

Ms Rosita Hickey
Director of Inquiries
European Ombudsman

Your ref: Complaint 948/2020/MIG
Our ref: ICO/MIJU/761a/2021
Please quote when replying.

Warsaw, 23 March 2021

Subject: Frontex's reply as regards complaint 2067/2020/MIG

Dear Ms Hickey,

With reference to your request of 22 January 2021 related to complaint 2067/2020/MIG, I would like to provide you with the answers to the questions addressed to Frontex as follows:

Question 1: Is there a written policy that reflects Frontex's approach to multiple requests made by the same applicant?

1.1 General Background

In 2020, Frontex has received the highest number of applications for public access to documents: 266 in total. An approximate 60 considerably complex applications were pending simultaneously at any period of that year, also during the periods during which the applicant applied. These cases were handled by the three staff of the Transparency Office, which is charged with processing public access to document applications, besides their duties in the Legal and Procurement Unit. One staff was absent for longer periods, including parts of the periods in question.

1.2 Background of the Case

In concreto, further to the complainant's previous application¹, application PAD-2020-00190² was still pending on 29 November 2020³, when the applicant submitted five additional individual applications. On 7 December 2020, the applicant submitted one further application⁴. Frontex engaged with the applicant to find a commonly acceptable fair solution and suggested a queuing of the applications submitted. The applicant did not agree. In regard to the applications submitted as of 29 November 2020, he only suggested to narrow down one of his applications, i.e. PAD-2020-00237. As part of this application, the applicant stated on 18 January 2021: "I have made several separate request for documents, which you have responded to separately. Furthermore, and not undermining the fact that this request is not very large and I've narrowed it down as per your demand".

Similar to previous cases⁵, Frontex explained to the applicant in numerous exchanges of correspondence regarding each individual of the six applications until 9 February 2021 that the combined scope of his pending applications was too wide to be processed simultaneously. The applicant had refused to accept the queueing Frontex had suggested. Frontex thus invited the applicant, the last time on 9 February 2021,

¹ PAD-2020-00170 (registered on 9 October 2020 and concluded within the statutory deadline on 13 November 2020).

² PAD-2020-00190 (registered on 13 November 2020 and concluded within the statutory deadline on 4 December 2020)

³ PAD-2020-00233, PAD-2020-00234, PAD-2020-00235, PAD-2020-00236, PAD-2020-00237

⁴ PAD-2020-00147.

⁵ As evidenced e.g. in para 14 of the Decision in cases 1808/2018/FP and 1817/2018/FP on how Frontex handled a request for access to its operational plans and interpreted Article 10(1) of Regulation 1049/2001 of 7 May 2019.

to make suggestions to develop a commonly acceptable fair solution for all of his applications. No reply from the applicant has been received.

1.3 Multiple Applications and a Fair Solution under Article 6(3) of Regulation (EC) 1049/2001

The decision to approach multiple applications made by the same applicant through a queueing system flows from Article 15(1) of Regulation (EC) 1049/2001 based on which Frontex has to develop “good administrative practices to facilitate the right of access guarantee” of Regulation (EC) 1049/2001 in an equitable and proportionate manner. In this regard, the suggestion to queue applications constitutes just one possibility, besides, e.g. offering a narrowing down, which Frontex had offered, depending on the circumstances, applicants in the past. All such offers and suggestions are based on Article 6(3) of Regulation (EC) 1049/2001 as interpreted by the Court of Justice of the European Union (CJEU) and the EO are made on a case-by-case basis and the final decision is made in cooperation with the applicant. The overarching aim is to ensure an equal treatment of all applicants and the offers and commonly developed solution take into account the scope and administrative workload of the applicant’s application(s) and already pending applications of other applicants, which are considered against the backdrop of the significant increase in applications Frontex has experienced in recent years.

