

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

Final Report of the Frontex Management
Board Working Group

1 March 2021

Foreword

Following the conclusions of the Frontex Management Board meeting on 20-21 January 2021 on its preliminary report, the Working Group on Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea followed up on the matters of still pending incidents and further legal questions on operational aspects of the Agency's Joint Operations.

In this regard, the Working Group further inquired on five remaining incidents by means of multiple Working Group meetings, expert interviews and additional documents provided by Frontex, EU Member States, the European Union Agency for Fundamental Rights and the Management Board's Consultative Forum to receive further clarification.

Taking up the Working Groups recommendations set out in the preliminary report, the Agency initiated several actions as part of its roadmap to fully implement all necessary measures. These measures have been subject of further consideration by the Working Group and are also addressed in this report.

The Working Group furthermore welcomes the European Commissions' elaboration on a number of legal questions previously addressed in the Working Group's preliminary report.

Composition of the Working Group:

GERMANY

FRANCE

GREECE

NORWAY

ROMANIA

SWITZERLAND

SWEDEN

EUROPEAN COMMISSION

HUNGARY

Content

- Foreword 2
- 1. Key findings of the preliminary report 4
- 2. Working methods 5
- 3. Examined incidents 5
 - 3.1 SIR 11095/2020, 18/19 April 2020 6
 - 3.2 SIR 11860/2020, 27 July 2020 8
 - 3.3 SIR 11934/2020, 5 August 2020 9
 - 3.4 SIR 12604/2020, 30 October 2020 10
 - 3.5 SIR 12790/2020, 21 November 2020 12
 - 3.6 Incident of 28/29 April 2020 13
- 4. Legal Aspects 13
- 5. Conclusions and recommendations 15
 - 5.1 Main results and proposals of the incidents 15
 - 5.2 Measures in conjunction with Article 46 of Regulation (EU) 2019/1896 17

1. Key findings of the preliminary report

- The Working Group's assignment was to inquire what has happened regarding the alleged so-called "pushbacks" in the Aegean Sea. In this context, **-13-** relevant incidents with a potential link to Frontex deployed assets were identified, which were subject to further examination.
- The Working Group fully acknowledges the special circumstances such as factors at sea, environmental influences, currents, waves and weather and a possible hybrid threat, which can all have an influence on the actions of the responsible officers in each individual case. Additionally, the behaviour of the facilitators and the people in the boats need to be borne in mind when assessing an incident. At the Greek/Turkish maritime border, the behaviour of the Turkish border authorities must also be taken into account. In light of these circumstances, it is difficult to retrospectively reconstruct each incident.
- It is the common legal understanding of the Working Group that not every detected boat with migrants on board per se qualifies as a distress case, in addition, not every detected attempt of illegal border crossing by circumventing official Border Crossing Points can automatically be considered as an asylum case not even at sea. A precise analysis of the specific circumstances of each individual case is therefore of utmost importance.
- In total **-8-** out of the examined incidents were clarified to the effect that no third-country nationals were turned back in contravention of the principle of non-refoulement, or otherwise in violation of Article 80(2) of Regulation (EU) 2019/1896. In particular, 6 out of these 8 incidents took place entirely in Turkish Territorial Waters.
- Part of the debate in the Working Group was on how access to the asylum system and respective individual assessment of protection needs can be guaranteed during border police measures at sea. The Fundamental Rights Officer took also note of the often quite difficult circumstances in such events. As a result, this question can only be answered by the officers in charge on the spot and depends on the suitability of the respective available assets.
- Any measures taken should be in proportion to the objectives pursued, non-discriminatory and fully respect human dignity, fundamental rights and the rights of refugees and asylum seekers, including the principle of non-refoulement. Each application for asylum has to be assessed individually.
- The European Commission accepted the request from the Working Group, to elaborate on a number of legal questions of certain legal provisions and application of jurisprudence of the European Court of Human Rights to the sea borders and the impact of that jurisprudence on the interpretation of provisions of Regulation (EU) 656/2014¹.

¹ The Working Group has been informed that the reply by the Commission will be delivered directly to the Management Board for its information.

- Considering all necessary requirements and practical terms, the Working Group identified deficiencies in the monitoring and reporting system of Frontex and suggested further necessary improvement. Furthermore, with regard to the draft conclusion of the Management Board from 21 January 2021, 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.
- Based on the preliminary findings, **-5-** incidents (SIR 11095/2020, 11860/2020, 11934/2020, 12604/2020, 12790/2020) were found in the preliminary Report plus another possible incident, to merit further examination by the Working Group.

2. Working methods

The Working Group maintained the confirmed division into sub-working groups, in which especially the further examination of **-5-** incidents plus another incident reported by the media continued. During multiple online consultations in February 2021, the Working Group drafted a questionnaire, which focussed on missing information and details that were necessary for the further clarification and final assessment of the incidents in question.

In this context, the Working Group reached out to further sources beyond the Agency itself and addressed the Member States having been involved or potentially able to contribute to the process, namely Denmark, Greece and Sweden. In addition, the Member States and the Agency supported the Working Group by providing several experts, including the Agency's Executive Director, who participated in the online consultations. In view of the aforementioned sources, the Working Group considered all data received until the completion of the final report.

Furthermore, the European Union Agency for Fundamental Rights and the Management Board's Consultative Forum provided substantial contributions to the Working Group² with regard to the applicable legal framework and fundamental rights challenges at borders. In addition, the Agency's Fundamental Rights Officer supported the Working Group's continuous work and provided valuable information, documents and other useful comments.

