



Decision of the European Ombudsman closing the inquiry into complaint 2053/2012/(JN)AN against the European Agency for the Management of Operational Cooperation at the External Borders ('Frontex')

Decision

Case 2053/2012/AN - **Opened on** 13/11/2012 - **Decision on** 21/11/2013 - **Institution concerned** European Border and Coast Guard Agency (Frontex) |

The background to the complaint

1. Since April 2009, the complainant was deployed by his country ('Member State X') to support the Frontex Joint Operation Poseidon Sea in Greece (the 'Joint Operation') as an interpreter and language analyst. His deployments took place in accordance with quarterly Notes of Understanding ('NoUs'), signed by Member State X and Frontex. The NoUs, in which the latter required the former to provide it with the services of an interpreter, established the economic and operative conditions for the deployment.
2. In October 2011, in the context of annual bilateral talks between Frontex and the Member States, Frontex and Member State X agreed that the latter would deploy an interpreter to the Joint Operation for a maximum of 259 work days in 2012. The NoU between Frontex and Member State X establishing the terms and conditions of the deployment between January and March 2012 was signed on 13 December 2011. Member State X envisaged that the complainant would be the deployed interpreter for whatever number of days was required during 2012, and the complainant agreed with this. Frontex had no involvement in the agreement between Member State X and the complainant.
3. By e-mail of 22 December 2011, Frontex's Director of Operations requested an evaluation of the pilot project for which the complainant had been working within the Joint Operation. In this context, the Director expressed his doubts internally within Frontex as to the complainant's "*reliability and trustfulness*" and requested Frontex's services to conduct an investigation "*about [the complainant's] role and activities, with a focus (among other) on the question whether he has claimed ... reimbursement from FRONTEX*" for non-reimbursable expenses. The Director of Operations requested the complainant's hierarchy within Frontex that the complainant be temporarily suspended while the investigation was being carried out and asked for confirmation of the suspension without delay.
4. The complainant was not deployed between January and March 2012. On 16 January 2012, the complainant's immediate superior in Frontex sent an e-mail to several top management officers at Frontex, in which he defended the complainant's integrity and professionalism.



5. The complainant requested on several occasions, through his hierarchy, to meet Frontex's Director of Operations and explain his position. No such meeting took place. In February 2012, the complainant also contacted Frontex's Executive Director, who replied that he had already discussed the matter with Member State X's authorities and that he would also look into the matter internally.

6. On 2 March 2012, Frontex informed Member State X in writing that, bearing in mind the complainant's long term deployment since 2009 and the need to introduce rotation, it proposed " *to suspend for the time being the [complainant's] deployment within joint operations coordinated by Frontex* ". Frontex made no reference to the complainant's alleged inappropriate behaviour. However, on 26 March 2012, Frontex requested Member State X to re-deploy the complainant to Greece from 13 April to 12 July 2012. The complainant accepted and was re-deployed for the said duration. At the end of the deployment, no new deployment was offered to him.

7. On 15 October 2012, the complainant submitted his complaint to the Ombudsman.
The subject matter of the inquiry

8. The Ombudsman opened an inquiry into the following allegation and claims.

Allegation:

Frontex treated the complainant in an unfair manner.

Claims:

1. Frontex should acknowledge its misbehaviour and apologise to the complainant.

2. Frontex should pay the complainant (i) the amount he would have received had he worked for the whole duration of the Mobile Office Unit project in 2012, and (ii) moral damages for the harm caused to his reputation and the psychological distress he has gone through.

The inquiry

9. On 13 November 2012, the Ombudsman opened an inquiry into the complaint and invited the Executive Director of Frontex to submit an opinion on the above allegation and claims.

10. On 28 February 2013, Frontex submitted its opinion, which was forwarded to the complainant with an invitation to submit observations.

11. On 14 March 2013, the complainant submitted his observations.
The Ombudsman's analysis and conclusions

A. Alleged unfair treatment of the complainant and related claims



Arguments presented to the Ombudsman

12. The substance of the complaint was that Frontex's Director of Operations had falsely accused the complainant of having committed irregularities during his deployment; that Frontex never investigated the accusations and never gave him the opportunity to defend himself and to clear his name. Moreover, following these unsubstantiated accusations, Frontex dismissed the complainant without giving a proper reason. It did so in spite of having committed itself to using the complainant's services for 259 days during the year 2012 and in breach of the NoU signed with Member State X on 13 December 2011.

