

Letter from the European Ombudsman opening own-initiative inquiry OI/5/2012/BEH-MHZ concerning implementation by Frontex of its fundamental rights obligations

Correspondence - 06/03/2012

Case OI/5/2012/BEH-MHZ - **Opened on** 06/03/2012 - **Recommendation on** 09/04/2013 - **Special report on** 07/11/2013 - **Decision on** 12/11/2013 - **Institution concerned** European Border and Coast Guard Agency (Closed after Special Report) |

Mr Ilkka Laitinen Executive Director European Agency for the Management of Operational Cooperation at the External Borders Rondo ONZ 1 00 124 WARSZAWA POLOGNE
Strasbourg, 06-03-2012

Own-initiative inquiry OI/5/2012/BEH-MHZ concerning implementation by Frontex of its fundamental rights obligations

Dear Mr Laitinen,

I am writing to inform you that I have decided to open an own-initiative inquiry into the implementation by Frontex of its fundamental rights obligations . The reasons for the inquiry are as follows:

On 1 December 2009, with the entry into force of the Treaty of Lisbon, the Charter of Fundamental Rights of the EU became legally binding on Frontex, which is an EU agency.

Subsequently, following extensive discussions and in response to concerns and expectations voiced by civil society, on 25 October 2011, the European Parliament and the Council adopted Regulation 1168/2011/EU ('the Regulation'), which further enhances the role of Frontex and explicitly provides that it shall fulfil its tasks in full compliance with the Charter of Fundamental Rights. The Regulation provides for Frontex to put in place certain administrative mechanisms and instruments to promote and monitor compliance with its obligations as regards respect for fundamental rights.

In view of the new legal framework under which Frontex operates and the great interest taken by civil society in the EU's management of external borders, including its fundamental rights dimension, I consider it useful to seek to clarify, by means of an own-initiative inquiry, the implementation by Frontex of the above-mentioned provisions. I would, therefore, appreciate it if



Frontex could inform me of its position regarding the following matters:

1 The Fundamental Rights Strategy

Article 26a(1) of the Regulation provides that Frontex shall (a) draw up, further develop and implement a Fundamental Rights Strategy, and (b) put in place an effective mechanism to monitor respect for fundamental rights in all its activities.

In view of these provisions, Frontex is requested to provide answers to the following questions:

(i) What is the current state of affairs as regards the adoption of Frontex's Fundamental Rights Strategy?

(ii) Which measures has Frontex taken, or envisages, to put in place an effective mechanism for monitoring respect for fundamental rights in Frontex's activities?

(iii) Taking into account that Frontex is involved in coordination and support activities on the territory of the Member States, could Frontex please explain its understanding, possibly also by way if examples, of the reference to "all the activities of the Agency", referred to in Article 26a(1) of the Regulation?

(iv) Does Frontex consider that the development of an effective mechanism for monitoring fundamental rights should include a complaints mechanism for persons affected by Frontex's activities? (*See also 3 (ii) and 5 (ii) below*).

2 Codes of Conduct

The Regulation provides for the adoption of Codes of Conduct applicable to all operations, such as a code concerning (a) procedures intended to guarantee the principle of the rule of law and respect for fundamental rights and (b) the return of third country nationals who are physically present in EU Member states without valid documents.

(i) Could Frontex please explain how it sees the relationship (a) between its Fundamental Rights Strategy (see point 1 above) and these codes of conduct; and (b) among the different codes themselves?

(ii) What is the current state of affairs as regards the adoption of these codes of conduct?

3 The Fundamental Rights Officer

According to Article 26a(3) of the Regulation, the Frontex Management Board shall designate a Fundamental Rights Officer (FRO).

(i) What does Frontex consider should be the FRO's precise responsibilities and duties?



(ii) Does Frontex foresee that the FRO could be competent to receive complaints from individuals concerning respect for fundamental rights by Member States and/or Frontex?

(iii) Has the Management Board already appointed the FRO and, if not, what is the procedure and the timeframe for doing so?

4 European Border Guard Teams/ The Coordinating Officer

The Regulation refers to European Border Guard Teams and requires that they shall, in the performance of their tasks and the exercise of their powers, fully respect fundamental rights.

(i) Given that these teams appear to be composed of representatives of both Frontex and the Member States, who will be responsible for possible failures of these teams fully to respect fundamental rights, and

(ii) what is the role of the Coordinating Officer in this respect?

5 Termination of joint operations and pilot projects

Pursuant to Article 3(1a) of the Regulation, Frontex may terminate, after informing the Member State concerned, joint operations and pilot projects if the conditions to conduct those joint operations or pilot projects are no longer fulfilled. The Executive Director shall suspend or terminate, in whole or in part, joint operations and pilot projects if he or she considers that violations of fundamental rights or international protection obligations are of a serious nature or are likely to persist.

In light of these provisions:

(i) Could Frontex please explain what procedures and criteria it will use to identify possible violations of fundamental rights or of international protection obligations which are of a serious nature, or are likely to persist?

(ii) Does Frontex envisage establishing a mechanism by which (a) persons claiming to be affected and/or (b) other persons, may complain to Frontex about violations of fundamental rights or international protection provisions?

(iii) In case the Executive Director decides to suspend or terminate an operation or pilot project, which other steps could Frontex, in line with its mandate, envisage to help remedy the detected violations of fundamental rights and international protection obligations?

I would appreciate it if you submitted an opinion on the above questions and issues by 31 May 2012. To the extent that Frontex has already adopted the policies, procedures and codes mentioned in points 1 and 2 above, I would moreover appreciate it if you could provide me with copies thereof.



I would also like to inform you that, during my inquiry, I may consider publishing Frontex's opinion on my website in order to give interested third parties the opportunity to make observations. I have also decided to inform the national ombudsmen who are members of the European Network of Ombudsmen of my inquiry.

Should your services require any further information or clarifications concerning this own-initiative inquiry, please do not hesitate to contact Mrs Marta Hirsch-Ziembinska (+33 388 17 27 46) or Mr Bernhard Hofstötter (+33 388 17 81 05), the legal officers responsible for the inquiry.

Yours sincerely,

P. Nikiforos Diamandouros