



Input for the 2021 EASO Asylum Report

Introduction

Statewatch is a non-profit-making voluntary group founded in 1991 comprised of lawyers, academics, journalists, researchers and community activists. Our European network of contributors is drawn from 18 countries. We undertake and encourage the publication of investigative journalism and critical research in Europe in the fields of the state, justice and home affairs, civil liberties, accountability and openness.

We welcome the opportunity to provide input to the 2021 EASO Asylum Report. With this submission we recommend that the forthcoming report take into consideration:

- how the overarching objectives of limiting the number of asylum applications and irregular arrivals relate to fundamental rights violations;
- the accessibility, independence and effectiveness of complaint mechanisms and internal reporting mechanisms;
- the monitoring, control and supervision of border control and policing agencies;
- the need for independent border monitoring mechanisms with meaningful investigative and enforcement powers;
- how a stronger formal role might be afforded to NGOs, journalists and independent observers in monitoring and reporting mechanisms; and
- the availability of effective remedies in multi/supra-national operations.

Please note that unless stated otherwise, terms such as “state agencies” or “state authorities” should be taken to refer to both national and European Union (EU) entities.

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Restricting access to EU territory

For the vast majority of asylum-seekers and refugees, access to EU territory is a prerequisite for accessing asylum procedures. During the course of 2020, various policies and practices of EU institutions and member states aimed to further restrict the ability of individuals to access EU territory, thus preventing access to asylum procedures. In particular, the use of pushbacks and pullbacks has become increasingly evident.

In the sections that follow we provide further detail on a number of relevant issues with regard to pushbacks and pullbacks: the activities of Frontex and the inadequacies of existing oversight and accountability mechanisms, the role of Regulation (EU) 656/2014 in determining whether individuals should be rescued or ‘intercepted’ when attempting to cross borders, the exchange of information by EU agencies and missions to facilitate pullbacks, and national developments.

1. The activities of Frontex

The legal basis of the European Border and Coast Guard Agency (Frontex) has been updated twice in the last five years, gradually expanding the scale and scope of its operations and possibilities for intervention both within and without EU territory. However, the accountability mechanisms available for individuals who may have suffered rights violations through the agency’s actions or omissions, and the agency’s internal mechanisms and practices for reporting on such incidents, remain seriously flawed.

Officers participating in a Frontex joint operation fall under the civil and criminal jurisdiction of the member state hosting the operation.¹ There are numerous testimonies that suggest officers deployed on Frontex operations at the Greek borders have been involved in pushbacks.² Leaving aside questions regarding the effectiveness of national investigative mechanisms, there remains the question of the agency’s role in identifying and investigating allegations of fundamental rights.

1.1. Complaints mechanism

The 2019 Frontex Regulation introduced an explicit requirement that the agency’s complaints mechanism be “independent and effective,” but the legislation governing it does not meet these requirements. The accessibility of the mechanism is questionable (for example, complaints cannot be anonymous and must be in writing), there is no requirement that investigations be prompt and the executive director has discretion over “follow-up”, amongst other things.³

1.2. Serious incident reporting (SIR) mechanism

The SIR mechanism should also provide a way for incidents – including those involving potential breaches of fundamental rights – to be reported and investigated. Frontex’s own Consultative Forum on Fundamental Rights has repeatedly expressed concerns over this

¹ Articles 84 and 85, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32019R1896>

² <https://www.borderviolence.eu/violence-reports/>

³ A full analysis of the agency’s complaints mechanism is available here: ‘The complaints mechanism: improved but insufficient’ in the report *Deportation Union: <https://www.statewatch.org/deportation-union-rights-accountability-and-the-eu-s-push-to-increase-forced-removals/frontex-the-eu-s-deportation-machine/deportations-rights-and-responsibilities>*

system, which in 2018 received just three reports alleging rights violations. The Forum described this as “an almost negligible number” given that the agency had, at that time, some 1,500 officers deployed at the EU’s external borders.⁴ At the time of writing, it has around 1,100.⁵

Recent examples demonstrate the mechanism’s inadequacy. The preliminary report of a working group set up by Frontex’s management board to look into allegations of the agency’s involvement in pushbacks highlights problems with the management of incident reports, including that those concerning fundamental rights are not automatically forwarded to the agency’s Fundamental Rights Officer (FRO). Furthermore:

“...there is no mechanism installed in Frontex which would have the purpose of identifying problems in the reporting practice (i.e. reports that are incomplete or not conclusive, frequent (need for) re-classification of reports, inconsistencies in the follow-up given to the reports, etc).”⁶

This comes on top of claims published in both *Efsyn*⁷ and *Kathimerini*⁸ that there is pressure within Frontex, from senior officials, not to submit such reports.

