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## URGENT

*Preliminary Action Pursuant to Article 265 TFEU*

Mr. Fabrice Leggeri

15 February 2021

Executive Director

Frontex

Subject: **Immediate Suspension or Termination of Activities in the Aegean Sea Region**

- 1.! **Front-LEX** and the **Legal Centre Lesvos**, hereby submit this request for action on the part of the European Border and Coast Guard Agency (FRONTEX or the Agency), pursuant to Article 265 of the Treaty on the Functioning of the European Union (TFEU).
  
- 2.! In the face of numerous violations of fundamental rights and international protection obligations related to acts and omission of the Agency in the Aegean Sea, which are of a serious nature and are likely to persist, we hereby invite the Agency to consider its position vis-à-vis its activities in the host Member State Greece and to ***immediately suspend or terminate all its***

**activities in the Aegean Sea Region**, in compliance with The Agency's obligations under Article 46 (4) of European Border and Coast Guard (EBCG) Regulation.<sup>1</sup>

3. We remind you that in taking a decision to suspend or terminate FRONTEX's activities in the Aegean Sea, you are obliged to provide duly justified grounds for your decision, within the meaning of Article 46 (6) of the EBCG Regulation.
4. **Front-LEX**<sup>2</sup> is a legal hub for challenging EU migration policies through strategic litigation and advocacy. *Front-Lex* is providing legal aid to organizations and individual victims of violations of fundamental rights committed by the European Union (EU) and its Member States.
5. **The Legal Centre Lesvos**<sup>3</sup> is a civil non-profit organization providing legal assistance and representation to migrants arriving to Lesvos, including to victims of violations of fundamental rights.
6. FRONTEX has operated in the Aegean Sea as part of Operation Poseidon since 2006. Over the years, along the borders with Turkey, countless incidents which concern, *inter alia*, a violation of the prohibition on *refoulement*, have been documented and reported by asylum seekers, rights groups and media outlets.
7. Following Turkey's announcement to open its borders to the EU on **28 February 2020**,<sup>4</sup> and the violence against migrants with which the Greek state responded, collective expulsions of persons in need of protection by the Greek authorities have been even more systematic.

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<sup>1</sup> REGULATION (EU) 2019/1896 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624

<sup>2</sup> *Front-LEX* (formerly Stichting Asylum and Migration Tribunal) is registered in The Netherlands with registration No. 861176753, Plantage Doklaan 12, 1018CM Amsterdam, info@front-lex.eu

<sup>3</sup> The Legal Centre Lesvos (LCL) is registered in Greece with registration No. 02/2019 in the Mytilene Civil Court, located at Sappous 2, Mytilene, 81100, +30 22510 40665, info@legalcentrelesvos.org.

8. Despite being aware of numerous reports of pushbacks in Greece during the last decade, as well as of the Greek authorities' dismissive attitude toward complaints in connection with this criminal practice, Frontex, under your direction, nonetheless decided in March 2020 to accept Greece's request to launch a Rapid Border Intervention in the Aegean Sea.

**I. No *Due Diligence*: FRONTEX's Decision to Operate in a Member State with Suspended or Dysfunctional Asylum System and Alleged Crimes Against Humanity**<sup>5</sup>

9. On **1 March 2020**, the Greek authorities officially asked FRONTEX to launch a Rapid Border Intervention in the Aegean Sea Region (Rapid Border Intervention Aegean). It took you only **one** single day to announce the launch of the requested operation, leaving no time for the competent organs of your agency to meet their *due diligence* obligations and conduct an adequate risk analysis of this operation.<sup>6</sup>

10. There is no evidence to suggest you have ever consulted with the Fundamental Rights Officer, in accordance with Article 46(5) of the EBCG Regulation, given that there were already compelling reasons to believe the requested operation would lead to serious and persisting violation of fundamental rights and international protection obligation, on the basis of the critical situation in the host Member State, Greece.

11. This included, at the time, the implementation of a set of violent anti-migrant measures by the Greek government in flagrant breach of EU and international law as well as fundamental

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<sup>4</sup> Matina Stevis-Gridneff and Carlotta Gall, 'Erdogan Says, 'We Opened the Doors,' and Clashes Erupt as Migrants Head for Europe', The New York Times, 29 February 2020, available at: <<https://www.nytimes.com/2020/02/29/world/europe/turkey-migrants-eu.html>>.

<sup>5</sup> Legal Centre Lesvos, 'Crimes against humanity in the Aegean', 1 February 2021, available at: <<http://legalcentresvos.org/wp-content/uploads/2021/02/Collective-Expulsions-in-the-Aegean-LCL-01.02.2021-1.pdf>>.

<sup>6</sup> FRONTEX, 'Frontex to launch rapid border intervention at Greece's external borders', 2 March 2020, available at: <<https://frontex.europa.eu/media-centre/news/news-release/frontex-to-launch-rapid-border-intervention-at-greece-s-external-borders-NL8HaC>>.

human rights. Inter alia, on 1 March 2020, the Greek National Security Council decided to unilaterally, unlawfully, suspend the right to seek asylum in Greece for a month period.<sup>7</sup> In parallel, the Greek state systematically pressed criminal charges against asylum seekers for illegal entry into the country, despite Article 31 of the 1951 Convention on the Status of Refugees prohibiting such prosecution.<sup>8</sup> New arrivals were summarily and arbitrarily detained across the Aegean islands in ports, overcrowded buses and ships, or on beaches without shelter; denied access to sanitation facilities; medical care; and asylum procedures.<sup>9</sup> Lawyers and members of the European Parliament were denied access to the port in Lesbos, where over 574 people were detained.<sup>10</sup> Increased violence at sea was already notorious with at least one instance, which was video-recorded, in which the Greek authorities fired at a rubber dingy approaching by sea.<sup>11</sup> In addition, since July 2019, the Greek government has repeatedly hardened its legislation on international protection, facilitating deportations to Turkey, obstructing access to asylum, to legal assistance and effective remedies in flagrant disregard for EU law, as denounced by various civil society actors. Those measures, added to the years of systematic pushback practices carried out by Greece at both its land and sea border with Turkey should, at the minimum, have been taken into account in FRONTEX's decision to launch its new intervention in the Aegean.<sup>12</sup>

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<sup>7</sup> See, among others:

Human Rights Watch, 'Greece Restarts Suspended Asylum Procedure', 5 June 2020, available at: <<https://www.hrw.org/news/2020/06/05/greece-restarts-suspended-asylum-procedure>>.

<sup>8</sup> HIAS Greece, 'Greece: Criminal charges pressed against the asylum seekers who arrived in Lesbos in March 2020', 8 July 2020, available at: <[https://www.hias.org/sites/default/files/greece-eng\\_criminal\\_charges\\_against\\_all\\_arrivals\\_of\\_march\\_final.pdf](https://www.hias.org/sites/default/files/greece-eng_criminal_charges_against_all_arrivals_of_march_final.pdf)>.

<sup>9</sup> LCL, 'No-man's land for Europe's "undesirables"', 13 March 2020, available at:

<<http://legalcentresvos.org/2020/03/30/discriminatory-restrictions-on-movement-further-contain-migrants-in-unsanitary-conditions-and-at-risk-of-covid-19-outbreak/>>.

<sup>10</sup> LCL, 'Illegal and immoral: European border priorities become policy', 5 March 2020, available at: <<https://www.facebook.com/LesvosLegal/posts/3005714389467254>>.

