

## Decision of the Executive Director

No R-ED-2022-12

### Standard Operating Procedure - mechanism to withdraw the financing of, or suspend or terminate, or not launch Frontex activities

of 25/01/2022

#### THE EXECUTIVE DIRECTOR,

Having regard to the European Border and Coast Guard Regulation<sup>1</sup> (hereinafter “the Regulation”), and in particular Article 106(4) thereof,

Whereas:

- (1) Article 46 of the Regulation regulates the decisions to withdraw the financing of, or suspend or terminate, or not launch Frontex activities.
- (2) The Standard Operating Procedure (SOP) is required to set up the mechanism to withdraw the financing of, or suspend or terminate, or not launch Frontex activities and to establish the roles and responsibilities within the Agency to support the decision-making process of the Executive Director under Article 46 of the Regulation.
- (3) The SOP defines the responsible entities and respective steps to be followed after a decision is made by the Executive Director including the steps needed to possibly restore the activity concerned.
- (4) In accordance with Article 3(2) of the Regulation, fundamental rights are an overarching component in the implementation of European Integrated Border Management. Therefore, this SOP is without prejudice to other possible measures that the Agency can take to ensure respect for fundamental rights is guaranteed for the activity concerned.

#### HAS DECIDED AS FOLLOWS:

##### *Article 1* Adoption

The SOP - mechanism to withdraw the financing of, or suspend or terminate, or not launch Frontex activities pursuant to Article 46 of the Regulation as set out in the Annex to this Decision, is hereby adopted.

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<sup>1</sup> Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard (OJ L 295, 14.11.2019, p. 1).

*Article 2*  
**Entry into force**

This Decision enters into force on the day following its signature.

*Signed with qualified electronic signature*

Fabrice Leggeri  
*Executive Director*

**Annex:** Standard Operating Procedure - mechanism to withdraw the financing of, or suspend or terminate, or not launch Frontex activities pursuant to Article 46 of the European Border and Coast Guard Regulation

**ANNEX:**

## **Standard Operating Procedure**

**MECHANISM TO WITHDRAW THE FINANCING OF, OR SUSPEND OR TERMINATE, OR NOT  
LAUNCH FRONTEX ACTIVITIES PURSUANT TO ARTICLE 46 OF THE EUROPEAN BORDER AND  
COAST GUARD REGULATION**

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## 1. Introduction

This document defines the procedure to be followed within the European Border and Coast Guard Agency (hereinafter the 'Agency') for supporting the Executive Director in the exercise of his or her powers provided for in Article 46 of the European Border and Coast Guard Regulation<sup>2</sup> ('the Regulation'). It sets out a mechanism to exercise those powers and facilitate the decision-making of the Executive Director as regards withdrawal of the financing of, or suspension or termination, or not launching Frontex activities, without limiting the scope of that Article itself.

In addition to the above, the SOP aims to clarify the applicable criteria and the key sources of information to be taken into consideration before the Executive Director takes a decision in line with Articles 46(4) and (5) of the Regulation.

## 2. General provisions

### 2.1. Background information

In view of the application of Article 46 of the Regulation, the Executive Director shall decide about withdrawal of the financing, or suspension or termination, or not launching activities, in the following cases:

- Article 46(1), the Executive Director **shall terminate** any activity of the Agency **if the conditions to conduct those activities are no longer fulfilled**. The Executive Director shall inform the Member State<sup>3</sup> concerned prior to such termination.
- Article 46(2), **the Member States participating in an operational activity** by the Agency **may request** that the Executive Director **terminate** that operational activity. The Executive Director shall inform the Management Board of such request.
- Article 46(3), the Executive Director **may**, after informing the Member State concerned, **withdraw the financing** of an activity or **suspend or terminate** it **if the operational plan is not respected by the host Member State**.
- 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**.
- Article 46(5), the Executive Director **shall**, after consulting the Fundamental Rights Officer, **decide not to launch** any activity by the Agency where he or she considers that there would already be **serious reasons** at the beginning of the activity to suspend or terminate it because it could **lead to violations of fundamental rights or international protection obligations of a serious nature**. The Executive Director shall inform the Member State concerned of that decision.

Following Article 46(6), the decisions referred to in Article 46(4) and (5) shall be based on duly justified grounds. The Executive Director shall inform the Management Board of such decisions and provide it with justifications thereof.

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<sup>2</sup> Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard (OJ L 295, 14.11.2019, p. 1).

<sup>3</sup> For the purpose of this document, the term "Member States" includes also the States participating in the relevant development of the Schengen acquis within the meaning of the Treaty on the Functioning of the European Union and its Protocol (No 19) on the Schengen acquis integrated into the framework of the European Union.

Following Article 46(7), if the Executive Director decides to suspend or terminate deployment by the Agency of a migration management support team, he or she shall inform the other relevant bodies, offices and agencies active in the hotspot area of that decision.

## 2.2. Operational and geographic scope

This SOP applies to the activities of the Agency in accordance with the respective provisions of Article 46. The activities referred to in this SOP can be operational activities (for example, joint operations, rapid border interventions, return operations, return interventions, Multipurpose Maritime Operations, Joint Action Days) as well as other activities such as, trainings, pilot projects, technical assistance projects in Third Countries, pre-frontier area surveillance, etc.

