

COMPLAINT TO THE EUROPEAN OMBUDSMAN UNDER ARTICLE 228 TFEU: TRANSFERS OF SURVEILLANCE CAPABILITIES TO THIRD COUNTRIES BY FRONTEX

I. The complainants

Privacy International (PI) is a London-based non-profit, non-governmental organization (Charity Number: 1147471) that researches and advocates globally against government and corporate abuses of data and technology. It exposes harm and abuses, mobilises allies globally, campaigns with the public for solutions, and pressures companies and governments to change.¹ PI challenges overreaching state and corporate surveillance so that people everywhere can have greater security and freedom through greater personal privacy. This submission relates to PI's ongoing work on 'Challenging the Drivers of Surveillance'.²

Access Now defends and extends the digital rights of users at risk around the world.³ By combining direct technical support, comprehensive policy engagement, global advocacy, legal interventions, grassroots grantmaking, and convenings such as RightsCon, we fight for human rights in the digital age.

Border Violence Monitoring Network (BVMN) is a non-profit coalition of organizations working to document in the form of testimonies and consolidated into reports human rights violations at border, pushbacks, collective expulsions and state violence along the EU's external borders in the Western Balkans, Greece and Turkey since the network's formulation in 2016.⁴ BVMN is registered under the framework of RigardU e.V. in Germany.

Homo Digitalis (HD) is a digital rights civil society organization based in Athens, Greece.⁵ HD works for the protection of human rights and freedoms in the digital age, by organising raising awareness activities for the wider public, conducting research studies to inform policy decisions, and participating in legal actions before competent authorities at national and EU level.

International Federation for Human Rights (FIDH) is an international human rights NGO federating 192 organisations from 117 countries.⁶ Since 1922, FIDH has been defending all civil, political, economic, social and cultural rights as set out in the Universal Declaration of Human Rights.

Sea-Watch e.V. is a civil non-profit organisation (NGO) which has conducted search and rescue operations in the Central Mediterranean Sea for over seven years, currently with the *Sea-watch 3* and the *Sea-Watch 4*.⁷ Sea-Watch also documents human rights violations

¹ Privacy International (PI), <https://privacyinternational.org>.

² PI, Challenging the Drivers of Surveillance, <https://privacyinternational.org/challenging-drivers-surveillance>.

³ Access Now, <https://www.accessnow.org>.

⁴ Border Violence Monitoring Network (BVMN), <https://www.borderviolence.eu>.

⁵ Homo Digitalis (HD), <https://www.homodigitalis.gr/en>.

⁶ International Federation for Human Rights (FIDH), <https://www.fidh.org/en>.

⁷ Sea-Watch e.V., <https://sea-watch.org/en>.

and reports people in distress using civil reconnaissance airplanes, Seabird 1 and *Seabird 2*, operated together with the Swiss non-profit organisation *Humanitarian Pilots Initiative*.

II. Purpose of this Submission

The purpose of this complaint is to request that the European Ombudsman opens an inquiry into whether the failure of the European Border and Coast Guard Agency (hereinafter '**Frontex**') to carry out prior human rights risk and/or impact assessments when transferring surveillance capabilities to third countries constitutes maladministration.

The aforementioned organisations (hereinafter the '**Complainants**') submit that EU institutions, including Frontex, are under an obligation to conduct human rights risk and impact assessments prior to engaging in any form of surveillance transfer. Prior risk and impact assessments are needed to ensure that any surveillance transfer will not result in serious violations of the right to privacy and/or that such transfers will not facilitate other human rights abuses. However, our extensive research into EU surveillance transfers suggests that, in most of these cases, no prior human rights risk and impact assessments seem to have been carried out prior to Frontex's engagement with authorities and law enforcement agencies in third countries.

We believe that such practices raise significant concerns about the institutions' compliance with their obligations under EU law and could amount to instances of maladministration.⁸ They may not only result in impeding transparency and public scrutiny, but they may also seriously undermine the rights and freedoms of both EU and non-EU citizens, including human rights defenders and journalists. Such transfers will very often involve extremely intrusive forms of surveillance that, without the proper (prior) assessments, may be left prone to abuse by regimes that fail to respect human rights.

