



TEXTS ADOPTED

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Special report of the European Ombudsman in own-initiative inquiry concerning Frontex

European Parliament resolution of 2 December 2015 on the Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex (2014/2215(INI))

The European Parliament,

- having regard to the Special Report of the European Ombudsman of 7 November 2013 in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex,
- having regard to Article 2 of the Treaty on European Union,
- having regard to Articles 67(1), 72, 228(1) (second subparagraph) and 263 of the Treaty on the Functioning of the European Union,
- having regard to the Charter of Fundamental Rights of the European Union, in particular Article 41 (Right to good administration) and Article 47 (Right to an effective remedy and to a fair trial),
- having regard to Decision 94/262/ECSC, EC, Euratom of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties, and in particular Article 3(7) thereof,
- having regard to Resolution 1932 (2013) of the Parliamentary Assembly of the Council of Europe on 'Frontex: human rights responsibilities',
- having regard to Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (the Frontex regulation),
- having regard to Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union,
- having regard to the communication from the Commission to the European Parliament and to the Council entitled 'EU Action Plan on return' (COM(2015)0453),

- having regard to the Frontex code of conduct for joint return operations coordinated by Frontex,
 - having regard to the European Council conclusions of 15 October 2015, in particular Point 2(n) thereof,
 - having regard to the UN Convention of 1951 relating to the Status of Refugees (Geneva Convention) and to the New York Protocol of 1967 relating to the Status of Refugees,
 - having regard to Rule 220(2), first sentence, of its Rules of Procedure,
 - having regard to the joint deliberations of the Committee on Civil Liberties, Justice and Home Affairs and the Committee on Petitions under Rule 55 of the Rules of Procedure,
 - having regard to the report of the Committee on Civil Liberties, Justice and Home Affairs and the Committee on Petitions (A8-0343/2015),
- A. whereas Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (hereinafter the Frontex regulation) requires that the Agency ensures full respect for fundamental rights and for the rights of migrants, refugees and asylum seekers;
- B. whereas Frontex, like any other EU institution, body, office or agency, has to comply in its activities with the Charter of Fundamental Rights and whereas this obligation finds its translation in Article 263 TFEU, according to which ‘acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them’;
- C. whereas even today Frontex coordination activity cannot in practice be dissociated from the Member State activity carried out under its coordination, so that Frontex (and thereby the EU through it) could also have a direct or indirect impact on individuals’ rights and trigger, at the very least, the EU’s extra-contractual responsibility (see Court of Justice Judgment T-341/07, Sison III); whereas such responsibility cannot be avoided simply because of the existence of administrative arrangements with the Member States involved in a Frontex-coordinated operation when such arrangements have an impact on fundamental rights;
- D. whereas the Union is to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe;
- E. whereas Article 26a of the Frontex regulation provides for a Fundamental Rights Strategy and requires the Agency to draw up and further develop and implement such a strategy, establish a Consultative Forum and designate a Fundamental Rights Officer;
- F. whereas Article 5(a) of the Code of Conduct for All Persons Participating in Frontex Activities stresses that participants in Frontex activities shall, inter alia, promote the provision of information on rights and procedures to persons who are seeking international protection;

