoing, but neither the Council<sup>91</sup> nor Parliament<sup>92</sup> position fundamentally alters the provisions related to return proceedings.

Perhaps the most extensive changes to an existing EU database are those being made to the Schengen Information System (SIS), for which renewed legislation was approved in 2018.<sup>93</sup> The

<sup>81</sup> European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the establishment of ‘Eurodac’, COM(2016) 272 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0272>

<sup>82</sup> The proposal would also lower the age limit for data collection, for all three categories of person, from 14 to six years of age. New categories of data are also to be stored, including facial images. This, the Commission noted in the See: Proposal for a Regulation of the European Parliament and of the Council on the establishment of ‘Eurodac’, COM(2016) 272 final, 4 May 2016, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0272>

<sup>83</sup> Steve Peers, ‘The Orbanisation of EU asylum law: the latest EU asylum proposals’, *EU Law Analysis*, 6 May 2016, <https://eulawanalysis.blogspot.com/2016/05/the-orbanisation-of-eu-asylum-law.html>

<sup>84</sup> ‘La réforme d’EURODAC : Renforcement du contrôle des personnes plutôt qu’un système d’asile plus équitable’, *AEDH*, 30 November 2016, <http://www.aedh.eu/la-reforme-deurodac-renforcement-du-controle-des-personnes-plutot-quun-systeme-dasile-plus-equitable-2/>

<sup>85</sup> ‘ECRE Comments on the Commission Proposal to recast the Eurodac Regulation’, July 2016, <https://www.ecre.org/wp-content/uploads/2016/07/ECRE-Comments-Eurodac-proposal.pdf>

<sup>86</sup> See: ‘All visa applicants to be profiled and children fingerprinted for revamped Visa Information System’, *Statewatch News*, 17 August 2018, <http://www.statewatch.org/news/2018/aug/vis-profiling-child-fingerprinting.htm>; ‘Visa Information System: Commission proposals sneak in mandatory biometrics for long-stay visas’, *Statewatch News*, 20 August 2018, <http://www.statewatch.org/news/2018/aug/vis-fingerprints-long-stay-visas.htm>; ‘Visa Information System: child fingerprinting and police access proposals criticised by data protection authorities’, *Statewatch News*, 21 August 2019, <http://www.statewatch.org/news/2019/jan/eu-vis-scg-letter.htm>

<sup>87</sup> European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EC) No 767/2008, COM(2018) 302 final, 16 May 2018, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0302>

<sup>88</sup> ‘Visa Information System: child fingerprinting and police access proposals criticised by data protection authorities’, *Statewatch News*, 21 January 2019, <http://www.statewatch.org/news/2019/jan/eu-vis-scg-letter.htm>

<sup>89</sup> Fundamental Rights Agency, ‘The revised Visa Information System and its fundamental rights implications’, 30 August 2018, p.50, [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2018-opinion-visa-information-system-02-2018\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-opinion-visa-information-system-02-2018_en.pdf)

<sup>90</sup> European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 767/2008...’, COM(2018) 302 final, 16 May 2018, <http://statewatch.org/news/2018/may/eu-com-vis-proposal-regulation-com-18-302.pdf>

<sup>91</sup> General Secretariat of the Council, ‘Mandate for negotiations with the European Parliament’, 15726/18, 19 December 2018, <http://www.statewatch.org/news/2019/jan/eu-council-new-vis-regulation-negotiating-position-15726-18.pdf>

<sup>92</sup> European Parliament legislative resolution of 13 March 2019, [https://www.europarl.europa.eu/doceo/document/TA-8-2019-0174\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-8-2019-0174_EN.pdf)

<sup>93</sup> Two are relevant for the purposes of this discussion: Regulation (EU) 2018/1860 of the European Parliament and of the Council of 28 November 2018 on the use of the Schengen Information System for the return of illegally staying third-country nationals, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018R1860>; and Regulation (EU) 2018/1861 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of

majority of alerts on persons held in the system have long been on “third country nationals to be refused entry or stay into the Schengen area,”<sup>94</sup> and one key aim of the new rules is to increase the number of entry bans stored. The system will also be more extensively used for enforcing expulsion orders.

The inclusion in the SIS of return decisions was for many years dependent on differing national laws, meaning they were not systematically entered in the system. In its proposal for the new SIS rules, the Commission argued that this meant individuals could “avoid or prevent the enforcement of an existing [return] decision by simply moving to another member state,” where the authorities might apprehend the person in question, but be unaware of the existing decision. In such cases “the apprehending member state would therefore need to re-launch return procedures from scratch, further prolonging the illegal stay and delaying the return of the irregular migrant.”<sup>95</sup> The new requirement is intended to overcome this barrier to removal, by making information on expulsion orders available to all relevant national authorities connected to the SIS.<sup>96</sup>

The previous SIS legislation already offered three reasons for which an alert on refusal of entry or stay could be recorded: criminal convictions; “serious grounds for believing that [a non-EU national had] committed a serious criminal offence” or had clear intentions to do so; or an individual being the subject of “a measure involving expulsion, refusal of entry or removal... [including or] accompanied by a prohibition on entry”.<sup>97</sup> The new rules add a further point, making it mandatory to enter an alert on refusal of entry or stay whenever an entry ban is issued in accordance with the Returns Directive.<sup>98</sup> Combined with potential changes to the Returns Directive that are also under discussion,<sup>99</sup> this is likely to significantly increase the number of alerts in the SIS on people to be barred from entering, or remaining within, the Schengen area. While the changes with regard to both return orders and entry bans are intended to overcome significant national differences in the conditions for entering alerts, the new mandatory requirements also bypass the need for an individual assessment of the necessity and proportionality of entering each alert into the system.

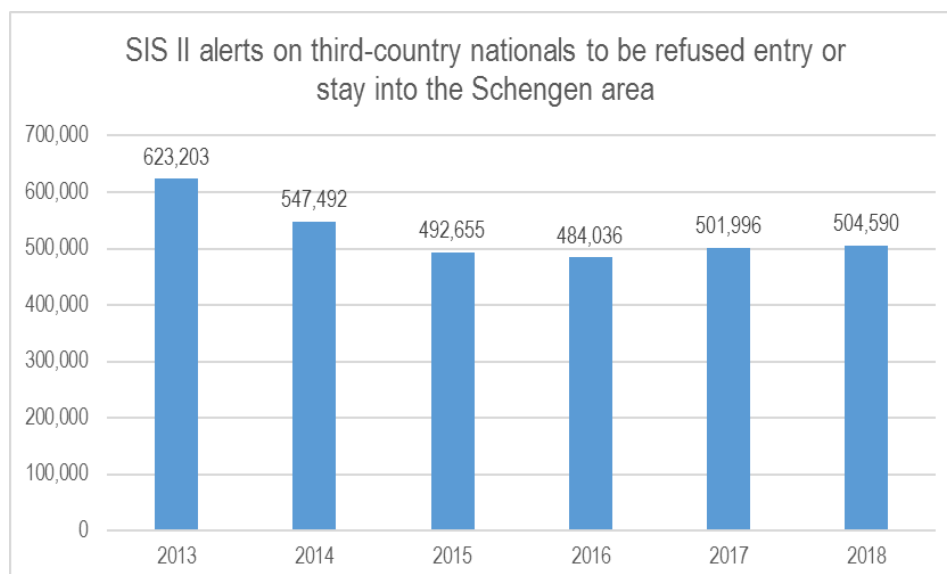


Figure 1: Entry bans in the Schengen Information System, 2013-18

### Towards a ‘return-option’

The political decision to try to step up expulsions from the EU has led to the transformation of existing databases and the introduction of new ones. These changes have been presented by their proponents as logical, desirable, necessary and proportionate, but this is far from being the case. Even the European Data Protection Supervisor has claimed that interoperability cannot be challenged, as it represents the “natural development” of IT systems. While the development of all technologies is subject to trends and transformations, framing the significant changes made to EU policing and migration databases in evolutionary

the Schengen Information System (SIS) in the field of border checks, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018R1861>  
<sup>94</sup> eu-Lisa, ‘SIS II – 2018 Statistics’, February 2019, <https://www.eulisa.europa.eu/Publications/Reports/SIS%202018%20statistics.pdf>

<sup>95</sup> Proposal for a Regulation on the use of the Schengen Information System for the return of illegally staying third-country nationals, COM(2016) 881 final, 21 December 2016, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0881>

<sup>96</sup> Lack of awareness of other member states’ decisions is not the only reason for a lack of mutual recognition and enforcement. In a majority of member states, national legislation provides the possibility to recognise return decisions issued by another member state under certain conditions, but they do not necessarily do so. A 2017 study by the European Migration Network found that “in practice, several of these Member States indicated that they never or rarely enforced such a return decision. The main challenge invoked for mutual recognition is the difficulty in knowing whether a return decision has effectively been issued by another Member State and whether it is enforceable.” See: European Migration Network, ‘The effectiveness of return in EU Member States’, 15 February 2018, p3, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00\\_eu\\_synthesis\\_report\\_return\\_study\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_eu_synthesis_report_return_study_en.pdf)

<sup>97</sup> Article 24, Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32006R1987>

<sup>98</sup> Article 24(1)(b), Regulation (EU) 2018/1861 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018R1861>

<sup>99</sup> Currently, return decisions handed down in accordance with the Directive (member states retain the option to deport people based on national, rather than EU law) must be accompanied by an entry ban in cases where national authorities have not provided for a period of voluntary departure or an individual has not complied with “the obligation to return”. Proposed revisions to the Directive would introduce a number of new situations in which it would be obligatory to deny a period of voluntary departure, thus increasing the number of situations in which an entry ban must be issued. The changes would also make it possible to issue entry bans to non-EU nationals who have “been illegally staying in the territory of the Member States and whose illegal stay is detected in connection with border checks carried out at exit” – that is to say, when they are leaving the EU anyway.

terms merely provides further cover for what are, at root, political choices.

Agreed and proposed changes to these systems will increase the risks of racial profiling and undermine the purpose limitation principle (the CIR and interoperability); are likely to fail without further massive, undesirable investment in coercive infrastructure and personnel (the EES); lack evidence to demonstrate their necessity (Eurodac); involve secondary purposes propelling the processing of new types of personal data (the VIS); and will massively increase the number of alerts on expulsion orders and refusal of entry or stay in the SIS, further entrenching the structure of 'Fortress Europe'.

Along with well-worn terms used to describe the EU's security architecture – 'panopticon', 'banopticon', 'neoopticon' – these changes could be seen as contributing to the development of a 'return-opticon': ultimately, the intention is to ensure the biometric registration of all foreign citizens in the EU and their 'visibility' to the authorities so that, if necessary, they can be deported as swiftly as possible. The scholar Niovi Vavoula has argued that:

*"...interoperability is much more than a buzz word and a panacea for security and migration concerns; it has become the 'Trojan Horse' towards the silent disappearance of the boundaries between law enforcement and immigration control and the radical intensification of surveillance of all mobile non-EU nationals."<sup>100</sup>*

In conjunction with the proposed changes to the Returns Directive discussed in the previous section, the transformation of these databases is supposed to lead to a massive increase in the number of people being deported from the EU – assuming that the authorities are able to cope with such an increase. In order to assist national authorities in these tasks, the EU is also taking on an increasingly operational role in the removal of 'unwanted aliens',<sup>101</sup> through a huge extension of the powers, funding and personnel available to its border agency, Frontex.

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<sup>100</sup> Niovi Vavoula, 'Interoperability of European Centralised Databases: Another Nail in the Coffin of Third-Country Nationals' Privacy?', *EU Immigration and Asylum Law and Policy*, 8 July 2019, <http://eumigrationlawblog.eu/interoperability-of-european-centralised-databases-another-nail-in-the-coffin-of-third-country-nationals-privacy/>

<sup>101</sup> Taking wording from Article 96 of the original Schengen Convention, this was the phrase used until the more palatable 'third-country nationals to be refused entry or stay' was brought into use by legislative updates in the 2000s.

## Frontex: the EU's 'deportation machine'<sup>102</sup>

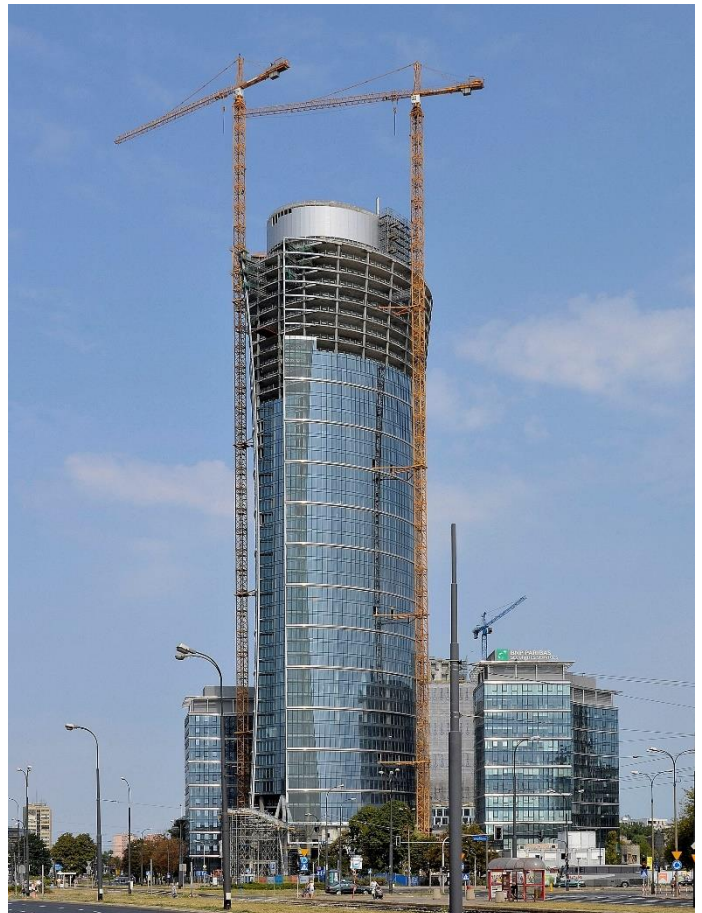
Since its establishment in 2004, Frontex has been granted an increasingly prominent role in coordinating and organising deportations from the EU's member states. In 2006 the agency coordinated one Joint Return Operation (JRO) which removed eight people from Austria, France and Poland to Armenia and Georgia. Just over a decade later, in 2017, the agency coordinated 153 JROs removing a total of almost 7,500 people to destinations including Bosnia & Herzegovina, Colombia, Gambia, Kyrgyzstan, Nigeria, Pakistan, Sudan and Ukraine (the chart on the following page shows the principal destinations for the agency's removal operations between 2007 and 2018). With the recent reform of the agency's legal basis and proposals for a massive budget increase in the 2021-27 period, the intention is for its role in forced removals to increase significantly.

Frontex has long been the subject of critical attention, in particular from social movements and civil society organisations who have tracked the agency's operations and activities and condemned its role in the development of 'Fortress Europe'. Concerns have often focused around the agency's legal and political accountability (or lack thereof) for its potential involvement in human rights violations. It is also evident that the agency has frequently sought to expand its role beyond existing legal boundaries.

The most recent reform of the legislation governing Frontex has introduced some extended accountability mechanisms. However, given the scale of the expansion of the agency's role in border control operations, surveillance, risk analysis and deportations, and the risks these carry for fundamental rights, these safeguards appear insufficient.

This section provides an overview of the different types of removal operation coordinated by Frontex, the financial costs associated with them and the considerable increase in the number of these operations that has taken place over the last decade, but in particular in the last three years. It goes on to look at the legal changes that have underpinned the increase in

expulsion operations and some of the most significant developments introduced by the 2019 Regulation. Finally, it examines the risks for fundamental rights associated with forced removals and relevant accountability and oversight mechanisms.



*Under construction: The Warsaw Spire building in August 2015. Frontex's headquarters is located in one of the smaller buildings to the side of the skyscraper.*

<sup>102</sup> This title has been used twice before: Karsten Polke-Majewski, 'Europe's Deportation Machine', *Zeit Online*, 6 August 2015, <https://www.zeit.de/feature/refugees-in-germany-deportation-flights-laws>; 'Frontex: EU's Deportation Machine', *Lighthouse Reports*, 2019, <https://vimeo.com/351673775>

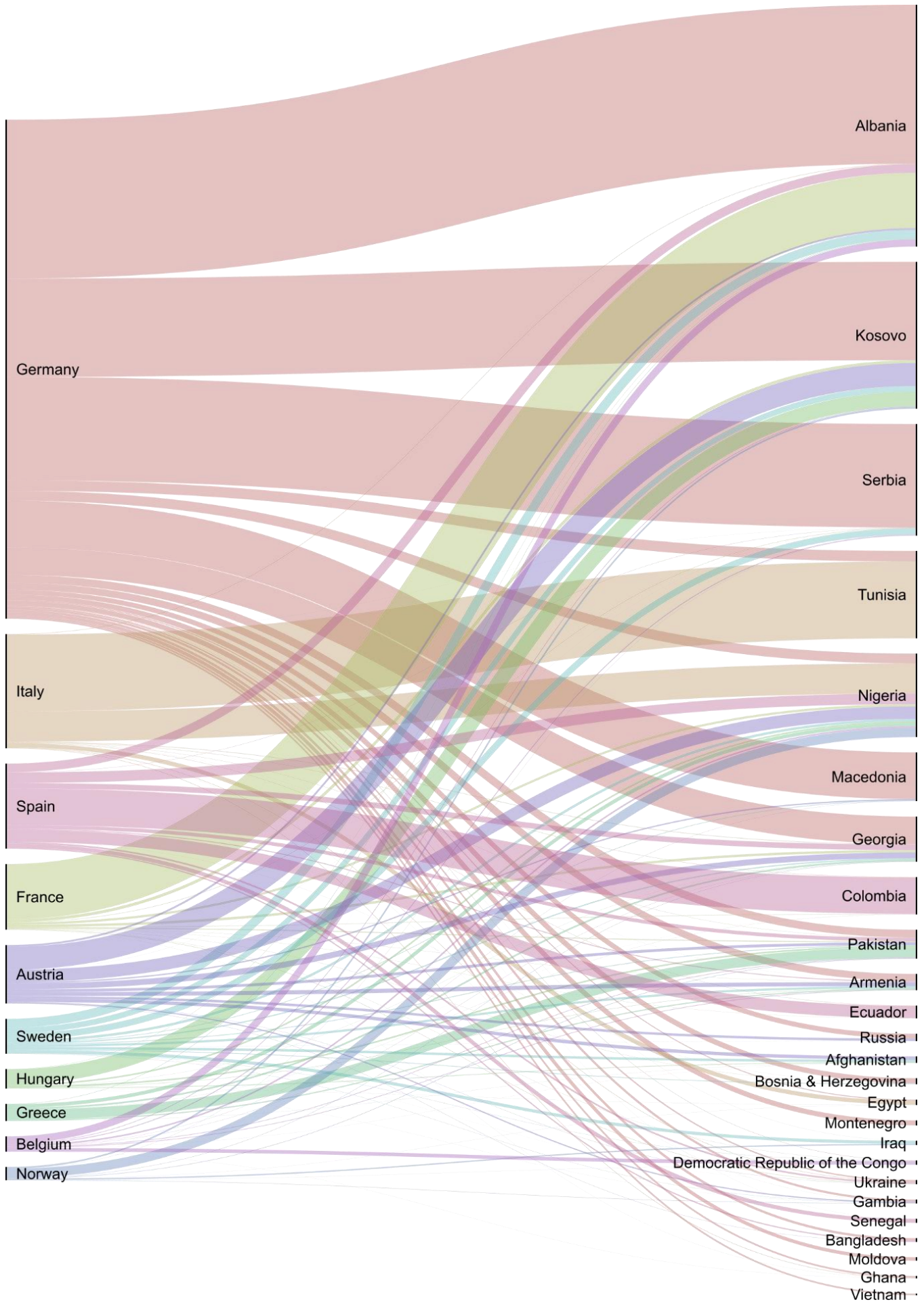


Figure 2: Principal EU member states conducting deportations with Frontex assistance and principal destination countries, 2009-18.

## Types of expulsion operation

Frontex is not responsible for decisions on whether to remove an individual from the EU or not. The legislation governing the agency – and the agency’s own promotional material – is keen to emphasise that it cannot enter into the merits of return decisions and that it must respect fundamental rights, EU law and international law in its work.<sup>103</sup> What Frontex has been able to do since it was founded in 2004 is provide support for national expulsion operations. Initially its mandate only concerned joint return operations (JROs), involving the removal of people from two or more member states on the same flight. Legal changes over the years have expanded this role, providing the possibility to finance and coordinate different types of removals. However, the agency actually began financing and coordinating both collecting return operations (CROs) and national return operations (NROs) before it had any legal mandate to do so. With the entry into force of the 2016 EU-Turkey deal, Frontex also acquired a role in ‘readmission’ operations from Greece to Turkey, and the agency has in recent years taken an increasing interest in using scheduled flights to expel people from the EU.

### Joint return operations (JROs)

EU legislation on JROs has been in place since 2004.<sup>104</sup> Frontex describes the procedure for organising them as follows:

*“If one Member State organises a return operation by air to a specific country of return and has some spare capacity on the plane, it can invite other Member States to take part. The organising Member State informs Frontex about its intention to conduct a return flight and requests the assistance of Frontex to coordinate this operation. Frontex then dispatches this information to all other Member States.”<sup>105</sup>*

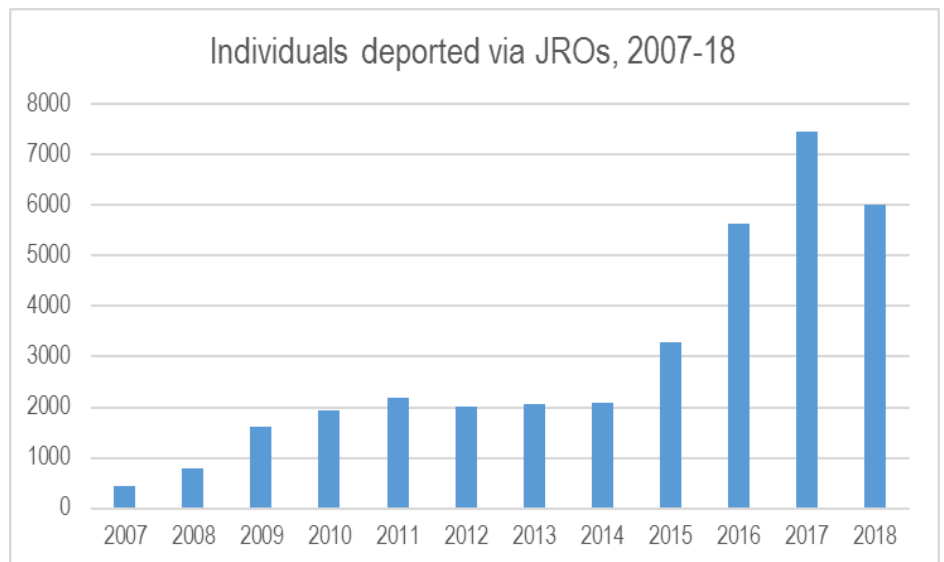


Figure 3: Individuals deported via JROs, 2007-18

Changes introduced by the 2019 Regulation will give Frontex an increasingly proactive role with regard to JROs. While the agency has been able to request that such operations are initiated since 2016 (“5-10” of these were planned for 2019<sup>106</sup>), the 2019 rules introduce further possibilities. For example, Frontex can now provide technical and operational assistance in “the collection of information necessary for issuing return decisions,” and the identification of individuals subject to removal proceedings.<sup>107</sup> Frontex will also take over the operation and development of two databases designed to enhance the efficiency of the removal process and the agency’s oversight over the situation in the member states (see ‘A centralised deportations database’).

### Collecting return operations (CROs)

In a CRO, “the means of transport and escort officers are provided by the non-EU country of destination” – in essence, the EU outsources the infrastructure and staffing requirements to another country.<sup>108</sup> Deportees from each participating member state are taken to the organising member state, from where the flight departs. Escorts from non-EU countries due to take part in

<sup>103</sup> It is perhaps because of this particularly, seemingly-technical role, that the agency has on a number of occasions been referred to as a “deportation machine” – a phrase also used in the title of this section. It is, in effect, supposed to function as a machine, ‘automatically’ enforcing the decisions made by the national authorities of the EU member states. See: Karsten Polke-Majewski, ‘Europe’s Deportation Machine’, *Zeit*, 6 August 2015, <https://www.zeit.de/feature/refugees-in-germany-deportation-flights-laws>; ‘Frontex: EU’s Deportation Machine’, *Lighthouse Reports*, 2 August 2019, <https://vimeo.com/351673775>

<sup>104</sup> Council Decision of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32004D0573>;

<sup>105</sup> Frontex, ‘Return’, <https://frontex.europa.eu/operations/return/>

<sup>106</sup> Frontex, ‘Programming Document 2019-2021’, p.89, [https://frontex.europa.eu/assets/Key\\_Documents/Programming\\_Document/2019/Programming\\_document\\_2019-2021.pdf](https://frontex.europa.eu/assets/Key_Documents/Programming_Document/2019/Programming_document_2019-2021.pdf)

<sup>107</sup> Article 48(1)(a)(i), Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European

Border and Coast Guard, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32019R1896>

<sup>108</sup> Article 28(3) of the 2016 Frontex Regulation stipulates that Frontex can coordinate and organise return operations in which “the means of transport and forced-return escorts are provided by a third-country of return,” either at the request of a member state participating in the operation or on its own initiative. The participating member states and the Agency are equally responsible for ensuring that “the respect for fundamental rights, the principle of non-refoulement, and the proportionate use of means of constraints are guaranteed during the entire return operation,” and at least one member state representative and one forced return monitor must be present for the duration of the operation. Under Article 28(4) the agency’s Executive Director is responsible for drawing up a plan for collecting return operations and Article 28(5) sets out the binding nature of that plan on the agency and member states. The provisions are replicated in Article 50 of the 2019 Regulation.



CROs “are trained by the agency to comply with EU standards, including on fundamental rights.”<sup>109</sup>

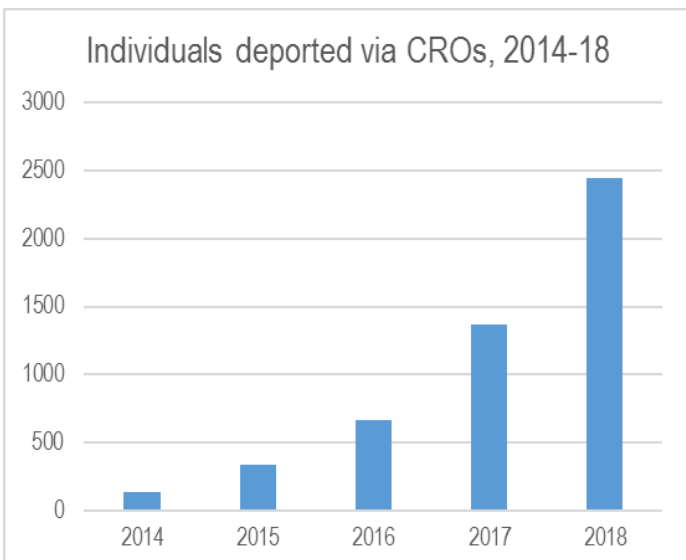


Figure 4: Individuals deported via CROs, 2014-18

CROs were first used in 2014, when Frontex announced them under the banner of ‘Self-Collection – A New Way of Returns’.<sup>110</sup> The agency underscored the rationale for such operations: “the fact that escorts speak the same language as the returnees promotes communication and reduces the need for restraint. It is also more cost-effective.”<sup>111</sup> Further advantages apparently include “higher acceptance”, “fewer incidents” and “organisational advantages (landing permit)”.<sup>112</sup> However, there would be no formal legal basis for this type of operation until the 2016 Frontex Regulation came into force.<sup>113</sup>

In May 2015, following an enquiry into Frontex’s role in forced removals, the European Ombudsman said that the agency needed to publicly explain their legal framework; the “working arrangements concluded in accordance with Article 14(2) of the Frontex Regulation”;<sup>114</sup> and “how Frontex complies with its own human rights obligations in fulfilling its role as coordinator of Collecting JROs.” The Belgian Federal Migration Centre, on the other hand, argued in a submission to the inquiry that: “As the EU legal framework does not explicitly provide for Collecting JROs, this practice should be suspended until it has been subject to a broad debate within the European and national parliaments and civil society.”<sup>115</sup>

The agency responded to the Ombudsman by referring to the “considerable care in selecting states with which Collecting JROs

are performed,” and underlined that “attention is paid to fundamental rights concerns” when working arrangements are concluded with non-EU states. It also committed to “amend the text about JROs on its website by including the requested information to the extent possible.”