<sup>11</sup> See, for example: BBC news, 'Greek coast guards fire into sea near migrant boat', available at: <<https://www.bbc.com/news/av/world-europe-51715422>>

<sup>12</sup> See, for example:

Amnesty International, 'FRONTIER EUROPE: Human Rights abuses on Greece's border with Turkey', July 2013, available at: <<https://www.amnesty.org/download/Documents/12000/eur250082013en.pdf>>;

ProAsyl, 'Pushed back: systematic human rights violations against refugees in the Aegean sea and the Greek-Turkish land border', November 2013, available at: <<https://www.proasyl.de/en/material/pushed-back-systematic-human-rights-violations-against-refugees-in-the-aegean-sea-and-the-greek-turkish-land-border/>>;

Human Rights Watch, 'Greece: Attacks on Boats Risk Migrant Lives', 22 October 2015, available at: <<https://www.hrw.org/news/2015/10/22/greece-attacks-boats-risk-migrant-lives#>>;

Human Rights Watch, 'Greece: Violent Pushbacks at Turkey Border – Summary Returns, Unchecked Violence', 18 December 2018, available at: <<https://www.hrw.org/news/2018/12/18/greece-violent-pushbacks-turkey-border>>;

12. Moreover, it appears that the Agency did not draft a tailored operational plan in order to assure, *inter alia*, that in the face of the volatile situation in the Aegean Sea described above, Serious Incident Reports (SIR) on violations of fundamental rights would be issued, a follow up mechanism on reported SIR was in place and that in relation to reported SIR and other relevant information, clear and transparent rules on the application of Article 46 of the EBCG Regulation had been established.
13. Notwithstanding the particular and preoccupying geopolitical circumstances in the relevant area and the imminent threats to fundamental rights, FRONTEX failed to adopt a *distinct* operational plan which would have enabled it to comply with its fundamental rights and international protection obligation. When referring to the Rapid Border Intervention Aegean in a hearing before the European Parliament on 1 December 2020, you stated that “*the operational plan and the operational objectives were the same as Joint Operation Poseidon*”.<sup>13</sup>
14. The hasty decision to launch the Rapid Border Intervention Aegean was taken on **2 March 2020**, *the day after* the Greek Government had *suspended* its national asylum process in flagrant breach of both international refugee law and the EU asylum acquis.<sup>14</sup> From its very outset, internationally wrongful acts committed by Greece surrounded the Rapid Border Intervention

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Greek Council for Refugees, ARSIS-Association for the Social Support of Youth, ‘The New Normality: Continuous Push-backs of Third Country Nationals on the Evros River’, HumanRights360, available at: <<https://www.humanrights360.org/the-new-normality-continuous-push-backs-of-third-country-nationals-on-the-evros-river/>>;

Mobile Info Team. ‘Illegal Pushbacks at the Border: Denying Refugees the Right to Claim Asylum’, 15 November 2019, available at: <<https://www.mobileinfoteam.org/pushbacks>>.

Forensic Architecture, ‘Pushbacks Across The Evros/ Meriç River: The Case Of Ayşe Erdoğan’, available at: <<https://forensic-architecture.org/investigation/pushbacks-across-the-evros-meric-river-the-case-of-ayse-erdogan>>.

<sup>13</sup> European Parliament, ‘Committee on Civil Liberties, Justice and Home Affairs’, 1 December 2020, available at <[https://multimedia.europarl.europa.eu/en/committee-on-civil-liberties-justice-and-home-affairs\\_20201201-1345-COMMITTEE-LIBE\\_vd](https://multimedia.europarl.europa.eu/en/committee-on-civil-liberties-justice-and-home-affairs_20201201-1345-COMMITTEE-LIBE_vd)> (13:55:25 – 13:55:32).

<sup>14</sup> UNHCR, ‘UNHCR statement on the situation at the Turkey-EU border’, 2 March 2020, available at:

<<https://www.unhcr.org/news/press/2020/3/5e5d08ad4/unhcr-statement-situation-turkey-eu-border.html>>;

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

<<https://twitter.com/PrimeministerGR/status/1234192922813267976?s=20>>

Aegean and foreshadowed the serious and persisting fundamental rights violations that were soon to come.<sup>15</sup>

15. On the *same* day the Rapid Border Intervention Aegean was announced, **2 March 2020**, a Danish Coast Guard vessel deployed to FRONTEX, with some 33 rescued migrants on board, and while already near the coastline of the Greek island of Kos, was ordered by the host Member State Greece ‘to **transfer** the migrants back to the rubber boat and escort/transfer them into the TUR territorial waters’.<sup>16</sup>

16. The Danish Coast Guard vessel **refused** the unlawful orders of Greece to forcefully transfer the rescued refugees to a rubber boat and back to Turkey, an act which would have constituted a violation of the prohibition on *refoulement* under international refugee law, a breach of the prohibition on collective expulsions under European and EU human rights law, an infringement of international maritime law and, committed in a widespread or systematic manner pursuant to a state policy, a **crime against humanity** of unlawful deportation under international criminal law.<sup>17</sup>

17. The Danish Coast Guard vessel informed the Danish official at the International Coordination Centre (ICC), who then forwarded information to the Hellenic Coast Guard (HCG). Following the Danish Coast Guard’s refusal to commit a serious infringement of international law, Greece ‘then cancelled the order to transfer the migrants back into the rubber boat. A new order was given to bring the

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<sup>15</sup> The failure of Greece to comply with international refugee and human rights law is not new. It has been going on for years. Deficiencies in the asylum procedure, including exposure to unlawful detention and inhuman and degrading living conditions were determined by the Strasbourg court to amount to an inhuman and degrading treatment within the meaning of Article 3 ECHR. See generally ECtHR - M.S.S. v Belgium and Greece [GC], Application No. 30696/09.

<sup>16</sup> Nikolaj Nielsen, ‘Revealed: Official Greek order to illegally pushback migrants’, euobserver, 18 November 2020, available at: <<https://euobserver.com/migration/150099>>.

<sup>17</sup> Article 3 and Article 4 Protocol 4 ECHR, Article 19 EU Charter of Fundamental Rights; Article 3 CAT; Article 33 of the 1951 Convention Relating to the Status of Refugees; Article 7(1)(d) of the Rome Statute.

*migrants to Kos Harbor and hand them over to HCG. The Issue was closed. There were no further discussions*.<sup>18</sup>

18. As will be detailed below, similar situations where non-Danish Member States were involved resulted in the collective expulsion of rescued refugees to Turkey.
  
19. The prohibition of *refoulement* is the cornerstone of International Law and EU Fundamental Rights Law. Meticulous observance of that principle must be an ultimate imperative for each and every participant in FRONTEX Joint Operations, underpinning every operational plan. It is unimaginable that any participant, from the sailor to the commander, be it personnel of the host or home Member State, would ever mistake an infringement of the prohibition of *refoulement* for a legitimate measure.
  
20. It took four days for the information regarding the incident of 2 March 2020 to be formally registered with FRONTEX on **6 March 2020**, just days after the Agency announced the launch of Rapid Border Intervention Aegean and yet ***before*** that operation began on **12 March 2020**. Such an unequivocal attempt by the host Member State Greece to collectively expel asylum seekers to Turkey should have led the Agency, under your direction, to decide ***not to launch*** any activity by the Agency in the Aegean Sea, in accordance with Article 46(5) of the EBCG Regulation. At minimum, you should have suspended or terminated the recently approved Rapid Border Intervention Aegean in accordance with Article 46(4) of the EBCG Regulation, considering that there were violations of fundamental rights or international protection obligations related to the activity in the Aegean Sea that were of a serious nature or likely to persist.