The Complainants are therefore urging the European Ombudsman to open an inquiry into the concerns detailed in this submission and to investigate the matter, including by obtaining further documents from the relevant institutions and bodies. Specifically, we are, first, asking the Ombudsman to confirm that Frontex is under an obligation to carry out human rights risk and impact assessments prior to engaging in any form of transfer of surveillance capabilities to authorities of third countries. Second, should the European Ombudsman find that Frontex has failed to carry out said assessments, we ask her to find that such failures constitute maladministration, and we invite her to issue recommendations to effectively address the matter that could potentially have implications for millions of people located both within and outside the EU.

The rest of this complaint is structured in as follows:

- First, we provide an overview of the key institutional framework that we have identified as enabling Frontex to carry out transfers of surveillance capabilities to third countries;
- Second, we detail the previous engagement and exchanges PI had with Frontex, in the context of both access to documents requests as well as written correspondence seeking clarifications;

⁸ According to the European Ombudsman, "[m]aladministration occurs if an institution or body fails to act in accordance with the law or the principles of good administration, or violates human rights. Maladministration can include administrative irregularities, unfairness, discrimination or the abuse of power, for example in the managing of EU funds, procurement or recruitment policies. It also includes the failure to reply, or the refusal or unnecessary delay in granting access to information in the public interest", <https://www.ombudsman.europa.eu/en/how-can-the-ombudsman-help>.

- Third, we describe the legal framework, under which we understand that EU institutions, including Frontex, are obliged to carry out human rights risk and impact assessments before engaging with authorities of third countries in the context of transfers of surveillance capabilities; and,
- Fourth, we highlight the grave human rights concerns arising in the context of surveillance transfers and provide further evidence of lack of (prior) human rights risk and impact assessments.

III. Frontex's involvement in the transfer of surveillance capabilities to third countries

EU bodies and EU member states have pursued counterterrorism and migration policies which are at odds with fundamental values. As a result, for example, the EU has passed legislation regarding the collection and use of Passenger Name Record (PNR) data,⁹ has funded the development of advanced surveillance technology,¹⁰ and is seeking interoperability between EU large-scale information systems, which the European Data Protection Supervisor has stressed "*could become a dangerous tool against fundamental rights.*"¹¹

Frontex is responsible for border control of the EU Schengen area.¹² In 2016, its mandate and role were significantly increased and is now involved in joint operation in non-EU countries. Frontex has concluded working arrangements with the authorities of at least 18 countries.

- Frontex cooperates with EUCAP Sahel Niger and deployed its own liaison officer since 2017. In November 2018 Frontex opened its first 'risk analysis cell' in Niamey in cooperation with Nigerien authorities. The role of the cell is to collect and analyze data on cross-border crime in various African countries and support authorities in border management. Similar cells will be established in, Gambia, Senegal, Kenya, Nigeria, Guinea and Mali over the next twelve months.¹³
- Similarly to Niger, in January 2019 Frontex and the Ghana Immigration Service opened a 'risk analysis cell' in Accra. Funded by the EU through the 'Strengthening of Africa-Frontex Intelligence Community (AFIC) project' the cell contributes to gather intelligence and share of information on border security.¹⁴ Frontex will help to collect, analyse and share information based on indicators such

⁹ Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, OJ L 119.

¹⁰ Statewatch, The European security-industrial complex, 24 May 2021 (latest update), <https://www.statewatch.org/observatories/the-european-security-industrial-complex>.

¹¹ EDPS, Summary of the Opinion of the European Data Protection Supervisor on the Proposals for two Regulations establishing a framework for interoperability between EU large-scale information systems, 2018/C 233/07, https://edps.europa.eu/sites/default/files/publication/18-04-16_opinion_interoperability_executive_summary_en.pdf.

¹² Frontex, Our mission, <https://frontex.europa.eu/about-frontex/vision-mission-values/>.