There remains very little information available on the agency’s website, while neither the 2016 nor 2019 reforms to the agency’s legal basis provide any significant degree of clarity. The legislation merely states that CROs may take place, the executive director should draw up a plan for their implementation, and all such operations must be monitored. So far, five countries have participated in CROs – Albania, Georgia, Montenegro, Serbia and Ukraine.<sup>116</sup> Only three of the working arrangements that Frontex has concluded with those countries (Albania, Montenegro and Serbia) refer to cooperation on expulsion operations.<sup>117</sup>

### National return operations (NROs)

The Regulation governing Frontex that came into force in 2016 introduced the possibility for the agency to assist member states with coordinating and financing NROs – that is, expulsion operations involving just one member state. However, as with CROs, the agency’s activities were ahead of its legal basis – it began financing NROs in January of that year, long before negotiations on the forthcoming legislation had even concluded.

Between January and October 2016, the agency paid out €3.6 million for expulsion operations from Germany, Denmark, Austria and Luxembourg to destinations including Afghanistan, Gambia, Mali, Morocco and Tunisia. In a report on the agency’s accounts for 2016, the European Court of Auditors (ECA, “the independent

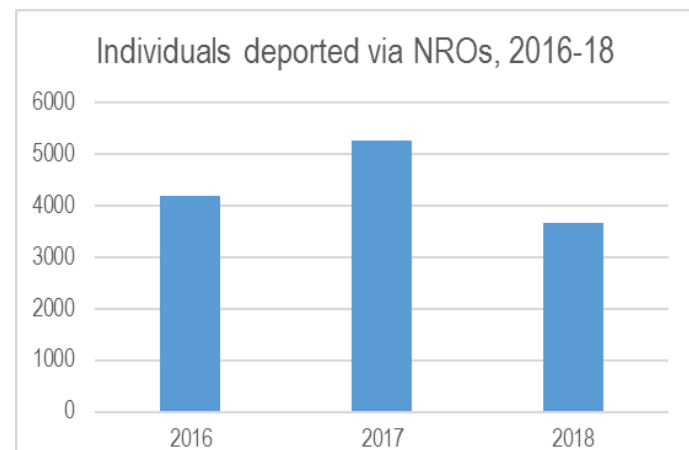


Figure 5: Individuals deported via NROs, 2016-18

<sup>109</sup> Ibid.

<sup>110</sup> ‘Self-Collection — A New Way of Returns’, 24 July 2014, <https://frontex.europa.eu/media-centre/focus/self-collection-a-new-way-of-returns-P4dpos>

<sup>111</sup> Ibid.

<sup>112</sup> Frontex training presentation, ‘Return support to MS by the European Border and Coast Guard Agency (Frontex)’, undated, p.17, <http://statewatch.org/docbin/eu-frontex-deportations-enhanced-return-support.pdf>

<sup>113</sup> Article 28, Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016R1624>

<sup>114</sup> Article 14 of Regulation 2007/2004 was entitled ‘Facilitation of operational cooperation with third countries and cooperation with

competent authorities of third countries.’ This was succeeded by Article 54 of the 2016 Regulation and Article 72 of the 2019 Regulation.

<sup>115</sup> ‘Decision of the European Ombudsman closing her own-initiative inquiry OI/9/2014/MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex)’, European Ombudsman, para. 24(xviii), 4 May 2015,

<https://www.ombudsman.europa.eu/en/decision/en/59740>

<sup>116</sup> Over 2,800 people have been expelled to Albania via CROs; 1,458 to Georgia; 648 to Serbia; 65 to Montenegro and 15 to Ukraine.

<sup>117</sup> Chris Jones, ‘Frontex: cooperation with non-EU states’, March 2017, <http://statewatch.org/analyses/no-309-frontex-third-countries-agreements.pdf>. See also: Frontex, ‘Non-EU countries’, <https://frontex.europa.eu/partners/non-eu-countries/>

guardian of the financial interests of the citizens of the Union”<sup>118</sup>) described these payments as “irregular” – although they would not comment further on whether the expulsion operations themselves might be described this way. An opinion drafted for the European Parliament’s civil liberties committee by Greek MEP Kostas Chrysogonos called them “illicit”,<sup>119</sup> although this was toned down to match the ECA’s wording in the final version.<sup>120</sup>

Although there was no clear legal basis that allowed Frontex to finance NROs, this obstacle was overcome by a Decision of Frontex’s Executive Director, Fabrice Leggeri, signed on 23 March 2016.<sup>121</sup> The Decision was adopted in response to policy documents adopted by the European Council and the European Commission. It notes that the Commission’s September 2015 Action Plan on Return “urged Frontex to provide on-the-spot operational and information support on return to frontline Member States, including the organisation, coordination and co-financing of return operations to countries of origin or transit and other return related activities.” Furthermore, Frontex’s budget had been increased “for the implementation of the EU Action Plan on Return,” says the Decision.

There was no mention of NROs in either the Action Plan or the Council Conclusions cited by the Executive Director’s Decision. Nevertheless, as there was no clear definition of ‘joint return operation’ in any of the legislation governing Frontex, Leggeri decided that it would include:

*“Return operations from one frontline Member State with hotspots, or from one Member State facing a disproportionate number of persons staying irregularly in its territory due to the specific and disproportionate migratory pressure at the external borders, as they serve the common interest of all EU Member States.”<sup>122</sup>*

The agency boasted about this shift in its Annual Activity Report 2016.<sup>123</sup> However, as policy documents, neither the Council Conclusions nor the Action Plan provided a legal basis for the agency’s actions and the legislation governing Frontex at the time did not offer the Executive Director the ability to launch new

types of expulsion operation.<sup>124</sup> The Action Plan was clear that in the immediate term, the agency was supposed to launch more JROs. In the long-term, the plan was to amend Frontex’s legal basis – precisely as was done in October 2016. Fundamentally, the Decision signed by Leggeri, which established new competences for Frontex, was not in accordance with the legal framework. Rather than “irregular”, ‘unlawful’ may be a more appropriate way to refer to the NROs that took place in the first nine months of 2016 – acts of public administration are only lawful when permitted by law.

This was not the first time the agency decided to act outside its competences. As noted above, it began financing and coordinating CROs before there was any legal basis to do so. It also began to process personal data for the purpose of carrying out JROs in 2010, despite the fact it was legally unable to do so until the 2011 legal amendment.<sup>125</sup> Beyond the context of expulsion operations, it also began operating the European Border Surveillance System (EUROSUR) long before the legal basis for that system came into force in 2013.<sup>126</sup> This enthusiasm for new activities for which there is no clear legal basis make clear the need for close and critical scrutiny of the agency’s activities.

## “Readmission” operations

The EU-Turkey Statement, agreed 18 March 2016, aimed to “break the business model of the smugglers” transporting people from Turkey to Greece, “and to offer migrants an alternative to putting their lives at risk”.<sup>127</sup> The first point of the statement promised the return of all irregular migrants arriving on the Greek islands after 20 March 2016 to Turkey. These expulsions are carried out through “readmission” operations.

Responsibility for these operations ultimately lies with the Greek authorities, but Frontex plays a significant role. Between December 2016 and April 2017, it concluded a series of contracts worth a total of €4.45 million with bus and ferry companies: the former were for transfers of people due to be ‘readmitted’ to Turkey from one place to another on the Greek islands;<sup>128</sup> the

<sup>118</sup> ECA, ‘Mission and Role’,

<https://www.eca.europa.eu/en/Pages/MissionAndRole.aspx>

<sup>119</sup> Draft opinion of the Committee on Civil Liberties, Justice and Home Affairs, 12 December 2017,

[https://www.europarl.europa.eu/doceo/document/LIBE-PA-613650\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/LIBE-PA-613650_EN.pdf)

<sup>120</sup> European Parliament decision of 18 April 2018 on discharge in respect of the implementation of the budget of the European Border and Coast Guard Agency (Frontex) for the financial year 2016,

[https://www.europarl.europa.eu/doceo/document/TA-8-2018-0164\\_EN.html?redirect](https://www.europarl.europa.eu/doceo/document/TA-8-2018-0164_EN.html?redirect)

<sup>121</sup> Decision of the Executive Director No. 2016/36 on the financing scheme for joint return operations and return related activities, 23 March 2016, <http://statewatch.org/docbin/eu-frontex-deportations-ed-decision-2016-36.pdf>

<sup>122</sup> Ibid.

<sup>123</sup> “Frontex started supporting Member States in the implementation of national return operations (NROs) even before the new regulation entered into force. Both the wording and the implementation of Art. 9 of the former Frontex regulation called for a more flexible approach in accordance with the EU policy on return. The ED Decision 2016/36 of 23.03.2016 adopted a broader interpretation of JROs, allowing Frontex to support more MS with NROs, not only frontline MS.” See: Frontex, ‘Annual Activity Report 2016’, p.9,

[https://frontex.europa.eu/assets/Key\\_Documents/Annual\\_report/2016/Annual\\_Activity\\_Report\\_2016.pdf](https://frontex.europa.eu/assets/Key_Documents/Annual_report/2016/Annual_Activity_Report_2016.pdf)

<sup>124</sup> Article 25, Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32011R1168>

<sup>125</sup> Art. 11(b) and (c), Regulation (EU) No 1168/2011, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32011R1168>

<sup>126</sup> Frontex, ‘General Report 2012’, p. 20, [http://www.statewatch.org/observatories\\_files/frontex\\_observatory/2013-09-frontex-annual-report-2012.pdf](http://www.statewatch.org/observatories_files/frontex_observatory/2013-09-frontex-annual-report-2012.pdf); Commission Staff Working Paper determining the technical and operational framework of the European Border Surveillance System (EUROSUR) and the actions to be taken for its establishment, SEC(2011) 45 final, p. 2, <http://www.statewatch.org/news/2011/feb/eu-com-eurosur-staff-working-paper-sec-145-11.pdf>

<sup>127</sup> <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>

<sup>128</sup> ‘Poland-Warsaw: Framework contract for passenger ferry transfer services’, 2017/S 130-265067, 11 July 2017, <https://ted.europa.eu/udl?uri=TED:NOTICE:265067-2017:TEXT:EN:HTML&src=0>

latter for services “mainly associated with the corresponding transfers by sea between one designated port of departure in Greece and one designated port of arrival in Greece/Turkey.”<sup>129</sup> Frontex provides training for the escort officers who will be deployed on those ferries, covering issues such as the law of the sea, fundamental rights, the role of monitors, and the different phases of readmission operations.<sup>130</sup> The agency has also announced its intention to start conducting readmission operations from Greece to Turkey by air,<sup>131</sup> although these have been taking place since at least the second half of 2018.<sup>132</sup>

The agency’s work is part of Joint Operation Poseidon, the aim of which is to “provide increased technical and operational assistance to Greece, control irregular migration flows, to tackle cross border crime and to enhance European cooperation on coast guard functions,”<sup>133</sup> as well as assisting with returns and readmissions,<sup>134</sup> including by providing funding for transfers of people from other Greek islands to Lesbos, from where they are mainly taken by ferry to Turkey.<sup>135</sup> Between April 2016 and June 2019, 1,969 individuals were returned under the Statement in 143 readmission operations (104 by sea and 39 by air).<sup>136</sup> Frontex was present on the islands before the EU-Turkey Statement was signed, however, deploying “screening officers on the islands of Lesbos and Kos to... play a role in helping the Greek authorities to determine the nationality of the incoming migrants in order to identify and register them,”<sup>137</sup> as part of the “hotspot approach”.<sup>138</sup>

## Charter flights: an expensive business

Deportation is an expensive business, in particular if the chosen method is removal by charter flight – as is the case for JROs,

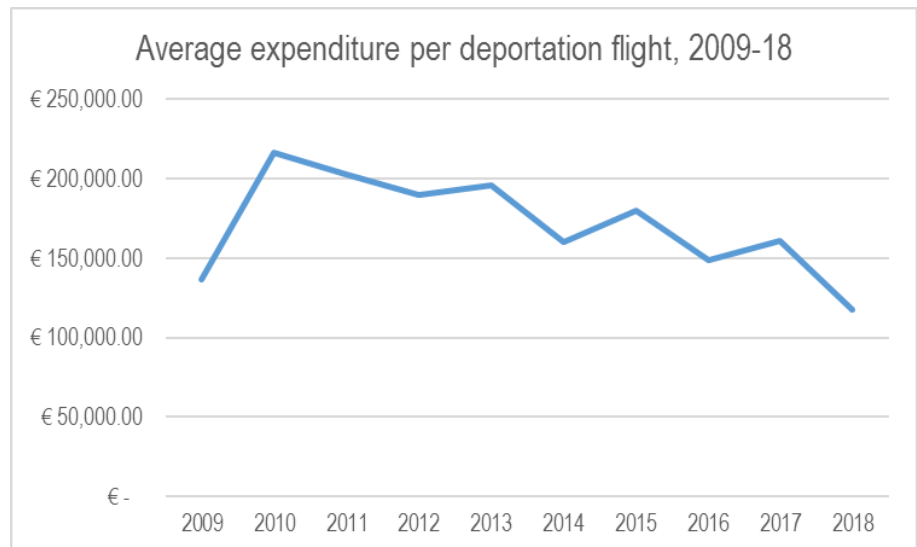


Figure 6: Average expenditure per deportation flight, 2009-18

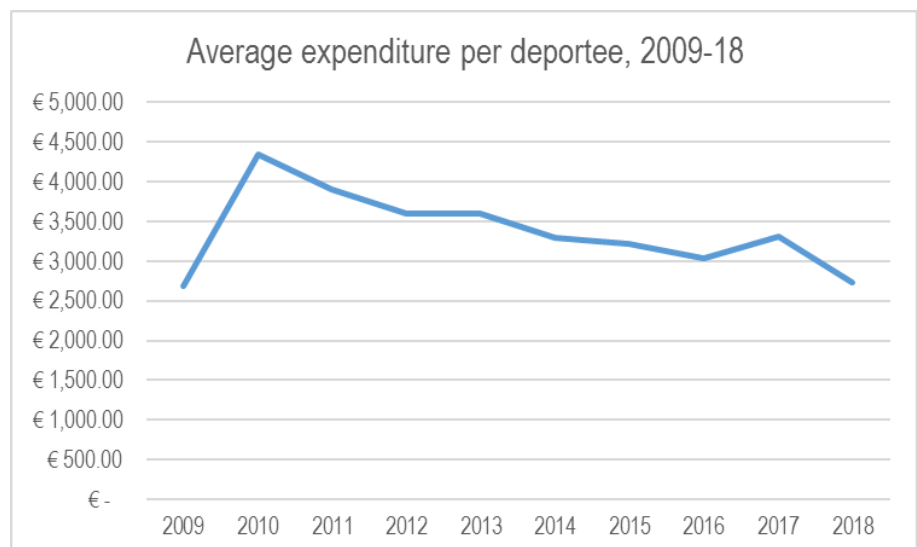


Figure 7: Average expenditure per deportee, 2009-18

CROs and NROs. Equally, as noted above, the ‘readmission operations’ from Greece to Turkey carried out by sea have also required the chartering of ferries. With regard to flights, the average cost to the EU to deport an individual via a Frontex-coordinated operation between 2009 and 2018 was, according to

<sup>129</sup> ‘Annex II – Terms of reference’, p.3, <https://etendering.ted.europa.eu/cft/cft-documents.html?cftid=1909>. The contract award notice is available here: Poland-Warsaw: Framework contract for the provision of passenger transfer services by land; lot 1 — Lesbos; lot 2 — Chios; lot 3 — Kos, 2017/S 001-000007, <https://ted.europa.eu/udl?uri=TED:NOTICE:7-2017:TEXT:EN:HTML&src=0>

<sup>130</sup> Reference to Batch 7 – Greece-Turkey readmission materials documents

<sup>131</sup> Frontex, ‘Programming Document 2019-2021’, p.87, [https://frontex.europa.eu/assets/Key\\_Documents/Programming\\_Document/2019/Programming\\_Document\\_2019\\_2021.pdf](https://frontex.europa.eu/assets/Key_Documents/Programming_Document/2019/Programming_Document_2019_2021.pdf)

<sup>132</sup> Frontex evaluation report, ‘Return Operations 2<sup>nd</sup> Semester 2018’, 31 May 2019, [https://frontex.europa.eu/assets/Key\\_Documents/Frontex\\_Evaluations\\_Reports/Return/2018/Return\\_operations\\_second\\_semester\\_2018.pdf](https://frontex.europa.eu/assets/Key_Documents/Frontex_Evaluations_Reports/Return/2018/Return_operations_second_semester_2018.pdf)

<sup>133</sup> Frontex, ‘Joint Operation Poseidon 2017’, 22 February 2018, <https://frontex.europa.eu/media-centre/photos/joint-operation-poseidon-2017-SOyflf>

<sup>134</sup> European Commission, ‘EU operations in the Mediterranean Sea’, 4 October 2016, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/securing-eu-borders/fact-sheets/docs/20161006/eu\\_operations\\_in\\_the\\_mediterranean\\_sea\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/securing-eu-borders/fact-sheets/docs/20161006/eu_operations_in_the_mediterranean_sea_en.pdf)

<sup>135</sup> Frontex, ‘Operation Poseidon (Greece)’, undated, <https://frontex.europa.eu/along-eu-borders/main-operations/operation-poseidon-greece/>

<sup>136</sup> Frontex, ‘Readmission activities Greece-Turkey’, undated, <http://www.statewatch.org/docbin/eu-frontex-deportations-readmission-activities-gr-tu.pdf>

<sup>137</sup> <https://frontex.europa.eu/media-centre/news-release/frontex-offers-additional-help-to-greece-qeFedV>

<sup>138</sup> Frontex, ‘Frontex offers additional help to Greece’, 8 September 2015, <https://frontex.europa.eu/media-centre/news-release/frontex-offers-additional-help-to-greece-qeFedV>

the figures analysed for this report, just under €3,000.<sup>139</sup> An average flight during that period carried 75 deportees and cost a total of over €224,000.

The costs for expulsion operations to different countries, however, can vary widely. The destinations with the lowest costs are those closest to the EU, such as Bosnia and Herzegovina (around €940 per person), Montenegro (around €1,000 per person), Serbia (€1,400), Kosovo (€1,600), Macedonia (€1,800) and Albania (€2,000). These are countries to which EU member states regularly deport people and, aside from their geographical proximity, more well-established relations with the national authorities are likely to contribute to lower costs.

At the other end of the scale are more distant destinations. In 2016, Frontex paid Denmark more than €150,000 for a National Return Operation that deported two people to Somalia – over €75,000 per person. Removal operations to Azerbaijan coordinated and paid for in 2017 and 2018 expelled 12 people from the EU at an average cost of almost €14,500 per person. Since 2011, over 1,600 people have been deported to Pakistan on Frontex flights, with an average cost per person of over €8,300. Removal flights to Nigeria have been going on slightly longer (since 2009). The average amount per deportee paid by Frontex over that period has been almost €6,000.

Despite their cost, however, charter flights pose numerous advantages to states wishing to keep deportations out of sight and out of mind of the public. A 2013 report by *Corporate Watch* highlighted some of the reasons why the UK has been so keen to use charter flights for deportations. They are useful for meeting targets (the UK introduced charter flight deportations in 2000, when “then Home Secretary Jack Straw set the first known deportation targets, aiming to deport 30,000 people in 2001-2”). They assist in stifling rebellion (there are no other passengers on the flight to whom deportees can appeal for assistance). It has been claimed they have a “deterrent effect” on would-be irregular migrants, although there is no evidence this is the case. They are also used as a foreign policy tool – *Corporate Watch* explained that charter flights “only go to a select number of countries where the UK has specific agreements with partner governments.”<sup>140</sup> The case of flights from the EU to Afghanistan is instructive in this regard – following the signing of the ‘Joint Way Forward’ in October 2016, the number of deportations coordinated and paid for by Frontex to that country increased significantly.

The average expenditure by Frontex per deportee has declined over time, although the cost per flight has, overall, increased.<sup>141</sup> Frontex has taken a number of measures to try to ensure ‘value for money’ in its removal operations. In December 2017 the agency signed two contracts with the companies AS Aircontact (from Norway) and Air Charter Service Limited (from the UK) to carry out charter flights. The aim of the agreements is: “Provision for Frontex the chartered aircraft, properly manned, maintained,

equipped, fuelled and fully insured, in order to carry out the short notice return flights.”<sup>142</sup> The first contract is worth €18 million and is for planned missions; the second, worth €2 million, is for “short notice missions”. Both the contracts initially lasted for a year and were renewable up to three times, for 12 months each time.

Destination	Total deportees, 2009-18	Average expenditure per deportee
Somalia	2	€ 75,092.52
Uzbekistan	6	€ 23,076.68
Azerbaijan	12	€ 14,437.98
Sri Lanka	40	€ 12,506.56
Guinea	49	€ 11,922.76
Gambia	81	€ 10,020.86
Afghanistan	862	€ 9,303.79
Pakistan	1628	€ 8,318.50
Iraq	291	€ 6,576.67
Bangladesh	133	€ 6,388.02
Nigeria	5128	€ 5,888.10
Ukraine	98	€ 5,734.83
DRC	156	€ 5,202.85
Ghana	76	€ 5,106.53
Lebanon	70	€ 3,856.27
Senegal	206	€ 3,493.60
Sudan	40	€ 3,473.68
Egypt	265	€ 3,414.71
Vietnam	112	€ 3,386.77
Armenia	268	€ 3,362.05
Georgia	1983	€ 3,286.51
Mongolia	124	€ 2,996.57
Russia	444	€ 2,844.99
Tunisia	4407	€ 2,656.11
Albania	6592	€ 2,048.98
Macedonia	783	€ 1,851.15
Kosovo	5710	€ 1,608.21
Serbia	3068	€ 1,421.36
Montenegro	123	€ 1,033.10
Bosnia & Herzegovina	77	€ 939.18

Table 2: Average expenditure per deportee by most to least expensive destination, 2009-18

<sup>139</sup> The figures included here have been calculated based on JROs, CROs and NROs with a single destination, as the data on costs provided by Frontex is not geographically disaggregated. Including data on flights with more than one destination would skew the costs by including the same figure twice (e.g. for an operation to Georgia and Armenia, both destinations would have the total cost of the operation taken into account).

<sup>140</sup> ‘Deportation Charter Flights: updated report 2018’, *Corporate Watch*, 2 July 2018, <https://corporatwatch.org/deportation-charter-flights-updated-report-2018/>

<sup>141</sup> The expenditure in these charts has been calculated using the data on expenditure for individual return operations, not the agency’s total budget appropriations for return.

<sup>142</sup> ‘Poland-Warsaw: Chartering aircraft and related services for return operations’, 2018/S 007-010627, Contract award notice, *Ted*, <http://ted.europa.eu/udl?uri=TED:NOTICE:10627-2018:TEXT:EN:HTML&src=0>

In September 2019 the agency posted another tender notice, this time for a framework contract that would involve at least three and up to 10 different companies, for “Short Notice Chartering of Aircraft for Frontex Operational Activities”. The services provided will be mainly used for organising “emergency return flights” when there is no availability of aircraft under the existing contracts. The framework contract (FWC) itself would merely establish broader terms and conditions, with individual contracts to be signed for each particular expulsion flight – that is to say, the companies chosen to participate in the framework contract would make bids to conduct any given “emergency” deportation flight. The notice states: “The provision of specific charter will be organised following the calls for competition for establishment of the specific contracts under this FWC”<sup>143</sup> – a sort of ‘deportation auction’. The framework contract is intended to last for 12 months, may be being renewed up to three times and has a maximum value of €10 million. The closing date for offers was in November 2019, but at the time of writing the names of the companies awarded the contract had not been published.

## Removal by scheduled flight

Perhaps because of the high cost of charter flights, Frontex has also begun to assist the member states with the organisation and financing of deportations via normal, scheduled, flights – the type that a person might take to go on holiday or a business trip. The European Commission’s March 2017 ‘Renewed Action Plan’ on returns said there was an “urgent need” for the agency to provide a “mechanism for assisting the Member States in carrying out return by commercial flights,” for both ‘voluntary’ and forced expulsions.<sup>144</sup>

Frontex thus launched a pilot project to assist national authorities with “the booking and purchase of flight tickets at special condition for escorted returnee(s) and unescorted returnee(s).” The first removals as part of this project, to Algeria and Morocco, took place in December 2017. In the following six months:

*“a total of 290 returnees were returned to Algeria, Morocco, Bosnia and Herzegovina, FYROM, Kosovo, Serbia and Albania with the use of Frontex-supported scheduled flights. Belgium and Germany were the most active Member States in the Pilot Project.”*<sup>145</sup>

It appears that the project was extended to run for the rest of 2018, as in the latter half of the year a further 1,187 people were deported via scheduled flights to 49 different destinations, with the participation of 16 member states. Of those removed, 283 were put on flights with escorts, while 903 boarded flights where no escorts were present. Frontex noted that:

*“an increase is evident in all categories: 328% in the number of returns, 309% in the number of returnees, 600% in the number of destinations reached and 46% in the number of organising Member States. The trend suggests that the mechanism developed by Frontex is successful and bolsters the decision to make it a stable activity of the Agency offered in support to Member States’ needs.”*<sup>146</sup>

That is precisely what Frontex has done – in January 2019 it concluded a €30 million, two-year contract with the Polish company eTravel. Frontex, through eTravel, will provide “high quality travel desk services,” such as “booking and ticketing services for the EU Member States who will organize return operations by scheduled flights with Frontex support.” The company was the only bidder for the contract, the final value of which was three times that originally foreseen by Frontex.<sup>147</sup> It describes itself as Poland’s biggest tourism company, providing a “service suited to the needs of every client.”<sup>148</sup>

Frontex has stated its intention for support for removals by scheduled flights to become “business as usual”, permitting an increase in the number of expulsions carried out. The plan for 2019 was for 500-600 expulsion operations by scheduled flights, with “1,000 TCNs to be returned.” The expected total cost was €6.3 million.<sup>149</sup>

<sup>143</sup> ‘Poland-Warsaw: Short Notice Chartering of Aircraft for Frontex Operational Activities’, 2019/S 177-429650, 13 September 2019, <https://ted.europa.eu/udl?uri=TED:NOTICE:429650-2019:TEXT:EN:HTML>

<sup>144</sup> European Commission, ‘Communication on a more effective return policy in the European Union – a Renewed Action Plan’, COM(2017) 200 final, 2 March 2017, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017DC0200>

<sup>145</sup> ‘Frontex evaluation report – Return Operations, 1<sup>st</sup> Semester 2018’, undated, p.7, [https://frontex.europa.eu/assets/Key\\_Documents/Frontex\\_Evaluations\\_Reports/Return/2018/Return\\_Operations\\_First\\_Semester\\_2018.pdf](https://frontex.europa.eu/assets/Key_Documents/Frontex_Evaluations_Reports/Return/2018/Return_Operations_First_Semester_2018.pdf)

<sup>146</sup> Ibid., p.7

<sup>147</sup> The agency’s procurement plan for 2019 estimated that the contract would be worth €10 million. See: Annex IX: Procurement Plan 2019 in Frontex, ‘Programming Document 2019-2021’, 18 October 2018, p.155, [https://frontex.europa.eu/assets/Key\\_Documents/Programming\\_Document/2019/Programming\\_Document\\_2019\\_2021.pdf](https://frontex.europa.eu/assets/Key_Documents/Programming_Document/2019/Programming_Document_2019_2021.pdf)

<sup>148</sup> ‘Welcome to the world of business travels’, eTravel, <http://www.etravel.pl/en/business-solutions>

<sup>149</sup> Frontex, ‘Programming Document 2019-2021’, 18 October 2018, p.89, [https://frontex.europa.eu/assets/Key\\_Documents/Programming\\_Document/2019/Programming\\_Document\\_2019\\_2021.pdf](https://frontex.europa.eu/assets/Key_Documents/Programming_Document/2019/Programming_Document_2019_2021.pdf)

## Deportations to Afghanistan



Group photo of the participants in the Brussels Conference on Afghanistan, held on 4-5 October 2016. The 'Joint Way Forward' between the EU and Afghanistan was signed on 6 October.

