

Date: 2nd of October 2022

To: European Commission
Directorate-General Migration & Home Affairs
Home.B.1 Schengen & External Borders

Submission to the European Commission’s call for evidence “European Border and Coast Guard/Frontex – standing corps review and evaluation of Regulation”

Key message:

The European Border and Coast Guard Agency Frontex (hereinafter ‘the Agency’) does not fulfil its objective to safeguard and respect fundamental rights and international protection objectives in its operation in Greece. Serious violations of fundamental rights and international protection obligations by Greek security forces and Agency officers are well documented. However, the Agency’s executive director has not taken action to withdraw the financing or suspend or terminate the Agency’s mission in Greece, as they are obliged to by Article 46(4) of the Regulation. IHR therefore proposes:

1. Article 46(6) be amended to include independent media and civil society as relevant information for assessing possible “violations of fundamental rights or international protection obligations [...] that are of a serious nature and are likely to persist” .
2. To ensure compliance with the Regulation and to provide additional oversight over the Agency’s activities the obligatory competence to withdraw financing or suspend or terminate missions of the Agency as described in Article 46(4) should additionally reside with a body that is independent from the Agency.

I. Introduction

I HAVE RIGHTS (IHR) is a legal organisation that provides information to asylum seekers on Samos, Greece. Despite Samos seeing the second most pushbacks out of any island in the Aegean, the Agency is still operational on the island. This stands in stark contrast with the executive director’s obligation to trigger Article 46(4) of the Regulation, where “he or she considers 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”.

II. Comments on the purpose and scope of the initiative

The purpose of the initiative is, among others, to assess how far the Agency fulfils its objectives and how far the Regulation works as intended. In this response IHR will focus on two interrelated shortcomings as to the Agency fulfilling its objective and the rules of the Regulation working as intended. Firstly, that Article 46(4) of the Regulation has not been used as intended in the Agency’s operations in Greece. Second, that the sources included in Article 46(6) are both incomprehensive and stymied by chronic under reporting by EU Agencies to provide a basis for the executive director to trigger Article 46(4).

Violations of objectives laid out in Regulation (EU) 1896/2019

The term 'fundamental rights' is mentioned 212 times in the Regulation. By comparison, the repealed Regulations mentioned 'fundamental rights' 66 times (Regulation (EU) 1624/2016) and 6 times (Regulation (EU) 1052/2013). These figures demonstrate the emphasis the current Regulation places on the respect and protection of fundamental rights when defining the objectives of the Agency.

However, the Agency does not fulfil its obligations to protect fundamental rights. Instead, the Agency directly engages in and facilitates systematic fundamental rights abuses. As reported by independent media, the Agency was actively involved in the pushbacks of at least 957 asylum seekers in the Aegean between March 2020 and September 2021. Actions later disguised as "prevention of departure". The Agency is also complicit in violations of fundamental rights committed by the Greek Coastguard. For example, the JORA database, the Agency's reporting system, was used to conceal pushbacks.

Regulation (EU) 1896/2019 not working as intended

Article 46 of the Regulation provides clear rules on the conditions under which the activities of the Agency shall be suspended, terminated or not launched.

Article 46(4) provides that:

*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**. [Emphasis added]*

Pushbacks are both a serious violation of fundamental rights and are likely to persist in Greece. This is not only evidenced by the fact they have been systematically carried out in Greece in the last years, but also because there is no indication that the Greek authorities intend to refrain from carrying out such practices.

The obligation laid out in Article 46(4) is not discretionary as the Article 46(4) reads, "The executive director shall". Whereas Article 46(3) allows the executive director to use their discretion ("The executive director may") Article 46(4) was clearly drafted with the intention of creating an obligation for the executive director to act when, "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".

However, it is clear from the Agency's mission in Greece that this obligation has not been met. IHR submits that the Agency has so far failed to comply with this obligation for at least two reasons which will be addressed in turn. Firstly, because the sources and reporting mechanisms mentioned in Article 46(6), which underpin Article 46(4) do not function as intended. Secondly, due to a lack of political will for the executive director to perform their duty as per Article 46(4).