- G. whereas Article 9 of Regulation (EC) No 863/2007 provides that team members responsible for carrying out monitoring and surveillance activities at the external borders must comply with Community law and the national law of the host Member State;
- H. whereas in 2012 the European Ombudsman opened an own-initiative inquiry into the implementation by Frontex of its fundamental rights obligations;
- I. whereas the draft recommendations of the European Ombudsman include implementing an individual complaints mechanism;
- J. whereas the European Ombudsman further issued a Special Report, in which the implementation of an individual complaints mechanism was insisted upon;
- K. whereas under Rule 220(2) of Parliament's Rules of Procedure, the European Ombudsman is obliged to inform Parliament of cases of maladministration, and whereas the committee responsible may draw up a report on such cases;
- L. whereas Frontex is tasked to ensure the efficient implementation of the common rules on standards and procedures for the control and surveillance of the external borders with respect to fundamental rights, by means of closer coordination of operational cooperation between Member States, and whereas these activities clearly have human rights implications which have not been adequately tackled by Frontex and the EU;
- M. whereas Frontex also builds operational cooperation with countries outside the EU as an integral part of its mission, in key areas such as information exchange, risk analysis, training, research and development, joint operations (including joint return operations) and pilot projects;
- N. whereas according to Article 14(1) of the Frontex regulation, the Agency and the Member States shall comply with norms and standards at least equivalent to those set by Union legislation, also when cooperation with third countries takes place on the territory of those countries;
- O. whereas Frontex's operational cooperation with the competent authorities of partner countries is conducted through working arrangements which are not legally binding and fall outside the scope of international law, and whose practical implementation is not to be regarded as fulfilment of international obligations by Frontex and the EU; whereas this situation constitutes an element of legal uncertainty which may be seen as in contradiction with Frontex's human rights obligations;
- P. whereas Frontex and the Member States have shared but distinct responsibilities regarding the actions of the officers deployed in Frontex operations and pilot projects;
- Q. whereas in light of the increase of competences of Frontex since its establishment, the Agency should be held accountable as a primary stakeholder in the border management process, including when allegations of fundamental rights are involved;
- R. whereas most participants in Frontex operations are guest officers sent by Member States other than that hosting the Frontex operation, in support of that operation;
- S. whereas according to Article 2a of the Frontex regulation the code of conduct is applicable to all persons participating in the activities of the Agency;

- T. whereas under Article 10(3) of the Frontex regulation guest officers participating in Frontex missions may only perform tasks and exercise powers under instructions from and, as a general rule, in the presence of border guards of the host Member State;
- U. whereas the use of different uniforms alongside the Frontex emblem during Frontex operations makes it difficult for individuals to identify under whose authority an officer falls and, ultimately, where to file a complaint – whether with Frontex or directly with the Member State concerned;
- V. whereas under Article 3(1a) of the Frontex regulation the Agency does not possess executive powers in the Member States and has no authority to sanction Member States or their officials;
- W. whereas the operational plans of Frontex joint operations are legally binding, and under Article 3a(1) of the Frontex regulation have to be agreed by the Frontex Executive Director and the host Member State, in consultation with the participating Member States;
- X. whereas Frontex has already established an incident reporting system which involves the Frontex operations division, the Frontex legal unit and the Frontex Fundamental Rights Officer, with the ultimate decision being taken by the Frontex Executive Director; whereas this system involves internal complaints received from Frontex staff and guest officers, and consequently does not cater for direct complaints by individuals claiming a breach of their fundamental rights;
- Y. whereas individual complaints mechanisms already exist at European level within the structures of the European Investment Bank, the European Agency for Fundamental Rights and the European Network of Ombudsmen; whereas it should be noted that Frontex is an operational agency differing in nature from the above-mentioned organisations;
- Z. whereas the Commission has committed to a review of Frontex in the near future;

Why Frontex should set up an individual complaints mechanism

1. Welcomes the Special Report of the European Ombudsman in the framework of the own-initiative inquiry concerning Frontex; supports Frontex's efforts in taking on board 12 of the Ombudsman's 13 recommendations; acknowledges Frontex's current efforts to enhance respect for fundamental rights in the form of, but not limited to, the setting-up of an incident reporting system as well as devising codes of conduct, creating a Consultative Forum on fundamental rights and establishing a Fundamental Rights Office;
2. Supports the recommendation by the European Ombudsman that Frontex should deal with individual complaints regarding infringements of fundamental rights in the course of its operations and should provide adequate administrative support for that purpose; calls on Frontex to set up an appropriate complaints mechanism, including within the framework of its working arrangements concluded with the competent authorities of third countries;
3. Expresses its deep concern at the legal vacuum that surrounds the deployment of third-country officers during joint return operations, as pointed out in the European Ombudsman's report, as well as at the lack of accountability which would thus prevail in the case of human rights violations involving third-country officers;