1.3.1 Jurisprudence of the CJEU

The jurisprudence of the CJEU was explained⁶ to the applicant on 15 December 2020 as follows:

Article 6(3) allows the institution concerned to find a fair solution with the applicant seeking access to documents in its possession. In finding such fair solution, a balance of the interest of the applicant for access against the workload resulting from the processing of the application for access in order to safeguard the interests of good administration may be undertaken (See Judgment of the Court of Justice, 2 October 2014, case C-127/13P, Strack v Commission, paras 26 et seq; Judgment of the General Court, 14 December 2017, case T-136/15, Evropaiki Dynamiki v European Parliament, paras 82 et seq). In view of the broad nature of your applications, implying a high number of documents to be identified and a considerable number of pages to be assessed, please note that the institution may avoid carrying out a concrete, individual examination only after it has genuinely investigated all other conceivable options and explained in detail in its decision the reasons for which those various options also involve an unreasonable amount of work (Judgment of 13 April 2005, Verein für Konsumenteninformation v Commission, T-2/03, para 115).

Frontex further informed the applicant on 15 December 2020 that “If you concur, we would thus suggest to register this case and to continue finding a fair solution also regarding the other applications in parallel within the meaning of Regulation (EC) No 1049/2001”.

1.3.2 Decision of the EO

In addition to the long standing CJEU case law, Frontex considered in particular the EO’s Decision in case 1608/2017/MIG⁷ (EO Decision 1608), in which it confirmed its previous decisions in this regard⁸. Para 28 et seq. of EO Decision 1608 states

28. Given that the complainant made a number of access requests in close temporal proximity, some of which concerned several documents, it is reasonable to consider his requests as one request relating to a large number of documents. Otherwise, applicants could easily circumvent the rules that provide for exceptions in cases where access to a very long document or to a very large number of documents is requested, by splitting such requests into several smaller requests.

⁶ While the applicant was aware of the provision of Article 6(3) of Regulation (EC) No 1049/2001, Frontex provided a detailed explanation as required of its content as required in Decision of the European Ombudsman closing his inquiry into complaints 2299/2010/(IP)(EIS)ER and 388/2011/(PMC)(IP)(EIS)ER against the European Commission of 14 Dec 2012.

⁷ Decision in case 1608/2017/MIG on the European Medicines Agency’s handling of multiple requests for public access to documents made by a single applicant and its extension of deadlines of 15 March 2019.

⁸ E.g. Decision in cases 562/2017/THH and 1069/2017/THH on the Commission’s handling of a large number of requests for access to documents concerning Commissioners’ travel expenses of 16 November 2018 and Decision in case 1602/2016/JAS on the European Medicines Agency’s handling of an access to documents request related to clinical study reports of 8 February 2018.

Consequently, EMA could, in fact, have denied the complainant any access to the documents that he requested in those four applications.

29. However, instead of availing itself of the option to refuse access in such cases, EMA has established a mechanism that ensures that as many applicants as possible can exercise their right of public access to documents and no request has to be denied due to the related administrative burden. In the light of the administrative workload that requests for access pose and the significant increase in such requests EMA has experienced in recent years, it is generally reasonable for EMA to look for fair solutions in order to be able to deal with all the requests for access it receives. (...)

Question 2: When does the “queuing” system kick in: after the second consecutive request by the same applicant or only once Frontex’s PAD team has reached full capacity?

As stated above, the Transparency Office suggests a queueing depending on the scope of each submitted application and applications that are already pending on a case-by-case basis. In this regard Frontex invites applicants to consider treating their second, third etc. applications upon the conclusion of Frontex’ reply to their first application. Frontex suggests solutions under Article 6(3) of Regulation (EC) 1049/2001 whenever deemed necessary, following the principle of good administration and considering the steadily increasing numbers and complexity of applications since 2010. In case the applicant does not consent to Frontex’ offer and suggestion to queue, Frontex invites the applicant to make a counter proposal and continues to finding a commonly acceptable fair solution balancing all needs. Therefore, the decision to line up applications in a queue is endeavoured only after weighting all elements and options that may constitute a fair solution. In any case, Frontex always replies promptly to the applicant and acknowledges receipt of all applications. In those cases where a queuing system was proposed, in cooperation with the applicants, a solution was found in cooperation with the applicant. Adhering to para 115 of the Judgment *Konsumenteninformation v Commission (op. cit.)* as confirmed in para 29 of EO Decision 1608, Frontex never had to avail “itself of the option to refuse access in such cases” and was always able to find a commonly acceptable fair solution with the applicants.