A deportation flight from Denmark to Afghanistan in September 2016 was the first to that country coordinated or financed by Frontex, and was also one of the “irregular” NROs highlighted by the European Court of Auditors. With the entry into force of the new Frontex Regulation in September 2016 and, the following month, the ‘Joint Way Forward on migration issues between Afghanistan and the EU’,<sup>150</sup> more expulsions were to come.

In December 2016 a further three flights (from Sweden, Germany and Finland) departed for Kabul. A total of 53 people were deported to Afghanistan via Frontex flights in 2016. That number increased six-fold in 2017 (to 314) and grew again in 2018 (to 495). These removals have prompted protests, with campaigners emphasising that the country remains unsafe. In Sweden, young refugees protesting against their expulsion wrote to the director of the Swedish Migration Agency to ask: “Is Sweden really a moral country when you say to Swedes not to travel to Afghanistan when it is dangerous, but you think it's safe for us young people to live there?”<sup>151</sup>

In October 2017, a year on from the signing of the Joint Way Forward, the Director of the *Afghanistan Migrants Advice &*

*Support Organisation (AMASO)* told the *European Council on Refugees and Exiles* that “the deal is not sustainable, not even efficient,” because of the ongoing violence in Afghanistan and the economic, social and political problems faced by the country. The situation for deportees was “not ideal”, and in some cases people deported “have never been to Afghanistan before, this is the group of refugees born and raised in exiles [sic] as in Norway or Sweden.” In fact, Ghafoor said, “the majority of returnees actually re-migrate because they cannot survive in Afghanistan.”<sup>152</sup>

AMASO has also reported receiving numerous complaints about “misbehaving, use of unnecessary force, torture and ill treatment of the Afghan asylum seekers during deportation to Afghanistan,” and has begun to cooperate with the German organisation *Pro Asyl* to support deportees in filing complaints to Frontex.<sup>153</sup> On occasion, these reports have made it to the media – in August 2018, an Afghan man being deported from Germany had his genitals “repeatedly squeezed... for prolonged periods,” by an escort. A group of escorts also used “calming techniques” which involved “pulling the man’s neck from behind while yanking his nose upwards.”<sup>154</sup>

<sup>150</sup> Mirren Gidda, ‘Why Germany and Other EU Countries Can Now Deport Tens of Thousands of Afghans’, *Newsweek*, 11 October 2016, <https://www.newsweek.com/2016/11/11/eu-migration-crisis-afghanistan-joint-way-forward-taliban-517834.html>; Sune Engel Rasmussen, ‘EU’s secret ultimatum to Afghanistan: accept 80,000 deportees or lose aid’, *The Guardian*, 28 September 2019, <https://www.theguardian.com/global-development/2016/sep/28/eu-secret-ultimatum-afghanistan-accept-80000-deportees-lose-aid-brussels-summit-migration-sensitive>. The full text of the agreement: ‘Joint Way Forward on migration issues between Afghanistan and the EU’, <http://www.statewatch.org/news/2016/oct/eu-afghanstan-refugee-deal-prel.pdf>

<sup>151</sup> ‘Refugee youths protest Swedish deportations to Afghanistan’, *The Local*, 7 August 2017, <https://www.thelocal.se/20170807/refugee-children-protest-swedish-deportations-to-afghanistan>; Andrea Grunau, ‘Protests against latest Afghan deportations from Germany’, *DW*, 24 January 2018, <https://www.dw.com/en/protests-against-latest-afghan-deportations-from-germany/a-42281591>; David Ehl, ‘Afghans deported from Germany face violence, other perils’, *DW*, 26 May 2019, [https://www.dw.com/en/afghans-deported-from-germany-face-](https://www.dw.com/en/afghans-deported-from-germany-face-violence-other-perils/a-48854746)

[violence-other-perils/a-48854746](https://www.dw.com/en/afghans-deported-from-germany-face-violence-other-perils/a-48854746); ‘Norway: Stop the deportation of three young unaccompanied siblings to Afghanistan’, *Amnesty International*, 17 June 2019,

<https://www.amnesty.org/en/latest/news/2019/06/norway-stop-the-deportation-of-three-young-unaccompanied-siblings-to-afghanistan/>

<sup>152</sup> ‘Interview with Abdul Ghafoor, Afghanistan Migrants Advice & Support Organisation on one year Joint Way Forward between EU & Afghanistan’, *ECRE*, 6 October 2017, <https://www.ecre.org/interview-with-abdul-ghafoor-afghanistan-migrants-advice-support-organisation-on-one-year-joint-way-forward-between-eu-afghanistan/>. The point about deportees ‘re-migrating’ is backed up by academic research: Liza Schuster and Nassim Majidi, ‘What happens post-deportation? The experience of deported Afghans’, *Migration Studies*, 1(2), pp.221-240, <https://openaccess.city.ac.uk/id/eprint/47171/2013%20Schuster%20Majidi%20.pdf>

<sup>153</sup> AMASO, 9 June 2019, <https://www.facebook.com/AmasoAfg/posts/2539616269401975>

<sup>154</sup> Nikolaj Nielsen and Apostolis Fotiadis, ‘Inhumane’ Frontex forced returns going unreported’, *EUobserver*, 30 September 2019, <https://euobserver.com/migration/146090>

For the EU and its member states, quite aside from the moral vacuum opened up by deporting people to a country still ravaged by war, deportations to Afghanistan are shockingly expensive. In 2016, the average cost per deportee removed on a Frontex-coordinated flight was over €14,000. This fell to just over €13,300 the following year and by 2018 had more than halved to just over €6,200 – still a hefty price tag.

Member state	2016-2018	
	Flights	Deportees
Germany	19	439
Austria	15	172
Sweden	9	123
Finland	13	65
Hungary	5	31
Denmark	2	19
Greece	3	6
Belgium	2	3
Bulgaria	1	2
France	1	1
Slovenia	1	1

*Figure 8: Frontex-coordinated deportations to Afghanistan, 2016-18*

## In numbers: a growing role for the agency

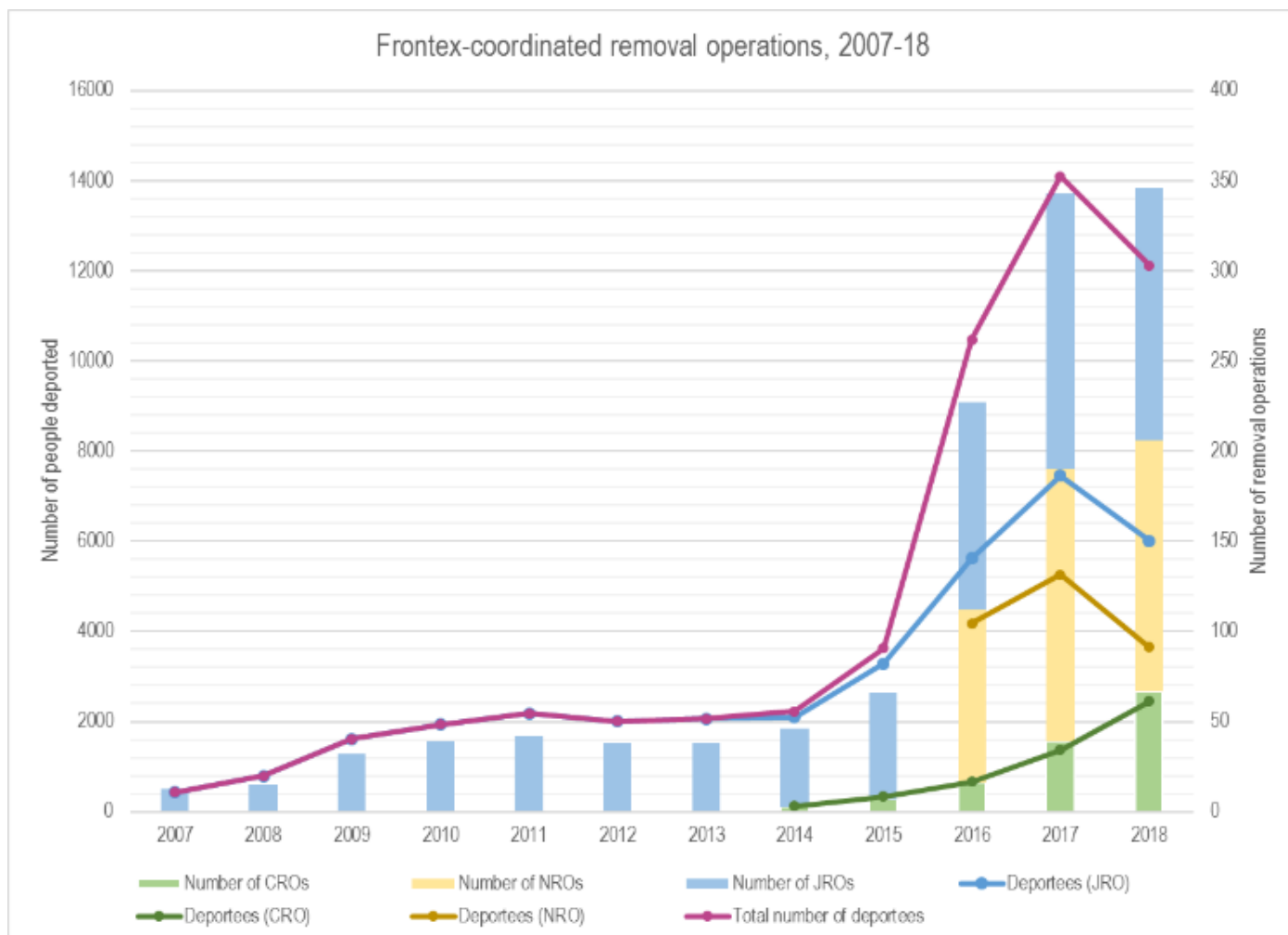


Figure 9: Frontex-coordinated forced removal operations, 2007-18

Between 2007 and 2018 over 53,000 people were deported from the EU on flights coordinated and financed by Frontex. The entry into force of the 2016 Regulation led to a significant increase in the number of people being removed in this way. Between 2015 and 2016, the number of JROs increased by 95% (from 59 to 115). The number of CROs increased by 129% (from 7 to 16). In 2016 there were 97 NROs, which were formally introduced by the 2016 Regulation. The following year there were 151; in 2018 there were a further 139. The agency also coordinates the removal of people via scheduled flights – almost 1,500 in 2018. According to Frontex: “In 2018, for every eight returns carried out via charter flight, one return took place via commercial flight.”<sup>155</sup>

In comparison with the number of expulsions carried out by EU states in total, Frontex’s contribution is small, but it has grown significantly in recent years. Between 2009 and 2014 the number of people removed by the agency (an average of around 2,000 annually) hovered around 1% of the total. In 2015 it grew to 2% (over 3,600 people), in 2016 to 4% (nearly 10,500), and in 2017 and 2018 rose to 7% of the total (over 14,000 and over 12,100 people per year, respectively). This proportional increase may be

explained in part by the decrease in the total number of non-EU nationals deported in the last three years, but the total number of people removed on Frontex flights has increased massively over the same period.

The agency’s budget for financing deportations has grown significantly between 2009 and 2019, both in absolute terms and as a percentage of the agency’s total budget (although data is unavailable for some years). Planned expenditure for 2021-27 dwarfs previous years, even though it begins to decline towards the end of that period as a percentage of the planned total. The Commission’s initial proposal for the EU’s 2021-27 budget aimed to increase annual funding for removal operations by more than 400% in just five years, from just over €63 million a year in 2019 to €277.5 million from 2024 onwards, which would allow the agency to assist with the deportation of 50,000 people annually.<sup>156</sup> This is likely to change as negotiations over the EU budget continue (the Council has proposed a series of significant reductions to the Commission’s proposal) but the intention is clear – a massively-expanded budget to make use of Frontex’s massively-expanded powers.

<sup>155</sup> Frontex, ‘European Centre for Returns’, p.3, [https://frontex.europa.eu/assets/Publications/General/EU\\_Centre\\_For\\_Returns\\_2019.pdf](https://frontex.europa.eu/assets/Publications/General/EU_Centre_For_Returns_2019.pdf)

<sup>156</sup> COM(2018) 631 final, 12 September 2018, p.157, p.138, <http://www.statewatch.org/news/2018/sep/eu-com-frontex-proposal-regulation-com-18-631.pdf>



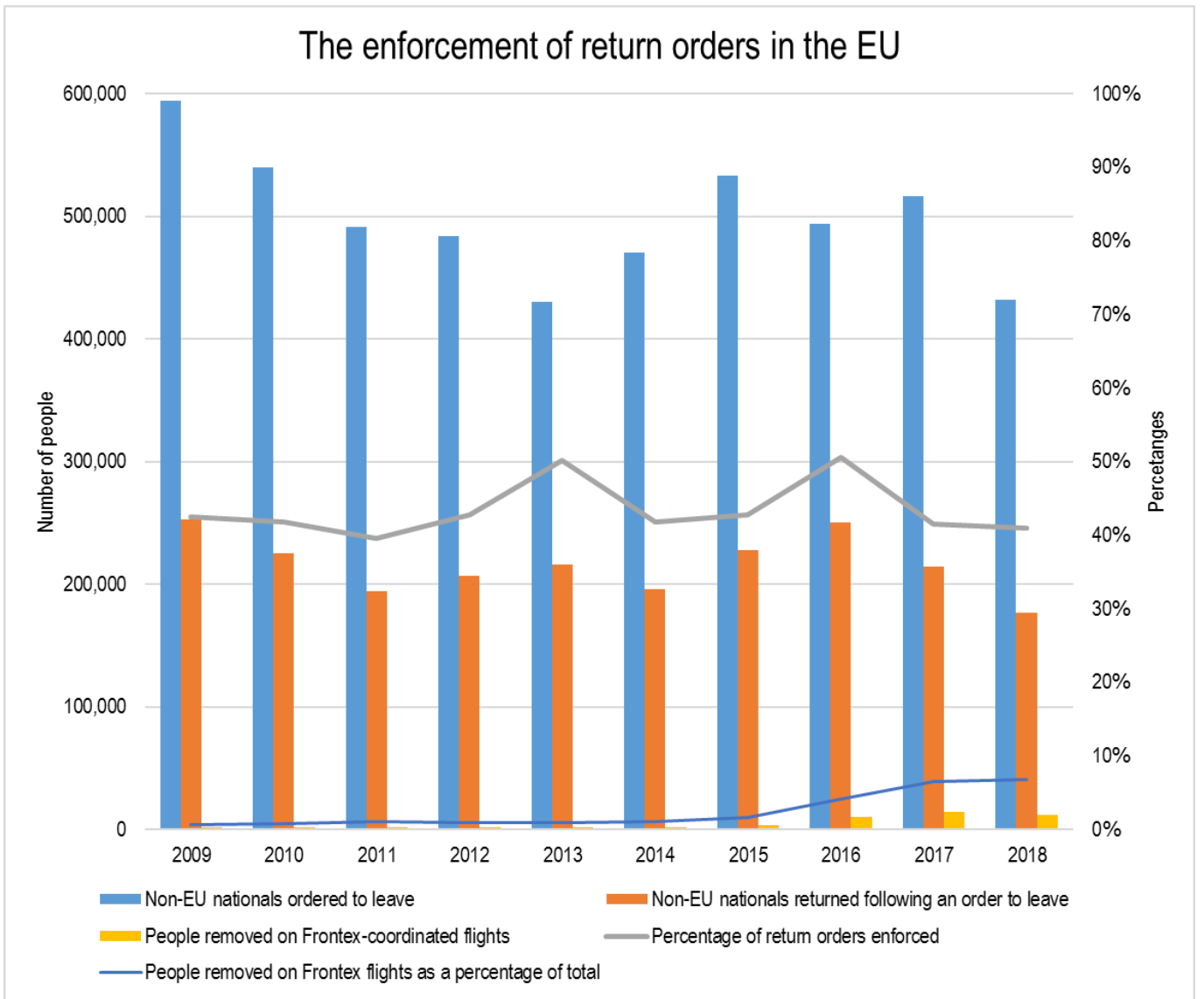


Figure 11: The enforcement of return orders in the EU, 2009-18

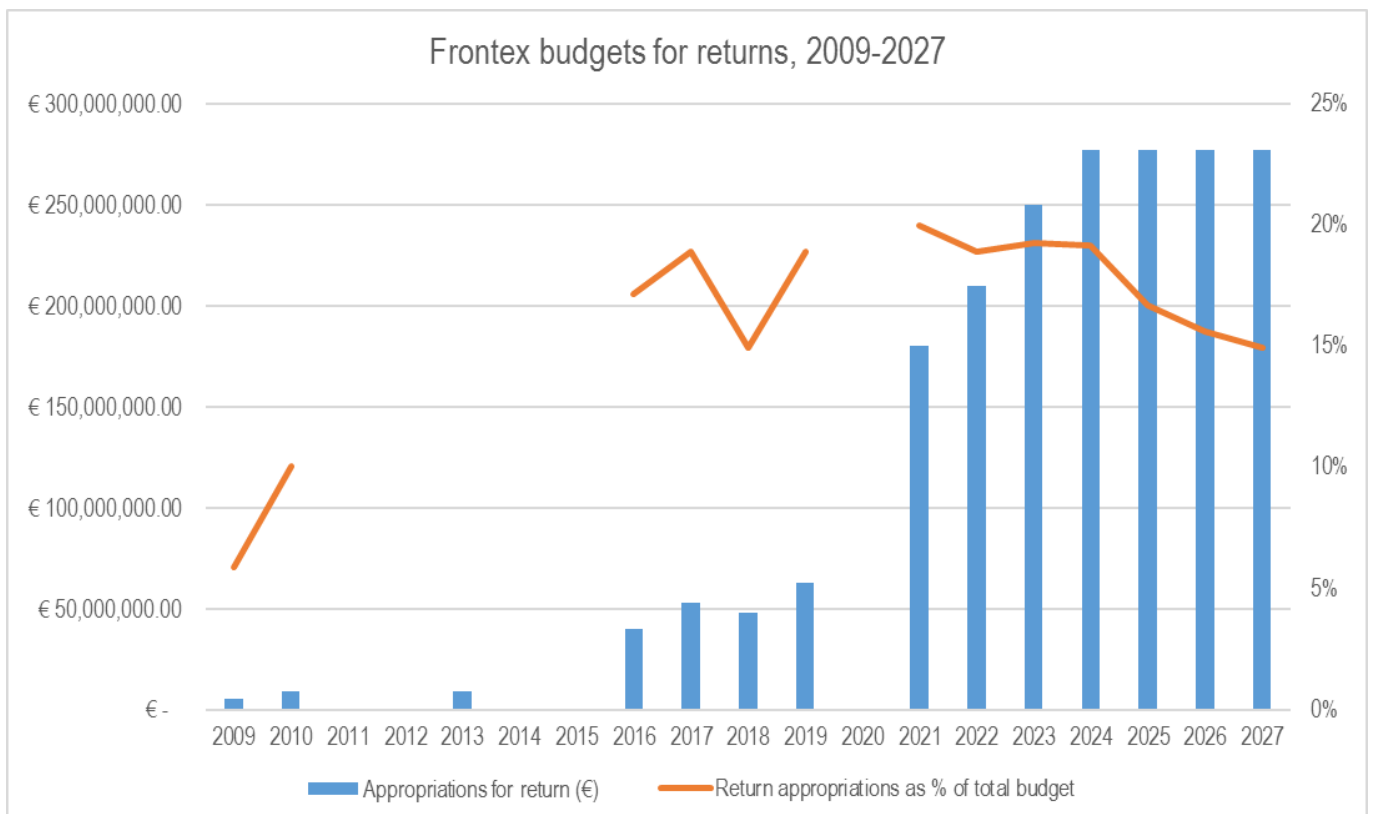


Figure 10: Frontex budgets for returns, 2009-27

## “Regaining control”: new powers for Frontex

Following the large-scale arrivals of refugees in Europe in 2015, the EU and its member states began what has now become a long-term process of significantly reinforcing the EU’s border security framework. Politicians located an extensive supply of hyperbole to accompany the situation – the Dutch prime minister, Mark Rutte, invoked the collapse of Rome and declared that “big empires go down if the external borders are not well-protected,”<sup>157</sup> while Donald Tusk, the president of the European Council, opined that “to save Schengen, we must regain control of our external borders.”<sup>158</sup>

Amongst a barrage of new measures, a new legal basis for Frontex was proposed by the European Commission in December 2015.<sup>159</sup> A text was approved “with breath-taking speed”,<sup>160</sup> in the words of the European Parliament, which struck a deal with the Council of the EU in June 2016.<sup>161</sup> Frontex – now also officially known as the European Border and Coast Guard Agency – was launched on 6 October 2016 at a lonely border checkpoint in Bulgaria.<sup>162</sup>

### Support agency to super-agency: 2004-2019

The 2004 Regulation that established Frontex gave the agency the mandate of assisting in the organisation of JROs, along with the possibility of financing them and identifying “best practices” on acquiring travel documents for individuals due to be deported.<sup>163</sup> A 2011 amendment to the rules gave the agency further powers.<sup>164</sup> At member states’ request it could “ensure the coordination or the organisation of joint return operations... including through the chartering of aircraft,” and finance those operations with its own budget as well as EU funds.<sup>165</sup>

The 2016 Regulation upgraded ‘return’ to one of the agency’s primary tasks,<sup>166</sup> with a whole section of the text on this topic introducing a range of new powers.<sup>167</sup> However, in September 2018, while the agency was still implementing the changes introduced in 2016, the European Commission published yet another proposal for upgrading Frontex’s legal basis.<sup>168</sup> This argued that “more remains to be done to ensure, as part of a comprehensive approach on migration, the effective control of EU external borders and to significantly step up the effective return of irregular migrants.” The proposal called for “a strengthened and fully operational European Border and Coast Guard in order to address citizens’ concerns regarding security and safety for the Union,” involving a “standing corps of 10,000 operational staff with executive powers for all its activities to effectively support member states on the ground.”<sup>169</sup>

A text was once again negotiated at unprecedented speed and a final compromise between the Council and the Parliament was approved in April 2019, with the Regulation coming into force in December of that year. Building upon the powers introduced in the 2016 Regulation, it provides Frontex with an extended set of tasks and activities related to deportations and brings aspects of the entire removal procedure – from the issuance of expulsion orders to engagement in “post-return” activities – into the agency’s remit. An internal agency programming document states that it also aims to work with the European Asylum Support Office (EASO) on “closing the gap between asylum and return procedures.”<sup>170</sup> The overall intention is to develop an “integrated system of return management,”<sup>171</sup> able to assist in the removal of

<sup>157</sup> Quoted in Angeliki Dimitriadi, ‘The European border guard: New in name only?’, *European Council on Foreign Relations*, 2 June 2016, [http://www.ecfr.eu/article/commentary\\_the\\_european\\_border\\_guard\\_new\\_in\\_name\\_only\\_7035](http://www.ecfr.eu/article/commentary_the_european_border_guard_new_in_name_only_7035)

<sup>158</sup> Quoted in Herbert Rosenfeldt, ‘Establishing the European Border and Coast Guard: all-new or Frontex reloaded?’, *EU Law Analysis*, 16 October 2016, <https://eulawanalysis.blogspot.com/2016/10/establishing-european-border-and-coast.html>

<sup>159</sup> European Commission fact sheet, ‘European Agenda on Migration: Securing Europe’s External Borders’, 15 December 2015, [http://europa.eu/rapid/press-release\\_MEMO-15-6332\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-6332_en.htm)

<sup>160</sup> European Parliament press release, ‘European Border and Coast Guard: Parliament and Council strike provisional deal’, 22 June 2016, <http://www.europarl.europa.eu/news/en/press-room/20160621IPR33114/european-border-and-coast-guard-parliament-and-council-strike-provisional-deal>

<sup>161</sup> The Regulation entered into force in September 2016. Section 4 (Articles 27-33) deals with the agency’s role in “return”. See: Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016R1624>

<sup>162</sup> Frontex, ‘European Border and Coast Guard Agency launches today’, 6 October 2016, <https://frontex.europa.eu/media-centre/news-release/european-border-and-coast-guard-agency-launches-today-CHIYAp>

<sup>163</sup> Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the member states of the European Union, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004R2007>

<sup>164</sup> Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the member states of the European Union, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2011.304.01.0001.01.ENG&toc=OJ:L:2011:304:TOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2011.304.01.0001.01.ENG&toc=OJ:L:2011:304:TOC). See also: Steve Peers, ‘The Frontex Regulation – Consolidated text after 2011 amendments’, <http://www.statewatch.org/analyses/no-140-frontex-reg-text.pdf>

<sup>165</sup> Article 27(4), 2016 Regulation

<sup>166</sup> Article 8(1) and 8(1)(l), 2016 Regulation: “The Agency shall perform the following tasks with a view to contributing to an efficient, high and uniform level of border control and return... assist Member States in circumstances requiring increased technical and operational assistance to implement the obligation to return returnees, including through the coordination or organisation of return operations”.

<sup>167</sup> Chapter II, Section 4, 2016 Regulation

<sup>168</sup> In the case of the new powers proposed by the Commission, the proposal was not accompanied by an impact assessment, despite this being a requirement for Commission initiatives “likely to have significant economic, environmental or social impact.” As the European Data Protection Supervisor noted, this made it impossible to properly assess the “benefits and impact, notably on fundamental rights and freedoms”.

<sup>169</sup> COM(2018) 631 final, 12 September 2018, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2018:631:FIN>

<sup>170</sup> ‘Frontex Programming Document 2020-2022’, contained in Council document 5117/20, 9 January 2020

<sup>171</sup> This phrase was introduced in the 2016 Frontex Regulation and reflects the long-standing objective of developing a system of “integrated border management”. While it was referred to once in the 2016 Regulation, it appears four times in the 2019 text.

people issued with expulsion orders through the lowered legal standards that the EU aims to introduce.

## Primary tasks

The 2016 legislation gave Frontex the mandate to “coordinate at a technical and operational level return-related activities of the Member States, including voluntary departures,” with the ultimate aim of establishing “an integrated system of return management among competent authorities of the Member States” in which EU states, non-EU states and “other relevant stakeholders” would participate. The 2019 legislation makes more explicit the precise contours of this technical and operational assistance:

- the collection of information necessary for issuing return decisions, the identification of third-country nationals subject to return procedures and other pre-return, return-related and post-arrival and post-return activities of the Member States;
- the acquisition of travel documents, including by means of consular cooperation;
- the organisation and coordination of return operations and the provision of assistance in relation to voluntary returns in cooperation with the Member States; and
- assisted voluntary returns from the Member States, providing assistance to returnees during the pre-return, return-related and post-arrival and post-return phases.<sup>172</sup>

The Regulation clarifies that the merits of individual return decisions “remain the sole responsibility of the Member States.” However, there is a legitimate concern that Frontex’s role could go beyond that permitted, as has happened with asylum

admissibility interviews conducted by the European Asylum Support Office (EASO) in Greece.<sup>173</sup> Stringent oversight of Frontex’s activities in relation to “the collection of information necessary for issuing return decisions” will be necessary in this regard. This is especially so given the intention, as noted above, to close the “gap” between asylum and removal proceedings.

## Technical and operational assistance

A requirement to provide “technical and operational assistance to Member States experiencing challenges with regard to their return systems,” introduced in 2016, remains in the 2019 legislation. Assistance from the agency will come in the form of:

- interpreting services;
- practical information on “third countries of return”;
- advice on the implementation and management of procedures carried out in accordance with the Returns Directive; and
- advising on and assisting with the implementation of measures “to ensure the availability of returnees for return purposes and to prevent returnees from absconding.”<sup>174</sup>

There are some additional provisions in the 2019 text. Frontex will be able to analyse information on third countries of return, rather than merely provide it, potentially extending its influence over the way national authorities understand and interact with the states to which they are deporting people. The new text also makes clear that in doing so it should cooperate, “in particular”, with the European Asylum Support Office (EASO). In July 2019 Frontex and EASO signed a renewed cooperation plan for the 2019-21 period that foresees: “Cooperation and development of

joint knowledge and information management activities in the area of return,” including potential interoperability between certain IT systems operated by the two agencies.<sup>175</sup>

Regarding measures intended to ensure that deportees are available for removal and do not abscond, Frontex is now obliged to provide “advice on and assistance in relation to alternatives to detention.” However, given that the proposed changes to the Returns Directive would, if approved, result in the automatic detention of far greater numbers of people than at present (see ‘A revamped Returns Directive: enforcement versus rights’), this change may be little more than cosmetic.