4. Believes that in view of the ever-growing humanitarian and legal challenges at the EU's external borders and the strengthening of Frontex operations there is a need for a mechanism that is capable of processing individual complaints about alleged breaches of fundamental rights occurring in the course of Frontex operations or cooperation with third countries, thus becoming a first-instance body for complaints;
5. Considers that the setting-up of a mechanism for individual complaints would provide individuals with an opportunity to exercise their right to an effective remedy in case of violation of their fundamental rights; recognises that the introduction of such a complaints mechanism would increase transparency and respect for fundamental rights also in the context of Frontex's working arrangements, since Frontex and the EU institutions would be more aware of possible violations of fundamental rights that could otherwise remain undetected, unreported and unresolved; stresses that this lack of transparency applies in particular in the case of Frontex's working arrangements, over which Parliament cannot exercise democratic scrutiny, since there is no obligation to consult it prior to the determination of those arrangements and Parliament is not even informed on how they are implemented in practice;
6. Notes that under the Frontex regulation there appear to be no legal obstacles to the introduction of an individual complaints mechanism and that such a mechanism would even fall within the scope of Article 26a(3) of the Frontex regulation, according to which the Fundamental Rights Officer is to contribute to the mechanism for monitoring fundamental rights; notes that such a mechanism would be compliant with EU law and the principle of good administration and would reinforce the effective implementation of the Agency's fundamental rights strategy; believes that the capacity of Frontex to deal with possible violations of fundamental rights should be strengthened in the context of expanding its role under EU law, in particular its participation in Migration Management Support Teams working in 'hotspot' areas and its operational cooperation with the competent authorities of partner countries through working arrangements;
7. Believes that the coordinating role of Frontex should not limit its responsibility under international and EU law, in particular in relation to ensuring that migrants' and asylum seekers' fundamental rights are respected and protected; recalls that all Union agencies and Member States, when implementing EU law, are bound by the provisions of the Charter of Fundamental Rights;

Structure of the individual complaints mechanism

8. Takes the view that it is a legitimate expectation to believe that the actions of those involved in Frontex operations are attributable to Frontex and more generally to the EU; stresses that the legal relations and the distinct yet shared responsibilities existing between Frontex and the Member States should not undermine the safeguarding of fundamental rights and respect for those rights in joint operations; recalls that Frontex has no authority to sanction Member States or their officials; believes that due consideration should therefore be given to the question of the competences of Frontex and those of the Member States;
9. Stresses the need for an official central structure within Frontex for the processing of individual complaints; recommends that the office of the Frontex Fundamental Rights Officer should play a crucial role in handling complaints; considers that, in particular, the office should objectively check the admissibility of complaints, filter them, pass them on to the authorities responsible, and follow up on them thoroughly;

10. Welcomes the fact that Frontex has already set up a thorough procedure for handling internal reports by Frontex staff and guest officers regarding serious fundamental rights violations; points out that this procedure is already used for handling complaints by third parties not directly involved in a Frontex operation, and recommends building further on this procedure with a view to establishing a full and accessible individual complaints mechanism; emphasises that Frontex should ensure that the mechanism respects the criteria of accessibility, independence, effectiveness and transparency;

Lodging and admissibility of complaints

11. Takes the view that persons who consider they have been harmed by border guards wearing the Frontex emblem should have the right to submit a complaint; urges Frontex to guarantee full confidentiality and not to disclose the identity of the complainant to third parties without his or her agreement unless compelled legally to do so on the basis of a judicial decision; further believes that Frontex should ensure that all care is taken to avoid any conflict of interest during the treatment of complaints;