In accordance with Article 71(2) of the Regulation, the Agency provides technical and operational assistance to Third Countries including with regard to the protection of fundamental rights. In accordance with Article 74(3) of the Regulation, Article 46 applies *mutatis mutandis* to deployments in Third Countries. Therefore, the provisions of this SOP apply to the activities of the Agency implemented within the Member States and on the territory of Third Countries.

In accordance with Article 80(1) of the Regulation, the European Border and Coast Guard shall guarantee the protection of fundamental rights in the performance of its tasks under the Regulation in accordance with relevant Union and international law, including obligations related to access to international protection. This SOP is without prejudice to other instruments adopted under the Regulation and related in particular to the protection of fundamental rights, such as those envisaged by Article 80(1) of the Regulation (fundamental rights strategy and action plan, including an effective mechanism for monitoring respect for fundamental rights in all the activities of the Agency) as well as to other possible measures that the Agency can take in order to ensure respect for fundamental rights is guaranteed for the activity concerned.

Finally, this SOP does not define procedures related to the Fundamental Rights Officer's duties and responsibilities.

## 2.3. Content and approach

The roles and responsibilities of the key actors for the purposes of this SOP are summarised in point 3 below.

The SOP defines the detailed mechanism for supporting the Executive Director in taking decisions under the respective paragraphs of Article 46 through the procedures described under point 4 below.

Points 5 and 6 of this SOP pay particular attention to the decisions of the Executive Director under Article 46(4) and (5) of the Regulation. These points aim to provide guidance on:

- the criteria which need to be assessed when taking such decisions;
- the sources of information which need to be taken into account when taking such decisions.

Finally, point 7 of the SOP envisages a monitoring mechanism for the follow-up on activities which were suspended, or their financing was withdrawn in accordance with Article 46(3) or (4). In addition, point 7 provides guidance on the follow-up of a decision not to launch an activity under Article 46(5).

As a general rule, for the application of this SOP, a gradual approach as well as the principle of proportionality should be considered when deciding on the actions to be taken under Article 46. Whenever appropriate, prior to withdrawal of the financing of, suspension or termination of the activity, the mitigation/corrective measures should be put in place with the aim to resolve the situation without taking actions according to Article 46. However, every case shall be assessed individually according to its particular circumstances.

Furthermore, the application of Article 46, and in particular its paragraph 4 (decisions in case of violations of fundamental rights or international protection obligations of a serious nature or likely to persist), is tied to a certain minimum level of severity and continuity and should not be based on a single incident<sup>4</sup>. Therefore, this SOP is without prejudice to the procedure for serious incident reporting<sup>5</sup> which obliges participants in Agency activities to report any such incidents and ensures immediate follow-up to all serious incident reports. As referred to in Article 46(6), as well as in point 6 of this SOP, serious incident reports are among the sources of information to be taken into account when taking decisions under Article 46(4) and (5).

Any communication, justification, information, consultation, request or notification referred to in this SOP shall be provided in writing.

## 3. Roles and responsibilities

### 3.1. Executive Director

It is the sole responsibility of the Executive Director to take decisions under Article 46. Before taking the decisions referred to in Article 46(4) and (5), the Executive Director shall consult the Fundamental Rights Officer. Where necessary - especially in situations requiring urgent action - the Executive Director may decide to depart from the procedures envisaged in this SOP provided that the Fundamental Rights Officer is consulted and the Member State / Third Country concerned is informed, as required by Article 46(4) and (5) of the Regulation. In such cases, the Executive Director shall include reasons for departing from the procedure envisaged in the SOP within the justifications provided to the Management Board pursuant to the last sentence of Article 46(6).

The Executive Director shall inform respectively the Management Board, the Members States, Third Countries (where applicable), and other relevant bodies, offices and agencies in accordance with the provisions provided in Article 46.

### 3.2. Deputy Executive Director for returns and operations

The Executive Director may appoint the Deputy Executive Director for returns and operations to act as responsible entity when the situations triggering activation of the mechanism under Article 46 within the operational activities are cross-cutting and/or of a complex nature. In such cases, the role of the Director of the Division responsible for the activity defined under this SOP will be fulfilled by the Deputy Executive Director for returns and operations.

### 3.3. Director of the Division responsible for the activity

The Director of the Division responsible for the activity should conduct the necessary assessment of the situation and provide the Executive Director with recommendation in accordance with this SOP.

The assessment and recommendation aim at facilitating the decision of the Executive Director under Article 46.

Before providing the Executive Director with the assessment and recommendation, the Director of the Division responsible for the activity should inform the respective Deputy Executive Director thereof.

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<sup>4</sup> See the Final Report of the Frontex Management Board Working Group 'Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea' ('FRaLO'), 1 March 2021, available at: [https://frontex.europa.eu/assets/Key\\_Documents/MB\\_Documents/Agenda\\_Point\\_WG\\_FRaLO\\_final\\_report.pdf](https://frontex.europa.eu/assets/Key_Documents/MB_Documents/Agenda_Point_WG_FRaLO_final_report.pdf).

<sup>5</sup> Decision of the Executive Director No-R-ED-2021-51 of 19 April 2021 Standard Operating Procedure (SOP) - Serious Incident Reporting.