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<sup>18</sup> *Supra.*, note 16.

## **II. No Specific Operational Plan; No Monitoring Mechanism; Failure to Investigate**

21. The unlawful attempt of the host Member State Greece to collectively expel rescued asylum seekers on 2 March 2020 constitutes, in itself, both a serious violation of fundamental rights and international protection obligations, and is a telling indicator of the high likelihood such infringements would persist. You failed to properly assess the implications of that incident, and you ***failed to act*** in accordance with your obligations under the aforementioned provisions of the EBCG Regulation.
22. Instead, you misrepresented the material facts pertinent to the incident, misinterpreted and downplayed the legal implications of the host Member State Greece’s unlawful conduct. During a hearing of 6 July 2020 before the European Parliament, you, Mr. Leggeri, provided a detailed account of what *supposedly* had happened on 2 March 2020:

“In the first days of March, there was apparently some misunderstanding, there was an instruction that was given by HCG to a Danish vessel deployed in the FRONTEX operation and those instructions were not in line with the Operational Plan, and this was immediately recognized and acknowledged by the HCG, I stepped in also personally in order to clarify the situation and this was acknowledged, that there was a misunderstanding there was wrong instructions given and this stopped this, let’s say, wrong instruction in the context of FRONTEX operation. This is the case that I can report that took place under the umbrella of FRONTEX operations.”<sup>19</sup>

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“On the incident that happened during the first days of the rapid border intervention when a Danish vessel deployed in the FRONTEX operation was instructed by the HCG ***not to take on board*** the migrants intercepted at sea but to return them to

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<sup>19</sup> European Parliament, ‘LIBE Committee meeting’, 6 July 2020, available at: <[https://multimedia.europarl.europa.eu/en/libe-committee-meeting\\_20200706-1645-COMMITTEE-LIBE\\_vd](https://multimedia.europarl.europa.eu/en/libe-committee-meeting_20200706-1645-COMMITTEE-LIBE_vd)>; (18:12:41 – 18:13:38).

Turkey, that was *in the first days* and there was clearly, apparently, ***a misunderstanding of the operational plan***. That’s why I immediately stepped in in order to ask HCG authorities to clarify what was the instructions and they found out that – and this was what was reported to me and to FRONTEX – that locally an officer of the HCG had not understood correctly the operational plan and that this ***would not happen again***. So, I’m just sharing with you the Parliament what was reported to me and this was ***the only case*** within the implementation of the operational plan rapid border intervention Aegean or Poseidon Operation.”<sup>20</sup> (Emphasis added)

23. The HCG did not order the Danish FRONTEX vessel “not to take on board” ‘the migrants’. ‘The migrants’ were already on board the FRONTEX vessel.<sup>21</sup> When the HCG ordered FRONTEX to forcibly transfer 33 human beings elsewhere, they were already under the jurisdiction of the state whose flag the vessel was flying: namely Denmark. This is not ‘the only case’ in which such ‘misunderstanding’ on your part misrepresents the turn of events.
24. Your failure to provide accurate facts in a formal hearing before an institution of the European Union – the sovereign authority supervising your conduct, to which the Agency is accountable – raises serious questions about your willingness or ability to comply with the human rights standards and basic principles such as the rule of law the EU is supposedly committed to.
25. The inaccuracies found in your statement before the European Parliament were not overlooked by the EU’s Home Affairs Commissioner, Ylva Johansson, who admitted that “some of the things being said by the Executive Director in Parliament [are] not true”.<sup>22</sup>

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<sup>20</sup> *Ibid.*, (18:34:24 – 18:35:45).

<sup>21</sup> *Supra.*, note 16.

<sup>22</sup> Daniel Boffey, ‘EU border force head faces calls to quit over allegations he ‘misled’ MEPs’, The Guardian, 19 January 2021, available at: <<https://www.theguardian.com/global-development/2021/jan/19/eu-border-force-head-fabrice-leggeri-faces-calls-to-quit-over-allegations-he-misled-meps>>.

26. **Failure of the Executive Director to fulfill his reporting duties in good faith may constitute in itself - under certain circumstances - a compelling reason to suspend or terminate a specific activity of the Agency, including to terminate the service of the Executive Director himself.**<sup>23</sup>
27. The reported incident took place ‘*during the first days of the rapid border intervention*’. But the Operational Plan for the Rapid Boarder Intervention Aegean was, by your own admission,<sup>24</sup> **the same** one drafted long before for Joint Operation Poseidon. In any case, the prohibition on **refoulement** is contained within any Operational Plan. Any conduct in breach of this principle cannot reasonably be perceived as a “*misunderstanding of the operational plan*”, as you claimed ([22] above).
28. The unlawful attempt of the host Member State Greece to collectively expel rescued asylum seekers to Turkey was formally registered with FRONTEX on 6 March 2020, yet the dissenting Danish Coast Guard crew **did not issue a Serious Incident Report (SIR)**, as is expected from every participant in a FRONTEX Joint Operation when confronted with a violation of fundamental rights or international protection obligation related to the activities of the Agency.
29. The attempted pushback operation of 2 March 2020, ordered by the host Member State Greece, was prevented only due to the Danish Coast Guard’s failure to follow the orders of the HCG, and their diligence and compliance with International and Regional Law. The attempted push back was prevented despite the failure of the Agency to take all measures to secure the rights of individuals at risk for their lives. However, for some unknown reason, the serious

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<sup>23</sup> EBCG, Articles 106-107.

<sup>24</sup> *Supra*, note 12.

incident the Danish Coast Guard were part of did not result in a SIR registered with the Agency.<sup>25</sup>

30. The fact the Danish crew witnessed a **serious incident but decided not to issue a SIR** reflects a serious failure of the reporting and monitoring mechanism of the Agency. Relying on one serious failure – the Agency’s failure to document, report and investigate serious incidents – to justify another failure – inaction within the meaning of Article 46(4) of the EBCG Regulation – only further supports the argument that due to a series of grave violations of positive and negative obligations of the Agency, your operations in Greek waters and land must immediately be suspended or terminated. As noted above, a failure to act on the part of the Agency in this context should be followed by the suspension or termination of not only the said operation in question but also the service of the Executive Director.

### **III. Structural Failures of FRONTEX Irrespective of the Involved Host and Home Member States**

31. This specific failure to issue a SIR in the 2 March 2020 incident is likely only one among immeasurable examples of systematic and widespread deficiencies inherent to the Agency’s reporting and monitoring mechanisms, whose illusory functioning makes it impossible for the Agency to guard against infringements of fundamental rights and international protection obligations.
32. The failure of the Agency and yourself as Frontex Executive Director to observe *due diligence* reporting and monitoring obligations, are by no means particular to a certain operation, jurisdiction or relationship with a specific Host Member State. Nor do they result from the conduct of a specific Home Member State’s agents operating under the aegis of FRONTEX.

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<sup>25</sup> Supra, note 16.

They are inherent to the functioning of the Agency, its direction and management. These failures appear in similar fashion everywhere FRONTEX operates.