These problems cannot be solved solely by procedural changes (the working group’s preliminary report calls for a “newly introduced culture” – also a necessity, but perhaps hard to develop given the overriding strategic imperatives underpinning Frontex’s role). Nevertheless, **there is a need for clear recommendations and guidance on ensuring independent and effective reporting mechanisms.**

It should also be noted that the working group cited above was established only after negative media coverage – which are just the latest in a long line of credible allegations of the involvement of officials deployed on Frontex operations in pushbacks.⁹ The Management Board is the principal organ for controlling the agency and holding it accountable for its action. If it only takes an interest in the agency’s reporting mechanisms following media coverage, **questions must be asked over whether these control and accountability mechanisms are fit for purpose.**

⁴ ‘EU: NGOs, EU and international agencies sound the alarm over Frontex’s respect for fundamental rights’, *Statewatch*, 5 March 2019, <https://www.statewatch.org/news/2019/march/eu-ngos-eu-and-international-agencies-sound-the-alarm-over-frontex-s-respect-for-fundamental-rights/>

⁵ Post by Frontex on Twitter, 4 February 2020, <https://twitter.com/Frontex/status/1357329689107431426>

⁶ ‘Frontex: Management Board pushes back against secrecy proposals in preliminary report’, *Statewatch*, 4 February 2021, <https://www.statewatch.org/news/2021/february/frontex-management-board-pushes-back-against-secrecy-proposals-in-preliminary-report/>

⁷ ‘Μαζί επαναπροωθούν, μαζί το συγκαλύπτουν’, *Efsyn*, 28 November 2020, https://www.efsyn.gr/ellada/dikaiomata/270551_mazi-epanaprootoyn-mazi-syglyptoyrn

⁸ ‘OLAF raided EU border chief’s office over migrant pushback claims’, *Kathimerini*, 14 January 2021, <https://www.ekathimerini.com/261205/article/ekathimerini/news/olaf-raided-eu-border-chiefs-office-over-migrant-pushback-claims>

⁹ ‘Greece - Turkey: ‘The route is dangerous, people are dying’’, *Migreurop*, 18 November 2013, <http://www.migreurop.org/article2313.html?lang=en>; ‘Greece: UNHCR call to stop Dublin II returns to Greece’, *Statewatch*, January 2010, <https://www.statewatch.org/news/2010/january/greece-unhcr-call-to-stop-dublin-ii-returns-to-greece/>; ‘EU: Greece accused of undertaking illegal ‘push-back’ operations, Maltese Prime Minister says they are an option’, *Statewatch*, 9 July 2013, <https://www.statewatch.org/news/2013/july/eu-greece-accused-of-undertaking-illegal-push-back-operations-maltese-prime-minister-says-they-are-an-option/>

1.3. Fundamental rights obligations

Article 46 of Regulation 2019/1896 obliges the Frontex director to terminate, suspend or not launch an operation where there is serious reason to believe that fundamental rights violations are occurring in a systematic and serious manner. On the evidence available, it would appear that the agency is either unwilling or unable to interpret this provision as intended, as made clear by the case of Hungary.

International organisations, human rights groups and journalists have continually highlighted the Hungarian authorities' flagrant abuse of asylum-seekers and migrants; the European Commission has also found that Hungary is infringing EU asylum law.¹⁰ Nevertheless, it was not until 28 January this year, a month after the Court of Justice of the EU (CJEU) ruled that Hungary had failed to uphold its obligations under EU law, that the agency suspended its operations in the country.¹¹

In Greece, there have been numerous claims that the authorities' use of pushbacks is systematic, including from organisations such as the Council of Europe.¹² Nevertheless, the agency's director has continually deferred to the views of state officials: a letter to the Hellenic Coast Guard about an alleged pushback stated: "I am willing to continue to provide Greece... with my support while ensuring good cooperation to effectively protect the human rights of those at sea."¹³ The presumption is that Frontex's support will continue, regardless.

The procedural requirements of Article 46 prioritise the role of state agencies in reporting potential incidents of rights violations. As current and previous incidents have demonstrated, they have failed to take that role seriously, compounding a culture of abuse and impunity at Europe's borders. **The establishment of truly independent monitoring mechanisms with meaningful investigative and enforcement powers is indispensable, and a stronger formal role needs to be afforded to the work of NGOs, journalists and independent observers** in those mechanisms.