13. In its **opinion**, Frontex first clarified that, in contractual terms, it had never been the complainant's employer. As a general rule, when Frontex requires the services of a deployed expert, it signs an NoU with the relevant national authorities. It is, subsequently, those authorities' decision whom to deploy to Frontex. In the present case, the complainant was deployed by his National Criminal Police in the framework of border control activities of Member States coordinated by Frontex. Based on the NoU, Frontex was not responsible as regards the provision of services defined by the National Criminal Police and it could not be deemed responsible in any further disputes.

14. Frontex further stated that during 2011, its division of operations received negative input from various stakeholders as regards the complainant's behaviour. This constituted a source of concern, even though no formal accusations were brought. However, on 2 March 2012, Frontex asked Member State X's authorities to consider suspending the complainant's deployment for a period of time in order to fulfil the principle of rotation, which prevents the same expert from being in the field for a long time. Out of respect for the complainant, Frontex avoided reporting to the national authorities the complainant's "*dubious attitude*" within his working environment.

15. On 11 March 2012, according to Frontex, the complainant's attorney wrote to Frontex's Director of Operations, requesting that the complainant be reinstated in his duties and compensated for the damage caused. The Director replied on 30 March 2012. He rejected the complainant's claims and stated that, in February 2012, the complainant and his Head of Unit in Frontex had already discussed the situation.

16. The complainant was, nevertheless, deployed once again for the period from 13 April to 12 July 2012. Frontex considered that it acted "*in a most generous way as the complainant should have rotated earlier*".

17. Frontex stated that, towards the end of this deployment, on 22 June 2012, Frontex requested Member State X not to deploy the complainant in the future. This request was motivated by the principle of rotation, but also by the "*difficult relationships between [the complainant] and his colleagues*". It was, subsequently, Member State X's responsibility to inform the complainant about the non-renewal of his contract and give proper reasons for it. Frontex said that it explicitly requested Member State X's national authorities to do so.



18. Frontex stated that, contrary to the complainant's allegation, he was not dismissed from his functions, but his contract came to an end.

19. Moreover, the project in which the complainant was involved was a Frontex Pilot Project and therefore required the utmost vigilance and monitoring so as to ensure and maintain the Agency's good reputation. The fact that, on 22 December 2011, Frontex's Director of Operations raised concerns about the complainant with the relevant Head of Unit was entirely appropriate, since it was his responsibility to ensure the proper facilitation and coordination of the project. He thus had to satisfy himself of the integrity of his deployed team. Frontex mentioned, in its opinion, that some facts reported to it concerning the complainant " *were far from fostering the mutual trust between Frontex and its experts* ".

20. However, contrary to the complainant's statement, the Director of Operations' instructions were not formal accusations against the complainant. They only expressed concerns about the complainant's general attitude and behaviour, which affected the level of trust in him. For instance, according to Frontex, the complainant used harsh language with various stakeholders, including Frontex staff, and attempted to blame the agency for inappropriate actions against him. It was also reported that the complainant pretended to be on a mission in the operational field, where he was not deployed, and requested the reimbursement of his expenses. Moreover, Frontex's finance team noted that the complainant repeatedly and dishonestly requested payment for "work" while being off duty.

21. Frontex stated that it did not formally investigate the above concerns, since no formal accusations were ever brought against the complainant. In any event, Frontex took the view that, in dealing with the complainant's case, it always followed the regular practice of cooperation and coordination with the national authorities in deployment of their experts. Moreover, according to Frontex, it did keep the complainant informed of its response to his enquiries as to why he was not to be further deployed.