33. In 2016-2017, for example, FRONTEX's Fundamental Rights Officer and Consultative Forum repeatedly invited you to act and suspend or terminate the Agency's activities in Hungary due to well documented violations of fundamental rights.<sup>26</sup> You ignored the recommendation of the internal organs of your own Agency. You disregarded the abundance of external evidence presented to you by human rights groups.

34. The number of victims had reached tens of thousands, before the highest competent court – the Court of Justice of the European Union (CJEU) – following proceedings instituted by the European Commission,<sup>27</sup> effectively left you no choice but to terminate the operation in that jurisdiction on 27 January 2021.<sup>28</sup>

35. In the context of the Aegean Sea region, your repeated failure to act, as the Executive Director of FRONTEX, with respect to no less than 13 serious suspicious incidents left no choice to the Management Board (MB) of the Agency but to establish its own “Working Group on Fundamental Rights and Legal and Operational Aspects of operations” (WG).<sup>29</sup> The Preliminary Report of the Frontex Management Board Working Group, on “The Fundamental

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<sup>26</sup> Frontex Consultative Forum on Fundamental Rights, ‘Recommendation by the Consultative Forum to the Executive Director and Management Board of the European Border and Coast Guard Agency (Frontex)’, 10 November 2016, available at: <<https://www.helsinki.hu/wp-content/uploads/8.-Recommendation-from-CF-Redacted.pdf>>;

Apostolis Fotiadis, ‘Frontex’s history of handling abuse evidence dogs Balkan expansion’, Balkan Insight, 6 February 2020, available at: <<https://balkaninsight.com/2020/02/06/frontexs-history-of-handling-abuse-evidence-dogs-balkan-expansion/>>

<sup>27</sup> Court of Justice of the European Union, PRESS RELEASE No 161/20, ‘Hungary has failed to fulfil its obligations under EU law in the area of procedures for granting international protection and returning illegally staying third-country nationals’, 17 December 2020, available at: <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-12/cp200161en.pdf>>

<sup>28</sup> Monika Pronczuk and Benjamin Novak, ‘E.U. Border Agency Pulls Out of Hungary Over Rights Abuses’, The New York Times, 27 January 2021, available at: <<https://www.nytimes.com/2021/01/27/world/europe/frontex-hungary-eu-asylum.html>>.

<sup>29</sup> The WG was established by decision No. 39/2020 of FRONTEX Management Board.

Rights and Legal Operational Aspects of Operations in the Aegean Sea' was leaked on 19 January 2021.<sup>30</sup>

36. Your failure to investigate, to provide a truthful account of the events, and to provide full and transparent access to information resulted in the WG having to investigate alleged "**knowledge and/or even involvement**"<sup>31</sup> of FRONTEX in serious and systematic breaches of international law, and to enquire "about the *true* events"<sup>32</sup> through access to "all relevant information, including information in databases, *held* by Frontex".<sup>33</sup> (Emphasis added)
37. In the aforementioned 2 March 2020 incident, *only* FRONTEX was present on-scene, acting upon – in this case refusing to act upon - instructions of the Greek authorities. How "interceptions" unfold when both FRONTEX and the HCG are both present on-scene is questionable. One of the incidents under the investigation by the WG, dated 30 October 2020, sheds some light on this. In this case, the division of labor was clear: FRONTEX is tasked with the interception, then HCG is in charge of the collective expulsion, abandonment at sea, leaving helpless men, women and children's lives in grave danger as the WG reminds us:

"On 30 October 2020 at 04:50 LT, a **Swedish** Coast Guard vessel detected a rubber boat, with an outboard engine, transporting around 20 people (men, women and children) and intercepted it... the rubber boat disregarded the stop orders given by the Swedish Coast Guard vessel and tried to continue its course towards the Greek Coast line until it got intercepted 1.5 Nautical Miles from the border line inside Greek Territorial Water. The Greek Liaison Officer on board contacted the Hellenic Coast Guard (HCG), which dispatched a Greek patrol boat to the scene. The Swedish Coast

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<sup>30</sup> 'The Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea, Preliminary Report of the Frontex Management Board Working Group', 19 January 2021, available at: <<https://t.co/ZcwV6CiwY?amp=1>>.

<sup>31</sup> *Ibid.*, page 2.

<sup>32</sup> *Ibid.*, page 5.

<sup>33</sup> *Ibid.*, page 5.

Guard vessel remained at the scene **until a HCG vessel took over**. The Hellenic authorities informed the crew of the Swedish Coast Guard vessel that it was **released from the scene**, once the HCG was taking over the situation. Afterwards the Swedish Coast Guard vessel **was then ordered to continue its patrol in northern direction**. While leaving the scene the Commanding Officer of the Swedish Coast Guard vessel **witnessed that one crew member of the HCG vessel stood on the foredeck handling ropes/mooring lines, and another crew member stood on the aft deck on the HCG vessel also handling ropes/mooring lines to fasten the rubber boat**. After leaving, **the Swedish crew continued to monitor the situation on radar and saw the radar echo of the Hellenic Coast Guard Patrol boat, which was moving towards the Turkish border line, where it stopped moving**. According to the data made available by Frontex, **no rubber boat with people on board has arrived to Chios during the day of the incident”**.

“According to the Hellenic Coast Guard, the Hellenic Coast Guard Boat attempted to control the rubber boat **to clear the situation** on scene. During the border police measures the **migrants behaved uncooperative** and the migrant boat continued its movement by its own will in the direction of Turkish Territorial Waters. Due to the uncooperative behaviour, the Hellenic Coast Guard vessel accompanied the rubber boat very closely. The Hellenic Coast Guard vessel stops at GRC/TUR Border. **The migrant boats left the Greek Territorial Waters independently**. According to the statement by the Hellenic Coast Guard **there was no opportunity for the migrants to apply for asylum** due to their non-cooperative behaviour since the situation was dominated by the efforts of the migrants to escape the border police measures.”<sup>34</sup>

(typos in the original document; emphasis added)

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<sup>34</sup> *Ibid.*, page 16.

38. As the WG suspects, this incident reveals both FRONTEX's **knowledge** of the practices of the HCG and FRONTEX's **involvement**. The Swedish agents concluded they are witnessing a collective expulsion, breaching the Agency's positive obligations. And they were also complicit in effectuating the operation, breaching FRONTEX's negative obligations.
39. This evidence of collaboration between FRONTEX and the HCG is supported by other incidents, where the intercepted persons supposedly either 'misbehave' or manifest no interest in staying in Greece, and Home State agents of FRONTEX at times are aware, monitor and refrain from intervening, and at times are actively involved.
40. In an incident dated 10 August 2020, detailed in the Preliminary Report of the Frontex Management Board Working Group, for example, the **German** Coast Guard witnessed the HCG taking the intercepted asylum seekers on board, later claiming that "the migrants had the opportunity to ask for asylum. No request for asylum was expressed in any case... migrants were retransferred on the rubber boat and returned to Turkish Territorial Waters..."<sup>35</sup>
41. Although the report is preliminary and the product of an internal investigation, it nonetheless already contains prejudicial findings. The WG's description of the conduct of the HCG in this case as "plausible"<sup>36</sup> reveals little understanding or, even worse, little interest in the minimum standards of access to asylum and rights of asylum seekers.
42. Yet, even this internal body, has already found at least one case of alleged pushback operation of 20 to 30 persons, noting that "**it cannot be ruled out completely that there might have**

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<sup>35</sup> *Ibid.*, page 14.