In case the Executive Director decides to withdraw the financing of, or suspend or terminate the activity, the Director of the Division responsible for the activity shall prepare a draft of the decision accordingly.

### **3.4. Coordinating Officer<sup>6</sup>**

In accordance with Article 44 of the Regulation, Coordinating Officer(s) act on behalf of the Agency and monitor the correct implementation of the operational plan, including, in cooperation with the Fundamental Rights Monitors, as regards the protection of fundamental rights and report to the Executive Director on this. Coordinating Officer(s) report to the Executive Director where the instructions issued to the teams by the host Member State / Third Country are not in compliance with the operational plan, in particular as regards fundamental rights and, where appropriate, suggest that the Executive Director considers taking a decision in accordance with Article 46. The Executive Director may authorise the Coordinating Officer(s) to assist in resolving any disagreement on the execution of the operational plan and deployment of the teams.

If considerations related to fundamental rights are involved, the Coordinating Officer(s) shall seek assistance and advice from the Fundamental Rights Monitors assigned to the operational area in question.

The respective Coordinating Officer(s) shall always be a member of the Working Group (if established) in case of operational activity. He or she shall be informed by any initiator about the proposal to activate the mechanism under this SOP and shall be closely involved in the initiation when the operational activity is under his or her coordination.

### **3.5. Fundamental Rights Officer**

In accordance with Article 109, the Fundamental Rights Officer shall, inter alia, constantly assess the fundamental rights compliance of operational activities and advise the Agency where he or she deems it necessary or, where requested, on any activity of the Agency, provide opinions on the operational plans of the operational activities, on pilot projects and on technical assistance projects in Third Countries. He or she informs the Executive Director about possible violations of fundamental rights during activities of the Agency. The Fundamental Rights Officer acts autonomously and is independent in the conduct of his or her duties.

Without prejudice to the Fundamental Rights Officer's independence, he or she shall always be invited as an advisor to the Working Group (if established), when the situations arising under Article 46 are related to fundamental rights and international protection considerations.

### **3.6. Fundamental Rights Monitors**

In accordance with Article 110, the Fundamental Rights Monitors shall constantly assess the fundamental rights compliance of operational activities, as assigned by the Fundamental Rights Officer, and provide advice and assistance in that regard.

The Fundamental Rights Monitors may act as forced-return monitors in return operations.

The Fundamental Rights Monitors shall inform the Coordinating Officer(s) and report to the Fundamental Rights Officer on any concerns related to possible violation of fundamental rights within the Agency's operational activities.

The Fundamental Rights Monitors shall cooperate and liaise with the Coordinating Officer(s) as provided for in Article 44 and provide advice and assistance to him or her if considerations related to fundamental rights are involved.

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<sup>6</sup> Appointed by the Executive Director in accordance to the Article 44 (2) of the Regulation.

### **3.7. Initiator**

The Initiator is an actor who triggers the activation of the mechanism under this SOP.

The activation of the mechanism can be triggered by the reporting/information provided by the relevant Frontex entities or staff monitoring the implementation of Frontex activities, such as the Coordinating Officer(s), the Fundamental Rights Officer and the Fundamental Rights Monitors, as well as by the participating Member State(s) within the application of Article 46(2).

However, the reporting/information from the Initiator do not interfere with the Executive Director's responsibility in regard of the application of Article 46 including his or her independent role in activating the mechanism under this SOP.

### **3.8. Working Group**

The Executive Director may decide to establish a Working Group which shall prepare a detailed assessment of the situations referred to in Article 46 including respective recommendations. The assessment and recommendation aim at facilitating the decision of the Executive Director under Article 46.

The assessment and recommendation prepared by the Working Group shall be submitted to the Executive Director via the Director of the Division responsible for the activity.

### **3.9. Frontex Operational Coordination Centre**

The Frontex Operational Coordination Centre as cross-divisional structure may administratively support the Director of the Division responsible for the activity and the Working Group (if established) in organising meetings, taking minutes, researching, compiling information, etc. The Director and the Working Group (if established) can assign any other supporting task to the Frontex Operational Coordination Centre, if needed.

### **3.10. Member State / Third Country concerned**

The Member State /Third Country concerned should be requested by the Executive Director or the Director of the Division responsible for the activity to provide its views on the situation which triggered the application of Article 46. The Member State /Third Country concerned should provide related information within the given deadline. However, lack of the feedback from the Member State / Third Country's side does not prevent from concluding the Agency's assessment and recommendation in that regard.

The Working Group (if established) may engage with the Member State / Third Country concerned in order to enrich the assessment with information from the Member State / Third Country's side.

## **4. The mechanism supporting the Executive Director in taking decisions under Article 46 of the Regulation**

### **4.1. Mechanism for decisions on termination of an activity if the conditions to conduct those activities are no longer fulfilled (Article 46(1))**

All activities of the Agency are subject to the regular monitoring, in particular by the Coordinating Officer(s) of the respective activities, the Fundamental Rights Officer and the Fundamental Rights Monitors or other relevant Agency entities or staff (hereinafter “initiator”).

Based on reporting from and with the support of the initiator, the Director of the Division responsible for the activity should conduct the necessary assessment of the situation, with the involvement of the Coordinating Officer(s) in case of operational activity, with regard to the conditions of the activity that are considered being no longer fulfilled.

The Member State /Third Country concerned should be requested to provide its views on the situation.

