

Warsaw, 19 October 2015

Ref no.:16610/19.10.2015

Mrs Emily O'Reilly
European Ombudsman
1, avenue du Président Robert Schuman
F-67001 Strasbourg Cedex, France

**Subject: Response to the European Ombudsman's Decision closing her own-initiative inquiry
OI/9/2015/MHZ and the conclusions**

Dear Madam,

Thank you for your letter of 4 May 2015 with your recommendations for Frontex to elevate its ongoing role in ensuring the respect of fundamental rights of migrants during Frontex coordinated Joint Return Operations who are subject to forced returns from the EU to their country of origin.

Frontex carefully considered each point raised. Please find our response to your recommendations in Annex I, attached.

I remain at your disposal should you require further information.

Yours sincerely,



Fabrice Leggeri
Executive Director

**Annex I - Response to the European Ombudsman's Decision closing her own-initiative inquiry
OI/9/2014/MHZ and the conclusions**

Response to the European Ombudsman's Decision closing her own-initiative inquiry OI/9/2014/MHZ and the conclusions

The European Ombudsman closed her own-initiative inquiry by letter to Frontex of 4 May 2015. On the basis of her inquiry she decided to submit some recommendations to Frontex and requested Frontex to inform her by 31 October 2015 of any action taken in relation to her findings.

The Ombudsman had divided her recommendations into the following eight categories, some of which include detailed sub-proposals:

- A) Adopt and publish a document describing the actions its representatives may take during a joint return operation (JRO) in situations of human rights violations or ill-treatment before or during the flight. This could be included in its *Best practices on JROs* or issued as a separate publication.**

Frontex will develop the requested document and issue it as part of the review of Best Practice for JROs¹.

- B) Produce a complaint form for returnees, as well as an information sheet about the complaints procedure, drafted in cooperation with the Member States; co-finance translations of these documents into the most frequently used languages. The information should include contact details of agencies or individuals who might assist returnees to submit a complaint when they are back in the country of return, for example NGOs, *pro bono* lawyers, and third country ombudsmen.**

Certain informal discussions have already taken place with Member States (MS) and Frontex is of the view that there should be a complaint form which returnees may use. Consideration would be given to the information sheet as envisaged above and suitable translations of the necessary documents.

- C) Support projects aimed at documenting the means of restraint allowed for return operations in each Member State or launch such a project itself; list those restraint means to which it would never agree in a JRO, and make these documents public.**

Frontex has been proactive and launched such a project itself. Frontex has approached MS² during summer 2015 requesting the information above. A reminder has been sent. Two thirds of MS have now responded. To meet the Ombudsman's requirement the remaining third of Member States have to respond. A further reminder will be sent. When the responses from all MS are gathered, Frontex will carefully analyse them to ascertain if any means of restraint should not be permitted during JROs coordinated by Frontex and set it as a condition for JRO participation.

¹ The practical guide *Best Practices for the Removal of Illegally Present Third-country Nationals by Air* is under revision, in cooperation with Frontex Fundamental Rights Officer (FRO), Member States and Frontex Consultative Forum (CF). The document will be renamed as *Guide for JROs by Air Coordinated by Frontex*.

² The term "Member State" means a Member State of the European Union or a Country associated with the implementation, application and development of the Schengen acquis.

Frontex will attach the list of restraints forbidden on JROs coordinated by Frontex to the revised Best Practice for JROs. Frontex will make it public on its website.

The country sheets on the allowed use of means of restraint in each MS can be made available for the monitors' training purposes with the Member State in question's consent. Frontex can publish these sheets for Member States' national monitoring bodies on its web-based information portal Frontex One-Stop-Shop ("FOSS"), which is available 24/7 for registered users. Training on the use of FOSS will be given by Frontex to those bodies.

- D) Establish a requirement in the JRO Implementation Plan, and scrutinise compliance with it, that families with pregnant women and families with children are enabled to board the aircraft separately and are seated separately from other returnees**

Such a requirement has been established in the JRO Implementation Plan and in the draft revised Best Practice for JROs. The provision in that Best Practice document matches the wording above.

There is an obligation of independent national forced-return monitoring bodies, established in MS in line with Art. 8(6) of Return Directive³, to scrutinise the compliance of the national escorts with the relevant legal obligations. Frontex wishes to build on this obligation.

