

FRONTEX ANSWER ON

DRAFT RECOMMENDATIONS OF THE EUROPEAN OMBUDSMAN TO FRONTEX ON FUNDAMENTAL RIGHTS

PREAMBLE

In the European Ombudsman letter dated 9 April 2013 addressed to Frontex, the European Ombudsman mistakenly refers to “inquiry into complaint” although this is his own initiative inquiry not based on any complaint. Frontex kindly asks an explicit rectification.

DETAILED ANSWERS

The Ombudsman divides his draft recommendations into six categories:

1. As regards Frontex Fundamental Rights Strategy
2. As regards the Action Plan implementing the Strategy
3. As regards Frontex Codes of Conduct
4. As regards the possibility to terminate/suspend operations
5. As regards the Consultative Forum
6. As regards the Fundamental Rights Officer

As regards the Strategy

- A. Clarifying (i) whether Frontex considers itself responsible for fundamental rights breaches within its activities and, if so, under which terms; and (ii) in the Code of Conduct, the legal framework applicable to the conduct of all participants in Frontex operations

Pursuant to Article 1 of the Frontex Regulation, the mandate of the Agency is to facilitate and render more effective the application of Union measures related to the management of external borders by ensuring the coordination of actions of the Member States and contributing to an efficient, uniform and high level of control on persons and of surveillance of external borders. Frontex is obliged to respect and promote fundamental rights in its coordinated activities in compliance with EU law, in particular the Charter of Fundamental Rights of the EU, and international law

obligations. However, its mandate in this regard is limited as Frontex has a practical supporting role while the responsibility for the control and surveillance of external borders lies with the Member States. Therefore, Frontex has responsibility for the activities directly defined within its mandate but cannot answer for Member States' sovereign actions. In this respect, it is a responsibility which has been clearly defined by the Legislator.

Notwithstanding the aforementioned, Frontex fully realizes the "rationale" behind the amendments in 2011 to the Frontex Regulation. It aims at increasing the Agency's responsibility in particular in the event Frontex would have knowledge of potential violations of fundamental rights.

In fact, Frontex was given new instruments to react to a possible breach of the fundamental rights during Joint Operations. For instance, Frontex can now express (through the Coordinating Officer deployed to the Joint Operation) its views on the instructions given to the members of the EBG by the host Member State, e.g. if such instructions fall out of the general instructions set forth in the operational plan and are perceived as a violation of fundamental rights.

Frontex may terminate the joint operations when the Agency estimates that the conditions to conduct such operations are not longer fulfilled. The Executive Director has the obligation to suspend or terminate, in whole or in part, joint operations in case he considers that violations of fundamental rights or international protection obligations are serious or persistent.

Frontex aims to prevent violations of fundamental rights through the following tools, *inter alia*:

- harmonization of training on fundamental rights in Member States,
- establishment of a monitoring and reporting system of possible violations of fundamental rights,
- mainstream fundamental rights in its activities,
- promoting the swift processing of potential complaints lodged by migrants by the respective Member States authorities, in the course of a joint operation,
- being the custodian of best practices.

As for the legal framework applicable to the conduct of the participants in operations coordinated by Frontex, the Frontex Regulation, in particular Article 10(3), provides that the guest officers are under instructions of the host Member State. However, they still remain subject to the disciplinary measures of their home Member State, e.g. in a

case of violations of fundamental rights or international protection obligations during an operational activity (Article 3(1a) third subparagraph).

All participants of operational activities coordinated by Frontex, including members of European Border Guard Teams, are trained in EU and international law, including fundamental rights and access to international protection. Prior to deployment, all participants receive a briefing regarding the situation in that particular operational area and the law applicable.

As follows, all participants in activities coordinated by Frontex are informed that they shall comply with international law, European Union law and national law of both home and host Member States. They are also informed that they shall meet the obligations imposed upon them by the provisions stated in the Operational Plan.

Finally, they are also subject to the professional values, ethical provisions and rules laid down by the Code of Conduct for all persons participating in activities coordinated by Frontex. “Humanity” is also one of the core values of Frontex and it has concrete implication in the activities coordinated by the Agency. In particular it serves as a guiding principle to ascertain what would be the best line of conduct in case of doubt.