For this assessment, “conditions to conduct”, whilst not defined in the Regulation, may be technical, legal, financial, security or operational reasons. All relevant circumstances of the specific case should be taken into account.

When no longer fulfilled conditions are related to the failure to respect the operational plan, the mechanism under points 4.3 shall apply. When no longer fulfilled conditions are related to fundamental rights or international protection obligations’ considerations, the Fundamental Rights Officer shall be notified. The Director of Division responsible for the activity may suggest to the Executive Director to activate the mechanism under point 4.4 of this SOP.

In case the Director of the Division responsible for the activity concludes that the conditions of the activity are no longer fulfilled, he or she shall issue a recommendation to the Executive Director to terminate the activity. The assessment may also conclude that there are no grounds to terminate the activity. In such case, the recommendation including mitigation measures, if needed, to the Executive Director is issued accordingly.

If the Executive Director decides that there are indeed conditions that are no longer fulfilled, he or she shall issue a decision on the termination. The Executive Director shall inform the Member State / Third Country concerned prior to such termination.

In case the Executive Director decides that there are no grounds for the termination of the activity, he or she should inform the Member State / Third Country concerned including providing information regarding the mitigation measures proposed, if applied. In this case, the Director of the Division responsible for the activity should ensure the follow-up of the implementation of the mitigation measures.

### **4.2. Mechanism for decisions on termination of the activity upon request of the Member State participating in an operational activity (Article 46(2))**

One or more Member States participating in an operational activity by the Agency may request that the Executive Director terminates that activity. The Member State requesting the termination of the activity should provide justification for that request. If the Member State’s original request does not provide justification, the Director of the Division responsible for the activity will contact the participating Member State(s).

The Executive Director shall inform the Management Board of such request and the Fundamental Rights Officer in case the request is related to considerations related to fundamental rights and international protection obligations.

The Member State’s request shall be assessed by the Director of the Division responsible for the activity, with the involvement of the Coordinating Officer and Fundamental Rights Officer in case the request is based on the

considerations related to the fundamental rights or international protection obligations, and provide his or her conclusion about the content of the request, particularly whether any of the following situations are present:

- the conditions (such as technical, legal, financial, security or operational) to conduct the activities are no longer fulfilled, including security of the staff deployed in Third Countries, in accordance with Article 74(4) of the Regulation; the applicability of mechanism under point 4.1 of this SOP is to be considered.
- the operational plan is not respected by the Member State/ Third Country concerned; the applicability mechanism under point 4.3 of this SOP is to be considered.
- it is considered by the Member State requesting the termination of the activity that there are violations of fundamental rights or international protection obligations related to the activity concerned; the applicability of the mechanism under point 4.4 of this SOP is to be considered.

The Member State /Third Country concerned should be requested to provide its views on the situation.

In case the Director of the Division responsible for the activity concludes that any of the situations listed above are present, he or she shall issue a recommendation to the Executive Director to activate the respective mechanisms foreseen in this SOP (points 4.1, 4.3 or 4.4).

In case none of the situations listed above are present, the Executive Director informs the Member State/Third Country concerned accordingly.

#### **4.3. Mechanism for decisions on withdrawal of the financing of, or suspension or termination of the activity if the operational plan is not respected by the host Member State / Third Country (Article 46(3))**

All activities of the Agency are subject to the regular monitoring, in particular by the Coordinating Officer(s) of the respective activities, the Fundamental Rights Officer and the Fundamental Rights Monitors or other relevant Agency entities or staff (hereinafter “initiator”).

In accordance with Article 44(3)(b) of the Regulation, the Coordinating Officer(s) monitors the correct implementation of the operational plan, including, in cooperation with the Fundamental Rights Monitors, as regards the protection of fundamental rights and reports to the Executive Director on this. Where appropriate, in accordance with Article 44(3)(d), the Coordinating Officer(s) shall suggest that the Executive Director consider taking a decision in accordance with Article 46.

In case other relevant Agency entities or staff are planning to initiate the activation of the mechanism, the Coordinating Officer(s) should be informed and closely involved in the initiation.

With the support of the initiator, the Director of the Division responsible for the activity should conduct the necessary assessment of the situation with regard to the failure to respect the operational plan by the respective host Member State/Third Country.

Where the failure to respect the operational plan is related to fundamental rights and international protection considerations, the Fundamental Rights Officer shall be notified. The Director of the Division responsible for the activity may suggest to the Executive Director to activate the respective mechanism foreseen in point 4.4 of this SOP.

The respective host Member State /Third Country should be requested to provide its views on the situation.

In case the situation is of a complex nature and require additional clarifications, the Executive Director may decide to set up a Working Group upon the recommendation of the Director Division responsible for the respective activity. The recommendation should indicate the mandate of the Working Group and its composition. The Coordinating Officer(s) shall always be a member of the Working Group. The Working Group may engage with the host Member

State / Third Country concerned in order to enrich the assessment of the situation with additional information from the host Member State / Third Country's side. The Working Group shall prepare a detailed assessment of the situation within the deadline set by the Executive Director.

In case the Director of the Division responsible for the activity / Working Group (if established) concludes that the operational plan is not respected by the respective host Member State / Third Country, he or she shall issue a recommendation to the Executive Director which should contain one of the following proposals:

- authorise the **Coordinating Officer(s) to assist in resolving any disagreement** in the execution of the operational plan in accordance with Article 44(4);
- **withdraw the financing of, suspend or terminate** the activity.