- E) Require, in the pre-JRO procedure, that the compulsory physical presence of monitors in the JRO is dealt with in the relevant documents (namely, in the offer of a return flight, the Conditions attached to the acknowledgement of the offer and in the Implementation Plan). Frontex could also make the plan for upcoming JROs public, at least one week in advance, and make it clear on its website that it pays for monitors' presence in the JRO; Frontex could, finally, prepare and publish country sheets on the allowed use of means of restraint in each Member State and provide training for monitors in this respect.**

Compulsory presence of monitors

Frontex agrees that monitors should be present on all return flights.

However, while the EU Return Directive clearly mentions the requirement for the MS to set up an effective forced-return monitoring system, it does not set out in detail how national forced-return monitoring systems should operate. It leaves a wide margin of discretion for MS. In short, Article 8(6) of the Return Directive does not imply an obligation to monitor each individual removal operation.

In addition, as it is up to each participating MS' monitoring body to decide on their activities and this includes monitoring JROs coordinated by Frontex, Frontex is not the decision maker on whether there is or is not a monitor present.

That said, through Frontex's efforts the percentage of JROs coordinated by Frontex with monitors present during the whole JRO has significantly increased from 60% in 2014 to 78% this year. We anticipate further increases as the MS increasingly understand the need and benefits of adding transparency to JROs.

As such, whereas it is not possible at the moment to guarantee the presence of monitors on all return flights, Frontex continues to work with Member States towards this goal.

³ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

Making the plan for upcoming JROs public

Frontex is committed to greater transparency and notes that the presence or absence of MS' monitors during Frontex coordinated JROs is already documented in various JRO documents (e.g. the JRO Implementation Plan, Final Return Operation Report submitted by an organising MS, Frontex Final Evaluation Report).

Frontex will make the plan of upcoming JROs available to monitors on FOSS.

Where Frontex requests a specific MS to organise a JRO, an acknowledgement letter is sent to that MS, which includes the following sentence:

“Referring to Article 8(6) of the Return Directive⁴ Frontex encourages the organising Member State to provide physical monitoring during the whole Joint Return Operation.”

The information about Frontex's continuous encouragement of MS to engage a monitor during all the phases of a JRO and to support MS by paying all the relevant costs borne by a monitor, can also be made public on the Frontex website.

Country Sheets

The country sheets on the allowed use of means of restraint in each MS can be made available on FOSS for the monitors' training purposes with the Member State in question's consent.

Training of monitors

Concerning the training for monitors, Frontex does not plan to develop its own training, because such training already exists. It has been developed by ICMPD within the FReM⁵ project with financing from the European Commission. Frontex, and in particular the Frontex Fundamental Rights Officer (FRO), has been actively involved in the training's development and implementation. The future of the FReM project needs to be defined by the project partners, including the question on who will carry out the trainings. Furthermore, in cases where Frontex has trained third-country escorts and escort leaders, the national monitoring mechanism/national ombudsman in question has always attended the training together with the police.

- F) Require in the JRO Implementation Plan (or Conditions) that monitors' reports are forwarded to Frontex; publish on its website: Frontex's JRO Evaluation Reports, including monitors' observations and Frontex recommendations; the section of the JRO implementation Plan, which refers to the agreed use of means of restraint; Frontex *Best Practices for JROs*; monitors' reports**

Requirement to forward monitors' reports

Frontex supports the Ombudsman's statement. Frontex itself would like to see those reports. However, the national forced-return monitoring bodies are independent and Frontex does not have decisive influence on their activities, their reporting requirements and how the systems operate. Monitors, as one of the JRO participants, should comply with the Frontex Code of Conduct for JROs⁶ and Frontex's general Code of Conduct⁷. In accordance with Art. 14(6) of the Frontex Code of Conduct for JROs, unless contrary to national rules and procedures, the monitors' reports are sent to Frontex soon after the end of a JRO and their observations are included in the

⁴ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

⁵ Forced Return Monitoring.

⁶ Code of Conduct for Joint Return Operations coordinated by Frontex.

⁷ Code of Conduct for all persons participating in Frontex activities.

Final Return Operation Report delivered to Frontex by the organising MS (OMS). In practice monitors contribute with their findings to the OMS Final Return Operation Report, but only a few national monitoring bodies have so far provided their complete reports directly to Frontex.

The topic of reporting to Frontex as well as a monitor's template report will be among other items discussed during the seminar for monitors to be hosted by Frontex in the first half of 2016. Frontex will use this opportunity to encourage national monitoring bodies to provide Frontex with their reports.

Publications on the Frontex website

The publication of monitors' reports on the Frontex website will be also discussed and input from monitors will be collected during the abovementioned seminar for monitors. Frontex will continue encouraging more transparency in respect of this issue and consider all opportunities for increasing such transparency.

A public version of Frontex's JRO Final Evaluation Report is published on the Frontex website. Frontex will consider making more aspects public.