¹³ Frontex Opens First Risk Analysis Cell in Niger, Homeland Security Today, <https://www.hstoday.us/channels/global/frontex-opens-first-risk-analysis-cell-in-niger>.

¹⁴ Frontex, "Frontex and Ghana Immigration Service opened a Risk Analysis Cell in Accra as part of the 'Strengthening of Africa Frontex Intelligence Community (AFIC)' project financed by @EuropeAid. The cells collect and analyse data on cross-border crime and support border management" (31 January 2019), <https://twitter.com/frontex/status/109096817898807296>.

as passengers flow, refusals, travel facilitators and documents fraud.¹⁵ Between 2014 and 2017, the EU funded a joint project by IOM and the Ghana Immigration Service called Ghana Integrated Management Approach (GIMMA).¹⁶ The aim was to contribute to the Government of Ghana's efforts to manage migration effectively through the establishment of an integrated migration management approach.

- The Africa-Frontex Intelligence Community (AFIC) was set up in 2010 to provide a framework for regular knowledge and intelligence sharing in the field of border security between Frontex and African countries. The initial geographical focus of AFIC was on West Africa, but since 2017 it has been extended to several other countries. AFIC was launched to provide a framework for regular information sharing about migrant smuggling and border security threats. It foresees close cooperation with a number of countries along the main smuggling routes. This is done through a series of training activities to develop national and regional strategies to fight cross-border crime.¹⁷
- €4 million was granted to Frontex to strengthen AFIC, which includes consolidating and enhancing inter-agency and inter-regional information-sharing, improving the operational capabilities of the partner countries, through promoting information exchange that can lead to investigations to dismantle organised crime networks, and increasing the capacities of beneficiary countries to draft and share strategic and operational risk analyses/assessments on regular/irregular migration flows, border security, and cross-border criminality.¹⁸
- In August 2018, Frontex put out the tender of framework contract for the provision of vehicles for migration management support (VMM), to be used for activities within Frontex Joint Operations/Pilot projects including the identification and registration of irregular migrants, interviewing of migrants, and documents checks. The tender states that the activities will be used in North and West parts of Africa, such as Mauritania, Morocco, Algeria, Tunisia, Libya, and Egypt.¹⁹ Frontex is to provide accordingly specialized devices such as fingerprint devices and document examination devices.
- Since 2017, Frontex has been supporting the development and strengthening of the Libyan General Administration for Coastal Security (GACS), which has been repeatedly accused of conducting unlawful pull-back operations.²⁰ In order to strengthen the GACS' border management capacities, Frontex provided a training program on maritime law enforcement operations (Annex 2).
- As part of a 2019 project financed by the Instrument for Pre-Accession II, Frontex provided countries in the western Balkans with a "registration system interoperable

¹⁵ GhanaWeb, Immigration Service opens risk analysis cell to bolster intel gathering, <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Immigration-Service-opens-risk-analysis-cell-to-bolster-intel-gathering-719554>.

¹⁶ IOM, Ghana Integrated Migration Management Approach (GIMMA), <https://www.iom.int/sites/default/files/country/docs/ghana/GIMMA-Information-Sheet-January-2016.pdf>.

¹⁷ Frontex, AFIC 2017, <https://frontex.europa.eu/publications/afic-2017-ktLwW1>.

¹⁸ Publications Office of the European Union, Strengthening of AFIC as an instrument to fight serious cross-border crimes affecting Africa and the EU, <https://op.europa.eu/en/publication-detail/-/publication/4915a6be-f5b9-11e7-b8f5-01aa75ed71a1/language-en>.

¹⁹ EU TED, Frontex: Framework Contract for provision of Vehicles for Migration Management support (Frontex/OP/810/2018/RS), <https://etendering.ted.europa.eu/cft/cft-display.html?cftId=3934>.

²⁰ Amnesty International, Libya: 'No one will look for you': Forcibly returned from sea to abusive detention in Libya, <https://www.amnesty.org/en/documents/mde19/4439/2021/en>.

at the [western Balkans] regional level", in the aim of achieving "future interoperability with EU information systems on border and migration management" such as the Eurodac database, a pan-European fingerprint database for asylum seekers (Annex 4).