3. Examined incidents

The Working Group inquired on the aforementioned so far unresolved incidents occurring in Frontex-coordinated activities in the Eastern Mediterranean Sea. All but one have been filed as Serious Incident Reports (SIR) within the Agency's reporting scheme. The SIR in question were:

- SIR 11095/2020,
- SIR 11860/2020,
- SIR 11934/2020,
- SIR 12604/2020 and

² Handbook on European law relating to asylum, borders and immigration, Migration: Fundamental rights issues at land borders, Fundamental rights of refugees, asylum applicants and migrants at the European borders, Fundamental rights at Europe's southern sea borders, Border controls and fundamental rights at external land borders.

SIR 12790/2020.

Additionally, the Working Group examined an incident, reported by the investigative media outlet Bellingcat that allegedly occurred on 29 April 2020, with regard to a possible link or interconnection to incidents that had been reported to the Agency.

It is important for the Working Group to emphasize that in the following clarification and assessments the statements of all involved partners are taken into consideration equally. Furthermore, no general distinction is made between material evidence and personal evidence in the following consideration.

3.1 SIR 11095/2020, 18/19 April 2020

Compressed facts of the case:

In the night of 18 April 2020, a Frontex Surveillance Aircraft observed a rubber boat in Greek Territorial waters. The rubber boat was empty and being towed by a Hellenic Coast Guard vessel towards Turkish Territorial waters. Approximately 20-30 people were on board the Hellenic Coast Guard vessel that was towing the rubber boat. After some time, these people were retransferred onto the rubber boat at the Greek-Turkish border. Afterwards, the Hellenic Coast Guard left the location. According to the statement by the Hellenic Coast Guard, the Turkish Coast Guard took over responsibility of the incident.

Final clarification and assessment:

- The Agency wrote both, a preliminary and a final Serious Incident Report, in which the chronological sequence of events was described as stated above. Among other documents, the final Serious Incident Report was provided to the Working Group. The Agency clarified and finalised the Serious Incident Report on 30 April 2020. The data available shows that the rubber boat in question was sighted by a Frontex Surveillance Aircraft in Greek Territorial waters. At the time of detection, a Turkish Coast Guard vessel was nearby as reported in the mission report.
- According to Greek authorities, the Hellenic Coast Guard intercepted the rubber boat and took the people on board of the Hellenic Coast Guard vessel. The Hellenic Coast Guard states that they assessed the personal circumstances of the people on board the vessel, categorized the situation as an irregular border crossing and ordered the rubber boat to alter its course to leave Greek Territorial waters in accordance with national law. In addition, the Hellenic Coast Guard provided people on board with information regarding their destination in Turkey. According to further statements of the Hellenic Coast Guard, there were no indications to dissuade their return back to Turkey and no claims for asylum or international protection were brought forward, even though such an opportunity was provided.
- Thus, the Hellenic Coast Guard vessel took course towards the Greek-Turkish borderline towing the empty rubber boat. After reaching the Greek-Turkish borderline, the people on board were retransferred onto the rubber boat by the Hellenic Coast Guard. The Hellenic Coast Guard further stated that two vessels of the Turkish Coast Guard were involved in the coordination of the incident, even though this

claim could not be corroborated and documented by the Frontex Surveillance Aircraft sightings due to its merely partial involvement in the incident. According to the statement of the Hellenic Coast Guard, they asked the Turkish Coast Guard to take over responsibility for the people on board of the rubber boat.

- On the photographic material made by the Frontex Surveillance Aircraft, there is no engine recognizable at the time the empty rubber boat was towed by the Hellenic Coast Guard vessel. According to the statement of the Hellenic Coast Guard, this could be either due to the angle and distance of the aircraft or because the engine was temporarily unmounted. The Working Group cannot conclusively assess, if and where an engine could have been stashed while the empty rubber boat was towed by the Hellenic Coast Guard.
- Furthermore, on the photographic material made by the Frontex Surveillance Aircraft there is no engine recognizable outside of the rubber boat by the time the people were retransferred. Whether an engine had been stowed inside the rubber boat at the time when the Hellenic Coast Guard, as the Hellenic Coast Guard state, left the spot could not be clarified by the Working Group.
- There were also no Turkish Coast Guard vessels recognizable in the pictures at the moment in time the rubber boat was left at the borderline, though one of them was spotted by the Frontex Surveillance Aircraft earlier on. The Hellenic Coast Guard reiterates that the rubber boat was sea-worthy, able to navigate, equipped with a working engine and that the Turkish Coast Guard was at the scene.
- In full support of the final Serious Incident Report, the 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 and to coordinate the possible follow-up measures stemming from the Serious Incident in cooperation with the respective Member State authorities.
- As the involved Hellenic Coast Guard assets were not co-financed by the Agency, incidents relating these assets are not covered by the Agency's reporting scheme.

3.2 SIR 11860/2020, 27 July 2020

Compressed facts of the case:

- On 27 July 2020 at 06:21 LT, a Danish helicopter deployed to Joint Operation Poseidon 2020 detected a rubber boat with people on board during a patrol near Chios Island within Greek Territorial waters.
- After the detection by the Danish helicopter, the rubber boat was intercepted by a Hellenic Coast Guard Patrol boat.
- The Joint Rescue Coordination Centre Piraeus informed the Maritime Rescue Coordination Centre Ankara about the incident.

