

# ACTION FOR FAILURE TO ACT (AS REFERRED TO IN ARTICLE 265 TFEU)

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## 1. PARTIES

### Identity of the Applicants

Applicant 1: A.N., Burundi national residing in Turkey, possessing no fixed address, has elected domicile at the law firm of their representatives, Chaussée de Haecht 55 in 1210 Saint-Josse-ten-Noode, Belgium

Applicant 2: Jeancy Kimbenga, a Congolese national residing in Turkey, possessing no fixed address, has elected domicile at the law firm of their representatives, Chaussée de Haecht 55 in 1210 Saint-Josse-ten-Noode, Belgium

### Identity of the Representatives

Mieke Van den Broeck, attorney, chaussée de Haecht 55 in 1210 Saint-Josse-ten-Noode, Belgium

Loïca Lambert, attorney, chaussée de Haecht 55 in 1210 Saint-Josse-ten-Noode, Belgium

### Identity of the Defendant

Frontex, the European Border and Coast Guard Agency, Plac Europejski 6, 00-844 Warsaw, Poland

## 2. SUBJECT MATTER OF THE DISPUTE

An Action Against the European Border and Coast Guard Agency (Frontex) Under Article 265 TFEU – Frontex Failed to Act by Not Suspending or Terminating its Activities in the Aegean Sea Region (ASR) Within the Meaning of Article 46 EBCG Regulation, in Infringement of the Treaties.

### 2.1 Type and Basis of the Action

1. On **15 February 2021**, in the face of both serious and persisting violations of fundamental rights and international protection obligations related to its activities in the ASR, Frontex was invited **to define its position** in connection to its obligation under Article 46 EBCG Regulation, as part of its broader positive obligations under the Treaties. The two-months period prescribed in Article 265 TFEU for so doing elapsed on **15 April 2021**. In light of Frontex’s continued failure to act, in infringement of the Treaties, the present Application is now submitted to the Honourable Court pursuant to Art. 265 TFEU.

2. On **23 March 2021**, a letter from the Executive Director of the Agency was received. However, the letter does not constitute a definition of position and, consequently, does not terminate the Agency’s failure to act. Because the Executive Director, *as a result of structural failures of the agency*, is unable to consider the *existence* of serious or persistent violations of fundamental rights, the Agency is *a priori* unable to act upon the preliminary request of the Applicants.

3. The basis of the present action, the **failure of Frontex to act**, is that **Frontex failed to suspend or terminate its activities in the Aegean Sea Region (Greece). This failure of its positive obligations infringes EU Treaties**, particularly articles 2, 4, 18, 19, 19(1) and 53(3) of the Charter of Fundamental Rights (CFR), and Article 78 TFEU. This infringement also reflects a flagrant breach of international and European customary and treaty law — including Article 1, 31, and 33 of the 1951 Refugee Convention, Articles 2, 3, and 4 of Protocol 4 of the European Convention of Human Rights (ECHR), and article 7 of the Rome Statute.

4. **The most potent and efficient manifestation of Frontex’s positive obligations under the CFR and is prescribed in Article 46(4) of EBCG Regulation:** in case of “violations of fundamental rights or international protection obligations *related* to the activity concerned that are of a serious nature or are likely to persist”, “the Executive Director *shall...* withdraw the financing... or suspend or terminate any activity by the Agency, in whole or in part...”.

5. A. N. (Applicant 1) and Jeancy Kimbenga (Applicant 2) both fled their home countries due to well-founded fears of violence and persecution, and both have *attempted* to seek asylum within EU territory (the Applicants). Five times they have tried to reach the EU in order to

lodge their asylum claims. Five times, whether on EU soil or in its waters, they were victims of egregious fundamental rights violations that were at the very least *related* to Frontex activities in the ASR. The failure of Frontex to comply with its positive obligations under the Treaties has contributed, and is still contributing, to the victimization of the Applicants.

6. The measures that the Frontex Regulation provides, in order to materialize the positive obligations of the Agency under the Treaties, impact the Applicants both individually and directly. The prevention of violations and protection of potential victims, including the Applicants, are at the very core of the Agency's positive obligations under the CFR. The desired measure decreases the risk that the Applicants would once again become victims of serious breaches of their rights to life, bodily and mental integrity, asylum, and to be free from *refoulement*, collective expulsion and cruel, degrading and inhuman treatment.

## **2.2 Brief Account of the Facts and Legal Context**

7. The Applicants are asylum seekers who have been victims to multiple collective expulsion operations and other 'tactics' which constitute flagrant breaches of EU fundamental rights law. These measures are affecting the Applicants to date, as they are putting the lives and well-being of the applicants at risk during their ongoing pursuit for asylum [Section 3.1].

8. These unlawful measures are part of a State and organizational policy that was introduced in March 2020. The Greek State policy included the temporal suspension of the asylum system in the country, the introduction of the above-mentioned 'tactics', and the targeting of the Applicants and others in similar situations at its borders. As part of this policy, Frontex launched Rapid Border Intervention (RBI) Aegean, and executed these 'tactics' in the framework of its ongoing joint operations in the ASR [Section 3.2].

9. In a blatant breach of its founding Regulation, Frontex has no fundamental rights monitors to record the countless, systematic and ongoing serious violations arising from this policy. When these violations are monitored, they are deliberately *not* reported. The failures of Frontex to monitor and report violations are structural and cultural to the organization. [Section 3.3].

10. When *external* sources, civil society, and investigative journalists do provide indisputable evidence of serious incidents of violations, Frontex is *unwilling* to genuinely investigate, and instead is taking *all* measures at its disposal to cover them up [Section 3.4].

11. The structural and cultural failure to prevent, monitor, report and investigate the said violations constitutes, *per se*, a failure to act in infringement of the Treaties [Section 4.1]. This failure renders Frontex *unable* to gain knowledge of and acknowledge the *existence* of serious or persistent violations of fundamental rights, which, in turn, prevents the agency from taking the desired measure to effectively counter these violations [Section 4.2].

12. These violations are at least *related* to Frontex's activities in the ASR. The structural and cultural deficiencies in the organization, and its unwillingness to interpret and implement the law regulating its activities, intend to either deny the incidents (e.g. arguing the need of victims in protection is **individually** assessed prior to their expulsion) or legalize (e.g. arguing **collective** expulsion is lawful under EU law) the policy introduced in March 2020, which consists of systematic and widespread attack directed against civilian population [Section 4.3].

13. Because there *are* serious or persistent violations of fundamental rights and international protection obligations; Because these violations are *related* to Frontex's activities in the ASR; Because Frontex's Executive Director was *obliged* to adopt one of the measures enumerated in Article 46 Frontex Regulation; Because Frontex is obliged to *respect* its obligations under the Treaties – Frontex failed to act vis-à-vis the Applicants, in infringement of the Treaties, within the meaning of Article 265 TFEU [Section 4.4].

14. FORM OF ORDER SOUGHT: to admit the case and consider it on its merits (*i*); Declare that after the agency was called upon to act in accordance with the procedure specified in Art. 265 TFEU, it has failed to act by withdrawing the financing, suspending or terminating, part or whole of its activities in the ASR under Art. 46(4) EBCG Regulation, or by providing duly justified grounds for not activating the relevant measure in the meaning of Art. 46(6), or

otherwise to define its position in response to the Applicants' preliminary request (ii); Declare this failure to act to be in infringement of the Treaties in the meaning of Art. 265 TFEU (iii).

### 3. FACTUAL CHRONOLOGY: THE AEGEAN SEA REGION

*“some of the things being said by the Executive Director in Parliament... [are] not true”*

– Ylva Johansson, EU Commissioner for Home Affairs,  
on Frontex Executive Director Fabrice Leggeri

#### 3.1 The Applicants

##### 3.1.1 Applicant 1

15. A. N., is an asylum seeker from Burundi (**Applicant 1**). She fled violence in her country of origin, where she was engaged with the political party “*Mouvement pour la Solidarité et la Démocratie*” (MSD). Her persecution began with an attempted *coup d'état* in 2015. Being part of the political opposition led to threats of violence, including burning her home. She transited through Rwanda and Uganda, where she was not safe, ultimately arriving to Turkey in 2019, seeking to find safe haven and apply for asylum in Greece. **Applicant 1 was already a victim of two violent and collective expulsion operations while trying to seek asylum in Greece.**

##### 3.1.2 Applicant 2

16. Jeancy Kimbenga, a Congolese national (born on 3 December 2003), is an **unaccompanied minor** and asylum seeker (**Applicant 2**). Applicant 2's father died when he was 15 years old. Since, his uncle, a colonel in the army, started to persecute and torture him, his brother, and his mother. His mother and smaller brother fled their residence in the capital and found refuge in a small village. Applicant 2 was a victim of beatings and threats on a regular basis. Following an incident during which the uncle attempted to stab Applicant 2 with a knife, Applicant 2 fled the country, transited through Addis-Ababa, Ethiopia and ultimately arrived in Turkey on 31 December 2019. The degrading and inhuman living conditions, the fear of *refoulement* to his country of origin, a failed attempt to receive protection in Turkey and the will to pursue his studies were – and still are – among the reasons which brought Applicant 2 to seek asylum in Greece, where he hoped – and still hopes - he could be safe. **Applicant 2 was already a victim of three violent and collective expulsion operations while trying to seek asylum in Greece.**

##### 3.1.3 Collective Expulsion #1: 8-9 May 2020 (Applicant 2)

17. On **8 May 2020**, around 9-10pm, Applicant 2 departed from the region of Izmir on board of a *dinghy* together with 24 men, women and children (**Group 1**). Around 12am, shortly before reaching the coast of Lesbos, Group 1 was intercepted by the Hellenic Coast Guard (HCG) officers on a speed boat. One of the HCG officers, dressed in black, his face covered, jump onto the dinghy and stopped its engine. Group 1 was forcibly transferred onto HCG vessel, followed by a body search, in the course of which all the belongings of Group 1 (phones, bags and money) were taken away. After approximately 6 to 7 hours of navigation, Group 1 was divided into two groups. On Turkish territory, two so-called ‘life’ rafts, coloured orange at the top and black at the bottom, rafts with no means of navigation (‘Life’-rafts), were thrown into the sea, and Group 1 was forcibly transferred onto them, while HCG officers are insulting the group. The HCG vessel departed, and Group 1 was abandoned in the middle of the sea.<sup>1</sup>

18. On **9 May 2020** at 07.39 a.m. a Turkish Coast Guard (TCG) boat rescued Group 1.<sup>2</sup> Two individuals were interviewed on the incident by the TCG.<sup>3</sup> Applicant 2 appears in the same video and can be identified<sup>4</sup>. Upon arrival to the Turkish Çannakale harbour, Group 1 was

<sup>1</sup> Turkish Coast Guard picture 1 09.05.20 <https://en.sg.gov.tr/kurumlar/sg.gov.tr/geritme/2020/55.zip>

<sup>2</sup> Turkish coast Guard pictures 2 and 3. 09.05.20 <https://tinyurl.com/mfwvyxh2>; Turkish Coast Guard Command “24 irregular migrants were rescued off the coast of Izmir”. <https://tinyurl.com/4at5vu5n>

<sup>3</sup> Turkish Coast Guard video material 09.05.20 <https://en.sg.gov.tr/kurumlar/sg.gov.tr/geritme/2020/55.zip>

<sup>4</sup> See Supra note 5, seconds 18-23 of the video

detained in a camp, commonly called “yabanji” (meaning “camp of the foreigners”) for 21 days. Applicant 2, despite being a minor, was also held in a cell.

#### 3.1.4 Collective Expulsion #2: 12-13 June 2020 (Applicant 2)

19. Applicant 2 departed from the region of Izmir at around 9-10pm, together with a number of other women, men, children and a baby (Group 2). As the dinghy entered Greek Territorial Waters (GTW), an HCG speed boat approached with two officers on board. **The officers chased and shoot at them** with weapons they had to hold with two hands. These events were observed by two TCG boats. After approximately a half an hour, a second HCG speed boat as well as a large HCG vessel arrived, whose manoeuvre made big waves, aimed at pushing the dinghy back on Turkish Territorial Waters (TTC). One member of Group 2, a minor and close friend of Applicant 2, **fell into the water and drowned to death. The HCG did not recover the body.** The TCG later confirmed that **one dead body was found** in the period from the 12<sup>th</sup> to the 14<sup>th</sup> of June 2020.<sup>5</sup>

20. After this incident, the HCG vessel approached and forcibly transferred Group 2 on board of HCG vessel. Phones, money and other belongings were confiscated by the HCG officers, while certain members of Group 2 endured harassment and were **beaten by the officers**. Group 2 was placed on the wet and cold deck, where they were freezing. Late at night the Group 2 were **forcibly transferred to ‘Life’-rafts**. After the transfer was completed, the HCG vessel departed and the group was abandoned and left to drift.<sup>6</sup> At around 2:00 a.m. the TCG arrived and rescued Group 2 off the coast of Çanakkale’s Ayvacık district. The TCG statement confirms that the ‘Life’-rafts were pushed back on Turkish territory by HCG assets.<sup>7</sup> Additionally, a video was published by the TCG,<sup>8</sup> which shows the HCG vessel and HCG speed boats with armed black dressed officials on board, pulling ‘Life’-rafts to TTW. Applicant 2 arrived back to Turkey, traumatized by the loss of his close friend.

#### 3.1.5 Collective Expulsion #3: 29-30 November 2020 (Applicant 1 and Applicant 2)

21. On **28 November 2020**, Applicant 1 and Applicant 2, part of a group of 18 asylum seekers, among them 3 pregnant women and 3 minors (including Applicant 1), traversed the Aegean Sea Region in an attempt to seek asylum in Greece (**Group 3**). They made a **landfall in Ag. Kratigou<sup>9</sup> in the south of Lesbos, Greece**, around 10pm. Upon arrival, Group 3 was divided into three groups. Applicant 1 stayed with one of the pregnant women, since both of them were not able to climb as far as the others of Group 3 (among others Applicant 2).

22. The next day, on **29 November 2020**, Group 3 was advised by *Aegean Boat Report (ABR)*, to go to the main road, where local habitants would witness their presence. ABR received via *WhatsApp* photos and geo-location data of Group 3.<sup>10</sup> At around 12:30pm, Applicant 1 was on the road towards *Katia*<sup>11</sup> together with the pregnant woman<sup>12</sup>. ***Mr. Kostas Theodorou, a professor at the University of the Aegean, and his wife Ms. Despina Theodorou, witnessed the presence of Applicant 1 in Lesbos,***<sup>13</sup> as well as of other members of Group 3 who joined her, including Applicant 2. Ms. *Despina Theodorou* went home to get water and food, which was very needed considering that Group 3 had spent the night without

<sup>5</sup> Turkish Coast Guard Command “Current Operations 12-14 June2020” <https://tinyurl.com/urb44yz3>

<sup>6</sup> Turkish Coast Guard Picture 1 and 2 13.06.20 (<https://en.sg.gov.tr/kurumlar/sg.gov.tr/geritme/2020/91.zip>)

<sup>7</sup> Turkish Coast Guard Command “68 irregular migrants were rescued off the coast of Çannakale”. <https://en.sg.gov.tr/kurumlar/sg.gov.tr/geritme/2020/91.zip>

<sup>8</sup> Turkish Coast Guard video material 13.06.20 <https://en.sg.gov.tr/kurumlar/sg.gov.tr/geritme/2020/91.zip>

<sup>9</sup> Picture 33. <https://www.facebook.com/AegeanBoatReport/posts/987333581789746>

<sup>10</sup> See *daserste* „Griechenland : Illegale Pushbacks“ 14.03.21 <https://tinyurl.com/vzn2d3aw>; *Tommy Olsen*, the founder of ABR confirms “The only proof we have, that they are where they say they are is through photos and videos. It is important to have that as documentation in case something happens that shouldn’t happen, but in this case it did.” ABR is a Norwegian NGO monitoring migration in the Aegean Sea. The information collected is used as a confirmation for the presence of asylum seekers in EU\Greek waters and land, in the case of Group 3, for their presence on the island of Lesbos Greece. See <https://aegeanboatreport.com/>

<sup>11</sup> Picture 9. (<https://www.facebook.com/AegeanBoatReport/posts/987333581789746>)

<sup>12</sup> Picture 14. (<https://www.facebook.com/AegeanBoatReport/posts/987333581789746>)

<sup>13</sup> Picture 15. (<https://www.facebook.com/AegeanBoatReport/posts/987333581789746>)

water or food. To the request of Applicant 1, Mr. *Kostas Theodorou* called ***Aegean Boat Report***. Group 3 continued walking on the main road,<sup>14</sup> where they were seen by more residents of the island.

23. At 1pm, Group 3 was stopped by a *Nissan Navara* vehicle of the **Greek Port police** at the marina “Limanaki Kratigou”. Applicant 2 photographed the jeep, the license plate (ΑΣ 5906)<sup>15</sup> and the port police officer.<sup>16</sup> Group 3 was told **to lie down on the floor** while the authorities waited for additional cars as reinforcement. Two cars arrived with officers with **covered faces**. The officers started searching men and women, **touching their breasts**, taking off their wigs, and **putting their hands in their underwear** in the course of the body search. **Phones, documents and bags were confiscated. One of the officers started to hit and insult certain members of Group 3.**

24. Afterwards Group 3 was **put into a van with tinted windows**. The van stopped several times. One member managed to hide a phone, which was used to contact ABR. The van stopped and Group 3 was transferred into a white bus, **they were told that they would go to a quarantine camp in order to get registered**. Once in the bus, they drove for a very long time, passing the airport, the harbour and the city Mytilene.

25. Group 3 never reached a quarantine camp, instead they were taken to an isolated port, identified as the Schengen port in Petra.<sup>17</sup> Outside the bus, a *Nissan Terrano II 2001* model of the port police in *Mólivos* (license plate ΑΣ 3804) was documented.<sup>18</sup> **Officers in balaclavas** blocked the road to prevent cars from passing. In the bus were 12 people. The Group was kept in the bus for several hours with no food or water. When it started to get dark another car arrived with one other boy who belonged to Group 3. Out of the 18 members of Group 3, five members were not present.

26. At around 7pm, Group 3 was taken out of the bus and **forcibly transferred on board of a HCG vessel**. Once again **the officers started to hit Group 1, to trample and spit on the Group members**. The members of Group 3 were soaking wet and cold. Photo material proves the vessel is a *Vosper Europatrol 250 MK1* class offshore patrol vessel of HCG visual ID number ΑΣ 050<sup>19</sup>, stationed in Petra.

27. The boat navigated for hours. Once in TTW, Group 3 was **forcibly transferred into the ‘life’-rafts** and the HCG vessel left, abandoning Group 3 at sea. After the departure of the HCG vessel, one individual of Group 3 called 158. TCG arrived, rescued them, and brought them to the port of *Çanakkale* for registration on **30 November 2020**.<sup>20</sup>

28. The German media *Daserste* published a TV report on the collective expulsion operation performed by HCG on the 29th November 2020. The video shows interviews with two individuals belonging to Group 3, one of whom is Applicant 2, as well as interviews with *Kostas and Despina Theodorou*.<sup>21</sup> An article was published by *Der Spiegel* on the illegal deportation, including photos of Applicant 1, taken by Professor *Kostas Theodorou* on Lesbos.<sup>22</sup> The **British Broadcasting Corporation (BBC)** published an article with the title “Pushbacks: Migrants accuse Greece of sending them back out to sea”<sup>23</sup> describing the circumstances of the illegal deportation.

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<sup>14</sup> Pictures 10-13. (<https://www.facebook.com/AegeanBoatReport/posts/987333581789746>)

<sup>15</sup> Picture 4. (<https://www.facebook.com/AegeanBoatReport/posts/987333581789746>)

<sup>16</sup> Picture 3. (<https://www.facebook.com/AegeanBoatReport/posts/987333581789746>)

<sup>17</sup> Picture 5, 22, 23. (<https://www.facebook.com/AegeanBoatReport/posts/987333581789746>)

<sup>18</sup> Picture 20. (<https://www.facebook.com/AegeanBoatReport/posts/987333581789746>)

<sup>19</sup> Pictures 21, 24, 25, 30, 31. (<https://www.facebook.com/AegeanBoatReport/posts/987333581789746>)

<sup>20</sup> Picture 34. <https://tinyurl.com/6pmahsy8>

<sup>21</sup> See *daserste* “Griechenland : Illegale Pushbacks” 14.03.21 <https://tinyurl.com/vzn2d3aw>

<sup>22</sup> See *Spiegel* “Griecheland setzt Geflüchtete nach Ankunft auf Lesbos auf dem Meer aus”, 9.12.20 <https://tinyurl.com/7tje8kb8>

<sup>23</sup> See BBC News “Pushbacks: Migrants accuse Greece of sending them back out to sea” <https://tinyurl.com/57skn2sk>

29. The NGO *Aegean Boat Report* published two reports on the pushback on their Facebook page, containing **36 photos** in total.<sup>24</sup> Additional documentation of the operation Applicant 1 and Applicant 2 were victims of can be found on the website of the **TCG**, which contains a report with video and photo materials on the rescue operation of the 30 November 2020.<sup>25</sup>

30. The unlawful operation of the HCG is also subject to a number of complaints addressed to the Greek Minister of Foreign Affairs, to the Minister for Public Protection and to the Minister for Migration and Asylum, as well as the *Médiateur de la République* and to the **Public Prosecutor at the Court of Cassation**<sup>26</sup>. The criminal complaint requests to authorize the deportees of Group 3 to re-enter the Greek territory, to provide them with residence permits on humanitarian ground and to enable them formally submit applications for refugee status and collect their testimonies on the illegal, violent and racially motivated expulsion for which the criminal complaint was filed.

#### 3.1.6 Collective Expulsion #4: 3-4 February 2021 (Applicant 1)

31. On **3 February 2021**, Applicant 1 departed on a dinghy from the region of Izmir with 37 other persons, including babies and several pregnant women (**Group 4**). After a couple of hours, when they were looking for a place to **dock in Greece**, an HCG speed boat arrived with three masked officials arrived, **pointing a weapon at them. The officers said: “we can kill you, we are on Greek territory”**. One official jumped on the dinghy and **removed the engine**. He told Group 4 to shut up and to keep their heads down while **hitting Group 4. A 9-month old baby** started to cry. The officer searched the group members and confiscated their phones. The two officers on the speed boat were pointing their arms. Ropes were attached to the dinghy, and Group 4 was **towed to a port in Greece**. Upon arrival to the port, Group 4 was forcibly transferred to a HCG vessel. The vessel brought them back to Turkish territory and Group 4 was forcibly transferred to an inflatable boat. Applicant 1 managed to hide her phone and called the TCG once HCG departed. TCG arrived and rescued them off the Coast of Balikesir on 4 February 2021 at 05:06am. A statement by the TCG confirms that HCG assets are responsible for the ‘pushback’.<sup>27</sup> A video was published by TCG which shows the night rescue operation. Applicant 1 testified that the HCG trampled on her feet, her legs and back causing her long-lasting pain.

#### 3.1.7 The Imminent Departure of the Applicants in Pursuit of Asylum in Greece

32. Applicant 1 is still unsafe in Turkey and is about to traverse the Aegean Sea in order to seek asylum and protection in the EU.<sup>28</sup> Her dream is to become a nurse. To date, she is suffering physical pains in her back and legs as a result of the violence inflicted by the HCG. She is also traumatized from the past ‘pushbacks’ she was victim of, and is suffering from insomnia.