22. In his **observations** , the complainant stated that Frontex did not mention any good reason for the decision to suspend his services, which was taken a week after his contract was renewed for another three months. He stated that the matter with the financial unit was based on the misinterpretation of the NoU and had been resolved long before the decision to suspend him was taken. As regards his harsh language, he stated that this incident occurred seven months after the decision to suspend him. In any event, Frontex did not officially inform Member State X about the decision to suspend him that was taken on 22 December 2011 and did not seek the views of the project manager or his line manager before it decided to suspend him, as it had done in other similar cases. The complainant insisted that he had never committed an error.

The Ombudsman's assessment

23. In its opinion, Frontex clarified the nature of its relationship with the complainant and the mechanism by which the latter came to take part in the Joint Operation. Contrary to the



complainant's view, the NoUs concluded by Frontex and Member State X, which the complainant provided to the Ombudsman, did not constitute a work contract or a promise of employment. They were agreements in principle, governing the terms and conditions under which Frontex would " *finance costs referring to interpretation, translation and language analysis support* " [1] for the relevant period. In return, Member State X undertook to " *do everything in its power to carry out the support as requested by Frontex* " [2] (emphasis added). Therefore, not only did the NoUs not establish **who** the deployed interpreter would be, they did not even provide that an interpreter **should** be put at Frontex's disposal. It remained up to Frontex to request the deployment of an interpreter and, subsequently, up to Member State X to decide upon his or her identity.

24. The Ombudsman, therefore, does not share the complainant's view that, by not requesting his deployment between January and March 2012, Frontex breached a work contract or failed to act in accordance with a legitimate expectation arising from the NoU signed on 13 December 2011. In this regard, it is important to stress that no interpreter from Member State X was deployed at Frontex in that period.

25. Moreover, it appears that, for a significant part of the said period, Frontex was carrying out an assessment of the whole pilot project in which the complainant was involved. Indeed, in his e-mail of 22 December 2011, the Operations Director requested Frontex's services to provide him, by 28 January 2012, with a progress and evaluation report of the project. It is reasonable to assume that, upon receipt of this information, further assessment and internal consultations were required, following which, according to the complainant, the project was discontinued.

26. In any event, even if the complainant had been entitled legitimately to expect that he would be deployed between January and March 2012, the fact that Frontex subsequently accepted his services between April and July 2012, that is to say, a period for which there was no NoU at the time that the Operations Director raised concerns about the complainant, constitutes appropriate compensation for the loss the complainant might have incurred for not being deployed as of January 2012.

27. The complainant's claims are, consequently, not grounded as regards the period between January and March 2012.

28. Concerning the fact that the complainant's deployment was not renewed after July 2012, the information in the Ombudsman's file shows that the deployment of interpreters was subject to quarterly NoUs. In the best case scenario, therefore, the complainant's expectation of being deployed could extend, following the signature of an NoU, to a maximum period of three months, and would be conditional upon an actual request by Frontex for the relevant services.

29. On 22 June 2012, before the expiry of the NoU covering the complainant's last deployment, Frontex informed Member State X that it would prefer that the complainant not be deployed again, in order to ensure the rotation of experts. It is a matter for Frontex to regulate its own affairs as regards the rotation of experts; although, like any other institution,



it must act in this regard in accordance with the requirements of fair procedure and the principles of good administration. In any event, the Ombudsman notes that, in accordance with the information that the complainant provided, he had been deployed to Frontex since 2009, which made him, in his supervisor's words, the longest deployed officer.

30. Therefore, the Ombudsman has no reason to question Frontex's stance that the complainant's position needed to be subject to rotation. In any case, it is the Ombudsman's conclusion that the complainant had no established right to be assigned by his Member State in response to a Frontex request for an interpreter. Consequently, the complainant's claim to be compensated for loss of employment with Frontex does not stand up.

31. However, the complainant's overall allegation is that Frontex treated him unfairly. It is a fact that Frontex raised allegations of improper behaviour on the part of the complainant and that it conveyed these allegations to his chain of command within Frontex. It is also a fact that Frontex failed to engage directly with the complainant, as he requested, in relation to these allegations. While Frontex argues that it did not raise any formal allegations against the complainant, the fact of raising them at all was potentially detrimental to the interests of the complainant.