IV. PI's correspondence with Frontex, including access to documents requests

a. Access to documents requests

Between August and November 2019, PI submitted a series of access to documents requests, under Regulation (EC) No 1049/2001, to several EU bodies, including Frontex, regarding the transfer of surveillance capabilities to non-EU countries.²¹ The requests sought documents providing information on the transfer of personal data, surveillance technology, training, financing, and legislation to third countries.

Among others, PI requested documents demonstrating how the agencies ensured that any transfer of surveillance capabilities would adhere to EU human rights law and principles, including a request for any risk and/or due diligence assessments, evaluations or audits which were conducted, and specific information about the type and content of these risk and/or due diligence assessments, evaluations or audits.

The documents received by Frontex suggest that no prior human rights risk or impact assessments are carried out in the context of transfer of surveillance capabilities to third-country authorities.

b. Correspondence with Frontex

On 9 March 2022, PI wrote to Frontex via email to share its concerns and request further clarifications *"regarding procedures Frontex has in place to ensure its cooperation with third countries respects human rights and does not contribute towards human rights violations, including violations of privacy or data protection rights"* (Annex 1).

Specifically, PI asked Frontex to:

- Provide details on what measures exist to protect human rights when providing capacity building to, or otherwise supporting, third countries with such surveillance capabilities;
- Provide information on what review of legal and other safeguards in the country to which such support is being provided is undertaken prior to providing such support;
- Provide information on what due diligence or human rights risk and impact assessments are undertaken prior to providing such support;
- Provide information on what if any data protection impact assessments are undertaken prior to providing such support.

Up to this date, Frontex has not responded to PI's letter. Therefore, it has not provided any clarifications about how the human rights compliance of their activities is ensured and

²¹ PI, Challenging the Drivers of Surveillance: EU Access to Documents Requests, 18 September 2019, <https://privacyinternational.org/report/3225/challenging-drivers-surveillance-eu-access-documents-requests>.

about whether prior human rights risk and impact assessments are carried out before engaging in transfers of surveillance capabilities to third countries.

V. Relevant Legal Framework

In accordance with its founding principles, including the principles of liberty, democracy, respect for human rights and freedoms and the rule of law, the European Union's external relations are underpinned by a constant commitment to human rights, freedoms and the rule of law.²² Article 2 of the Treaty on European Union (TEU) underlines that the EU's founding values are "*human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities*". Article 3 of the Treaty on European Union (TEU) requires the European Union in "*its relations with the wider world*" to contribute to "*the protection of human rights*", while Article 21 of the TEU lists "*democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity*" among the principles inspiring the European Union's external action. Similarly, Article 205 of the Treaty on the Functioning of the European Union (TFEU) determines that the EU's international actions are to be guided by the principles laid down in Article 21 of the TEU.

Article 21(3) of the TEU clarifies that the EU has a duty to respect the listed principles, including human rights, in the development and implementation not only of all areas of the Union's external action, but also of the external aspects of its other policies. Human rights, therefore, form part of those common principles and objectives that should cement policy coherence among different areas of the EU's external action.²³

With the adoption of the Treaty of Lisbon on 1 December 2009, the Charter of Fundamental Rights of the European Union (CFREU) came into direct effect, as provided for by Article 6(1) TEU, thereby becoming a binding source of primary law.²⁴ Most of the rights recognised by the Charter are granted to "*everyone*" regardless of nationality or status. Among the rights and freedoms guaranteed by the CFREU are human dignity (Article 1), the right to life (Article 2), respect for private and family life (Article 7), protection of personal data (Article 8), freedom of expression and information (Article 11), the right to asylum (Article 18), the prohibition of collective expulsion (Article 19), the right to good administration (Article 41) and the right of access to documents (Article 42).