Final Clarification and assessment:

- A disagreement between involved European entities concerning the first sighting coordinates in the Turkish Territorial waters did not influence the actual handling of the incident.
- After reviewing the data provided by the Agency, Denmark and Greece, the incident took place inside Greek Territorial waters. The data also clearly shows that the incident in question was not classified as a Search and Rescue case at any point in time within Greek Territorial waters.
- Information provided by the Hellenic Coast Guard indicates that the migrant boat altered its course on its own towards Turkish Territorial waters upon arrival of the Hellenic Coast Guard vessel. This statement has not been refuted by the examined data (in particular mission reports).
- Furthermore, the data provided does not substantiate the assumption that Turkish Coast Guard authorities did not fulfil their responsibilities and obligations regarding the safe return of all people on board the boat in question.
- According to the Danish helicopter's mission report, the Greek patrol boat passed the rubber boat at relatively high speed when reaching the scene. The Greek authorities confirmed this statement and state that this had never effected or jeopardized the state of the migrant's safety.
- The Greek side stated that the post-operational communication between them and the Danish detachment was a misunderstanding. The Hellenic Coast Guard expressed their regrets about any misconception their communication might have triggered, stressing that their request for an additional position in Turkish Territorial waters was based on the assumption that the Danish helicopter should have detected the boat within Turkish Territorial waters sooner, given that the latter came from Turkish Territorial waters.
- The Hellenic Coast Guard underlined the role of the Joint Coordination Board as the competent forum for resolving any misunderstandings and the provision of clarifications when needed.
- After examination, the available data could not resolve the contradiction between the Danish and Greek presentations of their mutual communication. Operational documentation, inquiries – beyond the scope of the Danish mission report – and

the still pending final incident assessment by Frontex did not allow an extensive clarification of the incident.

- The process of reporting, crosschecking and validating the operational data, at all levels, shall be carried out in an effective and transparent manner that leaves no room for interferences and misunderstandings.

3.3 SIR 11934/2020, 5 August 2020

Compressed facts of the case:

- On 8 August 2020 during the night, a Frontex Surveillance Aircraft reported the sighting of a rubber boat in Greek Territorial waters, which had been intercepted and presumably towed by a Hellenic Coast Guard Patrol Boat eastward towards Turkish Territorial waters. Initial information on the incident was contradictory as to the number of migrants on board (30 or about 60).

Final clarification and assessment:

- After a detailed examination and further discussions, the Working Group concludes that the actual amount of people on board was more likely to be at 60 rather than 30. This conclusion is based on the fact that the number provided by maritime assets are preferred over those provided by aerial assets as they are considered more accurate due to the closer distance to the incident.
- According to the statement by Greek authorities, Hellenic Coast Guard vessels did not tow the rubber boat, since the rubber boat had a working engine. Ropes/lines were utilized to set the migrant vessel under control. These attempts of taking control over the vessel did not succeed.
- In the further examination by the Working Group, the Hellenic Coast Guard asserts that the two involved Hellenic Coast Guard Patrol Boats undertook efforts to intercept the vessel in the context of border surveillance measures to prevent illegal border crossings. According to the statement of the Hellenic Coast Guard, these measures were conducted in accordance with corresponding legal obligations.
- Greek authorities state that the people on board behaved non-cooperatively. In particular, they attempted manoeuvres to avoid border control measures and cut or discard the ropes, which were used in an attempt to put the rubber boat under control. Therefore, the interception by the Hellenic Coast Guard was unsuccessful. The Hellenic Coast Guard explained that the circumstances of the incident left no possibility for asking for international protection. Following the failed attempts to approach the Greek coast, the rubber boat with people on board returned to Turkish Territorial waters on their own. After contacting Turkish authorities, the Turkish Coast Guard arrived on scene and took over responsibility of the incident.
- Even after the further examination by the Working Group, the actual events in the respective incident cannot be conclusively clarified. Evidence provided by the Agency (videos, photos and reports) does not clarify the circumstances in relation to the statements of the Hellenic Coast Guard.
- The respective Frontex Surveillance Aircraft only reported a limited sequence of the entire incident.

- According to the Serious Incident Report in question, the Frontex Surveillance Aircraft which reported the incident “was instructed by the Greek Sea Border Expert not to monitor the event and to continue the patrol in south-eastern direction”. The request by the Hellenic Coast Guard to continue the patrol is part of an established operational process used to ensure the effective surveillance of other areas which otherwise remain unattended during incidents. Maritime and aerial assets, both of the Host Member State or Participating Member State may be cleared to continue their patrol in cases as soon as appropriate capacities are able to respond to an incident. The Working Group attaches importance to the operational needs and tactical methods in the context of an effective external border management and a consistent border surveillance.
- The International Coordination Centre Piraeus has declared the event as “Prevention of Departure”, even though the incident occurred in Greek Territorial waters, which in the opinion of the Working Group is inconsistent.
- According to the Agency, the Serious Incident Report has not been finalised due to their ongoing correspondence with the Hellenic Coast Guard. According to the announcement by the Agency, the finalisation of the Serious Incident Report is expected very soon. The involved Hellenic Coast Guard asset was not co-financed by the Agency. Hence, the Agency exhausted its (limited) possibilities to clarify the facts of the case.
- In summary, the presentations of both sides differ considerably from one another. The statements and allegations could neither be substantiated nor dispelled by the Working Group.