Significant work has been done, before and after the entry into force of the amendments to the Frontex Regulation as well as the drafting of the Strategy and Action Plan taking up of the Fundamental Rights Officer’s and Consultative Forum’s duties, in order to ensure respect of fundamental rights in the frame of Frontex mandate.

It remains that respect and promotion of fundamental rights is a continued concern for Frontex, as well as for the relevant authorities of the Member States and efforts in this direction will continue. As regards the clarification of the responsibilities between the numerous different actors, Frontex is aware of the potential gaps and will endeavour to bring more clarity, at practitioner’s level, within the limits of its mandate. Further revision of the Strategy will consider the European Ombudsman’s suggestions.

- B. Defining specific data protection safeguards for intercepted migrants, as well as redress mechanisms for data subjects whose rights are infringed. Alternatively, the Action Plan could be supplemented in this respect.**

The Fundamental Rights Action Plan refers to protection of personal data processed by Frontex. By “personal data” it is meant data that Frontex processes for administrative purposes (organisation of meetings, establishment of the EBGT pool, operational deployment, etc.).

As regards the general framework applicable to processing of personal data, please refer to Articles 11a, 11b and 11c of the Frontex Regulation.

Frontex does not process personal data of migrants. The only exception could be found in Article 11b above-mentioned (processing of personal data in the context of joint return operations of the Member States). Should it happen, it would be done under the strict conditions, time-lines and safeguards laid down in that Article.

At last, Frontex would like to point out that data protection within its remit is not a new issue for Frontex; it has been an obligation since the creation of the Agency. Frontex already reports about its data protection efforts using separate channels. Frontex units are answerable to the Data Protection Officer of Frontex and the European Data Protection Supervisor (EDPS). Voluminous documentation on this matter is publically available. For instance, Frontex kindly refers to the EDPS Opinion of 26 April 2010 on a notification for prior checking concerning the collection of names and certain other relevant data of returnees for joint return operations¹.

As regards the Action Plan

- C. Identifying measures giving a concrete dimension to the objective foreseen in point 17 of the Strategy, which is that, after having been reported by Frontex staff or participating officers, any incidents or serious risks regarding fundamental rights “can be acted upon”.**

In order to ensure full effectiveness of the mechanism for monitoring compliance with fundamental rights and international protection obligations, a Standard Operating Procedure to ensure respect of fundamental rights in operations coordinated by

¹ Case 2009-0281, 26 April 2010

Frontex was introduced on 19 July 2012 by a Decision of the Executive Director of Frontex. It establishes a procedure to be followed by Frontex in case of reporting about suspected violations of fundamental rights or international protection obligations in operational activities of the Member States coordinated by Frontex.

Despite its very recent implementation (July 2012), the procedure is already well established and enables Frontex to be aware of alleged cases and contribute to their proper follow-up. After receiving reports of alleged violations in activities coordinated by Frontex, they are subsequently clarified with relevant authorities who are responsible for investigation on the case concerned and if substantiated, are given adequate reaction by the Member States.

In any case where there is a report received by Frontex on a violation of fundamental rights or international protection obligations, Frontex makes promptly an analysis of the provided facts, communicates the incident report to the authorities of the respective Member State and asks them to carry out an inquiry. Subsequently, Frontex asks for follow-up in particular whether the appropriate actions and, if needed, sanctions have been taken, including the temporary or permanent withdrawal from the operation of a staff placed under the responsibility of a Member State.

As regards the final follow-up by the Member States (e.g. corrective actions/sanctions) Frontex cannot enforce the procedure by itself. Frontex nevertheless makes its best efforts to prompt concrete answer and reaction from the respective Member States authorities. Without tangible follow-up, Frontex does not close its files and clearly reminds any outstanding issue to the responsible authorities.

Moreover, with the taking up of the Fundamental Rights Officer's functions in December 2012, internal work is currently undertaken to assess this new procedure and further develop it. The Action Plan will be updated to include a reference to the Frontex internal Standard Operating Procedure above described.