32. The Ombudsman takes no view on the accuracy or otherwise of the allegations made. But the Ombudsman believes, as a simple matter of fair procedure, that the complainant was entitled to be given full details of the allegations and entitled to be given a fair hearing by Frontex. This did not happen. The Ombudsman does not accept that Frontex was not required to follow fair procedure because, as it contends, any decision to deploy the complainant would be a decision for the authorities in Member State X.

33. It is not plausible that the Frontex decision to dispense with the services of the complainant was based solely on its policy regarding staff rotation. While the said policy may have been a factor in the de-selection decision, equally, Frontex's poor assessment of the complainant's performance (and its suspicion that he claimed some expenses to which he was not entitled) were most likely also a factor. To the extent that the actions of Frontex, in relation to the complainant, were influenced by allegations of misbehaviour on his part on which he was never allowed to comment, the Ombudsman finds maladministration on the part of Frontex. In this regard, she will make a critical remark below.

34. However, given that the complainant had no established right to be employed on Frontex projects, it is not evident that the complainant suffered any adverse consequence in terms of his continued employment on Frontex projects.

35. The Ombudsman understands that an agency like Frontex must have confidence in the staff assigned in projects in which it is involved. This is all the more so in a situation like the present one, in which the complainant acted as interpreter and linguistic facilitator for a sensitive joint operation aimed at preventing illegal migration across the EU borders. It is indeed hard to envisage that Frontex could reasonably entrust the complainant with such a mission, had it ceased to trust him.



36. However, the Ombudsman notes that a Frontex recommendation to a Member State not to deploy a particular expert is also a delicate issue, which requires careful consideration. It may well be that, since the decision whom to deploy depends on the Member State alone, the latter has no formal obligation to follow Frontex's recommendation. However, to the extent that (i) joint operations require loyal and smooth cooperation between Member States and Frontex, and (ii) it is ultimately Frontex that pays the deployed staff's fees when deployed, it is hard to envisage that a Member State could act contrary to Frontex's request. In other words, regardless of a Member State's room for manoeuvre, when Frontex issues such a recommendation, it, in fact, decides on the expert's non-renewal.

37. In circumstances where Frontex has lost confidence in a particular assigned expert, it must be free to deal with that situation with the best interests of the agency, and its very important functions, in mind. But doing so should not allow Frontex to act unfairly in relation to the particular individual concerned. In circumstances such as these, fair procedure and the principles of good administration would have required Frontex to substantiate its request by a concrete reference to the causes of concern. Moreover, prior to conveying its request to Member State X in this case, Frontex would have had to grant the complainant a real opportunity to put forward his point of view. This would guarantee the complainant's right of defence, a fundamental principle of EU law which must be applied even in the absence of any specific provision governing the procedure in question [3].

38. The Ombudsman hopes that, for the future, Frontex will be aware of this and will act appropriately in a manner which respects the right to fair procedure and the principles of good administration. This is addressed further in a critical remark below.

B. Conclusions

On the basis of her inquiry into this complaint, the Ombudsman closes it with the following critical remarks:

1. There was maladministration on the part of Frontex arising from its failure to abide by fair procedure and the principles of good administration in relation to the complainant's attempts to defend himself against allegations raised by Frontex.

However, in circumstances where there is no evidence of specific adverse affect for the complainant, arising from this maladministration, it is not necessary for the Ombudsman to pursue this complaint further.

2. While a loss of confidence by Frontex in any assigned expert is a serious obstacle to smooth and effective professional cooperation, such a situation must nevertheless be dealt with in a manner which respects the fundamental right of the assigned expert to defend himself or herself. This obligation applies in the case of Frontex even in circumstances where the expert in question has been assigned by a Member State and where Frontex is not that person's direct employer.



The complainant and Frontex will be informed of this decision.

Emily O'Reilly

Done in Strasbourg on 21 November 2013

[1] Point 1 of the NoU.

[2] Point 3 of the NoU.

[3] Case 234/84 *Belgium v Commission* [1986] ECR 2263, paragraph 27; Case C-288/96 *Germany v Commission* [2000] ECR I-8237, paragraph 99; Case C-344/05 P *Commission v De Bry* [2006] ECR I-10915, paragraph 37.