Frontex will publish the revised Best Practice for JROs on its website. Additionally, a public version of a JRO Implementation Plan template may be developed and published on the website as well.

As regards the publication of the permitted means of restraints, please see our response to point C.

- G) Ensure that fundamental rights are respected in so-called Collecting JROs; in particular, explain publicly (i) the legal framework for Collecting JROs, including the working arrangements with third countries concluded in accordance with Article 14(2) of the Frontex Regulation, and (ii) how Frontex complies with its own human rights obligations in fulfilling its role as coordinator of Collecting JROs.**

Frontex takes considerable care in selecting states with which Collecting JROs are performed. When concluding working arrangements with those third countries, attention is paid to fundamental rights' concerns.

Frontex will amend the text about JROs on its website by including the requested information to the extent possible.

- H) Revise the Code of Conduct, as follows:**

Article 5 (*Cooperation with returnees*) should be amended as follows. Paragraph 1 provides that the objective of such cooperation is to avoid, or limit to the minimum extent necessary, 'the use of force'. However, this concept is not explained in the Code and there is no requirement of a previous agreement on the use of force similar to the one provided for in point 6.4 Frontex should explain which use of force may be considered.

The EO's recommendation is (i) to define "use of force" in the Code of Conduct for JROs and (ii) to provide guidance on when force may be used in JROs, are covered by Art. 19 of the general Frontex Code of Conduct. This is complemented by the provisions of the Frontex Code of Conduct for JROs. However, a clear reference to (i) and (ii) shall be made in the Code of Conduct for JROs. Furthermore, the technical and detailed instructions for the practical implementation of JROs coordinated by Frontex are included in separate and relevant Best Practice.

Article 5(2) of the Code provides that Member States are expected to give sufficient and clear information to returnees about the JRO, including the possibility to lodge a complaint concerning alleged ill-treatment during the operation. This should be a clear requirement. Moreover, there is no reason to limit such a complaint to allegations of “ill-treatment”. Full implementation of the right to an effective remedy (Article 47 EU Charter, Article 13 ECHR) requires that the Code should extend to all violations of rights under the Charter occurring during the JRO. The Code should also state that guidelines on the complaints mechanisms of Member States and of Frontex will be provided to each returnee together with a complaint form.

It is MS responsibility to give information to returnees about: the removal operation (which in this case is also a JRO); and the MS’ national complaints’ mechanism (CM). Nevertheless, when revising this Code, Frontex will discuss that information with MS and attempt to amend Art. 5(2).

A complaint will not be limited only to ill-treatment. It may cover additional situations as set out above. Frontex supports this.

Article 6(2) (*Use of coercive measures*) should include a requirement that the use of coercive measures should take appropriate account of the individual circumstances of each person such as their vulnerable condition (children if present in the JRO with their families, persons with physical or mental disabilities, HIV positive persons).

Shortly after receiving the recommendations from the Ombudsman, the following text was included in the JRO Implementation Plan template as well as in the draft revised Best Practice for JROs:

“The use of coercive measures should take appropriate account of the individual circumstances of each person such as their vulnerable condition (e.g. children if present in a JRO with their families, persons with physical or mental disabilities, etc.).”

When revising the Code of Conduct for JROs, in cooperation with FRO, Consultative Forum and the MS, Frontex will include this text as well, in order to underline the importance of the individual circumstances of returnees.

Article 7 (*Fitness to travel and medical examination*) should be modified to avoid situations where returnees are examined weeks or days before the flight and possibly become sick before boarding with the JRO doctor being unaware of this development. Paragraph 2 should (i) provide that all returnees be examined shortly before the flight and (ii) mention when exactly this medical examination will take place (the day before or on the very same day instead of the existing “in reasonable time”). Paragraph 4 should provide that “only medical staff has access to medical information of returnees”, in order to avoid any abuses. The current version (“the processing of medical information must be carried out in line with applicable and relevant personal data protection”) serves little practical purpose in the circumstances of a return operation.

Frontex is not opposed to this but the timing, and whether the examination of all returnees is performed, depends on MS national rules. Frontex has enquired with a number of MS on this and awaits their responses.

In addition, Frontex does not process the medical information of returnees.

The following text has been already included in the draft revised Best Practice for JROs:

“Only medical staff has access to medical information of returnees”.

Practically though Member States have indicated that non-medical staff may have access to medical information of returnees when there is either an emergency situation or the consent of a returnee. Therefore the following text has been included as a useful addition in the draft revised Best Practice for JROs:

“During JROs returnees’ medical records should only be opened by another person than medical staff in an emergency or when the returnee consented to this.”