D. Specifying (i) the date of publication of the annual progress report on the implementation of the Strategy, and (ii) the means by which it “shall” be made public (point 63 of the Ombudsman’s assessment)

Frontex welcomes the European Ombudsman's suggestion on the integration of the date of publication of the annual progress report within the Fundamental Rights Action Plan.

The annual progress report on the implementation of the Fundamental Rights Strategy will be published by the second quarter of each year as an annex to the Frontex General Report, made public and available on Frontex website (www.frontex.europa.eu/about-frontex/governance-documents).

The Consultative Forum on Fundamental Rights is also expected to publish its report of activities by the first quarter of each year covering the previous year.

E. Clarifying the sanctions to be applied to participants in Frontex operations who are not members of its own staff

As rightly pointed out by point 64 of the European Ombudsman's assessment, the Executive Director of Frontex has limited direct power towards participants that are not Frontex staff members. It is worth recalling that participants "*in situ*" are not Frontex staff, except the Frontex Coordinating Officer.

In accordance with Article 3(1a) of the Frontex Regulation, taking disciplinary measures falls under the exclusive competence of the home Member State. Frontex has no competence for initiating disciplinary measures against persons other than its own staff members. Sanctions may be imposed only by the competent national authorities (e.g. Courts or participant's employer). The Member States' authorities may be requested by Frontex Executive Director to withdraw the participant from the operation. The subsequent disciplinary measures are applied by the national authorities in accordance with national legislation.

Thanks to the adoption of the above-mentioned Frontex Standard Operating Procedure (July 2012), reactions from Frontex to suspected violations of fundamental rights could prompt adequate actions by the respective national authority. Although these measures are already explicitly described in the Code of Conduct, which is the document distributed to all participants prior to an operation, Frontex agrees to include a reference in the upcoming revision of the Strategy. Frontex also follows up, as explained above in section C, national administrative / disciplinary inquiries, even though the Agency does not have the mandate to be directly involved or to substitute itself to the respective Member State authorities.

F. Laying down specific guidelines for participants in joint return operations on how to deal with distress situations in which intercepted migrants may find themselves

The expression “joint return operations of Member States” (“JROs”) refers to return flights, whereas “intercepted migrants” is used mainly during sea and land joint operations (“JOs”). Aiming at addressing all possible concerns, Frontex will envisage both the issue of “JROs” and “JOs”.

Guidelines for escort leaders (officials of Member States) of JRO are provided in the joint return flight implementation plan, including the restraint measures that are authorized during the flight. Frontex provides training for these escorts on regular basis, where practical training on how to deal with situations of distress is provided. Furthermore, Frontex is presently finalizing a drafting procedure related to its new Code of Conduct for Joint Return Operations coordinated by Frontex on a basis of which all participants in the joint return operation, prior to their engagement in the operation, are required to get acquainted with the content of the Code and fundamental rights through appropriate training.

As regards JO, there are “specific guidelines” for participants on how to deal with distress situations in which intercepted migrants may find themselves set forth on the rules of engagement of each operational plan.

In accordance with these rules, members of the EBGT shall, after interceptions and apprehension and prior to any other action (such as status assessment), support the host Member State authorities responsibility to cater the basic needs of apprehended persons such as food, shelter and medical assistance.

As regards the Codes of Conduct

From points 67 to 71 of the European Ombudsman’s assessment, the Ombudsman refers to the “amendments of the Frontex Code of Conduct for all participants in Frontex activities made in 2012”. Frontex would like to clarify the current status of various Codes of Conduct that regulate Frontex activities and staff:

- The Code of Conduct for all participants in activities coordinated by Frontex entered into force in March 2011. It has been a new development, not an amendment of previous internal rules.

It applies to all participants in activities coordinated by Frontex, meaning that it binds those participating in the operations, i.e. the persons deployed by the Member States as well as the very few present Frontex staff members.