Fabrice Leggeri (left), Frontex’s Executive Director, with Dimitris Avramopoulos, former European Commissioner for Migration and Home Affairs

<sup>172</sup> Article 48, 2019 Regulation

<sup>173</sup> A European Ombudsman inquiry found “EASO is being encouraged politically to act in a way which is, arguably, not in line with its existing statutory role,” and that while “ultimate legal responsibility for decisions on individual asylum applications rests with the Greek authorities,” there are “genuine concerns about the quality of the admissibility interviews as well as about the procedural fairness of how they are conducted.” See:

European Ombudsman, ‘Decision in case 735/2017/MDC’, 5 July 2018, <https://www.ombudsman.europa.eu/en/decision/en/98711>

<sup>174</sup> Article 48(2), 2019 Regulation

<sup>175</sup> ‘Frontex - New Cooperation Plan signed with EASO’, *Statewatch News*, 25 July 2019, <http://www.statewatch.org/news/2019/jul/eu-frontex-easo.htm>

The 2019 legislation also introduces the possibility for Frontex to provide “equipment, resources and expertise for the implementation of return decisions and for the identification of third-country nationals,” as part of its technical and operational assistance to the member states. However, there is no further detail on what this may involve.

The text also gives new emphasis to the agency’s role in assisting with ‘voluntary’ returns, stating that it will provide technical and operational assistance to the member states for both voluntary returns and “assisted voluntary returns”.<sup>176</sup> In the case of the former, the ‘returnee’ is not provided with assistance of any sort; in the case of the latter, they may be “supported by logistical, financial and / or other material assistance.”<sup>177</sup> With regard to voluntary returns, Frontex must now provide “assistance to returnees during the pre-return, return-related and post-arrival and post-return phases, taking into account the needs of vulnerable persons.”<sup>178</sup> According to the agency’s roadmap for implementing the new Regulation, in early 2020 it will produce an “Action Plan on expanding Agency’s return support capacity for MS on post-arrival and post-return,” in the third quarter of 2020.<sup>179</sup>

### Information hub

New provisions on national IT systems in the 2019 legislation give Frontex a far more interventionist role. Whereas previously the agency had to “coordinate the use of relevant IT systems,”<sup>180</sup> it will now develop “a non-binding reference model for national IT systems for return case management which describes the structure of such systems, as well as provide technical and operational assistance to Member States in developing such systems compatible with the model.”<sup>181</sup> This ties in with a further requirement – for the agency to “operate and further develop an integrated return management platform and a communication infrastructure” that interconnects the IT systems of Frontex and national authorities. These significant changes are discussed further in ‘A centralised deportations database’.

A requirement introduced in 2016 for Frontex to “organise, promote and coordinate” activities that allow the member states to exchange information and to identify and share “best practices in return matters” is maintained, as is a provision allowing Frontex to finance or co-finance all the activities referred to in the legislation’s section on return. The 2019 text also introduces the possibility for Frontex to reimburse national authorities with all the

costs for adapting their national IT systems so that they can be connected to the “integrated return management platform”.

### Taking over nationally-controlled networks

The new Regulation also requires Frontex to “aim at building synergies and connecting Union-funded networks and programmes in the field of return.” Although not explicitly mentioned in the legislation, the intention is for the agency to take over the management and coordination of a number of EU-funded projects currently managed by national authorities, such as EURLO (the European Return Liaison Officers Network), EURINT (the European Integrated Return Management Initiative) and potentially ERRIN (the European Return and Reintegration Network).

ERRIN “facilitates the return to countries of origin and provision of reintegration assistance to migrants who cannot, or no longer wish to, remain in Europe.” It is currently led by the Dutch Ministry of Justice and Security,<sup>182</sup> which is also responsible for coordinating the EURINT network. EURINT was launched in 2011; 27 member states and Frontex currently participate. Its purpose is to “develop and share European best-practices in the field of return, mainly focusing on non-voluntary return, from the moment of identification to the acquisition of travel documents required for a person to return to his or her country of origin.”<sup>183</sup> Both projects are currently funded by the EU’s Asylum, Migration and Integration Fund (AMIF). Frontex’s 2019 programming document foresees “full management” of the activities currently undertaken by EURINT from 2020 onwards;<sup>184</sup> by July 2022, there is supposed to be a “takeover of ERRIN into Frontex”.<sup>185</sup>

The 2019 programming document also outlines plans for Frontex to take over the management of EURLO by 2021, dependent on the outcome of a pilot project.<sup>186</sup> The network, which is led by Belgium and funded by the AMIF, “aims at stimulating country of origin-focused operational cooperation, notably through Return Liaison Officers in key countries.”<sup>187</sup> The Commission reported in 2017 that under the EURLO programme, “nine European Return Officers were deployed to countries relevant for readmission, for instance Afghanistan or Ethiopia, to provide support to all Member States on readmission issues.”<sup>188</sup>

Frontex itself has been able to deploy liaison officers to non-EU states since 2011, “to contribute to the prevention of and fight against illegal immigration and the return of illegal migrants,” by establishing contacts and cooperation with the authorities of those states.<sup>189</sup> This role was maintained in the 2016 rules and

<sup>176</sup> Article 48(1)(a)(iii) and (iv), 2019 Regulation

<sup>177</sup> European Commission, ‘Assisted voluntary return’, [https://ec.europa.eu/home-affairs/what-we-do/networks/european\\_migration\\_network/glossary\\_search/assisted-voluntary-return\\_en](https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/assisted-voluntary-return_en)

<sup>178</sup> Article 48(1), 2019 Regulation

<sup>179</sup> “Roadmap for implementing new Frontex Regulation: full steam ahead”, *Statewatch News*, 25 November 2019, <http://www.statewatch.org/news/2019/nov/eu-frontex-roadmap.htm>

<sup>180</sup> Article 27(c), 2016 Regulation

<sup>181</sup> Article 48(1)(c), 2019 Regulation

<sup>182</sup> ‘About ERRIN’, <https://returnnetwork.eu/about-errin/>

<sup>183</sup> European Commission, ‘Eurint network’, [https://ec.europa.eu/home-affairs/what-we-do/networks/european\\_migration\\_network/expert-groups\\_en/eurint-network\\_en](https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/expert-groups_en/eurint-network_en)

<sup>184</sup> Frontex, ‘Programming Document 2019-2021’, 18 October 2018, p.29, [https://frontex.europa.eu/assets/Key\\_Documents/Programming\\_Document/2019/Programming\\_document\\_2019-2021.pdf](https://frontex.europa.eu/assets/Key_Documents/Programming_Document/2019/Programming_document_2019-2021.pdf)

<sup>185</sup> Frontex Programming Document 2020-2022’, contained in Council document 5117/20, 9 January 2020

<sup>186</sup> *Ibid.*, p.88

<sup>187</sup> European Commission, ‘EU Action Plan on Return’, COM(2015) 453 final, 9 September 2015, footnote 22, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015DC0453>

<sup>188</sup> European Commission, ‘Report on the operationalisation of the European Border and Coast Guard’, COM(2017) 42 final, 25 January 2017, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2017:0042:FIN>

<sup>189</sup> Article 14(4) in Steve Peers, ‘The Frontex Regulation – Consolidated text after 2011 amendments’, 2011, <http://www.statewatch.org/analyses/no-140-frontex-reg-text.pdf>

the 2019 Regulation includes further provisions, specifying that liaison officers may be either from Frontex's own staff or "other experts," and that they should provide "technical assistance in the identification of third-country nationals and the acquisition of travel documents." Furthermore:

*"In third countries where return liaison officers are not deployed by the Agency, the Agency may support a Member State in deploying a return liaison officer to provide support to the Member States, as well as to support the Agency's activities, in accordance with Article 48 [which sets out the tasks related to deportations]."*<sup>190</sup>

Liaison officers deployed by Frontex – whether they are tasked to work specifically on return or not – will act as part of existing networks of national immigration liaison officers. Over 500 such officers are currently deployed, and EU rules governing their work were recently revised in order to enhance coordination and cooperation and to give the Commission the power to deploy its own officers.<sup>191</sup> Both those rules and the new Frontex Regulation make clear that liaison officers must act in compliance with EU law and fundamental rights. However, while the 2016 Regulation explicitly said that liaison officers will "only be deployed to third countries in which border management practices comply with minimum human rights standards,"<sup>192</sup> there is no such provision in the 2019 text. This may well facilitate the agency's intention to have 10 liaison officers in non-EU states by 2020.<sup>193</sup>

## Escorts, specialists and monitors

The 2016 legislation introduced new categories of officials in three return "pools", consisting of monitors, escorts and specialists. The agency's Management Board decided upon pools of 40 return specialists, 50 forced-return monitors and 600 forced-return escorts.<sup>194</sup> Return specialists were introduced to assist national authorities in carrying out "tasks such as identification of particular groups of third-country nationals, the acquisition of travel documents from third countries and facilitation of consular cooperation".<sup>195</sup> The jobs of the latter two categories of official are more obvious – to monitor the compliance of operations with fundamental rights standards and to prevent deportees from attempting to foil their forced removal from the EU.

Under the 2019 rules, the pools of forced return escorts and return specialists introduced in 2016 will become part of the "standing corps", itself made up of four different types of staff (see the table below).<sup>196</sup> It is not yet clear how many of each category will be required by the agency, but a decision taken by the Frontex Management Board in early 2020, based on a proposal from the agency,<sup>197</sup> defines the two roles as follows:

- Forced Return Escort and Support Officer: an official of a competent national authority of an EU member state, a Schengen associated country, or a member of the agency's statutory staff who undertakes "escorting" duties in forced return operations or provides "ground or on board support to voluntary and forced return operations";
- Return Specialist: an official of a competent national authority of an EU member state, a Schengen associated country, or a member of the agency's statutory staff who "carries out tasks connected to return of third country nationals illegally staying on a territory of a Host [member state/Schengen Associated Country]," for example by reinforcing national authorities' staff and supporting consular cooperation, operational data collection and "synergies with the integrated return management platform, use of operational return systems".<sup>198</sup>

Forced return monitors, meanwhile, will come from a pool drawn from national monitoring authorities and Frontex's statutory staff.<sup>199</sup> The 2019 legislation introduces a requirement for Frontex to recruit at least 40 fundamental rights officers by December 2020<sup>200</sup> and these staff may also be deployed as forced return monitors.<sup>201</sup> The size of the pool is to be determined by Frontex's Management Board,<sup>202</sup> although a decision does not yet appear to have been taken. While these changes seem likely to result in the availability of a greater number of monitors than previously, the independence of the structure has been questioned – Frontex both funds and manages the pool, trains monitors, and selects those to be deployed on any particular operation (for more detail, see 'Monitoring forced removals').

Both types of monitor - those drawn from national authorities and those that are Frontex statutory staff – can be deployed either on stand-alone expulsion operations (i.e. JROs or CROs), as part of

<sup>190</sup> Article 77, 2019 Regulation

<sup>191</sup> Regulation (EU) 2019/1240 of the European Parliament and of the Council of 20 June 2019 on the creation of a European network of immigration liaison officers, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32019R1240>. See also: European Parliament, 'Revision of the immigration liaison officers network: Implementation Appraisal', 16 May 2018, [https://www.europarl.europa.eu/thinktank/es/document.html?reference=PRS\\_BRI\(2018\)621810](https://www.europarl.europa.eu/thinktank/es/document.html?reference=PRS_BRI(2018)621810)

<sup>192</sup> Article 55, 2016 Regulation

<sup>193</sup> Frontex, 'Liaison Officers Network', last accessed 10 December 2019, <https://frontex.europa.eu/partners/liaison-officers-network/>

<sup>194</sup> Article 2, 'Management Board Decision 41/2016', [https://frontex.europa.eu/assets/Key\\_Documents/MB\\_Decision/2016/MB\\_Decision\\_41\\_2016\\_on\\_return\\_pools.pdf](https://frontex.europa.eu/assets/Key_Documents/MB_Decision/2016/MB_Decision_41_2016_on_return_pools.pdf)

<sup>195</sup> Article 31(1), 2016 Regulation

<sup>196</sup> Article 54(1), 2019 Regulation

Category 1: statutory staff deployed as team members in operational areas (Article 55) and staff responsible for the ETIAS Central Unit.

Category 2: staff long-term seconded from Member States to the Agency as part of the standing corps (Article 56). Category 3: staff from member states ready to be provided to the agency for short-term deployment as part of the standing corps (Article 57). Category 4: the reserve for rapid reaction consisting of staff from the member states ready to be deployed in accordance with Article 58 for the purposes of rapid border interventions in accordance with Article 39.

<sup>197</sup> As contained in the 'Frontex Programming Document 2020-2022', contained in Council document 5117/20, 9 January 2020

<sup>198</sup> 'Management Board Decision 1/2020', 4 January 2020, [https://frontex.europa.eu/assets/Key\\_Documents/MB\\_Decision/2020/MB\\_Decision\\_1\\_2020\\_adopting\\_the\\_profiles\\_to\\_be\\_made\\_available\\_to\\_the\\_EBC....pdf](https://frontex.europa.eu/assets/Key_Documents/MB_Decision/2020/MB_Decision_1_2020_adopting_the_profiles_to_be_made_available_to_the_EBC....pdf)

<sup>199</sup> Article 51, 2019 Regulation

<sup>200</sup> Article 110(6), 2019 Regulation. The European Parliament, which introduced this requirement during negotiations on the text, initially sought the appoint of 100 monitors.

<sup>201</sup> Article 110(2)(b), 2019 Regulation

<sup>202</sup> Article 51, 2019 Regulation

“migration management support teams”, or as part of “return interventions”. These provide new possibilities for Frontex and other EU agencies to take on operational roles in national territory, building on existing border control activities and on the ‘hotspots’ that have been introduced in Greece and Italy in recent years.

Migration management support teams have been introduced by the 2019 Regulation. They can be deployed when a member state faces “disproportionate migratory challenges at particular hotspot areas of its external borders characterised by large inward mixed migratory flows”. The member state in question must request support from the Commission, which shall forward the request to relevant EU agencies such as Frontex, Europol and EASO. Along with assistance in identifying, registering and debriefing people arriving in the member state, the teams will be able to provide “technical and operational assistance in the field of return... including the preparation and organisation of return operations.”<sup>203</sup> In the case of Frontex, officials deployed as part of these teams will come from the standing corps.

Return interventions, meanwhile, were first introduced in 2016. These are designed to provide technical and operational assistance when a member state faces “a burden when implementing the obligation to return returnees.” They “may consist in the rapid deployment of return teams to the host Member State providing assistance in the implementation of return procedures and the organisation of return operations from the host Member State,” and can be deployed either on the agency’s initiative with the agreement of the member state in question, or at the request of the member state.<sup>204</sup> This is a change from the 2016 rules, which only allowed the deployment of a return intervention following a request from the member state. Furthermore, Frontex may now also launch a “rapid return intervention” when a member state is facing not just a “burden” but “specific and disproportionate challenges when implementing its obligation to return returnees.” The only apparent difference

here is that the deployment of such an intervention must be “rapid”, although there are no timeframes specified.

### New safeguards

Alongside these new powers and increased operational capabilities, the 2019 Regulation introduces further safeguards with regard to deportations. The 2016 text gave the agency the power to acquire travel documents through cooperation with the consulates of destination states. While it was already an obligation to do so “without disclosing information relating to the fact that an application for international protection has been made,” the 2019 Regulation also prohibits the disclosure of “any other information that is not necessary for the purpose of return.”<sup>205</sup>

Return teams must also now include “officers with specific expertise in child protection,” where this is necessary, although it is not specified whom is to decide when that expertise is necessary. However, the profile adopted by the Frontex Management Board for a ‘Forced Return Escort and Support Officer’ says that specific expertise in child protection and vulnerable groups “would be of advantage” for the role – it does not make it a requirement.<sup>206</sup>

As noted above, the agency is also like to have more forced return monitors at its disposal than previously, although the Management Board is yet to decide on the size of the ‘pool’ required. Furthermore, the new Regulation says that Frontex “should allow, subject to the agreement of the Member State concerned,” the Council of Europe’s anti-torture committee to monitor forced removal operations. This will require the signature of a working arrangement between Frontex and the Council of Europe,<sup>207</sup> although there is no mention of the signature of any new working arrangements in the agency’s Programming Document for 2020-22.<sup>208</sup> The issue of monitoring is discussed in depth in subsequent sections.

	Category 1	Category 2	Category 3	Category 4	Total for the standing corps
	Statutory staff	Operational staff for long-term secondments	Operational staff for short-term deployments	Reserve for rapid reaction	
2021	1,000	400	3,600	1,500	6,500
2022	1,000	500	3,500	1,500	6,500
2023	1,500	500	4,000	1,500	7,500
2024	1,500	750	4,250	1,500	8,000
2025	2,000	1,000	5,000	0	8,000
2026	2,500	1,250	5,250	0	9,000
2027	3,000	1,500	5,500	0	10,000

Table 3: Planned development of the standing corps

<sup>203</sup> Article 40, 2019 Regulation

<sup>204</sup> Article 53, 2019 Regulation; Article 33(1), 2016 Regulation.

<sup>205</sup> Article 48(1)(a)(ii), 2019 Regulation

<sup>206</sup> ‘Management Board Decision 1/2020 adopting the profiles to be made available to the European Border and Coast Guard Standing Corps’, 4 January 2020,

[https://frontex.europa.eu/assets/Key\\_Documents/MB\\_Decision/2020/MB\\_Decision\\_1\\_2020\\_adopting\\_the\\_profiles\\_to\\_be\\_made\\_available\\_to\\_the\\_EBC....pdf](https://frontex.europa.eu/assets/Key_Documents/MB_Decision/2020/MB_Decision_1_2020_adopting_the_profiles_to_be_made_available_to_the_EBC....pdf)

<sup>207</sup> Article 68(1)(d) and 68(2), 2019 Regulation

<sup>208</sup> Contained in Council document 5117/20, 9 January 2020

## Suspending or terminating operations

The legislation also contains new provisions regarding the possibility to suspend or terminate activities due to violations of fundamental rights. Since 2011, the agency has been obliged to “suspend or terminate, in whole or in part,” activities at the external borders when there are fundamental rights violations “of a serious nature”.<sup>209</sup> The 2016 Regulation extended this to any of the agency’s activities, not all of which take place at the external borders of the Schengen area.<sup>210</sup> The 2019 Regulation introduces a requirement for the executive director, prior to the start of any activity or operation, to consider its potential impact on fundamental rights and “suspend or terminate” the action where “it could lead to violations of fundamental rights or international protection obligations of a serious nature.”<sup>211</sup> Such a decision must be based on consultation with the agency’s fundamental rights officer and a variety of other factors.<sup>212</sup>

To date, the agency has not suspended any operations and although it has made member states aware of concerns raised by its fundamental rights office regarding return decisions, no concrete measures have been put in place for acting on those concerns.<sup>213</sup> During a hearing in front of the European Parliament’s civil liberties committee, Frontex’s executive director said that the agency prevented the return of a pregnant woman on one of its operations (a flight from Hungary to Afghanistan).<sup>214</sup> However, the agency has continued to cooperate with the Hungarian authorities, despite the ongoing infringement proceedings against the state for its non-compliance with EU asylum legislation.<sup>215</sup> Whether the new Frontex legislation will make a difference in this respect remains to be seen.

## New oversight and accountability mechanisms

One factor that may influence such decisions are the new powers granted to the agency’s fundamental rights officer (FRO). Introduced by the 2016 Regulation, the FRO’s work has subsequently been hampered by Frontex’s failure to provide sufficient staff and resources.<sup>216</sup> The 2019 Regulation should, at least, address the staffing issue – there are now requirements set down in law for the provision of “sufficient and adequate human and financial resources” and, as noted above, for the appointment of 40 fundamental rights monitors (who may also be deployed as forced return monitors) by December 2020.<sup>217</sup> These officials will report directly to the FRO and, aside from acting as forced return monitors, will be responsible for ensuring and

monitoring compliance with fundamental rights standards by providing advice and assistance on all the agency’s plans and activities, and carrying out visits to and evaluations of operations.<sup>218</sup>

The FRO, meanwhile, has been given an extended set of powers. As with the introduction of fundamental rights monitors, these were introduced to the text by MEPs during negotiations with the Council. The FRO was previously responsible for contributing to Frontex’s fundamental rights strategy and monitoring its compliance with and promotion of fundamental rights. Now, they will be able to monitor compliance by conducting investigations; offering advice where deemed necessary or upon request of the agency; providing opinions on operational plans, pilot projects and technical assistance; and carrying out on-the-spot visits. The executive director is now obliged to respond “as to how concerns regarding possible violations of fundamental rights... have been addressed,” and the management board “shall ensure that action is taken with regard to recommendations of the fundamental rights officer.”<sup>219</sup> The investigatory powers of the FRO are not, however, set out in the Regulation.

Some less-significant changes have also been introduced to the rules on the Consultative Forum on Fundamental Rights, an independent body made up of non-governmental and international organisations that was established by the 2016 Regulation and provides advice to the executive director and management board. The 2019 Regulation clarifies that there is no requirement for the executive director and management board to seek the advice of the Consultative Forum. However, it does introduce provisions that require Frontex to “inform the consultative forum of the follow-up to its recommendations,” and where a member state does not agree to a visit by the Forum to an operation, it must provide written reasons for doing so.

Finally, some new attempts at parliamentary accountability have been introduced by the 2019 Regulation. The European Parliament must be consulted on the agency’s work programmes and Frontex must provide a “thorough justification” if it decides to discard proposals made by the Parliament.<sup>220</sup> An “expert” of the European Parliament may (not shall) be invited to meetings of the Management Board.<sup>221</sup> The executive director, as well as being obliged to appear before the European Parliament, if requested, must now also answer questions from MEPs within 15 days and “shall report regularly to the appropriate bodies and committees of the European Parliament.”<sup>222</sup> The European and

<sup>209</sup> Article 3, Regulation 2007/2004, as amended

<sup>210</sup> Article 25, 2016 Regulation

<sup>211</sup> Article 46(5), 2019 Regulation

<sup>212</sup> Article 46(6), 2019 Regulation: “The decisions referred to in paragraphs 4 and 5 shall be based on duly justified grounds. When taking such decisions, the executive director shall take into account relevant information such as the number and substance of registered complaints that have not been resolved by a national competent authority, reports of serious incidents, reports from coordinating officers, relevant international organisations and Union institutions, bodies, offices and agencies in the areas covered by this Regulation. The executive director shall inform the management board of such decisions and provide it with justifications therefor.”

<sup>213</sup> Interview with Annegret Kohler, 21 May 2019

<sup>214</sup>

<sup>215</sup> European Commission press release, ‘Migration and Asylum: Commission takes further steps in infringement procedures against Hungary’, 19 July 2018,

[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_18\\_4522](https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4522)

<sup>216</sup> ‘NGOs, EU and international agencies sound the alarm over Frontex’s respect for fundamental rights’, *Statewatch News*, 5 March 2019, <http://www.statewatch.org/news/2019/mar/fx-consultative-forum-rep.htm>; ‘Frontex condemned by its own fundamental rights body for failing to live up to obligations’, *Statewatch News*, 21 May 2018,

<http://www.statewatch.org/news/2018/may/eu-frontex-fr-rep.htm>

<sup>217</sup> Article 110(6), 2019 Regulation

<sup>218</sup> Article 110, 2019 Regulation

<sup>219</sup> Article 109, 2019 Regulation

<sup>220</sup> Article 102(1), 2019 Regulation

<sup>221</sup> Article 104(7), 2019 Regulation

<sup>222</sup> Article 106(2), 2019 Regulation

national parliaments may also cooperate in order to scrutinise Frontex's activities.<sup>223</sup> This possibility also applies to Europol, whose work is examined twice a year by a 'Joint Parliamentary Scrutiny Group' (JPSG). There has so far been no formal assessment or evaluation of the effectiveness of this form of oversight. The Europol JPSG meets twice a year, can oblige relevant officials to appear before it, has access to certain classified information, but has no power to sanction Europol in any way. In this respect, it may well prove to be little more than a talking shop. Given the expansion of powers granted to Frontex by the new Regulation – not just in the field of expulsions, but more broadly – there is a need to evaluate the strengths and weakness of the Europol JPSG and consider what the most effective methods of parliamentary scrutiny would be in relation to Frontex.

## What has changed?

The Commission's proposal for the new Frontex Regulation was ambitious, but not everything made it through the legislative process. With regard to deportations, the proposal sought to allow Frontex to carry out expulsions from one non-EU state to another – for example, from Serbia to Afghanistan. Despite strong support from Hungary, Poland and Slovenia,<sup>224</sup> this was entirely removed from the text following opposition from the European Parliament.<sup>225</sup> Equally, the preference of the Council and Commission to give Frontex the power to assist in "the preparation of return decisions" did not make it through the negotiations; the term was replaced with "the collection of information necessary for issuing return decisions."<sup>226</sup> What this means in practice remains to be seen.

It is nevertheless clear that the agency's powers regarding deportations, as with its other areas of activity, have been extended significantly. Along with information-gathering, it will be able to cooperate more extensively with other EU agencies, provide "equipment, resources and expertise for the implementation of return decisions and for the identification of third-country nationals," establish and integrate new databases and information systems, take over various networks dealing with deportation that are currently run by national authorities, and incorporate return escorts and specialists into the new 'standing corps'.

These powers are counter-balanced by new safeguards: specific requirements prohibiting the disclosure of any information to non-EU states "not necessary for the purpose of return" and to include

officials with child expertise protection in removal operations, "where necessary"; alongside more general requirements for the Executive Director to consider the impact of any activity on fundamental rights and to suspend any activity, rather than just those at the external borders, when there are serious fundamental rights violations; new powers for the fundamental rights officer; and new powers for the European and national parliaments.

If the agency is supplied with a sufficient budget, it is almost certain that these new powers will permit an increase in the number of deportations it carries out, as well as extending its role in the organisation and coordination of those operations. The new safeguards appear relatively extensive on paper, yet Frontex has consistently failed to prioritise fundamental rights in its work in the past and it has been argued that the new safeguards "do not correspond to the expansion of powers and competencies of the agency in any of the areas of its activity".<sup>227</sup> Leaving aside the broader question of whether Europe's migration and border control policies can every truly be implemented in respect of fundamental rights, it is clear that significant pressure from MEPs and civil society organisations, and commitment from the newly-appointed fundamental rights officials within the agency, will be required for it to prioritise these new legal requirements.