In case the Coordinating Officer(s) does not succeed in resolving the disagreement, the Director of the Division responsible for the activity / Working Group (if established) shall inform the Executive Director and recommend respective actions under Article 46(3).

The assessment of the Director of the Division responsible for the activity / Working Group (if established) may also conclude that there are no grounds to withdraw the financing of, or suspend or terminate the activity. In such case, the recommendation to the Executive Director including mitigation measures, if needed, is issued accordingly.

**The mitigation measures** aim at reducing or avoiding the failure to respect the operational plan. These measures could include, but are not limited to:

- the reinforcement of the Coordinating Officer functions including possible deployments of additional Coordinating Officer(s), or other relevant Frontex staff nominated by the Coordinating Officer(s), to enhance their capacity to monitor the correct implementation of the operational plan;
- engaging relevant Frontex entities carrying out scoping visits, if necessary;
- proposing to clarify the operational plan (through amendment or adaptation);
- enhancing information exchange between the Agency and the respective host Member State / Third Country;
- limiting implementation of corresponding aspects of the technical and operational assistance provided by the Agency;
- considering the feasibility of further activities in the respective host Member State/Third Country.

If the Executive Director decides that indeed the operational plan is not respected by the respective host Member State / Third Country, he or she shall issue a decision on the withdrawal of the financing of, or suspension or termination of the activity. The Member State / Third Country concerned shall be informed before the decision is taken by the Executive Director.

In case the Executive Director decides that there are no grounds for the withdrawal of the financing of, or suspension or termination of the activity, he or she should inform the host Member State / Third Country concerned including providing information on the mitigation measures proposed, if applied. In this case, the Director of the Division responsible for the activity should ensure the follow-up of the implementation of the mitigation measures.

#### **4.4. Mechanism for decisions on withdrawal of the financing, or suspension or termination of any activity, in whole or in part based on considerations related to violations of fundamental rights or international protection obligations of a serious nature or likely to persist (Article 46(4))**

All activities coordinated or organised by the Agency are subject to the regular monitoring ensuring compliance of these activities with fundamental rights, in particular by the Fundamental Rights Officer and the Fundamental Rights Monitors, Coordinating Officer(s) or other relevant Agency entities or staff (thereinafter "initiator"). In case other

relevant Agency entities or staff is planning to initiate the activation of the mechanism, the Coordinating Officer(s) should be informed and closely involved in the initiation in case of an operational activity.

The Member State /Third Country concerned should be requested to provide its views on the situation.

Based on reporting from and with the support of the initiator (as well as information coming from other sources indicated in point 6 of this SOP), the Director of the Division responsible for the activity with the involvement of the Coordinating Officer(s) in case of an operational activity and Fundamental Rights Officer) should conduct the necessary assessment of the situation with regard to the potential violations of fundamental rights or international protection obligations.

In case the situation is of a complex nature and requires additional clarifications, the Executive Director may decide to set up a Working Group upon the recommendation of the Director of Division responsible for the respective activity. The recommendation should indicate the mandate of the Working Group and its composition. The Coordinating Officer(s) shall always be a member of the Working Group in case of operational activity. Without prejudice to the Fundamental Rights Officer's independence, he or she shall always be invited as an advisor to the Working Group.

The Working Group shall engage with the Member State / Third Country concerned in order to enrich the assessment of the situation with additional information from the host Member State / Third Country's side. The Executive Director may decide to invite other EU institutions, offices and agencies, such as the European Commission, the European External Action Service, the EU Agency for Fundamental Rights, the European Union Agency for Asylum and other relevant entities including international organisations to support the Working Group.

The Working Group shall prepare a detailed assessment of the situation in accordance with the criteria by taking into consideration the relevant sources of information available to the Agency within the deadline set by the Executive Director.

In case the Director of the Division responsible for the activity / Working Group (if established) concludes that there are violations of fundamental rights or international protection obligations, he or she shall issue a recommendation to the Executive Director, which should contain one of the following proposals:

- if the situation is related to disagreements in the execution of the operational plan, authorise the Coordinating Officer to assist in resolving the disagreements in accordance with Article 44(4);
- if the violations are considered to be of a serious nature or likely to persist, recommend to the Executive Director to withdraw the financing of, or suspend or terminate the activity, in whole or in part.
- if the assessment of the situation requires additional clarification, recommend to the Executive Director to seek the views of other EU institutions, bodies, offices or agencies, where relevant.

In case the Coordinating Officer(s) does not succeed in resolving the disagreement, the Director of the Division responsible for the activity/Working Group (if established) shall inform the Executive Director and recommend respective actions under Article 46(4).

The assessment may also conclude that there are no grounds for the above actions. In such case, the recommendation to the Executive Director should also include proposal for corrective measures, if needed, in regard fundamental rights and international protection obligations.