<sup>36</sup> *Ibid.*, page 14.

been a violation of international legal obligations”,<sup>37</sup> leaving no less than five cases pending, in some cases due to the fact the Agency has again failed to provide relevant information.

43. This “violation of international legal obligations” cannot be completely attributed to the Host Member State, be it Hungary or Greece. Nor can it be limited to a single Home Member State, be it Denmark, Sweden or Germany. Indeed, the fact the complicity in the unlawful conduct conforms to a similar pattern irrespective of the Home Member State, indicates the failure is intrinsic and structural to the Agency.

#### **IV. Systematic, Widespread and Serious Violation of Fundamental Rights Obligations**

44. From the outset of the escalating political situation at the maritime border in the Aegean Sea in late February 2020, through the first reported attempt to commit a collective expulsion on 2 March 2020, the hasty launch of the Rapid Border Intervention Aegean in March 2020 and its extension in May 2020<sup>38</sup> – there have been well-documented serious and persisting violations of fundamental rights and international protection obligations related to FRONTEX’s activities in the Aegean Sea region.

45. According to evidence that emerged from a joint investigation by Lighthouse Reports, Bellingcat, ARD, the Japanese broadcaster TV Asahi and DER SPIEGEL<sup>39</sup> - between April to August 2020, at least **six** well-documented pushbacks were carried out in the Aegean Sea by vessels of the host Member State Greece, which in some instances was actively assisted by

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<sup>37</sup> *Ibid.*, page 8.

<sup>38</sup> Twitter, Frontex post, 21 May 2020, available at: <https://twitter.com/Frontex/status/1263386853912305665>.

<sup>39</sup> Nick Waters, Emmanuel Freudenthal and Logan Williams, ‘Frontex at Fault: European Border Force Complicit in ‘Illegal’ Pushbacks’, Bellingcat, 23 October, 2020, available at: <<https://www.bellingcat.com/news/2020/10/23/frontex-at-fault-european-border-force-complicit-in-illegal-pushbacks>> ; Giorgos Christides, Emmanuel Freudenthal, Steffen Lüdke and Maximilian Popp, ‘EU Border Agency Frontex Complicit in Greek Refugee Pushback Campaign’, Der Spiegel, 23 October 2020, available at: <<https://www.spiegel.de/international/europe/eu-border-agency-frontex-complicit-in-greek-refugee-pushback-campaign-a-4b6cba29-35a3-4d8c-a49f-a12daad450d7>>.

vessels of other Member States deployed to FRONTEX. It has been reported that all incidents occurred while FRONTEX assets – either surveillance planes flying overhead or vessels deployed in the region – were present at the scene of a refugee pushback or within a certain range from which they were expected to be able to track the distinct signature of pushback operations.

46. For many months, investigators meticulously collected and analyzed open sources – data available on social media, including incriminating videos from the Turkish Coast Guard, vessel tracking sites, information published or provided by FRONTEX – and combined it with a database of reported pushbacks, with a view to tracking FRONTEX assets and establishing whether they actively participated in identified refugee pushback operations.

47. Investigators documented **four** collective expulsions that were carried out by the Hellenic Coast Guard in proximity to FRONTEX assets (between one to five km from the reported incidents):<sup>40</sup>

- i. **28-29 April 2020:** “A group of refugees and migrants made landfall on Samos. They claim they were then detained, placed in a life-raft without any means of propulsion and towed into the middle of the Mycale Strait. A surveillance plane overflew the area twice while this pushback took place”.
- ii. **4 June 2020:** “Two dinghies were reported to have been pushed back from Northern Lesbos. Portuguese vessel Nortada appears to have been present around 15 km from the first incident and just over one km away from the second”.

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<sup>40</sup> *Ibid.*

- iii. **5 June 2020:** “A dinghy was reported to have been pushed back from Northern Lesbos. Portuguese vessel Nortada was approximately two to three km away”.
- iv. **19 August 2020:** “A dinghy was reported to have been pushed back from Northern Lesbos. Portuguese vessel Molivos was five km away and appears to have changed course and headed towards the pushback before its transponder either lost signal or was turned off”.

48. In **two** other well documented incidents, a FRONTEX vessel was **directly** participating in one pushback operation and *present at the scene* of the other:<sup>41</sup>

- i. **8 June 2020:** a refugee pushback was reported to have taken place off the north-east coast of Lesbos. It resulted in the rescue of 47 migrants, as reported by the Turkish Coast Guard (TCG) later that day. By obtaining videos from the TCG and tracking data of vessels in the vicinity, the investigators were able to reconstruct what happened: “After initially trying to cross under the cover of darkness, the dinghy was intercepted and physically blocked from proceeding by MAI1103 [FRONTEX vessel flying the Romanian flag – IC] early in the morning... We can see that the dinghy was extremely close to MAI1103, and is being physically blocked by the ship. Indeed, the two vessels are close enough that it appears that personnel on MAI1103 are communicating with people in the dinghy...”

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“At one-point MAI1103 makes a pass close to the dinghy at enough speed to generate waves, a manoeuvre that previously only HCG and TCG have been

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<sup>41</sup> *Ibid.*

seen making. It is especially dangerous due to the overloaded and unseaworthy nature of the dinghies...”

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“Eventually HCG vessels arrive and MAI1103 leaves, resulting in a standoff between the TCG and HCG. This lasted several hours and gradually moved to the north-west, observed by the NATO ship Berlin...”

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“During this period the dinghy was approached at least twice by a rigid-hulled inflatable boat 060 (RHIB) from the HCG...”

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“In the final stage of the pushback at 10:30 AM it is possible to see the Portuguese FRONTEX vessel Nortada within 5 km with both AIS data and on the TCG radar screen. The Nortada had been in that vicinity since at least 09:11 AM that morning. Although it may not have been able to pick up this dinghy on its radar, it would have certainly been within visual range of the larger ships surrounding it. After the pushback, the Nortada continued its patrol off North Lesbos.”

- ii. **15 August 2020:** “On the morning of August 15 there were reports of a confrontation between the Greek and Turkish coast guards. As well as multiple photos posted to social media by locals, this was also reported as a pushback by CRG, MRC, Alarm Phone and Aegean Boat Report. CRG and MRC also posted videos from people on this dinghy, with CRG’s video showing an engine without a starter cord, claiming it had been taken by the Greek Coast Guard. In the videos, the dinghy is surrounded by vessels from both the Greek and Turkish coast guards. We have previously noted that disabling the motor of dinghies is a tactic that has reportedly been used by the Greek

Coast Guard. Most of the images of this incident are taken from a distance, making identification of the vessels difficult. However, we were also sent an image of this confrontation that is very clear. In this image we can clearly see the presence of MAI1102, a Romanian border forces vessel which had just arrived in theater... Although it is not possible to be certain of exactly how far away MAI1102 is from this pushback, we can see that it is certainly *within visual range* of the confrontation and the dinghy itself.”<sup>42</sup> (Emphasis added)

49. Considering that FRONTEX assets deployed in the Aegean Sea were assigned with surveillance activities, their highly sophisticated equipment, and the distinct signature of pushback operations involving the relatively big vessels of the HCG and the TCG, it is unimaginable that FRONTEX assets – present within up to five km of the reported pushback operations - were not aware of the four collective expulsions detailed at [47] above carried out by the host Member State’s vessels.
50. In the other two reported incidents detailed at [48] above, where FRONTEX assets were directly engaged in the pushback operations, awareness is not in dispute but rather the extent to which FRONTEX assets facilitated the pushbacks towards Turkey.
51. Given the poor track record of FRONTEX in setting up and maintaining an efficient internal reporting system, it is unsurprising that in relation to the six aforementioned well documented pushback operations, **only one SIR** was registered with the Agency, according to **your statements in hearings before the Committee** on Civil Liberties, Justice and Home Affairs (LIBE) at the European Parliament on 6 July 2020 and 1 December 2020.