3.4 SIR 12604/2020, 30 October 2020

Compressed facts of the case:

- On 30 October 2020, a Swedish Coast Guard vessel detected a rubber boat inside Greek Territorial waters.
- After intercepting the rubber boat, the Swedish Coast Guard Vessel handed the incident over to Hellenic Coast Guard.
- Upon departing the scene to continue on their border surveillance patrol, the crew of the Swedish Coast Guard vessel followed the incident on the radar screen and perceived a singular echo, despite the presence of two vessels that were moving towards the Turkish Territorial waters.
- The Swedish Coast Guard requested to launch a Serious Incident Report via the Frontex reporting mechanism, which was then allegedly hampered but eventually initiated by the responsible Frontex officer at that time.

Final Clarification and assessment:

- After reviewing the data provided by Frontex, Greece and Sweden, the incident took place inside Greek Territorial waters and was classified as SIR Category 4. Following an internal investigation, Frontex denied the accusations of hampering the transmission of the report. According to Frontex, the respective staff in question only explained that it was not possible to initiate a Serious Incident Report via the

internal reporting system JORA and referred the case to the exceptional reporting procedure and the proper line of command.

- The data provided clearly states that the incident in question was not classified as a Search and Rescue case at any point in time within Greek Territorial waters. According to the statement by the Hellenic Coast Guard, the Turkish Coast Guard took over the incident after the boat returned to Turkish Territorial waters.
- In the Joint Coordination Board of 30 October 2020, the incident was 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.
- The rubber boat was first intercepted by a Swedish vessel, which then requested a Hellenic Coast Guard vessel to take over. The latter reached the scene. The Hellenic Coast Guard statements described the rubber boat in question as seaworthy, able to navigate, and equipped with a functioning engine. Swedish and Greek data describe the behaviour of the people on board as non-cooperative, meaning that they did not obey the instructions and orders given by Swedish and Hellenic Coast Guard officers.
- Sweden furthermore stated in their report that the behaviour of the people on board of the rubber boat eventually shifted towards a cooperative manner once they had realized that it was a Swedish vessel. Sweden states that the people on board “started to call thanks, put their hands together as a grateful gesture.”
- According to the statement by the Hellenic Coast Guard, after taking over responsibility of the incident, the Hellenic Coast Guard tried to take control over the rubber boat by using ropes and mooring lines in order to clear the situation on scene. Upon releasing the ropes and lines, the facilitator started the engine and tried to evade police measures by the Hellenic Coast Guard. The rubber boat continued its movement powered by its own engine towards Turkish Territorial waters and was closely accompanied by the Hellenic Coast Guard vessel. The Hellenic Coast Guard authorities emphasised in their statement that the situation was dominated by the efforts of the rubber boat to escape the border police measures and therefore a possibility for the people on board to demand international protection was not feasible.
- Furthermore, the Hellenic Coast Guard explained that the proximity between their patrol vessel and the rubber boat might have caused the Swedish vessel to receive a singular echo on the radar screen. However, Hellenic Coast Guard authorities ruled out the possibility that the boat was towed towards Turkish Territorial waters at any point in time. Observations and statements given by Swedish authorities did not refute statements given by the Hellenic Coast Guard.
- Information provided by Frontex, Greece and Sweden did not allow to close all remaining information gaps in the case, in particular regarding the measures taken by Hellenic Coast Guard. The Agency’s assessment of the incident is yet to be finalized by the Frontex Serious Incident reporting mechanism.
- The Working Group appreciates the unwavering commitment by the Swedish Coast Guard crew to follow-up on the clarification of the circumstances of this incident. 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.

3.5 SIR 12790/2020, 21 November 2020

Compressed facts of the case:

- During a screening procedure on Kos Island, migrants reported to Frontex Team Members that on 9 November 2020, upon their arrival with a rubber boat in Greek territorial waters, a Hellenic Coast Guard Patrol Boat arrived on scene, created large waves and made the rubber boat rock from side to side.
- One Border Guard Officer from the Hellenic Coast Guard made gestures with a large pointy object to imply their return back to Turkey.
- The Hellenic Coast Guard presented a different chronology of events.

Final clarification and assessment:

- Within the further examination by the Working Group, the corresponding Screening and Debriefing Reports were reviewed. The Screening Reports describe that these allegations were made against the Hellenic Coast Guard. The Debriefing Reports do not refer to any of those allegations. In total, these reports were not able to shed light on the actual events.
- In order to provide some background information, the Hellenic Coast Guard presented video footage to the Working Group. The video footage documents the circumspect behaviour of the Hellenic Coast Guard and the methods of Turkish Coast Guard in dealing with such situations. Additionally, the video highlights the systematic difficulties at Greek-Turkish sea border areas and the problems to evaluate the overall situation in a reliable manner, in view of the real conditions and influences, which have an effect on everyone involved, both the Border Guard Officers and the people on board the rubber boat.
- The allegation of threatening behaviour in the case in question by Hellenic Coast Guard officers could not be substantiated for the timeframe depicted in the video.
- In summary, there is a difference in presentation of facts with regard to this case. The statements and allegations could neither be substantiated nor dispelled by the Working Group.
- Due to the fact that there have been recent exchanges of information between the Agency and Greek authorities regarding the validation of the incident, the Serious Incident Report is still ongoing. The Working Group acknowledges that further information are pending.

3.6 Incident of 28/29 April 2020

Facts of the case:

- 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 located in the vicinity of Samos and labelled by Bellingcat as a “maritime pushback” in the Aegean Sea was subject to a further examination by the Working Group.

