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Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea

Executive Summary

Preliminary Report of the Frontex Management Board
Working Group

19. January 2021

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Mandate of the Working Group

A series of reported incidents related to Frontex coordinated activities at the Greek-Turkish maritime border in the Aegean Sea indicate the assumption of possible misconduct with the involvement of deployed assets of European Member States. These allegations were highlighted through several media reports in the recent past.

In order to examine these claims, especially concerning assumed involvements of Frontex units, the Frontex Management Board (MB) established a Working Group on Fundamental Rights and Legal and Operational Aspects of Operations on 26 November 2020.

Examined Incidents

. On the basis of the information at its disposal the Working Group identified **-13-** relevant incidents that were subject to a further examination.

- Based on the provided and reviewed data most of the doubts in the majority of the examined incidents were clarified regarding the involvement of Frontex. Especially in those incidents, where Turkish Coast Guard took over responsibility for the situation inside the Turkish Territorial Waters the allegations were cleared up. This was the case for the following **-7-** incidents:
 - JORA Report no. 407256, 407206, 407258, 406283 and 406393 as well as in the incidents on 28 April 2020 and on 15 August 2020.

In these incidents, the migrant boats either altered their course on their own initiative or by intervention of the Turkish Coast Guard and therefore never reached Greek Territorial Waters. With a view to the date of 28 April 2020, the group however, still needs to examine further whether the media reports on this day could have referred to another incident that could not be identified yet.

- Furthermore, **-1-** more incidents (incident on 10 August 2020), that occurred in Greek Territorial Waters, was deemed, based on the data available, clarified to the extent justifying no further discussions by the Working Group.
- In sum, **-8-** incidents were clarified.

A detailed review of the six cases that were located in Greek Territorial Waters resulted in the following clustering¹:

- In **-3-** incidents, inter alia based on the statement of the Hellenic Coast Guard, the boats with migrants had already reached Greek Territorial Waters. However, due to the border control measures by the Hellenic Coast Guard the respective migrant boats altered their course and headed back towards Turkish Territorial Waters. This was the case in the following incidents:
 - SIR 12604/2020, SIR 11860/2020 and SIR 11934/2020.
- Not affected by that there were **-2-** incidents, where the Greek authorities stated that no desire for asylum had been expressed by the migrants during the border police questionings:

¹ Due to the clustering, multiple listings of the incidents appear.

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- SIR 11095/2020 and incident of 10 August 2020.
- In **-2-** incidents, the Greek authorities stated that the special situation at sea and the behaviour of the migrants did not allow border police questionings and that an opportunity to apply for asylum was therefore not possible:
 - SIR 12604/2020, SIR 11860/2020

Incidents from this group for a further review:

- **-5-** incidents have not been yet fully clarified, partly due to unclear data provided by Frontex. Based on the **-partwise-** unclear data provided by Frontex it is common understanding of the Working Group that these incidents shall be subject for further review. These incidents will be reported to the Management Board at its next meeting:
 - SIR 11934/2020, SIR11860/2020, SIR11095/2020, SIR12604/2020 and SIR 12790/2020.

Assessment

- With a view to those incidents that can be closed the inquiry of the Working Group could not substantiate that third-country nationals, were turned back in contravention of the principle of non-refoulement, forced to enter, conducted to or otherwise handed over to the authorities of a country where, inter alia, there is a serious risk that they would be subjected to the death penalty, torture, persecution or other inhuman or degrading treatment or punishment, or where their life or freedom would be threatened on account of reasons enlisted in the 195 Geneva Convention.
- The inquiry of the Working Group also could not substantiate, that the Turkish Authorities did not take over the safely returns of the migrants.
- It is the common legal understanding of the Working Group that not every detected boat with migrants on board automatically qualifies as a distress case, in addition, not every detected attempt of illegal border crossing by circumventing official Border Crossing Points - not even at sea - can automatically be considered as an asylum case. A precise analysis of the concrete circumstances of each individual case is therefore of most important.
- This Working Group fully acknowledges the special circumstances such as factors at sea, environmental influences, currents, waves and weather and hybrid type of threats - influencing the actions of the responsible officers in each individual case. In addition, the behaviour of the facilitators and the migrants on the rubber boots need to be borne in mind when assessing an incident. At the Greek/Turkish maritime border, the volatile behaviour of the Turkish border authorities must also be taken into account. In light of these circumstances, it is also difficult to retrospectively reconstruct each incident.
- Part of the debate in the Working Group was, whether the access to the asylum system can be guaranteed during border police measures at sea. The Frontex Fundamental Rights Officer did not reject this in general. This is a question, which can only be answered by the responsible Member State and the suitability of the respective provided assets.

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Legal framework

A large number of different legal obligations and provisions within international regulations, which makes the process of evaluation very complex. In particular, the following legal aspects have to be considered:

- International Law (distress at sea), Fundamental Rights (right for asylum/principle of non-refoulement in the context of EU-TUR agreement, border police measures according to EU regulations, and judgements by European Court of Human Rights).

Assessment:

- Any measures taken should be proportionate to the objectives pursued, non-discriminatory and should fully respect human dignity, fundamental rights and the rights of refugees and asylum seekers, including the principle of non-refoulement. Each application for asylum has to be assessed individually.
- At the same time and taking into account these fundamental principles in the context of the challenges that frontline States are currently facing a judgment of the European Court of Human Rights (13 February 2020/Melilla) pointed out, that asylum seekers who have failed, without cogent reasons, to use legal avenues (such as to apply at existing border crossing points or via embassies and consulates) **and seek to cross the border illegally** at different locations in **large numbers and in a violent manner can be immediately refused without an individual assessment**.
- In context of the aforementioned decision by the European Court of Human Rights, the discussed difficulties in the Aegean Sea underlines the necessity for an establishment of legal ways for a pre-screening mechanism for asylum seekers. (as recently proposed in a reform of the Common European Asylum System).
- The European Commission has accepted the request from the Working Group, to elaborate on a number of legal questions that concern in particular the interpretation of certain legal provisions and application of jurisprudence of the European Court of Human Rights to the sea borders and the impact of that jurisprudence on the interpretation of provisions of Regulation (EU) 656/2014.

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Reporting mechanism

Considering all necessary requirements and practical terms, the Working Group identified a lack of monitoring in the reporting system of Frontex and further needs for improvements. The most important recommendations are:

- The existing reporting and validation system should be reviewed, taking into account in particular the following elements:
 - experts in the Frontex Situation Centre (FSC) need to have a minimum of qualifications and experience,
 - the Serious Incident Report Category 4 (alleged violation of Fundamental Rights) should be directly reported to the Fundamental Rights Officer,
 - a function should be established which can handle confidential reports from Frontex employees and team members and can guarantee the protection of the identity (i.e. “Centre of Compliance”),
- A systematic monitoring of the reporting mechanism should be established, covering all levels of the Host Member State and all levels of Frontex;
- The relation between whistleblowing procedures and exceptional reporting procedure should be clarified; clear communication to staff and team members on these mechanisms should be ensured, including through mandatory training sessions,
- There should be no-blanket classification of Serious Incident Report as RE-STREINT UE/EU RESTREINT. The decision has to be made conscientious on a case by case basis.

The aforementioned recommendations for improvements in the reporting system should be combined with a newly introduced culture, in which failure is acknowledged and addressed, in order to create awareness and sensitivity of possible misconduct. It remains to be stated, that the presence of the European Border and Coast Guard Agency constitutes a safeguard for fundamental rights and ensures secure and well-functioning external borders.