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<sup>42</sup> *Ibid.*

52. In fact, at the time of the European Parliamentary hearing on 6 July 2020, apart from the attempted pushback of 2 March 2020 you acknowledged therein, FRONTEX was aware of *at least one further* pushback operation that took place on **18-19 April 2020**, in respect of which a **SIR was issued**.

53. During the European Parliamentary hearing on 1 December 2020, while referring to a documented pushback operation that was perhaps mistakenly reported by the media to have taken place on the 28-29 April 2020, you stated:

“In one occurrence, this was a FRONTEX flight on the 28 and 29 April, so this was an alleged **contribution to a pushback**, in fact the flight, there was no FRONTEX flight on that night, it was before [...] in fact we were able to detect autonomously two suspicious situations that I reported to Greek authorities. The first one occurred in the night from **the 18<sup>th</sup> to the 19<sup>th</sup> of April, a SIR was issued**, FRONTEX surveillance flight let’s say spotted, and we have live streaming so we can from the Head Quarters in Warsaw also see what’s going on and we detected a suspicious situation, so we could see suspicious movements, unusual movements, migrants, Turkish vessel, HCG vessels [...] I was reported this because **it was a SIR** and the situation was a little bit strange [...] I decided to escalate this suspicious case that we have spotted to the Greek minister in charge of maritime affairs, my letter was signed on *the 8<sup>th</sup> of May and his reply was dated 10<sup>th</sup> of July*. I escalated because there was a very strange situation, suspicion that perhaps **something was wrong regarding fundamental rights**...”<sup>43</sup> (Emphasis added)

54. It is clear from this statement that at the time of the European Parliamentary hearing on 6 July 2020 you were already aware of the pushback operation that took place on 18-19 April, in

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<sup>43</sup> *Supra.*, note 12 (14:03:45–14:06:35).

respect of which an internal SIR was issued, and yet, **you misleadingly reported to the European Parliament** that the attempted pushback operation of 2 March 2020 – a mere ‘misunderstanding’, in your words – was “*the only case*” of registered potential violations of fundamental rights related to FRONTEX activities in the Aegean Sea Region, stating:

“So, I’m just sharing with you the Parliament what was reported to me and this was the **only case** within the implementation of the operational plan rapid border intervention Aegean or Poseidon Operation”<sup>44</sup> (Emphasis added).

55. Apart from the misleading picture presented to the European Parliament, it is telling that in the face of a ‘live-streamed’ pushback operation of 22 asylum seekers, unfolding in the Aegean Sea for hours, as you described at the hearing ([53] above), FRONTEX did not immediately communicate its views to the host Member State Greece, with a view to positively influencing its conduct, in compliance with the Agency’s positive obligations in relation to the 22 asylum seekers whose lives were at risk.

56. Instead, **you limited yourself to sending a letter to the Greek authorities only on 8 May, 20 days after the serious incident and its report**, to which the Greek authorities responded circa **two months later**. While your lodged ‘inquiry’ was pending before the Greek authorities, the Agency’s activities in the Aegean Sea Region were not suspended even for a single day.

57. Considering the seriousness of the reported incident on 18-19 April 2020, which concerns a violation of the prohibition on *refoulement*, taken with the Greek authorities’ dismissal of complaints regarding collective expulsions and consistent denial of their involvement in such

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<sup>44</sup> *Supra.*, note 19 (18:35:29 – 18:35:42).

violations,<sup>45</sup>, despite the abundance of evidence to the contrary – the measure eventually taken by the Agency and yourself as its representative cannot be considered adequate and compatible with FRONTEX’s fundamental rights obligations.

58. Moreover, per the WG preliminary report, during the many hours this illegal pushback operation was ongoing, FRONTEX Surveillance Aircraft (FSA) was ordered by the HCG “to fly northbound for the remaining 30 min of flight”.<sup>46</sup> When FRONTEX Headquarters asked the HCG whether “there was any specific reason to fly north, the reply from HCG Sea Border Expert was “negative”.<sup>47</sup>

59. At that point (02:57 LT), FSA had already taken **a picture of the HCG vessel towing the rubber boat with intercepted persons on board toward Turkish Territorial Waters (at 02:46 LT), and later communicated that the rubber boat had no engine (03:21 LT).**<sup>48</sup> Finally, it was **abandoned** in Turkish Territorial Waters by the Greek assets. Surely aware of the serious infringement taking place and of the threat to the lives of the people on the rubber boat, FRONTEX HQ proposed to the HCG to divert FSA as to check the rubber boat, HCG Sea Border Expert replies (at 04:48 LT): “Negative. FSA will continue its normal route”.<sup>49</sup>

60. Notwithstanding the abundant evidence gathered and reported by the WG which categorically suggests **FRONTEX HQ was aware in real time of the circumstances of a pushback operation slowly unfolding for hours**, it peculiarly concludes that the Agency has complied with its due diligence obligation by simply **sending a letter** to the Greek authorities for “clarification” more than **two weeks later**:

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<sup>45</sup> CNN Live, Interview of Prime Minister Mitsotakis by Christiane Amampour, ‘Greek PM Mitsotakis Categorically Denies New York Times Story’, The Pappas Post, Youtube, available at:

<[https://www.youtube.com/watch?v=u-blgKqe7Is&ab\\_channel=ThePappasPost](https://www.youtube.com/watch?v=u-blgKqe7Is&ab_channel=ThePappasPost)>.

<sup>46</sup> *Supra.*, note 27, page 7.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

“In this case, the Executive Director has personally requested further clarification from the Greek authorities on 8 May 2020. **It can be stated that Frontex acted accordingly to its current reporting mechanism.** However, in view of the outstanding lack of verifiable evidence at the time, it is not clear whether the Agency could have deployed additional efforts to make sure that the reported course of actions did not result in a serious violation of fundamental rights or of international protection obligations related to the Agency’s activities”<sup>50</sup>

61. A letter, two weeks later, and no mention of what the response of the Host Member State was. The question of “whether the Agency could have deployed additional efforts”,<sup>51</sup> according to the WG, hinges on evidence they do not have. What factual evidence is needed to legally determine whether the involved FRONTEX agents should have intervened to prevent an unfolding crime?

62. In addition to the internal SIR issued in relation to the collective expulsion on 18-19 April, your later statements before the European Parliament reveal that a further SIR was issued in the context of FRONTEX’s activities in the Aegean Sea Region:

“...another recent example was that the crew of a Swedish vessel, end of October, issued directly a SIR...”<sup>52</sup>

63. The preoccupying circumstances surrounding the incident of 30 October 2020 are still pending<sup>53</sup> further investigation of the WG, and were thoroughly discussed earlier. Given the

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<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> *Supra.*, note 12 (14:01:10 – 14:01:19).

<sup>53</sup> *Supra.*, note 27, page 16.

evidence that was already at the disposal of the Agency at the time, you should have reported to the European Parliament a somewhat more detailed account of this pushback operation rather than a cryptic statement. At any rate, the incident of 30 October 2020 is yet another indicator of the persisting fundamental rights violations related to the Agency's activities in the Aegean Sea Region.