12. Acknowledges that safeguards are needed to prevent misuse of the complaints mechanism; recommends, therefore, that anonymous complaints should not be accepted; emphasises, however, that this does not exclude complaints submitted by third parties acting in good faith in the interest of a complainant who may wish to keep his or her identity undisclosed; suggests further that only complaints based on violations of fundamental rights as protected by EU law should be admitted; considers that this should not prevent Frontex from taking account of other information sources concerning alleged fundamental rights violations, including general reports by NGOs, international organisations and other relevant stakeholders, beyond the complaints procedure; emphasises the need for clear criteria for the admissibility of complaints and recommends the creation of a standardised complaint form, requiring detailed information such as date and place of the incident, since this would facilitate decisions on admissibility; recommends that the criteria and the standardised form should be determined in cooperation with the Consultative Forum;

13. Emphasises that the above form should be accessible in languages that migrants and asylum seekers understand or may be reasonably supposed to understand, and that it should include all necessary information on how to submit a complaint, including practical guidelines drawn up in a comprehensible manner; recalls that Regulation (EU) No 656/2014 already provides for the availability of shore-based interpreters, legal advisers and other relevant experts; recommends the possibility of being able to initiate a complaint orally with a person wearing the Frontex emblem, which complaint would be duly transcribed by the officer involved; urges Frontex to make the complaint form available both in smartphone-compatible electronic format on its website and in hard-copy format, in the Member States' screening centres as well as from Frontex staff and guest officers participating in any Frontex operation;

14. Recommends that Frontex should set a reasonable time limit for the submission of a complaint and ensure the possibility of filing a complaint after the termination of a Frontex operation; considers this to be of particular relevance for return operations; recommends that Member States handle the complaints within a reasonable time in compliance with national procedural rules;

Complaints against guest officers

15. Acknowledges that potential complaints may refer to the conduct of guest officers who fall under the particular authority of a Member State but wear the Frontex emblem; notes that these officers wear their own national uniform while performing tasks which does not necessarily include a name or identification number visible on it; notes that while guest officers are obliged to carry an accreditation document, requesting identification might be an obstacle to lodging a complaint against an officer; recommends that all persons acting under the Frontex emblem should have a visible name or identification number on their uniforms;
16. Recalls that Frontex has no competence to initiate disciplinary measures against persons other than its own staff members, and that under Article 3(1a) of the Frontex regulation taking disciplinary measures falls under the exclusive competence of the home Member State;
17. Takes note that Member States handle complaints against guest officers in very different ways; is concerned that alleged fundamental rights violations might not be followed up effectively by some Member States; calls on Frontex and the Member States to cooperate closely and to exchange best practice in order to ensure the proper follow-up of complaints against guest officers;
18. Recommends that the office of the Fundamental Rights Officer should transfer a complaint against a guest officer via a well-defined referral system to the competent national authority; recommends that this system include an appeal mechanism for cases where a claim is ruled inadmissible or rejected; considers it crucial to involve national ombudsmen or any other relevant bodies competent for fundamental rights that are empowered to investigate national authorities and officials, given that the Fundamental Rights Officer does not have the right to do so; stresses the need for cooperation of Frontex with national human rights bodies as well as with national border authorities;
19. Recommends gender-based training to be mandatory for both Frontex staff and guest officers before joining a Frontex operation, notably in order to raise awareness concerning gender-based violence and the vulnerability of migrant women;
20. Takes the view that if appropriate, the Fundamental Rights Officer should, in close cooperation with the relevant Frontex operational division, contribute to investigations by national authorities by providing further information on the incident;
21. Stresses that Frontex should closely follow up on complaints by formally requesting feedback from the respective Member State and, if necessary, sending a letter of warning recalling the possible action which Frontex can take if no follow-up is received to the letter; recalls that Frontex has the right to receive information on fundamental rights violations by guest officers in the context of its obligation to monitor respect for fundamental rights in all of its activities; recommends that Frontex cooperate closely not only with the national border authorities but also with the national human rights bodies;
22. Recommends that a justification should be provided to the complainant by the Fundamental Rights Officer, including contact details of the responsible national authority, should no follow-up procedure be initiated by Frontex;
23. Recalls that the Frontex Disciplinary Procedure may also apply to seconded guest officers and seconded national experts if the relevant Member State agrees; recalls that Frontex may request the Member State to immediately remove the guest officer or seconded

national expert concerned from the Frontex activity if the Member State does not allow the disciplinary procedure to take place, and, if necessary, to remove the person from the pool of guest officers;