- In November 2012, the Frontex Staff Code of Conduct was adopted superseding previous internal codes. This Code does not amend the Code of Conduct for all participants in Frontex activities. It provides for rules which Frontex Staff members should respect mainly in their relation with the public. It applies essentially to the daily performance of the administrative duties of Frontex staff members.
- Frontex is in the process of drafting a specific Code of Conduct for Joint Return Operations as mandated by Article 9(1a) of the Frontex Regulation, in consultation with the Consultative Forum. The wording “Joint Returns Code” does not exist in Frontex’s terminology. The proper name of the draft code is the aforementioned one. This Code aims at setting out common principles to be observed in the exclusive scope of joint return operations run by the Member States and coordinated by Frontex, i.e. for national escorts and the only Frontex Staff member present during the operation. It complements the Code of Conduct for all participants in activities coordinated by Frontex (March 2011).

G. Further clarifying the legal nature of the Code of Conduct

The Code of Conduct for all participants in activities coordinated by Frontex (March 2011) includes rules that apply to everyone participating in an operation coordinated by Frontex. The concept underpinning codes of conduct is to define behavioural principles for conduct which relates necessarily with a “soft law approach”.

However, insofar:

- The Code relates *inter alia* to fundamental rights which are already reflected in legally binding national, European and international instruments, and,
- The Code is attached to the operational plans,

It follows that the Code is binding even though Frontex cannot enforce it by itself.

Violations to the Code of Conduct entail a response from Frontex and the Member States which are specified in the code itself, namely in Article 23: Frontex Executive Director may immediately remove the Frontex staff member from the operational activity or request the home Member State (meaning the Member State deploying the concerned officer) to remove this person from the activity or ultimately to remove him/her from the European Border Guard Team pool.

It has to be borne in mind that very few Frontex staff members are actually participating in an operational activity in the field.

Violations of the Code of Conduct have entailed concrete reactions from the Member States competent authorities in the past (for e.g. immediate withdrawal of the persons concerned or disciplinary measures undertaken by the national authorities) thus demonstrating its concrete usefulness.

Frontex takes note and will clarify the nature of the Code in its Strategy.

H. Clarifying Articles 19(2) and 20(2) of the Code of Conduct (Use of force/use of weapons)

As laid down in Article 10 (2) of the Frontex Regulation, while performing their tasks and exercising their powers, guest officers shall comply with EU and international law, and shall observe fundamental rights and the national law of the host Member State.

As regards the use of weapons, Article 10(5) of the Frontex Regulation is of particular relevance: such use must be both authorised by the home and host Member States. Given that a common definition on “legitimate self-defence” or “legitimate defence of other persons” does not exist at the EU level, it is the definition provided by the national law of the host Member State that applies.

Conditions of the use of weapons are further developed in the operational plans of the operations coordinated by Frontex. Indeed, the host Member States are requested to provide information on the general and specific conditions on their national law regarding the use of force and the use of weapons. As a general rule, the use of weapons is considered as the last resource of actions of guest officers.

As regards the advice on the need to clarify the statement “minimum degree necessitated by the circumstances”, the issue is already addressed in the operational plans: they state, as regards using force, that if the use of force is inevitable, guest officers shall ensure that it will be done in such a way that causes the less possible injuries.

I. Including in the forthcoming Joint Returns Code a provision on the relationship between this code and the (general) Code of Conduct

The draft Code of Conduct for Joint Return Operations coordinated by Frontex already includes an adequate provision regulating this relation, i.e. the draft Article stipulates that *“the present Code complements the provisions of the Code of Conduct for all persons participating in Frontex activities”*.

The draft Code of Conduct for Joint Return Operations coordinated by Frontex provides additional rules for the conduct of a joint return operation and once it is adopted, it will become obligatory to all participants in these operations, i.e. national escorts and Frontex Staff members (usually one staff member from the Return Operations Sector is present during a joint return operation).

Already in November 2007, the Return Operations Sector of Frontex elaborated best practices which bring together the experience of Member States in the field of the removal of illegally present third-country nationals in order to describe common standardised procedures. It was amended in November 2009 with a new chapter providing some guidelines on monitoring. In addition, the implementation plan of joint return operations coordinated by Frontex takes into account the provisions of relevant EU and international law and guidelines such as the Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third country nationals who are subjects of individual removal orders (in particular its Annex), the “Twenty guidelines on forced return” of September 2005, developed by Council of Europe, and the interpretations from Contact Committee “Return Directive” Document also called “MIGRAPOL CC Return Dir 36” Document.