64. From a close reading of your statements before the European Parliament on 1 December 2020, it appears that apart from the two aforementioned internal SIRs that were indeed issued in relation to the Agency's activities in the Aegean Sea, there was perhaps another 'half' SIR worthy of mention:

“...there was in July a Danish helicopter pilot who issued **or wanted** to issue a SIR, then we heard about this, we were informed in FRONTEX and so this is one example [...] On the 27<sup>th</sup> of July, the Danish pilot of this helicopter **wanted** to issue a SIR, as I told you, and there was a discussion in the ICC, so the one that has the command in Piraeus, they **had a discussion** during the briefing in order to know **whether it's worth or not to issue a SIR**, but the Agency was informed, the headquarters were informed, and my decision was to sign a letter to the commander of the HCG to ask him what is this”<sup>54</sup> (Emphasis added).

65. Your own account before the European Parliament reveals either the reluctance of the Danish helicopter pilot to issue a SIR when it would have been appropriate to do exactly that, or suggests external pressure the pilot was under to refrain from doing so. Either way through your own account it becomes clearer why so few internal SIRs have been issued during FRONTEX Operations.

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<sup>54</sup> *Supra.*, note 12 (14:00:57 – 14:01:12; 14:06:47 – 14:07:25).

66. Again, the preliminary report of the WG reveals significant information that was already at your disposal at the time of the aforementioned hearing before the European Parliament in which you participated, yet you did not disclose this. It appears that a SIR in relation to the incident of 27 July 2020 was issued after all (SIR 11860/2020). The preliminary report reads as follows:

“On 27 July 2020 a Danish Helicopter deployed to JO Poseidon 2020 detected during a patrol near Chios Island inside Greek Territorial Waters a rubber boat with people on board. After the detection, the boat was intercepted by a Hellenic Coast Guard Patrol boat. After the Hellenic Coast Guard vessel arrived at the scene, the Danish helicopter left the area to continue border surveillance tasks. Joint Rescue Coordination Centre Piraeus informed Maritime Rescue Coordination Centre Ankara. According to the information provided by Greek Authorities, a Turkish (TUR) patrol boat took over the responsibility of the incident inside TUR Territorial Waters. According to the mission report of the Danish helicopter, **the Hellenic Coast Guard vessel passed the rubber boat at relative high speed while the rubber boat was laying still**, which was recorded by a Danish helicopter. The mission report of the Danish helicopter and the Serious Incident Report point out that there has been a communication between the Danish helicopter and the Hellenic Coast Guard (International Coordination Centre Coordinator), in which **the Coordinator asked to change the reported coordinates of the incident, in order to indicate that the incident took place outside Greek Territorial Waters**. This request was refused by the Danish detachment. According to the DNK mission report, the request from the Hellenic Coast Guard to change the reported coordinates of the incident **was not a case of misunderstanding**. After receiving the respective Serious Incident Report and those accusations, the ICC Piraeus referred to a misunderstanding and stated that the request to change the location was

only meant additionally including to the initial detection in the Turkish Territorial Waters”.<sup>55</sup> (Emphasis added)

67. In our view, a request by the Host Member State to alter official records, in order to cover up serious breaches of international law, suffices to suspend FRONTEX’s activities in connection with that Host Member State.

68. As for other reported pushback operations, during your hearing before the European Parliament on 6 July 2020, while failing to mention the fact that a SIR was issued in relation to a collective expulsion on 18-19 April 2020, you did not explicitly determine whether or not collective expulsions were carried out by the host Member State Greece. Despite this, you appeared sure enough of the circumstances to affirm that such ‘events’ are unrelated to the activities of the Agency:

“For the rest, I hear sometimes, well, news, I know there are discussions, reports, well, by NGOs, by some members of Parliament, asking, well, questions about situations, that they consider as pushbacks, when I have doubts, I ask Greek authorities. I’m doing this in my capacity as Executive Director of the Agency, although sometimes these are **events which are not related** to the implementation of the Operational Plan but events taking place occurring in the region where we have **nearby** our operational areas”<sup>56</sup> (Emphasis added)

69. And during your hearing before the European Parliament on 1 December 2020, you stated:

“We have not found evidence that there were active **direct or indirect** participation of FRONTEX staff or officers deployed by FRONTEX in pushbacks during either Poseidon or

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<sup>55</sup> *Supra.*, note 27, page 11.

<sup>56</sup> *Supra.*, note 19 (18:35:46 – 18:36:38).

Rapid Border Intervention Aegean so we were able to trace the dates and to confirm that in the time slots on the days the assets that were mentioned, in particular the Romanian vessel and the Portuguese vessel were indeed deployed but ***there was no evidence*** that they were engaged in pushback activities.”<sup>57</sup> (emphasis added)

70. Stating ‘there was no evidence’ is misleading, to say the least, given that there is video footage clearly showing FRONTEX vessels flying the Romanian flag directly participating in a pushback operation and present right at the scene of another (set out at [48] above), in flagrant breach of the Agency’s obligation to comply with international law and with respect for fundamental rights in all its operations.

71. Even more dubious, however, is the attempt in your statement before the European Parliament ([68]-[69] above) to surgically separate – both spatially and practically – FRONTEX’s presence and activities in the Aegean Sea Region from activities carried out in the exact same region by the host Member State Greece.

72. When it comes to border surveillance activities, Greece operates in the Aegean Sea Region under the operational framework of FRONTEX Joint Operation Poseidon and previously also under Rapid Border Intervention Aegean. These Operational Plans are legally binding for the participating host and home Member States as well as FRONTEX staff.<sup>58</sup>

73. When, for example, FRONTEX vessels are instructed by the host Member State Greece to approach the scene of a pushback operation or to ‘*transfer the migrants back to the rubber boat and escort/transfer them into the TUR territorial waters*’, then the activities of the host Member State Greece are obviously related to and intertwined with FRONTEX Joint Operations in the

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<sup>57</sup> *Supra.*, note 12 (14:03:00 – 14:03:45).

<sup>58</sup> EBCG Regulation, Article 38.

Region; if FRONTEX assets are instructed not to approach a certain area, to turn off their transponders or to suddenly change their course – the activities then carried out by the host Member State Greece are related to the FRONTEX Joint Operation in the Region.

74. It is FRONTEX that has the discretionary power to decide in the first place whether or not to launch a Joint Operation and, where appropriate, to suspend or terminate it. Between these two critical points of launching and termination, FRONTEX's contribution is indispensable and intertwined with each and every activity carried out by the participating Member States: the Agency's Executive Director, together with the Host Member State, draft the legally binding Operational Plan; the Agency finances the operation; guides, trains, supervises and monitors the Member States' implementation of the Operational Plan, including compliance with fundamental rights obligations; conducts research and risk analysis; is assigned with a coordinating role mainly through the Coordinating Officer always present on the ground; deploys guest officers and assets; it is under the aegis of FRONTEX that state agents of Member States other than the Host Member State participate in the joint operations to begin with.<sup>59</sup>

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

76. We believe there are sufficient and compelling reasons for you to consider there are serious and persisting violations of fundamental rights and international protection obligations *related* to the

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<sup>59</sup> *Ibid.* Section 7, Articles 36-47.

activity of FRONTEX in the Aegean Sea Region. We therefore invite you to fulfil your obligation under Article 46(4) of the EBCG Regulation and to immediately suspend or terminate any activity carried out by the Agency in that region.