Final clarification and assessment:

- After reviewing all available data and considering a number of different sources, the Working Group comes to the conclusion that the Agency has not been notified about an incident nor has it received any information linked to the respective incident of 28/29 April 2020 reported on by Bellingcat on 20 May. The Agency stated that the sole reported incident that occurred in the period in question was incident No 406283, which had previously been deemed as not raising any specific concerns by the Working Groups preliminary report and which took place in the vicinity of Lesbos.
- To completely exclude a connection and as the Bellingcat report stated that a surveillance aircraft flew twice over the area while the alleged pushback took place, the Working Group examined the routings of all possible Frontex coordinated assets. Additionally, the Working Group examined the routings of all possible Frontex coordinated assets that had been on duty within the operational area of Joint Operation Poseidon on 28-29 April 2020.
- The following Frontex assets were deployed on 28-29 April 2020: -1- German Helicopter, -1- Latvian Offshore Patrol Vessel, -2- German Coastal Patrol Boats, -1- Portuguese Coastal Patrol Boat, -1- Portuguese Thermal Vision Vehicle. In conclusion, none of the mission reports of the aforementioned assets under Frontex presence provide any indications of an incident similar to the one reported on by Bellingcat on 20 May 2020.

4. Legal Aspects

In its preliminary report on Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea, the Working Group pointed out how complex the practical implementation of the legal provisions actually is, with regard to applicable international law (in particular the European Convention of Human Rights), EU law (in particular the EU asylum acquis, the Schengen Borders Code and the Charter) and national law of Greece as the respective Host Member State for Frontex coordinated Joint Operations. Any measure taken in the course of Joint Operations should be adequate to the objectives pursued, non-discriminatory and should fully respect human dignity, fundamental rights and the rights of refugees and asylum seekers, including the principle of non-refoulement.

However, this Working Group fully acknowledges the special circumstances at the Greek/Turkish maritime border (without high seas) – such as factors at sea, individual behaviour of facilitators/offenders and hybrid threats³ – affecting actions of responsible officers in each individual case.

The Working Group believes that guidance is needed in order to come to a conclusion for reconciling the following legal provisions: the European Court of Human Rights (ECHR) judgment in the case N.D and N.T of 13 February 2020; Regulation (EU) 656/2014; special circumstances following the agreement between the EU and Turkey⁴ (on the readmission of persons residing without authorization) from 2014 and the EU-Turkey statement from 2016.

This Working Group asked the European Commission to elaborate on the practical implementation of applicable law if facts lead to the assumption of a detected illegal border crossing attempt into (sea) territory of a European Union Member State (not a distress situation). 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 the key messages of the 13 February 2020 N.D and N.T judgment (ECtHR applications 8675/15 and 8697/15), 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, taking into account international and EU fundamental rights obligations. The need for ensuring common rules for land and sea borders should also be taken into account.

- Against the background of this new jurisprudence, 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?
- To what extent are the provisions and formal requirements for a refusal of entry (as stated in Art.14 (i.e. Annex V) Schengen Border Code or under national law) applicable during measures taken according to Art. 6 of Regulation (EU) 656/2014?

The aim of this consultation is to provide the basis for issuing clear operating instructions for practical use for the Team Members in Frontex operational activities.

As already stated in the preliminary report – and mentioned in the conclusions of the Management Board on 21 January 2021 – it needs to be clarified, to what extent the key messages of the 13 February 2020 N.D and N.T judgment (ECtHR applications 8675/15 and 8697/15), 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 there-

³ As indicated by Frontex strategic risk analysis as well as pandemic and connected EU travel restrictions.

⁴ The agreement between the EU and Turkey on the readmission of persons residing without authorization) from 2014 and the EU-Turkey statement from 2016.

fore politely asked the European Commission – as the authors and responsible authority for the EU Regulation 656/2014 to clarify the questions of the Working Group formulated under point 4.

Unfortunately, the Working Group has not received the reply from the EU Commission by the submission date. Therefore, the Working Group was not able to take the Statement by the European Commission on the legal aspects into consideration for the report.

5. Conclusions and recommendations

The Working Group once more emphasizes the difficult circumstances of conducting border police measures at the EU external maritime border in the Aegean Sea faced by all stakeholders. Jointly with the respective Host Member States, Frontex constitutes the main guarantor for strong and protected European external borders while upholding fundamental rights and international protection obligations. The outcome is underpinned by approx. 28,000 reported persons, who were rescued in the framework of Frontex coordinated joint operations with the help of Frontex deployed assets in 2019⁵. and despite a 85% annual decrease in arrivals in 2020 compared to 2019, 10,433 apprehended irregular migrants, 84 arrested people's smugglers, 97 Search and Rescue Operations and 2,954 rescued persons in 2020⁶. This underlines the significance of the Joint Operations to promote a shared and coordinated European border management in the Aegean Sea. In the course of the Working Groups examination the Agency's positive effect and that of the contributing Members States became obvious through the strengthening of the European external borders upon high and harmonized standards in all aspects of Integrated Border Management, including fundamental rights.

An effective border protection and compliance with the associated legal requirements are mutually dependent. Wherever deficits are identified, targeted intervention must follow-suit with the aim of avoiding any misconduct in the future. Therefore, the Working Group had also included the incidents still under review in the continued examination as part of the extended mandate.

5.1 Main results and proposals of the incidents

After the continued examination of the -5- incidents (SIR 11095/2020, SIR 11860/2020, SIR 11934/2020, SIR 12604/2020, SIR 12790/2020) plus -1- incident (28/29 April 2020) it has not been possible to completely resolve the incidents beyond any reasonable doubt. At the same time, the continued efforts once more could not substantiate that the Turkish Authorities did not take over responsibility for the safe return of the migrants or that migrants did not reach the Greek shores safely. There is no indication of anybody injured, reported missing or having died in connection with the respective incidents.