Article 51 para 1 of the CFREU states that "*the provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union*". It adds that "[t]hey shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers." In its judgment in *Ledra*, the Court of Justice of the European Union (CJEU) confirmed that Article 51 CFR applies to the EU institutions always and at all times as it is addressed to them also "when they act outside the EU legal framework".²⁵ In its reviews of the compatibility of the European Commission's actions with the CFREU, the CJEU has increasingly focused on procedural aspects, assigning particular weight, to whether EU institutions have exercised due diligence in assessing the potential fundamental rights impacts of their choices.²⁶

²² European Parliament, Human Rights, <https://www.europarl.europa.eu/factsheets/en/sheet/165/human-rights>.

²³ Chiara Macchi, With trade comes responsibility: the external reach of the EU's fundamental rights obligations, *Transnational Legal Theory* (Vol. 11:4, 2020) pages 409-435.

²⁴ Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

²⁵ Case C-8/15 P, *Ledra Advertising v. Commission and ECB*, 20 September 2016, para 67.

²⁶ See Olivier De Schutter, The implementation of the Charter by the institutions of the European Union in Steve Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing, 2014), pages 1644-1645.

Furthermore, the second EU Action Plan on Human Rights and Democracy, published by the Council of the European Union in 2015, which seeks to cover the period between 2015 and 2019, underlines:

The EU will promote human rights in all areas of its external action without exception. In particular, it will integrate the promotion of human rights into trade, investment, technology and telecommunications, Internet, energy, environmental, corporate social responsibility and development policy as well as into Common Security and Defence Policy and the external dimensions of employment and social policy and the area of freedom, security and justice, including counter-terrorism policy. In the area of development cooperation, a human rights based approach will be used to ensure that the EU strengthens its efforts to assist partner countries in implementing their international human rights obligations.²⁷

The European Ombudsman has repeatedly held that the European Commission's refusal to conduct a human rights impact assessment in the context of trade agreement negotiations constitutes maladministration. For example, in her draft recommendation adopted on 26 March 2015, the EU Ombudsperson found that "*the Commission's failure to carry out a specific human rights impact assessment, in relation to Vietnam, constitutes maladministration.*"²⁸ The issue in this case was whether the European Commission should carry out a human rights impact assessment in the context of its negotiations to conclude a free trade agreement with Vietnam:

10. In her analysis leading to her recommendation, the Ombudsman pointed out that good administration means, in the first place, observance of and respect for fundamental rights. In fact, where fundamental rights are not respected, **there cannot be good administration**. Accordingly, EU institutions and bodies must always consider the compliance of their actions with fundamental rights and the possible impact of their actions on fundamental rights. This applies also with respect to administrative activities in the context of international treaty negotiations.

11. The Ombudsman noted that the principles set out in Article 21(1) TEU and Article 21(2) TEU apply also in the area of the common commercial policy. Although the Ombudsman agreed with the Commission that there appears to be no express and specific legally binding requirement to carry out a human rights impact assessment concerning the relevant free trade agreement, she took the view that it would be in conformity with the spirit of the legal provisions mentioned above to carry out a human rights impact assessment. Since the 2009 sustainability impact assessment concerning ASEAN covers only certain aspects of the impact on social rights, it is not a proper substitute for a human rights impact assessment.

25. As rightly argued by the complainants, the human rights impact assessment is not a collection of data or a response to public opposition, but rather an analytical tool for demonstrating that all necessary factors and circumstances have been taken into account in framing a policy. The human rights impact assessment tool identifies the sources of risks and the human rights impacts on the affected stakeholders at each stage of the implementation of the agreement concerned. Its

²⁷ Council of the European Union, EU Action Plan on Human Rights and Democracy (2015), page 10, https://www.consilium.europa.eu/media/30003/web_en_actionplanhumanrights.pdf.