77. Although the existing evidence is abundant and compelling enough for you to consider that the conditions set out in Article 46(4) of the EBCG Regulation are met, there are aggravating circumstances and factors that in themselves, and at least until they are clarified and resolved, constitute **an autonomous compelling reason for the Agency to immediately suspend or terminate its activity** in the Aegean Sea Region.

78. Some extremely preoccupying facts emerge from FRONTEX Management Board's conclusions on the preliminary report of its Working Group on Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea, following its meeting on 20-21 January 2021.<sup>60</sup>

79. According to the Management Board, there are currently five incidents under inquiry of the WG, several of which are still pending due to the Agency's failure to provide the WG with relevant information.

80. In these unfortunate circumstances it is necessary to suspend the Agency's activities in the Aegean Sea Region under Art. 46 (4) of the EBCG Regulation, as suspension is a reversible measure in operational terms and constitutes, under the existing circumstances, the threshold for the Agency's compliance with its fundamental rights obligations.

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<sup>60</sup> FRONTEX, 'Conclusions of the Management Board's meeting on 20-21 January 2021 on the preliminary report of its Working Group on Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea', 21 January 2021, available at: <<https://frontex.europa.eu/media-centre/management-board-updates/conclusions-of-the-management-board-s-meeting-on-20-21-january-2021-on-the-preliminary-report-of-its-working-group-on-fundamental-rights-and-legal-operational-aspects-of-operations-in-the-aegean-sea-GnFaIc>>

81. That the Agency is currently incapable of complying with its fundamental rights obligations is further evidenced by different observations and recommendations of the Management Board, for example the obligation “to establish transparent rules on the FRONTEX-internal process to follow up on serious incidents that have been established, including on the application of Art. 46 of the EBCG Regulation.”<sup>61</sup>
82. In the absence of clear and transparent criteria for the application of Art. 46 of the EBCG Regulation, the executive director of FRONTEX is bound to reach arbitrary decisions, which in the context of international protection obligations are matters of life or death. There are currently other serious deficiencies in the Agency’s reporting and monitoring systems, which also hinder FRONTEX Executive Director from making an informed decision on the applicability of Art. 46 (4) of the EBCG.
83. According to FRONTEX Management Board, the Agency should, *inter alia*, ensure that SIRs on alleged violations of fundamental rights are always reported to the Fundamental Rights Officer; establish a systematic monitoring of the reporting mechanism; assure that every Operational Plan include a transparent reporting mechanism, inviting the Host Member States to involve in this transparent approach all assets which are acting in the operational area, with the objective that every incident in the operational area is reported.<sup>62</sup>
84. Another issue raised by the Management concerns the 40 Fundamental Rights Monitors that were not yet recruited by the Agency, notwithstanding the fact Article 110 (6) of the EBCG Regulation states the Agency shall ensure their recruitment by 5 December 2020.

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<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

85. The Fundamental Rights Monitors are assigned with monitoring and assessment activities with a view to upholding the Agency's compliance with its fundamental rights obligations. According to Article 110 (3) of the EBCG Regulation, the fundamental rights officer shall assign *at least* one fundamental rights monitor to *each* operation.
86. The Agency's failure to recruit fundamental rights monitors, and more specifically to assign them to its operations, including the ones taking place in the Aegean Sea Region, significantly hamper the Agency's ability to comply with its fundamental rights obligations.
87. These and other deficiencies and misconduct of the Agency, including allegations of pushbacks, are currently under investigation by the European Anti-Fraud Office. It has been reported that OLAF raided the offices of FRONTEX Executive Director on 7 December 2020. OLAF confirmed it has indeed opened an investigation concerning FRONTEX.<sup>63</sup>
88. FRONTEX's non-compliance with its fundamental rights and international protection obligations is systematic and deep-rooted. All of its ongoing activities, not only the contested ones in the Aegean Sea Region, are permeated by defective reporting, monitoring and compliance methods.
89. This is even more so in the geopolitical context of the Aegean Sea Region, where serious violations of fundamental rights and international protection obligations, which are likely to persist, are indisputable, let alone given the inability of the Agency to prevent, monitor and investigate these unlawful practices.

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<sup>63</sup> Jacopo Barigazzi, 'EU watchdog opens investigation into border agency Frontex', Politico, 11 January 2021, available at: <<https://www.politico.eu/article/olaf-opens-investigation-on-frontex-for-allegations-of-pushbacks-and-misconduct/>>; Nikolaj Nielsen, 'EU anti-fraud office launches probe into Frontex', Euobserver, available at: <<https://euobserver.com/migration/150574>>

90. Based on your hearing before the European Parliament on 6 July 2020 it appears you either turn a blind eye or somehow misinterpret the existing evidence for serious and persisting fundamental rights violations related to the Agency's activities in the Aegean Sea Region.

91. It also appears that you failed to provide the European Parliament with a truthful report regarding existing evidence for such violations. It also appears that you are not oblivious to the extremely volatile operational context in the Aegean Sea Region:

“...what we predict is probably an increase of pressure coming from Turkey, we can also witness a very complex situation in terms of geopolitical situation there, and we of course as an operational Agency cannot comment on political statements, but we can see that **the geopolitical context**, and, well, the volatile situation in the region, **makes or creates a situation that is very difficult to operate.**”<sup>64</sup> (Emphasis added)

92. The aforementioned multiple pending investigations substantiate the allegations based on which FRONTEX should have already suspended or terminated its activities in Greece. The systematic and widespread nature of the investigated breaches indicates that they are both ongoing and likely to persist.

93. Multiple acts and omissions in which FRONTEX is allegedly implicated may amount to a widespread and systematic attack directed against civilian populations that is committed pursuant to a state and organizational policy.

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<sup>64</sup> *Supra*, note 19 (18:13:41 – 18:14:21).

94. This is the contextual definition of the Crime Against Humanity of Deportation within the meaning of the Rome Statute of the International Criminal Court. A Communication under Article 15 of the Rome Statute concerning the situation in the Aegean Sea has already been submitted to the Office of the Prosecutor (OTP) of the International Criminal Court (ICC).<sup>65</sup> In the event the OTP finds the case does not manifestly fall outside its jurisdiction, an investigation shall be opened, which may include individual criminal liability.

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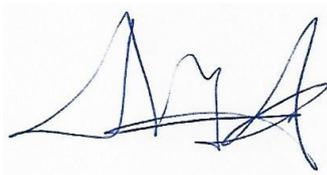
**We hereby invite you to act pursuant to Article 265 TFEU, and to suspend or terminate FRONTEX's activities in the Aegean Sea Region, in compliance with your obligations under Article 46 (4) of EBCG Regulation.**



**Omer Shatz, Adv.**

Legal Director

*front-LEX*



**Anastasia Ntailiani, Adv.**

Head of Legal Team

Legal Centre Lesbos



**Iftach Cohen, Adv.**

Senior Legal Adviser

*front-LEX*

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<sup>65</sup> Syria Justice and Accountability Centre, 'Article 15 Communiqué to the Office of the Prosecutor of the International Criminal Court regarding Crimes Against Humanity Committed by Greek and Frontex Officials against Refugees', January 2021, available at: <https://syriaaccountability.org/library/the-situation-in-greece-systematic-human-rights-abuses-against-refugees-on-greek-territory-and-at-reception-and-identification-centres-on-the-aegean-islands/>.