**European Ombudsman**

OI-5-2012-BEH-MHZ
S2013-183323

**Emily O'Reilly**
European Ombudsman

Mr Martin Schulz
President
European Parliament
Rue Wiertz
1047 BRUSSELS
BELGIQUE

Strasbourg, 07/11/2013

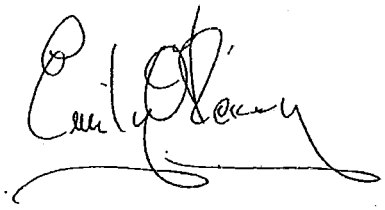
Special Report from the European Ombudsman following his Draft Recommendation to Frontex in her own-initiative inquiry OI/5/2012/BEH-MHZ

Dear Mr President,

Please find enclosed, in accordance with the Ombudsman's Statute, a special report concerning the above case.

Should you require any further information, please do not hesitate to contact me. My services are also available to provide you with any assistance you may require.

Yours sincerely,



Emily O'Reilly

Enclosure:
- Special Report

cc: Mr Klaus Welle

1 avenue du Président Robert Schuman
CS 30403
F-67001 Strasbourg Cedex

T. + 33 (0)3 88 17 23 13
F. + 33 (0)3 88 17 90 62

www.ombudsman.europa.eu
eo@ombudsman.europa.eu

# Special Report

## of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex

## Summary

Frontex[1] has rejected a recommendation made by the European Ombudsman following an investigation of its compliance with human rights standards and, in particular, with the requirements of the EU's Charter of Fundamental Rights. The Ombudsman, Emily O'Reilly, is sending this special report to the European Parliament seeking its support on the matter.

Dealing with immigration, and in particular with the challenges presented by illegal entry, poses major legal and humanitarian challenges for the EU. There are, almost necessarily, tensions between the legitimate interest in controlling immigration and the humanitarian requirement to offer illegal entrants a safe haven pending the legal processing of their claims for asylum. Frontex, working at the front line with the authorities of the individual Member States, must seek to achieve what is a difficult balance between these conflicting demands. For some time, concerns were being expressed about the human rights implications of Frontex's activities and these concerns became more acute when the EU's Charter of Fundamental Rights became legally binding in 2009.

The EU responded to these concerns by way of a 2011 Regulation[2] which explicitly required Frontex to act in accordance with the Charter in the course of its work. In addition the Regulation required Frontex to make administrative arrangements to promote compliance, as well as to monitor compliance, with the Charter. These arrangements included the drawing up of Codes of Conduct for Frontex operations, the appointment of a Fundamental Rights Officer within Frontex and the establishment of a Consultative Forum on Fundamental Rights.

In March 2012 the then European Ombudsman, P. Nikiforos Diamandouros, began an own initiative inquiry into the progress being made by Frontex in meeting its obligations under the Charter and the 2011 Regulation. The Ombudsman invited civil society and other interested parties to contribute to the inquiry and he received 18 contributions in reply.

The Ombudsman found[3] that, in general, Frontex was making reasonable progress in addressing its obligations under the Charter and the Regulation. However, the Ombudsman found that Frontex had no mechanism in place by

[1] Frontex (the European Agency for the Management of Operational Cooperation at the External Borders of the Member States) was established in 2004.
[2] Regulation 1168/2011/EU
[3] The Ombudsman's draft recommendation in this investigation is available at http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/49848/html.bookmark

1 avenue du Président Robert Schuman
CS 30403
F-67001 Strasbourg Cedex

T. + 33 (0)3 88 17 23 13
F. + 33 (0)3 88 17 90 62

www.ombudsman.europa.eu
eo@ombudsman.europa.eu

which it could deal with individual incidents of breaches of fundamental rights alleged to have occurred in the course of its work. The Ombudsman saw the lack of an internal complaints mechanism as a significant gap in Frontex's arrangements. On the one hand, the lack of such a mechanism meant that Frontex would be less aware of concerns or complaints about the manner in which it operated; and, on the other hand, people with complaints did not have the opportunity to have their complaints dealt with directly by Frontex.

The Ombudsman recommended to Frontex that it should set up a mechanism whereby it could deal directly with complaints from people claiming to have had their fundamental rights breached by Frontex. Regrettably, Frontex decided not to accept this recommendation.