Question 3: How often does it happen that requests have to be put in a queue?

Frontex does not record the number in which, together with the applicants, the case-by-case-based solution of queuing was found and applied in cooperation with the applicants.

Question 4: Is there a maximum amount of time a request can wait in a queue?

No maximum times are set. Following the common determination of using a queue, for which applicants can determine the sequence of the applications, the timelines for each application are eventually determined by Regulation (EC) 1049/2001. Upon the conclusion of the preceding application, the successive application is processed automatically and applicants are notified accordingly. Frontex constantly reappraises the possibility to (re-)combine previously queued applications into one application in a holistic manner and informs applicants immediately.

Question 5: Does the scope of the request (small vs. large document or number of documents requested) play a role?

In line with Article 6(3) of Regulation (EC) 1049/2001, queueing may be proposed if an application pertains to “a very long document or to a very large number of documents”, which may include the identification of a wide and vague number of documents, taking into consideration the limits of such proposals as shaped by the CJEU and EO. In all cases, a constructive solution could be found together with applicants.

Question 6: Can applicants change the order of their requests? If yes, are they systematically made aware of this possibility?

Before determining whether one or more applications submitted by the same applicant is/are treated in queue the Transparency Office always invites the applicant to indicate the preferred order according to which the applications shall be processed and subsequently follows the applicant’s preferences. Further

to deciding on the order when the queue is set up, as indicated above, applicants are always able to change the order of the next application to be processed.

Question 7: Are applicants informed by which date they can expect their requests to be handled?

In its correspondence with an applicant, Frontex always indicates the 15-working-day deadline until which the reply to an application will be provided. The timelines are determined by Regulation (EC) 1049/2001. Frontex would like to emphasize again that it constantly reappraises the possibility to (re-)combine previously queued applications into one application in a holistic manner and informs applicants.

In the context of developing a commonly acceptable fair solution with the applicants, Frontex stresses that the time-limits of Regulation (EC) No 1049/2001 are applicable to all of the applications, which are going to be considered back to back.

Question 8: Does the “queuing” system apply to all applicants alike?

Like other proposals to find a fair solution indicated above, the proposal to queue applications is based on the determinants as provided in reply to questions 1 to 7 based on considerations of equity and proportionality and indifferent of the applicant.

With regard to the questions addressed - by the EO case handler - to Frontex on 2 March 2021, please find attached the overview of all requests the complainant has made since September 2020, including the date of receipt, the number and kind of documents concerned, the date of registration.

Furthermore, Frontex hereby submits the following written answers to the following additional questions:

1/ How did Frontex deal/is Frontex dealing with each request (e.g. was the request put in a queue, and, if so, why, how and when was this communicated to the complainant, etc.)?

4.1 Application PAD-2020-00190

As stated above, the applicant was informed that his application PAD-2020-00190, submitted on 26 October 2020 was to be considered after the conclusion of his application PAD-2020-00170, which constituted a fair solution within the meaning of Article 6(3) of Regulation (EC) No 1049/2001. In the ensuing correspondence, this was communicated on 27 and 30 October 2020. Application PAD-2020-00190 could be registered on 13 November 2020 and was concluded on 4 December 2020. The confirmatory application PAD-2020-00216 submitted on 14 November 2020 regarding application PAD-2020-00190 was not admissible as application PAD-2020-00190 was still pending at this point in time. PAD-2020-00190 was replied to on 4 December 2020. No further confirmatory application regarding case PAD-2020-00190 was received.

