

COMPLAINT to the European Ombudsman

FRONTEX application of the Regulation of 1049/2001

Background

1. Under Article 28 of the Council Regulation 2007/2004 dated 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders (hereafter referred to as Frontex) of the Member States of the European Union it was obliged to be subject to Regulation 1049/2001 on public access to EU documents.

Article 28.1 states:

“Six months after the entry into force of this Regulation the Agency shall be subject to Regulation (EC) No 1049/2001 when handling applications for access to documents held by it.”

Article 28.3 goes on to state that:

“The Management Board shall lay down the practical arrangements for the application of paragraphs 1 and 2.”

Further Article 28.5 states that complaints could be lodged with the Ombudsman or action taken in the Court of Justice (as per Article 8 of 1049/2001)

2. On 21 September 2006 a Decision of the Frontex Management Board was adopted on: “Laying down practical arrangement regarding public access to the documents of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX)”

The Decision of the Management Board deviates from the provisions of Regulation 1049/2001 in the following respects:

i) in Recital 6 and Article 4 FRONTEX seek to claim a status equivalent to that of a Member State as if it has interests independent of the European Union and its Member States which set it up. Article 4 states that the decision to grant access to a “FRONTEXT document” must take into account “the necessity not to jeopardise the attainment of objectives and tasks of FRONTEX.

ii) Article 7.2 concerning confirmatory applications where access is refused say that the applicant will be informed of “the remedies open to him or her”. As distinct from 1049/2001 which explicitly states that an applicant has the right of appeal to the ECJ and the European Ombudsman.

iii) the Frontex Decision on access to documents does not include an Article regarding Article 11 of Regulation 1049/2001, namely the requirement to maintain a public register of documents and further that references to documents shall be recorded in the register without delay.

iv) the Frontex Decision on access to documents does not transpose Article 8.3 of Regulation 1049/2001 namely by expressly stating the right to make a complaint to the European Ombudsman or to go to the Court of Justice as set out in Article 28.5 of Regulation 2007/2004.

Article 7.2 of the Frontex Decision simply states that "Frontex will inform the applicant of the remedies open to him or her".

v) Article 15 of the Frontex Decision on access to documents states that its Annual Report "shall include... the number of cases in which it refused to grant access to documents and the reasons for such refusals..." Whereas Article 17 of Regulation 1049/2001 states that the Annual Report shall also include:

- the number of sensitive documents not recorded in the register.

3. The amending Regulation (EU) No 1168/2011 of 25 October 2011 amending Council Regulation 2007/2004 does not change the obligation set out under Article 28.1 of 2007/2004.

4. Under the Lisbon Treaty it is stated in that the legal base for public access to documents is now Article 15(3) of the consolidated version of the Treaty on the Functioning of the European Union. This new provision extends the public right of access to documents to all the Union institutions, bodies, offices and agencies. In March 2011 the Commission put forward a proposal to effect this commitment, however, the European Parliament decided that this provision should be incorporated into its 1st Reading position (adopted in December 2011) on the Commission's 2008 proposals to amend 1049/2001 and has not treated this matter separately.

The Lisbon Treaty commitment simply reinforces the provisions already contained in Regulation 2007/2004 and therefore FRONTEX is subject to Regulation 1049/2001.

Complaint No 1

Under Article 11 of the Regulation 1049/2001 FRONTEX is required to provide public access to a register of documents, in electronic form. Further references to documents shall be recorded in the register without delay.

Making available a public register of documents ensures that citizens and civil society can follow and understand what is being discussed and decided. And further by making available documents concerning implementation it ensures that the activities of Frontex are subject to public and parliamentary accountability. Access to documents is the life-blood of a

democratic system and a public register of documents is crucial to this process.

Substance: FRONTEX has failed since 2004 to provide a public register of documents produced and held and that this is a case of maladministration.

Complaint No 2

An examination of the Frontex Annual Reports shows that regarding Article 17 of 1049/2001:

2006: No reference at all to requests for documents or to the number of sensitive documents not recorded

2007: No reference at all to requests for documents or to the number of sensitive documents not recorded but there is a reference to the fact that: "The document management system [was] in place by end of December 2007" (p58)

2008: No reference at all to requests for documents or to the number of sensitive documents not recorded in the register

2009: No reference at all to requests for documents or to the number of sensitive documents not recorded in the register

2010: There is a reference to "13 official requests for Frontex documents" but no mention of whether any were refused or granted with partial access nor to the number of sensitive documents not recorded in the register

2011: There is a reference to: "received and processed 17 official requests for Frontex documents (Regulation (EC) No.1049/2001 regarding public access to European Parliament, Council and Commission documents)." but no mention is made of whether any were refused or granted with partial access nor to the number of sensitive documents not recorded in the register

Substance: It is held that the failure to give information on the number of documents refused, the reasons for such refusals and the number of sensitive documents not recorded in the register is a case of maladministration.

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