A key element in the position being adopted by Frontex is that individual incidents, which become the subject of complaint, are ultimately the responsibility of the particular Member State on whose territory the incident occurred. The Ombudsman does not accept that Frontex does not carry responsibility for the actions of staff operating under the Frontex banner. That responsibility may sometimes be shared with the individual Member State, but it is not tenable that Frontex has no responsibility and that, thus, it should not deal with complaints arising from actions in which it is involved.

The view taken by the Ombudsman is one expressed also by the Parliamentary Assembly of the Council of Europe (PACE) which, in April 2013, adopted a resolution entitled "Frontex: human rights responsibilities"[4]. In its resolution, PACE called on the EU to ensure that its Member States and Frontex comply with their human rights obligations by, among others, "*establishing a complaints mechanism for individuals who consider that their rights have been violated by Frontex*". In his report to the PACE's Committee on Migration, Refugees and Displaced Persons, the Council of Europe's Rapporteur observed that Frontex's position is "*a shortcut and would not stand up under a Court's assessment*". The Rapporteur concluded that it is necessary for Frontex to establish a complaints mechanism for persons affected by Frontex's activities[5].

The Ombudsman seeks the support of the European Parliament in prevailing upon Frontex to act on the recommendation to establish its own complaints mechanism.

## The background to the own-initiative inquiry

**1.** Article 228 of the Treaty on the Functioning of the European Union empowers the European Ombudsman to conduct inquiries on his own initiative into the activities of the Union institutions, bodies, offices or agencies.

**2.** On 1 December 2009, by virtue of the entry into force of the Treaty of Lisbon, the Charter of Fundamental Rights of the EU became legally binding on Frontex, which is a specialised EU agency that promotes, coordinates and develops the management of the EU's external borders. Its full title is "the European Agency for the Management of Operational Cooperation at the

[4] http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=19719&Language=EN

[5] http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=19547&Language=EN

External Borders of the Member States of the European Union". Frontex's areas of activity include, among others, co-ordinating joint operations; providing a rapid response capability in the form of European Border Guard Teams; and assisting Member States in joint return operations.

**3.** On 25 October 2011, the European Parliament and the Council adopted Regulation 1168/2011/EU ('the Regulation')[6], which explicitly provides that Frontex shall fulfil its tasks in full compliance with the Charter of Fundamental Rights. The Regulation requires Frontex to put in place certain administrative mechanisms and instruments to promote and monitor compliance with its obligations as regards respect for fundamental rights.

**4.** In view of this new legal framework and the interest taken by civil society in the EU's management of the external borders, including its fundamental rights dimension, the Ombudsman considered it useful to seek to clarify, by means of an own-initiative inquiry, how Frontex implements the above-mentioned provisions.

## The subject matter of the inquiry

**5.** The Ombudsman asked Frontex to inform him of its position regarding a number of matters: Frontex's Fundamental Rights Strategy, Frontex's Consultative Forum and the role of Frontex's Fundamental Rights Officer (the 'FRO')[7]; the Action Plan implementing the Strategy; Frontex's Codes of Conduct and the possibility to terminate and/or suspend operations.

**6.** As regards the FRO, the Ombudsman put, among others, the following question to Frontex:

[6] Regulation (EU) No 1168/2011 of the European Parliament and 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, OJ 2011 L 304, p. 1.

[7] Art 26a of the Regulation reads as follows:
"*1. The Agency shall draw up and further develop and implement its Fundamental Rights Strategy. The Agency shall put in place an effective mechanism to monitor the respect for fundamental rights in all the activities of the Agency.*
*2. A Consultative Forum shall be established by the Agency to assist the Executive Director and the Management Board in fundamental rights matters. The Agency shall invite the European Asylum Support Office, the Fundamental Rights Agency, the United Nations High Commissioner for Refugees and other relevant organisations to participate in the Consultative Forum. On a proposal by the Executive Director, the Management Board shall decide on the composition and the working methods of the Consultative Forum and the modalities of the transmission of information to the Consultative Forum.*
*The Consultative Forum shall be consulted on the further development and implementation of the Fundamental Rights Strategy, Code of Conduct and common core curricula.*
*The Consultative Forum shall prepare an annual report of its activities. That report shall be made publicly available.*
*3. A Fundamental Rights Officer shall be designated by the Management Board and shall have the necessary qualifications and experience in the field of fundamental rights. He/she shall be independent in the performance of his/her duties as a Fundamental Rights Officer and shall report directly to the Management Board and the Consultative Forum. He/she shall report on a regular basis and as such contribute to the mechanism for monitoring fundamental rights.*"