4.2 The total of six Applications of 29 November 2020 and 7 December 2020

On 29 November 2020, the applicant submitted applications PAD-2020-00233, PAD-2020-00234, PAD-2020-00235, PAD-2020-00236, and PAD-2020-00237. On 7 December, the applicant submitted application PAD-2020-00247. On 30 November 2020, the Transparency Office informed the applicant under of his application PAD-2020-00237:

In light of the already pending application, the combined scope of your five applications submitted on 29 November 2020 is too wide to be processed and we thus invite you to find a commonly acceptable fair solution, e.g. by treating these five applications of 29 November 2020 separately after the conclusion of your application PAD-2020-00190 to be considered back to back with Regulation (EC) No 1049/2001 being applicable to each.

Further to the applicant's request of 1 December 2020 submitted as part of application PAD-2020-00237 to be explained the legal basis for such proposal, the explanation was provided on 2 December 2020 and the following correspondence was exchanged:

3 December 2020: The applicant stated: “I don't agree to this solution. How many of my requests can you process at once?”

4 December 2020: Frontex: “Due to the wide-ranging scope of your applications, at this stage only a consecutive consideration can be offered. Kindly indicate whether you would consider narrowing down the scope of any of your applications and/or to provide further information regarding your concrete interest to commonly explore other solutions”.

5 December 2020: The applicant stated: “I cannot view the other requests I've sent you because your system blocks me. (...) As requested, I'll narrow down my request above to the one *latest* relocation for each contract. This is a total of 5 documents, or less. I assume they have been appropriately filed with the contract, so they should be very easy to find. This is an extremely narrow request. I'm looking forward to your response for all my requests by the 15 working days.”

8 December 2020: On 7 December 2020, the applicant submitted application PAD-2020-00247. Frontex stated: “Thank you for your offer. In light of the in total six applications pending and as indicated earlier, we suggest to process this application first [i.e. PAD-2020-00237] and to consider the other five applications back to back as individual applications with Regulation (EC) No 1049/2001 being applicable to each individual application. The access links to these five applications [which includes application PAD-2020-00247] have just been sent to you. Kindly confirm that you concur with this approach.”

9 December 2020: The applicant replied: “As mentioned before, I do not consent to successive consideration of the applications. This is nowhere in the EU regulations and is not standard practice for access to information schemes.”

As indicated above, on 15 December 2020, the Transparency Office explained the case law to the applicant and that all his six applications - five submitted on 29 November 2020 and one on 7 December 2020 - are to be considered as one application. The applicant reiterated on 18 January 2020 that he had narrowed down his application PAD-2020-00237. Since this date and until 9 February 2020, the Transparency Office informed the applicant that the combined scope of all of his applications was too wide and invited the applicant to commonly develop a fair solution.

2/ Why did Frontex deem justify not to process (some of) the access requests of the complainant (if that was indeed the case)?

For case PAD-2020-00190 the scope of the documents applied for as determined initially led to the conclusion that a queueing in light of the already pending application PAD-2020-00170 and the considerations explained under questions 1 to 7 was seen as necessary.

In the cases PAD-2020-00233 to ...00237 and PAD-2020-00247, the applicant, after narrowing down his application PAD-2020-00237 was not willing to queue the remaining five applications or to make a counter proposal on how to equitably manage these partly wide applications⁹. In order to establish legal certainty, Frontex was seeking the applicant's consent to commence with application PAD-2020-00237 and sought a way forward on how to proceed with his remaining applications. The applicant did only narrow down application PAD-2020-00237 but was not willing to find a compromise on how to proceed with the remaining five applications, which, as Frontex has explained to him individually in regard to each of the five applications were to be seen as one wide application.

In light of para 29 of the EU Decision 1608, which states that

[g]iven that the complainant made a number of access requests in close temporal proximity, some of which concerned several documents, it is reasonable to consider his requests as one request (...)

