

WEISKORN Michael

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Sent: 28 September 2012 21:33
To: Euro-Ombudsman
Subject: [EOWEB] OWN-INITIATIVE INQUIRY OI/5/2012/BEH-MHZ
Attachments: AI response to Ombudsman Frontex consultation.pdf

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Subject OWN-INITIATIVE INQUIRY OI/5/2012/BEH-MHZ
Dear Mr Diamandouros

Amnesty International is pleased to submit comments in relation to your inquiry into Frontex implementation of its fundamental rights obligations. We would kindly ask to ignore our earlier submission as the draft had not yet been completed and it was sent by mistake. We thank you for your understanding.

Content Best regards,

Amnesty International European Institutions Office

Prof. Dr. Diamandouros
European Ombudsman
Avenue Schuman 1
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**AMNESTY
INTERNATIONAL**



European Institutions Office

Our Ref: B1356

Brussels, 28 September 2012

Dear Dr. Diamandouros,

OWN-INITIATIVE INQUIRY OI/5/2012/BEH-MHZ CONCERNING IMPLEMENTATION BY FRONTEX OF ITS FUNDAMENTAL RIGHTS OBLIGATIONS

Amnesty International welcomes your own-initiative inquiry into the implementation by Frontex of its fundamental rights obligations and wishes to respond to your call for observations on Frontex's Opinion of 17 May 2012. We were engaged extensively in advocacy on revising the legal framework governing Frontex activities which culminated in the adoption of the Regulation (EU) No 1168/2011 amending Frontex's founding Regulation (EC) No 2007/2004.¹ Various aspects of Frontex's activities, particularly its operations, are extremely human rights-sensitive, hence we have a continuing interest in Frontex as part of our work to highlight the human rights impact of European border control policies.² We have therefore also applied and been selected for membership of the Frontex Consultative Forum on Fundamental Rights, which will soon hold its inaugural meeting.

In its 17 May response to your questions, Frontex clarifies that fundamental rights monitoring of all its activities will effectively be ensured by the interaction of three mechanisms provided by the new legal framework, namely the Consultative Forum (CF), the Fundamental Rights Officer (FRO), and the power to suspend or terminate operations where there are serious or persisting violations of fundamental rights or international protection obligations. While some details of how these mechanisms will work are being finalised, we wish to pinpoint various weaknesses in what has been devised so far. These should be addressed to ensure the "effectiveness" of the fundamental rights monitoring mechanism as required under the new legal framework. We are particularly concerned about the absence of (i) a procedure for filing complaints; (ii) a

¹ See in particular Amnesty International and ECRE, *Briefing on the Commission proposal for a Regulation amending Council Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX)*, September 2010.

² See Amnesty International's report, *S.O.S. Europe – Human Rights and Migration Control*, June 2012, Index: EUR 01/013/2012.

follow-up to incident reporting; and (iii) sufficient capacity and independence of the Fundamental Rights Officer.

Complaints procedure

Frontex claims that it is for the competent authorities from member states hosting or participating in the operation to provide a complaint mechanism since Frontex staff do not have executive powers over border control. This seems to be at odds with various provisions in the legal framework governing the Agency which apportion decision-making power on the Agency on aspects that are by no means secondary and also likely to have a human rights impact. We refer for example to the following responsibilities the Agency has under the Regulation as recently amended:

- Ensure the operational implementation of all organisational aspects of joint operations and pilot projects (Art.3a.3)
- The coordinating officer's power to give binding views on instructions issued by the host member state to the guest officers participating in an operation (Art.3c.2)
- Power to itself initiate and carry out joint operations and pilot projects in cooperation and with the agreement of concerned member states (Art.3.1)
- Decision to suspend or terminate operations (Art.3.1a)
- Acquisition of technical equipment for checks and surveillance to be used by its experts during operations (Art.8.3)
- Decision to co-finance and finance entirely technical equipment deployed for operations (Art.7.5) and joint return operations (Art.9.1)
- Power to use Union funding to provide technical and financial assistance to third countries (Art.14.5)

Frontex decisions such as those outlined above may have legal effects and the Agency must ensure that fundamental rights are always respected in the scope of its activities. We particularly stress the fact that liability exists also in cases where the Agency through financing or the provision of technical equipment supports joint operations or engages in capacity-building activities in third countries. This is for example reflected in Article 9 of the amended Regulation which states that "any financial support is conditional upon the full respect for the Charter of Fundamental Rights."