33. Applicant 2 is still looking for a safe haven, where he too is going to traverse the Aegean Sea to seek asylum in the EU, where he hopes to be able to pursue his studies in literature and philosophy, his area of study in his country of origin. He intends to continue using his voice in order to raise awareness for the systematic and collective expulsions taking place at the Aegean Sea Region. Despite his past experiences, he still maintains that “Europe is a continent where

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<sup>24</sup> See ABR reports 29.11.20 and 8.12.20 <https://tinyurl.com/6pmahsy8>, <https://tinyurl.com/tasvv9hk>

<sup>25</sup> Turkish Coast Guard Command Push Back Incidents <https://tinyurl.com/5bua8kxd> ; for a comprehensive audio-visual documentation of Geek-Frontex ‘Push-Back’ Operations since March 2020, see: : <https://en.sg.gov.tr/pushback-news> ; for documentation of selected incidents, see ANNEX 8

<sup>26</sup> Letter to authorities 29.12.20 <https://racistcrimeswatch.wordpress.com/2020/12/29/2-273/>

<sup>27</sup> Turkish Coast Guard Command “38 irregular Migrants Rescued off the Coast of Balikesir”. <https://tinyurl.com/fe2nsdfw>

<sup>28</sup> See Josoor “Why Turkey is not a safe place for people on the move and why it matters” <https://tinyurl.com/3uwvvcut> and Human Rights Watch “Submission to the Europe and North America Regional Review on Implementation of the Global Compact for Safe, Orderly and Regular Migration” <https://tinyurl.com/3eerpdd7>

law prevails”. An unaccompanied minor, he is unsafe in Turkey<sup>29</sup> and is about to traverse the Aegean Sea in order to seek asylum in Greece.

### **3.2 1 March 2020: A New State Policy in the ASR**

#### 3.2.1 Suspension of Asylum System & Other Measures

34. The EU Border and Coast Guard agency (Frontex or the Agency) has operated in the Aegean Sea Region (ASR) as part of Joint Operation (JO) Poseidon since 2006. Over the years, along the borders with Turkey, countless violations of the prohibition on *refoulement* have been documented and reported by asylum seekers, rights groups, and media outlets. The Greek government has repeatedly hardened its legislation on international protection: facilitating deportations, obstructing access to asylum, to legal assistance and effective remedies in flagrant disregard for EU law.<sup>30</sup>

35. On **1 March 2020**, the Greek National Security Council decided (the KYSEA Decision) to unilaterally, unlawfully, and unprecedentedly **suspend the right to seek asylum** in Greece for a one-month period<sup>31</sup> and systematically pressed criminal charges against asylum seekers for illegal entry into the country.<sup>32</sup> New arrivals were summarily and arbitrarily detained across the Aegean islands in ports, overcrowded buses and ships, or on beaches without shelter, and were denied access to sanitation facilities, medical care, and asylum procedures.<sup>33</sup> At some point, even lawyers and legislators were denied access.<sup>34</sup>

36. Increased violence at sea toward asylum seekers was notorious. Greek authorities were documented firing at a rubber dingy full of women, men, and children, violently attacking its passengers and risking their lives.<sup>35</sup>

#### 3.2.2 “The New Tactics” in the ASR: Interceptions as a Code-Name for Pushbacks

37. An *internal* Frontex document provided to its Management Board (MB) reveals the KYSEA Decision also contained an entirely new policy in the ASR. According to Frontex’s internal note from **November 2020**, Greece decided on a “change of the national Border Protection tactics and introduction of the preventive measures concerning arrivals at sea.”<sup>36</sup>

38. A Greek official corroborated the Agency’s allusive message to its MB. Notis Mitarachi, Minister of Migration and Asylum, confirmed that “a series of decisions have been taken... focusing on the early detection of migrants prior to their entry to the EU waters, to prevent an unauthorized border crossing.”<sup>37</sup> Greek MP, Georgios Koumoutsakos, confirmed that **since March 2020** “...**nothing is the same** at the overall management of the migration pressure.”<sup>38</sup> The Greek Minister of Civil Protection ensured these new ‘tactics’ are here to stay: “What we’ve been doing **since March** will continue every day in the European border.”<sup>39</sup>

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<sup>29</sup> Ibid

<sup>30</sup> See, for example: Amnesty International, ‘FRONTIER EUROPE: Human Rights abuses on Greece’s border with Turkey’, July 2013, available at: <https://tinyurl.com/b8nhv36r>; ProAsyl, ‘Pushed back: systematic human rights violations against refugees in the Aegean sea and the Greek–Turkish land border’, November 2013, available at: <https://tinyurl.com/3cc47xkt>; Human Rights Watch, ‘Greece: Attacks on Boats Risk Migrant Lives’, 22 October 2015, available at: <https://tinyurl.com/7r9xfb3n> ; Human Rights Watch, ‘Greece: Violent Pushbacks at Turkey Border – Summary Returns, Unchecked Violence’, 18 December 2018, available at: <https://tinyurl.com/bspyzmx>

<sup>31</sup> See, among others: Human Rights Watch, ‘Greece Restarts Suspended Asylum Procedure’, 5 June 2020, available at: <https://tinyurl.com/36sb34m8> .

<sup>32</sup> In violation of article 31 of the Refugee Convention; See HIAS Greece, ‘Greece: Criminal charges pressed against the asylum seekers who arrived in Lesbos in March 2020’, 8 July 2020, available at: <https://tinyurl.com/byre6w3k>

<sup>33</sup> LCL, ‘No-man’s land for Europe’s “undesirables”’, 13 March 2020, available at: <https://tinyurl.com/5bb6afz2>

<sup>34</sup> LCL, ‘Illegal and immoral: European border priorities become policy’, 5 March 2020, available at: <https://www.facebook.com/LesvosLegal/posts/3005714389467254>

<sup>35</sup> See, for example: BBC news, ‘Greek coast guards fire into sea near migrant boat’, available at: <https://www.bbc.com/news/av/world-europe-51715422>

<sup>36</sup> Internal Note, Management Board Meeting, 10 November, page 7. Available at: <https://tinyurl.com/fu73ncw>

<sup>37</sup> European Parliament, ‘LIBE Committee meeting’, 6 July 2020, 17:03:18 – 17:04:00, available at: <https://tinyurl.com/2sd7njww> ;

<sup>38</sup> Ibid, 17:08:30 – 17:08:58

<sup>39</sup> Ibid, 16:57:55 – 16:58:19



39. **In December 2020**, Frontex’s Executive Director (ED), Fabrice Joël Roger Leggeri, partly disclosed details on this new State policy in the ASR to the European Parliament (EP). 9 months into this new tactics, ED Leggeri had no idea whether this *joint* policy is lawful or not: “[W]e **identified**... some **notions**, like prevention of departure, the common factor in all these **not closed**, let’s say, **incidents, reports, which are not SIR but are daily reports**... is description of **prevention of departure**, and that there are **interceptions**... and then there’s a possibility ... to **legally invite the boat ... not to stay or enter in the national waters**... this situation... that **we cannot qualify, and we don’t know how to qualify them legally**.”<sup>40</sup>

40. The ploy was completely revealed a year after the inception of this new policy. Three months after ED Leggeri admitted ‘daily’ ‘incidents’ of ‘unknown’ legal nature are taking place in the ASR, he further admitted that a **political** shift to the far right (“If I may say”) caused an ‘**operational** momentum’ in Frontex’s *Joint* Operations. After a number of official investigations<sup>41</sup> during this 3-month period, ED Leggeri learned how to **legally** ‘qualify’ these practices: not as serious breaches but rather as an ‘*optimal use*’ of EU law: “...the Greek Government **in March 2020** decided in the National Security Council meeting chaired by the prime minister... to **make optimal use** of the provisions on interceptions which means that **in some cases boats can be instructed not to stay** in the Territorial Waters or not to enter. That is why there is now **momentum in operational terms... because of political shift in Greece if I may say**...”<sup>42</sup>

### 3.2.3 Frontex Launches Rapid Border Intervention Aegean

41. **On the very same day** that Greece internally suspended its asylum system and introduced externally new and unlawful border control ‘*tactics*’, it coincidentally requested Frontex to launch a Rapid Border Intervention in the Aegean Sea Region (RBI Aegean). It took ED Leggeri one single day to approve the launch of the requested operation.<sup>43</sup> Despite the critical situation in Greece, the Agency’s Fundamental Rights Officer (FRO) submitted her observations on the draft operational plan only after ED Leggeri had already approved to launch RBI Aegean. The FRO retroactively criticized the launching of the operation. But it was too late for ED Leggeri to reconsider his position: “...FRO is **deeply concerned** about the intended suspension... **return without registration** of the irregular migrants... **this risks to compromise the Agency ability to comply with Article 80(1) of the EBCG Regulation 2019/1896 according to which the Agency shall guarantee the protection of fundamental rights (...)** and obligations related to access to international protection... entry on the Greek territory may only be refused by a **substantiated decision stating the precise reasons for the refusal**... “There is a **high risk that unlawful procedures** may negatively affect **persons in need of international protection** and other vulnerable groups”.<sup>44</sup>

42. ED Leggeri failed to act in relation to his obligation under Art. 46(5) EBCG Regulation (Frontex Regulation or EBCG Regulation or founding Regulation)<sup>45</sup> by not *properly* consulting with the FRO and, based on the situation in Greece, refraining from launching RBI Aegean. In fact, the situation in Greece inherently breached the Operational Plan of RBI Aegean, whose objectives, *inter alia*, are to refer and provide “initial information to **persons who are in need** of, or wish to apply for, **international protection**”, and to support “**the identification** of special

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<sup>40</sup> European Parliament, ‘Committee on Civil Liberties, Justice and Home Affairs’, 1 December 2020, available at: <https://tinyurl.com/43cxc37w>, 14:08:15 – 14:10:40

<sup>41</sup> To that effect, see: Frontex investigations: what changes in the EU border agency's accountability?, Statewatch, available at: <https://tinyurl.com/myusjuee>

<sup>42</sup> EP Frontex Scrutiny Group meeting on 4 March 2021, available at: <https://tinyurl.com/2vyawub9>

<sup>43</sup> FRONTEX, ‘Frontex to launch rapid border intervention at Greece’s external borders’, 2 March 2020, available at: <https://tinyurl.com/n49um66w>

<sup>44</sup> RAPID BORDER INTERVENTION AEGEAN 2020 FRO Observations, (4 March 2020) (on file with the Authors); also available at: <https://tinyurl.com/7u2sxjw3>

<sup>45</sup> Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624

needs of... **unaccompanied minors...** victims of trafficking in human beings... **persons in need of international protection...**”<sup>46</sup>

43. The contested operation was hastily launched. The FRO’s warnings materialized. Out of almost 10,000 civilians transiting in the ASR in 2020, not a single person has been found to be in need of protection or otherwise raised objections to his or her return to Turkey. Persisting and serious violations of fundamental rights and international protection obligations *in relation* to Frontex’s operations in the ASR have been documented. ED Leggeri has also failed to act by not withdrawing the financing, suspending, or terminating the contested activities under Art. 46(1), (3) and (4) EBCG Regulation.

44. Even today, after countless human beings were victims of severe breaches of international and EU fundamental rights law, Frontex is still reflecting on the basics of its mandate: **“how access to the asylum system and respective individual assessment of protection needs can be guaranteed during border police measures at sea.”**<sup>47</sup>

45. The internal (3.1.1) and external (3.1.2) Greek and Frontex’s (3.1.3) dubious tactics and measures of **1 March 2020** form a widespread and systematic attack directed against the Applicants and countless other asylum seekers. This attack is committed pursuant to State (Greece) and organizational (Frontex) policy. The objective: to abolish the right to asylum, the principle of *non-refoulement* and the prohibition of collective expulsion - customary, *jus cogens*, peremptory norms, enshrined at the core of EU Treaties.<sup>48</sup> The means: spreading mass violence, administrative dysfunction and legal ambiguity. The following chapters describe how these three means constitute, each element by itself and certainly together, a failure to act in infringement of the Treaties.

### **3.3. Who Guards the Guards? No Monitoring & No Reporting of Serious Incidents**

#### 3.3.1 No Fundamental Rights Monitors: An Intentional Infringement of Frontex’s Obligations

46. The extended tasks and competencies conferred on Frontex in its revised regulation should be balanced with strengthened fundamental rights safeguard and increased accountability and liability.<sup>49</sup> To do so, the Fundamental Rights Officer (FRO) and her subordinates were assigned with extended responsibilities, a whole new category of Fundamental Rights Monitors (FRM) was created, and special rules securing the independence of this position were clearly and unambiguously enacted.

47. The proper functioning of the FRO is deeply intertwined with the Agency’s ability to comply with its positive obligation to guarantee the protection of fundamental rights, through contribution to the Agency’s fundamental rights strategy and action plans; monitoring compliance with fundamental rights, including by conducting investigations; advising and opining the Agency on any activity including the operational plans; informing the ED about possible violations of fundamental rights during the activities of the Agency.<sup>50</sup> In order to secure the integrity and independence of the FRO and her staff, the deputy FRO shall be appointed directly by the MB from a list of candidates presented by the FRO.<sup>51</sup>

48. Of utmost importance for the Agency’s capability to comply with its positive obligations, and central to the present application, is the involvement of the FRO in the crucial decisions of the ED to refrain from the launching, to withdraw the financing, to suspend or terminate – in whole or in part – any activity of the Agency, due to serious or persisting violations of fundamental rights related to the activity concerned: **Under Art. 46 of EBCG**

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<sup>46</sup> Supra, note 36, page 8

<sup>47</sup> The Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea, Final Report of the Frontex Management Board Working Group’, 1 March 2020, available at: <https://tinyurl.com/3sj6sjfe>, page 4

<sup>48</sup> See Article 2, 18, 4, 19 and 19(1) of the Charter of Fundamental Rights; See also: ‘UNHCR warns asylum under attack at Europe’s borders, urges end to pushbacks and violence against refugees’, available at: <https://tinyurl.com/4zf7s8vs>

<sup>49</sup> EBCG Regulation, supra note 45, preamble 24

<sup>50</sup> Ibid, art. 109

<sup>51</sup> Ibid, art. 109 and 110.

**Regulation, the ED shall take such decision “after consulting the fundamental rights officer”.**

49. Intimately associated with the proper functioning of the FRO and essential for the Agency’s ability to comply with its positive obligation to guarantee the protection of fundamental rights, the Fundamental Rights Monitors (FRM) are assigned, *inter alia*, with the following tasks:<sup>52</sup> monitoring compliance with and providing advice and assistance on fundamental rights in the preparation, conduct and evaluation of the operational activities of the Agency which the FRO has assigned to them to monitor; follow the preparation of operational plans and report to the FRO; inform and cooperate with the coordinating officer<sup>53</sup> and report to the FRO on any concerns related to possible violation of fundamental rights within the Agency’s operational activities; the FRO is *exclusively* responsible for the selection and management of the FRMs; at least one FRM shall be assigned by the FRO **to each operation**; The FRO may also decide to assign FRMs to monitor any other operational activity he or she considers relevant.<sup>54</sup>

50. According to Art. 110(6) of the EBCG Regulation, the Agency shall ensure that by **5 December 2020** at least 40 FRMs are recruited by the Agency. At the time we have called upon the Agency to act and establish the infringement of the Treaties, the Agency has failed to recruit even a single FRM, in violation of EU law. Still to this date it has failed to finalise the process. The recruitment of the FRMs and the execution of their designated duties are meant to enable the Agency, along other prescribed instruments, to comply with its positive obligation to guarantee the protection of fundamental rights.

51. The Agency’s persistent failure to comply with the obligation to recruit and deploy the FRMs constitutes, in itself, a breach of the Agency’s positive obligations. Since the role of the FRMs is deeply intertwined with monitoring and reporting duties of Frontex, their inoperativeness brings about overreaching deficiencies. The FRMs are the FRO’s ‘*eyes and ears*’ on the ground. Their absence disables the functioning of the FRO. The dysfunction of the FRO hampers the proper application of art. 46 of the EBCG Regulation, staged at the centre of the present Application, and more broadly the effective protection of fundamental rights.

52. **Without a single FRM deployed to Joint Operation Poseidon or RBI Aegean, there can be no knowledge of serious or persisting fundamental rights violations** related to these operations. Without a single FRM in Greece, the monitoring and reporting capacities of the Coordinating Officer (CO) who, under certain conditions, advises the ED on the applicability of Art. 46 EBCG, are jeopardized.<sup>55</sup> The situation in the ASR may, in part, be attributed to the lack of designated and trained human rights ‘sensors’ on the ground.

53. Art. 46 of the EBCG Regulation is perhaps the most efficient and robust instrument – among a relatively limited pool of such means – at the Agency’s disposal to take appropriate action to protect fundamental rights during its activities. The failure to deploy FRMs may constitute a structural breach to comply with Art. 46, as the first step in responding to serious or persistent human rights violations is the capability to become aware of them. With no *eyes and ears* on the ground, Frontex is *a priori* unable to meet its positive obligations and is in a continued breach of the Treaties and in particular the Charter of Fundamental Rights (CFR).

54. The Executive Director Leggeri is *exclusively* responsible for the application of Art. 46 EBCG Regulation. He alone holds the key to the protection mechanism against serious and persisting fundamental rights violations. He has successfully hampered the Agency’s capacity

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<sup>52</sup> Ibid, art. 110

<sup>53</sup> According to art. 44 of EBCG Regulation, the Coordinating officer monitors the correct implementation of the operational plan, including, in cooperation with the fundamental rights monitors, as regards the protection of fundamental rights and report to the executive director on this. In case instructions issued to the teams by the host Member States are not in compliance with the operational plan, in particular as regards fundamental rights and, where appropriate, he or she suggest that the executive director consider taking a decision in accordance with Article 46.

<sup>54</sup> Supra, note 45, Art. 110(3)

<sup>55</sup> Supra, note 53

to recruit the 40 FMRs. He manifested defiance towards the rule of law, in a stark disregard to the letter and spirit of the new EBCG Regulation, aimed at reinforcing the independence of the Agency's FRO and her staff.

55. Under the new EBCG Regulation, the MB shall lay down special rules to guarantee the independence of the FRO; the FRO shall report directly to the MB; the MB shall ensure that action is taken with regard to recommendations of the FRO; the Agency shall ensure that the FRO is able to act autonomously in the conduct of his or her duties; the FRO shall have sufficient and adequate **human** and financial resources at his or her disposal necessary for the fulfilment of his or her tasks; the FRO shall select his or her staff, and that staff shall only report to him or her.<sup>56</sup>

56. In a letter addressed to ED Leggeri on **18 December 2020**, the Director-General (DG) Monique Pariat, of the Directorate General for Migration and Home Affairs (HOME) in the **European Commission (EC)**, felt “compelled to correct... important points which were **presented in misleading manner...** especially considering the fact that you also made some of them **during your public hearing in... the European Parliament.**”

57. DG Pariat corrected ED Leggeri that contrary to his statement, published vacancy notices for FRO and Deputy FRO had to be withdrawn because “the publication of these two vacancies was plain and simply **unlawful**”, in the absence of approval from the MB for the first post, and absence of consultation with the FRO for the second post. “It is the duty of the Commission as a member of the Management Board, to intervene to prevent **serious irregularities which could jeopardise the well-functioning and reputation of the Agency.**”<sup>57</sup> DG Pariat also accused ED Leggeri that publishing a vacancy notice for the FRO more than a year before the end of the term in office of the current one, “could be considered as an attempt **to discredit or weaken the holder of the FRO's post**, and give rise to an action for damages”<sup>58</sup>.

58. DG Pariat reveals that in **December 2019** ED Leggeri expressed ‘concerns’ regarding the competence of the Agency's FRO,<sup>59</sup> and that at a video-conference held with the MB Chair and the Commission, he explicitly calls for Ms. Arnaez's replacement.<sup>60</sup> The problem is that the FRO cannot be removed by the ED under the new EBCG Regulation.

59. The EC also accused ED Leggeri that “due to **your insistence on an arrangement which would not have been compatible with the EBCG Regulation**, it took another five months to have the decision adopted.”<sup>61</sup> According to DG Pariat, “[d]espite... clear guidance, you have continued to raise concerns which contributed to the delays...”<sup>62</sup> DG Pariat was “**dismayed**” by ED Leggeri's comments during his parliamentary hearing on **1 December 2020**, which she considered even more “**disconcerting**” in light of **contradicting** information provided later on at Agency's Management Board meeting.<sup>63</sup>

60. The EC was concerned with ED Leggeri's publicly open defamatory allusions against it, but less so with providing false information to the European Parliament, a common practice for ED Leggeri, as demonstrated further below. Under Art. 6 of the EBCG Regulation, “the Agency shall be accountable to the European Parliament...” which seems to include the duty to tell the truth.

61. On **6 July 2020**, months before ED Leggeri slandered the EC before the EP on **1 December 2020**, he already provided the EP with misleading information regarding the urgent recruitment of the 40 FRM: “we've also **made substantive progress...** in the preparations for

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<sup>56</sup> EBCG Regulation, supra note 45, art. 109.

<sup>57</sup> Director-General Pariat's letter to Executive Director Leggeri, 18 December 2020 <https://tinyurl.com/ujwz3pf6>

<sup>58</sup> Ibid, page 6.

<sup>59</sup> Ibid, page 2.

<sup>60</sup> Ibid, annexed timeline regarding the development of the Frontex's fundamental rights monitoring framework under the EBCG Regulation, page 7

<sup>61</sup> Ibid, page 3.

<sup>62</sup> Ibid, page 3.

<sup>63</sup> Ibid, page 3-4

the recruitment of Fundamental Rights Monitors”<sup>64</sup> However, during the same period of time, the recruitment of at least 40 FRM was completely stranded. ED Leggeri insistently hampered the adoption of a number of decisions, without which the selection process for the recruitment of FRM could not have been initiated.<sup>65</sup>

62. Since **March 2019** the Commission has continuously urged the Agency “**to comply ... with the clear requirements of the EBCG Regulation, and in particular those in the area of the protection of fundamental rights**”<sup>66</sup>. Since **March 2020**, the FRO was ‘absent’. And in **December 2020**, not a single FRM has been recruited: “the Agency’s **surprising reluctance to implement the guidance provided by the Commission has further obstructed and delayed... the Agency has not complied with several of the obligations which are set out in clear and precise terms in the EBCG Regulation**. For example, while the EBCG Regulation explicitly states that ‘[t]he Agency shall ensure that by 5 December 2020 at least 40 fundamental rights monitors are recruited by the Agency’, today, 18 December 2020, **0 recruitments have been made**”.<sup>67</sup> “[A] **cornerstone of the Agency’s fundamental rights monitoring framework**, namely the special rules to guarantee the full independence of the Fundamental Rights Officer and his or her staff, is in line with both the letter and the spirit of the EBCG Regulation”.<sup>68</sup>

63. The annexed timeline to DG Pariat’s letter reveals **dozens of** additional occasions, from **November 2019 to November 2020**, in which ED Leggeri persistently exceeded his competencies in infringement of the Agency’s founding regulation, and personally dictated and distorted Management Board decisions and arrangements meant to secure the proper functioning and independence of the FRO and her staff.<sup>69</sup>

64. Unlawful vacancies, discrediting, hampering and attempting to impose excessive control over the work of the FRO, manipulating the MB, unlawful involvement in the selection process of the FRO, hampering the capability to of the MB to pass decisions that would be in compliance with the Agency’s Regulation, submitting and resubmitting virtually the same rejected unlawful proposals – all of these acts and omission ultimately boil down to the Agency’s incompliance with its basic fundamental rights obligations.<sup>70</sup>

65. To sum, for the purpose of the present Application, already at this stage we argue that Frontex failed to act within the meaning of Art. 265 TFEU by not complying with at least one of the expressions of its positive obligation to prevent violation of fundamental rights by taking all reasonable measures necessary for doing so. This indisputable failure to act is, at least to a certain extent, intertwined with the Agency’s failure to act in accordance with Art. 46 of its founding regulation.

66. The Agency’s established failure to act in relation to the recruitment of at least 40 fundamental rights monitors by **5 December 2020** demonstrates its reluctance to comply with fundamental rights obligations imposed by the EBCG Regulation at large and, practically, **prevents the Agency from being able to ever apply Art. 46 EBCG**, which is the centre of the present Application.