*"Does Frontex foresee that the FRO could be competent to receive complaints from individuals concerning respect for fundamental rights by Member States and/or Frontex?"*

# The inquiry

**7.** On 6 March 2012, the Ombudsman opened the own-initiative inquiry and requested an opinion from Frontex by 31 May 2012 which it submitted on 17 May 2012.

**8.** On 18 June 2012, in view of the subject matter of the inquiry, the Ombudsman forwarded Frontex's opinion to the Fundamental Rights Agency (henceforth referred to as 'FRA') and invited it to submit comments by 30 September 2012. The FRA sent its comments on 26 September 2012.

**9.** Taking into account the interest that civil society had shown in the inquiry, the Ombudsman also considered it appropriate and useful to invite other interested parties, in particular NGOs and other organisations specialised in the area covered by the inquiry, to submit observations on Frontex's opinion. The opinion was published on the Ombudsman's website on 19 July 2012, with a deadline for observations of 30 September 2012.

**10.** The Ombudsman received a total of 18 contributions from international organisations, NGOs, a national Ombudsman and private individuals[8].

**11.** On 9 April 2013, the Ombudsman made a draft recommendation to Frontex containing a list of thirteen recommended actions in relation to the issues covered by his own-initiative inquiry. On 25 June 2013, Frontex submitted its detailed opinion on the Ombudsman's draft recommendation.

# The Ombudsman's analysis and conclusions

### Preliminary remark

**12.** The present special report deals only with the role of the Fundamental Rights Officer (FRO). The other matters raised in the own-initiative inquiry, to which Frontex's replies were broadly satisfactory, are dealt with separately in the Ombudsman's decision closing the inquiry.

**13.** The next section of the report summarises, as regards the role of the FRO, Frontex's reply to the Ombudsman's letter opening the own-initiative inquiry and the observations from interested parties. This section is followed by an explanation of the reasons for the Ombudsman's draft recommendation.

### Arguments presented to the Ombudsman by Frontex and observations from interested parties as regards the role of the FRO

**14.** Frontex explained that the FRO was appointed in December 2012[9]. The FRO is an independent staff member who performs a monitoring role and reports

[8] After obtaining the contributors' consent, the contributions received have been made available on the Ombudsman's website.

directly to the Management Board. She also reports regularly to the Consultative Forum (the 'CF') and to the Executive Director, who is the appointing authority.

**15.** The FRO and the CF have access to all information concerning respect for fundamental rights, and their activities are complementary. While the FRO exercises a monitoring function, the CF offers strategic guidance and pools information. The tasks of the FRO include, for instance, contributing to an effective monitoring mechanism and setting up and maintaining a record of possible fundamental rights breaches.

**16.** As regards the issue of identifying possible violations of fundamental rights, Frontex referred to a detailed internal procedure, and highlighted the importance of (i) reporting obligations for all participants and reporting possibilities for third parties; (ii) the manner in which reported information is dealt with in-house; and (iii) the assessment of information received by the stakeholders concerned. Frontex considered that its broad approach involving the identification and prevention of possible violations would allow an appropriate response to such violations and, in this regard, highlighted the importance of specialised training.

**17.** As regards the issue of a complaints mechanism for persons affected by fundamental rights violations, Frontex pointed to the possibility for third parties to report possible violations to it. It also emphasised that it would deal with any complaint about fundamental rights violations and that it would give "*appropriate consideration*" to such complaints. At the same time, Frontex highlighted that it has no authority to decide on individual cases, since these fall within the competence of the Member States concerned.