**The corrective measures** aim to ensure compliance with the fundamental rights and international protection obligations. These measures could include, but are not limited to:

- the reinforcement of the Coordinating Officer function including possible deployments of additional Coordinating Officer(s) or other relevant Agency staff nominated by the Coordinating Officer(s), to enhance their capacity in cooperation with the Fundamental Rights Monitors to monitor the correct

- implementation of the operational plan in regard to fundamental rights and international protection obligations;
- increased information exchange between the Agency and the Member State / Third Country concerned;
  - engaging the Fundamental Rights Officer in carrying out scoping visits possibly together with FRA and European Union Agency for Asylum, if necessary;
  - exploring the possibility, in cooperation with the Fundamental Rights Officer, to increase the number of assigned Fundamental Rights Monitors to the respective operational area, where the situation so requires.

If the Executive Director decides that indeed there are grounds for the application of Article 46(4), he or she shall issue a decision on withdrawal of the financing of, or suspension or termination of the activity, in whole or in part. The Fundamental Rights Officer shall be consulted, and the Member State / Third Country concerned shall be informed before the decision is taken by the Executive Director. The Executive Director shall inform the Management Board of such decision and provide it with justification.

In case the Executive Director decides that there are no grounds for the application of Article 46(4), he or she should inform the Member State / Third Country concerned, including providing information on the corrective measures proposed, if applied. In this case, the Director of the Division responsible for the activity should ensure the follow-up of the implementation of the corrective measures.

#### **4.5. Mechanism to support taking decisions on not launching the activity based on considerations related to fundamental rights or international protection obligations (Article 46(5))**

The entity responsible for the planning of the activity, as well as any other Frontex entity may propose to the Executive Director not to launch an activity in case of (non) compliance with the criteria established (point 5 of this SOP) and taking into consideration the relevant sources of information available (point 6 of this SOP). The proposal might also include suggestion for corrective measures allowing for the activity to be launched<sup>7</sup>.

All planned operational activities are included in the Plan of Operational Response for the upcoming year (N+1) annexed to the Single Programming Document presented to the Management Board at the beginning of the year N.

According to Article 109(2)(e) of the Regulation the Fundamental Rights Officer shall provide opinions on the operational plans drawn up for the operational activities of the Agency, on pilot projects and on technical assistance projects in Third Countries. In addition, he or she can at any time advise to the Executive Director on the necessity of not launching any activity.

The Executive Director shall assess the proposal/opinion with the involvement of the Director of Division responsible for the activity and may establish a dedicated Working Group to assess the situation based on considerations related to fundamental rights or international protection obligations. The Coordinating Officer(s) shall always be a member of the Working Group in case of an operational activity, and if appointed. Without prejudice to the Fundamental Rights Officer's independence, he or she shall always be invited as an advisor to the Working Group. The Working Group may engage the Member State / Third Country concerned in order to enrich the assessment with the information from the Member State / Third Country's side.

Within a deadline set by the Executive Director, the Working Group shall prepare a detailed assessment of the situation in accordance with the criteria (point 5 of this SOP) and taking into consideration the relevant sources of information (point 6 of this SOP) available to the Agency. The assessment shall include recommendation either not to launch

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<sup>7</sup> The mitigation measures might include, for example, limiting the geographical scope or the objectives of the activity.

activity by the Agency, or to launch the activity including corrective measures, if needed. In such case, the corrective measures should be addressed during the planning phase of the activity.

If the Executive Director decides not to launch the activity, he or she shall issue a decision. The Fundamental Rights Officer shall be consulted before the decision is taken by the Executive Director.

The Executive Director shall inform the Management Board of such decision and provide it with justification therefor. The Executive Director shall inform the Member State / Third Country concerned.

#### **4.6. Suspension or termination of the deployment by the Agency of the migration management support team (Article 46(7))**

In case the suspension or termination of the activity relates to deployment of the migration management support team(s) by the Agency, the Executive Director shall inform the other relevant bodies, offices and agencies (such as the European Union Agency for Asylum, Europol, etc.) active in the respective hotspot area about the Decision. As the Agency should assist the Commission in the coordination among the different agencies on the ground, and while it is the sole responsibility of the Executive Director to take decisions under Article 46, the Executive Director should liaise with the Commission prior to suspending or terminating the deployment of a migration management support team.

## **5. Criteria for decisions based on considerations related to fundamental rights or international protection obligations**

Under Article 46(4) an activity shall have its financing withdrawn, or shall be suspended or terminated, in whole or in part, if the Executive Director considers that:

1. there are **violations of fundamental rights or international protection obligations** related to the activity concerned; and
2. these are of a **serious nature**; or
3. these are **likely to persist**.

While under Article 46(5), the activity shall not be launched if the Executive Director considers that:

1. there would already be **serious reasons at the beginning of the activity** to suspend or terminate it because it could lead to **violations of fundamental rights or international protection obligations**; and
2. these violations would be of a **serious nature**.

In respect of each potential case, the relevant assessment shall focus on the seriousness of the fundamental rights violations, the likelihood that the violations would occur or persist, the circumstances of the situation at hand and the fundamental rights at stake.

The “likely to persist” criteria indicates a foreseen frequency and/or duration of the violations. It is to be noted that in Article 46(4), this is a criterion separate from the “serious nature”. However, it is not included in Article 46(5).

In considering the two above terms, the Agency shall construe them as follows.

In the European Convention on Human Rights (ECHR) context, the Council of Europe has previously treated as “serious human rights violations” acts in respect of which States have an obligation under the ECHR, and in the light of the European Court of Human Rights (ECtHR) case-law, to enact criminal law provisions.