67. ED Leggeri is not alone. Behind his failures, one finds a Management Board incapable of executing its duties under Art. 100 of the EBCG Regulation. Its 27 board members, including the two from the Commission, could have the ED removed from his office based on his failures. They could trigger Art. 46 on their own initiative.<sup>71</sup> They could report back to their Member States, whose police forces and assets are deployed to Frontex and are potentially complicit in its wrongful acts. After all, “it is the duty of the Commission as a member of the Management

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<sup>64</sup> Supra, note 37, from 9:29:38 to 9:29:50

<sup>65</sup> Supra, note 57, page 8

<sup>66</sup> Ibid, page 4

<sup>67</sup> Ibid

<sup>68</sup> Ibid

<sup>69</sup> Ibid

<sup>70</sup> Ibid

<sup>71</sup> Supra, note 45, Art. 46(2).

Board, to intervene to prevent serious irregularities which could jeopardise the well-functioning and the reputation of the Agency”, as DG Pariat justly puts it.

### 3.3.2 Structural and Cultural Failures in Frontex’s Monitoring and Reporting Systems

68. The saga of the Agency’s failure to recruit the FRMs, or to respect the independence of the FRO, are only a few examples of the structural breach of the Agency’s monitoring and reporting obligations under EU law. It was the Agency *itself*, as well as the *Commission*, that explicitly acknowledged these deficiencies in Frontex’s monitoring and reporting systems.

69. In the context of Frontex’s activities in the ASR, these deficiencies are reflected in the Agency’s recurrent failure to act with respect to no less than **13 well-documented serious incidents**. The publication of these incidents in the media, followed by increasing pressure from the EC,<sup>72</sup> left no choice to the Management Board of the Agency but to establish its own “Working Group on Fundamental Rights and Legal and Operational Aspects of operations” (WG).<sup>73</sup>

70. In addition to its so-called inquiry into the reported allegations of pushback operations related to Frontex in the ASR, which we extensively analyse in the next chapter, the WG also “aimed to provide further input on future **improvements in particular with regard to Frontex’ current reporting system**”<sup>74</sup>.

71. In its Preliminary Report dated **19 January 2021**, the WG correctly notes that “reporting on Serious Incidents within the Frontex operational activities is regulated by a Management Board Decision. According to Frontex’s own terms, a Serious Incident is “an event or occurrence, natural or caused by human action, which may affect, or be relevant to a particular Frontex activity... Serious Incidents also including situations of alleged **violations of fundamental rights and of EU acquis or international law, particularly related to international protection obligations... Every participant related to or involved in Frontex activities is under an obligation to report immediately** a serious incident report... in case he/she obtains the knowledge of such an incident.”<sup>75</sup>

72. As the next chapter demonstrates in detail, in most of the examined cases, Frontex failed to report or register serious incidents. This systematic failure reveals a structural pattern that is by no means limited to the agents on the ground. To the contrary, the culture of non-reporting percolates from the highest position in the Agency. In multiple cases, the ED himself failed to comply with his reporting obligation by providing *false* reports on serious incidents, refraining from reporting altogether, or did not report in timely manner (‘immediately’) to the organ to which under EU law Frontex is accountable, that is, **the European Parliament (EP)**. The EU Commission was aware, stating that the statements ED Leggeri provided the EP were “not true”.<sup>76</sup>

73. Indeed, ED lied to EP reporting that except for one, there were no other serious incidents, while being aware of at least one more; he reported a serious incident to the EP no less than eight months after it happened; he provided false account of material facts of a serious incident; ED Leggeri also failed to report in a timely manner to his counterparts of the *Joint Operation*:. it took him two weeks to ask for ‘clarification’ on undisputed serious incident of forcible transfer, collective expulsion, and abandonment at sea, which Frontex Surveillance Aircraft live-streamed for hours from its patrols at the ASR to the HQ in Warsaw.

74. Yet, in the context of monitoring and reporting obligations, which their fulfilment enables the proper application of Art. 46, apart from one straightforward and concrete

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<sup>72</sup> See supra note 42, 12:30:32 – 12:31:07 (“...[I]n October there were reports... of course I immediately contacted the Executive Director and asked about this... and since then I have been asking for this to be clarified”)

<sup>73</sup> The WG was established by decision No. 39/2020 of FRONTEX Management Board.

<sup>74</sup> ‘The Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea, Preliminary Report of the Frontex Management Board Working Group’, 19 January 2021, page 5. available at: <https://t.co/ZcwV6CiwY?amp=1>

<sup>75</sup> Ibid, page 27.

<sup>76</sup> See infra, note 118

recommendation,<sup>77</sup> the WG Preliminary Report’s recommendations in this context are fairly abstract and technical in nature: the WG “has identified a **lack of monitoring in the reporting system** of Frontex. In fact, there is **no mechanism installed in Frontex which would have the purpose of identifying problems in the reporting practice**”<sup>78</sup>; “...It is very difficult for the Team Members to categorize the incident correctly”<sup>79</sup>; “Frontex has recognised that the Serious Incident reporting has to be revised...”<sup>80</sup>; “a systematic monitoring of the reporting mechanism should be established, covering all levels of the Host Member State and all levels of Frontex. The monitoring system should ensure a control of the whole process, including fulfilment of reporting requirements of all involved stakeholders and efficient democratic control”<sup>81</sup>; “the 40 pending Fundamental Rights Monitors have to be recruited immediately in order to strengthen the monitoring system for Fundamental Rights”<sup>82</sup>.

75. Following the WG Preliminary Report, Frontex Management Board convened on **20-21 January 2021**. In its ‘conclusions’, the MB reiterated some of the WG’s findings and added some others. Also, these ‘conclusions’ are either self-evident or revealing the failure to comply with positive fundamental rights and international protection obligations. The MB urged the ED to *immediately* implement a number of recommendations. The first was to apply its *current* reporting system, i.e., to simply abide by the rule of law. The MB also called to revise the reporting mechanism – acknowledging its failure – in order to make it more efficient, including by ensuring that Serious Incident Reports on alleged violations of Fundamental Rights are always reported to the Fundamental Rights Officer. The proposed revision provided that every Operational Plan would include transparent reporting mechanisms, establish systematic monitoring of the reporting mechanism and transparent rules on the Frontex internal process to follow-up on serious incidents that have been established – including on the application of Art. 46 of the EBCG Regulation – and immediately recruit the 40 Fundamental Rights Monitors that were required to be in place by 5 December 2020 under the EBCG Regulation.<sup>83</sup>

76. In its final report, the WG restates its previous findings and recommendations regarding the “**identified deficiencies in the monitoring and reporting system of Frontex**” and *welcomes* the Agency for having “undertaken efforts and actions to reform its reporting and monitoring mechanism”.<sup>84</sup> The WG also acknowledged that without a functioning monitoring and reporting systems the Agency is simply incapable of gaining knowledge of fundamental rights violations, when it stated: “**The deficits and the need for improvement of the reporting and monitoring system** have already been described in the preliminary report. **These shortcomings lead (inter alia) to the outcome that the Working Group was not able** to clarify completely the five further examined incidents.”<sup>85</sup>

77. However, the WG also goes beyond the structural technical failures and points out to a cultural failure: “the reporting system should be combined with a **newly introduced culture**, in which failure is acknowledged and addressed, in order to create awareness of and sensitiveness towards possible misconduct”<sup>86</sup> – as opposed to the current culture, in which failure is neither acknowledged nor addressed, and there is no awareness nor sensitivity to misconduct.

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<sup>77</sup> See supra note 74, pages 36-37. The recommendation is that Serious Incident Report (SIR) regarding violation of Fundamental Rights should be directly reported to the FRO, for follow-up in accordance with her competencies under art. 109(2)(b) of the EBCG Regulation

<sup>78</sup> Ibid, page 34

<sup>79</sup> Ibid, page 36

<sup>80</sup> Ibid, page 36

<sup>81</sup> Ibid, page 38

<sup>82</sup> Ibid, page 38

<sup>83</sup> FRONTEX, ‘Conclusions of the Management Board’s meeting on 20-21 January 2021 on the preliminary report of its Working Group on Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea’, 21 January 2021, available at: <https://tinyurl.com/2d3faz32>

<sup>84</sup> Supra, note 47, page 5

<sup>85</sup> Ibid, page 16

<sup>86</sup> Ibid, page 5

78. Commissioner for Home Affairs, Ylva Johansson, followed suit, taking herself a quantum leap from the defected technical aspects of the Agency’s monitoring and reporting systems towards a human-centred perception of these deficiencies. On a parliamentary hearing dated **6 July 2020**, Johansson stated: “In my view, it’s time to consider if we also need **to put in place a new mechanism to monitor and verify report of pushbacks**. To me it is clear that we need to do **more to ensure that Member States comply with EU law and fundamental rights**.”<sup>87</sup>

79. Whereas during a parliamentary hearing dated **4 March 2021**, the Commissioner stated: “In the report... **there are identified deficiencies in the monitoring and reporting systems** of Frontex... They were also saying that the reporting system should be combined with a **new culture** in which failure is acknowledged and addressed in order to create awareness and sensitivities toward possible misconduct... **And I think it’s important.**”<sup>88</sup> “**I think it’s pity... it could have been addressed earlier... I think it’s important we have a culture** that we learn from mistakes and also for the trust in the Agency it’s important to show that the Agency is **listening to criticism**.”<sup>89</sup>

80. MEP Bettina Vollath reminded us that the *present culture* of the Agency seems to “**deliberately refrain from preparing such Serious Incident Report and there would even be pressure within the Agency on officials not to do so...**”, and asked Mr. Marko Gašperlin, Frontex Management Board Chairman, “**who in the Agency was responsible for this old culture in which failure was not acknowledge and addressed?**”<sup>90</sup> But the Chair of the MB did not shed a light on the present culture in the organization he is chairing.

81. There are no technical deficiencies or insufficient administrative procedures. Any participant in Frontex *Joint Operations* is already under the binding legal obligation to immediately report suspected violations of fundamental rights and international protection obligations. The failure is indeed structural and cultural. Take the warranted recommendation to directly refer report to the FRO, which, on the face of it, is a straightforward and meaningful idea. But, within the present organizational culture of Frontex, what good would it do when the FRO is discredited, isolated, absent and effectively disregarded by the ED and the MB alike?

82. The extremely low number of Serious Incident Reports (SIRs) issued by agents of Frontex witnessing violations of fundamental rights cannot be attributed to *confusion* as to how to categorize the incidents. The structural deficiencies, as the Commissioner and the WG determine, lurk in the culture of the organization. Their aspired ‘*new culture*’ reveals more on the present one, which completely disregards the protection of fundamental rights.

83. This structural and cultural failures is neither limited to the ASR, nor to a certain operational area. Because of their organizational nature, they prevail in Greece and everywhere Frontex operates. Widespread and well-documented incidents of fundamental rights violations in the Evros region in Greece, for example, resulted in only six SIRs between **2017 and 2019**.<sup>91</sup>

84. From the FRO’s mission report from Evros emerges the same alarming organizational culture which promotes concealment through “**retaliation**”. One of the two objectives of the FRO’s mission to Evros in **January 2019** was to follow up on SIR regarding allegations of pushbacks. The FRO noted that “[d]ifficulty to evidence pushback practices remain despite collected testimonies by different international organizations and national NGOs, reports in open sources... lack of safeguards/protection for a victim as well as **person submitting SIR in order to prevent possible retaliation measures**.”<sup>92</sup>

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<sup>87</sup> Supra, note 37, 17:14:05 - 17:14:55

<sup>88</sup> Supra, note 42, 12:31:45 – 12:32:35

<sup>89</sup> Ibid, 12:34:00 – 12:34:41

<sup>90</sup> EP Frontex Scrutiny Group (FSWG) meeting of 15 March 2021, 14:23:30 – 14:24:16, available at: <https://tinyurl.com/2fjv38st>

<sup>91</sup> ‘What is Frontex Doing About Illegal Pushbacks in Evros?’, 1 August 2020, available at: <https://tinyurl.com/3y429cvd>

<sup>92</sup> FRO’s mission report – Evros, 5 February 2019, available at: <https://fragdenstaat.de/dokumente/2703/>



85. Based on her findings, the FRO recommended to “**consider suspension or termination of the activities in case violations of fundamental rights or international protection obligations are of a serious nature or are likely to persist**”<sup>93</sup>, i.e., the same demand, under Art. 46 EBCG Regulation, the Applicants are requesting today.

86. The FRO reiterated that **reform of the SIR mechanism is “highly necessary”** also during the 23<sup>rd</sup> Meeting of Frontex Consultative Forum on Fundamental Rights (CF)<sup>94</sup>, held on **16 October 2020**, days before the media outlets came out with extensive reports on pushback operations related to the activities of Frontex in the Aegean Sea.

87. The FRO’s recommendations regarding a reform of the SIR mechanism or possible suspension of the Frontex’s activities in Evros were never implemented by the Agency. The next year, ED Leggeri demanded, *ultra vires*, to remove the FRO from her office.

88. The Chairperson of the MB, Mr. Marko Gašperlin, also admitted that participants habitually disregard their duty and do not tend to report on suspicious incidents: “The problem of the WG was that they could not, without any doubt, identify in several cases what was the case what was the situation and some statements were contradictory. I’d say we appealed for more transparency, for more material, in the case, **if we have the SIR**, that it will be possible to establish what really happened in reality.”<sup>95</sup>

89. As will be presented in the next chapter, it is evident from the circumstances surrounding many of the allegations examined by the WG, that institutional ‘*retaliation*’ is indeed deployed by the Agency against officers witnessing fundamental rights violations who are, as a result, reluctant to issue SIR where appropriate.

90. From the culmination of documents and statements, frequently originating from ED Leggeri himself, emerges the conclusion that, by no means, is it the ‘confusing’ catalogue of four categories of SIR that is to blame for the systematic non-submission of SIRs and the Agency’s illusory reporting system. It is the ‘*current culture*’ of the Agency, a culture that invites retaliation against decent officers, an organizational culture of unlawful concealment, and of turning a blind eye on the most serious violations of refugee, human rights, maritime, and criminal law.

91. ED Leggeri “repeatedly made it clear to staff” that “Frontex is not an expensive lifeguard service,” and staff in operations understood that “reporting pushbacks involving Frontex personnel is not a route to popularity or promotion within the agency”.<sup>96</sup> This is the culture of the Agency, at the head of the agency, and all the way to the ground.

### **3.4 Serious and Persistent Violations and Their Pseudo-Investigations**

92. The hasty decision of Frontex to launch the RBI Aegean was taken on **2 March 2020**,<sup>97</sup> a day after Greece suspended its asylum system in a breach of international law and the EU asylum acquis,<sup>98</sup> and introduced the new unlawful ‘tactics’ in the ASR<sup>99</sup>. From its outset,

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<sup>93</sup> Ibid

<sup>94</sup> 23<sup>rd</sup> Meeting of Frontex Consultative Forum of Fundamental Rights, 16 October 2020, available at: <https://tinyurl.com/apkzkb28>

<sup>95</sup> Supra, note 90, 14:25:34 – 14:26:30

<sup>96</sup> ‘OLAF raided EU border chief’s office over migrant pushback claims’, ekathimerini.com, 14 January 2021 <https://tinyurl.com/rvrta22e>

<sup>97</sup> FRONTEX, ‘Frontex to launch rapid border intervention at Greece’s external borders’, 2 March 2020, available at: <https://tinyurl.com/44rn2539>. In the next chapter we will examine whether Frontex met its due diligence obligations and conducted an adequate risk analysis prior to the decision to launch the requested operation, whether the FRO was ever consulted by the ED in accordance with Article 46(5) and if that provision was altogether complied with.; see also the extension of RABIT Aegean in May 2020: Twitter, Frontex post, 21 May 2020, available at: <https://twitter.com/Frontex/status/1263386853912305665>

<sup>98</sup> The failure of Greece to comply with international refugee and human rights law is not new. It has been going on for years. Deficiencies in the asylum procedure, including exposure to unlawful detention and inhuman and degrading living conditions were determined by the Strasbourg court to amount to an inhuman and degrading treatment within the meaning of Article 3 ECHR. See generally ECtHR - M.S.S. v Belgium and Greece [GC], Application No. 30696/09.

<sup>99</sup> UNHCR, ‘UNHCR statement on the situation at the Turkey-EU border,’ 2 March 2020, available at:

wrongful acts surrounded the RBI Aegean and foreshadowed the serious and persisting fundamental rights violations that were soon to come.

93. Since March 2020, there was “a dramatic increase in fundamental rights violations in the Aegean, both at sea and on land. Illegal pushbacks... play an especially crucial role. Over the past year... pushbacks have become an inhumane everyday reality for people on the move. Pushbacks happen almost daily at the Greek-Turkish border and **in 2020 alone, we counted... 9,798 people pushed back**”.<sup>100</sup> Since the beginning of 2020, **The UNHCR has observed several hundred cases** of suspected pushbacks in the Aegean Sea since the beginning of last year.”<sup>101</sup> **The German authorities reported to the Bundestag that Frontex confirms involvement in 132 so-called ‘interception’ operations**.<sup>102</sup>

94. Also, the Human Rights Commissioner of the **Council of Europe** is “particularly concerned about an increase in reported instances in which migrants **who have reached the Eastern Aegean islands from Turkey by boat, and have sometimes even been registered as asylum seekers**, have been embarked on life-rafts by Greek officers and pushed back to Turkish waters”. The Commissioner recalls the prohibition on torture and *refoulement* apply “to anyone, regardless of the way in which they arrive at member states’ borders, including if this in an irregular manner. The Commissioner noted that “**The verbal and physical abuses reportedly inflicted on the persons pushed back to Turkey may amount to inhuman or degrading treatment, and the mere fact of leaving them on... life-rafts in the Aegean sea seriously endangers their right to life.**”<sup>103</sup>

95. Evidence produced by a joint investigation by **Lighthouse Reports, Bellingcat, ARD, the Japanese broadcaster TV Asahi, and the German DER SPIEGEL** (The Bellingcat Investigation)<sup>104</sup> – between **April and August 2020**, at least six well-documented pushbacks were carried out in the ASR by vessels of the host Member State, Greece. In all of these cases, assets of Frontex were involved, either by means of detection, surveillance, monitoring, active interception or other assistance of forces. All incidents occurred while assets of Frontex were at least present where a collective expulsion and abandonment at sea was unfolding.

96. The months-long investigation collected and analyzed open-source information, videos from the Turkish Coast Guard, vessel tracking sites, and information provided by Frontex. The abovementioned evidence was then combined with a database of well-documented ‘pushbacks’, aiming to establish whether Frontex assets were present during, or even actively participated in, grave and systematic breaches of international and EU law while engaged in its *joint* operations with Greece.

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<https://tinyurl.com/kvhz9kew>; Prime Minister GR, “Our national security council has taken the decision to increase the level of deterrence at our borders to the maximum. As of now we will not be accepting any new asylum applications for 1 month. We are invoking article 78.3 of the TFEU to ensure full European support.”, Tweet, 1 March 2020, 9:04 PM, available at: <https://tinyurl.com/4xhy3ekv>

<sup>100</sup> Mare Liberum “PUSHBACK REPORT 2020”<https://mare-liberum.org/en/pushback-report>; See also GHM <https://racistcrimeswatch.wordpress.com/2021/05/04/2-289/> “Criminal complaint to Supreme Court Prosecutor calling for the investigation of 147 cases of illegal, violent, racist pushback or deportation of 7000+ foreigners in March-December 2020” and Greek Ombudsman <https://www.synigoros.gr/resources/docs/280421-pushbacks-interim-report-eng.pdf> “Alleged pushbacks to Turkey of foreign nationals who had arrived in Greece seeking international protection”

<sup>101</sup> Info Migrants “UNHCR reprimands Greece over more reports of pushbacks at sea” <https://tinyurl.com/rn6kv9ua>; see also <https://tinyurl.com/et7j3nj2>; see also <https://tinyurl.com/97v29dvd>

<sup>102</sup> See Infra note 241; Letter from the German Bundestag to the German Federal Government dated 19 March 2021 and Letter from the German Federal Government to the German Bundestag dated 28 March 2021 are annexed to the Application and marked ANNEX 5 and ANNEX 6 respectively.

<sup>103</sup> Letter from Council of Europe Commissioner for Human Rights to Greek Ministers dated 3 May 2021 <https://tinyurl.com/757nmmsv>

<sup>104</sup> Nick Waters, Emmanuel Freudenthal and Logan Williams, ‘Frontex at Fault: European Border Force Complicit in ‘Illegal’ Pushbacks’, Bellingcat, 23 October, 2020, available at: <https://tinyurl.com/3u7zcmj2>; Giorgos Christides, Emmanuel Freudenthal, Steffen Lüdke and Maximilian Popp, ‘EU Border Agency Frontex Complicit in Greek Refugee Pushback Campaign, Der Spiegel’, 23 October 2020, available at: <https://tinyurl.com/4wsbky6t>

97. As noted above, with documented reports on countless forcible transfers, collective expulsions and abandonment at sea stockpiling, and an increasing number of investigations against the Agency and ED Leggeri, Frontex MB had no choice but to establish the WG.<sup>105</sup>

98. The Agency's failure to provide transparent access to information, properly investigate, and ultimately establish a truthful account of the events was meant to be remedied by the establishment of the WG. The WG's mandate was to investigate alleged "**knowledge and/or even involvement**"<sup>106</sup> of Frontex in serious and systematic breaches of international law, and to enquire "**about the true events**"<sup>107</sup> through access to "all relevant information, including **information... held by Frontex**"<sup>108</sup>.

99. Yet, the WG had a spokesperson, but no will to discover the 'true events'. Most of the appointed members were 'alternate' members of the MB – with representatives from the HCG, i.e., the 'key suspect' – and other Member State police forces *involved* in the investigated incidents. The majority of these police officers are border guards with no professional competence to fulfill the WG's mandate, i.e., to conduct forensic fact-finding and legal analysis, under international, European, and EU law, in order to determine 'what happened'.

100. Accordingly, incidents that were corroborated by conclusive evidence for serious breaches of EU law were omitted from the final report altogether. They were left open, pending, or have been labelled 'unresolvable' – only to be 'cleared' shortly after by a mysterious different organ or official within the Agency, 'cleared' by finding the most inconceivable factual and legal accounts to be 'plausible'.<sup>109</sup>

101. The common strand to all the incidents analyzed below is the involvement of Frontex, to varying degrees, in serious and persistent violations of its fundamental rights and international protection obligation. However, it should be noted at the outset that even if Frontex had no direct involvement whatsoever in the collective expulsion of about 10,000 civilians in the past year – this mass expulsion is nonetheless *related* to its activities in the ASR under Frontex Regulation, and thus constitutes a failure to act within the meaning of the TFEU.

102. The analysis of the *selected* incidents is predominantly drawing on the following sources: the Bellingcat investigation of October 2020 and previous reports (i);<sup>110</sup> a *leaked* MB Note from November 2020 (ii);<sup>111</sup> a *leaked* WG Preliminary Report dated January 2021 (iii);<sup>112</sup> the WG Final Report dated March 2021 (iv);<sup>113</sup> testimonies of ED Leggeri, the Chair of the MB and other Frontex officials before the LIBE committee and the Frontex Scrutiny Group of the European Parliament (v);<sup>114</sup> and 60GB of visual evidence of countless collective expulsions provided to the European Parliament by Turkey (vi);<sup>115</sup>

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<sup>105</sup> The WG was established by decision No. 39/2020 of FRONTEX Management Board.

<sup>106</sup> Supra, note 74, page 2.

<sup>107</sup> Ibid., page 5.

<sup>108</sup> Ibid., page 5.

<sup>109</sup> Supra, note 47, page 2.

