

PICUM Submission on the evaluation of the European Border and Coast Guard Regulation

September 2022

The Platform for International Cooperation on Undocumented Migrants (PICUM) was founded in 2001 as an initiative of grassroots organisations. Now representing a network of 164 organisations working with undocumented migrants in 31 countries, PICUM has built a comprehensive evidence base regarding the gap between international human rights law and the policies and practices existing at national level. With nineteen years of evidence, experience and expertise on undocumented migrants, PICUM promotes recognition of their fundamental rights, providing an essential link between local realities and the debates at policy level.

PICUM welcomes this opportunity to provide feedback on Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard (EBCG Regulation). At the same time, we regret the short and difficult time period during which this call for evidence remained open, which we believe hindered the participation of many other stakeholders.

As a member of Frontex Consultative Forum between 2012 and 2019, PICUM witnessed with concern the expansion of this Agency, the increased reports of fundamental rights violations, and the limited and inadequate accountability mechanisms. In this submission, we explain why the expansion of Frontex has increased, rather than reduced, fundamental rights and procedural law violations

PICUM recommends the European Commission to take action to ensure accountability and change directions in resources allocation. In PICUM's view, this action should be based on the implementation of existing standards and legal obligations and of the broad existing set of recommendations (see, for instance, recommendations from the [EU Ombudsman](#), the [European Parliament](#), the [Fundamental Rights Officer](#), [ECRE](#), the [Special Rapporteur on the human rights of migrants](#)), **and not by legislative reform.**

Non-exhaustive list of reports of human rights violations in which Frontex was involved or which Frontex failed to prevent

In February 2020, Balkan Insight reported [acts of brutality](#) by Frontex on the Hungarian-Serbian border, including use of batons, teargas and pepper spray on asylum seekers — including children — and violent “pushbacks” into northern Serbia. Frontex appeared to be directly responsible for deploying dogs against migrants.

In March, 2020 an [investigation](#) by the Guardian revealed coordinated efforts involving Frontex, Operation Sophia and the Libyan Coast Guard to prevent migrants boats from reaching EU waters and to return them to Libya. The investigation includes intercepted audio from Operation Sophia and unpublished letters.

In June 2020, Border Violence Monitoring Network [reported](#) Frontex's continued involvement in pushback operations on the Albanian border based on reports by migrants. Interviewees maintained they were threatened with firearms, a development reflecting a new regulation allowing Frontex personnel to bear arms.

In October 2020, a [joint investigation](#) by Bellingcat, Lighthouse Reports, Der Spiegel, ARD and TV Asahi showed that Frontex was involved in operations to drive away refugees and migrants attempting to enter the European Union via Greek waters. According to the investigation, this has occurred in at least 20 cases since January 2020. On one occasion, 91 migrants died at sea or went missing because Frontex failed to alert nearby merchant ships or private sea rescuers

In April 2021, the German news magazine “Der Spiegel”, the German broadcaster ARD, the organization “Lighthouse Reports” in Netherlands and the French newspaper “Libération” [published](#) a report that accuses Frontex of having flown over migrant boats and informed the Libyan coast guard of their coordinates, even when merchant ships or private sea rescuers in the area could have conducted faster rescues. According to the investigation, this has occurred in at least 20 cases since January 2020. On one occasion, 91 migrants died at sea or went missing because Frontex failed to alert nearby merchant ships or private sea rescuers.

In October 2021, Frontex [reported](#) 14 collective expulsions from Lithuania, while indicating that the EU agency itself had not been involved in the forced removals. In subsequent [declarations](#), Frontex Executive Director Fabrice Leggeri hinted at the possibility that violations could be [even higher](#). Frontex Executive Director failed to comment about the possibility of suspending the agency's operations in Lithuania, which EU law foresees in case of serious fundamental rights abuses. The EU's border agency presence in Lithuania at the time consisted of 126 officers.

Following these allegations, Frontex has been undergoing increasing scrutiny, including several pending judicial cases. On 15 July 2021, the Frontex Scrutiny Working Group in the LIBE Committee published the final investigation [report](#) into the alleged role of Frontex in cases of illegal pushbacks at EU borders. While the working group did not find conclusive evidence of the direct involvement of the Agency in activities of pushbacks and/or collective expulsions, the report found evidence that Frontex was aware of violations carried out by Member States and failed to prevent and address them. The report highlights that Frontex consistently disregarded reports of fundamental rights violations by civil society actors and international human rights bodies, and failed to adequately respond to observations raised by the Fundamental Rights Officer (FRO), the Consultative Forum or through incident reports.

In the latest judicial case against Frontex, a Syrian national [has sued](#) the EU border agency Frontex in response to a refoulement enacted by Greek authorities in 2020. The claimant and other 21 asylum-seekers had reached the Greek coast and intended to ask for asylum, but the Greek authorities returned them to shore and put them in an inflatable boat with no motor. A private surveillance plane working for Frontex passed twice over the boat without triggering any help. The asylum-seekers were eventually rescued by the Turkish coastguard. In October 2021, a Syrian family [pushed back](#) from Greece to Turkey in 2016 in a Frontex-operated forced return flight had sought compensation from Frontex before the European Court of Justice.

Inadequate monitoring mechanisms

Despite the increasing number of allegations of fundamental rights violations in which Frontex is involved, or of which Frontex should have been aware, the accountability mechanisms remain weak and inadequate.

Forced return monitoring

Forced return flights involve serious risks of fundamental rights violations, including violations of the principle of *non-refoulement*, ill-treatment and the right to dignity. [Forced return monitors](#) should monitor return operations from the pre-departure phase until the person arrives in the country of return, and submit a report to the Frontex executive director, the FRO and to the competent national authorities involved. The presence of monitors is key towards accountability and should also contribute to prevent fundamental rights violations.