**18.** As for the measures Frontex could take in case of detected violations of fundamental rights, it stated that it could, for instance, "*address letters of concern or warning letters to Member States concerned, discuss the matter at the Management Board level or report to the Commission, withdraw or reduce financial support, take disciplinary measures, and suspend or terminate operations, termination being a measure of last resort.*" Frontex further explained that, due to the complexity of operations involving a number of political and operational issues, it would not always be appropriate to suspend or terminate an operation, and the Executive Director must decide on the basis of reports presented to him by Frontex staff.

**19.** Frontex stated that an answer to the question as to whether the FRO could receive complaints from individuals concerning respect for fundamental rights is expected only once the fundamental rights monitoring mechanism has been fully defined.

**20.** In their observations, a number of interested parties expressed concern about the current lack of an effective complaints-handling mechanism in respect of Frontex operations. At the same time, they underlined the need for Frontex to provide such a mechanism, alongside effective monitoring and reporting systems (see, in particular, the contributions of Caritas Europa, Amnesty International, Meijers Committee, Red Cross, Independent Monitoring Boards,

[9] According to a press release on Frontex's website, it appointed Ms Inmaculada Arnaez Fernandez as its first FRO on 27 September 2012. See http://www.frontex.europa.eu/news/management-board-designates-fundamental-rights-officer-8IK8Im.

European Network of Legal Experts (Trans Europe Experts), Jesuit Refugee Service Europe, and the Greek Ombudsman). Some contributors also pointed to a lack of clarity as regards the means available to the FRO to oversee respect for fundamental rights effectively, or took the view that the FRO's role is not sufficient for that purpose.

### The Ombudsman's assessment leading to the draft recommendation

**21.** Article 26a(1) of the Frontex Regulation provides that, in order to comply with its obligation to promote and respect fundamental rights, Frontex should put in place an effective mechanism to monitor respect for fundamental rights in all its activities.

**22.** Against the background of this obligation the Ombudsman examined Frontex's stance as regards (i) a possible mechanism to complain about violations of fundamental rights by Frontex and/or the Member States, and (ii) the role of the Fundamental Rights Officer (FRO) in this respect. In this regard, he took note of Frontex's statement in its opinion that the FRO will have an active role in establishing the concrete mechanism to monitor respect for fundamental rights.

**23.** The Ombudsman did not share Frontex's view that putting in place a system of reporting and/or informing about fundamental rights breaches is sufficient to ensure full compliance with its fundamental rights obligations. On the contrary, reporting obligations and complaints mechanisms are not alternatives. Rather, they constitute complementary means to guarantee the effective protection of fundamental rights.

**24.** Furthermore, disciplinary measures are not, in themselves, sufficient to ensure compliance with fundamental rights.

**25.** Finally, the Ombudsman understands that, for each operation, Frontex appoints a Coordinating Officer (FCO) who monitors the implementation of the Operational Plan and the Code of Conduct and thus plays a key role in the follow-up to the reporting of serious incidents. In the Ombudsman's view, however, this does not eliminate the need for a genuine complaints mechanism open to all persons involved, namely, participants in operations who are obliged to report under EU or national rules and also those directly affected by infringements, as well as those who become aware of them and wish to complain in the public interest (journalists, NGOs etc).

**26.** The Ombudsman thus reiterated the importance of providing an effective complaints mechanism at Frontex.

**27.** In line with this consideration there may be, in the Ombudsman's view, sound reasons for the FRO to consider dealing with individual complaints about fundamental rights infringements.

**28.** Handling complaints by the FRO concerning the activity of the staff of a Member State could mean, at least, transferring the complaints to the competent Member State authority or to a national ombudsman supervising that authority. In this respect, the Ombudsman noted the suggestion by the *Greek Ombudsman*, as regards the joint operations and pilot projects carried out by Frontex together with the Greek authorities, that a monitoring mechanism for fundamental rights breaches should be established at the EU level in order to "*investigate and prevent fundamental rights violations*".

**29.** As regards complaints concerning the behaviour of Frontex's staff, the Ombudsman recalled that the European Border Guard Teams are composed not only of Member State representatives, but also of Frontex representatives. While the Ombudsman could accept that members of Frontex staff are not qualified to perform border control functions and are deployed for coordination tasks only, so as to foster cooperation between the host and the participating Member States, he considered that this could not absolve Frontex from responsibility for acts performed by its staff in exercising their coordination role.

