



Report

of the European Ombudsman following his visit to the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) - OII/13/2012/MHZ

The background to the visit

1. In May 2011, the European Ombudsman initiated a programme of visits to the EU agencies with the aim of identifying and spreading best practices in their relations with citizens. Initially, the Ombudsman carried out three 'pilot' visits to the EU agencies in the United Kingdom, namely, the European Banking Authority, the European Medicines Agency and the European Police College. In October 2011, the Ombudsman visited the European Environment Agency in Copenhagen and, in November 2011, the European Monitoring Centre for Drugs and Drug Addiction and the European Maritime Safety Agency in Lisbon. In February 2012, the Ombudsman visited the European Centre for the Development of Vocational Training in Thessaloniki and, in May 2012, the European Foundation for the Improvement of Living and Working Conditions in Dublin. In June 2012, the Ombudsman visited the European Police Office and Eurojust in The Hague, and the European Systemic Risk Board in Frankfurt. Finally, in July 2012, the Ombudsman visited the European Network and Information Security Agency, ENISA, in Heraklion, Crete.

2. By letter of 12 September 2012, the Ombudsman informed Frontex that, in the framework of his programme of visits to agencies, he intended to visit it on 4 September 2012.

3. Frontex was established by Council Regulation 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union ('Frontex Regulation')¹. This regulation was subsequently amended in 2007 by Regulation 863/2007 establishing a mechanism for the creation of Rapid Border Intervention Teams². On 25 October 2011, further amendments to the

¹ OJ 2004 L 349, p.1

² OJ 2007 L 199, p. 30



Frontex Regulation were adopted, namely Regulation 1168/2011 of 25 October 2011 amending Council Regulation 2007/2004³. In accordance with the Frontex Regulation, Frontex aims to facilitate the application of existing and future EU measures relating to the management of external borders by ensuring the coordination of Member States' actions in the implementation of those measures. In particular, it should: (i) assist Member States with implementing the operational aspects of external border management; (ii) carry out risk analysis in order to provide the EU and the Member States with adequate information to allow for appropriate measures to be taken or to tackle identified treats and risks with a view to improving the integrated management of external borders; (iii) provide training at EU level for officers of the competent national services and for national instructors of border guards and additional training and seminars related to control and surveillance at external borders and removal of third-country nationals illegally present in the Member States; (iv) follow up on developments in scientific research relevant for its field and disseminate information to the Commission and to the Member States; (v) manage lists of technical equipment provided by the Member States; and (vi) support the Member States in circumstances requiring increased technical and operational assistance at external borders. In addition, one of the new tasks defined by Regulation 1168/2011 is to "provide the necessary assistance to the development and operation of a European border surveillance system and, as appropriate, to the development of a common information sharing environment, including interoperability of systems."

4. The Ombudsman sent Frontex a draft agenda with the specific issues he wished to discuss. In addition, the Ombudsman informed Frontex that, in response to a commitment he had undertaken following a request by the Assembly of Agency Staff Committees ('AASC'), he would also meet with Frontex's Staff Committee during his visit.

The visit

5. The meeting took place at Frontex's premises on 4 October 2012. The Ombudsman was accompanied by Ms Marta Hirsch-Ziembinska, Head of a Complaints and Inquiries Unit in his Office. Frontex was represented by Mr Gil Arias Fernández, Deputy Executive Director; a Senior Legal Officer from the Legal Affairs Unit; the Spokesperson from the Information and Transparency Team; the Head of the Human Resources and Services Unit; the Head of the Human Resources Sector; the Procurement Officer Coordinator; the Quality Manager; the *Aide-de-camp* to the Deputy Executive Director, and the Assistant to the Deputy Executive Director.

6. At the beginning of the meeting, the Ombudsman provided information on the purpose and context of his visit to Frontex. He clarified that he carries out his visits to agencies of the EU on the basis of his competence to conduct own-

³ OJ 2011 L 304, p.1



initiative inquiries. An own-initiative inquiry implies, among others, that the usual procedural guarantees concerning such inquiries apply. These include the Agency's right to request the Ombudsman to treat information and documents on a confidential basis, in accordance with Articles 5.1, 5.2 and 14.2 of the Ombudsman's Implementing Provisions⁴.

7. Following the Ombudsman's introductory remarks, Frontex presented its position on the subjects identified by the Ombudsman in his letter of 12 September 2012. The Deputy Executive Director responded to the Ombudsman's introductory remarks, and the persons in charge then addressed the different agenda items with the help of PowerPoint slides. Each presentation was followed by a discussion and a question and answer session. At the end of the meeting, a copy of the presentation and supporting documents were provided to the Ombudsman.⁵ Frontex asked for the confidential treatment of all internal documents submitted to the Ombudsman⁶, apart from the following decisions adopted by its Management Board:

-Decision No 23/2012 of 27 September 2012 adopting Frontex disciplinary procedure;

-Decision –No 017/2005 of 16 December 2005, on the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interests; and

-Decision No 3402 of 22 September 2006 laying down practical arrangements regarding public access to the documents of FRONTEX.

8. After the meeting with Frontex's management, the Ombudsman and Ms Hirsch-Ziembinska met with the Staff Committee representatives.

⁴ www.ombudsman.europa.eu/resources/provisions.faces

⁵ Subsequently, Frontex sent the Ombudsman, by e-mail, PDF versions of PowerPoint presentations and internal documents.