<sup>110</sup> Frontex at Fault: European Border Force Complicit in 'Illegal' Pushbacks, Bellingcat, 23 October 2020, available at: <https://tinyurl.com/4ajzmskx>; Samos And the Anatomy of a maritime Push-Back, Bellingcat, available at: <https://tinyurl.com/23kzahy3>, Bellingcat, 20 May 2020; all findings of this investigation including audio-visual materials are part and parcel of this Application.

<sup>111</sup> Supra, note 36

<sup>112</sup> Supra, note 74

<sup>113</sup> Supra, note 47

<sup>114</sup> Supra, notes 37, 42, 40, 90.

<sup>115</sup> Letter from Mr. Mehmet Kemal Bozay, the Turkish Ambassador to the European Union, addressed to MEP Juan Fernando Lopez Aguilar, Chair of the Committee on Civil Liberties, Justice and Home Affairs (LIBE), the European Parliament, 17 February 2021 (on file with the authors); Access to the materials are granted upon request from the European Parliament (LIBE Committee); See also full documentation of Frontex-HCG collective expulsion documentation: <https://en.sg.gov.tr/pushback-news>

### 3.4.1 The 2 March 2020 Incident: An Order to Forcibly Transfer, Collectively Expulse and Abandon at Sea Migrants on Board a Frontex-Danish Vessel

103. On the same day RBI Aegean was approved by ED Leggeri, Greece ordered a **Danish** Coast Guard (DCG) vessel deployed to Frontex with some 33 rescued migrants **on board**, “**to transfer the migrants back to the rubber boat and escort/transfer them into the TUR territorial waters.**”<sup>116</sup> The DCG refused the order,<sup>117</sup> and Greece “**then cancelled the order to transfer the migrants back into the rubber boat. A new order was given... to ... hand them over to HCG.** The Issue was closed. There were no further discussions”.<sup>118</sup>

104. The incident was registered with Frontex 4 days later, on **6 March 2020** – a few days *after* Frontex approved but still *before* RBI Aegean started on **12 March 2020**. Such an unequivocal attempt by the host Member State to forcibly transfer, collectively expell and abandon civilians at sea on unworthy rafts should have led the ED Leggeri to decide *not* to launch, to withdraw financing, suspend, or to terminate the recently approved RBI Aegean operation in accordance with Art. 46 of the EBCG Regulation.

105. Instead, **ED Leggeri lied to the European Parliament** by misrepresenting the material facts pertinent to the incident, misinterpreted and downplayed the legal implications of Greece’s unlawful conduct. During a hearing of **6 July 2020** before the European Parliament, ED Leggeri, provided a detailed account of what *supposedly* had happened on **2 March 2020**:

“...there was apparently some **misunderstanding...** not in line with the Operational Plan... **I stepped in also personally...** there was a **misunderstanding** there was **wrong instructions** given... This is the case that I can report that took place **under the umbrella of Frontex operations**<sup>119</sup>...Danish vessel deployed in the Frontex operation was instructed by the HCG **not to take on board** the migrants... but **to return them to Turkey**, that was in the first days and there was clearly, apparently, **a misunderstanding** of the operational plan... locally an officer of the HCG had **not understood** correctly the operational plan and that this **would not happen again**. So, I’m just sharing with you the Parliament what was reported to me **and this was the only case...**”<sup>120</sup>

106. *First*, the HCG did *not* order the Frontex vessel “not to take on board” ‘the migrants’: ‘the migrants’ were **already on board the Frontex vessel**, i.e., under the jurisdiction of the flag-state, Denmark. *Second*, this is not ‘*the only case*’ in which such ‘misunderstanding’ occurred. While testifying before the Parliament, **ED Leggeri was at least aware of the incident of 18-19 April 2020.**<sup>121</sup> *Third*, ED Leggeri himself argued elsewhere that the operational plan of RBI Aegean is identical to that of JO Poseidon. Suggesting a Greek agent misunderstood orders that govern any operational plans, i.e., the prohibition on collective expulsions and *refoulement* – is false.<sup>122</sup>

107. Providing multiple lies to the sovereign EU authority supervising the Agency raises serious doubts on the willingness or ability to comply with the human rights standards and basic principles such as the rule of law the EU is supposedly committed to. The Executive Director of Frontex has personal reporting duties to provide the Parliament with full, accurate and good-faith accounts of incidents.

108. ED Leggeri’s flagrant incomppliance with his reporting duties, here and on countless other occasions, is being diffused throughout the Agency, corrupting the personnel under his leadership and is in correlation with officers’ widespread and systematic failure to comply with

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<sup>116</sup> Nikolaj Nielsen, ‘Revealed: Official Greek order to illegally pushback migrants’, euobserver, 18 November 2020, available at: <https://euobserver.com/migration/150099>

<sup>117</sup> Ibid.

<sup>118</sup> Ibid

<sup>119</sup> Supra, note 37 (18:12:41 –18:13:38).

<sup>120</sup> Supra, note 37 (18:34:24 – 18:35:45).

<sup>121</sup> Supra, note 40

<sup>122</sup> Supra, note 40, “the operational plan and the operational objectives were the same as Joint Operation Poseidon”, (13:55:25 – 13:55:32).

their own reporting duties.<sup>123</sup> The EU’s Home Affairs Commissioner, Ylva Johansson, admitted that **“some of the things being said by the Executive Director in Parliament [are] not true”**.<sup>124</sup>

109. The attempted collective expulsion was prevented only due to the DCG’s resistance to follow the official and usual orders of the HCG. The extraordinary diligence and compliance with the rule of law was established not because of but *despite* the failure of the Agency to take all reasonable measures in advance to prevent serious violations of human rights obligations in relation to Frontex’s activities.

110. For some unknown reason, the Danish crew **did not issue a Serious Incident Report (SIR)**, which, in itself, constitutes a serious failure of the Agency. However, this specific failure to issue a SIR is only one example for the systematic and widespread deficiencies inherent to the Agency’s reporting and monitoring mechanisms. The Agency’s illusory functioning makes it impossible for it to gain knowledge of and guard against infringements of fundamental rights and international protection obligations.

111. Whilst no formal SIR has been filed, the incident was somehow communicated by the DCG. These suspicious circumstances were presented by ED Leggeri himself, albeit in a heavily distorted and manipulated manner, as detailed above. The WG, however, simply declined to investigate this incident – adding a failure to investigate on top of the failure to report.

112. A number of elements make the **March 2020** incident exceptional: Because only Frontex’s team was present on scene, and since the ‘migrants’ were transferred on board a Frontex vessel, the incident did not result in forcible transfer to unworthy rafts, collective expulsion (‘towing’), and abandonment at sea with no means of navigation and, at times, no life vests and other basic needs.

113. The new policy and tactics introduced in the KYSEA decision, implemented through JO Poseidon and RBI Aegean, dictated a different division of labor: Frontex is tasked with detection, interception and handing over ‘migrants’ to the HCG<sup>125</sup>; the HCG completes the collective expulsion operation by either towing the ‘migrants’ own unworthy boat after removing its engine and fuel; or transferring the migrants to some other rafts with no means of navigation before abandoning them at sea. How a typical interception unfolds when both Frontex and the HCG are on-scene can be learned from the following incident investigated by Frontex internal WG.

#### 3.4.2 The 30 October 2020 Incident: Swedish-Frontex Vessel Participating in and Witnessing a Forcible Transfer, Collective Expulsion and Abandonment at Sea

114. “... a **Swedish Coast Guard vessel detected** a rubber boat, with... around 20 people (men, women and children) and **intercepted** it... The Swedish Coast Guard vessel remained at the scene **until a HCG vessel took over**. The Hellenic authorities informed the crew of the Swedish Coast Guard vessel that it was **released from the scene... ordered to continue its patrol in northern direction**. While leaving the scene the Commanding Officer of the Swedish Coast Guard vessel **witnessed that one crew member of the HCG vessel stood on the foredeck handling ropes/mooring lines, and another crew member stood on the aft deck on the HCG vessel also handling ropes/mooring lines to fasten the rubber boat**. After

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<sup>123</sup> Failure of the Executive Director to fulfil his reporting duties before the European Parliament in good faith should constitute a compelling reason for the Agency’s Management Board to dismiss him or her, acting on a proposal from the Commission. See Regulation EBCG, Articles 106-107

<sup>124</sup> Daniel Boffey, ‘EU border force head faces calls to quit over allegations he ‘mised’ MEPs’, The Guardian, 19 January 2021, available at: <<https://www.theguardian.com/global-development/2021/jan/19/eu-border-force-head-fabrice-leggeri-faces-calls-to-quit-over-allegations-he-mised-meps>>. Notwithstanding the Commission was not here nor in countless other occasions oblivious to ED Leggeri’s unethical behavior, a proposal to dismiss him from duties was never put forward by the Commission

<sup>125</sup> “...Frontex has never towed boats to Turkish waters, **the role of Frontex** in this particular case in Greece, in Poseidon, is **to contribute to boarder surveillance, to inform HCG about detected, interceptions, and Greece wants to be in frontline...**”, ED Leggeri, 4 March 2021, see *Supra*, note 42, 13:17:23 – 13:17:53

leaving, **the Swedish crew continued to monitor the situation on radar and saw the radar echo of the Hellenic Coast Guard Patrol boat, which was moving towards the Turkish border line, where it stopped moving.** According to the data made available by Frontex, **no rubber boat with people on board has arrived to Chios during the day of the incident**".<sup>126</sup>

115. "According to the Hellenic Coast Guard, the Hellenic Coast Guard Boat attempted to control the rubber boat **to clear the situation** on scene. During the border police measures the **migrants behaved uncooperative** and the migrant boat continued its movement **by its own will** in the direction of Turkish Territorial Waters... **The migrant boats left the Greek Territorial Waters independently... there was no opportunity for the migrants to apply for asylum** due to their non-cooperative behaviour since the situation was dominated by the efforts of the migrants **to escape the border police measures.**"<sup>127</sup>

116. According to the WG's final report, the Greek authorities not only refute the legal implications emerging from the Swedish crew's report, when claiming that a "possibility for the people on board to demand international protection was not feasible"<sup>128</sup>, but they go as far as denying the facts presented by the Swedish crew, ruling out "the possibility that the boat was towed towards Turkish Territorial water at any point"<sup>129</sup>. The notoriousness of the HCG, however, is implied in the Swedish report: "the behavior of the people... shifted towards a cooperative manner once they had realized that it was a Swedish vessel..."<sup>130</sup>

117. Frontex's own agents witnessed a 'pushback' operation by the HCG. But the WG concluded that "information provided... did not allow to close all remaining information gaps in the case", while adding that "an adequate control mechanism must be in place to thoroughly address cases in which there are reasonable **doubts with regard to the fulfilment of obligations of International and European Law**".<sup>131</sup>

118. In this case, again, the Swedish crew had to go through retaliation and resistance of the Agency in order to issue SIR regarding such flagrant violation of fundamental rights and international protection obligations related to the activities of the Agency. Only due to the Swedish crew's insistence to comply with its reporting duties, the collective expulsion of circa 20 people have come to light.

119. The final WG report states that "the Swedish Coast Guard requested to launch a Serious Incident Report via the Frontex reporting mechanism, which was then allegedly **hampered...**", while "Frontex denied the accusations of hampering the transmission of the report".<sup>132</sup> Even the Swedish representative in the Agency's MB, could not find a convincing way to dismiss such allegation: "If it is true that a Swedish border guard faced resistance when entering a SIR? **That is partially correct...**"<sup>133</sup>

120. It should be noted that, among many suspicious contradictions and the resistance of the Greek authorities to allow the submission of SIR by the Swedish crew, the incident was also "categorized as *Prevention of Departure* despite the fact that the rubber boat entered Greek Territorial waters. In the view of the Working Group, this classification is inconsistent".<sup>134</sup>

121. Monitoring, reporting, and investigation are the necessary elements for the identification of fundamental rights violations. Frontex has none: no monitors to inform, it presses its agents not to report – ensuring that its *ad hoc* 'investigative organ' will be unable to be conclusively determine what happened based on the lack of information, only to enable this body to leave the incriminating cases pending and limiting itself to alluding to 'the fulfilment of obligations of International and European Law'.

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<sup>126</sup> Supra, note 74, pp. 15-16

<sup>127</sup> Ibid., page 16.; Typos in the original document;

<sup>128</sup> Supra, note 47, page 11

<sup>129</sup> Ibid, page 11

<sup>130</sup> Ibid

<sup>131</sup> Ibid, page 11-12

<sup>132</sup> Ibid, page 10

<sup>133</sup> Supra, note 90, 14:13:31 – 14:14:32

<sup>134</sup> Supra, note 47, page 11

122. This incident reveals both Frontex’s involvement and knowledge of the unlawful HCG practices: the Swedish agents witnessed a collective expulsion but failed to meet their positive obligation to prevent this pushback operation by all reasonable means. They also failed to meet their negative obligation as their detection and interception reflect, at minimum, their aiding and abetting, if not co-perpetrating, of the pushback operation. Beyond the shady tactical division of labor between Frontex and the HCG, characterizing the intercepted persons as either non-cooperative, or as possessing no interest in seeking asylum, is also typical for the Greek version of events – which is, in turn, adopted by Frontex’s WG.

#### 3.4.3 10 August 2020 Incident: German-Frontex Vessel Witnessing Migrants Being Taken on Board a Greek Vessel and Later Collectively Expelled and Abandoned at Sea

123. In the **10 August 2020 incident**, the **German Coast Guard**, while leaving the scene, witnessed the HCG taking a group of intercepted asylum seekers on board. The HCG claimed “the migrants had the opportunity to ask for asylum. No request for asylum was expressed... migrants were retransferred on the rubber boat and returned to Turkish Territorial Waters...”<sup>135</sup>

124. The WG nonetheless described the HCG’s version of events, according to which persons crossing to Greece did not seek protection, as “plausible”,<sup>136</sup> revealing no knowledge of or interest in the minimum standards for providing access to asylum.<sup>137</sup>

125. **Also this incident has not made it to the official, public and final WG report.**<sup>138</sup>

#### 3.4.4 The 28-29 April 2020 Incident: Migrants Abducted from EU Soil, Collectively Expelled and Abandoned at Sea for 17 Hours; Frontex Asset Was Allegedly Monitoring from Above

126. On **28 April 2020**, 22 civilians made landfall on the island of Samos, Greece. Later that day they were rounded up, abducted, detained, forcibly transferred to a life raft without any means of propulsion, and towed into the middle of the Mycale Strait by the HCG in the early morning of April 29, where they were abandoned and later recovered by the Turkish Coast Guard (TCG) in Turkish Territorial Water (TTW). Despite witness statements, images, and videos – the Greek government denied that these people had ever reached Greek territory.<sup>139</sup> A Frontex surveillance asset passed twice, very close to the identified pushback operation,<sup>140</sup> leaving the 22 ‘migrants’ to drift over the entire night, during a grueling 17 hours.<sup>141</sup>

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<sup>135</sup> Supra, note 74, page 14.

<sup>136</sup> Ibid., page 14

<sup>137</sup> See generally, UNHCR, Background Note on the Protection of Asylum Seekers and Refugees Rescued at Sea paragraph 23 (“...the identification and subsequent processing of asylum-seekers is an activity most appropriately carried out on dry land”);

<sup>138</sup> Supra, note 47

<sup>139</sup> See Supra, note 110 ‘Samos And the Anatomy of a maritime Push-Back’, Bellingcat, May 2020. This incident is one of the most precisely documented push-back of its kind. The investigators verified three videos and gathered the accounts of two witnesses who were themselves pushed back, as well as the account of a relative of one of the victims. They confirmed that the people we see across three separate videos, including footage of these refugees on the Greek island of Samos, are the same. They cross-referenced this with local radio broadcasts reporting their arrival and social media posts by islanders who saw them. They have located this visual evidence in time and space and found that it corroborates the accompanying witness accounts the investigators were able to collect. In this case, they were able to establish contact with two asylum seekers who were part of the group pushed back, as well as the husband of one of the women in the videos. The asylum seekers all confirmed the group made it onto the island, and that the members were detained and almost immediately pushed back.

<sup>140</sup> Ibid, (“As the life raft was floating in the strait, a private surveillance plane passed over the area twice at 5,000 feet, once at 02:41 AM and once at 03:18 AM on April 29. This plane, G-WKTH, belongs to DEA Aviation, which provides aerial surveillance services to Frontex, live-streamed back to the Frontex HQ in Warsaw. The plane is reportedly equipped with an MX-15 camera, which has both low-light and infrared sensors. Considering this plane is specifically employed for aerial surveillance, it would be surprising if it did not identify the life raft full of people and, according to one member of this group, the presence of Greek and later Turkish vessels.”)

<sup>141</sup>Supra, note 104, *Der Spiegel*, 23 October 2020 (“Jouma al-Badi thought he was safe when he first set foot on European soil on April 28. Together with 21 other refugees, he had been taken in a rubber dinghy from Turkey to the Greek island of Samos. The young Syrian planned to apply for political asylum. He documented his arrival in videos. Local residents also remember the refugees. ... Greek security forces captured the migrants... according to al-Badi, the officers dragged them back out to sea and released them on an inflatable rubber raft. Videos obtained

127. The WG identified a potential corresponding incident in its Preliminary Report. This was the **only incident** recorded in vicinity of Samos.<sup>142</sup> Although the identified incident matched the Bellingcat report in the number of ‘migrants’ and the time and place of the incident – the **WG refrained from providing the specific timeline of this incident**, as it did with the other investigated incidents.<sup>143</sup>

128. Instead, the WG argued that “**Frontex did not provide** any further evidence **in time** that would allow to assess whether this case is linked to any incident reported by the media... given that **this information was only provided in the final stage** of the group’s work, it **should be further examined...**”<sup>144</sup>.

129. Yet, while the WG rushed to reject some last-minute evidence received from Frontex, it nonetheless provided two contradictory observations with respect to the Agency’s involvement and awareness of the incident: on the one hand, the WG stated that “**no Frontex Surveillance Aircraft took place on this date**”, and on the other hand noted that “**there were three different Frontex Surveillance Aircrafts** and a **German helicopter** operating at different times **on 29 April**, outside the geographical area”<sup>145</sup>.

130. The WG Final Report only adds confusion. While Frontex argues that an incident involving approximately 20 persons on board was reported, dated **29 April 2020** and not **28 April 2020**,<sup>146</sup> based on which the WG concludes Frontex “has not been notified on the 28-29 incident reported by Bellingcat.”<sup>147</sup>

131. Moreover, “to **completely exclude... that a surveillance aircraft flew twice over the area while the alleged pushback took place**”, the WG examined “the routings of **all** possible Frontex coordinated **assets** that had been on duty within the operational area... **on 28-29 April 2020**”.<sup>148</sup> These assets included the German Helicopter, as well as a Latvian Offshore Patrol Vessel, 2 German Coastal Patrol Boats, a Portuguese Coastal Patrol Boat, and a Portuguese Thermal Vision Vehicle. None of their mission reports provided any indication of an incident similar to the one reported by Bellingcat.<sup>149</sup>

132. While the final report suggests that no aircraft flew over the area of the incident, the Agency’s internal note from November 2020 clearly determined that the location, dates and hours of a **Frontex Surveillance Aircraft, OSPREY, performing its scheduled patrol, perfectly matches**<sup>150</sup> **the Bellingcat report**.<sup>151</sup> To sum, on July 2020, ED Leggeri simply lied to the EP when he stated that “**there was no Frontex flight on that night**”, i.e. of the **28-29**

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by DER SPIEGEL also show him on the raft... Greek border guards kept pushing the men and women away as their raft floated around in circles. The Turkish coast guard filmed the maneuver... An aircraft used by the European border protection agency Frontex also passed over the refugees. The crew of the surveillance plane, with the registration identifier “G-WKTH,” were part of a European Union operation in Greece. The plane twice flew over the Strait of Mykali, where al-Badi and the other migrants were located. According to flight data... the first flight happened at 2:41 a.m. and the second at 3:18 a.m... Frontex didn’t send any help... Jouma al-Badi had to endure more than 17 hours of fear after Greek security forces abandoned him on a rubber raft.”)

<sup>142</sup> As for the other identified incident that took place on the same dates and reported by media outlets, it involves approximately 40 people (and not circa 20), was detected on the 29 April 2020 (not 28 April) in vicinity to Lesbos (and not Samos).

<sup>143</sup> Supra, note 74, pages 8-9

<sup>144</sup> Ibid, 8-9

<sup>145</sup> Ibid

<sup>146</sup> Supra, note 47, page 13 (“According to the information provided by the Agency, an incident, which involved a boat with approx. 20 persons on board, was reported on 29 April 2020 by the Agency. Whether or not the incident is the same incident reported by the investigative network Bellingcat on 20 May 2020, which was ... labelled by Bellingcat as a “maritime pushback” in the Aegean Sea was subject to a further examination by the [WG]”)

<sup>147</sup> Ibid

<sup>148</sup> Ibid

<sup>149</sup> Ibid.

<sup>150</sup> Supra, note 36, page 13

<sup>151</sup> Ibid, page 12 (“On the 28-29.04.2020 the FSA OSPREY 1 performed the scheduled patrol at the sea area from Kos south up to Samos north between the hours 28.04.2020 21:00Z (29.04.2020 00:00 Greek time) and 29.04.2020 01:00 (29.04.2020 04:00)”)



**April 2020** incident. In **November 2020** – before Frontex and its ED were under the pressure of political, administrative and criminal scrutiny which started in December 2020<sup>152</sup> – Frontex determined that Frontex **aircraft did fly** over the area, but did not detect the incident. The note concludes: “*Accusations only assume that the FSA should have detected the claimed incident at sea.*”<sup>153</sup> In **January 2021**, Frontex *internally* identified **3 aircrafts** that were operational. In **March 2021** Frontex examined these 3 aircrafts, probably among them was the OSPERY 1, and based on their silent mission reports, implied no aircraft overflew the area.

133. Based on the insufficient evidence and investigative failures, the WG ‘clarifies’ the Bellingcat incident.<sup>154</sup> Based on this ‘clearing’, ED Leggeri and the Chair of the MB later reassured the EP that all cases were closed.

134. This is not a case of non-detection, but rather non-reporting: part of a prevalent and widespread pattern of incompliance with reporting duties. This incident was a unique pushback operation, unfolding for an entire night and morning, in the same area where Frontex’s most well-equipped *surveillance* aircraft – tasked with *detecting* similar incidents – was patrolling for hours. We too assume that “reporting pushbacks involving Frontex... is not a route to popularity or promotion”.<sup>155</sup>

#### 3.4.5 The 4 June 2020 Incident: Portuguese-Frontex Vessel Fails to Report a Collective Expulsion Taking Place Within a 1km Radius

135. According to the Bellingcat investigation, “[t]wo dinghies were reported to have been pushed back from **Northern Lesbos**. **Portuguese** vessel *Nortada* appears to have been present around 15 km from the first incident and just over **one km away** from the second”.<sup>156</sup>

136. Frontex, in an internal note from November 2020, *confirmed* that “[o]n the **04.06.2020** the PRT CPB *Nortada* performed the scheduled patrol at the sea area **North of Lesvos** between the hours **02:00 and 09:00**.” However, the Agency once again relied on the culture of non-reporting (“*Accusations only assume that the PRT CPB should have observed the claimed incident at sea*”)<sup>157</sup>. The WG, for its part, has not investigated this incident at all.

137. There is mounting evidence that suggests it is not the well-equipped vessel that failed to detect a distinct signature of a maritime operation taking place within a 1km radius – it is those on board who failed to report it: the culmination of incidents of retaliation and resistance against officers who wish to comply with their reporting duties, the extremely low number of SIRs compared to external and objective data and evidence on the widespread and systematic nature of the new policy of **1 March 2020**, and the Agency’s acknowledgment of the inherent systematic deficiencies in its reporting and monitoring mechanism.