Nevertheless, the Working Group comes to the following conclusions:

⁵ Frontex: Annual Report 2019 on the implementation of Regulation 656/2014.

⁶ Frontex: Biweekly Analytical Report JO Poseidon 2020 (Weeks 50-51).

- Not every detected attempt of illegal border crossing by circumventing official Border Crossing Points – not even at sea – can automatically be considered as an asylum case. However, the right of access to asylum must be guaranteed regardless of the circumstances. The EU Member States have agreed on a common European asylum policy, including subsidiary and temporary protection. Article 4 of EU Regulation 656/2014 also underlines this right once again and points out that any measures under this Regulation may only be taken in accordance with this fundamental right. Especially this aspect has also been stressed by the Consultative Forum in their letter to the Working Group and the Chair of the Management Board.⁷
- Boats must not be left adrift unable to navigate regardless of other vessels in the vicinity. All stakeholders shall undertake the utmost to prevent such situations at any given time as well as any interference to the sea-worthiness to vessels at sea. This aspect has also been highlighted by the Consultative Forum in their letter to the Working Group and the Chair of the Management Board.⁸
- Any incident implying a possible violation of fundamental rights must be categorized in a Serious Incident Report category 4 and immediately allocated to the coordination of the Agency’s Fundamental Rights Officer (or equivalent in a new system). Corresponding investigative measures must be carried out without any delay and finalized as soon as possible. Any retrograde interference to adjust operational data shall be avoided. Necessary measures by all parties shall be taken into consideration to prevent even the slightest indication of such behaviour in the future.
- 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.
- The Working Group welcomes that, based on the conclusions of the Management Board of 21 January 2021, the Agency has already undertaken efforts and actions to reform its reporting and monitoring mechanism, and has presented the intermediate results on 10 February 2021. It also welcomes the letter from the Head of Frontex’s Operational Response Division to the Member States on ensuring incident reporting as well as the roadmap to include the proposed recommendations.

Acknowledging the recommendations already included in the Management Board conclusions of 21 January 2021 referring to the preliminary report, the Working Group makes the following additional recommendations:

⁷ See the letter of Consultative Forum to the Chair of the Frontex Management Board from 24 February 2021.

⁸ See the letter of Consultative Forum to the Chair of the Frontex Management Board from 24 February 2021.

- It remains undisputed that the national authorities of the hosting Member States exercise the tactical command on the operations. However, the Working Group believes that the documentation and monitoring of such sensitive scenarios are worthwhile to be considered under the reporting mechanism. This would strengthen this process and introduce a two-entity integrity (“second set of eyes principle”). For example, Frontex surveillance flights or other Frontex assets could in future remain at the location of detected incidents to document border police measures until they have been completed, provided that operational activities are not weakened and no gap in the surveillance system occurs.
- If feasible, all actions taken by Frontex assets or Frontex co-financed assets – in scope of Regulation (EU) 656/2014 – should be documented by video consistently.
- Concerning the letter from the Head of Operational Response Division to the Member States on ensuring incident reporting, the Working Group once again invites the Host Member States to contribute to the Agency’s reporting scheme.
- The role of the Joint Coordination Board as the competent forum for resolving misunderstandings and the provision of clarifications should be highlighted.
- The fact that -4- out of -5- incidents are still under examination by Frontex gives reason to re-evaluate the Agency’s internal proceedings in cases of suspected fundamental rights violations. Having said that, the question of a proper implementation of Article 46 of the Regulation (EU) 2019/1896 must be taken into account. Article 46 provides the Executive Director of the Agency the possibility to suspend, terminate or not launch activities if the operational plan is not respected.

5.2 Measures in conjunction with Article 46 of Regulation (EU) 2019/1896

- According to Article 46 (4) the “executive director shall, after consulting the fundamental rights officer and informing the Member State concerned, 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.”
- Therefore, the application of Article 46 is tied to a certain minimum level of severity and continuity of detected fundamental rights violations and should not be based on a single incident.
- Regardless of the specific application of Article 46 in individual cases, it should be noted that any decision in the context of a common European border management has a special scope, which also entails possible disadvantages. The fact that the agency's presence at the external borders with human and technical resources has a deescalating and preventive effect and can implement uniform standards on site needs to be highlighted. Also, it is in particular the agency which can contribute to participating authorities in the hosting countries complying with human rights on

site and, in a certain way, embody a supervisory authority for entities and units involved.

- Against this background, talking about considering the application of Article 46 in this particular case, -8- out of the -13- examined incidents were clarified and none of the incidents could substantiate fundamental rights violations. In relation to the remaining -5- incidents, it has to be stressed that only -1- incident has been closed by the Agency. For all other incidents, a final assessment is still pending for various reasons. Therefore, in view of the Working Group it can be said that, in view of all the circumstances, an application of Article 46 would not be justified in this case.
- The existing legal framework only offers limited options for Frontex for action in the event of reported and established legal violations. The most important measure to name is the aforementioned examination of the applicability of Article 46.
- Due to the seriousness and scope of such a decision, it would be necessary to discuss which measures below the threshold of Article 46 could be taken – in the sense of proportionality and Article 46 as a measure of last resort in the event of established legal violations. Such measures should be reflected in a tiered approach with a set of proceedings, made applicable for the Agency's operational activity.