²⁸ European Ombudsman, Draft recommendation of the European Ombudsman in the inquiry into complaint 1409/2014/JN against the European Commission (26 March 2015), <https://www.ombudsman.europa.eu/en/recommendation/en/59398>.

role is preventive in the first place because when negative impacts are identified, either the negotiated provisions need to be modified or mitigating measures have to be decided upon before the agreement is entered into. This analytical tool cannot be replaced by trade or non-trade policy measures, meetings with stakeholders, internal summaries or reports of such meetings.²⁹

Most recently, in March 2021, the European Ombudsman found that the European Commission's failure to complete a sustainability impact assessment (SIA) essential to evaluating the social and environmental impact of the negotiated trade deal between the EU and Mercosur – the South American trade bloc comprised of Argentina, Brazil, Paraguay and Uruguay – constituted maladministration.³⁰ In her decision, the Ombudsman noted that *"while it was impossible to foresee the dynamics of the negotiations, the SIA in this case has taken much longer to finalise than anticipated. Specifically, the Commission should have ensured that the SIA was finalised before the conclusion of the EU-Mercosur trade negotiations"*.³¹ She also underlined that:

39. While Article 21 TEU does not set out an explicit and legally binding requirement to conclude an SIA before the end of trade negotiations, SIAs are one of the Commission's most important tools to ensure that the principles set out in Article 21 TEU are respected in trade agreements.³²

Our understanding is that Frontex is under an obligation to conduct human rights risk and impact assessments, including privacy and data protection impact assessments, prior to engaging in any transfer of surveillance capabilities. Such assessments must consider impact and risks on the whole spectrum of human rights. Without prior assessments it is not possible to ensure that any surveillance transfer will not cause serious violations of, or interferences with privacy or other fundamental rights.³³ They may not only result in impeding transparency and public scrutiny but may also seriously undermine the rights and freedoms of both EU and non-EU citizens, including human rights defenders and journalists.

While the transfer of surveillance capabilities to third countries will very often involve extremely intrusive forms of surveillance that without the proper (prior) assessments could be left prone to abuse by regimes that fail to respect human rights, our findings based on the documents disclosed to us and relevant desk-research suggest that, in most of these cases, no human rights risk and impact assessments seem to have been carried out prior to the engagement with authorities of third countries.

VI. The lack of prior human rights risk and impact assessments in Frontex's activities that support surveillance capabilities in third countries

A training programme, led by the Italian government but financed by the EU Trust Fund for Africa, involves the training and equipping of Libyan authorities in ways that raise human

²⁹ European Ombudsman, Decision in case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement (26 February 2016), <https://www.ombudsman.europa.eu/en/decision/en/64308>.

³⁰ European Ombudsman, Decision in case 1026/2020/MAS concerning the failure by the European Commission to finalise an updated 'sustainability impact assessment' before concluding the EU-Mercosur trade negotiations (17 March 2021), https://www.ombudsman.europa.eu/en/decision/en/139418#_ftnref16.

³¹ Ibid.

³² Ibid.

³³ On biometric data, see Dr. Krisztina Huszti-Orbán and Prof. Fionnuala Ní Aoláin, 'Use of Biometric Data to Identify Terrorists: Best Practice or Risky Business?' – Report prepared under the aegis of the Mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (2020), <https://www.law.umn.edu/human-rights-center/research/use-biometric-data-identify-terrorists>.

rights concerns around, for instance, the misuse of data and possible privacy infringements of third country populations in a vulnerable position. A 2018 document details the training, provided by Frontex to Libya's General Administration for Coastal Security (GACS) (Annex 2).

The document indicates that Frontex taught participants how to secure "*evidence for prosecution and intelligence purposes*", including from electronic devices, how to acquire fingerprints, including from "*children and people with vulnerabilities*", as well as "*basic self-defence techniques that can be used during the apprehension of suspects on board, including the use of force and its limitations*" (Annex 2, pages 2–4). In a 2021 document, the training of the so-called Libyan Coast Guard and the GACS is still one of the many activities supposedly carried out by Frontex.³⁴ Furthermore, "Representatives of the Libyan National Team for Border Management and Security and their respective authorities routinely participate in regional workshops organised by Frontex."³⁵