#### 3.4.6 The 5 June 2020 Incident – Portuguese-Frontex Vessel Fails to Report a Collective Expulsion Taking Place Within a 2-3km Radius

138. According to the Bellingcat investigation, once again “[a] dinghy was reported to have been pushed back from **Northern Lesbos**.” Once again, the “**Portuguese** vessel *Nortada* was approximately **two to three km away**”.<sup>158</sup> According to the Frontex internal note from November 2020, “On the 05.06.2020 the PRT CPB *Nortada* performed the scheduled patrol at the sea area **North of Lesvos** between the hours 00:01 and 07:00.” While the *Nortada* “**has been in the area of a media claimed incident**”,<sup>159</sup> once again, the Agency first claimed the

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<sup>152</sup> Supra, note 41. Various deficiencies and misconduct of the Agency, including allegations of pushbacks are currently under investigation by the European Anti-Fraud Office (OLAF). It has been reported that OLAF raided the office of Frontex ED on 7 December 2020: Jacopo Barigazzi, ‘EU watchdog opens investigation into border agency Frontex’, Politico, : January 2021, available at: <https://tinyurl.com/kwwuj289> ; Nikolaj Nielsen, ‘EU anti-fraud office launches probe into Frontex’, Euobserver, available at: <https://euobserver.com/migration/150574>

<sup>153</sup> Supra, note 36, (““during the patrol, the FSA OSPREY 1 didn’t report any incident in the Area of Samos”)

<sup>154</sup> Supra, note 47

<sup>155</sup> Supra, note 96

<sup>156</sup> Supra, note 110

<sup>157</sup> Supra, note 36, page 13

<sup>158</sup> Supra, note 110

<sup>159</sup> Supra, note 36, page 14

vessel failed to detect the incident, while we maintain it has instead failed to report it (“Accusations only assume that the PRT CPB should have observed the claimed incident at sea”).

139. While Frontex confirms the presence of its vessel effectively on-scene, the WG saw no need to examine, let alone investigate, this incident.

#### 3.4.7 The 19 August 2020 Incident – Prorogues Frontex Vessel Reports a Collective Expulsion Committed Pursuant to the New 1 March 2020 Frontex-Greek Policy

140. According to the Bellingcat investigation, “A dinghy was reported to have been pushed back from **Northern Lesbos**. Portuguese vessel *Molivos* was **five km** away and **appears to have changed course and headed towards the pushback before its transponder either lost signal or was turned off**”.<sup>160</sup> According to the Frontex internal note, “On the 19.08.2020 the PRT CPB *Molivos* performed the scheduled patrol at the sea area North of Lesbos between the hours 00:01 and 07:00. In the mission report, no suspicious incidents have been reported. PRT CPB has been in the area of a media claimed incident. No factual reporting on pushbacks (only NGO organisation information on Facebook). *Accusations only assume that the PRT CPB should have observed the claimed incident at sea*”<sup>161</sup>.

141. In the previous incidents, Frontex crews were ordered to commit collective expulsions, co-perpetrated it by orchestrating the detection, interception, and forcible transfer of the asylees to the HCG. Frontex crews monitored, witnessed, and failed to assist and to report these incidents. In the following two incidents, Frontex is documented on-camera actively executing a collective expulsion, acting in concert with the HCG and using the violent new tactics introduced in **March 2020**.

#### 3.4.8 The 8 June 2020 Incident – Frontex Violently Participates in Collective Expulsion

142. According to Bellingcat’s forensic investigation,<sup>162</sup> **47 asylees** were reported to be intercepted, forcibly transferred, collectively expelled, abandoned at sea, and rescued by the TCG. Evidence corroborated from a number of independent sources clearly shows the **Romanian-Frontex vessel MAI1103 blocking a dinghy**. The NATO ship, Berlin, was also in the vicinity. The Frontex and ‘migrant’ vessels were so close they appeared to be communicating. “...**At one-point MAI1103 makes a pass close to the dinghy at enough speed to generate waves, a maneuver that previously only HCG and TCG have been seen making. It is especially dangerous due to the overloaded and unseaworthy nature of the dinghies...**The dinghy was approached at least twice by a... boat... from the HCG...”. In the final stage of the pushback... it is possible to see the Portuguese FRONTEX vessel *Nortada* within 5 km... [the dinghy] within visual range of the larger ships surrounding it. After the pushback, the *Nortada* continued its patrol off North Lesbos.”<sup>163</sup>

143. The WG Preliminary Report identified this incident. Although the Preliminary Report establishes “the TCG was informed about the incident and took over responsibility”, it also noted that “According to Frontex, **a Romanian (ROU) Coast Guard vessel patrolled on this day in the area of the incident. Frontex did not give evidence whether the ROU Coast Guard vessel witnessed the incident**”.<sup>164</sup>

144. Any person – including the honorable Court – watching the meticulously analyzed video, and other data corroborating the turn of events minute by minute, sees the direct involvement of **Frontex Vessels** in serious breaches of its negative obligations under EU law.

145. The WG neither mentions the most basic facts nor considers the undisputed evidence pertaining to the incident, such as the matching location of the vessel. The investigative journalists obtained videos from different sources; tracked data of vessels in the area; established

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<sup>160</sup> Supra, note 110

<sup>161</sup> Supra, note 36, page 17

<sup>162</sup> Supra, note 110. See also audition of Lighthouse and Der Spiegel before EP LIBE Committee 10 May 2021 from 18:08:40 onwards <https://tinyurl.com/as4ypx5v>

<sup>163</sup> Supra, note 110

<sup>164</sup> Supra, note 74 page 11

the presence at scene of other witnessing assets (e.g., NATO ship *Berlin*); analyzed coordinates visible on the screens appearing in the videos; compared panoramic views appearing in the videos against the appearance of the landscape from coordinates which appear on camera feed; meticulously reconstructed what actually happened, namely what the WG was ostensibly tasked with. Instead, the WG simply claims ‘Frontex’ did not provide its evidence to the MB, i.e., to...‘Frontex’.

146. Despite the abundance of external and objective evidence corroborated from a number of independent sources, the WG closed the case based, *per se*, on the suspicious fact that **“Frontex did not give evidence”** to its own pseudo-investigative body: “In conclusion **the limited data available** related to the incident does not indicate an influence by the Hellenic Coast Guard on the incident. Therefore, **there is no evidence**, which indicates a possible violation of legal obligations”.

147. A coercive EU law enforcement agency currently enjoys full impunity and fails to act at all levels of its operations. Active breaches of Frontex’s fundamental rights and international protection obligations – which are not examined by a fundamental rights monitor because it does not exist – are not reported by its agents, and, in turn, are not investigated by its management. All of this leads to the conclusion that only judicial review of Frontex’s conduct can reinstate the rule of EU law at Europe’s borders, and over its border agency.

148. This case, along with countless others, reveals the futile attempts of the Agency to vulgarly cover up allegations of fundamental rights violations related to its activities. While the investigative journalists have managed to obtain and analyze evidence that conclusively establishes the Romanian Frontex Vessel’s complicity in a pushback operation of 47 asylum seekers, the Agency’s internal investigative body intentionally refrained from processing the evidence, failed to obtain relevant information from the Agency, failed to obtain evidence at the disposal of its German partners, and was comfortable enough to close the case – knowing that no one would be held to account for such abuses of power.

149. Also, in this case, the internal note of the MB reveals much more than the cover up of the WG. Frontex, in its internal note from November 2020, acknowledges that an “[i]ncident reported as a prevention of departure **corresponds with the timing, location and number of migrants in a claimed pushback incident**”, **both the Portugese *Nortada* and the Romanian vessels “have been in the area”, and in one of the videos “you can see ROU CPV 1103 [the Romanian vessel-O.S.] close to a migrant dinghy in a matching location and time of the day”** – “no suspicious incidents have been reported”, “the situation on the video is passive”, the Romanian vessel “pass a migrant dinghy on a **moderate** speed”, and the HCG vessel is described as “assisting” the ‘migrant’ boat.<sup>165</sup>

150. In its internal note from November 2020 Frontex concludes that “[t]he claimed active involvement of the Frontex assets nor the pushback itself cannot be confirmed” because the “videos do not show the full data (**such as dates**) or **the whole context** and the pictures presented on locations of assets and dinghies are only presumable based on what **cannot be confirmed** from the article only.”<sup>166</sup>

151. How can the MB’s note confirm the claimed time matches the agency’s data and, at the same time, determine that they do not have the full data, “such as dates”? How can the MB’s note confirm the claimed location matches the Agency’s information on the location of the assets and then argue that the “locations of assets...are only presumable”?

152. As opposed to the WG, it appears that in **November 2020** the Agency was at least willing to watch the videos. However, it would seem that they watched different videos than the ones obtained by the investigative journalists. In the Agency’s imaginary videos, the situation is ‘passive’, no one blocks the dinghy, no one is conversing with those on board the dinghy, and the dangerous maneuver is classified as ‘moderate speed’ and does not intentionally generate

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<sup>165</sup> Supra, note 36, page 15

<sup>166</sup> Ibid

risk for the miserable dinghy. The honorable judges have discerning eyes, and we leave it to their interpretation.

#### 3.4.9 The 15 August 2020 Incident–Frontex Vessel On the Scene of a Collective Expulsion Operation

153. The Bellingcat investigation of this incident obtained videos showing an engine without a starter cord, claiming it had been taken by the HCG. Disabling the motor of ‘migrant’ dinghies has reportedly been a known HCG tactic. In this case, however, a Romanian-Frontex vessel is seen within visual range of the... dinghy itself.”<sup>167</sup>

154. Here too, the WG’s Preliminary Report identified a corresponding incident in terms of date, time, location, and number of victims. According to the WG, **the Frontex-Romanian vessel ‘early detected’ a rubber boat** with approximately 30 people at the sea area North of Lesbos, **inside TTW [Turkish Territorial Waters- O.S.]**<sup>168</sup>. Examining the geographical coordinates in the Frontex-Romanian vessel’s mission report, the WG determines that “...the migrant **boat was clearly inside Turkish Territorial Waters near the Turkish Coast when it was detected by a Frontex unit... and never entered Greek Territorial Waters**...the incident was not classified as a Search and Rescue case and reported as a “*Prevention of Departure*” ...<sup>169</sup>

155. As with the previous cases, the Agency’s internal note, drafted two months before the WG Preliminary Report, completely contradicts the findings of the WG: “The Mission report of the ROU CPV 1102 presents the interception location of the HCG vessel and the dinghy **very close to the borderline, seemingly inside of the Greek Territorial Waters**, and describes HCG vessel to have taken “measures according to the *national instruction* for border surveillance.”<sup>170</sup>

156. *Contrary* to the findings of the WG, the ‘migrant’ boat did not alter its course on its own toward Turkish coast when sighting the Frontex Romanian Vessel. *Contrary* to the finding of the WG, the ‘migrant boat’ did enter Greek Territorial Waters. The HCG *did* ‘interact’ with the ‘migrant boat’. Perhaps the Frontex Romanian vessel also did, but there were “uncertainties” regarding its whereabouts and deeds. When examining the prevalent falsities and contradictions, it appears that the only profoundly true sentence in the WG’s preliminary report is: “*Frontex acted accordingly to its current reporting mechanism*”.

157. In the above **four ‘proximity’ incidents**, Frontex vessels were within a proximity of **1-5km** to the ‘pushback’ operations. It is impossible **not to detect** their occurrence with assets on **surveillance mission**, equipped with the most sophisticated equipment available, and the distinct signature of ‘pushback’ operations involving large HCG and TCG vessels. The well-established pattern of non-submission of SIRs among officers participating in Frontex Joint Operations, that is, the culture of **monitoring with no reporting**, explains the four ‘proximity incidents.

158. In the above **two ‘active participation’ incidents**, the awareness of Frontex assets and crews is no longer in dispute. What is in dispute is the extent to which Frontex assets were directly engaged and facilitated the collective expulsion. The transparent efforts of the Agency and its WG to conceal and distort information pertinent to these two incidents themselves constitute evidence for the Agency’s complicity in these operations.

159. Given the poor track record of Frontex in setting up and maintaining an effective internal reporting and monitoring system, it is unsurprising that, **out of six well-documented illegal operations, zero SIRs were registered.**

#### 3.4.10 The 18-19 April 2020 Incident – Frontex HQ Jointly Operating a Collective Expulsion

160. Five SIRs were registered in relation to violations of fundamental rights and international protection obligation related to Frontex’s activities in the ASR between March and

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<sup>167</sup> Supra, note 110

<sup>168</sup> Supra, note 74 pages 14-15

<sup>169</sup> Ibid

<sup>170</sup> Supra, note 36, pages 15-18

December 2020.<sup>171</sup> Inquiring into this matter, the European Parliament, to which the Agency is accountable<sup>172</sup>, was fooled by ED Leggeri during his Parliamentary hearings. As mentioned above, during the EP hearing of **6 July 2020**, ED Leggeri stated that the **2 March 2020** incident was ‘**the only case**’,<sup>173</sup> while being aware of (at least) the pushback of **18-19 April 2020**, for which a **SIR was issued**, as ED Leggeri himself revealed during the EP hearing of **1 December 2020**:

“...we were able to **detect autonomously** two suspicious situations that I reported to Greek authorities. The first... from **the 18th to the 19th of April, a SIR was issued**, Frontex surveillance flight let’s say spotted, and **we have live streaming so we can from the headquarters in Warsaw** also see... we detected a suspicious situation [...] **I was reported this because it was a SIR...** I decided to escalate this... to the Greek minister... **my letter was signed on the 8th of May and his reply was dated 10th of July...** a very strange situation, suspicion that perhaps **something was wrong regarding fundamental rights...**”<sup>174</sup>

161. ED Leggeri *also* lied to the EP when he stated that “**there was no Frontex flight on that night**” of the **28-29 April 2020** incident. As detailed above, months before the WG had failed to establish or disclose the ‘true’ facts pertaining to the reported Frontex Surveillance Flight on the night of **29 April 2020**, the Agency *internally* reported to its MB that “**the media reflected on the two overflights of the FSA in the area and timings are matching with the conducted patrolling flights.**”<sup>175</sup>

162. It is also telling that a ‘live-streamed’ operation – during which **22 asylum seekers** were collectively expelled and unfolded in the **ASR for hours** – was not communicated to the host Member State *in real-time*, nor was there an attempt to prevent an unfolding crime. Not even minimal necessary measures – required by the Agency’s positive obligations vis-à-vis 22 human being whose lives were at risk – were taken to positively influence this series of events.

163. Instead, a letter was sent. It was sent **20 days after** the serious incident, to which Greece responded circa **two months later**. In the meantime, no measures under Art. 46 EBCG Regulation were taken. No financing was withdrawn, the collaboration was not suspended, not for even a single day – two simple, gradual, and moderate measures enshrined in the Agency’s founding regulation, providing concrete content for its positive obligations under the CFR.

164. The **18-19 April 2020** incident is *the* case the Court should consider as the facts are not in dispute: all information on this event was provided by Frontex and reported by its Executive Director.

165. Serious breaches of, *inter alia*, prohibitions on collective expulsions and *refoulement*, and the right to life – along with the Greek authorities’ dismissal of complaints and consistent denial of their involvement altogether, despite the abundance of evidence to the contrary<sup>176</sup> – was met merely with the act of drafting a letter. Such an act is not only a failure to respond to the breach but is also part of a continued breach of the Agency’s positive obligations.

166. During the many hours of this ongoing and live-streamed collective expulsion, a Frontex Surveillance Aircraft (FSA) was ordered by the HCG to deviate from its usual route so that no

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<sup>171</sup> Supra, note 47

<sup>172</sup> EBCG Regulation, supra note 45, art. 6.

<sup>173</sup> Supra, note 37 (18:35:29 – 18:35:42) (““So, I’m just sharing with you the Parliament what was reported to me and this was the only case within the implementation of the operational plan rapid border intervention Aegean or Poseidon Operation””

<sup>174</sup> Supra., note 40 (14:03:45–14:06:35).

<sup>175</sup> Supra, note 36

<sup>176</sup> CNN Live, Interview of Prime Minister Mitsotakis by Christiane Amampour, ‘Greek PM Mitsotakis Categorically Denies New York Times Story’, The Pappas Post, YouTube, available at: <https://tinyurl.com/49vx255r>

evidence of the event would be recorded. When the pilot sceptically inquired if there is a reason for the unusual order, he was answered with a conclusive “negative”.<sup>177</sup>

167. **The problem was that the Frontex aircraft had already taken a picture of the HCG vessel towing the rubber boat with intercepted persons on board. The Frontex aircraft reported the rubber boat – to which the asylees were forcibly re-transferred from the Greek vessel – had no engine.**<sup>178</sup> The Frontex aircraft then reported that the asylees were abandoned by the Greek forces in the middle of the sea, in Turkish Territorial Waters.

168. Being aware they were witnessing the potential attempted murder of 22 human beings, Frontex HQ proposed to the HCG to divert FSA in order to check on the rubber boat. But HCG replied: “Negative. FSA will continue its normal route”<sup>179</sup>.

169. Once again, both the preliminary and final WG report reveals not only a failure to report and investigate, but rather the manner in which Frontex’s reporting and investigatory mechanisms are used to systematically cover-up a widespread policy of unlawful ‘tactics’ in grave breach of international and EU law.

170. According to the WG Preliminary Report, it was Greece that informed Frontex of the incident, and it was the HCG that asked its FSA to reach the incident.<sup>180</sup> By contrast, according to EG Leggeri and the WG Final Report, the FSA autonomously detected the incident.<sup>181</sup> In any event, flying over the area was indeed sufficient identify and observe the distinct signature of such incident.

171. The “assumption” that the presence of the FSA over the area is sufficient to observe a pushback operation is confirmed both by the ED and the WG. This assumption, that similar asset must have detected but failed to report, was nonchalantly dismissed by the Agency on November 2020 in relation to the **28-29 April 2020** incident.<sup>182</sup> This very same assumption is, however, confirmed with the **18-19 April 2020** incident.

172. In that, we believe the Preliminary Report. In the **18-19 April 2020** incident, Frontex FSA was ordered by Greece’s HCG to fly over the incident. The FSA did “report and described” such a ‘migration incident’, since it was formally asked by the HCG “to reach the point.”<sup>183</sup> Because this was a formal request by the host Member State, which must have left traces on the records, Frontex had no choice but to document the incident in a SIR. In the late version, ‘autonomous detection’ is intended to cover up the full complicity between Frontex and the HCG, which are acting, intentionally and in concert, to execute the new policy of **1 March 2020**. By contrast, the **28-29 April 2020** incident was detected autonomously by Frontex FSA. Because it was not preceded by a formal request that would have been registered with the Greek authorities, there was no need for the detection to be followed by a report, let alone a formal SIR.

173. The WG Preliminary Report also notes that “[d]espite Frontex final SIR, that there might have been a **distress situation**, the incident was **at no point classified as a Search and Rescue (SAR) case** by the responsible Hellenic Coast Guard... Frontex... communicated that the rubber **boat had no engine** and it was adrift... Greek assets left the area **leaving the rubber boat adrift**”<sup>184</sup>.

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<sup>177</sup> Supra, note 47, pages 6-8 (“to fly northbound for the remaining 30min of flight”. When Frontex Headquarters asked the HCG whether “there was *any specific reason* to fly north, the reply from HCG Sea Border Expert was “*negative*”.”)

<sup>178</sup> Ibid

<sup>179</sup> Ibid

<sup>180</sup> Supra, note 74

<sup>181</sup> Supra., note 37 (14:03:45–14:06:35) (“...Frontex surveillance flight let’s say spotted...”); Supra, note 47, page 6 (“distorting adaptation when it states: “In the night of 18 April 2020, a Frontex Surveillance Aircraft observed a rubber boat in Greek Territorial waters.”)

<sup>182</sup> Supra, note 36, page 13 (“Accusations only assume that the PRT CPB should have observed the claimed incident at sea”).

<sup>183</sup> Supra, note 74, page 6

<sup>184</sup> Ibid, page 7.

174. The WG Final Report, despite the facts, nonetheless notes that, according to Greece, the **boat was sea-worthy**.<sup>185</sup> Greece also submits that the 20-30 asylum seekers on board had been given the opportunity to seek asylum but, unfortunately, everyone changed their mind and no longer wished to do so. This last point was too much even for a partial and incompetent body such as the WG: “it remains unclear what exactly happened after the migrants were retransferred on the rubber boat. Hence, it **cannot be ruled out completely** that there might have been a **violation of international legal obligations**... it is not clear whether the Agency **could have deployed additional efforts to make sure** that the reported course of actions did not result in a serious violation of fundamental rights or of international protection obligations related to the Agency’s activities.”<sup>186</sup>

175. However, with respect to this undisputed case – in which Frontex is aware, in real time, of a serious violation of international protection and fundamental rights obligations that was slowly unfolding for hours – the WG found that sending a letter two weeks later, seeking “clarifications”, was the reasonable measure to take, and that Frontex has complied with its due diligence obligation: “[T]he Working Group **welcomes** the measures taken by the Agency after the incident was examined, **namely addressing an official letter** to the Hellenic Coast Guard, requesting to launch an internal investigation...”<sup>187</sup>

176. The WG had no interest in the response of the Greek Minister to Leggeri’s letter. What if he responded by reminding ED Leggeri this incident is only one out of many, part of a widespread and systematic attack directed against civilian population, pursuant to Frontex and Greece new policy, officially decided by the KYSEA decision on 1 March 2020, to stem migration at all costs and specifically through tactics that amount to crimes against humanity of deportation, persecution and other inhuman acts? We will never know.<sup>188</sup>

177. 22 human beings at immanent risk for their lives, with no means of navigation, no food or water, on a rubber boat with no engine, alone at sea, for hours. A letter, two weeks later, with no mention of what the response was. The question of “whether the Agency could have deployed additional efforts”, according to the WG, hinges on evidence that they do not have. What factual evidence is needed to legally determine whether the involved Frontex agents should have intervened to prevent an unfolding crime?

#### 3.4.11 The 27 July 2020 Incident – Danish-Frontex Helicopter Witnessing Collective Expulsion is Ordered by the HCG to Forge the Coordinates of the Incident

178. On the EP hearing of **1 December 2020**, ED Leggeri reported on two SIRs. The first is connected to the **18-19 April 2020** incident. The second regards the **30 October 2020** incident, which took place in Greek waters but was intentionally misclassified as ‘*prevention of entry*’<sup>189</sup> and resulted in a SIR<sup>190</sup> that was, strangely, left ‘pending’ when the WG published its final report.<sup>191</sup> On top of these two incidents, ED Leggeri also mentions a ‘*half*’ SIR that he feels the time is right to disclose: “...there was in July a Danish helicopter pilot **who issued or wanted to issue** a SIR, then we heard about this, we were informed[...] the Danish pilot of this helicopter **wanted to issue a SIR**... so the one that has the command in Piraeus, they had a **discussion... whether it’s worth or not to issue a SIR**, but the Agency was informed, the headquarters were informed, **and my decision was to sign a letter** to the commander of the HCG to ask him what is this.”<sup>192</sup>

179. The reluctance of the Danish helicopter pilot to issue a SIR – when it would have been appropriate to do exactly that – or the external pressure the pilot was under to refrain from doing

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<sup>185</sup> Supra, note 47, page 7

<sup>186</sup> Supra, note 74, page 8

<sup>187</sup> Ibid, page 8

<sup>188</sup> Supra, note 47, page 11

<sup>189</sup> Ibid

<sup>190</sup> Supra, note 40, (14:01:10 – 14:01:19).

<sup>191</sup> Supra, note 47, page 11

<sup>192</sup> Supra, note 40 (14:00:57 – 14:01:12; 14:06:47 – 14:07:25).

so, both evidence the ‘retaliation’ and ‘current culture’ mentioned by the Agency’s FRO and Commissioner Johansson, making it clear why so few SIRs have been issued.