Brussels 03/03/2021

Subject: 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

I. Introduction

On 15 January 2021, the Working Group on Fundamental Rights and Legal Operational Aspects of Operations (the “Working Group”) established by the Management Board of the European Border and Coast Guard Agency (“Frontex”) put forward a number of questions to the Commission.

It needs to be emphasised that an authoritative interpretation of EU law is reserved to the European Court of Justice. This note therefore obviously cannot substitute for and is without prejudice to such an authoritative interpretation.

The questions asked by the Working Group are the following:

- (1) Having regard to the recent case law of the European Court of Human Rights in *N.D and N.T*¹, under what conditions can Frontex apply Article 6(2)(b) of Regulation (EU) 656/2014 in a manner that ensures compliance with Article 4(3) of that same regulation?
- (2) To what extent are the provisions and formal requirements for a refusal of entry within the meaning of Article 14 and Annex V of Regulation (EU) 2016/399² (the “Schengen Borders Code”) or under national law applicable during measures taken according to Article 6 of Regulation (EU) 656/2014?

¹ *N.D and N.T*, App Nos. 8675/15 and 8697/15, judgment of 13 February 2020.

² Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ L 77, 23.3.2016, p. 1).

II. Legal Framework

1. Regulation (EU) 656/2014

The Working Group seeks an interpretation of the obligations of border surveillance teams in circumstances where the facts could justify the assumption that interception relates to a detected attempt of unauthorised border crossing (as opposed to situations where a vessel is in distress). The Working Group also seeks guidance on the interpretation of these requirements in the context of the EU-Turkey Statement.³

Regulation (EU) 656/2014 regulates Frontex operations in different geographical contexts. As set out in the 2013 Commission proposal⁴, the Regulation has as an objective to overcome previous differences in interpretations of international law that the Member States are subject to, and therefore to increase the efficiency of cross-border cooperation (see also e.g. recital 53 of Regulation (EU) 2019/1896). The obligations imposed on Frontex by Regulation (EU) 656/2014 essentially mirror the obligations of Member States under international law and the Charter of Fundamental Rights.

Whereas Article 6 of the Regulation governs interception in Member States' territorial seas, Article 7 regulates interception on the high seas. Insofar as the Working Group's first question relates specifically to Article 6 of Regulation (EU) 656/2014 and given the scope of the Group's mandate, it is considered to concern detections and interceptions by Frontex-coordinated border surveillance teams in the *territorial sea* of the Member States. This note therefore does not cover interceptions outside the territorial waters of an EU Member State or in the high seas.

Article 5 of Regulation (EU) 656/2014 sets out the procedure to be followed in cases where, during a joint operation, a Frontex-coordinated border surveillance team ("border surveillance team") detects a vessel suspected of carrying persons circumventing or suspected or intending to circumvent checks at border crossing points or of being engaged in the smuggling of migrants by sea.

Article 6 of Regulation (EU) 656/2014 establishes a **two-step procedure** for engaging with the vessel detected. Article 6(1) of Regulation (EU) 656/2014 lists a number of measures that may, but do not in all cases have to be, applied cumulatively. The measures listed in Article 6(1) may, but need not necessarily, involve contacts with each person on board the intercepted vessel, for instance where information requested on ownership, registration and elements relating to the voyage of the vessel suffices to dispel the initial suspicion. Nor does Article 6(1) as such require that persons on board the intercepted vessel be brought on board of the participating unit.⁵

Pursuant to Article 6(2) of Regulation (EU) 656/2014, in case evidence confirms the border surveillance team's suspicions, those teams may be authorised to take one or more of the measures listed in that article, including ordering the vessel to alter its course outside of or towards a destination other than the territorial sea.

³ Statement of 18 March 2016 accessible at <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>.

⁴ COM(2013)197.

⁵ However, in this regard, border surveillance teams remain subject to obligations resulting from other norms, including, in particular, the asylum *acquis*.

The specific rules laid down in Article 6 of Regulation (EU) 656/2014 are subject to the “general rules” on respect for fundamental rights that are laid down in Articles 3 and 4 of that same regulation.

Article 3 states that measures taken for the purpose of a sea operation shall always be conducted in a way to ensure the safety of the persons that are intercepted or rescued, of the participating teams and of third parties.

Article 4(1) enshrines general obligations flowing from the principle of *non-refoulement*. These obligations are to be applied taking into account case-specific circumstances.

In all cases, **Article 4(2)** spells out the obligation of the host Member State, in the context of planning a sea operation, to take into account, in coordination with the participating Member States and Frontex, the general situation in a third country when considering the possibility of disembarkation in that third country.

Article 4(3) of Regulation (EU) 656/2014 requires an *individualised assessment* of the personal circumstances of each intercepted or rescued person. It imposes an obligation on border surveillance teams in relation to such persons before they are disembarked in, forced to enter, conducted to or otherwise handed over to the authorities of a third country: Border surveillance teams shall use all means to identify the intercepted or rescued persons, assess their personal circumstances, inform them of their destination in a way that those persons understand or may reasonably be presumed to understand and give them an opportunity to express any reasons for believing that disembarkation in the proposed place would be in violation of the principle of *non-refoulement*.

Furthermore, all vulnerable persons have to receive special attention, as set out in Article 4(4).

The existence of the **EU-Turkey statement** in the context of addressing irregular migration between Greece and Turkey is one of the relevant factors to be taken into account when assessing the general situation in that third country.