2. Regulation (EU) 656/2014

Some EU states (in particular, Greece) and Frontex have cited Regulation 656/2014 on surveillance of the external sea borders¹⁴ as a justification for pushbacks, based on an interpretation of whether vessels are "intercepted" or "rescued". In any case, individuals can

¹⁰ 'Hungary: Facing Fifth Infringement Procedure Related to Asylum Since 2015', *ECRE*, 6 November 2020, <https://www.ecre.org/hungary-facing-fifth-infringement-procedure-related-to-asylum-since-2015/>

¹¹ CJEU, '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, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-12/cp200161en.pdf>; 'E.U. Border Agency Pulls Out of Hungary Over Rights Abuses', *New York Times*, 27 January 2021, <https://www.nytimes.com/2021/01/27/world/europe/frontex-hungary-eu-asylum.html>

¹² Parliamentary Assembly of the Council of Europe, 'Pushback policies and practice in Council of Europe member States', 28 June 2019, <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=28074>

¹³ Letter from Fabrice Leggeri, executive director of Frontex, to Vice-Admiral Theodore Kliaris, Hellenic Coast Guard, 6 August 2020, on file with *Statewatch*.

¹⁴ 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, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.189.01.0093.01.ENG

only be disembarked in a non-EU state where fundamental rights standards are met, following an individual assessment of their situation.¹⁵

Frontex's FRO has "repeatedly drawn attention" to their concerns about "lack of clarity and/or absence of clear methods for the assessment of personal circumstances of intercepted or rescued persons" and "insufficient information/clarity in relation to procedures regarding identification and referral of persons with international protection needs and in a particularly vulnerable situation."¹⁶

Furthermore, in 2019 the FRO concluded that the assessment of the general situation in Turkey, undertaken by Greece, "did not meet the basic requirements established in Regulation 656/2014 to justify that any disembarkation will not amount to potential violation of fundamental rights, and in particular the principle of non-refoulement."¹⁷ The fact that the agency concluded otherwise once again points to issues raised already: not enough weight is granted to the agency's fundamental rights obligations, which are overridden by its strategic objectives.

3. Information exchange to facilitate pullbacks

One method used to prevent access to EU territory is via outsourcing controls to non-EU states. In the Central Mediterranean, Libya is key to this strategy. The EU and its member states have funded, trained and equipped the Libyan Coast Guard (LCG) and supported the registration of a Libyan search and rescue zone with the International Maritime Organization. While the EU admits that Libya is not a safe country in which to disembark people rescued at sea, its actions are aimed at strengthening the very institutions responsible for such disembarkations.¹⁸

According to *Amnesty International*, "EU aerial assets [deployed during Frontex operations] have routinely been employed to identify the presence of refugee and migrant vessels at sea and to immediately inform the Libyan authorities of their position,"¹⁹ yet there is no way to hold Frontex legally accountable for these actions or other involvement in potential human rights violations. National courts cannot assess the lawfulness of Frontex's actions, the ability of individuals to access the CJEU is limited,²⁰ and the EU is not a party to the ECHR (although negotiations on this have recently restarted).

¹⁵ Article 4(3), Regulation (EU) 656/2014

¹⁶ Frontex, 'Annual report on the implementation of Regulation (EU) 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex (2019)', 2 September 2020, <https://data.consilium.europa.eu/doc/document/ST-10414-2020-INIT/en/pdf>

¹⁷ Ibid.

¹⁸ Letter from Paraskevi Michou to Fabrice Leggeri, 18 March 2019, [https://www.statewatch.org/media/documents/news/2019/jun/eu-letter-from-frontex-director-ares-2019\)1362751%20Rev.pdf](https://www.statewatch.org/media/documents/news/2019/jun/eu-letter-from-frontex-director-ares-2019)1362751%20Rev.pdf)

¹⁹ 'Malta: waves of impunity', Amnesty International, 2020, <https://www.amnesty.org/download/Documents/EUR3329672020ENGLISH.PDF>; 'EU: Frontex on cooperation with Libya: nothing to see here', *Statewatch*, 15 October 2020, <https://www.statewatch.org/news/2020/october/eu-frontex-on-cooperation-with-libya-nothing-to-see-here/>