Additionally, the “Fitness-to-travel” form⁸ (attached) includes the following clear guidance:

“Transmit the completed report from PMS⁹ medical staff to OMS¹⁰ medical staff”.

Article 8(3) (Escorts) should be amended to read that escorts should undergo training in human rights with a focus on people with disabilities, women and children [see above]. The current Article 15, which mandates human rights training for all participants” is not sufficiently clear.

Frontex supports the Ombudsman’s statement and will amend both Article 8(3) and 15 of the Frontex Code of Conduct for JROs accordingly. Additionally, Frontex will review the curricula of its return related trainings with the support of the FRO and amend them, in order to place emphasis on the abovementioned groups.

By way of background, Frontex does not train every escort. It provides trainings for escort leaders; national escort multipliers (who then should train their national escorts); *ad hoc* trainings of national escorts within the EU; and trainings of a number of escorts in third countries.

Article 9 (Identification) should specify that all JRO staff be individually identifiable by name or identification number (for example, on a badge). This should facilitate the submission of complaints by returnees and help ensure proper accountability.

Frontex will make a point of discussing with MS (during the revision of the Code of Conduct for JROs) the specific issue of identification. However, since some MS’ law-enforcement bodies neither use an identification number, nor a name tag, the implementation of this recommendation could only be expected in a long term perspective.

Article 10(1) (Recording) should include a disclaimer to the effect that monitors do not need permission from the Organising Member State (OMS), Participating Member States (PMSs), Frontex or the company operating the means of transport to photograph, film or carry out any other form of recording during a JRO.

Recording can act as a deterrent and be useful evidence in legal proceedings. In addition, Frontex wishes to mitigate risks in JROs wherever possible. However, MS have made observations on this suggestion for some of the following reasons: no legal permission to carry this out in some MS; escorts security (i.e. risk of identification and retaliation against escorts nb. incidents have occurred); personal data processing issue; practical issues on storage, security and retention of recordings; dignity of returnees; etc.

Based on our experience, airline companies and airport authorities may well also be resistant due to the following reasons: security of airport facilities; crew members’ security; sensitivity of returns and linking of airline companies to forced returns.

⁸ The form was developed by Member States’ JRO medical doctors and consulted with and approved by the Frontex Consultative Forum. This was in order to have a common standardised way of transmitting returnees’ medical information between PMS and OMS medical staff prior to a JRO. It was recommended at point 1.1.2. of the Common Guidelines on security provisions for joint removals by air annexed to 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.

⁹ Participating Member State.

¹⁰ Organising Member State.

Additionally, recording by monitors might have a negative effect on the environment during a JRO and cause a hostile atmosphere. For example, returnees may not understand why they are being filmed and may not accept explanations.

Finally, Frontex fears that introducing the disclaimer would serve no practical use unless Frontex has the agreement of all stakeholders (airport, airline, returnees, MS personnel, etc.). Otherwise Frontex itself could be liable to legal action e.g. from an airline company for unauthorised filming (and the disclaimer may be held by the court to be of no value in those legal proceedings).

Article 11 (*Medical staff and interpreters*) should provide that the JRO medical doctor be provided with full medical information of all returnees.

Art. 11 is linked to Art. 7 of the Frontex Code of Conduct for JROs, referring to medical information.

Frontex understands that the Ombudsman means relevant medical information in the hands of the doctor who examined the returnee and declared him/her fit to travel. Frontex agrees that such medical information be provided to the medical staff concerned.

Frontex plans to create a list of medical equipment/medication which each doctor present on board a charter should have. This list shall be sent to all MS and made available on FOSS.

Article 17(3) (*Information procedure and Right to be informed*) should be drafted in mandatory terms as follows: "*The Frontex Executive Director shall request information from the Member States on the conduct and results of their investigation into the violation of fundamental rights.*" Without a binding follow-up mechanism, Frontex cannot assess whether the right to an effective remedy and reparation is ensured for returnees in a JRO.

Frontex's Executive Director will endeavour to make full use of his ability to request information from the MS, to the greatest extent possible.

Two final points. First, Frontex underlines that it will make full use of the Consultative Forum's expertise when making any revision to the Code of Conduct for JROs.

Second, Frontex welcomes the Ombudsman's own-initiative inquiry into joint return operations. We recall that the joint returns of Member States assisted by Frontex are, quite properly, under significant scrutiny and that such returns already meet high standards. It is Frontex's aim that those standards are maintained, and, where possible, improved on. Many of the Ombudsman's proposals are very helpful in this regard.