## The European Centre for Returns

The new roles given to the agency by the 2019 Regulation will be implemented by the European Centre for Returns (ECRet), a unit set up following the entry into force of the 2016 Regulation. ECRet is part of the agency's 'Operational Response Division' (ORD), which also includes the 'Field Deployment Unit' and the 'Coast Guard and Law Enforcement Unit'. As of late 2018, the ORD had an overall annual budget of some €116 million<sup>228</sup> (with some €47.8 million devoted to expulsions<sup>229</sup>) and 130 staff divided between the three units. However, there has been a significant recruitment drive – it was expected that 200 staff would be employed in the ORD by the end of 2018. Furthermore, a "steady growth in staff and budget allocated to the Division is expected to continue until 2020. This growth reflects the upscaling of the Joint Operations – in particular activities aiming at returning irregular migrants," according to a job advert posted by the agency.<sup>230</sup> An internal programming document produced by the agency and obtained by *Statewatch* sets out the changes

<sup>223</sup> Article 112, 2019 Regulation

<sup>224</sup> Council of the European Union, Draft REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 (first reading) Statements, 29 October 2019, <https://data.consilium.europa.eu/doc/document/ST-13329-2019-ADD-2-REV-1/en/pdf>

<sup>225</sup> Article 10(23) of the proposal would have permitted Frontex to "support third countries in the coordination or organization of return activities from other third countries, including the sharing of personal data for return purposes". See: Nikolaj Nielsen, 'Frontex set to help Balkan states deport migrants', *EUobserver*, 28 March 2019,

<https://euobserver.com/migration/144521>; 'New roles for Frontex agreed by Council and Parliament - but externalised deportations excluded', *Statewatch News*, 1 April 2019, <http://www.statewatch.org/news/2019/mar/eu-frontex-returns-non-eu.htm>

<sup>226</sup> Article 48(1)(a), 2019 Regulation

<sup>227</sup> Mariana Gkliati, 'The new European Border and Coast Guard: Do increased powers come with enhanced accountability?', *EU Law Analysis*, 17 April 2019, <https://eulawanalysis.blogspot.com/2019/04/the-new-european-border-and-coast-guard.html>

<sup>228</sup> 'Senior Coordinating Officer (Senior Team Leader) in European Centre for Returns (AD9)',

<https://microsite.frontex.europa.eu/en/recruitments/RCT-2018-00073/422>

<sup>229</sup> Frontex, 'Budget 2018 N5', 12 December 2018,

[https://frontex.europa.eu/assets/Key\\_Documents/Budget/Budget\\_2018\\_N5.pdf](https://frontex.europa.eu/assets/Key_Documents/Budget/Budget_2018_N5.pdf)

<sup>230</sup> 'Senior Coordinating Officer (Senior Team Leader) in European Centre for Returns (AD9)',

<https://microsite.frontex.europa.eu/en/recruitments/RCT-2018-00073/422>



# European Centre for Returns - setup

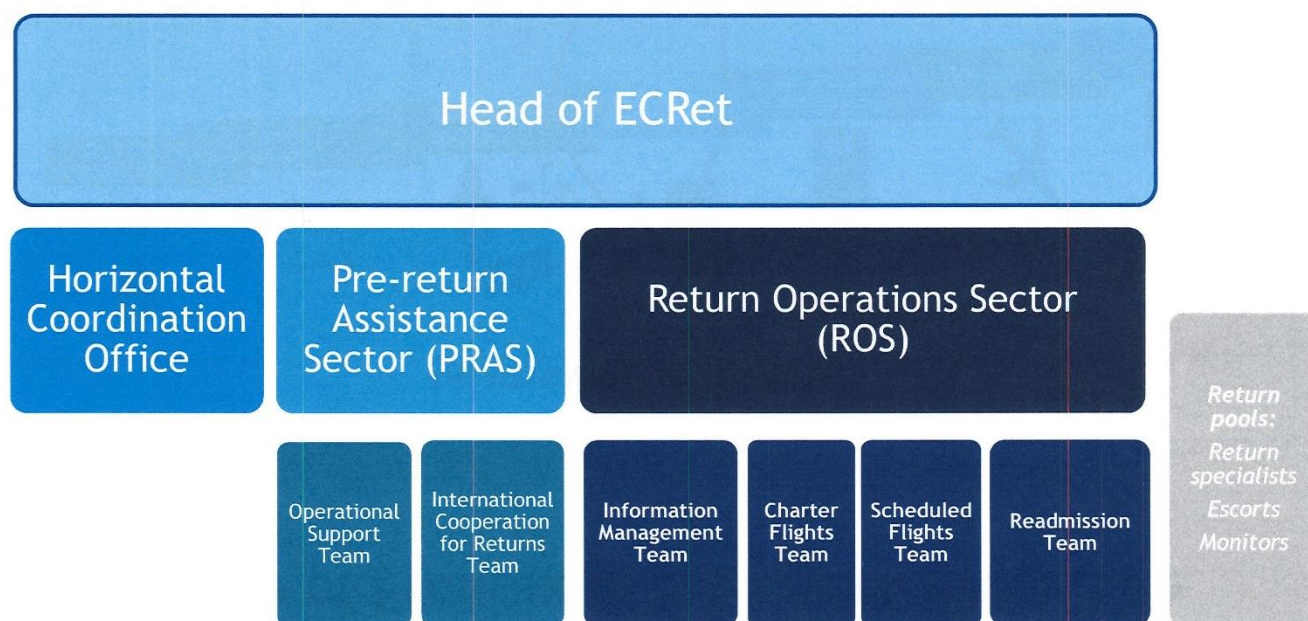


Figure 12: The structure of the European Centre for Returns

introduced by the 2019 Regulation; it foresees an equivalent of 71 full-time staff dedicated to deportations, with a budget of almost €60 million.<sup>231</sup>

The purpose of the ECRet is to support member states in increasing the number of people removed and in making return management systems more efficient.<sup>232</sup> It consists of a 'Pre-Return Assistance Sector' (PRAS) and a 'Return Operations Sector' (ROS), with further sub-divisions in each. The former is concerned with the coordination of "various activities required to implement effective returns," focusing on the work that must be done before an individual can be expelled: identification, acquiring travel documents and "overall Third Country cooperation in the area of return". It also works on "streamlining national case management systems" and training activities. The latter unit, ROS, is concerned with coordinating the operations themselves.<sup>233</sup>

The ECRet also deploys return specialists to member states at the request of national authorities. As noted above, following the

entry into force of the 2016 Regulation, Frontex sought to develop a pool of 40 return specialists.<sup>234</sup> In 2017, one was deployed in Greece; in 2018, a further two were deployed to Bulgaria and Greece. According to a Frontex presentation, their "main achievements" included recommendations on the management of subsequent last minute asylum applications (known as 'SALMAS'); developing a new tool to identify non-EU nationals; and the deployment of interpreters and screeners in detention centres.<sup>235</sup> A presentation produced by Greece's Return Coordination Office states that Frontex return specialists are expected to identify "possible bottlenecks" and offer support to consular cooperation and return operations by sharing experience, to share "any special knowledge and know-how for specific nationalities" and information on procedures followed in their home state.<sup>236</sup>

## A centralised deportations database

The 2019 Regulation gives Frontex extensive new powers to develop and operate databases and IT systems that are

<sup>231</sup> 'Frontex Programming Document 2020-2022', contained in Council document 5117/20, 9 January 2020

<sup>232</sup>

[https://frontex.europa.eu/assets/Publications/General/EU\\_Centre\\_For\\_Returns\\_2019.pdf](https://frontex.europa.eu/assets/Publications/General/EU_Centre_For_Returns_2019.pdf)

<sup>233</sup> 'Coordinating Officer in European Centre for Returns – 2 posts',

<https://microsite.frontex.europa.eu/en/recruitments/RCT-2018-00082>

<sup>234</sup> Article 2, 'Management Board Decision 41/2016 of 6 December 2016 adopting the profiles and the overall numbers of experts to be made available to the pools of forced-return monitors, forced-return escorts and

return specialists',

[https://frontex.europa.eu/assets/Key\\_Documents/MB\\_Decision/2016/MB\\_Decision\\_41\\_2016\\_on\\_return\\_pools.pdf](https://frontex.europa.eu/assets/Key_Documents/MB_Decision/2016/MB_Decision_41_2016_on_return_pools.pdf)

<sup>235</sup> Frontex, 'Training for Return Specialists – 17-20 September 2018, Amsterdam, The Netherlands', <http://www.statewatch.org/docbin/eu-frontex-deportations-training-for-return-specialists.pdf>

<sup>236</sup> 'Training Course for Return Specialists – Presentation RCO, Amsterdam, 18 September 2018', <http://www.statewatch.org/docbin/eu-frontex-deportations-presentation-greece.pdf>

supposed to facilitate cooperation and coordination on expulsions between Frontex and member states. Indeed, these new obligations are perhaps the most novel of those introduced by the 2019 Regulation with regard to deportations.

A requirement for Frontex to “coordinate the use of relevant IT systems” was introduced in 2016 and the 2019 Regulation builds upon this, introducing a requirement to develop “a non-binding reference model for a national IT return case management system” and to provide assistance with “developing such [national] systems compatible with the model.” The purpose is to facilitate connections between national systems and those operated by the agency.<sup>237</sup> The 2019 Frontex Regulation does not establish a legal obligation to establish those connections, but the Commission’s September 2018 proposal for a revamped Returns Directive did – were those provisions to become law, national return management systems would have to be “set up in a way which ensures technical compatibility allowing for communication with the central system.”<sup>238</sup>

Frontex is also now formally required to develop “an integrated return management platform,”<sup>239</sup> although it was in the process of doing so before the new legislation was even proposed. A note sent by Frontex to national delegations in the Council in January 2019 refers to a September 2017 report on a “mapping exercise with regards to Return Case Management Systems (RECAMAS).” The agency’s programming document for the 2019-21 period, produced in October 2018, outlines a plan to “coordinate the use of IT systems”. The intention is to offer all member states a “gap analysis” of their national return case management systems, based on a model system designed by Frontex. The agency will then provide funds for member states to implement the findings of its analyses, with the aim of bringing national systems “as much as possible into line with the model RECAMAS”. This will “digitalise the return process, which will lead to greater efficiency,” and member states will also be offered “interconnection between FAR [the Frontex Application for Return] and the national RECAMAS.”<sup>240</sup>

There are currently<sup>241</sup> two key systems operated by the agency with regard to deportations – the Irregular Migration Management Application (IRMA)<sup>242</sup> and the Frontex Application for Return (which is integrated into IRMA).<sup>243</sup>

IRMA, which was initially developed and operated by the European Commission but has now been handed over to Frontex, is concerned with enhancing the ability of the EU and the member states to coordinate and conduct deportations through the provision of general data. FAR aims to rationalise and ‘streamline’ the implementation of return operations through the management of the authorities, personnel and deportees. Put more simply, IRMA is concerned with the big picture, and FAR with individual cases. The overall aim is to “increase the efficiency of returns in the EU, in terms of numbers, time and cost.”<sup>244</sup> Once an individual has been identified and located – perhaps with the assistance of one or more of the EU databases examined previously – and issued with an expulsion order, these two systems will be used to administer their removal from the EU.

The 2016 Regulation introduced a requirement for the agency to produce a “rolling operational plan” on return, so that it could provide member states with “the necessary assistance and reinforcements.” FAR is used to implement this plan:

*“The FAR application pulls together, in one easily accessible and user-friendly format, the planned return operations by Member States, the announcement of participation in those operations, and all communication relating to a Frontex coordinated return operations [sic] as well as pre-return assistance. The advantage of the FAR application is the provision of planning and implementation progress of return operations at the European level.”<sup>245</sup>*

<sup>237</sup> Article 48(1)(c) and (d), 2019 Regulation

<sup>238</sup> Article 14(2), Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), COM(2018) 634 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0634>

<sup>239</sup> Article 49(1) of the 2019 Regulation states that the agency must “operate and further develop... an integrated return management platform for processing information, including personal data, transmitted by the Member States’ return management systems, that is necessary for the Agency to provide technical and operational assistance.”

<sup>240</sup> Frontex, ‘Programming Document 2019 – 2021’, p.88, [https://frontex.europa.eu/assets/Key\\_Documents/Programming\\_Document/2019/Programming\\_document\\_2019-2021.pdf](https://frontex.europa.eu/assets/Key_Documents/Programming_Document/2019/Programming_document_2019-2021.pdf)

<sup>241</sup> More systems may be put in place. The 2019 Regulation also contains a further, extremely vague, provision in Article 49(2), which states that Frontex “shall develop, deploy and operate information systems and software applications allowing for the exchange of information for the purpose of return within the European Border and Coast Guard and for the purpose of exchanging personal data.”

<sup>242</sup> “A restricted and secure information exchange platform developed by the European Commission which connects EU Member and Schengen States, the European Commission, the European Border and Coast Guard Agency (Frontex) and the relevant EU funded programmes at operational, practitioner level and which facilitates the planning,

organisation and implementation of return and readmission activities with the objective of making return procedures more effective.” The name ‘IRMA’ is used due to the original title: Integrated Return Management Application. The reason for the name change is unknown, although it suggests more ambitious plans for the platform than for simply dealing with expulsion operations. See: European Commission, ‘Irregular Migration Management Application (IRMA)’, [https://ec.europa.eu/home-affairs/content/irregular-migration-management-application-irma\\_en](https://ec.europa.eu/home-affairs/content/irregular-migration-management-application-irma_en)

<sup>243</sup> FAR will allow Frontex “to better coordinate return operations, and better collect Member States’ needs for assistance. The Frontex Application for Return will be connected with the Integrated Return Management Application (IRMA) developed by the Commission. The combination of both applications will allow the Agency to actively contribute to achieving an effective exchange of return related information among all Member States and proactively propose return operations to Member States, as one of the possible measures to increase the number of returns.” See: Letter from the European Commission, C(2017) 5553 final, 2 August 2017,

<https://ec.europa.eu/transparency/regdoc/rep/3/2017/EN/C-2017-5553-F1-EN-MAIN-PART-1.PDF>

<sup>244</sup>

<sup>245</sup> Frontex, ‘General Report 2015’, p.32,

[https://frontex.europa.eu/assets/Key\\_Documents/Annual\\_report/2015/General\\_Report\\_2015.pdf](https://frontex.europa.eu/assets/Key_Documents/Annual_report/2015/General_Report_2015.pdf)

Dataset	Purpose
3. Persons ready to be returned (with Travel Document + identified + documented + available) (stock)	This dataset will allow IRMA Countries or the EBCGA to take the initiative for the organisation of joint return operations.
5a. Number of persons with a return decision, needing identification (stock)	This data is useful in that it enables IRMA Countries, the EBCGA and EURINT to coordinate identification missions.
5b. Number of persons with verification/identification requests/requests for ETD submitted by MS (flow)	Datasets 5b to 5g will give indication on the level of cooperation of third countries on return and readmission.
5c. Number of persons identified positively with no ETD issued (flow)	
5d. Number of persons with ETD issued (flow)	
5e. Number of persons for whom negative replies to the identification request were received	
5f. Number of persons with pending replies to the identification requests / no replies received (stock)	
5g. Number of identifications performed/travel documents issued within deadline (where applicable) (flow)	
6. Number of persons with EU Travel Documents readmitted by the third country (flow)	This dataset gives information on the acceptance by third countries to readmit returnees on the basis of the EUTD. In the case of third countries with which readmission agreements have been signed, this is also a possible indicator on the level of implementation of the agreement.
7. Number of persons whose readmission was refused at the border (flow)	This dataset, even if the numbers will be limited, give a strong signal of eventual lack of cooperation of a third country on readmission and return.

Table 4: Irregular Migration Management Application (IRMA) – purposes of datasets

FAR was approved by the European Data Protection Supervisor (EDPS) in late 2018, although neither the EDPS opinion, nor Frontex’s proposals, have been made public.<sup>246</sup> It is thus not currently possible to see what recommendations the EDPS made to the agency, nor to know if or how any recommendations were met.

Nevertheless, the overall context in which it has been implemented are clear. Under the 2019 Regulation, Frontex can include in the rolling operational plan “the dates and destinations of return operations it considers necessary, based on a needs assessment.” It may do so on its own initiative (with the agreement of the member state concerned), or at a member state’s request.<sup>247</sup> Assistance with the assessment process comes from IRMA, which enables the collection of data on

activities at member state level concerning expulsion proceedings and decisions, which will “provide a close-to-real-time overview of the operational situation in the area of return in order to facilitate the management and return of irregular migrants at EU level.”<sup>248</sup>

As noted above, aside from generally improving coordination between the agency and national authorities, one aim of these systems is to give Frontex a proactive, rather than reactive, role in the organisation of JROs. A document distributed within the Council sets out the purpose of a number of the different IRMA datasets, summarised in the table above. It also highlights that the “IRMA Request’ module will allow MS but also the Commission or EBCGA [Frontex] to ‘trigger’ specific return support measures/actions,” such as “the launch of joint return

<sup>246</sup> An initial notification was submitted to the EDPS in September 2017, but was subsequently withdrawn. It remains publicly-accessible on the EDPS website.

<sup>247</sup> Article 51(2), 2019 Regulation

<sup>248</sup> General Secretariat of the Council, ‘Irregular Migration Management Application (IRMA) – Technical guidelines for Return Operational Data

Collection – Encryption of exchanged files = Endorsement’, 5202/1/18 REV 1, 17 January 2018, p.1, <https://data.consilium.europa.eu/doc/document/ST-5202-2018-REV-1/en/pdf>

actions,” the “organisation of identification missions” or “shared use of facilities”. Aside from providing insight into the need for particular operations or actions, it is clear that the data being gathered is also intended to inform policy and diplomatic initiatives concerning non-EU states – for example, to assist with decisions on whether to punish a country for failing to cooperate with the readmission of its own nationals.<sup>249</sup>

## Restrictions on data protection rights

While it might be expected that national and EU agencies would seek to ‘digitise’ the deportation process in the hope of making it more efficient, an unnerving restriction on individual rights accompanies these developments – the rules on FAR include an exemption that can be invoked to prevent individuals accessing their personal data. Thus, if the agency is handed incorrect data by a member state, an individual facing deportation may have no way of rectifying it before it results in their removal.<sup>250</sup>

The exemption was first introduced in 2016 as part of the new provisions intended to significantly increase the agency’s role in deportations.<sup>251</sup> It is maintained in the 2019 Regulation,<sup>252</sup> which reiterates that restrictions will be applied “on a case-by-case basis as long as the application of those provisions would risk jeopardising return procedures.”<sup>253</sup>

A variety of data is entered into FAR by national authorities in the process of coordinating removal proceedings. According to the system’s data protection notice, it covers:

*“name and surname, destination of departure and destination of arrival, date of birth, nationality, gender, country of origin, type and validity of travel document, whether the returnee is healthy or not, whether it is a*

*voluntary or forced return and a security risk assessment.”<sup>254</sup>*

The notice states that deportees have the right to rectification of inaccurate data; to request restrictions on processing; and to object to the processing of their personal data. However, the exercise of these rights is dependent on the individual’s right to access their data. On a “case-by-case basis” and “as long as the exercise of such right would risk to jeopardise the return procedure,” individuals can be denied access to their data “for reasons of national security, public security and defence of the Member States.”

EU data protection legislation does permit the application of restrictions to data subjects’ rights regarding issues such as national security, the investigation of criminal offences, the protection of judicial independence and “other important objectives of general public interest of the Union or of a Member State”, which includes the management of migration. Furthermore, during negotiations between the Council and Parliament, the text of what would become the 2019 Regulation was amended to take into account suggestions from the EDPS that made improvements to the original proposal.<sup>255</sup> Nevertheless, it remains unclear whether Frontex or the relevant national authority would be responsible for making the decision on applying the restriction, and while the internal rules may have been approved by the EDPS, that approval (and the justifications for the decision) have not been made public.

In the context of deportation proceedings, mistakes in decision-making can have extremely serious, even life-threatening, implications. Accurate personal data is essential for accurate decision-making. The UK Data Protection Act 2018 (which implemented the EU’s General Data Protection Regulation into domestic law) included an exemption restricting data subjects’

<sup>249</sup> The EU’s recently-revised Visa Code includes a requirement for the Commission to monitor the level of cooperation of non-EU states with regard to return and readmission. If they are not deemed to be cooperating sufficiently, it will be possible to raise visa fees, require more documents to accompany visa applications, slow down processing times and/or limit the issue of multiple-entry visas as part of a ‘carrot and stick’ approach. See: Steve Peers, ‘The revised EU visa code: controlling EU borders from a distance’, 17 April 2019, <https://eulawanalysis.blogspot.com/2019/04/the-revised-eu-visa-code-controlling-eu.html>

<sup>250</sup> Paragraph 100 of the preamble to the new Regulation states: “it is necessary for the Agency to be able to restrict certain rights of data subjects so as to prevent the abuse of such rights from impeding the proper implementation of return procedures and the successful enforcement of return decisions by the Member States or from preventing the Agency from performing its tasks efficiently. In particular, the exercise of the right to the restriction of processing could significantly delay and obstruct the carrying out of the return operations. Furthermore, in some cases, the right of access by the third-country national could jeopardise a return operation by increasing the risk of absconding should the third-country national learn that the Agency is processing his or her data in the context of a planned return operation. The right to rectification could increase the risk that the third-country national in question will mislead the authorities by providing incorrect data. In order to enable the Agency to restrict certain rights of data subjects, it should be able to adopt internal rules on such restrictions.”

<sup>251</sup> Article 28(2) of the 2016 Regulation, to be superseded by Article 51(2) of the 2019 Regulation.

<sup>252</sup> The European Data Protection Supervisor (EDPS) was extremely critical of the proposal for the 2019 Regulation. Aside from the fact that

the EDPS was not formally consulted on the legislation, the organisation highlighted that there was – amongst other things – a lack of clear allocation and definition of responsibility between Frontex and the member states; a lack of clear identification of and distinction between the purposes of data processing, uncertainty regarding procedures and responsibility due to the impact on other EU rules; uncertainty regarding limits on data-sharing. See: Formal comments of the EDPS on the Proposal for a Regulation on the European Border and Coast Guard, [https://edps.europa.eu/data-protection/our-work/publications/comments/formal-comments-edps-proposal-regulation-european-0\\_en](https://edps.europa.eu/data-protection/our-work/publications/comments/formal-comments-edps-proposal-regulation-european-0_en)

<sup>253</sup> Article 86(2) of the 2019 Regulation refers to restrictions to the application of Article 14 to 22, 35 and 36 of Regulation 2018/1725, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32018R1725>

<sup>254</sup> ‘Data protection notice for Frontex Application for Return (FAR)’, undated, [https://frontex.europa.eu/assets/Data\\_Protection/Data\\_Protection\\_Notice\\_Returns.pdf](https://frontex.europa.eu/assets/Data_Protection/Data_Protection_Notice_Returns.pdf). Frontex’s withdrawn notification to the EDPS went far beyond this. It proposed a “drop-down list” that would be included in FAR, containing the following: Not security risk; Criminal activity; Dirty protester; Disinhibited behaviour; Disruptive behaviour; Escapee; Food/Fluid refusal; Known suicide attempt; Known violent behaviour; Mental illness; National security; Serious criminal activity; Threat of self-harm.

<sup>255</sup> The EDPS highlighted that the text as proposed voided the data subject’s rights of any meaning and proposed a series of amendments, which were included in the final text. See: ‘Formal comments of the EDPS’, 30 November 2018, pp.15-16, [https://edps.europa.eu/sites/edp/files/publication/18-11-30\\_comments\\_proposal\\_regulation\\_european\\_border\\_coast\\_guard\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/18-11-30_comments_proposal_regulation_european_border_coast_guard_en.pdf)

rights in the name of ensuring “effective immigration control”. This was challenged in court by *Open Rights Group* and *the3million*,<sup>256</sup> who argued that it would make it impossible to “properly challenge errors made by the [UK] Home Office. This could lead to applications relating to immigration statuses being wrongly refused or wrongful deportations taking place.”<sup>257</sup>

A court ruled against the challenge in early October 2019,<sup>258</sup> but the groups are seeking permission to appeal. In a statement issued in response to the judgement, they said:

*“We still believe that the immigration exemption in the Data Protection Act 2018 as it stands breaches fundamental rights. It is a blunt instrument, poorly defined and ripe for abuse... This exemption removes [the] ability to correct errors, which could prove decisive in immigration decisions whether to allow a person to remain in the United Kingdom.”*<sup>259</sup>

There are further curiosities in the FAR data protection notice. It also states: “Personal data are not transferred by Frontex to third countries and/or international organisations.” However, it is hard to see how it would be possible to ensure that the correct people are disembarked from a deportation flight, in the correct country, without checking their details with the ‘receiving’ authorities – whose cooperation is essential for any removal operation. Indeed, while the 2016 Frontex Regulation prohibited Frontex or the member states transferring personal data to “authorities of third countries or third parties, including international organisations,”<sup>260</sup> this prohibition did not apply with regard to “return activities”. The 2019 Regulation is even more permissive, permitting international transfers of personal data “insofar as such transfer is necessary for the performance of the Agency’s tasks,”<sup>261</sup> covering return and all other areas of activity. The original notification sent by Frontex to the EDPS concerning FAR made clear that lists of returnees would be handed over to the destination state.<sup>262</sup>

There is no specific requirement in the legislation for either Frontex’s data protection officer or the EDPS to have oversight of the processing of personal data in the context of Frontex’s expulsion operations, but this is an issue of the utmost importance. Enormous risks to individual rights arise from denying individuals the right of access to their data in immigration

proceedings, where the accuracy of that data is crucial to ensuring they are treated fairly and correctly. Those risks begin at the national level – in particular in a country such as the UK that has introduced sweeping exemptions to individual rights – but are multiplied when an increasing number of deportations are coordinated by Frontex, which may also apply exemptions to data subjects’ rights.

## Access to other systems

In order to enhance its ability to conduct a number of tasks – including expulsions – Frontex officials will be given access to a number of the databases and information systems discussed earlier in this report, such as the SIS and the VIS. The purpose of doing so is to facilitate the new tasks that have been afforded to Frontex in recent years; and to boost its longstanding information-gathering and analysis abilities.

Members of Frontex teams, migration management support teams and staff involved in “return-related tasks” will be able to consult information in the Schengen Information System (SIS) for carrying out border checks, border surveillance and forced removals,<sup>263</sup> “insofar it is necessary for the performance of their task and as required by the operational plan for a specific operation.”<sup>264</sup>

To do so, an interface providing direct connection to the Central SIS is to be established. Members of the teams (who are deployed ‘on the ground’ in the member states, rather than operating from Frontex’s headquarters in Warsaw), may only to act in response to ‘hits’ resulting from searches of the SIS under instructions from the authorities of their host state and, “as a general rule, in the presence of border guards or staff involved in return-related tasks of the host Member State in which they are operating.” However, this requirement can be waived by the host authorities.<sup>265</sup>

In relation to expulsions, one purpose of giving Frontex staff access to the SIS is to allow the examination of expulsion orders issued to deportees on Frontex-coordinated removal flights, to ensure that those orders remain in force<sup>266</sup> – a useful safeguard, if the national authorities ensure that the relevant information is up-to-date. It seems, however, that this is not always the case, with potentially disastrous consequences.<sup>267</sup> At the time of writing

<sup>256</sup> The exemption states that individual rights to information, confirmation, erasure, restriction and objection set out in the GDPR do not apply if they would prejudice “the maintenance of effective immigration control” or “the investigation or detection of activities that would undermine the maintenance of effective immigration control”. See: ‘Immigration’ in Schedule 2, Exemptions etc. from the GDPR, Data Protection Act 2018, <http://www.legislation.gov.uk/ukpga/2018/12/schedule/2>

<sup>257</sup> ‘Campaign groups granted permission for judicial review of immigration exemption’, Leigh Day, <https://www.leighday.co.uk/News/2019/January-2019/Campaign-groups-granted-permission-for-judicial-re>

<sup>258</sup> *Open Rights Group and the3million v Secretary of State for the Home Department*, [2019]EWHC 2562 (Admin), 3 October 2019, <http://www.statewatch.org/news/2019/oct/uk-org-3million-data-protection-exemption-case-judgment-3-10-19.pdf>

<sup>259</sup> ‘Open Rights Group and the3million seek to appeal immigration exemption judgment’, *Open Rights Group*, 3 October 2019, <https://www.openrightsgroup.org/press/releases/2019/open-rights-group-and-the3million-seek-to-appeal-immigration-exemption-judgment>

<sup>260</sup> Article 45(4), 2016 Regulation

<sup>261</sup> Article 86(3), 2019 Regulation

<sup>262</sup> The notification, which was subsequently withdrawn, stated: “the returnees list, extract from the passengers list, is to be handed over to the Authorities of the Destination Country (DC), according to the readmission procedure and to readmission agreements when implemented, either by the OMS. [sic] The Destination Country can then initiate the relevant verifications before the handover of the returnees.”