Such obligations<sup>8</sup> may arise in the context of:

- the right to life (Article 2 ECHR);
- the prohibition of torture and inhuman or degrading treatment or punishment (Article 3 ECHR);
- the prohibition of forced labour and slavery (Article 4 ECHR);
- certain aspects of the right to liberty and security (Article 5, paragraph 1 ECHR);
- the right to respect for private and family life (Article 8 ECHR).

Additionally, the Agency also exercises vigilance regarding the following fundamental rights principles and standards relevant to border management activities and returns:

- prohibition of trafficking in human beings (Article 5(3) of the EU Charter of Fundamental Rights - the Charter);
- protection of personal data (Article 8 of the Charter);
- right to asylum (Article 18 of the Charter) and to protection against removal and expulsion and *non-refoulement* (Article 19 of the Charter);
- non-discrimination (Article 21 of the Charter);
- the rights of the child (Article 24 of the Charter).

Not all violations of these articles would necessarily reach the “serious nature” threshold.

The “persistence” of the violations suggests their repetition or continuation. In that regard<sup>9</sup>, the ECtHR describes the “repetition of acts” as “an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected not to amount to merely isolated incidents or exceptions but to a pattern or system”<sup>10</sup>.

The “persistence” is also evidenced by the element of “official tolerance”, described by the ECtHR as “illegal acts being tolerated in that the superiors of those immediately responsible, though cognisant of such acts, take no action to punish them or to prevent their repetition; or that a higher authority, in face of numerous allegations, manifests indifference by refusing any adequate investigation of their truth or falsity”<sup>11</sup>.

## 6. Sources of information for decisions based on considerations related to fundamental rights or international protection obligations

The decision of the Executive Director under Articles 46(4) and (5) shall always be based on duly justified grounds taking into account the relevant substantiated information available to the Agency. In line with Article 46(6) indicating particular sources of relevant information for the purpose of taking a decision pursuant to Article 46(4) and (5), the following sources available for the Agency and provided that they are substantiated, among others, should be taken into consideration aiming to identify and assess the potential violations of fundamental rights or international protection obligations which are of serious nature or likely to persist<sup>12</sup>:

- The number and substance of registered complaints<sup>13</sup> that have not been resolved by a national competent authority;

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<sup>8</sup> *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations (adopted by the Committee of Ministers on 30 March 2011 at the 1110<sup>th</sup> meeting of the Ministers’ Deputies.*

<sup>9</sup> *The ECtHR has found that an administrative practice comprises two elements: the “repetition of acts” and “official tolerance” (ECtHR, Georgia v. Russia (I) [GC], no. 13255/07, 3 July 2014, § 122).*

<sup>10</sup> *See ECtHR, Georgia v. Russia (I) [GC], cited above, § 123, and the case-law cited therein.*

<sup>11</sup> *See ECtHR, Georgia v. Russia (I) [GC], cited above, § 124, and the case-law cited therein.*

<sup>12</sup> *The criteria “likely to persist” applies only in regard of withdrawal of the financing for any activity by the Agency or suspension or termination of any activity by the Agency, in whole or in part under Article 46(4) of the Regulation.*

<sup>13</sup> *In accordance with Article 111(2) of the Regulation, any person who is directly affected in by the actions of failure to act on the part of staff involved in a joint operation, pilot project, rapid border intervention, migration management support team deployment, return operation, return intervention or an operational activity of the Agency in a third country, and who considers himself or herself to have been the subject of a breach of his or her fundamental rights due to those actions or that failure to act,*

- Reports of serious incidents, in particular the serious incidents of category 1 (*Situations of potential violations of fundamental rights or international protection obligations*) in accordance with the SOP - Serious Incident Reporting<sup>14</sup>;
- Reports on incidents of the use of force when those concern failure to comply with respect for fundamental rights;
- Reports from Coordinating Officer(s) indicating cases or events of non-compliance with fundamental rights and international protection obligations in any Frontex activity;
- Reports from the Fundamental Rights Officer and Fundamental Rights Monitors indicating cases or events of non-compliance with fundamental rights and international protection obligations in any Frontex activity;
- Reports from the forced-return monitors indicating cases or events of non-compliance with fundamental rights and international protection obligations in return operations;
- Reports from the Consultative Forum on non-compliance with fundamental rights and international protection obligations;
- Reports from relevant international organisations and Union institutions, bodies, offices and agencies. This may refer to any formal account of information from such entities (not necessarily an actual “report”)<sup>15</sup>;
- Legal analysis provided by Frontex Legal and Procurement Unit or by the European Commission;
- Rulings by the Court of Justice of the European Union, the European Court for Human Rights or any relevant national court of a Member State concerned by Frontex activities.

The list is not exhaustive, and it is at the Executive Director’s discretion to consider other sources of information.

The frequency and substance of the information bears a high importance. Thus the application of Article 46 should not be based on a single incident or a single report.

Decision-making would benefit from comparing information available from different sources provided that they are substantiated, non-biased and authoritative.

Before making a decision in accordance with Article 46(4) and (5), operational effects of such a decision and the implications for the European Integrated Border Management should also be considered in particular with regards to the well-functioning of the European Area of Freedom, Security and Justice or any other threat affecting the European Union and its Member States.