²⁰ House of Commons Library, 'Taking a complaint to the Court of Justice of the European Union', 11 March 2010, <https://researchbriefings.files.parliament.uk/documents/SN05397/SN05397.pdf>

Similar issues arise with the EU Common Security and Defence Policy (CSDP) mission EUNAVFOR MED IRINI. Irini has shared information on vessels in distress in the Mediterranean with the LCG on at least eight occasions,²¹ facilitating pullbacks to Libya, where migrants face the risk of arbitrary detention, mistreatment, torture and even death. However, CSDP missions are excluded from the jurisdiction of the CJEU and domestic legal proceedings are not binding on the EU. This leaves individuals with essentially no possibility of accessing an effective remedy in cases of rights violations.²²

It is important to note that a recent working arrangement between Frontex and Irini enables cooperation on “cross-border crime, such as arms trafficking and the disruption of the human smuggling business model and trafficking networks.” Frontex will provide Irini with “information... such as tracking vessels of interests on the high seas, as well as data from its aerial surveillance in the Central Mediterranean.” This cooperation seems likely to further entrench cooperation with the LCG, whilst compounding the problems of legal accountability.²³ **Urgent consideration must be given to how effective remedies can be made available in the context of complex, multi-national and/or supranational operations involving multiple actors and unclear lines of responsibility.**

4. National practices

A court in Rome recently ruled that the Italian authorities were guilty of the ‘informal’ return of an asylum-seeker to Slovenia, followed by violent chain readmissions to Croatia and Bosnia-Herzegovina. The Italian interior minister candidly admitted that people are pushed back without having access to procedures even if they request asylum, and spoke of hundreds of cases.²⁴

Elsewhere, the Danish Refugee Council counted 14,090 readmissions from Croatia to Bosnia; the Greek authorities have used numerous methods to push individuals back to Turkey; and in the Spanish enclaves of Ceuta and Melilla the government has introduced the concepts of a “physical” border and an “operational” border. Those who cross the former but not the latter are deemed not to have entered Spanish territory, and can thus be pushed back. We note with concern that the European Court of Human Rights has effectively endorsed the Spanish practice of “hot returns”.²⁵

²¹ This figure concerns the period 31 March and 21 July 2020, and has thus likely increased substantially by now.

²² ‘EU military mission aids pull-backs to Libya, with no avenues for legal accountability’, *Statewatch*, 27 October 2020, <https://www.statewatch.org/analyses/2020/eu-military-mission-aids-pull-backs-to-libya-with-no-avenues-for-legal-accountability/>

²³ ‘EU: Agreement between Frontex and Mediterranean military force: cooperation on pullbacks to Libya?’, *Statewatch*, 25 January 2021, <https://www.statewatch.org/news/2021/january/eu-agreement-between-frontex-and-mediterranean-military-force-cooperation-on-pullbacks-to-libya/>

²⁴ ‘When informal means illegal: Italian interior ministry guilty of pushbacks to Slovenia’, *Statewatch*, 26 January 2021, <https://www.statewatch.org/news/2021/january/when-informal-means-illegal-italian-interior-ministry-guilty-of-pushbacks-to-slovenia/>

²⁵ ‘Spain: ECHR judgment a blow to refugee and migrant rights’, *Amnesty International*, 13 February 2020, <https://www.amnesty.org/en/latest/news/2020/02/spain-echr-judgment-a-blow-to-refugee-and-migrant-rights/>

Pushbacks – whether or not based on bilateral deals or more ‘informal’ understandings,²⁶ and whether of the ‘chain’ variety or not – prevent asylum seekers from lodging applications and allow states to deny that people have entered their territory. In the case of such ‘informal’ returns between EU member states, such practices are permitted by the Returns Directive.²⁷ However, as the Rome court found, this does not necessarily neutralise other legal obligations deriving from national, EU and international law. While these practices violate national, EU and international law, they serve broader strategic objectives – to decrease the number of “irregular” border crossings and asylum applications – two of the key unspoken aims of EU and national immigration and asylum policies.

²⁶ For example, between the EU and Turkey (2016), the Memoranda of Understanding between Italy (2017, renewed in 2020) and Malta (2020) with Libya or between states such as Italy, Slovenia, Croatia and Bosnia.

²⁷ Article 6(3) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals states: “Member States may refrain from issuing a return decision to a third-country national staying illegally on their territory if the third-country national concerned is taken back by another Member State under bilateral agreements or arrangements existing on the date of entry into force of this Directive. ...”