**30.** In light of the foregoing analysis, the Ombudsman made the following draft recommendation to Frontex:

*Frontex should consider 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.*

**Arguments presented to the Ombudsman after the draft recommendation**

**31.** In its detailed opinion, Frontex stated that it has responsibility for the activities within its mandate but cannot answer for Member States' sovereign actions. As regards specifically the FRO, Frontex submitted that the competences of the FRO as defined in the Regulation do not include resolving external and individual complaints because the FRO has no executive powers as such. Instead, other institutions (such as national and EU courts) are competent in this field.

**32.** Frontex added that, 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, alleged violations of fundamental rights and creating an incident reports' archive.

**33.** The FRO uses several external sources of information to support her fundamental rights scrutiny. This means that, in practice, additional information on possible infringements shared in the public interest is already being taken into account in the FRO's activities and reported, as indicated in the Frontex Regulation.

**34.** Therefore complaints directly related to Frontex activities could be considered as an additional information source and trigger monitoring activities.

**The Ombudsman's assessment after the draft recommendation**

**35.** The starting point of the Ombudsman's assessment is that, as Frontex rightly pointed out in its detailed opinion, Frontex is responsible for activities within its mandate, but not for Member States' sovereign actions.

**36.** This theoretical division of responsibility for potential violations of fundamental rights at the EU borders does not, however, call into doubt that, the mission of Frontex involves the co-ordination of joint operations that involve both its own staff and those of one or more Member States. The Ombudsman accepts Frontex's submission that few of its own staff members actually participate in operational activities in the field. However, the fact remains that there are numerous guest officers made available by the Member

States present at the borders who, to the Ombudsman's knowledge, wear armlets inscribed "Frontex"[10].

**37.** The natural and reasonable inference for persons affected by a Frontex operation to draw is that an officer wearing such an armlet is acting under the responsibility of Frontex. Persons affected by a Frontex operation are typically under stress and vulnerable and it cannot possibly be expected from them to investigate what is undoubtedly a complex allocation of responsibility. It would seem only logical for these persons to see Frontex as the first resort for submitting complaints about violations of their fundamental rights.

**38.** Bearing in mind the division of responsibility as set out in Frontex's detailed opinion, the following complaint scenarios are foreseeable: (i) complaints about the conduct of Frontex staff members for which Frontex must take responsibility[11]; (ii) complaints about the conduct of officers who are not staff members of Frontex, including guest officers who act under the responsibility of the relevant Member States but wear a Frontex armlet; (iii) complaints about the organisation, execution or consequences of a joint operation, which do not refer to the conduct of specific individuals.

**39.** It is clear that, as to substance, Frontex should deal with the first category of cases. As regards the second category, Frontex could not deal with the substance. However, it could assist complainants by forwarding complaints rapidly to the competent authority of the Member State(s) concerned, such as, for instance, national Ombudsmen. As regards the third category, the appropriate reaction by Frontex would depend on the specific complaint. In all cases, Frontex is clearly in a better position than the potential complainant to identify who should have responsibility for answering on the substance of the complaint. In this regard, the Ombudsman notes that, in its detailed opinion on the draft recommendation, Frontex undertook to promote a swift processing of potential complaints lodged by migrants with the respective Member State authorities in the course of joint operations.

**40.** In its detailed opinion, Frontex pointed to its system of incident reporting and stated that complaints received could be considered as a source of information and trigger monitoring activities. Moreover, Frontex pointed to the possibility of taking disciplinary sanctions. The Ombudsman reiterates that, in line with the considerations set out in the draft recommendation (see paragraphs 29-30 above), these mechanisms should be seen as complementary to a complaints mechanism not as a substitute for it.

**41.** It is true, as Frontex pointed out, that other institutions such as the EU Courts and national courts are, or could be, competent to deal with complaints. However, the Ombudsman has great difficulty imagining how the rights of persons typically concerned by Frontex operations, including intercepted migrants, could be enforced through court proceedings, given the commitments in terms of time, legal representation and costs which are usually involved in such proceedings, as well as the rules of standing.

