

STATEWATCH

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Reference: OI/132012/MHZ

Dear Mr Diamandouros,

You forwarded to us your Report following your visit to FRONTEX (2.2.13) and FRONTEX's response on 24 February 2013.

We would like to make the following observations:

The substance of Statewatch's complaints against FRONTEX

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 the Decision of the FRONTEX Management Board on public access to documents was adopted: *"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)"*

3) 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 its interests are independent of the European Union (and its Member States) which set it up. Article 4 states that the decision to grant access to a "FRONTEX document" must take into account:

"the necessity not to jeopardise the attainment of objectives and tasks of FRONTEX."

ii) 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.

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.

iii) 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 if a confirmatory appeal is rejected.

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

iv) 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.

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

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.

APENDIX

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

The Ombudsman's Report of 7 February 2013

The Ombudsman visited FRONTEX on 4 October 2012 and issued his Report on Frontex 7 February 2013.

The Ombudsman posed three general questions: a) FRONTEX's website does not have a section on access to documents and how do they handle requests for access to documents? b) does FRONTEX produce an annual report on access to documents? c) does Frontex intend to have a public register of documents in the sense of Article 11 of Regulation 1049/2001?

FRONTEX says it is subject to Regulation 1049/2001 but seeks to create for itself a number of exceptions.

On the specific complaints made by Statewatch there are the following references:

a) On the issue (3.i) that FRONTEX seeks to give itself the status of a Member State FRONTEX is recorded in the Report as saying:

"On 21 September 2006, the Frontex Management Board adopted a decision laying down practical arrangements regarding public access to Frontex documents. That decision reiterates that, in accordance with Article 28 of the Frontex Regulation, Frontex is subject to Regulation 1049/2001 when handling applications for access to documents held by it. The decision states that "in order to safeguard the ability to carry out its tasks, special attention should be paid to the specific requirements of Frontex as a specialised body tasked with improving the integrated management of the external borders of the Member States of the EU. Therefore, full account of the sensitive nature of tasks carried out by Frontex, in particular in relation to operations at borders and border related data should be taken. In any case, the successful and effective fulfilling of Frontex objectives and tasks as foreseen in the Frontex Regulation should not be jeopardised." (para 24)

The Ombudsman's Report makes no comment on this assertion. FRONTEX claims it operates under Regulation 1049/2001 yet here it is claiming a further block exception due to the "sensitive nature of its tasks" - a factor already provided for in the Regulation (Article 9). The cited statement in the Management Board's Decision on public access should be deleted.

b) The Ombudsman records that FRONTEX's Annual Report contains a section on "Transparency and access to documents" (para 26) (Statewatch 3.iv)

The Ombudsman's report makes no reference to the obligation under Article 17 of 1049/201 to place on record in the Annual Report the number of sensitive documents not recorded in the register and further that references to these could be included in the register in a way which did not disclose the subject matter. It could be argued that as FRONTEX does not yet have a public register this is not relevant - however, neither Europol or Eurojust have a public register yet but the Ombudsman drew both of these issues to their attention in his Reports on them.

As the Management Board's Decision on public access contain no reference to the Article 17 (1049/2001) obligation to place on record the number of sensitive documents not listed on the public register the Decision should be amended in this respect.

Further it should be drawn to FRONTEX's attention that the section on public access in its Annual Report must the reasons for refusing access to documents as set out in Article 15 of its Decision on public access (See Appendix above).

c) On the issue of FRONTEX's failure to make available a public register of documents Statewatch 3.ii) it responded:

"As of yet, there is no public Register of FRONTEX documents, but there are plans to create one." (para 26)

The Ombudsman's report makes no mention of the fact that the Management Board Decision on public access does not contain a provision in it on providing a public register - FRONTEX should be obliged to amend its Decision.

d) The issue of the right of an applicant to go to the Ombudsman if a confirmatory \appeal is rejected is covered in the report (para 29) (Statewatch 3.iii) However, this does not refer to the equal right to go to the ECJ instead (see Frontex's response below which confirms this).

The Management Board Decision on public access to documents should be amended to include the right of appeal to the EU Ombudsman and the Court of Justice.

In our view the four substantive Statewatch complaints have not been fully addressed.

FRONTEX's Response to the Ombudsman's Report

FRONTEX's Response to the Ombudsman's Report, in the light of the above, is brief and peremptory.

a) Under a.2. FRONTEX agree to recognise an applicant's right to appeal to the Ombudsman - but not to the ECJ.

b) The response to Ombudsman's recommendation, on providing a public register of documents that "He trusts this will be done without delay" comes in two parts, First:

"We have a mid-term plan to build a comprehensive document management system that would include, as one of its sub-components, a register"

This response does not answer the Ombudsman's position of "without delay". What does "mid-term" mean? Two, three, four, five years? The Management Board's Decision should be amended (as referred to above) and an actual date should be given to provide a public register without delay.

The second part is institutional blather. Nine years after FRONTEX was obliged to provide a public register they are still seeking to put off providing a public register into some undefined point in the future. So they say they will "by the end of 2013, or beginning of 2014" provide a "temporary solution" to give "a better overview of the documents produced by the agency". This is not an acceptable answer.

FRONTEX did not respond to other issues in the Statewatch complaints as they were not put to them.

We hope you will take our views into account when responding to FRONTEX's response to your Report.

Yours sincerely,

Tony Bunyan,
Director