Frontex was considering in each of the respective queueing cases the individual applications submitted as one wide and - partly - as vague application. In case of PAD-2020-00190, the applicant was informed about the need to find a fair solution under Article 6(3) of Regulation (EC) No 1049/2001. In regard to the applications submitted as of 29 November 2020, Frontex had informed the applicant on 15 December 2020 about the case law of the CJEU interpreting Article 6(3) of Regulation (EC) No 1049/2001 which requires cooperation and thus constitutes a two way street to find a fair solution.

⁹ E.g. application PaD-2020-00233: “all the Frontex “Serious Incident Reports” that contain the word “Libya” in the title or the text of the incident report since 1st January 2020.”

Frontex invited the applicant to commence with PAD-2020-00237 and to continue finding a solution for the remaining five application.

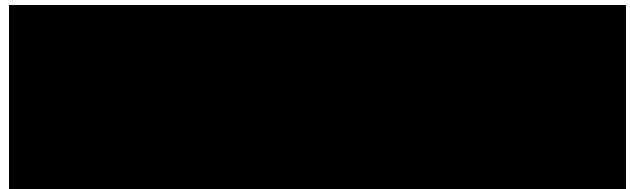
Since he denied any offer and in particular the queuing of the five applications pending in addition to PAD-2020-00237, Frontex invited the applicant to make a counter offer on how to process the in total six applications. Unfortunately, the applicant did not go beyond narrowing down one of his applications (PAD-2020-00237) and refused to find a commonly acceptable fair solution for the other five applications. Frontex continued until 9 February 2021 to invite the applicant to develop such together.

3/ Is there any additional information that Frontex considers to be useful to be mentioned with regard to this inquiry?

As indicated in the communications to the applicant, Frontex would welcome discussing with him on how to find a commonly acceptable fair solution for all the six pending applications, e.g. by commencing with registering application PAD-2020-00237 and to find, as proposed, a common way forward for the remaining five application and providing legal certainty for all applications.

Furthermore, Frontex wishes to express its gratitude to the European Ombudsman's inquiry team in being invited to reply to the questions and stands ready to provide any further information the team might require.