180. Once again, it is the WG Preliminary Report that reveals significant information that was already at ED Leggeri’s disposal at the time of the hearing but was not disclosed to the EP. **Contrary to Leggeri’s statements to the Parliament, a SIR on the 27 July 2020 incident was issued after all.**<sup>193</sup> The preliminary report reads as follows: “...Danish Helicopter deployed to JO Poseidon 2020 detected... **inside Greek Territorial Waters** a rubber boat with people on board. After the detection, the boat was intercepted by a Hellenic Coast Guard Patrol boat... **According to the mission report of the Danish helicopter, the Hellenic Coast Guard vessel passed the rubber boat at relative high speed while the rubber boat was laying still, which was recorded by a Danish helicopter**... a communication between the Danish helicopter and the Hellenic Coast Guard... in which **the Coordinator asked to change the reported coordinates of the incident, in order to indicate that the incident took place outside Greek Territorial Waters**. This request was refused by the Danish detachment. According to the DNK mission report, **the request... to change the reported coordinates of the incident was not a case of misunderstanding**. After receiving... those accusations, the ICC Piraeus referred to a misunderstanding...”<sup>194</sup>

181. Although this incident was still *pending*, the WG Final Report is rushed to conclude that it is impossible to *clarify* it. The WG finds it difficult to resolve the contradiction between the Danish Officer and the Greek authorities, although the latter have been repeatedly found ‘inconsistent’ in categorizing incidents inside Greek Territorial Waters as ‘*Prevention of Departure*’ incidents.<sup>195</sup> An investigative body should know how to pass judgment at least on the factual turn of events. A request by the Host Member State to alter official records, with the aim of covering up serious breaches of international law, should suffice to withdraw the financing or to suspend Frontex’s activities in connection with that Host Member State.

#### **3.4.12 Conclusion: Serious and Persistent Violations of Fundamental Rights and International Protection Obligations Related to Frontex’s Activities in the ASR**

182. Without any justification, the Frontex Management Board WG has **declined to investigate** the Greek order to Danish-Frontex agents to collectively expel and abandon 33 rescued asylum seekers at sea on **2 March 2020**. The WG also *declined* to investigate 3 out of the 4 ‘proximity’ incidents, i.e., serious breaches taking place when assets of Frontex were participating or present within a 1-5 km radius. The latter failure is further substantiated by the fact that the Management Board confirmed in an internal note that the location and times of these 3 reported incidents match the exact location and times the identified Frontex-asset performed their activities.

183. The same goes for the 4<sup>th</sup> ‘proximity’ incident of **28-29 April 2020**: The Agency’s internal note confirms that the FSA patrolled the area of the reported incident, but the MB-WG failed to establish even the basic facts, which were in the possession of the MB itself – thus, failing to investigate even this singular incident.

184. Taking into account the Agency’s organizational culture of concealment and retaliation against officers who wish to comply with their reporting duties, its illusory reporting and monitoring systems, the *surveillance* equipment and tasks assigned to Frontex, and, of course, the abundance of external and objective evidence provided by the Bellingcat investigating, it is well beyond the required standard of proof that Frontex assets were aware of the pushback operations taking place in the proximity and simply did not report them.

185. With regard to **two** well-documented *active incidents* reported by the Bellingcat investigation, where a Frontex vessel was directly participating in one pushback operation of 47 asylum seekers and was present at the scene of the other, the WG **declined to examine** the incriminating evidence provided by Bellingcat, and distorted or ignored information the MB

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<sup>193</sup> SIR 11860/2020

<sup>194</sup> Supra, note 74, page 11

<sup>195</sup> Supra, note 47, page 8.



possessed internally, only to then rely on “the limited data available” to conclude that “there is no evidence” of any infringement, and subsequently closing or ‘clearing’ the cases.

186. The WG also examined **13 allegations of pushback operations** that were not reported by the Bellingcat investigation. It has ‘resolved’ 8 of them. Relying on information provided by the HCG – which has falsified coordinates and was found to be ‘inconsistent’ in other cases – the WG dismissed 6 incidents because they “*took place entirely in Turkish Territorial Waters*”<sup>196</sup>, even though fundamental rights obligations *related* to the activities of Frontex are not ‘geographically’ limited.

187. In relation to the remaining 5 incidents, the WG concluded that “**it has not been possible to completely resolve the incidents beyond any reasonable doubt**’. It has also stated that the “deficits and the need for improvement of the reporting and monitoring system have already been described in the preliminary report. **These shortcomings lead, *inter alia*, to the outcome that the Working Group was not able to completely clarify the five further examined incidents.**”<sup>197</sup>

188. Should Frontex be exonerated from responsibility for failing to act vis-à-vis serious breaches of international protection obligations because its ‘current reporting and monitoring mechanism’ is designed to avoid formal awareness of international protection obligation?

189. The evidentiary standard of ‘*beyond any reasonable doubt*’, pertaining to criminal proceedings, and being randomly applied by the WG, is suitable for Hollywood but not for administrative procedures related to the protection of fundamental rights. Applying the highest evidentiary standard of *beyond any reasonable doubt* means a violation of fundamental rights will be never established.

190. While grave breaches of international law may certainly qualify as crimes, the WG is not a criminal court: nearly none of its members have any legal training, no prosecutor has appeared before the WG, no exhibits were submitted, no testimonies were heard, no cross examinations took place. Applying the highest criminal standard of proof, without providing the process and means to do so, is yet further evidence for the structural inability and unwillingness of Frontex to comply with its founding regulation in a flagrant breach of the treaties.

191. Through this dense filter, no allegation of fundamental rights violation could ever seep through. Marko Gašperlin, Frontex Management Board Chairperson, made it clear during his parliamentary hearing that the notion of ‘*beyond any reasonable doubt*’ indeed governs the Agency’s monitoring methods related to the protection of fundamental rights: “The problem of the WG was that they could not **without any doubt** identify in several cases what was the case what was the situation and some statements were contradictory”<sup>198</sup>.

192. The Applicants, and thousands of other silent, anonymous victims, are seeking judicial review and effective remedy from the honorable Court, based on EU law. To the extent the grave crimes committed against them will not be genuinely adjudicated, there are other tribunals and proceedings where Frontex officials could be tried and convicted beyond reasonable doubt.

193. Another curious anomaly in the WG’s “working methods” concerns the “several experts, including the **Agency’s Executive Director, who participated** in the online consultations”<sup>199</sup>. Professional and impartial investigative body committed to *due process* would not invite a key suspect to serve as an ‘expert’. The Frontex Chairperson felt compelled to deny the unambiguous statement of the WG: “Regarding to the involvement of the Executive Director in this, so called, investigation... Executive Director **was not involved**, he was only invited to present the statements...”<sup>200</sup>

194. Notwithstanding the evident partiality of the Management Board Working Group; its unwillingness to examine documented ‘pushback’ operations revealed during parliamentary

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<sup>196</sup> Supra, note 47, page 4

<sup>197</sup> Ibid, page 13

<sup>198</sup> Supra, note 90, 14:25 – 14:26:30

<sup>199</sup> Supra, note 47, page 5

<sup>200</sup> Supra, note 90, 14:55:00 – 14:55:30

hearings or reported by the Bellingcat investigation; its incapability to obtain relevant information and gather evidence and analyse it; its reluctance to take a position regarding contradicting versions, also when Greece's version was found to be 'inconsistent'; its acceptance of the Greek authorities' proposal – that individual assessments are conducted while 'migrants' are being towed or forcibly transferred to 'life' rafts and then abandoned in Turkish Territorial water – as 'plausible', and that, out of the thousands individuals collectively expelled, **“no claims for asylum or international protection were brought forward, even though such an opportunity was provided”**;<sup>201</sup> and its absurd use of evidentiary standard pertaining to criminal proceedings when conducting an administrative procedure.

195. Despite these and other regrettable features of the WG, the WG could not exonerate Frontex from all allegations. Remarkably, even after applying the highest existing evidentiary threshold reserved to criminal law, the WG failed to reject allegation regarding no less than five cases of serious violations of fundamental rights and international protection obligations. The WG Final Report was submitted on **1 March 2021**, concluding that, in relation to no less than **five cases** of pushback operations related to the Agency's activities in the ASR, it **“has not been possible to completely resolve the incidents beyond any reasonable doubt”**.

196. What happened to the five cases that remained open? An unknown Frontex body or person, other than the WG of course, 'cleared' 4 out of the 5 cases the body that was assigned for the task failed to do. In a strange coincidence, the 4 cases were closed on **15 March 2021**, the very same day, and just before, the Chairperson of the Management Board Marko Gašperlin was publicly questioned before the European Parliament: “Regarding to the, **this morning**, yes, we have the meeting of the Executive Board, and we were **informed by the Executive Director** that the four pending serious incidents were cleared, so **we will ask him** for the information and that only one is still open”<sup>202</sup>; “Regarding the SIR I can, unfortunately I can't answer which is still open, it was **just mentioned this morning** that 4 are **somehow** close and that 1 is still pending.”<sup>203</sup>

197. *Somehow*, 4 out of the 5 cases the WG has not been able to *clear*, and not because it did not try hard enough – were closed. *Someone*, the Chair of the MB sees the fingerprints of the ED Leggeri, took care of that too.

198. We believe that from a case-by-case basis examination, as detailed above, emerges a clear, convincing picture of persisting and serious violations of both fundamental rights and international protection obligations, related to activities of Frontex in the Aegean Sea Region, under Article 46 (4) of the EBCG Regulation. Each of the examined infringements occurred before the time at which we called upon the Agency to act, pursuant to Article 265 TFEU. Therefore, the Agency was under the obligation to either withdraw financing, or to suspend or terminate its operations in the Aegean Sea in compliance with its positive obligations to take any reasonable measure to guarantee the protection of fundamental rights. By neglecting to take any of the measures prescribed in Article 46 of its founding regulation, the Agency has failed to act.

199. It is impossible that all of the incidents analysed above can be attributed solely to the Host Member State, be it Hungary or Greece. Nor can it be limited to a single Home Member State, be it Denmark, Sweden or Germany, Portugal or Romania. The fact that the complicity in the unlawful conduct conforms to a similar pattern, irrespective of the Home or Host Member State participants, indicates the failure is intrinsic and structural within Frontex itself, its failed management, and, above all, its Executive Director.

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<sup>201</sup> Supra, note 74

<sup>202</sup> Supra, note 90, 14:40:06 – 14:40:29

<sup>203</sup> Ibid, 15:12:30 – 15:12:48

#### 4. NORMATIVE FRAMEWORK: FAILURE TO COMPLY WITH FUNDAMENTAL RIGHTS AND INTERNATIONAL PROTECTION OBLIGATIONS WITHIN THE MEANING OF ART. 46 EBCG REGULATION

*“the Hellenic Police is systematically supporting the implementation of Frontex Joint Operations”*

– The Government of Greece, May 2021<sup>204</sup>

##### 4.1 The Charter of Fundamental Rights & Frontex Regulation

200. Frontex is bound by EU fundamental rights law and, in particular, the Charter of Fundamental Rights (CFR). The following rights are predominantly put in peril during Frontex’s everyday border control activities and are breached in the present case: the right to life, the right to asylum, the prohibition of torture and inhuman or degrading treatment, the prohibition of *refoulement* and the prohibition of collective expulsions.<sup>205</sup>

201. Frontex is obliged to comply, by action or *omission*, with its *negative* obligations under the CFR to respect fundamental rights. Frontex is in systematic and ongoing breach of this obligation *structurally* – based on the established division of labour and tasks assigned to its agents and assets in the execution of the unlawful State policy implemented in the ASR since **March 2020** – as well as its direct participation in some pushback operations, as described in the above-mentioned incidents.

202. Frontex is obliged to comply, by action or omission, with its *positive* obligations. Namely, to protect individuals from fundamental rights violations of which it knows or should know about, including at the hands of its counterparts to the *joint* operations, i.e., Greece and particularly the HCG, by taking all reasonable measures..<sup>206</sup>

203. Frontex’s positive obligations to guarantee the protection of fundamental rights in the performance of its tasks are reiterated in its founding Regulation:<sup>207</sup> The Frontex Regulation stipulates a specific set of obligations concerning the protection of fundamental rights, such as *monitoring* and *reporting* obligations regarding the proper *implementation* of the Operational Plan – including in relation to the protection of fundamental rights;<sup>208</sup> specific reporting obligations, mainly through the Coordinating Officer, where instructions issued by the host Member State are not in compliance with the Operational Plan – particularly regarding fundamental rights and, where appropriate, the *coordinating* officer shall suggest the ED to take a decision **in accordance with Article 46;**<sup>209</sup> **obligation of the ED to refrain from launching any activity that could be related to violations of fundamental rights or international protection obligations of a serious nature.**<sup>210</sup>

##### 4.2 Unable to Acknowledge Facts: Frontex Fails to Comply with Article 46(4) EBCG

204. A cornerstone of the Agency’s positive obligations relating to the protection of fundamental rights, is provided in **Art. 46 of EBCG Regulation**: *“The executive director shall, after consulting the fundamental rights officer and informing the Member State concerned,*

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<sup>204</sup> Letter from Greek Ministers of Citizen Protection, Migration and Asylum, and Maritime Policy and Insular Affairs, dated 11 May 2021, in response to allegations of ‘pushbacks’ by the Human Rights Commissioner of the Council of Europe; <https://tinyurl.com/dtyjtvfe>

<sup>205</sup> Article 2, 18, 4, 19, 19(1) of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (Treaty of Lisbon) <http://data.europa.eu/eli/treaty/lis/sign>

<sup>206</sup> Article 53 (3) CFR requires EU law to guarantee the same level of protection as the ECHR, which in turn imposes positive obligations.

<sup>207</sup> Supra, note 45, art. 80.

<sup>208</sup> EBCG Regulation, supra note 45, art. 44 (3) (b); for the fulfilment of the abovementioned monitoring and reporting obligations, the Coordinating Officer shall cooperate with the fundamental rights monitors, who according to art. 110 (6) were required to be recruited by 5 December 2020. However, the Agency has failed to comply with that requirement and the fundamental rights monitors are yet not operative, which inherently hamper the Agency’s capability to observe this and other of its fundamental rights obligations.

<sup>209</sup> EBCG Regulation, supra note 45, art. 44(3)(d).

<sup>210</sup> EBCG Regulation, supra note 45, art. 46 (5).

*withdraw the financing for any activity by the Agency, or suspend or terminate any activity by the Agency, in whole or in part, if he or she considers that there are violations of fundamental rights or international protection obligations related to the activity concerned that are of a serious nature or are likely to persist.”*

205. Insofar as the occurrence of serious *or* persisting violations of fundamental rights *or* international protection obligations that are related to the activities of Frontex is established, the ED is *obliged* (‘shall’) to adopt at least one of the proportionate measures provided for in art. 46(4) of EBCG Regulation. The ED has no discretion whether to take a measure or not when the conditions for the application of Art. 46 are fulfilled. His discretion revolves not around the ‘if’ but the ‘what’. His discretion is limited to decide *which* measure to adopt among the number of gradual measures provided in Art. 46, and the *extent* of the chosen measure (‘whole or in part’).

206. It is true that, in fulfilling its positive obligations to guarantee the protection of fundamental rights, the Agency is not limited to take one or more of the specific measures reiterated in its founding regulation. Rather, it is under the obligation to take *all* reasonable measures to prevent infringements related to its activities, of which it knows or should know. The assessment of the measures adopted by the Agency is dependent on the circumstances of the particular case at hand. The choice of measures should be based on reasonableness, sufficiency and appropriateness vis-à-vis the considered risks and violations.

207. However, given the extremely limited ‘normative’ means at the disposal of the Agency to effectively guarantee protection of fundamental rights, and – in light of the limited degree of authority, control and discretion Frontex has in *modus operandi* of ‘joint’ conduct – the Agency simply cannot disregard the most efficient means to fulfil its positive obligation to protect fundamental rights, which is derived directly from its founding regulation.

208. This is especially so, considering Frontex’s traditional stance regarding fundamental rights responsibilities during its joint operations, locating them mainly with the host Member State, whose officers were exclusively assigned with executive powers up until 1 January 2021<sup>211</sup>.

209. In an operational scenario, where multiple parties are acting in jointly, the positive obligations of the Agency as EU Agency often comes down to what the legislator under EU law prescribed in its Regulation.

210. It is not by mistake that the Agency’s Executive Director, in response to our preliminary request pursuant to article 265 TFEU, bothered to mention the ‘rules concerning instructions by the host Member State to the members of the teams’<sup>212</sup>, with a view to attributing fundamental rights responsibilities solely to the host Member State while excusing itself from such. On virtually every occasion in which the Agency had to respond to allegations of fundamental rights violations related to its activities, Frontex emphasizes that instructions on the ground are issued exclusively by the host Member State, and that it denies ‘any involvement of *its* officers in violation of fundamental rights’<sup>213</sup>.

211. The factual and legal (in)accuracy of this kind of statements aside, this position represents a fundamental misunderstanding of the nature of positive obligations. The organs and officers of Frontex are under a *negative* obligation to refrain from violating fundamental rights, even under the orders of the host Member State.

212. But the positive obligation under which the organs and agents of Frontex refers to the duty to take all reasonable measures to prevent also *others*, by action or omission, from violating fundamental rights during the Agency’s activities. The other actors in this case may be either organs and agents of its counterpart to the joint operation, i.e., the host member state Greece, and the participating officers from other Member States who are deployed to the Agency.

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<sup>211</sup> EBCG Regulation, supra note 45, art. 54 and 123(3).

<sup>212</sup> Letter from the Executive Director, 23 March 2021, annexed and marked ANNEX 3

<sup>213</sup> See, e.g., <https://twitter.com/frontex/status/1158393650356920322?lang=en>

213. It follows that – even if none of the Frontex deployed assets was directly involved in infringements, and notwithstanding the fact executive powers are mainly assigned to the host Member State’s personnel – the relevant question is whether there are serious or persisting fundamental rights violations related to the activities of the Agency.

214. Had it been otherwise, the legislator would not have emphasized that the unlawful conduct is *related* to the Agency rather than resulting from its activities. The choice of wording is expansive, and had the legislator wanted to limit the scope of the violation to the activity of the Agency itself, he would have done so.

215. The awareness of Frontex to the existence of such violations, irrespective of the direct or indirect involvement of Frontex personnel, are the *only* determining factors in the assessment of the Agency’s compliance with its positive obligations.

216. The Agency cannot simply with one hand absolve itself from fundamental rights responsibilities by arguing it does not exercise effective control over the conduct of the participating units of the home and host member states, and with the other hand to completely neglect the designated means at its disposal with which it could nonetheless positively affect the conduct and compliance of the national officers.

217. Accepting this kind of legal interpretation turns concrete obligation to act, in accordance with the Agency’s positive obligation reiterated in Art. 46, into a dead letter that.

218. The positive obligations of Frontex are the common strand in all operational circumstances and chronological stages that may trigger article 46. Throughout the various provisions of Article 46, the positive obligations to prevent and protect are echoed in the interplay between the discretionary scope of the Executive Director (may/shall) and the scope of means at his disposal (withdrawal of funding, temporary suspension and termination).

219. Article 46 presents a threefold normative framework. In the case of ‘simple’ incompliance of the Host member state with the Operational Plan, the discretionary scope of the ED is fairly wide: (s)he can decide whether or not to take action (‘may’), and he can choose which measure would be appropriate to adopt (Art. 46(3)); when serious or persistent violations of fundamental rights are at stake, by contrast, the discretionary scope of the ED is dramatically narrower. On one hand, in line with the general concept of positive duties, the violation is not limited to the Host Member State but can be attributed to any actor whose conduct is related to the activities of Frontex. On the other hand, the ED has no discretion on whether taking a measure (‘shall’) and can only choose between the means that correspond to the risk. Finally, in case the ED finds that the conditions to conduct the activity are not fulfilled, the ED has no discretion at all: not on the application nor the choice of the measure to be applied to the situation: the ED shall terminate the activity.<sup>214</sup>

220. In order to assess whether Frontex took all reasonable measures to comply with its positive obligations to guarantee the protection of fundamental rights in a specific situation, an examination should depart from the applicability and proper implementation of the measures explicitly stipulated in its founding Regulation, such as the ones prescribed by Art. 46, through which the agency may exercise factual – sometimes decisive – influence over the conduct of national officers participating in its joint operations.

221. *First*, when the ED needs to assess whether the launching of an activity of the agency ‘could lead to violations of fundamental rights or international protection obligations of a serious nature’, this assessment is not dependent on the conduct of its own officers, who are naturally not yet operational, but on the situation and the conduct of others. If the conclusion of this assessment is positive, the ED *shall* decide not to launch the said activity. Insofar as the ED took a manifestly unreasonable decision to launch a joint operation, neglecting to consider the surrounding human rights situation despite compelling reasons to do so, then Frontex has failed to act in compliance with its founding regulation, which reiterate its positive obligations to

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<sup>214</sup> Supra, note 45, Article 46(1)

prevent the commission of, and protect the victims from, fundamental rights risks it either *was* aware of or *should have been* aware of.<sup>215</sup>

222. *Second*, the Agency's Executive Director, together with the host Member State, draft and adopt the *legally binding* operational plan for each and every joint operation. It goes without saying that infringements of fundamental rights could not be inherent to the operational plan. To the contrary, international protection obligations are implicitly enshrined in the operational plan. At times, as is the case with RBI Aegean, they are explicitly stipulated in the Operational Plan.<sup>216</sup> In order to comply with its positive obligations, Frontex needs to establish in the operational plan monitoring and reporting mechanisms enabling it to gain knowledge of fundamental rights violations related to the concerned activity. If it fails to establish effective monitoring and reporting mechanisms to begin with, such omission would constitute another failure to act under its founding regulation, mirroring the Agency's positive obligations.

223. *Third*, the Agency guides, trains, supervises, and monitors the Member States' implementation of the Operational Plan, including compliance with fundamental rights obligations; conducts research and risk analysis; is exclusively assigned with a coordinating role; the Agency may communicate its views to the host Member State through its Coordinating Officer, who is always present on the ground. The host Member State, in turn, is obliged to at least consider the views of the Agency.

224. ***Lastly, the ED shall withdraw the financing, suspend, or terminate any activity – in whole or in part – if he or she ‘considers that there are violations of fundamental rights or international protection obligations related to the activity concerned that are of a serious nature or are likely to persist’***<sup>217</sup>. Again, the ED's margin of discretion is limited to deciding *how* to react, not *if* to react. For the purpose of the application at hand, by not taking any of the measures requested by the applicants in the preliminary notice, by not even considering their applicability and consequently not providing a reasoned justification why it did not do so, the agency would be in a state of failure to act in accordance with its obligations under its founding regulation, reiterating its positive obligations.

225. Between the launch and termination of a Joint Operation, the EBCG Regulation prescribes several instruments through which the Agency is able to influence the conduct of the participating units and, through their proper implementation, to comply with its positive obligations to guarantee the protection of fundamental rights during its activities. Between these two critical points, the Agency's failure to comply with its supervisory, monitoring, and reporting obligations may constitute, individually, a serious breach of Frontex's positive obligations concerning the protection of fundamental rights.

226. Yet, structural deficiencies in the design and/or implementation of the Agency's monitoring and reporting systems are also deeply intertwined with the Agency's ability to eventually apply the most efficient measures at its disposal to guarantee the protection of fundamental rights during its activities – namely, the decision of its Executive Director to withdraw financing for, suspend, or terminate activities permeated with serious or persistent fundamental rights violations.

227. By failing to establish and maintain functioning monitoring and reporting systems, the Agency is currently unable to gain knowledge and acknowledge fundamental rights violations related to its activities and is in a constant state of failure to comply with its obligations to guarantee the protection of fundamental rights during its overall activities.