<sup>263</sup> Article 17(3), Regulation 2018/1860, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018R1860>

<sup>264</sup> This concerns the rules on the SIS relating to return, border checks and police and judicial cooperation: Article 36(1), Regulation 2018/1861, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018R1861>; Article 50(1), Regulation 2018/1862, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018R1862>

<sup>265</sup> Article 36(3), Regulation 2018/1861

<sup>266</sup> Article 50(2), 2019 Regulation

<sup>267</sup> Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 16 to 18 December 2015, <http://hudoc.cpt.coe.int/eng/?i=p-ita-20151216-en-2>

this report, Frontex was seeking a framework contract worth up to €5 million for an “effective ICT solution (i.e. A2SISII System) that will enable European Border and Coast Guard Agency teams to access to Schengen Information System in line with current Regulations”.<sup>268</sup>

If the Commission’s proposal on the Visa Information System is approved by the Council and Parliament, members of Frontex teams will also be given access for three purposes: conducting border checks; “verifying whether the conditions for entry to, stay or residence on the territory of the Member States are fulfilled,” and “identifying any person that may not or may no longer fulfil the conditions for the entry to, stay or residence on the territory of the Member States.”<sup>269</sup>

Under the proposed rules, members of Frontex teams would require authorisation from their host member state to conduct searches in the VIS. These searches would appear to take place through a rather convoluted procedure, given the potential deployment of Frontex officials at border crossings or elsewhere in national territory. The agency will have to establish a “central access point” to which team members will have to make requests to access the system. The intention is to presumably ensure that requests are duly authorised – but with members of Frontex teams making access requests to a unit at the Frontex headquarters in Warsaw, the agency will be authorising itself.<sup>270</sup> As with SIS, a requirement for team members to have

authorisation from host authorities to act upon ‘hits’ in the VIS is included, but may be waived by those authorities.<sup>271</sup>

Frontex will also be given access to the Entry/Exit System (EES), with the aim of improving its provision of information to national authorities. A range of information held in the EES will be available to the agency for the purpose of conducting risk analysis and ‘vulnerability assessments’.<sup>272</sup> The former concerns “migratory flows towards the Union, and within the Union in terms of migratory trends, volume and routes, and other trends or possible challenges at the external borders and with regard to return.”<sup>273</sup> The aim of the latter is “to assess the capacity and readiness of Member States to face present and upcoming challenges at the external borders,” and to identify any states “facing specific and disproportionate challenges,” in order to inform operational response from the agency and national authorities.

Finally, the proposal to expand Eurodac would give officials of both Frontex and the European Asylum Support Office the power to take and transmit the fingerprints of applicants for international protection and individuals apprehended in connection with irregularly crossing an external border of the Schengen area. This would require the permission of the member state in which those officials were operating. Neither agency would have any powers to search the database.<sup>274</sup> Negotiations on the proposal are ongoing.

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<sup>268</sup> ‘Poland-Warsaw: Framework Contract for the Development of ICT Software Solution for EBCG Team Members Access to Schengen Information System (A2SISII)’, 14 February 2020, <https://ted.europa.eu/udl?uri=TED:NOTICE:074107-2020:TEXT:EN:HTML>

<sup>269</sup> Article 45d and 45e(5), Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EC) No 767/2008, Regulation (EC) No 810/2009, Regulation (EU) 2017/2226, Regulation (EU) 2016/399, Regulation XX/2018 [Interoperability Regulation], and Decision 2004/512/EC and repealing Council Decision 2008/633/JHA, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0302>

<sup>270</sup> Ibid., Article 45e(1)

<sup>271</sup> Ibid., Article 45e(3)

<sup>272</sup> Article 63(1), Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32017R2226>

<sup>273</sup> Article 29(1), 2019 Regulation. For an overview of the new powers of the agency concerning ‘internal’ surveillance, see: ‘Monitoring “hotspots” and “secondary movements”’: Frontex is now an internal surveillance agency’, *Statewatch Analysis*, December 2019,

<http://www.statewatch.org/analyses/no-348-frontex-internal-surveillance.pdf>

<sup>274</sup> European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes (recast), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0272>

# Deportations: rights and responsibilities

## What could possibly go wrong?

There are countless documented instances of human rights violations occurring in relation to or during deportations, and violations have also taken place during Frontex-coordinated expulsion operations. They include the use of racial profiling for the purpose of attempting to fill charter flights; the physical abuse of deportees by escorts; the failure of national authorities to keep records up-to-date regarding appeals by people due to be deported or to offer individuals the opportunity to apply for asylum; and the enforcement of removal orders handed down by inadequate or flawed decision-making procedures.

In Spain and Italy, raids and identity checks based on ethnic profiling have been used to try to fill deportation flights booked to travel to specific countries. For example, in January 2017 the Italian interior ministry issued a memo to police forces concerning the scheduling of a deportation flight and interviews with Nigerian authorities. The memo explicitly instructed police services to target Nigerians, indicating that 95 places had been reserved in detention centres,<sup>275</sup> and proposed "targeted services for the purpose of tracking down Nigerian citizens in an irregular situation in the national territory."<sup>276</sup>

Filippo Miraglia, vice president of the association *ARCI*, highlighted the illegality and discriminatory nature of this initiative, which he called "a collective expulsion, forbidden by law, enacted on the basis of nationality, and hence discriminatory, regardless of the individual people's situations". He explained that people do not have "irregular Nigerian" written on their forehead, and there were thus strong concerns over how police forces would implement the instructions in practice. Giorgio Bisagna, a lawyer for the *Adduma* association, expressed concern over the intention to enact a "collective

expulsion of irregulars" and warned that that "you cannot carry out a sort of round-up."<sup>277</sup>

This is not the only time the issue of collective expulsions, which are prohibited by European human rights law,<sup>278</sup> has been raised in recent years. In October 2016, eight Syrians were returned to Turkey in a Frontex-coordinated flight from the Greek island, Kos, after the entry into force of the EU-Turkey deal.<sup>279</sup> The passengers were reportedly never given the opportunity to apply for asylum and were not informed of the destination of their trip (they believed they were flying to Athens). *Amnesty International* denounced the incident as *refoulement*.<sup>280</sup> In 2012, *Migreurop* accused Frontex of legitimising the German government's policy of "systemic expulsion against the Roma community" through the organisation of return flights on which a significant number of passengers had had asylum claims refused in accelerated procedures, potentially infringing the prohibition against collective expulsions.<sup>281</sup>

Frontex's involvement with expulsions from Greece also raises serious human rights questions. On the Greek islands, the "geographical restriction" that prevents people from leaving for the mainland has created appalling and widely reported overcrowding, insufficient services and limited or no access to healthcare. Fundamentally flawed decision-making procedures compound the problems created by utterly inadequate living conditions. *Human Rights Watch* has described the hotspots as "some of the most appalling mismanaged, and dangerous refugee camps in the world."<sup>282</sup> Fast-track assessment procedures, the consideration of Turkey as a "safe third country" for Syrians without genuine individual assessments, lengthy delays in decision-making, and a lack of interpreters all call into question the validity of decisions made by the Greek authorities<sup>283</sup> (with the assistance of agencies such as the European Asylum Support Office, EASO, whose role has also been the subject of stern critique<sup>284</sup>). According to the *Greek*

<sup>275</sup> It is unknown whether this was a Frontex-coordinated flight. However, the agency's data shows that Italy was the organising member state for two flights to Nigeria around that time, on 26 January and 23 February. The interior ministry's memo made said that 50 places for women were being made available in Rome and 45 for men would be distributed between Turin (25) Brindisi (10) and Caltanissetta (10), from 26 January to 18 February 2017. The note said the places must be made available "without exceptions", even if it meant releasing other occupants ahead of schedule.

<sup>276</sup> Italy: Police instructed to target Nigerians – There's a charter plane to fill and interviews with Nigerian authorities have already been agreed, *Statewatch News Online*, 2 January 2017, <http://www.statewatch.org/news/2017/feb/italy-nigeria.htm>

<sup>277</sup> Ibid. A further report on an incident in Italy in which "two women were repatriated, despite the suspension of their deportation decreed by the court," is available here: Yasha Maccanico, 'Italy: Mass discrimination based on nationality and human rights violations – Nigerian refugees and trafficking victims deported from Rome', *Statewatch Analysis*, March 2016, <http://www.statewatch.org/analyses/no-287-italy-mass-discrimination.pdf>

<sup>278</sup> European Court of Human Rights, 'Collective expulsion of aliens', July 2019, [https://www.echr.coe.int/Documents/FS\\_Collective\\_expulsions\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Collective_expulsions_ENG.pdf)

<sup>279</sup> 'EU-Turkey statement, 18 March 2016', <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>

<sup>280</sup> Amnesty International, 'Greece: Evidence points to illegal forced returns of Syrian refugees to Turkey', 28 October 2016, <https://www.amnesty.org/en/latest/news/2016/10/greece-evidence-points-to-illegal-forced-returns-of-syrian-refugees-to-turkey/>

<sup>281</sup> Migreurop, 'New Group Deportation Flight Coordinated by FRONTEX as means of Collective Expulsion towards Serbia: Rights violation and the impunity of member-states', 20 April 2012, <http://www.migreurop.org/article2113.html?lang=en>

<sup>282</sup> Bill Frelick, 'Déjà vu on the Greek-Turkey border', *Human Rights Watch*, 20 December 2018, <https://www.hrw.org/news/2018/12/20/deja-vu-greek-turkey-border>

<sup>283</sup> 'Greece – 2018 update', *Asylum Information Database*, <https://www.asylumineurope.org/reports/country/greece>

<sup>284</sup> European Ombudsman, 'Decision in case 735/2017/MDC on the European Asylum Support Office's (EASO) involvement in the decision-making process concerning admissibility of applications for international protection submitted in the Greek Hotspots, in particular shortcomings in admissibility interviews', 5 July 2018, <https://www.ombudsman.europa.eu/en/decision/en/98711>. See also: FRA, 'Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the 'hotspots' set up in Greece and Italy', February 2019,

*Council for Refugees*, the lack of available legal assistance means that many people are returned unaware that they could have claimed asylum in Greece. The Turkish authorities, meanwhile, have claimed that Greece illegally deported almost 60,000 people.<sup>285</sup>

Frontex has been closely involved in implementing the flawed procedures and appalling living conditions to which people are subject prior to deportation from Greece, for which it has received strong criticism. The Greek Ombudsman has highlighted a failure to maintain medical files and carry out 'fitness to travel' checks on deportees; a lack of individualised assessment regarding the use of restraint; and the failure to take into account individuals making fresh claims for international protection with new evidence.<sup>286</sup> Frontex, by consenting to cooperate with removals from Greece – including by deploying return specialists to the country – is legitimating unfair and unjust procedures and executing decisions based on violations of fundamental rights.

Moreover, the serious discrepancies in the asylum determination systems of different EU member states mean that individuals of the same nationality have a vastly differing likelihood of receiving international protection in the EU, depending on the state in which they lodge an application.<sup>287</sup> The issue has been ongoing for years – in Greece, recognition rates sank as low as 0.04% at first instance hearings in 2010. This was one of the reasons that the ECtHR essentially banned 'Dublin' returns to the country – anyone returned there from another member state faced the risk of *refoulement*.<sup>288</sup> The result of such unfair asylum procedures may be that refugees are sent back, via a Frontex-coordinated operation, to places where they are at risk of being tortured or persecuted.<sup>289</sup> Frontex return specialists have been deployed in both Greece and Bulgaria – both countries where serious concerns have been raised over the quality of decision-making<sup>290</sup> – to assist with expulsions.

The Council of Europe's Committee for the Prevention of Torture (CPT) has monitored four Frontex-coordinated expulsion operations in the last five years, with numerous critiques raised in each subsequent report.<sup>291</sup> Recently, *EUobserver* highlighted the physical abuse of a deportee on a flight bound from Germany

for Afghanistan. In order to enforce 'compliance', an Afghan man had his testicles repeatedly squeezed and was subjected to restraint techniques which prevented him from breathing properly.<sup>292</sup> CPT officials reported the situation to the German authorities, who responded to their concerns, although they did not pass any information to Frontex, which coordinated the flight. The agency said it "may even have stopped the return operation to Afghanistan if it had known."<sup>293</sup> However, as *EUobserver* reported, Frontex staff were on board the flight and did not report the abuse to the agency. This suggests that there are some serious problems with the procedures in place.<sup>294</sup>

The information that is available to the agency is crucial in relation to its coordination of forced return operations. In 2015 the Council of Europe's anti-torture committee (the CPT) monitored a Frontex-coordinated deportation from Italy. They interviewed 13 Nigerian women in a detention centre who were due to be put on the flight, and found that they had all appealed against the initial rejection of their applications for asylum. Although this did not automatically suspend the removal order, the expulsion of seven of those women was subsequently halted before the flight departed. In the case of another woman, "the competent court had decided to grant suspension of removal," but this was only communicated to the authorities "after the joint flight had departed from Rome airport." The report highlighted that: "No information as to the pending legal procedures could be found in the women's removal files. Apparently, such a state of affairs is not unusual."<sup>295</sup> While this may be the fault of the national authorities, it remains the responsibility of Frontex to ensure that the deportation orders handed down against individuals are enforceable.

In May 2019, the UN High Commissioner for Refugees (UNHCR) denounced the Hungarian authorities for giving two families from Afghanistan the choice of either "entering Serbia or being flown back to Afghanistan on a flight organized by Frontex". The UNHCR advised Frontex "to refrain from supporting Hungary in the enforcement of return decisions which are not in line with

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[https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2019-opinion-hotspots-update-03-2019\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-opinion-hotspots-update-03-2019_en.pdf)

<sup>285</sup> Elliott Douglas, 'Greece illegally deported 60,000 migrants to Turkey: report', *DW*, 4 November 2019, <https://www.dw.com/en/greece-illegally-deported-60000-migrants-to-turkey-report/a-51234698>

<sup>286</sup> The Greek Ombudsman, 'Return of Third Country Nationals', pp.24-25, <https://www.synigoros.gr/resources/docs/english-final.pdf>

<sup>287</sup> For example, in 2017 the recognition rate for asylum applicants from Iraq was 8% in Denmark and 86% in France; for people from Afghanistan the recognition rate was 35% in the UK but 75% in Greece; and for Ethiopian applicants the rate was 37% in Sweden but 92% in Italy. There are numerous other examples. See: 'Asylum Recognition Rates in the EU/EFTA by Country, 2008-2017', *Migration Policy Institute*, <https://www.migrationpolicy.org/programs/data-hub/charts/asylum-recognition-rates-euefta-country-2008-2017>

<sup>288</sup> *M.S.S. v. Belgium and Greece*, para. 301, <http://hudoc.echr.coe.int/eng?i=001-103050>

<sup>289</sup> Such concerns have been expressed, for instance, also with respect to Hungary (Hungarian Helsinki Committee, 'Serbia as a safe third country: Revisited', 2012, <http://helsinki.hu/wp-content/uploads/Serbia-report-final.pdf>) and Germany (see footnote 279).

<sup>290</sup> 'Immigration Detention in Bulgaria: Fewer Migrants and Refugees, More Fences', *Global Detention Project*, 29 April 2019,

<https://www.globaldetentionproject.org/immigration-detention-bulgaria-fewer-migrants-refugees-fences>

<sup>291</sup> A report on a joint return operation that departed from the Netherlands raised concerns regarding access to a lawyer, medical examinations and the possibility for deportees to make phone calls to their relatives prior to removal. Similar issues were raised in relation to an inspection of a deportation from Spain, as well as the fact that the individuals being expelled were notified just 12 hours before their removal. Because of the lack of time given to prepare for removal a number of deportees were unable to withdraw money from their Spanish bank accounts, and one man was even deported in his work uniform. See: 'Report to the Government of the Netherlands', CPT/Inf(2015) 14, 5 February 2015, <https://rm.coe.int/168069782c>; 'Report to the Spanish Government', CPT/Inf(2016) 35, 15 December 2016, <https://rm.coe.int/16806ce534>

<sup>292</sup> 'Inhumane' Frontex forced returns going unreported', *EUobserver*, 30 September 2019, <https://euobserver.com/migration/146090>

<sup>293</sup> 'EU agency kept in dark on forced flight abuse', 9 October 2019, <https://euobserver.com/migration/146203>

<sup>294</sup> 'Inhumane' Frontex forced returns going unreported', *EUobserver*, 30 September 2019, <https://euobserver.com/migration/146090>

<sup>295</sup> 'Report to the Italian Government', CPT/Inf (2016) 33, p.9, <https://rm.coe.int/16806ce532>



international and EU law.”<sup>296</sup> However, while the agency must ensure that an enforceable return decision exists, it cannot enter into the merits of that decision. The Council of Europe and Frontex’s own Consultative Forum on Fundamental Rights have both recommended that the agency cease operations at the Hungarian-Serbian border given the “systematic violations of human rights in the transit zones”.<sup>297</sup> The fact that it has not done so calls into questions its stated commitment to its fundamental rights obligations.

Finally, there is the issue of what happens once an individual arrives in the country of ‘return’. According to the organisation *Rights in Exile*: “What happens to rejected asylum seekers post-deportation is still largely unknown. They might be apprehended by state security and sent to prison, tortured, tried for treason, or even killed.” Nevertheless, a significant amount of evidence has been gathered on the risks faced by deportees upon their return ‘home’.<sup>298</sup> In 2018, Zainadin Fazlie was shot and killed by the Taliban following his deportation from the UK to Afghanistan, after the introduction of the ‘deport first, appeal later’ rule.<sup>299</sup> Despite the evident risks, states do not monitor what happens to individuals after they are deported – yet where this leads to mistreatment or abuse, the deportation could be considered as *refoulement*.<sup>300</sup> While Frontex has no say in the decisions handed down by national authorities, it has a positive obligation to prevent *refoulement*. The 2019 Regulation introduced new references to engagement in “post-return” activities, and a ‘roadmap’ drawn up by Frontex and the Commission foresees the adoption of an ‘Action Plan on expanding Agency’s return support capacity for MS on post-arrival and post-return’ from autumn 2020. What exactly that will entail remains to be seen.

## Legal accountability for fundamental rights violations

Decisions over who may remain on the territory of the EU ultimately rest with the administrative and judicial authorities of the member states. Frontex cannot assess the merits of the return decisions it enforces or review a returnee’s failed asylum claim. Moreover, the return escorts that may use abusive means of restraint have, until now, been staff of national authorities, rather than being directly employed by the agency. The 2019 Regulation allows agency staff to act as escort officers, which changes this equation.

While the agency may not be directly responsible for the (in)effectiveness of the national procedures and the misconduct

of national officers, it still has a positive duty to ensure that the operations it conducts will not result in violations of fundamental rights. Frontex, like all member states, institutions, agencies, bodies and offices of the EU is bound by the EU Charter of Fundamental Rights (CFR) and the European Convention on Human Rights and Fundamental Freedoms (ECHR), to the extent that the latter is represented in the development of general principles of EU law. In this regard, the agency has negative obligations to not actively violate human rights, as well as positive obligations, according to which it should protect human rights by preventing foreseeable violations.

The agency has a wide range of supervisory and monitoring powers, amongst which is the duty of the Executive Director to suspend or terminate an operation when serious and consistent violations are taking place and the presence of forced return monitors, which should report any human rights-related incidents to the agency. Frontex staff present on flights, for example to oversee the running of the operation, should also inform their superiors should they become aware of a violation or potential violation.

To the extent that the agency is informed that a violation is taking place, it is obliged to act within its powers to prevent that or similar violations in the future. If the agency does not utilise its supervisory role and fails to take such action, it may incur legal responsibility next to the primary responsibility of the member state. Such responsibility may also arise if there are legitimate reasons to believe that Frontex should have known of such violations, even if it claims that it had no knowledge thereof. This could for instance be the case of return flights from Hungary, given the systemic and well-reported violations at the Hungarian-Serbian borders, as mentioned above. Frontex’s legal responsibility may be clear in principle, but so far advice from the UNHCR to suspend support for return operations in Hungary due to their inconsistency with international and EU law seems to have gone unheeded by the agency, and legal responsibility has not been incurred in practice.<sup>301</sup>

Moreover, responsibility may arise from other Frontex activities, for example erroneous age registration, which may result in the unlawful deportation of a minor and the violation of the rights of the child. The new powers granted by the 2019 Regulation increase the possibility for Frontex to be held responsible for fundamental rights violations during its returns, especially since

<sup>296</sup> ‘Hungary’s coerced removal of Afghan families deeply shocking – UNHCR’, UNHCR, 8 May 2019, <https://www.unhcr.org/ceu/10940-hungarys-coerced-removal-of-afghan-families-deeply-shocking-unhcr.html>

<sup>297</sup> Tineke Strik, ‘Pushback policies and practices in Council of Europe member states’, <http://website-pace.net/documents/19863/5680684/20190531-PushbackPolicies-EN.pdf/4ecace9-6c04-4202-a555-0eed58299b63>. In May 2017 the Commission took the first step in infringement proceedings against Hungary for its violation of asylum-seekers’ rights – but it was doing so for the second time. It is only recently that it has gone a step further and sent a ‘reasoned opinion’, the step in the process before the initiation of a case before the CJEU. See: ‘HUNGARY: Commission takes next step in the infringement procedure for non-provision of food in transit zones’, European Commission, 10 October 2019, [https://europa.eu/rapid/press-release\\_INF-19-5950\\_EN.htm](https://europa.eu/rapid/press-release_INF-19-5950_EN.htm); and ‘Commission takes first steps against Hungarian asylum law - for the second time’, *Statewatch News*, 17 May

2017, <http://www.statewatch.org/news/2017/may/eu-com-hungary-asylum.htm>.

<sup>298</sup> ‘Post-Deportation Monitoring Network - Suggested Reading List’, *Rights in Exile*, <http://www.refugeelaidinformation.org/post-deportation-monitoring-network-suggested-reading-list>

<sup>299</sup> May Bulman, ‘Afghan father who sought refuge in UK ‘shot dead by Taliban’ after being deported by Home Office’, *The Independent*, 13 September 2018, <https://www.independent.co.uk/news/uk/home-news/zainadin-fazlie-deport-home-office-taliban-afghanistan-shot-dead-refugee-a8536736.html>

<sup>300</sup> ‘Post deportation monitoring’, *Rights in Exile*, <http://www.refugeelaidinformation.org/post-deportation-monitoring>

<sup>301</sup> UNHCR, ‘Hungary’s coerced removal of Afghan families deeply shocking’, 8 May 2019, <https://www.unhcr.org/ceu/10940-hungarys-coerced-removal-of-afghan-families-deeply-shocking-unhcr.html>

such return flights may be conducted in the agency's own aircrafts, by the agency's own escorts.

Finally, the agency's new role in "the collection of information necessary for issuing return decisions," even though the ultimate authority for issuing the decision rests with the member state, could lead to the agency exercising informal influence beyond its mandate. This could give rise to legal responsibility resulting from the *de facto* powers of the agency, something that would not be unprecedented. Such concerns have been expressed by NGOs and the European Ombudsman with respect to the extent of the involvement of the European Asylum Support Office (EASO) in assessing asylum applications in Greek hotspots, as in practice the national authorities rely disproportionately on the agency's assessments.<sup>302</sup>

Since there is indeed scope for its legal responsibility, the agency should take certain measures in order to prevent violations, for instance with respect to the use of forced return monitors, while its accountability needs to be ensured, through fora and procedures in which Frontex has to answer for the impact of its activities upon fundamental rights. Next to mechanisms of administrative accountability, such as the individual complaints mechanism and the Frontex Fundamental Rights Officer, judicial accountability is of the utmost importance.

While the officers participating in a joint operation fall under the civil and criminal jurisdiction of the member state hosting the operation, the accountability of the agency itself is a much more complex matter. Due to the exclusive jurisdiction of the Court of Justice of the EU (CJEU) over matters regarding the legality of EU acts and the liability of EU institutions and agencies, national courts cannot assess the lawfulness of Frontex's actions. However, the ability of individuals to access the CJEU is limited,<sup>303</sup> which significantly restricts the possibilities for Frontex to be held legally accountable. This issue, combined with the lack of transparency over the agency's activities and the lack of clarity over its responsibility, is why a case regarding the human rights obligations of Frontex has yet to have its day in court, even though the possibility for such a case has existed since the Lisbon Treaty came into force. While there are still available legal

avenues to pursue before the CJEU, the road to the legal accountability of Frontex will remain half-closed until the EU finally accedes to the European Convention on Human Rights,<sup>304</sup> allowing for individual access before the European Court of Human Rights (ECtHR) in Strasbourg.

## The use of force: restraints and escorts

In 2014 the European Ombudsman carried out an inquiry into forced removals coordinated by Frontex. One of its recommendations was that the agency seek to document "the means of restraint allowed for return operations in each Member State," and to publicly list "those restraint means to which it would never agree in a JRO."<sup>305</sup> There is good reason for doing so. In 2010, the *Institute of Race Relations* published a list of the 14 people who had died during deportations from European countries since 1991, noting that the "official cause of death in most cases was positional asphyxia or cardiac arrest," the former most likely caused by restraint techniques used against deportees.<sup>306</sup>

Frontex responded to the Ombudsman that it had "launched such a project itself" and was seeking the relevant information from the member states, after which it would analyse the responses "to ascertain if any means of restraint should not be permitted during JROs coordinated by Frontex". The agency subsequently published a 'Guide for Joint Return Operations by Air coordinated by Frontex', which contains a list of restraints that are prohibited in those operations: "metal chains used to restrain hands or legs"; "straightjackets"; and "plastic ties not specifically designed for handcuffing or for leg restraint."<sup>307</sup> The document stipulates that "compliance of Member States with this list is considered by Frontex to be a condition for participation in a JRO, based on the permissible restraints of the organising member state (OMS), coordinated by the Agency." Furthermore, according to a Frontex training presentation, the Code of Conduct for JROs prohibits "measures that can provoke asphyxia or the use of sedatives,"<sup>308</sup> although only the latter is explicitly mentioned in the Code.<sup>309</sup>

It remains impossible to know the types of restraint that are *permitted* in the agency's return operations, apart from via formal

<sup>302</sup> HIAS, Islamic Relief USA, 'EASO's Operation on the Greek Hotspots An overlooked consequence of the EU-Turkey Deal Greece Refugee Rights Initiative', March 2018,

[https://www.hias.org/sites/default/files/hias\\_greece\\_report\\_easo.pdf](https://www.hias.org/sites/default/files/hias_greece_report_easo.pdf); EU Ombudsman, Decision in case 735/2017/MDC on the European Asylum Support Office's (EASO) involvement in the decision-making process concerning admissibility of applications for international protection submitted in the Greek Hotspots, in particular shortcomings in admissibility interviews, July 2018,

<https://www.ombudsman.europa.eu/nl/decision/en/98711>.

<sup>303</sup> Vaughne Miller, 'Taking a complaint to the Court of Justice of the European Union', 11 March 2010,

[https://researchbriefings.files.parliament.uk/documents/SN05397/SN05397\\_7.pdf](https://researchbriefings.files.parliament.uk/documents/SN05397/SN05397_7.pdf); 'Complaints to the European Court of Justice', *Eurofound*, 20 September 2011,

<https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/complaints-to-the-european-court-of-justice>

<sup>304</sup> Council of Europe, 'EU accession to the ECHR', undated,

<https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights>; European Parliament Think Tank, 'EU accession to the European Convention on Human Rights (ECHR)', 6 July 2017,

[https://www.europarl.europa.eu/thinktank/da/document.html?reference=EPRS\\_BRI%282017%29607298](https://www.europarl.europa.eu/thinktank/da/document.html?reference=EPRS_BRI%282017%29607298)

<sup>305</sup> Decision of the European Ombudsman closing her own-initiative inquiry OI/9/2014/MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), para. 37, 4 May 2015, <https://www.ombudsman.europa.eu/en/decision/en/59740>

<sup>306</sup> UNITED continues to compile a list of deaths of people who have died due to "the restrictive policies of 'Fortress Europe'". See: 'The Fatal Policies of Fortress Europe',

<http://www.unitedagainstracism.org/campaigns/refugee-campaign/fortress-europe/>

<sup>307</sup> Frontex, 'Guide for Joint Return Operations by Air coordinated by Frontex', 9 June 2016, <https://frontex.europa.eu/publications/guide-for-joint-return-operations-by-air-coordinated-by-frontex-PkKeDV>

<sup>308</sup> Frontex, 'Fundamental Rights in return operations', undated, <http://statewatch.org/docbin/eu-frontex-deportation-fro-return-specialists-training-11-17.pdf>

<sup>309</sup> Restraint techniques that can cause positional asphyxia are, however, covered in training sessions for escorts organised by the agency. See, for example: Frontex, 'National training Athens18/3/2019-22/3/2019', <http://statewatch.org/docbin/eu-frontex-deportations-training-agenda-athens-3-19.pdf>

JRO	Hand cuffs				Body cuffs	Head protections	
	Steel	Velcro	Plastic	Textile		Helmet	Spit mask
09/03/2016 to Nigeria	Y	Y	Y	Y	Y	Y	Y
27/04/2017 to Serbia	Y	Y	Y	Y	Y	Y	N
11/05/2016 to Pakistan	Y	Y	Y	Y	N	N	N
31/01/2017 to Serbia	Y	Y	Y	Y	Y	Y	N
03/05/2017 to Nigeria	Y	Y	Y	Y	Y	Y	Y
07/06/2017 to Pakistan	Y	Y	Y	Y	Y	N	N
18/01/2018 to Serbia and North Macedonia	Y	Y	Y	Y	Y	N	Y
24/09/2018 to Pakistan	Y	Y	Y	Y	Y	Y	Y
12/12/2018 to Nigeria and Gambia	Y	Y	Y	Y	Y	Y	Y

Table 5: Restraints used in selected Frontex joint return operations, 2016-18

requests for access to documents (and this is still only retrospective). The table below summarises the information concerning restraints contained in implementation plans and operational overviews covering nine JROs conducted in between 2016 and 2018, which were released to *Statewatch* in response to an access to documents request.