Yours sincerely,



Head of Inspection and Control Office

Annex:
Overview of Applications PAD-2020-00170 to PAD-2020-00247

| Case ID | Case Name | Applicant's Name | Applicant's Surname | Application type | Status | Internal deadline | Initial deadline | Extended deadline | Created | Registration date | Notification date | Application description |
|----------------|--------------------------------------|------------------|---------------------|------------------|---------|-------------------|------------------|-------------------|------------------|-------------------|-------------------|---|
| PAD-2020-00247 | Letters | [REDACTED] | [REDACTED] | Initial | On hold | | | | 07/12/2020 06:43 | | | Hello,I would like all the letters mentioned in the response to question number 5 (page 3) in this document https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/LIBE/DV/2020/11-30/_Annex_AnswerstothequestionsfromtheLIBECommittee_EN.pdf Thanks in advance. Best [REDACTED] |
| PAD-2020-00237 | Notifications for relocation | [REDACTED] | [REDACTED] | Initial | On hold | | | | 29/11/2020 10:21 | | | Hello,I would like all the notifications of relocations under the following contracts- Frontex/OP/932/2018/IL/Airborne-Frontex/OP/932/2018/IL/CAE- Frontex/OP/932/2018/IL/DEA-Frontex/OP/932/2018/IL/ItalyLess-Frontex/OP/932/2018/IL/EASFor the sake of expediency, I only need one document per relocation. The document chosen should include the date and the location of relocation. The meaning of "relocation" is the one that is used in the contracts mentioned above.Thanks in advance. [REDACTED] |
| PAD-2020-00236 | Incident reports | [REDACTED] | [REDACTED] | Initial | On hold | | | | 29/11/2020 10:04 | | | Hello,I would like all the Frontex "Serious Incident Reports" that contain the word "Libya" in the title or the text of the incident report since 1st January 2020.If you need a definition of "Serious Incident Reports" you can find more details here https://www.statewatch.org/media/documents/news/2016/aug/frontex-serious-incident-reporting.pdf Thanks in advance. Best [REDACTED] |
| PAD-2020-00235 | All of the contracts for sea assets | [REDACTED] | [REDACTED] | Initial | On hold | | | | 29/11/2020 09:55 | | | Hello,I would like all the active contracts of all the companies that provide sea-based and/or land-based surveillance services to Frontex on Europe's sea borders, i.e. all boats, surveillance cars, radar, video etc.in case this needs clarification, "active" means that these contracts are in force today. 29th November 2020.Thanks in advance. Be [REDACTED] |
| PAD-2020-00234 | Video recordings of incidents | [REDACTED] | [REDACTED] | Initial | On hold | | | | 29/11/2020 09:23 | | | Dear Frontex,I would like the list of video recordings (e.g. from drones, aircrafts and boats) and incident reports regarding any incidents that occurred in the Aegean on the following days (yyyy-mm-dd), including the nights of those days (e.g. on 28th April 2020, this includes the morning of 29th April 2020)2020-04-282020-04-292020-05-012020-05-132020-05-282020-05-292020-06-022020-06-042020-06-052020-06-062020-06-092020-06-132020-06-172020-06-182020-06-222020-06-232020-06-252020-06-302020-07-032020-07-042020-07-062020-07-082020-07-092020-07-112020-07-242020-07-262020-07-272020-07-292020-08-052020-08-092020-08-112020-08-152020-08-192020-08-24 Thanks in advance. Be [REDACTED] |
| PAD-2020-00233 | All previous FOIAs | [REDACTED] | [REDACTED] | Initial | On hold | | | | 29/11/2020 09:16 | | | Dear Frontex,I would like- all the documents disclosed in all the FOIAs that were answered by Frontex since 1st January 2019. - the text of the requests (i.e. what people asked for). I do not need the name of the person making the requests, just the text of the request.Since those documents were already disclosed by Frontex, it should not take additional work. As you know Frontex should have these documents and a register of them available on your website but it does not seem to be the case.Thanks in advance. [REDACTED] |
| PAD-2020-00216 | CA - Research and Innovation project | [REDACTED] | [REDACTED] | Confirmatory | Closed | 26/11/2020 00:00 | 07/12/2020 00:00 | | 14/11/2020 09:59 | 16/11/2020 00:00 | 16/11/2020 15:20 | Dear Frontex,The 15 working days since I've made the request have expired today. Your reasons for delay are outside the scope of EU regulations.Therefore, I would like to request a confirmatory application. Could you confirm that you've received my request for a confirmatory application? [REDACTED] |
| PAD-2020-00190 | Research and Innovation project | [REDACTED] | [REDACTED] | Initial | Closed | 25/11/2020 00:00 | 04/12/2020 00:00 | | 26/10/2020 09:34 | 13/11/2020 00:00 | 04/12/2020 20:01 | Hi there,I would like a list of all the contracts under the "Research and Innovation" budget line (see e.g. this budget page https://frontex.europa.eu/assets/Key_Documents/Budget/Budget_2020.pdf)The period is 1st January 2019 until today.I want a list of the contracts including: tender reference- procedure type-Estimated total value- Name(s) of the company that won the tender.I have already sent you my passport copy for an earlier request, so there is no need to ask for it again.Thanks in advance. [REDACTED] |
| PAD-2020-00170 | Frontex surveillance | [REDACTED] | [REDACTED] | Initial | Closed | 21/10/2020 00:00 | 30/10/2020 00:00 | 24/11/2020 00:00 | 22/09/2020 09:12 | 09/10/2020 00:00 | 13/11/2020 00:00 | Dear Sir or Madam,I would like all the active contracts of all the companies that provide airborne surveillance services to Frontex, i.e. aircrafts, helicopters and drones.Thanks in advance [REDACTED] |