24. Calls on the Frontex Executive Director to consider the exclusion of any officer who has been found to be in breach of fundamental rights from participating in any Frontex operation or pilot project; stresses that this should also apply to national officers from partner countries participating in Frontex's operations as part of a working arrangement;
25. Considers that the possibility of withdrawing financial support from Member States or the suspension of a Member State from joint operations in case of serious fundamental rights violations should be explored; believes furthermore that the suspension and, ultimately, the termination of an operation in case of serious or persistent fundamental rights violations should be decided, without prejudice to the saving of lives;
26. Considers that clear criteria on when Frontex operations should be terminated should be established following recommendations from the Consultative Forum, the Fundamental Rights Officer and other relevant actors and NGOs such as FRA, UNHCR or IOM;
27. Stresses that an individual complaints mechanism should not be deemed to confer any additional rights of access to criminal justice on those lodging a complaint; recalls that criminal investigations must be conducted by the Member State in which operations take place;

General considerations

28. Takes the view that an individual complaints mechanism can only be effective if potential complainants, as well as the officers taking part in Frontex operations, are made aware of individuals' right of complaint by means of an effective and gender-sensitive information campaign, in the official EU languages as well as in languages asylum seekers and migrants understand or may reasonably be supposed to understand; believes it should be possible for the number of potential inadmissible complaints to be substantially limited through such an information campaign and a well-structured admissibility check on complaints; notes that returnees should be informed prior to the return operation of their rights, including the right to complain;
29. Considers that the individual complaints mechanism should be both efficient and transparent; emphasises that the Fundamental Rights Office must be adequately equipped and staffed to handle the complaints received, and calls for the necessary additional resources for this purpose;
30. Considers the description of the tasks assigned to the Fundamental Rights Officer to be too limited and imprecise in its wording; notes that the tasks of the Officer are at the moment only described in the vacancy notice; suggests including provisions on the tasks of the Fundamental Rights Officer in the forthcoming review of the Frontex regulation;
31. Considers that in order to improve Frontex's transparency, accountability and effectiveness and allow the thorough investigation of individual complaints, the use of funds by Frontex should be regularly reported on to Parliament and made public on the Frontex website;
32. Welcomes the readiness of the European Ombudsman, the members of the European Network of Ombudsmen with competence on fundamental rights and the Frontex

Consultative Forum to support Frontex in setting up and implementing an individual complaints mechanism; calls on Frontex to follow the good practice of other European bodies, such as the European Investment Bank, in close cooperation with the European Ombudsman;

33. Recommends that Frontex and the European Ombudsman establish close cooperation in order to improve the protection of individuals from possible acts of maladministration regarding the activities of Frontex, including when the Agency operates beyond the external borders of the EU through working arrangements;
34. Calls on the Member States and the partner countries which have concluded working arrangements with Frontex to cooperate efficiently with the Agency in order to ensure the smooth running of the complaints mechanism; encourages Frontex to provide technical assistance to the Member States and the relevant third countries in order to ensure the mechanism's effectiveness;
35. Underlines the need for special protection of unaccompanied minors, women who are victims of gender-based persecution, LGBTI persons and other vulnerable groups; recommends that, where appropriate, Frontex consult with the relevant EU agencies for this purpose;
36. Calls on Frontex to provide publicly accessible information on the complaints mechanism in the context of its annual general report; recommends indicating the number of complaints received, the types of fundamental rights violations, the Frontex operation concerned and the follow-up measures taken by Frontex; notes that this information would help Frontex to identify possible shortcomings and improve its working methods;
37. Recommends the inclusion of provisions on the individual complaints mechanism in the forthcoming review of the Frontex regulation;

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38. Instructs its President to forward this resolution to the Council, the Commission, the European Ombudsman, the national parliaments and Frontex.