Those responsible for applying restraint to the people being removed are referred to as escorts. Forced removals necessarily require the use of escorts to control the movements and activities of deportees, who may attempt to prevent or frustrate their own expulsion. Over the past 30 years a significant body of documentation (in the form of guidance, instructions, manuals, and so on) has been developed by state and non-state actors to govern the actions of escorts, in an attempt to ensure that as little physical harm as possible is done during the deportation process

– a primary example of the “constant tension between norms and violence” that is always at play in forced removal proceedings.<sup>310</sup>

The number of escorts to be deployed on any given deportation operation, and the type of restraints that may be used, is determined by national authorities and is supposed to be worked out on the basis of individual risk assessments for each deportee. According to the EU guidelines on joint removal operations, national authorities should undertake “an analysis of the potential risks” and engage in mutual consultation to determine the number of escorts to be deployed.<sup>311</sup> Frontex recommends that each state involved in a joint operation “carry out an individual risk assessment of their returnees (based on factors such as previous behaviour and removal history),” to establish the number of escorts needed as well as the type of coercive measures that may be deployed.<sup>312</sup>

The UK Home Office’s instructions on “risk assessment and use of restraints on detainees under escort,” which deals with the transfer of detainees from detention centres to hospitals, police stations, airports or any other location, run to 15 pages and refer to a series of other relevant training courses and manuals with which escorts must be acquainted. The instructions set out factors to be taken into consideration regarding the use of force in general, and with regard to specific types of equipment (handcuffs, waist restraint belts, leg restraints and the “mobile chair”). The document notes that “where the use of restraint equipment is planned a minimum of two DCOs [detention custody officers] is mandatory to affect the move.”<sup>313</sup> Germany also reportedly follows the practice of generally assigning two escorts to each detainee, unless they present “a high security risk” or resist their removal.<sup>314</sup>

These instructions are reflected in a document produced by the Dutch authorities and used in training sessions for “escort leaders” organised by Frontex. This says that a minimum of two escorts are needed per deportee, but there are “various criteria” that should be taken into account – for example, the route being taken and the airline being used. For the risk assessment of each individual, “all information collected and available in the ‘chain’ could be useful”. This includes contact details of people responsible for the deportee, any criminal background, any “asylum history”, medical information, length (presumably

<sup>310</sup> Clara Lecadet, ‘Deportation, nation state, capital: Between legitimisation and violence’, *Radical Philosophy*, December 2018, <https://www.radicalphilosophy.com/article/deportation-nation-state-capital>

<sup>311</sup> Section 1.2.6, ‘Arrangements regarding the number of escorts’, cited in European Commission, ‘Return Handbook’, undated, p.43, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/return\\_handbook\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/return_handbook_en.pdf)

<sup>312</sup> Section 6.1.16, ‘Risk assessment’, in Frontex, ‘Guide for Joint Returns Operations by Air coordinated by Frontex’, 12 May 2016,

[https://frontex.europa.eu/assets/Publications/General/Guide\\_for\\_Joint\\_Return\\_Operations\\_by\\_Air\\_coordinated\\_by\\_Frontex.pdf](https://frontex.europa.eu/assets/Publications/General/Guide_for_Joint_Return_Operations_by_Air_coordinated_by_Frontex.pdf)

<sup>313</sup> Home Office, ‘Use of restraint(s) for escorted moves – all staff’, *Detention Services Order 07/2016*, August 2016,

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/543806/DSO\\_07-2016\\_Use\\_of\\_Restraints.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543806/DSO_07-2016_Use_of_Restraints.pdf)

<sup>314</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), ‘Report to the German government on the visit to Germany from 13 to 15 August 2019’, CPT/Inf (2019) 14, p.17, <https://rm.coe.int/1680945a2d>

meaning height), weight, luggage, money, “behaviour of the returnee in all stages” and “behaviour during previous return attempts.” A separate presentation put together by Frontex runs through much the same list but adds “religious and cultural aspects” and language to the factors to be taken into account. The same document also states that the number of escorts assigned to each returnee depends on the risk assessment, rather than proposing a default of two for each individual.<sup>315</sup>

The idea of individualised risk assessment is based on the idea that only the absolute minimum amount of coercion should be applied to individuals, in a proportionate manner, and only when strictly necessary. The UK formally maintains a “presumption against the use of restraint equipment,” but whether this presumption is respected has been questioned – in 335 cases out of 447 in which some type of restraining equipment was used in deportations from the UK between April 2018 and March 2019, “more than one form of restraint was used at the same time.” Such equipment is predominantly deployed on charter flights.<sup>316</sup>

The data available on Frontex-coordinated removal operations, although limited, makes it possible to take a further step back and examine some of the results of risk assessment procedures across different member states. Specifically, it is possible to examine the number of escorts deployed by national authorities per deportee, according to the nationality of those people.<sup>317</sup> The results are, in some cases, striking. They suggest that the risk assessment processes used by national authorities in four different states generally result in people of colour – that is, those being removed to states in Africa, the Middle East and Asia – being accompanied by a greater number of escorts than

individuals facing expulsion to states where the majority of the population would generally be considered as ethnically ‘white’.

In the case of Germany, individuals being deported to Balkan states are almost invariably accompanied by far fewer escorts per deportee than people being expelled to states such as the Democratic Republic of the Congo, Nigeria and Pakistan. Less data is available from Austria, Sweden and Belgium, but here a similar (if less-pronounced) pattern emerges. The data from France and Hungary, meanwhile, paints a more nuanced picture.

Of course, it may be that people of certain nationalities are more likely to resist their removal. The CPT has stated:

*“Removal operations by air to Nigeria are considered by many national authorities in Europe as the most difficult return operations to be carried out (i.e. difficulties both before and during the flight, at disembarkation, etc.). This conclusion is in particular shared by many national escort teams in Europe and by the relevant independent monitors.”<sup>318</sup>*

Talking to *Statewatch*, a deportation monitor working in Germany also expressed this view, noting that people being removed to countries further from the EU often have a lot more to lose by being expelled. At the same time, she highlighted that it often seems restraints are applied to people unnecessarily. Without more detailed investigations and a more extensive set of data it is not possible to draw any firm conclusions about the patterns that emerge from the data. Nevertheless, they give the impression of concerning practices.

## Pre-departure Phase Boarding



Figure 13: A slide from a Frontex training presentation on the different phases of a forced removal operation

<sup>315</sup> Frontex, ‘Organisation of a RO – Pre return phase’, undated, <http://statewatch.org/docbin/eu-frontex-deportations-organisation-of-ro.pdf>

<sup>316</sup> Diane Taylor, ‘Shackles and restraints used on hundreds of deportees from UK’, *The Guardian*, 11 August 2019, <https://www.theguardian.com/uk-news/2019/aug/11/shackles-and-restraints-used-on-hundreds-of-deportees-from-uk>

<sup>317</sup> The data used here concerns those joint removal operations for which data was available on the number of escorts deployed per deportee for

each destination (thus excluding, for example, flights with two destinations where the number of escorts was not disaggregated by destination).

Charts have been produced for member states with data on at least four destination states over at least two years. It is assumed that the nationality of the individuals being deported is that of the country to which they are being removed, although this may not always be the case.

<sup>318</sup> ‘Report to the Government of the Netherlands’, CPT/Inf(2015) 14, 5 February 2015, p.7, <https://rm.coe.int/168069782c>

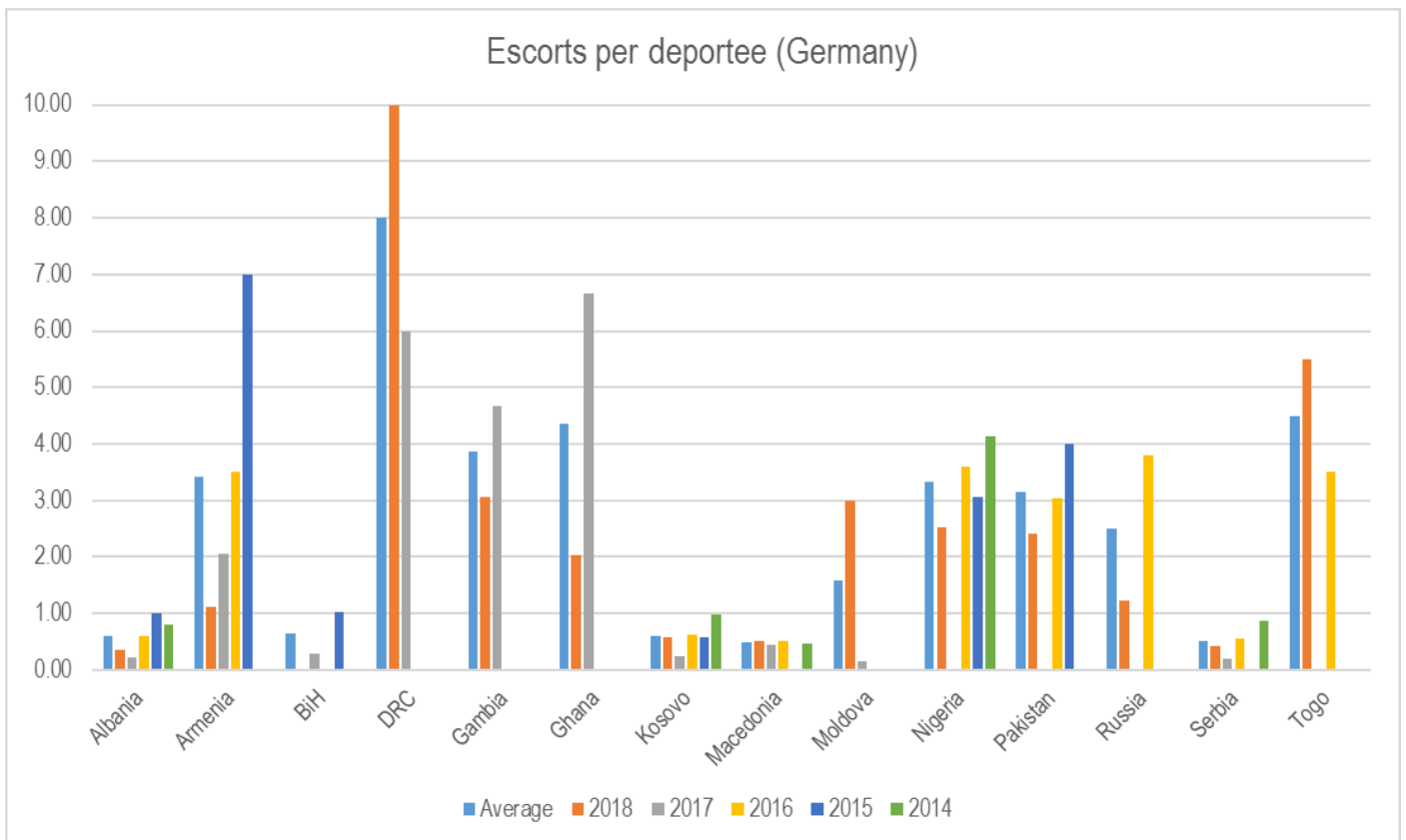


Figure 15: Escorts per deportee (Germany, 2014-18)

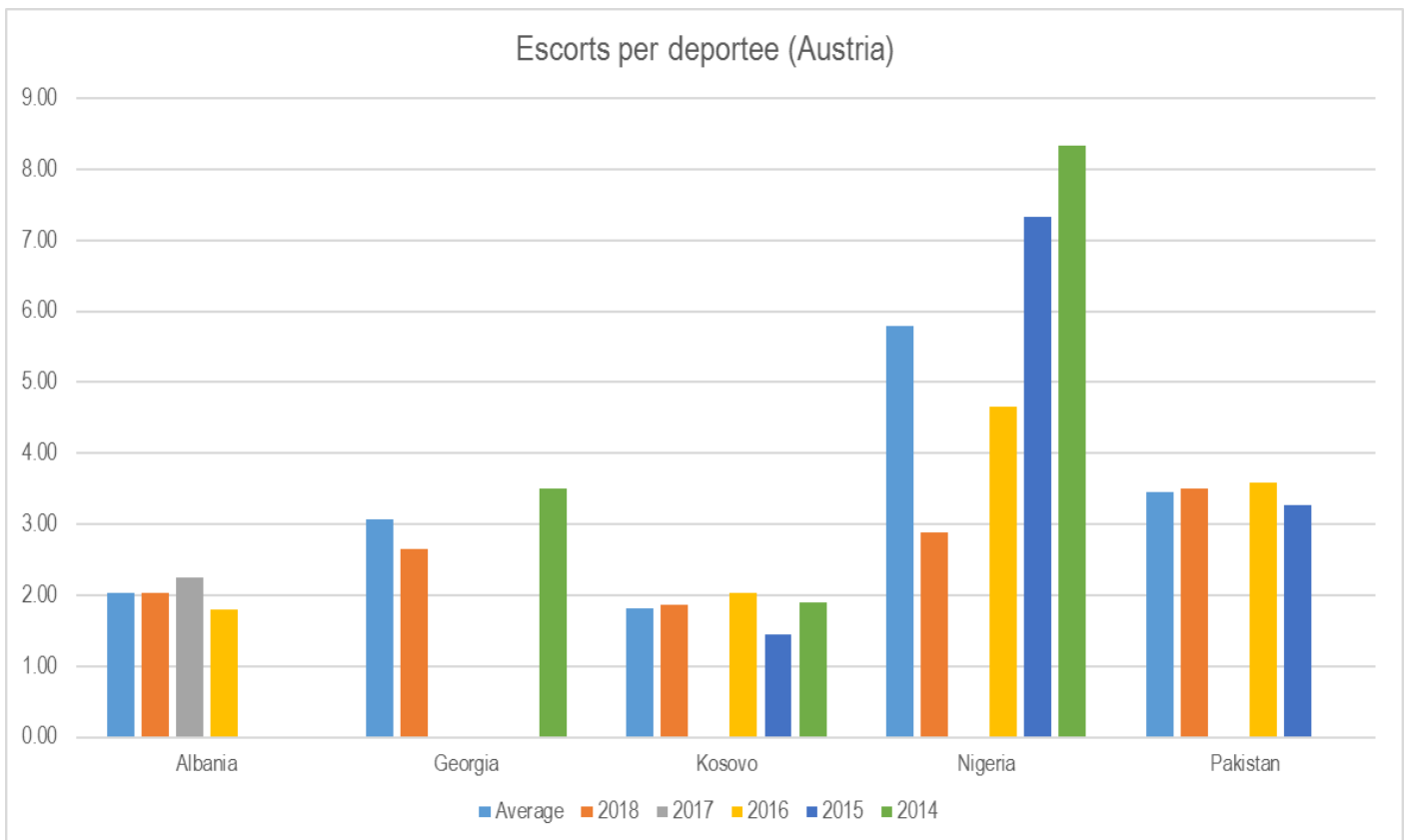


Figure 14: Escorts per deportee (Austria, 2014-18)

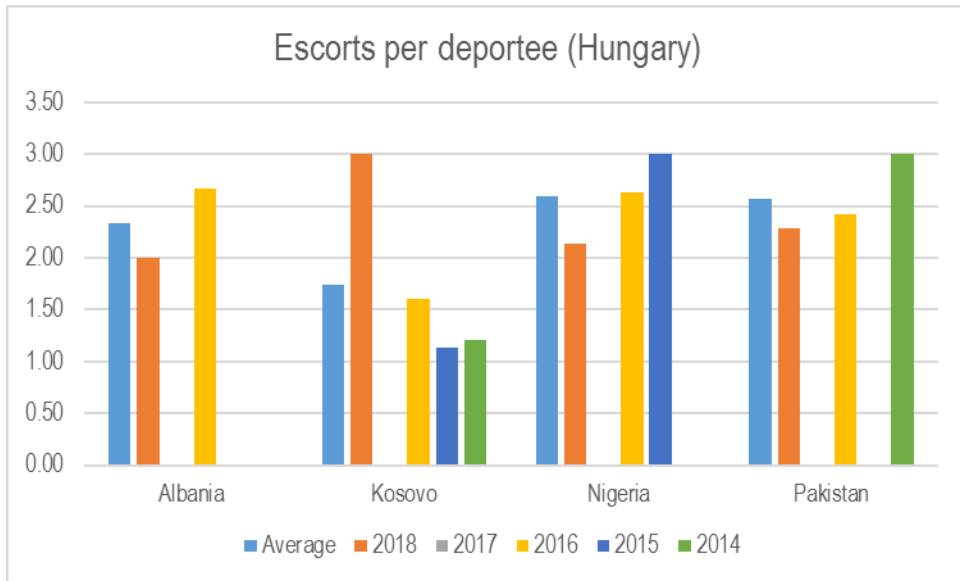


Figure 18: Escorts per deportee (Hungary), 2014-18

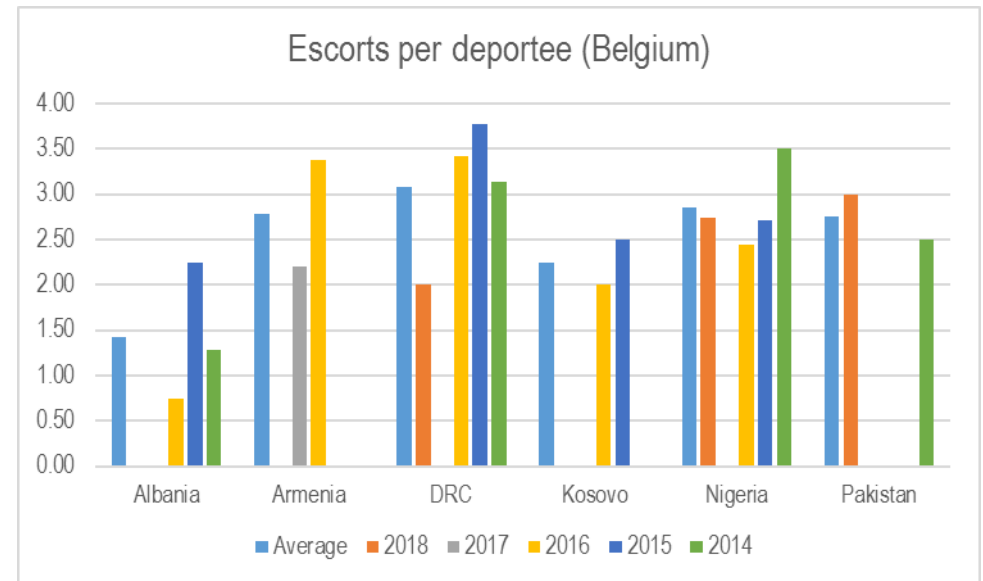


Figure 17: Escorts per deportee (Belgium), 2014-18

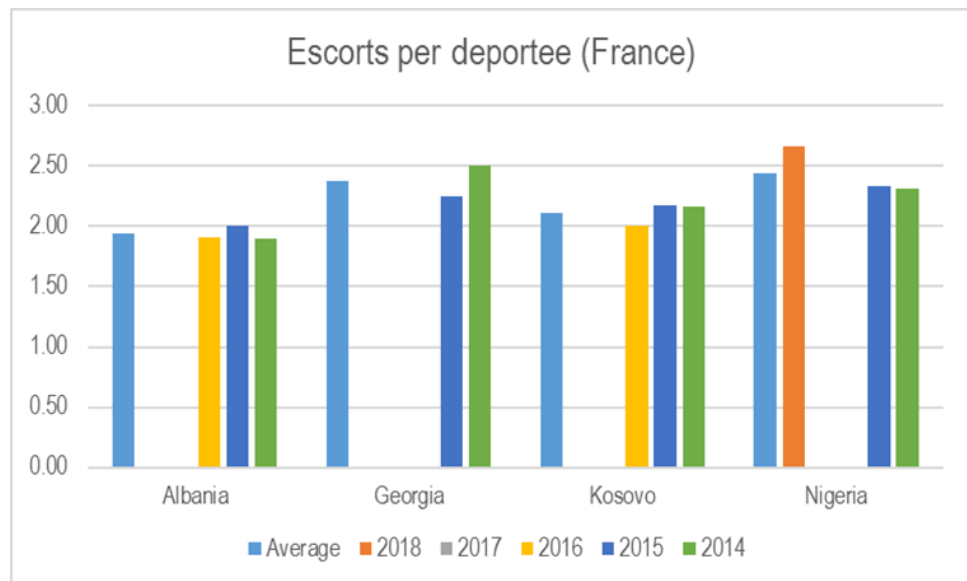


Figure 16: Escorts per deportee (France), 2014-18

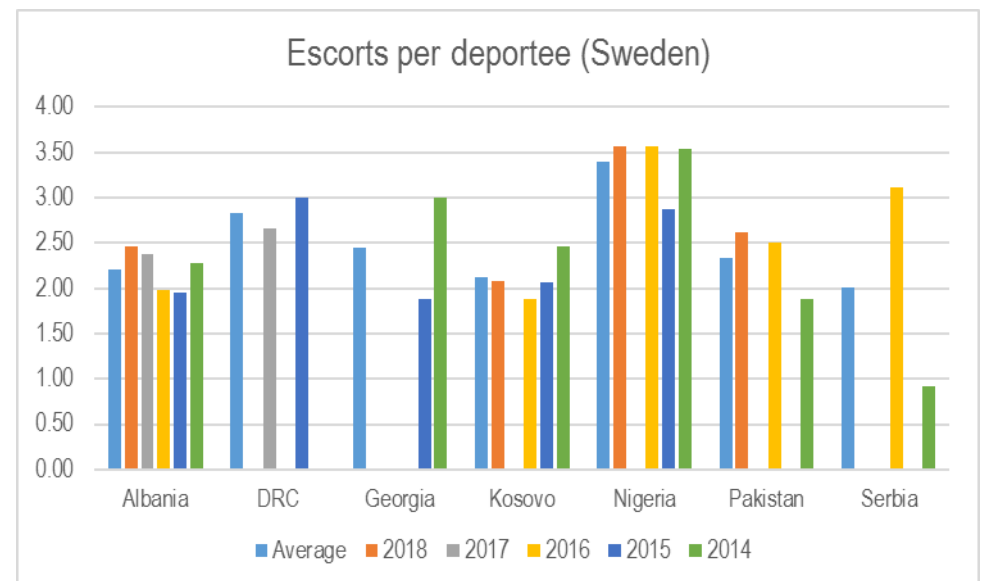


Figure 19: Escorts per deportee (Sweden), 2014-18

## Monitoring forced removals

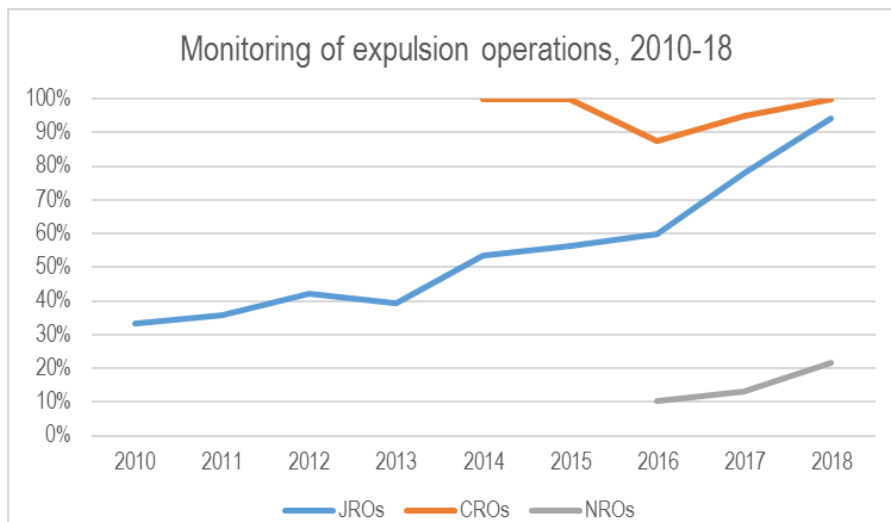


Figure 20: Monitoring of expulsion operations, 2010-18

The deployment of monitors is key to ensuring that individuals are not physically abused or otherwise mistreated during deportation operations. An increase in the use of deportation charter flights by states in the 1990s and 2000s led to corresponding concerns from jurists, scholars, journalists and NGOs that abuses could take place unseen by the outside world. The only other passengers on the plane are the crew and the officials deployed by states: “Since charter flights take place away from the watching eye of the fellow passenger they place detainees in a particularly vulnerable position, outnumbered as they are by the security and escort teams.”<sup>319</sup> Recognition of this problem led to growing calls for the establishment of independent monitoring systems, and in 2008 the EU Returns Directive introduced an obligation for member states to “provide for an effective forced-return monitoring system.”<sup>320</sup>

The Directive provides no further clarity on what precisely this means, but generally, member states identify and appoint independent forced return monitors able to observe and report on all aspects of forced removals, short of what happens after an individual has been disembarked in the destination country. An overview of forced return monitoring systems in the member states published by the EU’s Fundamental Rights Agency (FRA) in June 2019 identified four member states – Cyprus, Germany, Slovakia and Sweden – that still lacked an effective forced return monitoring system. Cyprus had no system in place, while in the other three states the monitoring body was part of the same state

institution responsible for expulsion operations, and thus lacking in independence.<sup>321</sup> However, the FRA noted that “two of these [states] were taking steps to have effective monitoring systems by 2019,” although it did not identify them.<sup>322</sup>

Following the Ombudsman’s inquiry in 2015, Frontex agreed that the presence of monitors on all removal flights was necessary. However, it noted that while the Returns Directive does require a forced return monitoring system in every member state it “does not imply an obligation to monitor each removal operation.” Furthermore, said the agency, it had no power to direct the activities of national monitoring bodies and so “is not the decision maker on whether there is or is

not a monitor present”. Nevertheless, engagement with national authorities had led to an increase in the number of flights monitored and, as the chart below shows, this has improved in the years since. However, the number of NROs with a monitor present remains extremely low – in 2018, only 22% of NROs were monitored, according to data provided by Frontex and analysed for this report.<sup>323</sup>

The Ombudsman also proposed that the JRO Implementation Plan include a requirement for monitors’ reports to be forwarded to Frontex. Frontex agreed with the idea and said that it “would like to see those reports,” but “the national forced-return monitoring bodies are independent and Frontex does not have decisive influence on their activities”. While “monitors contribute with their findings to the OMS Final Return Operation Report... only a few national monitoring bodies have so far provided their complete reports directly to Frontex.”

Starting in 2018, the agency began publishing a six-monthly report summing up the results of all types of return operation and highlighting new developments,<sup>324</sup> although the level of detail in these reports is rather limited. Fundamental rights monitoring and serious incident reporting are given slightly more attention in the report for the latter half of 2018, though it does not refer to the biannual report issued by Frontex’s own Fundamental Rights Office (FRO) covering the same period or acknowledge this report’s concern for the low number of serious incident reports

<sup>319</sup> William Walters, ‘The Microphysics of Deportation. A Critical Reading of Return Flight Monitoring Reports’ in Matthias Hoesch and Lena Laube (eds.), Proceedings of the 2018 ZIF Workshop: Studying Migration Policies at the Interface between Empirical Research and Normative Analysis, ULB Münster, 2019, pp.166-186

<sup>320</sup> 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, article 8(6)

<sup>321</sup> FRA, ‘Effective forced return monitoring systems 2018’, [https://fra.europa.eu/sites/default/files/fra\\_uploads/forced\\_return\\_monitoring\\_overview\\_2018\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/forced_return_monitoring_overview_2018_en.pdf)

<sup>322</sup> FRA, ‘Forced return monitoring systems - 2019 update’, June 2019, <https://fra.europa.eu/en/publication/2019/forced-return-monitoring-systems-2019-update>

<sup>323</sup> In an evaluation of return operations carried out in the first half of 2018, Frontex said: “it has to be highlighted that the number of NROs physically monitored referred only to operations where a national monitor was also on board. The other 24 return operations in which only one Member State returned non-EU country nationals are considered joint operations because of the presence of a monitor from the Frontex pool, provided by another Member State.” In any case, it is clear that national authorities are clearly failing to meet the highest standards when it comes to monitoring forced return operations.