We believe it is not sufficient to point out that mechanisms to file a complaint are those provided at the national and EU level. A mechanism by which complaints can be made directly to Frontex about its operations and the conduct of its staff and guest officers in member states and outside the external borders is essential for two reasons. First, because, as set out above, Frontex has its own legal obligations and must take proper steps to detect any breach of these obligations. Second, because where it has operations, Frontex must monitor compliance with fundamental rights by its own staff, guest officers and those of host member states.

A complaints mechanism is a necessary aspect of such monitoring. It is essential that Frontex seriously considers a mechanism for receiving complaints and relevant information on fundamental rights violations from individuals or third parties other than Frontex staff and border guards who take part in operations. The internal mechanism where staff and border guards may report infringements, which may be serious enough to trigger the procedure suspending or terminating an operation (see below), fails to meet this requirement.

Follow up to incident reporting

We welcome Frontex's development of internal mechanisms for staff and guest officers to report possible violations. These comprise requirement for staff and guest officers to report incidents under the Code of Conduct (CoC); the incident-reporting system via the Frontex Situation Centre; and the new Standard Operating Procedure (SOP) which was developed to give effect to the Executive Director's power to terminate joint operations or pilot projects.

However, it is not apparent how any reported incident would be followed up.

Implementation of the CoC is monitored by Frontex itself and envisages sanctions in the form of disciplinary measures when its provisions are violated, including violations of respect for fundamental rights or international protection obligations (see Articles 4 and 5 of the CoC). We doubt that disciplinary measures alone permit adequate follow-up to violations of fundamental rights or international protection obligations.

Regarding SOP, we particularly welcome this mechanism's inclusion of a possible fundamental rights-related risk procedure at the preliminary stage, *before launching an operation*, which involves an independent assessment by the FRO and relevant risk mitigating measures. As for the SOP measures for Frontex's response to incident reporting *during operations*, we welcome the fact that it involves reporting the case/decision taken to the Commission but would expect broader public accountability through communication to the European Parliament and inclusion of relevant information in the evaluation and annual reporting mechanism.

We understand that current incident reporting must be adjusted in consultation with FRO to establish an effective monitoring/reporting system and look forward to contributing to it through the Consultative Forum.

Fundamental Rights Officer's capacity and independence

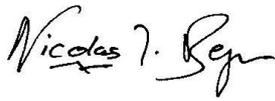
According to the amended Frontex Regulation, the FRO is to ensure effective oversight of all Frontex activities with regard to compliance with fundamental rights and thus has a crucial role in the fundamental rights monitoring mechanism. It is unclear how the person in this post will have the capacity to fulfil this role alone. We would suggest that *de minimis* the Consultative Forum is closely associated with the FRO's work so to be able to support and assist in fulfilling this task's effective fulfillment.

We also question the attributed "independence" of the FRO, given the holder's appointment as Frontex staff and reporting to the Executive Director, who as the appointing authority will appraise the FRO's work. It is important that the FRO's independence in performing duties be guaranteed by not making the person in this position responsible to the Executive Director.

More broadly, regarding implementation of the Frontex Fundamental Rights Strategy, we wish to highlight that the Action Plan adopted in November 2011, does not envisage either the FRO or the Consultative Forum as 'Actors' or 'Possible Partners' in any of the operational activities, including those concerning cooperation with third countries. This too must be adjusted so as to enable the FRO to provide effective oversight and not limit the extent to which the Forum can provide advice.

We hope you will find our comments helpful to your inquiry and should naturally be happy to provide any further information you might require.

Yours sincerely,

A handwritten signature in black ink, reading "Nicolas J. Beger". The signature is written in a cursive style with a large initial 'N' and a long, sweeping underline.

Dr Nicolas J Beger
Director