A risk assessment undertaken for the training does not identify any possibility that the training could facilitate human rights abuses or undermine the local reputation of the EU (Annex 3), despite evidence of Libyan authorities shooting at or beating migrants on board vessels or threatening NGOs,³⁶ and reports detailing how people are then locked in cramped detention camps rampant with diseases and subjected to serious human rights abuses,³⁷ including rape and torture.³⁸ The Independent Fact-Finding Mission in Libya recently declared to have "reasonable grounds to believe that crimes against humanity" were being committed and that persons were "subjected to widespread and systematic arbitrary detention. Acts of murder, enforced disappearance, torture, enslavement, sexual violence, rape, and other inhumane acts, are being committed in connection with their arbitrary detention."³⁹

In the central Mediterranean Sea, Frontex only operates with aerial assets and exclusively cooperates with the so-called Libyan Coast Guard, for people to be pulled back to Libya. According to law, Libya not being a place of safety⁴⁰ for persons rescued at sea, as recently reiterated by the UN Special Rapporteur on the Human Rights of Migrants.⁴¹

In addition, a 2019 project financed by the Instrument for Pre-Accession II aims to provide countries in the western Balkans with a "*registration system interoperable at the [western Balkans] regional level*", in the aim of achieving "*future interoperability with EU information systems on border and migration management*" such as

³⁴ See EEAS, Working Document of the External Action Service of 19/02/2021 (2021) 174, page 44, <https://www.statewatch.org/media/1964/eu-eeas-eubam-libya-strategic-review-eeas-2021-174.pdf>.

³⁵ Ibid.

³⁶ Sea-Watch, So-called Libyan Coast Guard firing shots at migrant boat in distress (5 July 2021), https://sea-watch.org/en/libyan_coast_guard_shots_fired; Benjamin Bathke, When helping hurts – Libya's controversial coast guard, Europe's go-to partner to stem migration (InfoMigrants, 24 July 2019), <https://www.infomigrants.net/en/post/18196/when-helping-hurts-libya-s-controversial-coast-guard-europe-s-go-to-partner-to-stem-migration>.

³⁷ Sally Hayden, Calls for inquiry after migrants captured by Libyan coast guard shot dead (The Irish Times, 29 July 2020), <https://www.irishtimes.com/news/world/europe/calls-for-inquiry-after-migrants-captured-by-libyan-coast-guard-shot-dead-1.4317019>.

³⁸ Amnesty International, Libya 2020, <https://www.amnesty.org/en/countries/middle-east-and-north-africa/libya/report-libya>.

³⁹ Report of the Independent Fact-Finding Mission on Libya (A/HRC/50/63, 27 June 2022), §75.

⁴⁰ A place of safety is a "place where the survivors' safety of life is no longer threatened and where their basic human needs (...) can be met", according to the IMO Resolution MSC. 167(78), §6.12 et seq. Libya disqualifies itself as a place of safety according to law.

⁴¹ UN Special Rapporteur on the human rights of migrants, Human rights violations at international borders: trends, prevention and accountability (A/HRC/50/31, 26 April 2022), §65, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/328/57/PDF/G2232857.pdf?OpenElement>.

the Eurodac database, a pan-European fingerprint database for asylum seekers (Annex 4).

As the above illustrate, Frontex is providing third-country authorities with surveillance capabilities which have been used and will likely continue to be used to circumvent individuals' freedoms. While we believe that EU bodies and agencies are under an explicit obligation to promote and safeguards human rights and the rule of law in all their dealings with third countries, Frontex's disclosures with regard to our access to documents requests show a lack of prior human rights risk and impact assessments, including any privacy and data protection impact assessments, in order to mitigate the risks described above.

VII. Applications/Remedy

For the reasons set out above, the Complainants submit that EEAS has been and continues to transfer surveillance capabilities to third countries, in absence of the required prior human rights risk and impact assessments, including any privacy and data protection impact assessments.

The Complainants therefore ask the European Ombudsman to examine the present complaint and open an inquiry into whether the lack of prior human rights risk and impact assessments, including any privacy and data protection impact assessments, by EEAS, in the context of the transfer of surveillance capabilities to third countries constitutes maladministration under EU law. Should the European Ombudsman find that EEAS's failure to carry out said assessments constitutes maladministration, we invite her to issue recommendations to effectively address the matter that could potentially have implications for millions of people located both within and outside the EU.

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