228. Furthermore, from the time we have called upon the Agency to comply with Art. 46 EBCG Regulation, in relation to its activities in the ASR, until now, there are ongoing, serious and persisting violations of fundamental rights related to the contested activity. Owing to the abovementioned deficiencies in its monitoring and reporting systems, and/or due to its tendency

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<sup>215</sup> Ibid, Article 46 (5)

<sup>216</sup> See *supra*, para 28

<sup>217</sup> *Supra*, note 45, Article 46 (4)

to turn a blind eye to fundamental rights violation related to its activities, the Agency has simply failed to register the occurrence of rights violations in the Aegean Sea Region.

229. Illusory monitoring and reporting system, coupled by an organizational culture of denial and dishonesty, inevitably renders the Executive Director oblivious to numerous exemplary, well-documented, clear-and-convincing, serious and persisting fundamental rights violations.

230. The Agency's Executive Director was and still is under the obligation to take one of the measures prescribed in art. 46 of EBCG Regulations. By not doing so, in infringement of its positive obligations to guarantee the protection of fundamental rights, the Agency has failed, and is in a constant state of failure, to act – in infringement of the Treaties – within the meaning of art. 265 TFEU.

231. In order to apply Article 46(4), the Executive Director needs to be capable of gaining knowledge of fundamental rights violations or international protection obligations related to its activities. The inexistent reporting and monitoring systems of the Agency, its organizational culture of concealment and retaliation against officers who wish to adhere to functioning accountability mechanisms, brings about an unreasonable state of affairs in which violations of fundamental rights and international protection obligations categorically cannot be acknowledged by the Agency.

232. Consequently, the measures prescribed by Article 46, conceived with a view to guaranteeing the protection of fundamental rights, could not *a priori* be taken by the ED even in the most extreme situations. If the ten incidents described above are not considered by ED Leggeri to be violations that are either serious or likely to persist, then what would be?

233. As noted above, the failure of the Agency and its Executive Director to observe their positive obligations, including due diligence reporting and monitoring obligations, are by no means particular to a certain operation, jurisdiction, relationship with a specific Host Member State. Nor do they result from the conduct of a specific Home Member State's agents operating under the auspices of Frontex. They are inherent to the functioning of the Agency, its direction and management. These failures appear in a similar fashion everywhere Frontex operates.<sup>218</sup>

234. The recommendation to consider the application of Article 46 to the situation in Evros, Greece, was not the only time ED Leggeri ignored the FRO. In **2016-2017**, for example, Frontex's Fundamental Rights Officer and the Consultative Forum repeatedly called the ED Leggeri to act and suspend or terminate the Agency's activities in Hungary due to well-documented violations of fundamental rights.<sup>219</sup> ED Leggeri ignored the recommendation of an internal organ of his own Agency and disregarded the abundance of external evidence presented to him by human rights groups, relying on relatively low number of SIR registered with the Agency. The number of victims had reached tens of thousands before the highest competent court – the CJEU – following infringement proceedings instituted by the European Commission,<sup>220</sup> effectively left ED Leggeri no choice but to suspend or terminate the operation in that jurisdiction on 27 January 2021<sup>221</sup>.

235. When there is no functioning monitoring and reporting system in place, the organizational culture consists of concealment and of turning a blind eye, where allegations of fundamental rights violation could be established only if proven 'beyond any reasonable doubt', and the only evidence of such that is considered to be valid must be encapsulated in a judgment

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<sup>218</sup> Supra, note 88

<sup>219</sup> Frontex Consultative Forum on Fundamental Rights, 'Recommendation by the Consultative Forum to the Executive Director and Management Board of the European Border and Coast Guard Agency (Frontex)', 10 November 2016, available at: <https://tinyurl.com/ch38vdj6>; Apostolis Fotiadis, 'Frontex's history of handling abuse evidence dogs Balkan expansion', Balkan Insight, 6 February 2020, available at: <https://tinyurl.com/4uwwpyzn>

<sup>220</sup> Court of Justice of the European Union, PRESS RELEASE No 161/20, 'Hungary has failed to fulfil its obligations under EU law in the area of procedures for granting international protection and returning illegally staying third-country nationals', 17 December 2020, available at: <https://tinyurl.com/299hvck4>

<sup>221</sup> Monika Pronczuk and Benjamin Novak, 'E.U. Border Agency Pulls Out of Hungary Over Rights Abuses', The New York Times, 27 January 2021, available at: <https://tinyurl.com/8yjs5nbf>

of the highest competent court of the EU. The ED would simply never, *a priori*, consider that there are persistent or serious violations of fundamental rights related to the activities of the Agency. Within the Agency, serious violations are taking place on an ongoing basis and, consequently, Frontex is in a constant state of failure to act in relation to its obligation under Article 46.

236. The fact that the Agency is incapable of identifying and acknowledging infringements, coupled with the lack of clear and transparent criteria for the application of Art. 46, has led to a distortion of responsibilities by which it is not the ED that possesses the obligation to suspend operations under Article 46, but rather the CJEU that is the responsible party. It has been shown that only a judgment of the highest court of the European Union – following proceedings instituted by the Commission or not – would ever suffice, under the Agency’s current culture, as evidence of fundamental rights violations related to the activities of the agency. Such a random, informal, and intangible criterion hampers the Executive Director’s ability to exercise his discretion under Art. 46.

237. On his parliamentary hearing held on **4 March 2021**, ED Leggeri shed light on the *de facto* criterion for the application of Art. 46: “On Hungary I decided in, well, **after the decision of the Court of Justice**, to suspend the operation because it was clear for me that by design **because of the decision of the Court**, it means that by design the risk is that we would contribute to implementation of national law that does not comply with EU standards, so for me **that was the criteria...**”<sup>222</sup>

238. It is all the more telling that the decisive findings of the highest court of the European Union on serious and persisting fundamental rights violations relating to the Agency’s activities suffice only for the suspension of the concerned activities and not for their termination. You come to wonder, what better evidence would ever convince the ED to terminate contentious activities.

239. Another statement contained in the letter– being completely irrelevant to the framework of Art. 46 – suggests that ED Leggeri’s reply does not constitute a definition of position in relation to his failure to comply with Frontex’s obligations under Art. 46. In the letter, ED Leggeri states that the Agency’s presence at the external borders “*can be considered to have a de-escalating and preventive effect*”.

240. Such affirmation is completely irrelevant to the proper application of Art. 46. The legislator simply did not contain such consideration within Art. 46. It was the legislator who struck the balance, with a view to guaranteeing the protection of fundamental rights during the Agency’s activities, when prescribing gradual and proportionate measures to be taken in the face of persisting or serious fundamental rights violations related to the Agency’s activities. ED Leggeri’s reference to a consideration manifestly irrelevant to the application of Art. 46 suggests that he has not taken a decision in the under Art. 46.

241. We dispute the assumption that the Agency’s presence in the Aegean Sea or elsewhere “have a de-escalating and preventive effect”. On the contrary, we suggest Frontex serves as a legitimizer and facilitator of unlawful conduct for the host Member State. The Greek Minister of Citizen Protection’s telling statement in response to accusations of fundamental rights violations exemplifies it: “I mean there were observers, and in the past three months **Frontex is there** as well, **so you cannot accuse Greece so easily**”<sup>223</sup>.

242. Another fact suggesting ED Leggeri has not taken any reasoned decision under Art. 46 is that the Fundamental Rights Officer was not consulted regarding his reply to our preliminary request, as prescribed by Art. 46, in case the ED does exercise his discretionary power.

243. Considering the persisting and serious violations of fundamental rights and international protection obligations related to the Agency’s activities in the Aegean Sea Region, at the time we have called upon it to act, and given the Agency’s positive obligations to take any reasonable measure to guarantee the protection of fundamental rights, it was under a legal obligation to act

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<sup>222</sup> Supra, note 42, 12:45:51 – 12:47:00

<sup>223</sup> Supra, note 37, 17:46:25 – 17:46:55



in accordance with such obligations, insofar as they were transposed into its founding regulation – namely, into Art. 46.

244. Given that the Agency was called upon by the applicants to act – insofar as it failed to withdraw financing for, suspend, or terminate, in whole or in part, its operation in the Aegean Sea Region, and has failed to define its position or to provide reasoned justification for not adopting the desired measure – this application for a declaration of failure to act is now being brought before the honorable Court, pursuant to Article 265 TFEU.

245. When public debate and official scrutiny commenced, Frontex did not deny the existence of serious violation of fundamental rights and international protection obligations. Instead, it merely argued these infringements are ‘not related’ to the Agency. During the Parliamentary hearing dated **6 July 2020**, for example, ED Leggeri did not *explicitly* determine whether collective expulsions were carried out by the host Member State Greece or not. At the same time, ED Leggeri did affirm that such ‘events’ are unrelated to the activities of the Agency: “For the rest, I hear sometimes, well, news, I know there are discussions, reports, well, by NGOs, by some members of Parliament, asking, well, questions about situations, that they consider as pushbacks, when I have doubts, I ask Greek authorities. I’m doing this in my capacity as Executive Director of the Agency, **although sometimes these are events which are not related to the implementation of the Operational Plan but events taking place occurring in the region where we have nearby our operational areas**”.<sup>224</sup>

246. During ED Leggeri’s hearing before the Parliament on **1 December 2020**, he stated: “We have not found evidence that there were **active direct or indirect** participation of Frontex staff or officers deployed by Frontex in pushbacks during either Poseidon or Rapid Border Intervention Aegean so we were able to trace the dates and to confirm that in the time slots on the days the assets that were mentioned, in particular the Romanian vessel and the Portuguese vessel were indeed deployed but there was **no evidence** that they were engaged in pushback activities.”<sup>225</sup>

247. In **July 2020**, ED Leggeri testified that ‘these events’ are taking place, but they are not related to Frontex, they are not part of Frontex *Joint* Operational Plan nor in its area. They only take place ‘in the region’, ‘nearby’ the operational area of Frontex. In **December 2020**, however, ‘these events’ are taking place in the presence of Frontex assets, i.e., well inside the operational area and part of the operational plan – but the assets themselves are not actively, directly, or indirectly, participating.

248. At any rate, Leggeri has failed to surgically separate – spatially and operationally – the presence and activities of Frontex from activities carried by the host Member State Greece in the exact same region, under the same *joint* operation, according to the same operational plan, based on funding and other forms of support (surveillance, detection, interception etc.). Greece operates in the Aegean Sea Region under the operational framework of Frontex Joint Operation Poseidon and previously Rapid Border Intervention Aegean. These Operational Plans are binding for all participating host and home Member States as well as Frontex staff.<sup>226</sup>

249. When, for example, a Frontex vessel and crew is instructed by the host Member State to **approach** a certain area to ‘transfer the migrants back to the rubber boat and escort/transfer them into the TUR territorial waters’, the activities of Greece are *related* to and intertwined with Frontex Joint Operations in the Region. Equally, when Frontex assets are instructed **not to approach** a certain area, to leave a certain area, or to suddenly **change their course**, the activities carried out by Greece thereafter are related to Frontex.

250. It is Frontex that has the discretionary power to *decide* in the first place whether or not to launch a *Joint* Operation and, where appropriate, to suspend or terminate it. Between these two critical points of launching and termination, Frontex’s contribution is indispensable and structurally intertwined with each and every activity carried out by the participating Member

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<sup>224</sup> Ibid (18:35:46 – 18:36:38)

<sup>225</sup> Supra., note 40 (14:03:00 – 14:03:45).

<sup>226</sup> Supra, note 45 Article 38.

States: [t]he Agency’s Executive Director *drafts* the Operational Plan; the Agency *co-finances* the operation; *guides, trains, supervises, and monitors* the Member States’ implementation of the Operational Plan, including compliance with fundamental rights obligations; conducts research and *risk analysis* on the basis of which an operation is conducted; is assigned with a *coordinating* role, mainly through the Coordinating Officer who is always present on the ground; *deploys* guest officers and assets; it is under the auspices of Frontex that state agents of Member States other than the Host Member State *participate* in the joint operations to begin with.<sup>227</sup>

251. As a result, to say that ‘events’ resulting from the activities of the Hosting Member State within the geographical and operational scope covered by a legally binding Operational Plan, which is heavily financed, coordinated and facilitated by Frontex – to say that such ‘events’ are not related to the activities of the Agency but “taking place in the region where we have *nearby* our operational areas” is simply misleading, and false.

252. Indeed, the Greek authorities have a rather different view on the nature of their joint operations with Frontex – admittedly, one that is more honest and reflects the legal and factual reality. In response to allegations of unlawful ‘pushbacks’ made by the Commissioner of Human Rights of the Council of Europe,<sup>228</sup> the Greek Ministers of Citizen Protection, Migration & Asylum and Maritime Affairs & Insular Policy, noted on **11 May 2021** that “**the Hellenic Police is systematically supporting the implementation of Frontex Joint Operations**”<sup>229</sup>.

#### **4.3 State Policy of a Systematic and Widespread Attack Directed Against Civilian Populations**

253. New ‘tactics’ were ‘introduced’ in **March 2020** and have been implemented relentlessly ever since as part and parcel of a state and organizational policy, executed in a flagrant breach of EU law – including, but not limited to, Regulation 656/2014.<sup>230</sup> The new ‘tactics’ on the ground and distorted legal terms such as ‘*prevention of departure*’ and ‘*interceptions*’ are tantamount to ‘pushbacks’ or collective expulsions, and their purpose is to cover up and spark ‘confusion’ over the illegality of the new policy that has been operational in the ASR since **March 2020**. After the ‘*new tactics*’ were visually documented and could no longer be denied, ED Leggeri moved to legalize them:

254. “What we identified is that there are some **notions**, like *prevention of departure*, the common factor in all these **not closed, let’s say, incidents, reports, which are not SIR but are daily reports**, the JORA reports, the common factor is that there is description of *prevention of departure*, and that there are *interceptions*... So, if you remember back to this **Regulation 656/2014**... it’s an *interception* at the border and then there’s a possibility either to apprehend or to **legally** invite the boat not to cross irregularly the border but to change its course and not to **stay** or **enter** in the national waters”... “Because of this situation, this operational situation, that we cannot qualify, and **we don’t know how to qualify them legally**, I requested from the Commission and the Management Board also involved, to analyze and give legal interpretation of this **Regulation 656/2014**...”<sup>231</sup>

255. Also, the WG Final Report echoed ED Leggeri’s perplexity regarding the legal interpretation of Regulation 656/2014 (‘if you remember’). This ‘old’ Regulation which entered into force in 2014, establishes rules for the surveillance of the external sea borders in the context

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<sup>227</sup> Ibid. Section 7, Articles 36-47.

<sup>228</sup> Letter from Council of Europe Commissioner for Human Rights to Greek Ministers regarding allegations of ‘pushbacks’ dated 3 May 2021 <https://tinyurl.com/757nmmsv>

<sup>229</sup> Letter from Greek Ministers of Citizen Protection, Migration and Asylum, and Maritime Policy and Insular Affairs, dated 11 May 2021, in response to allegations of ‘pushbacks’ by the Human Rights Commissioner of the Council of Europe; <https://tinyurl.com/dtyjtvfe> <https://tinyurl.com/dtyjtvfe>

<sup>230</sup> Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union

<sup>231</sup> Supra, note 40, 14:08:15 – 14:10:40

of the Agency's Joint Operation, and is frequently mentioned in the Agency's very own founding Regulation:<sup>232</sup>

“Guidance is needed on possible circumstances at sea borders, under which **migrants can be immediately returned** to a third country **without individual assessment**. It needs to be clarified, to what extent ... N.D and N.T judgment ... regarding the possible return of migrants directly **to (safe or not safe) a third country without an individual assessment**, can be applied at the maritime borders in light of **Art. 6** of EU Regulation **656/2014**... the Working Group politely asked the European Commission to clarify under which conditions article **6 §2 b)** of Regulation 656/2014 can be applied **without infringing article 4 §3?**”<sup>233</sup>

256. What is behind Frontex's interpretative ‘complexity’ of EU Regulation 656/2014 and the so-called ‘new jurisprudence’ of the ECtHR in *N.D vs. Spain*? And where are Frontex's lawyers to resolve the legal mystery around them? They must have known that *N.D v. Spain* is limited to land borders. They surely noticed the ECtHR stated that the decision has no bearing on maritime migration. In fact, the judgement repeatedly reaffirms the landmark ruling on maritime migration, *Hirsi v. Italy*, which governs the collective expulsion of “applicants who had attempted to enter a State's territory by sea” and the ECtHR stresses that the determinations in that decision “have lost none of their relevance”.<sup>234</sup>

257. Was it really beyond the knowledge and understanding of the Agency's troops of lawyers? Why does Frontex need to request the Executive branch of the EU, to which it is not even subordinated, to ‘clarify’ whether *ND v. Spain* applies to maritime situations when the ECtHR already decided that it does not? Can the EU Commission disregard the ruling of the ECtHR? Can it replace the CJEU?

258. *ND v. Spain* was the basis for Frontex's request that the European Commission provide guidance ‘on possible circumstances at sea borders, under which migrants can be immediately returned to a third country **without individual assessment**’. Whereas Article 6(2)(b) of Regulation 656/2014 submits that case evidence suggests a vessel may be carrying persons intending to circumvent checks at border crossing points or is engaged in the smuggling of migrants by sea, the participating units may order the vessel to alter its course outside of or toward a destination other than the territorial sea.

259. This provision, however, is subject to the general rules set forth in Articles 3 (‘Safety at Sea’) and 4 (‘Protection of fundamental rights and the principle of non-refoulement’) of the very same regulation, encompassing, *inter alia*, obligations associated with the principal of *non-refoulement*, such as the **strict requirement of individualized assessment** of the personal circumstances of each and every person on board. The drafters of Regulation 656/2014 must have had ED Leggeri in mind when they drafted Article 4(7) of this Regulation, which clarifies that “[T]his Article [article 4] shall apply to **all measures taken by Member States or the Agency in accordance with this Regulation**”.

260. If not through individualized assessment, how could evidence ever confirm the suspicion that a vessel may be carrying *persons* intending to circumvent checks at border points rather than carrying *asylum seekers*, whose right to seek asylum outweighs any other considerations? Or, whether the vessel is engaged in the smuggling of *migrants* rather than smuggling of asylum seekers, victims of human trafficking or simply persons in need of protection, whose expulsion would breach the principle of non-refoulement? And what about the right of *every* person to effective remedy?

261. Frontex theatrically requested the Commission to be permitted to circumvent the checks provided in articles 3 and 4 of Regulation 656/2014. Alas, the Commission confirmed, as any first-year law student would, that *N.D v. Spain* simply do not apply to maritime situations, and that the Member States and the Agency's obligations under the CFR – as enshrined in

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<sup>232</sup> Supra, note 45, Article 36 (e); Article 38 (j):“in that regard the operational plan shall be established in accordance with Regulation (EU) No 656/2014”

<sup>233</sup> Supra, note 47, page 14

<sup>234</sup> ECtHR, *N.D and N.T*, App Nos. 8675/15 and 8697/15, judgment of 13 February 2020

Regulation 656/2014 – must be fully respected. It is going back to basics, but apparently Frontex just had to hear it from the Commission.<sup>235</sup>

262. If the law is so simple, why does a well-funded EU agency like Frontex fail to independently interpret the most trivial laws applying to its daily activities? The legal positions the Agency chooses to adopt – following the position of the FRO, if she was at all consulted<sup>236</sup> – may be right or wrong. They may also engage the Agency’s liability, as is happening since March 2020 in the ASR. But the Agency should be capable of autonomously interpreting and implementing the legal framework within which it operates. If not FRO, then what are Frontex’s lawyers billing their exceptionally high fees for?<sup>237</sup>

263. In the meantime, Frontex has already ‘resolved’ the allegations of collective expulsions. Frontex considered the Greek version of events to be ‘plausible’. Despite all direct and circumstantial evidence suggesting to the contrary, authorities claim that *intercepted* persons were either unable to apply for asylum due to their non-cooperation, simply did not express their wish to apply for international protection, or otherwise did not raise any objections to be returned to Turkey during the course of their *individual* assessment.

264. Unlike most cases – that are visually documented but which nobody investigates – in these cases the Greek authorities insisted that the personal circumstances of each and every person on board **was individually assessed**. Alas, out of hundreds of individual assessments that were somehow conducted at sea, in defiance of the rules and standards applicable to such assessment, not a single individual had manifested a wish – not even one *unfounded* claim – to seek asylum. Consequently, the personal belongings of these wandering people were confiscated, they were exposed to state violence, forcibly transferred to an engineless rubber boat, which was towed and ultimately abandoned in Turkish Territorial Waters with no life vests, means of communication, or other basic needs.

265. At this point, the inability of Frontex to acknowledge the fact of grave breaches of fundamental rights law is in dissonance with its unwillingness to abide by the law: if Frontex found the ‘individual assessment’ version ‘plausible’, why does the same WG Final Report request the Commission to opine ‘on possible circumstances at sea borders, under which migrants can be immediately returned to a third country **without individual assessment**’? If Frontex adopts the Greek narrative of these events, why is it seeking a legal opinion that would exempt the Greeks from an already fulfilled obligation to conduct individual assessments, in line with Article 4 of Regulation 656/2014?

266. If everything with the Greek authorities is so fine and dandy, or if the Greek activities are not related to those of Frontex, why does Frontex bother to hide behind manifestly irrelevant case-law (*‘new jurisprudence’*) in order to acquire some shady legal opinion permitting Greece to expel intercepted persons without individual assessment?

267. Frontex knows: all of the reported and unreported ‘pushback’ operations in the Aegean Sea Region were part of the joint policy introduced on **March 2020**. This policy has been the basis for the launch of RBI Aegean. The ‘*new tactics*’ policies were incorporated to Joint Operation Poseidon and are in force to date.

268. Frontex knew about this ongoing unlawful State policy from its outset. Frontex adapted its conduct according to a clear division of labor and is complicit in its execution from day one. Now, it is desperately trying to cover up its ongoing infringement of the Treaties by using smoke and mirrors about the ‘complexity’ lurking in Regulation 655/2014, in light of a manifestly irrelevant ECtHR judgment. The ploy was revealed by the main protagonist, ED Leggeri, during his parliamentary hearing on **4 March 2021**:

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<sup>235</sup> EU Commission, 3 March 2021, The nature and extent of Frontex’s obligations in the context of its implementation of joint maritime operations at the Union’s external sea borders, <https://tinyurl.com/4z6a76kd>

<sup>236</sup> Compare, generally, with Article 46(4) and 46(5) EBCG Regulation

<sup>237</sup> See, e.g., Case T-31/18 DEP, Luisa Izuzquiza and Erne Semsrott v. Frontex, order dated **26 March 2021** <https://tinyurl.com/2apjuwat>

269. “On the question why we discovered that **656/2014 Regulation is complicated...** notably the **Greek Government in March 2020 decided** in the National Security Council meeting chaired by the prime minister of Greece... to make **optimal use** of the provisions on interceptions which means that in some cases boats can be instructed not to stay in the Territorial Waters or not to enter. That is why there is now **momentum in operational terms**, because of geography, **because of political shift in Greece** if I may say...”<sup>238</sup>

270. For the Agency, Regulation 656/2014 merely replicates the obligations of Member States in similar situations and joint operations under international, European and EU law. When it comes to fundamental rights or international protection obligations, Regulation 656/2014 simply mirrors the cornerstones of these legal frameworks.

271. There is no mystery in this old Regulation. It is not ‘complicated’ in any way. The unwillingness to *comply* with the law does not make it *complicated*. Knowing about and assisting Greece to systematically breach these laws, however, renders Frontex *complicit* in a widespread and systematic attack directed against civilians, pursuant to that state’s policy.

272. There is no new jurisprudence. There are new tactics operated jointly by Greece and Frontex as early as **March 2020**. What *is* new is that in **March 2021** Frontex began having a hard time to interpret virtually every piece of law: article 46 is too extreme and thus ignored; *ND v. Spain* is new but irrelevant; regulation 656/2014 is old and yet complicated.