## **7. The follow-up of the decisions taken by the Executive Director**

### **7.1. Monitoring mechanism for ensuring a follow-up to decisions on withdrawal of the financing of or suspension of the activity if the operational plan is not respected by the host Member State / Third Country**

Once a decision on withdrawal of the financing of, or suspension of the activity based on situations related to the failure to respect the operational plan by the respective host Member State / Third Country is taken, the Director of

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*or any party representing such a person, may submit a complaint in writing to the Agency. The complaints can be addressed against any person participating in Frontex activity, alleging breaches of fundamental rights in the context of their participation in that activity.*

<sup>14</sup> *Decision of the Executive Director No-R-ED-2021-51 of 19 April 2021 Standard Operating Procedure (SOP) - Serious Incident Reporting.*

<sup>15</sup> *Such as legal analysis provided by the European Commission, rulings by the Court of Justice of the European Union, the European Court for Human Rights, etc.*

the Division responsible for the activity as referred to in point 4.3 of this SOP shall ensure the follow-up by monitoring the situation. He or she shall involve the Coordinating Officer(s) and where appropriate the Frontex Liaison Officer(s) as well as other relevant Frontex entities or staff, if the activation of the mechanism under Article 46(3) was initiated by them.

The Executive Director may decide to set up a Working Group<sup>16</sup> responsible for monitoring the respect of the operational plan. The Coordinating Officer shall always be a member of the Working Group.

The Director of the Division responsible for the activity / the Working Group (if established) shall provide periodical reports including recommendations to the Executive Director with the view of proposing to resume the financing of, or recommence the activity or, if the conditions which triggered withdrawal of the financing or suspension cease to exist.

The Director of the Division responsible for the activity / the Working Group (if established) may cooperate with the respective host Member State / Third Country for the purpose of performing their tasks. The Director of the Division responsible for the activity / the Working Group (if established) may also propose to the Executive Director to adopt certain mitigation measures among those listed in point 4.3 of this SOP to allow for the financing to resume or the activity to recommence.

In case the Executive Director decides to resume the financing of, or recommence the activity, the respective decision shall be issued. The Executive Director shall inform the Member State/Third Country concerned.

In case the activity related to the deployment of migration management team(s) by the Agency is recommenced, the Executive Director shall inform the other relevant bodies, offices and agencies active in the respective hotspot area about the Decision. The Executive Director should also liaise with the Commission on this matter.

## **7.2. Monitoring mechanism for ensuring a follow-up to decisions on withdrawal of the financing of, or suspension of the activity based on considerations related to violations of fundamental rights and international protection obligations of a serious nature or likely to persist**

Once a decision on withdrawal of the financing of, or suspension of the activity based on considerations related to fundamental rights and international protection obligations is made, the Director of the Division responsible for the activity as referred to in point 4.4 of this SOP shall ensure the follow-up by monitoring the fundamental rights related situation. He or she shall involve the Coordinating Officer(s), the Fundamental Rights Officer, and where appropriate the Frontex Liaison Officer(s) as well as other relevant Frontex entities or staff, if the activation of the respective mechanism under Article 46 was initiated by them.

In the remits of the Fundamental Rights Officer's independent mandate, he or she monitors, follows up and informs the Executive Director on the fundamental rights related situation in accordance with the Fundamental Rights Officer's duties and responsibilities.

The Executive Director may decide to setup a Working Group<sup>17</sup> responsible for monitoring the aspects related to fundamental rights. The Coordinating Officer(s) shall always be a member of the Working Group in case of operational activities. Without prejudice to the Fundamental Rights Officer's independence, he or she shall always be invited as an advisor to the Working Group.

The Director of the Division responsible for the activity / the Working Group (if established) shall provide periodical reports including recommendations to the Executive Director with the view of proposing to resume the financing of,

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<sup>16</sup> The Executive Director can assign this role to the same Working Group, if established as defined in this SOP under point 4.3.

<sup>17</sup> The Executive Director can assign this role to the same Working Group, if established as defined in this SOP under point 4.4.

or recommence the activity, if the conditions which triggered withdrawal of the financing or suspension cease to exist.

The Director of the Division responsible for the activity / the Working Group (if established) may cooperate with the Member State / Third Country concerned for the purpose of performing their tasks. The Director of the Division responsible for the activity / the Working Group (if established) may also propose to the Executive Director to adopt certain corrective measures among those listed in point 4.4. of this SOP in order to allow for the financing to resume or the activity to recommence.

In case the Executive Director decides to resume the financing or recommence the activity, a respective decision shall be issued. The Executive Director shall inform the Management Board of such decision and provide it with justifications therefor. The Executive Director shall inform the Member State/Third Country concerned.

In case the activity related to the deployment of migration management team(s) by the Agency is recommenced, the Executive Director shall inform the other relevant bodies, offices and agencies active in the respective hotspot area about the Decision. The Executive Director should also liaise with the Commission on this matter.

### **7.3. Follow-up of a decision not to launch an activity under Article 46(5)**

The Member State / Third Country concerned may request that the Agency launch the activity in accordance with Article 37(1) of the Regulation. The Executive Director shall evaluate the proposal made by the Member State / Third Country concerned and decide whether to launch the activity or not in accordance with the mechanism defined under 4.5. point of this SOP.