

**8 January 2021**

**Reference: 2273/2019/MIG**

Dear Ms O'Reilly,

Thank you for your letter of 8 December 2020 and for the work you and your team have put into addressing the issues raised in our complaint. You will find below our comments on the proposed solution and Frontex's roadmap.

### **The proposed solution**

We welcome the Ombudsman's decision to set out certain principles, derived from Regulation 1049/2001, to be applied to the work of justice and home affairs agencies such as Frontex. We believe those principles are sound and largely reflect the spirit of the legislation.

At the same time, we wish to emphasise that the law remains the law, until it is changed through the democratic procedure. The establishment of certain principles to be applied by the agencies in relation to their access to documents obligations should not make it possible to sidestep or undermine legal responsibilities.

There is an obligation upon EU institutions, agencies and bodies to include references in their register all documents drawn up or received by them and, where possible, direct access to them, subject to the exceptions laid down in the Regulation – which should be interpreted strictly. Given that, in response to access to documents requests, the agency frequently provides documents that were not previously public and were not listed on its existing register(s), it is fair to say that its practice to date has not met this requirement.

The proposed solution says that in order to meet this requirement, the agency's forthcoming public register should include documents "such as legislative documents and [those] concerning... decisions, strategy, and policy." To ensure the greatest possible degree of openness, transparency and accountability, this should also be taken to require the inclusion of documents concerning the decision-making process leading to the adoption of those decisions, strategies and policies. This should include, *inter alia*, decisions of the Executive Director, the agendas and minutes of internal and inter-agency working groups, committees and units; evaluation and assessment reports of operations and other activities; and documents concerning planning, procurement and projects undertaken by the agency.

### **Frontex's roadmap**

We welcome the adoption by Frontex of its roadmap and look forward to seeing it thoroughly implemented. We are not qualified to comment on the technical specificities of the chosen solution for establishing a public register. However, we would like to draw attention to the agency's comment that it will implement a feature allowing publication on its website of

documents “if feasible to be integrated”. In the interests of complying with the Ombudsman’s four requirements for ensuring an adequate public register, the chosen technical solution should allow for such a possibility.

The roadmap also notes that there will be a stock-taking exercise of “all important documents... deemed suitable for inclusion” in the public register. We welcome this commitment but would like to underline that it is not a question of what the agency deems “suitable” for inclusion, but rather what it is obliged to include, in accordance with the letter and spirit of the treaties, relevant legislation and case law.

This brings us to our final point. The most technically-advanced document management system would not be worth much, were it not to further facilitate the right of access to documents. In this regard, it is important to emphasise the need for the agency to adopt a broad and generous attitude towards the proactive publication of documents, and – in line with the case law of the CJEU – to ensure a strict interpretation of the exceptions provided for in the Regulation. Not only will this ensure greater transparency and accountability of the agency and its work, it will also reduce the administrative burden induced by dealing with numerous access to documents requests.

Thank you again for your work on this complaint and the solution reached.

Your sincerely,

Chris Jones  
Director