First, Article 46(6) provides that:

*The decisions referred to in paragraphs 4 and 5 shall be based on duly justified grounds. When taking such decisions, the executive director shall take into account relevant information such as the number and substance of registered complaints that have not been resolved by a national competent authority, **reports of serious incidents**, reports from coordinating officers, relevant international organisations and **Union institutions, bodies, offices and agencies in the areas covered by this Regulation**. [Emphasis added]*

One of the key sources underpinning Article 46(4) are Serious Incident Reports (SIR). However the Agency systematically fails to report serious and persistent fundamental rights violations as required by Art. 38(3) (h) of the EBCG Regulation and Decision of the executive director of 19 April 2021 on Standard Operating Procedure and in the Agency Codes of Conduct. Through a freedom of information request, IHR has gained access to all SIRs filed since 2016 in the operational area of Samos. There has not been a single Category 1 SIR filed in the last 2 years and 9 months. As of 2021 Category 1 SIRs describe "situations of potential violations of fundamental rights or international protection obligations". Additionally, no SIR since 2016 references a pushback from Samos. For the same period of time numerous independent media and civil society reports have documented the systematic practice of pushbacks from the operational area of Samos. It is therefore alarming that not one pushback account has been reported by the Agency. Of exceptional pertinence to this initiative is, with serious incidents being chronically under reported, whether SIRs, as they are currently being used, are an appropriate indicator of serious and persistent fundamental rights violations for Article 46 of the Regulation.

Another reporting mechanism laid out in Article 46(6) which does not function as intended are reports by "Union institutions, bodies, offices and agencies in the areas covered by this Regulation". IHR has evidence as to the European Union Agency for Asylum (EUAA) refusing to engage with credible reports of pushbacks, told to them in asylum interviews by pushback survivors themselves. On Samos, caseworkers of the EUAA support the Greek Asylum Service by conducting asylum interviews. For example, in one interview the EUAA caseworker asked the applicant when they entered Greece. The applicant responded, "I entered Greece for the first time on 01/01 I was sent back then I made a second attempt and entered in March 2022". The EUAA caseworker ignores this information about a possible pushback and refrains from asking further questions about the incident. This is just one example of the systematic under-reporting and lack of investigations done by EUAA caseworkers when alerted about pushbacks by applicants for international protection.

The above outlined shortcomings in the reporting mechanisms show the necessity to include external sources, such as independent media reports or reports from civil society, in the list of relevant information for decisions referred to in Article 46(4).

Second, the Executive Director has so far failed to comply with their obligations as per Article 46(4) in relation to the Agency's mission in Greece due to the lack of political will for them to do so. This is despite conditions to trigger Article 46(4) being clearly met in Greece. In order to ensure compliance with the rule of law, for the Agency fulfil its objective to uphold fundamental rights and international protection obligations and for the Regulation to work as intended (i.e. for the Agency to leave an operational area or member state when violations of fundamental rights or international protection obligations related to the

activity concerned that are of a serious nature or are likely to persist), the competence and obligation to trigger Article 46(4) should additionally reside with another EU body, which is independent of the Agency. The Committee on Civil Liberties, Justice and Home Affairs (LIBE) could be well suited for this role.

III. Conclusion

This evaluation aims to assess the “results achieved by the Agency, having regard to its objectives”. With this response IHR provides the European Commission with evidence that the Agency, in its operation in Greece, has failed to guarantee the protection of fundamental rights and international protection obligations, as laid out in several articles of the Regulation. In particular, it has failed to properly apply Article 46 of the Regulation, creating a chasm between the intention of the Regulation and the Agency’s current practice in Greece.

In order to ensure the Agency’s compliance with European law and the fulfilment of the Regulation’s objectives IHR presents two proposals to amend the Regulation:

1. Article 46(6) be amended to include independent media and civil society as relevant information for assessing possible “violations of fundamental rights or international protection obligations [...] that are of a serious nature and are likely to persist” .
2. To ensure compliance with the Regulation and to provide additional oversight over the Agency’s activities the obligatory competence to withdraw financing or suspend or terminate missions of the Agency as described in Article 46(4) should additionally reside with a body that is independent from the Agency.