273. Can a culprit of premeditated murder rush to his lawyer months after the crime, and politely ask for a legal opinion on the interpretation of ‘self-defense’ to demonstrate he did not ignore but was ignorant of the law? And ignorance of the law – as our children know – let alone a façade of ignorance, excuses no one.

274. The so-called ‘*optimum use*’ the Greek authorities are doing with Regulation 656/2014 since March 2020 is what the Agency described on **November 2020** as a “change of the national border protection tactics and introduction of the preventive measures concerning arrivals at sea”. It is exactly what the Agency’s WG later referred to in its final report as the ‘return of migrants directly to (safe or not safe) a third country without an individual assessment’.

275. Both Greece and Frontex can use any number of words as euphemism to collective expulsions, from ‘*optimum use*’ and ‘change of tactics’ to ‘*prevention of departure*’. They cannot, however, spin the truth or defend the indefensible: Greece is engaged in a State policy of a systematic and widespread attacks directed against civilian populations, and is responsible for, *inter alia*, crimes against humanity, collective expulsion, and other inhuman acts.

276. Aware of the consequences, ED Leggeri still denies these ‘tactics’ are concurrently being committed, to support his Agency’s and more broadly the EU policy in the Eastern Mediterranean, albeit not very convincingly: “...there is **no policy** to **directly** or **indirectly** contribute or carry out violations of fundamental rights...”<sup>239</sup>. But when he gets more graphic, his account appears to be somewhat incriminating and uncanny: “... Frontex has never towed boat to Turkish waters, **the role of Frontex** in this particular case in Greece, in Poseidon, is to contribute to border surveillance, **to inform** HCG about detected, **interceptions**, and **Greece wants to be in frontline**, so that is very clear...”<sup>240</sup>

277. Frontex knows of, and is actively aiding the Greek authorities in, the execution of this policy since March 2020. Now that it feels the heat, the Agency is trying to cover it up. “[U]nder which conditions article 6 (2) (b) of Regulation 656/2014 can be applied without... article 4 §3?”, the Agency politely asks. The answer is: None. Under no circumstances whatsoever can the participating Member States or the Agency circumvent the binding legal norms and collectively expel civilians. Simply saying that the Regulation is ‘complicated’ and politely asking for guidance could not retrospectively excuse Frontex for its ongoing complicity in serious and persistent violations of its international obligations.

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<sup>238</sup> Supra, note 42

<sup>239</sup> Ibid 12:45:51 – 12:46:00

<sup>240</sup> Ibid 2021, 13:17:23 – 13:17:53

278. It has recently been reported that in response to a request of Ulla Jelpke, a member of the German Bundestag, the German federal government reported **132 cases** of refuge boats being *intercepted* – that is, *interceptions* within the meaning that Frontex and the Greek authorities conveniently choose to give them – **132 refugee boats** with who knows just how many asylum seekers on board, that were returned without individualised assessments.<sup>241</sup>

279. Moreover, according to the UNHCR representative in Greece, Mireille Girard, since the beginning of 2020, **several hundred cases** of alleged pushbacks have been registered with the UN Agency. It has been reported that UNHCR has provided the Greek authorities with relevant documentation, and that, in relation to all registered cases, UNHCR was able to collect and submit information establishing the circumstances of pushback operations.<sup>242</sup>

280. Of the **13 incidents** investigated by the Management Board Working Group, many cases share the characteristics of *interceptions* à la Frontex and the Greek authorities. *Interception* belonging to the alternative legal dimension in which Article 6 of Regulation 6565/2014 is the one and only article stipulated therein: the incident of **18-19 April**, the one of **27 July** (taking place within Greek Territorial Waters but nevertheless classifies as ‘*prevention of departure*’, ‘*no opportunity for the migrants to ask for asylum*’), that of **5 August** (‘*prevention of departure*’), the one of **10 August** (‘*no request for asylum was expressed in any case*’. ‘*the migrants were retransferred in the rubber boat and returned to Turkish Territorial Waters within the meaning of Art. 6 of the regulation 6565/2014*’), and the incident of **30 October** (*there was no opportunity to apply for asylum*).

281. There were also other similar well-documented pushback operations – the *proximity incidents* investigated and reported by the media outlets, carried out in similar fashion insofar as Frontex and Greece were circumventing the general rules of Regulation 656/2014, and the push pushback attempt of **2 March 2020** – all of which were never even examined by the WG. But it really doesn’t matter. The Agency eventually *clarifies* all cases, no matter the circumstances.

282. From the culmination of the well documented pushback operations examined herein, coupled by the **132** cases reported by the German federal government, the hundreds documented by the UNHCR, emerges a picture of clear-and-convincing, persisting and serious violations of both fundamental rights and international protection obligations related to the activities of the Agency in the Aegean Sea. The existence of such was true already at the time we called upon the Agency to act in accordance with its positive obligations to guarantee the protection of fundamental rights through the application of Article 46 of its founding regulation

283. When, on **March 2020**, as a result of ‘*political shift in Greece*’, the Greek Government introduced its ‘new tactics’ for, and ‘optimum use’ of, the binding legal provisions to conduct mass pushbacks, Frontex was capable of understanding the legal meaning of such policy and was consequently obliged under article 46 of its Regulation to either withdraw the financing for, suspend, or to terminate its activities, in whole or in part, in Greece. To clarify: for Article 46 to be triggered, human rights violations that are either serious *or* likely to persist must only occur *in relation* to the activities of the Agency. Even if Frontex is not complicit in the alleged international crimes, because they are nonetheless related to its activities, Frontex should have reacted by terminating or at least suspending its activities in the Aegean Sea Region within the meaning of Article 46 of the Frontex Regulation.

#### **4.4. Article 265: Frontex Failed to Act in accordance with its obligation under Art. 46, in Infringement of the Treaties (CFR, TFEU)**

264. The Applicants made numerous attempts to seek asylum and protection in Greece. Whether on EU soil or in EU waters, they were equally abducted, detained, forcibly transferred, collectively expelled, and abandoned at sea in violent operations – committed pursuant to State (Greece) and organizational (Frontex) policy of systematic and widespread attacks directed against civilian populations in the Aegean Sea Region. As a result of the violation of the

<sup>241</sup> Spiegel Austria, “Pushbacks in the Aegean” <https://tinyurl.com/3pkfimehw>

<sup>242</sup> Spiegel Austria, “UN Refugee Agency Counts Hundreds of Alleged Pushbacks” <https://tinyurl.com/3fnzyykh>

Applicants' rights, *inter alia*, to seek and enjoy asylum and not to be subjected to collective expulsions – they are currently trapped in Turkey in dire need of international protection.

#### 4.4.1 The Preliminary Request<sup>243</sup>

265. On **15 February 2021** – in the face of serious and persisting violations of fundamental rights and international protection obligations related to the activities of Frontex in the ASR – the Applicants and other individuals in similar peculiar situations invited the Agency to define its position in relation to its obligation under Art. 46 of its founding regulation, and to immediately suspend or terminate these activities (the Preliminary Request).

266. The subject line and content of the Preliminary Request were sufficiently clear that the purpose of the Request is to compel the Agency to define its position and that it constitutes a preliminary notice prior to legal proceedings.<sup>244</sup> We have emphasized that in taking a decision to suspend or terminate the contested activities, ED Leggeri was obliged to provide **duly justified grounds** for his decision, within the meaning of Article 46 (6) of EBCG Regulation.

267. On **15 April 2021**, a period of two months from the time the Agency was called upon to act elapsed, the Agency had not defined its position within the meaning of Article 265 TFEU.<sup>245</sup> In light of Frontex's continued failure to withdraw the financing for, suspend, or terminate, in whole or in part, its operation in the Aegean Sea Region, and in light of its failure to define its position regarding this failure, the present application is now submitted to the Honorable Court pursuant to Article 265 TFEU to have the infringement of the Treaties established.

#### 4.4.2 The Letter Not Defining A Position<sup>246</sup>

284. On **23 March 2021**, a letter from ED Leggeri was received (the Letter). The Letter does not explicitly, clearly, or sufficiently constitute a definition of position in response to our preliminary Request, and therefore does not terminate the Agency's failure to act in relation to its positive obligation to guarantee the protection of fundamental rights during its activities through the application of one of the measures prescribed in Article 46.

285. The content of the Letter is perplexing, irrelevant, and abstract. Not a single consideration or reason, let alone one that is duly justified, can be found with respect to the request. In line with his previous 'misunderstanding' regarding what the law is, here too ED Leggeri does not even acknowledge the procedural context of the formal request under the TFEU, calling it 'a letter'.

286. More importantly, recent statements, the inexistent reporting and monitoring systems, and the lack of clear and transparent criteria for the application of Art. 46 of the EBCG Regulation, suggests that ED Leggeri is *by definition* unable to define any position on the matter, simply because he is incapable of taking any decision under Art. 46: he who is not able to identify – structurally and culturally – infringement of the Treaties, as argued by the Applicants, cannot define a position vis-à-vis the appropriate measures to counter them.

287. In his Letter, ED Leggeri elaborates on the drafting of the operational plan for the RBI Aegean and its launching, and for about an entire page boasts about the SIR mechanism. ED Leggeri acknowledges the responsibility of Frontex, under RBI Aegean, for the deployment of assets and the coordination of their operations, which is not in dispute and not what the ED was requested to define his position on. He then notes "*that incidents you refer to in the letter have*

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<sup>243</sup> The Preliminary Request dated 15 February 2021 is annexed to the Application and is marked ANNEX 2

<sup>244</sup> See, to that effect, order of 30 April 1999 in *Pescados Congelados Jogamar v Commission*, T-311/97, ECR, EU:T:1999:89, paragraph 35; order in *Pescados Congelados Jogamar v Commission*, EU:T:1999:89, paragraph 37

<sup>245</sup> See Art. 265 Treaty on the Functioning of the European Union [http://data.europa.eu/eli/treaty/tfeu\\_2012/oj](http://data.europa.eu/eli/treaty/tfeu_2012/oj) "The action shall be admissible only if the institution, body, office or agency concerned has first been called upon to act. If, within two months of being so called upon, the institution, body, office or agency concerned has not defined its position, the action may be brought within a further period of two months."

<sup>246</sup> Letter from Fabrice Leggeri dated 23 March 2021 is annexed to the Application and marked ANNEX 3; see also letter from Fabrice Leggeri dated 17 February 2021, labelling the formal request under Article 265 TFEU as 'proposal' (annexed and marked ANNEX 4).

been examined and clarified in the FRaLo final report. None of the incidents included in the FRaLO WG final report could substantiate fundamental rights violations. Therefore, the Agency has correctly the obligations it is under".

288. This passage in the Letter is perhaps the only one somehow relevant to the application of Art. 46. However, the Agency is under positive obligations to take *any* reasonable measure to guarantee the protection of fundamental rights. The application of Art. 46 is indeed the most potent and efficient measure, but not the only one. ED Leggeri refrains from even directly referring to the actual and specific measure he was called upon to take. Nowhere in his letter does ED Leggeri define the Agency's position vis-à-vis the requested *suspension or termination* of Frontex's activities in the ASR, providing duly justified grounds for not suspending them, or more broadly what the criteria are for such suspension.

289. As was argued in detail, the inherent incapacity of the Agency to gain knowledge and identify fundamental rights violations hampers the Executive Director's theoretical possibility to exercise his discretionary power under Art. 46. The Executive Director, in his Letter and elsewhere, insists – in contrast to clear and convincing evidence, and even *before* the pseudo-reports he refers to are published – that he knows that, *a priori*, there are no, and cannot ever be, fundamental rights violation related to the activities of the Agency in the ASR: ***"The report will be published tomorrow, but I don't see any substantiated violation of fundamental rights that would be in this report"***<sup>247</sup>.

290. The fact that Agency is currently incapable of complying with its fundamental rights obligations is further evidenced by different recommendations of the Management Board. For example, the obligation "to establish transparent rules on the FRONTEX-internal process to follow up on serious incidents that have been established, including on the application of Art. 46 of the EBCG Regulation."<sup>248</sup> In the absence of clear and transparent criteria for the application of Art. 46, the Agency's ED is bound to reach arbitrary decisions, which in the context of international protection obligations are literally matters of life or death.

291. To conclude, because the ED is structurally and culturally unable to acknowledge the factual occurrence of violations of fundamental rights or international protection obligations of a serious nature or that are likely to persist – and since ED Leggeri is unwilling to 'understand' the law applicable to these violations – he is *'by design'*, to borrow his own terminology, both unable and unwilling to autonomously exercise his discretionary power under Art. 46, or to define the Agency's position vis-à-vis its failure to act in relation to Art. 46.

#### 4.4.3 The Requested Measure is of Direct Concern to the Applicants

268. A settled case-law enables natural persons to rely on the third paragraph of Article 265 TFEU for the purpose of seeking a declaration that an EU institution, body, office or agency has failed to adopt – in infringement of the Treaties – measures other than recommendations of opinion, of which those individuals are the potential addressees, or which are of direct, or, where relevant, direct and individual concern to them.<sup>249</sup>

269. The Applicants, as well as other individuals trapped in similar life-threatening situations, therefore, may not be the addressee of the Agency's requested decision to suspend or terminate its contested operation in the ASR, in accordance with Art. 46(4) of its founding Regulation, and more broadly positive obligations under the Treaties. But they are undoubtedly directly concerned by it.

270. Similarly, to the Court's jurisprudence on the fourth paragraph of Article 263 TFEU, the third paragraph of Article 265 TFEU ought to be interpreted as enabling individuals to

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<sup>247</sup> Supra, note 42, 12:45:51 – 12:46:15:

<sup>248</sup> FRONTEX, 'Conclusions of the Management Board's meeting on 20-21 January 2021 on the preliminary report of its Working Group on Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea', 21 January 2021, available at: <https://tinyurl.com/2d3faz32>

<sup>249</sup> Order of 5 September 2013, H-Holding v Parliament, C-64/13 P, not published, EU:C:2013:557, paragraph 15



initiate proceedings against an institution that has failed to adopt an act, albeit not addressed to them, provided it is of direct and, where relevant, of individual concern to them.<sup>250</sup>

271. The desired measure Frontex has failed to adopt, one of the proportionate and gradual measures prescribed by Art. 46(4) of its founding Regulation, is legally binding and capable of affecting the interests of the Applicants by bringing about a distinct change in their position in two ways. *First*, for being asylum seekers in dire need of international protection, who, in the country to which they were collectively expelled, despite the 2016 ‘deal’ between the EU and Turkey,<sup>251</sup> are deprived of access to an efficient and fair asylum system and legal remedy, or to genuine and effective means of legal entry to the EU.<sup>252</sup>

272. It is in this context that the Applicants are directly and individually concerned with the adoption of the desired measure. The desired measure counters violent, ongoing, widespread, systematic, and serious violations of fundamental rights in the ASR. The failure to adopt it directly concerns the Applicants, who were, are, and will be exposed to these violations.

273. Conversely, had this measure been already adopted, the Applicants would have already crossed the Aegean Sea, arrived in Greece, and lodged their asylum request in the EU. The adoption of the desired measure, therefore, would significantly reduce the Applicants’ exposure to mass violence and fundamental rights violations upon their imminent re-traversing of the Aegean Sea in a search of a safe haven.

274. The lack of alternative pathways that would enable the applicants to secure their rights to life and asylum renders the re-traversing of the Aegean Sea extremely imminent and inevitable. At the same time, it is affected by, and dependent upon the adoption of the desired measure: as long as the failure to take the desired measure and to comply with EU law endures, the imminent and inevitable re-traversing of the ASR will be significantly more hazardous.

275. This is the link between the precarious situation of the Applicants and the desired measure that the Agency failed to take. This is why the Applicants are directly concerned with the compliance of Frontex with EU Fundamental Rights Law. This is why the interests of the Applicants would be affected once the desired measure is adopted.

276. *Second*, the desired measure is capable of directly and individually affecting the interests of the Applicants by bringing about a distinct change in their position as victims of past serious violations of fundamental rights and international protection obligations related to the activities of Frontex. As the Factual Section details, the Applicants are victims of multiple ‘pushback’ operations. These defining experiences *per se*, i.e., the continuous and ongoing process of victimization and deprivation of fundamental rights with no effective legal remedy alone gives rise to feelings of injustice, frustration, and distress.

277. A corrective measure by which the Rule of Law is restored may very well reestablish the victims’ human dignity and facilitate their rehabilitation. The termination of the inhuman and degrading treatment that the Applicants are still suffering from would not repair, but at least reduce, their suffering and restore, to some extent, their sense of dignity and worthiness. This is, therefore, another independent reason why the Applicants have direct and individual interest in the adoption of a measure that is pertinent to them and is capable of bringing about a distinct change in their positions.

278. Acknowledging that much does not preclude the right of Member States to perform border control at EU external borders, nor does it grant any person the permission to enter the territory of EU Member States. It only concerns the Applicants’ right to asylum and

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<sup>250</sup> See, to that effect, judgments in *T. Port*, cited in paragraph 20 above, EU:C:1996:452, paragraph 59, and 15 September 1998 in *Gestevisión Telecinco v Commission*, T-95/96, ECR, EU:T:1998:206, paragraph 58

<sup>251</sup> EU-Turkey statement, 18 March 2016, available at: <https://tinyurl.com/4hu9u7xh>

<sup>252</sup> See: Josoor “Why Turkey is not a safe place for people on the move and why it matters” <https://tinyurl.com/3uwvvcut> and Human Rights Watch “Submission to the Europe and North America Regional Review on Implementation of the Global Compact for Safe, Orderly and Regular Migration” <https://tinyurl.com/3eerpdd7>

international protection, coupled with their impossibility to seek asylum in Turkey or to access means of legal and safe entry to the EU.

279. By acknowledging that much, the Court would merely reiterate one admittedly banal truism: that both the right to enter for the purpose of seeking asylum and the right to control this entry are subjected to and regulated by the same one law: The Treaties, notably the Charter and the TFEU, the Schengen Code, as well as Frontex Regulation and other pieces of EU legislation. The policy must be a careful result of the delicate balance between these two rights, a balance whose contours are the boundaries of EU law. This is what Rule of Law is about, this is the true meaning of protecting ‘EU way of life’.

280. The precarious personal and surrounding circumstances of the Applicants compel them to traverse the Aegean Sea as an *extreme* measure of *last resort* in a search of safe haven. Subsequently, they have a direct and individual concern that, whilst doing so, EU law will be exercised over EU borders, territories, and waters, so their rights to life, physical and mental integrity, asylum and freedom from collective expulsion and refoulement – as well as effective legal remedy – would be meticulously observed.

281. The application demonstrates that Frontex is a facilitator and a legitimizer of an unlawful policy of a systematic and widespread attack directed against civilian populations, introduced by the Greek authorities on **March 2020**. The operational and financial contribution of Frontex, and its aiding and abetting the implementation of unlawful state policy is indispensable to the continuation of these unlawful practices.

282. It is highly plausible that, as the EU legislator envisioned, adopting a measure which reduces the operational and material support provided by Frontex would act as a chilling effect on the host Member State: materially, strategically, politically, and legally, Greece will be less equipped to execute as many infringements as it commits every day now without the presence and financial assistance of Frontex. Consequently, the Applicants, who are now on the verge of re-traversing the Aegean Sea, will be less exposed to the risk of being tortured, ill-treated, and ultimately collectively expelled by the Greek authorities.

283. Instead, as described in the present application, the current stance of Frontex is the complete opposite: its complicity in violations on the ground, its structural and cultural organizational failure to monitor, report and investigate them, and its legal spins on the alleged difficulty to interpret the applicable law exemplifies its relentless efforts to provide its Greek counterpart legal protection – under which, Greece and Frontex enjoy full impunity.

284. Frontex turning a blind eye to the most clear-and-convincing infringements carried out by Greece shields the state from political criticism and legal scrutiny: “I mean *there were observers*, and in the past three months *Frontex is there* as well, *so you cannot accuse Greece so easily*”<sup>253</sup>.

285. The legislator was also of the opinion that EU’s engagement, through its coercive law-enforcement Agency, in activities related to persisting or serious violations of fundamental rights, is inevitably a facilitator and legitimizer of such infringements. Considering the operational and political constraints, interests, legal obligations and values, the legislator struck the balance in prescribing that the Agency must take one among the gradual and proportionate restraining measures in Art. 46 (4) EBCG Regulation.

286. The potential chilling effect of Art. 46 on violations by Member States is also learned from ED Leggeri’s own comment on the proper application that provision: “...I think this is the system we have to develop, that we have an escalation, maybe we should map this in a Standard Operational Procedure and communicate better what are the **warnings**...”<sup>254</sup>.

287. The Applicants’ personal situation is being, and will continue to be, prejudiced as long as Frontex’s involvement persists in the execution of an unlawful State policy of a systematic and widespread attack directed against asylum seekers in the Aegean Sea. The adoption of one

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<sup>253</sup> Supra, note 37, 17:46:25 – 17:46:55

<sup>254</sup> Supra, note 42, 13:27:26 – 13:28:50

of the measures stipulated in Art. 46 would almost certainly ensure the reduction of risks and a restoration of fundamental rights for the Applicants.

#### 4.4.4 No Judicial Oversight of the Conduct of EU Coercive Law Enforcement Agency

288. The keys to the Agency's most efficient – amongst very few altogether – mechanism for guaranteeing the protection of fundamental rights during its operation is exclusively entrusted to one person: The Executive Director. As the present application demonstrates, the pseudo-investigation conducted by the Management Board manifests the latter's failure to oversee the Agency's including the ED's conduct, and the ineffectiveness of the illusory accountability mechanisms available for individuals whose fundamental rights are jeopardized during Frontex's activities.

289. The complete absence of any independent oversight and judicial review mechanism for a coercive law enforcement agency, operating along the expansive external borders of the EU, deprives affected individuals of the power to challenging the contested inactions and actions of the Agency – serving as a breach of the principle of sound administration and the right to an effective remedy.<sup>255</sup>

290. National courts and other Community judicatures (Courts and judges of the community) are not competent to review the legality of the conduct of Frontex. The **only** legal avenue available for the countless individual victims of Frontex's acts and omissions – who are seeking judicial review and remedy – leads them to the Court of Justice of the EU. The conditions for the admissibility of legal actions before the Community Court must be interpreted in light of the principle of effective judicial protection.

291. Yet, during the more than 15 years that the EU Border Agency has been in operation, **not a single case** concerning fundamental rights violations related to its activities at the EU's borders has been adjudicated. Given the demonstrated individual and direct concern of the Applicants with the measure the Agency has failed to adopt, and in light of the striking accountability gap present within the EU's most potent, coercive law-enforcement Agency, this Court is the Applicants' *only* resort. The Court must not refuse to hear their stories – allow them to have their day in Court. We implore the Court to restore the Rule of Law at the EU's External Borders.

## **5. SCHEDULE OF ANNEXES**

**Annex A.1** – Application for Anonymity (Applicant 1)

[Pages 1-1]

**Annex A.2** – Letter to the Executive Director of Frontex Dated 15 February 2021

[Paragraph 1 in the Application; Pages 1-34]

**Annex A.3** – Letter from the Executive Director of Frontex Dated 21 March 2021

[Paragraph 2 in the Application; Pages 1-3]

**Annex A.4** – Letter from the Executive Director of Frontex Dated 17 February 2021

[Paragraph 284 in the Application; Pages 1-1]

**Annex A.5** – Letter from the German Bundestag Dated 19 March 2021

[Paragraph 93 in the Application; Pages 1-1]

**Annex A.6** – Letter from German Minister of Interior Dated 28 March 2021

[Paragraph 93 in the Application; Pages 1-1]

**Annex A.7** – Authorisation to Practice

**Annex A.8** - Selected Audi-visual Evidence for Frontex and Greece's Policy (TCG)

[Paragraph 29 in the Application; Pages 1-5]

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<sup>255</sup> To that effect, see C-623/17 PI and C-511/18 La Quadrature du Net