Given that the irregular crossing of sea borders in unseaworthy vessels is difficult to control, this Statement is one of the measures to prevent loss of lives and endangering public safety by such crossings. The ultimate objective is to replace risky irregular journeys by orderly and regulated migratory movements using legal pathways, such as resettlement or sponsorships.

Pursuant to point 1 of the Statement, all returns to Turkey are to “take place in full accordance with EU and international law, thus excluding any kind of collective expulsion. All migrants will be protected in accordance with the relevant international standards and in respect of the principle of *non-refoulement*.”

In view of the nature of the rules and criteria mentioned above, it is essential that **each case be judged on its own merits**, taking into account all circumstances governing the concrete situation at sea.

2. Impact of the ECHR's jurisprudence on the interpretation of Regulation 656/2014

In its judgment in *N.D and N.T.*, the Grand Chamber of the European Court of Human Rights (“ECtHR”) ruled, in the context of Ceuta and Melilla, that Article 4 of Protocol No 4 to the Convention did not preclude in certain circumstances the summary removal of migrants who sought to unlawfully scale border fences – without individualised assessments – in circumstances where the “genuine and effective” means of legal entry existed for the purposes of submitting claims for international protection and migrants did not make use of them without cogent reasons.

Pursuant to Article 52(3) of the Charter, rights under the Charter that correspond to provisions of the ECHR are to have the same meaning and scope as those laid down in the Convention. Since Article 19(1) of the Charter corresponds to Article 4 of Protocol No 4 of the ECHR, the judgment in *N.D and N.T.* forms part of the legal framework applicable to Frontex and national border guards, in particular, as regards the application of Article 19(1) of the Charter, including in the context of border surveillance operations at the Union’s external sea borders.

That being said, this judgment cannot be directly applied to all situations, for a number of reasons, including the following:

- (1) This judgment assessed the situation only from the point of view of obligations under Article 4 of Protocol No 4 of the ECHR and could not consider the specific obligations applicable in the Union legal order as regards in particular Regulation (EU) 656/2014 and the EU’s asylum and return acquis.
- (2) This judgment related to a specific situation at a land border and not at sea borders.
- (3) This judgment related to the specific situation at the border with a specific third country (Morocco) and the situation, notably as regards compliance with relevant international standards and possibilities for legal pathways to enter the EU, is different in each country and may also change over time.
- (4) The principle of *non-refoulement* was not at stake in that judgment as the applicants’ claims concerning a breach of Article 3 ECHR were rejected as inadmissible in their individual circumstances.

3. Refusal of entry

By its second question, the Working Group inquires in essence about the extent to which measures taken pursuant to Article 6 of Regulation (EU) 656/2014 would trigger the provisions and formal requirements for a refusal of entry within the meaning of Article 14 and Annex V of the Schengen Borders Code (SBC).

At the outset, it is observed that pursuant to **Article 14 SBC**, third country nationals must be refused entry when they do not fulfil all the entry conditions laid down in Article 6(1) SBC and do not belong to the categories of persons referred to in Article 6(5) of that Code. **Article 13 SBC** (Border Surveillance) provides that a person who has crossed a border illegally and who has no right to stay on the territory of the Member State concerned shall be apprehended and made subject to procedures respecting Directive 2008/115/EC.

It therefore depends on the circumstances (apprehension in conduct of border checks at a border crossing point or apprehension in the context of border surveillance) which type of measure may be taken:

a) At a border crossing point: According to Annex V, part B of the Schengen Borders Code, refusals of entry within the meaning of Article 14 Schengen Borders Code shall be issued at border crossing points only. Such decision shall be adopted in line with all procedural requirements set out in the Schengen Borders Code, using the standard form set out in its Annex V.

In these conditions, the refusal is subject to the specific provisions laid down in Article 14 of the Schengen Borders Code, including in particular, the requirements of Annex V. Pursuant to these requirements, the decision is to be substantiated, stating the precise reasons for the refusal and must be able to be subject to an appeal.

However, it should also be underlined that it follows from the terms of Article 14 of the Schengen Borders Code, that a refusal can only take place *after* the competent authorities have evaluated that a third country national does not fulfil the entry conditions, and in particular, does not belong to the categories of person referred to in Article 6(5) of the Schengen Borders Code. Third country nationals who may have a right to be admitted pursuant to point (c) of Article 6(5) of the Schengen Borders Code include persons seeking access on humanitarian grounds, including as a result of international obligations.

Furthermore, pursuant to the second sentence of Article 14(1) of the Schengen Borders Code, refusal shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection.

b) In the context of border surveillance: Article 13 of the Schengen Borders Code prescribes that in the case of irregular entries discovered in the context of border surveillance, “procedures respecting Directive 2008/115/EC” shall be applied. This means that either a return procedure in accordance with that Directive shall be launched or that Member States may have recourse to simplified national return procedures and arrangements covered by its Article 2(2)(a).

Article 2(2)(a) of Directive 2008/115/EC allows for the Directive’s provisions not to be applied to third country nationals who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State. However, Article 4(4) of that Directive obliges Member States that make use of the derogation and adopt simplified national return measures instead of “full” return decisions under the Directive to provide for a certain minimum level of treatment and protection, including the right to protection against *refoulement*.

Where a person subject to a return procedure (full return procedure under Directive 2008/115/EC or national procedure covered by Article 2(2)(a) of the Directive) asks for international protection and as a result enjoys a right to remain, pending the examination of that application, return procedures shall be stopped or suspended.