<sup>324</sup> In accordance with Article 28(8) of the 2016 Regulation, now Article 51(6) in the 2019 Regulation.

## Contributions/Deployment Mechanism

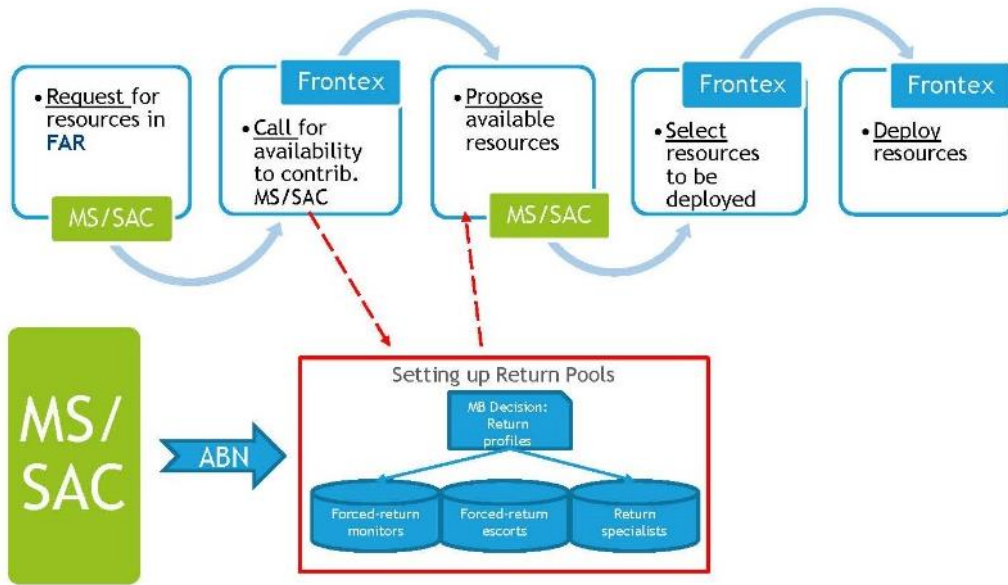


Figure 21: The process of setting up a Frontex-coordinated removal operation

filed compared to the incidents logged in forced return monitors' reports to the FRO.<sup>325</sup>

The FRO and the requirement to produce reports on forced return operations were both introduced by the 2016 Regulation, which significantly changed the legal basis in force at the time the Ombudsman's report was issued. It introduced an obligation to constitute a pool of forced-return monitors, drawn from national authorities, who would be invited to monitor Frontex-coordinated expulsion operations. It became active in January 2017. Prior to this, monitors could only be deployed when made available by national authorities for any given operation.

The 'pool' monitors conduct their work only on behalf of the member state that has requested their presence – that is, the member state organising any given operation that is coordinated by Frontex (this issue was also raised in submissions to the

provided with "enhanced fundamental rights training" by the last quarter of 2020.<sup>328</sup>

While this may make it possible to monitor a greater number of flights, the independence of the structure is questionable. Frontex funds and manages the pool of forced return monitors, provides training<sup>329</sup> and even selects the individual monitors who will attend operations.<sup>330</sup> Given that the entire process and activity is managed by the agency itself, it is doubtful whether the system can be truly independent. Indeed, the EU's Fundamental Rights Agency has recommended that an independent actor, rather than Frontex, manages the pool of forced-return monitors.<sup>331</sup> The Council of Europe Committee for the Prevention of Torture has also concluded that "current arrangements cannot

<sup>325</sup> FRO biannual report, report-frontex-document-104.pdf

<sup>326</sup> "With regard to so-called "representative monitoring" under Article 14(5) of the Code, the Ombudsman notes some respondents' scepticism as to how a monitor from one Member State could monitor the behaviour of escorts from another Member State, given that they act according to their national rules. The Ombudsman, however, sees potential in such monitoring, provided that monitors are properly briefed on the means of restraint agreed in the Implementation Plan." See: 'Decision of the European Ombudsman', para. 41, <https://www.ombudsman.europa.eu/en/decision/en/59740> s

<sup>327</sup> Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EU) n° 1052/2013 of the European Parliament and of the Council and Regulation (EU) n° 2016/1624 of the European Parliament and of the Council, article 107(a), (1)(a), (2)(a), (2)(v)(b), (3), (4).

<sup>328</sup> "Roadmap" for implementing new Frontex Regulation: full steam ahead', *Statewatch News*, 25 November 2019, <http://www.statewatch.org/news/2019/nov/eu-frontex-roadmap.htm>

<sup>329</sup> After undertaking studies for the European Commission on the monitoring of forced removals, the International Centre for Migration Policy Development was then contracted to implement three FReM (Forced Returns Monitoring) projects. FReM I ran from 2013-15 and was co-funded by the European Return Fund. A new, €1.1 million FReM II

project was launched to complement the 2016 upgrade to Frontex's mandate. A third iteration of the project is due to be handed over to Frontex. The agency has been closely involved with the FReM projects "since day one", according to ICMPD staff responsible for the project, and they do not think much will change following the handover.

<sup>330</sup> To request a monitor on an operation, member states or Schengen Associated Countries (MSSAC) submit a call to the ECRet, via the FAR, specifying any additional eligibility criteria (for instance, experience in cooperation or working with Frontex, or knowledge of languages spoken in countries of destination of the return operation). The Pooled Resources Unit of Frontex then puts out an open call to all MSSAC who contribute to the Frontex forced-return monitors pool. Any experts offered by these competent authorities must be members of the pool, and must have received the standard FReM training from Frontex, the ICMPD and the FRA. Once Frontex receives the request from a MSSAC for resources, Frontex puts out a call for availability to contributing MSSAC. Based on the proposed candidates from the states' competent authorities, Frontex then select and deploy monitors to return operations.

<sup>331</sup> Fundamental Rights Agency, 'The revised European Border and Coast Guard Agency and its fundamental rights implications', 2018, [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2018-opinion-ebcg-05-2018\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-opinion-ebcg-05-2018_en.pdf)

Ombudsman's inquiry<sup>326</sup>). They do however report to Frontex, submitting operation reports to the fundamental rights officer. When the 2019 Regulation enters into force, the pool will remain in place, but it will also be possible for Frontex staff to act as monitors. The agency is obliged to appoint 40 fundamental rights officers within the first year of the Regulation's entry into force, and they will be assigned by the FRO either to particular operations or to the pool by the FRO.<sup>327</sup> A 'roadmap' produced by the agency and the European Commission outlines a plan to recruit "at least 40 Fundamental Rights Monitors" who will be



be considered as an independent external monitoring mechanism".<sup>332</sup>

The process of monitoring an individual operation ends with the submission of a report from the monitor to the executive director, the fundamental rights officer and the competent national authorities after the handing over of deportees to third country authorities. Following this, "if necessary, appropriate follow-up shall be ensured by the executive director and competent national authorities respectively", including further communication (at the discretion of the executive director) with member states and the European Commission.<sup>333</sup> Monitors themselves do not necessarily receive any specific response to the reports they have submitted, seeing only a summary of outcomes, recommendations and "best practices" in the fundamental rights office's biannual observations. They cannot identify any specific response to incidents reported or recommendations made, how specific member states have responded to breaches, or what measures have been implemented to improve fundamental rights compliance in return operations.

It is extraordinary that despite longstanding, formal recognition of the link between forced removals and violence or mistreatment, the monitoring systems and reporting mechanisms that have rightfully been introduced have not been coupled with effective regimes of accountability. Of course, it must be recognised that these systems and mechanisms in some ways serve to legitimise coercive state practices, and that legitimacy may be called into question if effective accountability regimes were also part of the equation. As the following section demonstrates, shortcomings may also be found in another of the accountability mechanisms that Frontex has been obliged to introduce in recent years – a complaints mechanism for those affected by its operations.

## The complaints mechanism: improved but insufficient

While the deployment of monitors can play an important role in preventing fundamental rights abuses during forced removals and preventing them occurring again in the future, the need for other accountability mechanisms with regard to Frontex's role in deportations has long-been recognised. In 2013, the European Ombudsman called for the establishment of a complaints mechanism. Frontex rebuffed the suggestion, arguing that rights violations were the responsibility of the member states involved

in an operation;<sup>334</sup> the Ombudsman raised the issue again in 2015.<sup>335</sup> The 2016 Frontex Regulation introduced a binding obligation on the agency to set up a complaints mechanism and the 2019 Regulation adds further provisions. These provide some improvements, but it is still not possible to consider the agency's complaints mechanism as truly independent or effective.

A 2018 study published by the *Centre for European Policy Studies (CEPS)* provided a systematic examination of regional, international, and supranational human rights law and set out the minimum standards that could qualify a complaints mechanism as an effective remedy.<sup>336</sup> These include institutional independence, accessibility in practice, adequate capacity to conduct thorough and prompt investigations based on evidence, and a suspensive effect in the context of joint expulsions.<sup>337</sup>

For a remedy to be considered institutionally independent, the procedure needs to be impartial.<sup>338</sup> Furthermore, "if complaints are only allowed before the same authority responsible for conducting checks at the EU borders", it must be possible to appeal the decisions made by that authority.<sup>339</sup> The criterion of accessibility requires adequate access to information, procedural clarity and fairness, respect for privacy and confidentiality, the possibility for returnees to file a complaint "either immediately upon arrival or on board the plane prior to arrival." The mechanism must also be open to all persons concerned – not only the affected individual(s), but also the responsible supervisory authorities and anyone aware of the violation (for example, journalists or NGOs).<sup>340</sup> Finally, thorough and prompt investigations require adequate capacity in both procedural and practical terms – a "genuine complaints mechanism" must be based on transparent procedures, the exclusion of large margins of appreciation<sup>341</sup> and thoroughness in follow-up procedures.<sup>342</sup> With the changes introduced by the 2019 Regulation, Frontex's complaints mechanism has come some way towards meeting these criteria. Nevertheless, there are still significant shortcomings.<sup>343</sup>

The 2019 Regulation gives the fundamental rights officer (who reports directly to the agency's management board, rather than the executive director, and must be able to act autonomously and independently<sup>344</sup>) an expanded role in the complaints procedure. They will now have a greater say in determining the admissibility of complaints, in ensuring that the agency and the member states follow up on complaints concerning their staff, and in

<sup>332</sup> 'Report to the German government on the visit to Germany carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 13 to 15 August 2018', CPT/Inf (2019) 14, 9 May 2019, p.24, <https://rm.coe.int/1680945a2d>

<sup>333</sup> Article 52(5a)

<sup>334</sup> European Ombudsman, 'Ombudsman calls on Frontex to deal with complaints about fundamental rights infringements', 13 November 2013, <https://www.ombudsman.europa.eu/en/press-release/en/52487>

<sup>335</sup> In this case, however, there was no mention of a complaints mechanism, but rather a call for the provision of a standardised complaint form to deportees.

<sup>336</sup> Sergio Carrera and Marco Stefan, 'Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?', *CEPS*, 2018, [https://www.ceps.eu/system/files/Complaint%20Mechanisms\\_A4.pdf](https://www.ceps.eu/system/files/Complaint%20Mechanisms_A4.pdf)

<sup>337</sup> *Ibid.*, p.5

<sup>338</sup> *Ibid.*, p.13

<sup>339</sup> *Ibid.*, p. 36

<sup>340</sup> *Ibid.*, p.13. Such public interest complaints were for the Ombudsman a necessary precondition for an effective complaints mechanism in Frontex operations. See: 'Draft recommendation of the European Ombudsman in his own-initiative inquiry OI/5/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex)', <http://www.ombudsman.europa.eu/en/cases/draftrecommendation.faces/n/49794/html.bookmark>.

<sup>341</sup> 'Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?', p. 24

<sup>342</sup> *Ibid.*, p36

<sup>343</sup> In the case of complaints declared inadmissible or unfounded, however, the agency must now set up "an appropriate procedure" (Article 111(5)).

<sup>344</sup> Articles 109(4) and (5), 2019 Regulation

recommending to the executive director the action to be taken in response to complaints (including “referral for the initiation of civil or criminal justice proceedings,” where deemed appropriate).

Nevertheless, institutional independence is still sorely lacking – it remains the job of the executive director to “ensure the appropriate follow-up” to complaints accepted and registered by the fundamental rights officer. There is no mention in the Regulation of the possibility to appeal against decisions.

The 2019 Regulation takes some steps to make the complaints mechanism more accessible. Under the 2016 rules, individuals could submit a complaint if they considered that the actions of staff involved in the agency’s operational activities<sup>345</sup> had breached their fundamental rights. Now, complaints may also be submitted in relation to a *failure* to act by Frontex or member state officials. Furthermore, the onus to complain is not only on the affected individual – since 2016, it has been possible for complaints to be submitted by any party representing the affected individual.<sup>346</sup>

New provisions also require that the standardised complaint form “be easily accessible, including on mobile devices,” and Frontex is obliged to provide “further guidance and assistance” to complainants.<sup>347</sup> Complainants must be given information on the registration and assessment of their complaint and informed when a decision is made on its admissibility. An “appropriate procedure” must be established for inadmissible or unfounded complaints, which must be re-assessed where new evidence is submitted. Any decision on a complaint must also be provided in written form that states the reasons for the decision.<sup>348</sup> Complaints are treated confidentially unless the complainant explicitly states otherwise.<sup>349</sup> Furthermore, the implementation of the complaints mechanism should become more transparent when the 2019 Regulation enters into force – the FRO’s annual report must now include “specific references to the Agency’s and Member States’ findings and the follow-up to complaints.”<sup>350</sup>

The low number of submitted complaints has raised questions regarding the accessibility of the remedy. Carrera and Stefan indicate that only two complaints were registered in 2016, and 13 in 2017.<sup>351</sup> They have also noted that complaints must be signed (that is, they cannot be anonymous) and the complaint must be submitted in writing, while the admissibility criteria do not seem to take into account the practical difficulties individuals in an

irregular situation may face in accessing justice, especially when the individual has been subject to deportation. Nevertheless, the overall accessibility of the complaints procedure has clearly been improved – on paper. The question is whether they will be put into practice effectively. Current practices show a clear need for improvements – it has been reported that deportees are not always provided with complaint forms, despite the fact that a member of Frontex staff is present on every Frontex-coordinated expulsion flight.<sup>352</sup>

Finally, an effective complaints mechanism requires thorough and prompt investigations. As noted above, it remains the executive director’s responsibility to examine the complaint, reach “a preliminary view” and ensure “appropriate follow-up”, if considered necessary.<sup>353</sup> Without further details on the handling of complaints received by the agency so far, it is hard to evaluate whether this can be considered a “thorough” investigation. However, there is now a requirement for the fundamental rights officer to recommend the appropriate course of action on any given complaint, which reduces the executive director’s margin of appreciation.<sup>354</sup> In the case of complaints directed to national authorities, the thoroughness of any given investigation is dependent on the legislation and practice in the member states. Complaints concerning members of Frontex teams (rather than the agency’s own staff) must be forwarded to national authorities and fundamental rights bodies, “for further action in accordance with their mandate.”<sup>355</sup>

There is no clear requirement for investigations to be prompt. Complainants must be informed that “a response may be expected as soon as it becomes available,” but there are no further details on time limits. Nor is there any limit on how long the executive director may take in reaching their decision. There is a requirement for the executive director to provide a report to the fundamental rights officer on follow-up within a “determined timeframe”, but both the legislation and the implementing rules are silent as to what that timeframe is.

One overarching issue for an effective complaints mechanism is the provision of sufficient staff and resources to the fundamental rights officer. As the European Parliament highlighted in April 2018, “the fundamental rights officer has received five new posts since 2016”. However, at that time, three remained vacant – a situation that the Parliament “deeply deplored.”<sup>356</sup> The situation

<sup>345</sup> Specifically, Article 111(2) of the 2019 Regulation lists the following activities in relation to which a complaint may be submitted: “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.”

<sup>346</sup> The rules on the complaints mechanism adopted by the executive director in order to implement the 2016 Regulation allow the submission of complaints by “any party, whether a natural or legal person, acting on [the affected individual’s] behalf,” as well as by the individual themselves. See: ‘The agency’s rules on the complaints mechanism’, [https://frontex.europa.eu/assets/Key\\_Documents/Complaints/Annex\\_1\\_-\\_Frontex\\_rules\\_on\\_the\\_complaints\\_mechanism.pdf](https://frontex.europa.eu/assets/Key_Documents/Complaints/Annex_1_-_Frontex_rules_on_the_complaints_mechanism.pdf)

<sup>347</sup> Article 111(10), 2019 Regulation

<sup>348</sup> Article 111(5), 2019 Regulation

<sup>349</sup> Article 111(11), 2019 Regulation

<sup>350</sup> Article 111(9), 2019 Regulation

<sup>351</sup> ‘Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?’, p. 25

<sup>352</sup> FRO report 2018

<sup>353</sup> Article 10, ‘The agency’s rules on the complaints mechanism’, [https://frontex.europa.eu/assets/Key\\_Documents/Complaints/Annex\\_1\\_-\\_Frontex\\_rules\\_on\\_the\\_complaints\\_mechanism.pdf](https://frontex.europa.eu/assets/Key_Documents/Complaints/Annex_1_-_Frontex_rules_on_the_complaints_mechanism.pdf)

<sup>354</sup> Article 111(6), 2019 Regulation: “In the case of a registered complaint concerning a staff member of the Agency, the fundamental rights officer shall recommend appropriate follow-up, including disciplinary measures, to the executive director and, where appropriate, referral for the initiation of civil or criminal justice proceedings in accordance with this Regulation and national law.”

<sup>355</sup> Article 111(4), 2019 Regulation

<sup>356</sup> ‘European Parliament decision of 18 April 2018 on discharge in respect of the implementation of the budget of the European Border and Coast Guard Agency (Frontex) for the financial year 2016’, para. 17, [https://www.europarl.europa.eu/doceo/document/TA-8-2018-0164\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-8-2018-0164_EN.html). Frontex’s Consultative Forum on Fundamental Rights has also repeatedly raised this issue, stating in its 2018 report that inadequate staffing is “seriously undermining the fulfilment” of the agency’s fundamental rights obligations. See: ‘NGOs, EU and international

had not improved significantly by the end of the year, when the Consultative Forum warned that the Fundamental Rights Office's work was still "compromised in areas such as monitoring of operations, handling of complaints, provision of advice on training, risk analysis, third country cooperation and return activities."<sup>357</sup>

The Consultative Forum's 2018 report noted that new rules on the complaint mechanism had been drafted by the fundamental rights officer. These were a "remarkable improvement" on the existing rules, but had not been adopted. When the 2019 Regulation comes into force it will be necessary for the agency

to adopt new implementing rules, providing an opportunity to address several issues relevant to the complaints mechanism. Nevertheless, although the 2019 Regulation has introduced an explicit requirement that the complaints mechanism be "independent and effective",<sup>358</sup> the legislation governing it does not meet these requirements. There is still no truly effective remedy available to individuals who have had their fundamental rights violated by Frontex staff or agents – and even the insufficient rules that do exist cannot be properly implemented if the staff and resources for doing so are not available.

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agencies sound the alarm over Frontex's respect for fundamental rights', *Statewatch News*, 5 March 2019, <http://www.statewatch.org/news/2019/mar/fx-consultative-forum-rep.htm>

<sup>357</sup> 'NGOs, EU and international agencies sound the alarm over Frontex's respect for fundamental rights', *Statewatch News*, 5 March 2019, <http://www.statewatch.org/news/2019/mar/fx-consultative-forum-rep.htm>

<sup>358</sup> Article 111(1), 2019 Regulation

## Conclusions

This report has examined ongoing initiatives that seek to expand the role of EU institutions and agencies in managing and enforcing deportations. Those who advocate for these initiatives tell a simple story – not even half of those issued with a deportation order are removed and for the EU and its member states to retain their ‘credibility’, that number needs to go up. The legal and operational initiatives examined in this report thus have a twofold aim: first, to make it easier for states to hand down removal orders; and second, to expand the means available to enforce those orders, in the form of large-scale databases and the resources of the EU’s border agency, Frontex.

The logic behind this narrative of efficiency is simple enough to understand. However, it obscures a host of important issues that this report has tried to elucidate and wilfully ignores the fact that any substantial increase in the EU’s ‘return rate’ will require vast financial and material expenditure. As such expenditure would likely be impossible to sustain in the long-term, especially in view of the emerging socio-economic crisis caused by the novel coronavirus pandemic, the policy may very well fail to achieve its goal, whilst using precious resources that would be better-directed elsewhere.

Should the measures discussed here be fully implemented, they will lead to a significant expansion of state power over the lives of people who are already frequently marginalised, excluded and unable to effectively exercise their rights. As highlighted in the introduction to this report, if liberal democratic states are to do more than simply pay lip service to human rights and the rule of law, then the power to forcibly remove individuals from a state’s territory should be used only in cases of the utmost urgency and with stringent control and oversight, if it has to be used at all.

The EU initiatives examined here point in the opposite direction – towards swifter, less ‘troublesome’ legal proceedings at national level, with detection and deportation aided by interconnected databases and information systems, and operations instigated, coordinated and overseen by an agency, Frontex, whose powers have increased far more swiftly than the necessary oversight and accountability mechanisms.

*Should the limited legal protections afforded to people at risk of deportation be removed even further in the hope of increasing the EU’s ‘return rate’?* When the Returns Directive was originally approved in 2008, critics – including Statewatch – warned that it set a dangerously low bar for migrants’ rights, as well as placing detention and deportation firmly at the heart of the EU’s migration regime. More than a decade later, the European Commission has not undertaken any formal, public evaluation of the Directive. Instead, it has asserted, without any evidence and in absence of an impact assessment (in the name of ‘urgency’), that a more punitive regime is required to increase the rate of removals.

The 2018 proposal for the recast Return Directive, which remains under discussion within the Council of the EU and European Parliament, would remove many of the protections contained within the 2008 Return Directive and subsequent case-law, in an attempt to appease the vicious xenophobic sentiment that has resurfaced across European societies in recent years. There has been no consideration of alternatives – or, if there has, those considerations have not been presented to the public. This focus

on removal at all costs seems wilfully blind to the ongoing vast disparities in asylum recognition rates across the EU, as well as the fact that many people are ‘non-removable’ for a variety of reasons beyond their control. It also remains the case that many people have to enter EU territory clandestinely – and later become subject to removal orders – because of a lack of legal migration routes. Now more than ever, there is a need to address these long-standing issues. The proposed revamp of the Returns Directive does no such thing.

*Is the ongoing transformation of the EU’s justice and home affairs databases – justified by intermingled references to migration and security – necessary, proportionate, feasible or desirable?* While some legislation remains under discussion, leaving room for migrants’ rights and data protection advocates to make their case, the direction of travel is clear – the ‘general-use’ availability of the personal data of non-EU nationals for a wide variety of purposes, including deportations.

Wojciech Wiewórowski, now the European Data Protection Supervisor, reportedly said in February 2019 that there is “no way to fight” the ‘interoperability’ of state databases and information systems, “since this is the natural development of future IT systems”. However, IT systems do not ‘naturally develop’ – they are designed and constructed by individuals and institutions. To suggest otherwise is merely to aid those who have succeeded in introducing dramatic changes to personal data processing in EU justice and home affairs policy by presenting political choices as mere technical ones. While many of those choices, in terms of legislation, have already been made, a broader understanding of the new systems amongst civil society organisations, journalists and elected officials is crucial if there are to be effective interventions in the debates still to come.

*What role should a European border agency have and what controls and limits should be in place to ensure fundamental rights, democratic accountability, and access to effective remedies?* The fundamental question of whether a European border guard is needed at all has largely been removed from public discussion. At the same time, it is clear that the checks and balances that apply to Frontex in the realm of deportations remain inadequate to address the human rights issues inherent in such operations. The new powers afforded to the agency by legal reforms in 2016 and 2019 have not been matched with sufficient powers of oversight, scrutiny and remedies for those who may have their fundamental rights breached by Frontex itself, or by national officials participating in a Frontex-coordinated operation.

The agency has significant powers with regard to deportation operations. Its European Centre for Returns is able to gather information necessary for issuing return decisions and for the identification of those subject to those decisions; acquire travel documents; organise and coordinate deportation operations and ‘voluntary’ return flights; provide information on destination countries; and advise on the implementation of EU legislation and measures to prevent absconding. Where agreed with a member state, Frontex can launch “return interventions” through the deployment of officials to assist with deportation proceedings, and the agency will seek to deepen its engagement with non-EU

states on Collecting Return Operations and other matters concerning cooperation on deportations. These activities will likely be propelled by a massively-increased budget (€13 billion over seven years has been proposed), although negotiations on the EU's future financial framework are ongoing.

Although there is still no role for the agency in national decision making leading to deportation orders, its enhanced role increases the possibility of involvement in breaches of fundamental rights, especially since return operations can now take place on the agency's own aircrafts and vessels with the agency's own return escorts. It may coordinate deportations from EU states with dismal records in protecting the rights of migrants and asylum-seekers, such as Greece and Hungary. The massive discrepancies in asylum recognition rates across the EU indicate a significant risk that a Frontex-coordinated flight may remove refugees to countries where they are at risk of torture or persecution. The agency's new data-gathering powers and control of EU-wide information networks give it an increasingly proactive role in the instigation of deportation operations, raising the possibility of increased raids and detention based on ethnic profiling.

Some new and expanded safeguards have been introduced alongside the new powers, but they remain incomplete and inadequate. Frontex now has recourse to an increased number of fundamental rights monitors for observing deportation operations. Nevertheless, providing Frontex itself with the responsibility for employing, training and managing the new cohort of forced returns monitors means they cannot be considered independent. The complaints mechanism for individuals affected by Frontex's activities has also been improved upon, but remains a long way from providing a genuinely effective remedy. The agency's Fundamental Rights Officer has been granted more staff and a greater degree of independence from the Executive Director, but the new legislation remains silent on the powers they will be granted to undertake investigations, while questions still remain as to the adequacy of the resources at her disposal. Crucially, it is still practically impossible for an individual to bring legal action against the agency, a problem that could be solved by EU accession to the European Convention on Human Rights – but

that stop-start process has now been under discussion for over four decades.

Responsibility for ensuring that the agency is held accountable in the exercise of its new powers will thus have to be more holistic and include solutions beyond legal cases. Pursuing other means of accountability should not be seen as a substitute for formal legal and political accountability, but rather a means for ensuring it is introduced and enforced. The agency's own Consultative Forum on Fundamental Rights will continue to have a role, given the privileged (albeit limited) access it has to the agency's internal workings. The 2019 Frontex Regulation also includes the possibility of establishing a Joint Parliamentary Scrutiny Group made up of national and European parliamentarians. Depending on its composition and rules of procedure, this could provide a useful forum for critical inquiry into the agency's activities. The work of journalists, researchers, campaigners, NGOs, and informed citizens will also remain crucial as the agency's role in a number of areas – from deportations, to border management strategies, to border control operations – continues to grow.

Above all, there has to be a shift in the political direction of the EU and its member states. It is not going to be possible for the EU to deport its way out of the situation in which it finds itself – the financial, moral and human cost of removing all those currently in Europe who are deemed to have no right to remain is impossible to pay. As the coronavirus pandemic slowly begins to recede and leaves a dramatic social, economic and political impact in its wake, this impossibility may become increasingly apparent – but that in itself will not automatically lead to any positive changes. It will require significant work to alter the direction of public policies that have been developed over the last three decades.

Nevertheless, the need to push for those changes has never been clearer. The initiatives that have been introduced or are under discussion to try to appease xenophobic and anti-migration sentiment in governments and societies are undermining the liberal democratic basis of the EU. That ultimately threatens not just the rights of non-citizens, but of everyone living in the EU. Reversing the trend is an urgent task for the years ahead.

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# DEPORTATION UNION

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