[10] See http://www.frontex.europa.eu/photo/rabit-operation-greek-turkish-border-vUmhJs.
[11] Article 41(3) of the Charter of Fundamental Rights.

**42.** It is also true that the European Ombudsman has the power to deal with complaints against Frontex from anyone since, even if a complaint is submitted by somebody who is not a citizen or a resident of the EU, she can make use of her own-initiative power.

**43.** The fact remains, however, that Frontex would be the logical first resort for submitting complaints. In keeping with the Ombudsman's consistent view, each institution in frequent contact with people who may have reason to complain should provide for a first line complaints mechanism allowing for their problems to be addressed and resolved rapidly, before, in the event that resolution is not successful, having to turn to other redress mechanisms, such as Ombudsmen and courts.

**44.** Reference can be made in this regard to the European Investment Bank (EIB), which agreed, with the encouragement of the European Parliament, to put in place a front-line complaints mechanism for persons affected by EIB-funded projects. This arrangement, which is embodied in a Memorandum of Understanding between the Bank and the European Ombudsman, is working well and has enhanced the Bank's and the Union's reputation among the international development community. It would be both efficient and in the interests of the reputation of the European Union in the field of fundamental rights for Frontex also to agree to put in place a first-line complaints mechanism.

**45.** The Ombudsman considers that, given her role and functions, the FRO could be the natural addressee of complaints submitted to Frontex.

**46.** In this respect, the Ombudsman takes note of Frontex's view that resolving complaints is not part of the FRO's competences, as defined in the Regulation. The Ombudsman finds this position surprising, given that Article 26a(3) of the Regulation, other than stating that he/she shall report on a regular basis and as such contribute to the mechanism for monitoring fundamental rights, is silent on the functions and duties of the FRO. In fact, the duties of the FRO would appear to have been defined through the relevant vacancy notice advertised by Frontex in April 2012.

**47.** The Ombudsman considers that the FRO's broad mandate contained in Article 26a(3) of the Frontex Regulation would allow Frontex to entrust the FRO with the power to deal with individual complaints.

**48.** The fact that the FRO has "no executive powers as such" certainly does not stand in the way of dealing with complaints. In fact, the FRO's tasks and duties, as described in the vacancy notice, come close to equipping the FRO with the powers that would be needed to deal with complaints. Thus, the vacancy notice provided that the FRO should, among other things, identify corrective measures addressing possible fundamental rights incidents and contribute to other fundamental rights issues in Frontex.

**49.** The Ombudsman also notes that the competencies and qualifications of the incumbent FRO would equip her to deal effectively with complaints.

**50.** Finally, the Ombudsman underlines that the experience of the European Investment Bank's complaints mechanism could provide a valuable source of inspiration for Frontex. The Ombudsman has contacted the relevant services of the EIB, who are ready to offer assistance and advice in this regard. The Ombudsman is also ready to offer the co-operation of her own services and also

to use the well-established channels of cooperation within the European Network of Ombudsmen, which comprises ombudsmen and similar bodies in the 28 Member States and beyond.

**51.** In light of the foregoing, the Ombudsman considers that, in order to fulfil its fundamental rights responsibilities in accordance with principles of good administration, Frontex should establish a complaints mechanism. This role could be entrusted to the FRO, who should be resourced accordingly. Given the importance of this issue for people affected by operations coordinated by Frontex, the Ombudsman requests the assistance of Parliament in this regard.

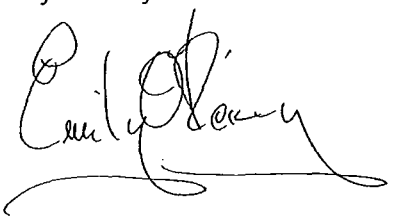
**The Ombudsman's recommendation**

The Ombudsman therefore makes the following recommendation to Frontex:

*Frontex should establish a mechanism for dealing with complaints about infringements of fundamental rights in all Frontex-labelled joint operations. The mechanism should receive complaints from persons who claim to be individually affected, or who complain in the public interest. This role could be entrusted to the FRO, who should be resourced accordingly.*

The European Parliament could consider adopting a resolution accordingly.

Emily O'Reilly



Done in Strasbourg on 07/11/2013