Article 8(6) of the 2008 Return Directive states that “Member States shall provide for an effective forced-return monitoring system” and recital 13 clarifies that “Member States should be able to rely on various possibilities to monitor forced return”.

Despite the key importance of monitors, in the first half of 2021 the number of operations with at least one human rights monitor on board [decreased](#) by 7% - at the same time in which Frontex deported a record number of people, with an increase of 9% from the pre-Covid period.

Complaint mechanisms

In an [inquiry](#) into Frontex complaint mechanisms, published in June 2021, the European Ombudsman found several shortcomings in the agency's complaints framework, while finding no formal maladministration. In particular, it found that lack of public awareness, lack of engagement of Frontex officials, and the impossibility to submit anonymous complaints are all reasons which may explain the low number of complaints introduced between 2016 and January 2021.

The inquiry further found that the way in which the complaints mechanism works isn't sufficiently transparent, and that the Executive Director's cooperation with the Fundamental Rights Officer isn't satisfactory. In addition, the inquiry found that the FRO does not have sufficient independence with regard to the serious incident reports procedure.

Serious incident reporting

The second accountability mechanism, the Serious Incident Reporting system, is also underused, as demonstrated by the mismatch between the few reports of fundamental rights violations submitted every year and the broad evidence of fundamental rights and procedural violations.

For example, during a joint return operation from Munich, Germany, to Kabul, Afghanistan in August 2018, a team of observers of the Committee for the Prevention of Torture (Council of Europe) recorded two incidents involving the use of unauthorised restraint techniques, a headlock that caused [shortage of breath to the returnee and the application of pressure to his genitals](#). As this was a Frontex coordinated flight, the national guards involved were bound by the [Frontex Code of Conduct for Joint Return Operations](#), which stipulates that breaches of fundamental rights must be reported. However, no Serious Incident Report was submitted by the Frontex staff member monitoring the flight.

Inadequate oversight of influence by interest groups

The analysis of 136 documents obtained through freedom-of-information requests by NGO [Corporate Europe Observatory \(CEO\)](#) and German public broadcaster [ZDF](#) showed that Frontex agency has increasingly given privileged access to industry without a corresponding increase in transparency, and that it misled the European Parliament with regard to how many meetings the Agency had with non-registered lobbyists. In 2018, the agency [told](#) MEPs in response to a question that “Frontex only met with registered lobbyists who are registered in the EU Transparency Register ... no meetings were held in 2017.” However, CEO and ZDF found that between 2017 and 2019, more than 70 percent (105 out of 149) of the groups that met with Frontex were not registered in the EU Transparency Register, and that the Agency had met with 24 groups in 2017.

Recommendations

This submission highlights different areas in which Frontex’s operations have led or contributed to serious fundamental rights violations. Due to the increase in human rights violations and other ethical questions associated with Frontex in recent years, we recommend a decrease in the scope of the mandate of the agency as well as a sharp decrease in budget.

In addition, we recommend a number of ad interim measures aimed at increasing accountability and preventing fundamental rights violations. In PICUM’s view, the recommendations below do not require a legislative reform of the EBCG Regulation, but rather a better implementation of the existing legal framework.

- A key step towards accountability consists in ensuring transparency of Frontex’s operations. This requires publishing the report of the European Anti-Fraud Office and facilitating an open and inclusive discussion on its findings; facilitating [access to documents requests](#); and refraining from imposing legal fees on transparency activists, as also recommended by the [European Parliament](#).
- The Fundamental Rights Officer (FRO) should be ensured adequate staffing, capacity and funding to implement their work, as [recommended](#) on repeated occasions by the

Consultative Forum. It is essential that the FRO has access to all relevant documents and Frontex operations and that the recommendations issued by the FRO are taken into due account. If the Agency chooses not to implement the FRO recommendations, it should provide a public written explanation of the reasons why these are not carried out.

- In some cases, individuals and members of civil society organisations face judicial harassment because they have publicly denounced pushbacks or other rights violations, or undertaken legal actions in this regard. This has been increasingly the case in the EU [over the past years](#). In other cases, people submitting complaints might fear retaliation when the authorities in charge of receiving the complaint are, or are perceived as, being the same authorities who are in charge of evaluating their asylum application; taking decisions over their detention or return; or managing the detention centre. In these cases, people might fear presenting a complaint because they are afraid this will affect their asylum application or lead to worsened detention conditions. In order to prevent this, individuals should be allowed to submit anonymous complaints, as also [recommended](#) by the EU Ombudsperson. Additionally, people who suffer fundamental rights violations by Frontex or national border guards might not have the opportunity to submit a complaint because they have been victims of pushbacks or deportation. In order to address this issue, civil society organisations should be allowed to present complaints on behalf of groups of people. Anonymised information and statistics from the complaints mechanisms should be published every year to identify which areas of work present risks of fundamental rights violations and implement concrete actions to prevent these violations from happening again.
- Building independent and effective human rights monitoring is key both to contribute to prevent fundamental rights violations and to ensure accountability and redress in case violations take place. For this reason, the Commission should build independent border monitoring mechanisms with mandate to investigate all fundamental rights violations which can take place in the context of border control activities, [without geographical or procedural limitations](#). It is also key that every deportation operations is monitored by forced return or human rights monitors, as opposed to the current practice.
- This submission includes references to numerous reports of fundamental rights violations collected by third parties, including investigative journalists and civil society organisations. Such evidence is essential in the context of the initiation of infringement procedures and accountability mechanisms is an essential tool at the Commission disposal and should not be disregarded simply because they are from third parties.

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