The expected added-value of the future Code of Conduct for Joint Return Operations is to compile all those relevant instruments and provides with a high standard approach

for common principles and procedures to be observed by the participants in joint return operations of Member States coordinated by Frontex.

As regards termination/suspension of operations

- J. Providing concrete guidance as regards the actual meaning of formulation: “if the conditions to conduct those joint operations or pilot projects are no longer fulfilled” and violations of fundamental rights or international protection obligations which “are of a serious nature or are likely to persist”**

The assessment of the nature of the violation, its seriousness or persistency can only be done on a case-by-case basis. This assessment is based on a prior examination by different designated Frontex entities, including a separate and independent assessment by the Fundamental Rights Officer. Contributions are enclosed in a report submitted to Frontex Executive Director for a final decision in this regard. Frontex is currently assessing whether further guidance or indicators are necessary.

It is worth noting that the wording referred to by the European Ombudsman has been adopted by the Legislator after detailed debates and careful consideration.

- K. Considering whether there would be room for laying down rules, for instance in the Joint Returns Code, on the termination and suspension of joint return operations.**

The Article 3 (1a) of Frontex Regulation introducing an obligation for the Executive Director to suspend or terminate joint operations and pilot projects if fundamental rights violations are of a serious nature or are likely to persist is applicable to all joint operations, i.e. also to joint return operations of the Member States.

A decision to return a person is taken individually by national authorities. It is therefore up to the national authorities to decide if they will send an individual with a return flight.

Frontex' role is, at the request of the participating Member States, to support the return operations organised by a Member State where other Member States wish to take part. Consequently, it is likely that the decision to suspend or terminate a joint return operation would mainly be taken for issues related for instance to air carrier dysfunctions or any problem that would endanger the conduct of the operation and the safety of passengers.

As regards the Consultative Forum

L. Taking any possible action to encourage the Forum's close cooperation with, and support for, the FRO in fulfilling her tasks effectively.

The European Ombudsman suggests a possible way of clarifying and ensuring the independence the Fundamental Rights Officer (FRO), who entered into function in December 2012.

Some further information on the FRO's status can be added:

- As rightly exposed by the assessment, the FRO reports to the Executive Director, as well as to the Management Board and to the Consultative Forum.
- Pursuant to Articles 25(3) (d) and 17(2) of Frontex Regulation, and under the Staff Regulations/CEOS of the EU, the Executive Director is the Appointing Authority of all Frontex staff members including the FRO. This is unavoidable under the current legal framework. However, the FRO is independent in her opinions, views, assessments, etc. and performs a monitoring role with full access to all information required to perform her tasks.

As far as the role of the Consultative Forum (CF) is concerned, Frontex respectfully informs the European Ombudsman that in May 2013 the fourth meeting of the CF was held and that the FRO participates in all CF meetings since she took office. In this sense, FRO and CF are already cooperating and supporting each other in their complementary tasks: the FRO's being more focused on the operational aspects of the Frontex mandate, and the CF as a more strategic advisor.

In conclusion, Frontex takes note of the European Ombudsman's recommendation and confirms that the close cooperation of CF and FRO already exists.

As regards the FRO

- M. (i) Taking any possible action to enable the FRO to consider dealing with complaints on infringements of fundamental rights in all Frontex activities submitted by persons individually affected by the infringements and also in the public interest, and (ii) providing adequate administrative support for that purpose.**

The competences of the FRO, as defined in the Frontex Regulation, do not include resolving external and individual complaints as she has no executive powers as such. For this purpose, other institutions are competent (e.g. mainly national and EU Courts), at present.

At this stage, the FRO is strengthening the system of dealing with incident reports submitted by participants in activities coordinated by Frontex, assessing, along with other Frontex entities, the alleged violations of fundamental rights and creating an incident reports' archive. The FRO uses several external sources of information to support her fundamental rights scrutiny. In practice, this means that additional information on possible infringements shared in the public interest is already being taken into account in FRO's activities and reported, as indicated in the Regulation. Therefore, complaints directly related to Frontex activities could be considered as additional information source and trigger monitoring activities. FRO is administratively supported by an Assistant competent in fundamental rights issues, who is also acting as Secretariat to the CF.