

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

Frontex<sup>1</sup> 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<sup>2</sup> 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<sup>3</sup> 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 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

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<sup>1</sup> Frontex (the European Agency for the Management of Operational Cooperation at the External Borders of the Member States) was established in 2004.

<sup>2</sup> Regulation 1168/2011/EU

<sup>3</sup> The Ombudsman's draft recommendation in this investigation is available at <http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/49848/html.bookmark>

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"<sup>4</sup>. 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<sup>5</sup>.

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

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<sup>4</sup> <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=19719&Language=EN>

<sup>5</sup> <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=19547&Language=EN>