⁶ There were:

- (a) templates of: (i) Interview evaluation report; (ii) Overall screening report for a post; (iii) Screening report for a post; (iv) Declaration on compliance with the personal data protection provisions and declaration on independence and interest (for the selection committee); (v) Declaration on confidentiality and discretion; (vi) Declarations of interests; (vii) Declaration of absence of conflicts of interest and of confidentiality (for Opening Board and Evaluation Committee in tenders procedures); and (viii) letters informing candidates of the outcome of the selection procedure; (ix) Acknowledgement of receipt-declaration on the Frontex Code of Conduct and Frontex Code of Good Administrative Behaviour;
- (b) Administrative Notice No 36/2010 of 2 June 2010 "Understanding the concept of *Conflict of Interest* in Frontex";
- (c) Administrative Notice No 46/2010 of 18 November 2010 "Internal policy on the procedures applicable to the recruitment and selection of Temporary and Contract staff at Frontex" with enclosures;
- (d) Decision of the Executive Director No 58/2009 of 19 November 2009 establishing the procedure governing the engagement and use of temporary staff;
- (e) Document "Reporting suspected improprieties" dated 18 January 2010, with enclosures;
- (f) Decision of the Executive Director No 36/2008 of 8 September 2008 adopting implementing rules concerning data protection at Frontex; and
- (g) copies of three last Frontex's answers to public requests for access to documents.



9. The following issues constituted the object of discussion between the Ombudsman and Frontex's management:

- A. Frontex regulations on personal conduct and good administrative behaviour;
- B. The public service principles;
- C. Transparency, dialogue and accountability (public access to documents);
- D. Selection and recruitment;
- E. Conflicts of interest;
- F. Whistle-blowing; and
- G. Tenders and contracts.

The Ombudsman's findings and suggestions

(A) Frontex's regulations on personal conduct and good administrative behaviour

10. One of the Ombudsman's fundamental tasks is to ensure that the EU administration is open, service-minded and efficient in handling contacts with citizens. The relevant basic principles are laid down in the European Code of Good Administrative Behaviour ('the Code'). The European Ombudsman often receives complaints alleging lack of service-mindedness and efficiency. This suggests that the EU administration is still faced with challenges in this area. When appropriate, the European Ombudsman tries to find a rapid solution to complaints that concern grievances arising from citizens' initial contacts with the administration. In such circumstances, the Ombudsman's services usually contact the relevant member of staff by telephone.

11. In his letter dated 12 September 2012, the Ombudsman informed Frontex that all the EU agencies had agreed to adopt the Code at a meeting of the heads of the agencies held in Lisbon in October 2008. However, Frontex's website contained no reference to the Code and, therefore, the Ombudsman sought additional information on how Frontex has implemented this decision. Moreover, the Ombudsman asked how Frontex ensures that its staff members comply with the principles laid down in the Code.

12. Frontex informed the Ombudsman that, on 21 May 2008, it adopted its own Code of Good Administrative Behaviour (ED Decision 2008/23), in order to implement the Ombudsman's conclusions in his own-initiative inquiry OI/1/98/OV. This Code is based on the Commission's Code of Good Administrative Behaviour for the Staff of the European Commission in their relations with the public. In 2008, in addition to the Code of Good Administrative Behaviour, Frontex adopted another code, the Code of Conduct, which is based on Articles 11 and 11a of the Staff Regulations, aiming at establishing rules on behavioural and professional standards (ED Decision 2008/51 of 1 October 2008).

13. Frontex explained that, in 2011, it also adopted an operational code of conduct, more suited to its core business and containing "do-do not"



provisions, namely the Code of Conduct for all persons participating in Frontex activities (ED Decision 2011/24 of 22 March 2011), which also applies to Member States' Guest Officers participating in operational activities of the Member States coordinated by Frontex. Frontex underlined that all participants in its activities at the borders need to realise that they serve the public interest and that they are primarily and individually responsible for their actions. This specific code is based on the Frontex Regulation, as amended.

14. Finally, Frontex indicated that a Code of Conduct for Joint Return Operations is forthcoming.

15. Frontex further stated that its staff members systematically undergo induction training on the four codes mentioned above. Documents confirming participation in such training are kept in Frontex files. Moreover, operational plans refer to the code designed for participants in its border activities.

16. Frontex takes the view that it would be better to avoid the coexistence of four different codes, and for that reason, it is working on a project to merge at least the two of the codes adopted in 2008. This project is at the stage of consultation with the Staff Committee. In this respect, Frontex acknowledged that the merged code should be aligned with the European Code of Good Administrative Behaviour.

17. Frontex stated that the Code of Conduct is published on its website under the section "Publications. General."

18. Finally, Frontex gave concrete examples of application of the four codes. For instance, in the Human Resources Sector, the information on administrative procedures is transparent; enquiries are answered as quickly as possible; all efforts are made to take well-reasoned decisions; and the decisions include information on appeal procedures. As regards Frontex operations, the Code of Conduct for all persons participating in Frontex activities provides that the participants (namely, law enforcement officers of the Member States who have particular responsibilities) shall: (i) abstain from all behaviour likely to compromise the prestige and the nature of the public mission and bring discredit upon their organisation or Frontex; (ii) act with fairness and impartiality in their dealings with public and other participants; (iii) avoid all forms of victimisation or discrimination; and (iv) report violations of the Code to Frontex.

19. The Ombudsman welcomes Frontex's initiative to merge existing codes, and thus simplify its internal rules on good administrative behaviour. This project should help to ensure more efficient administrative procedures and better contacts with the public. He also applauds Frontex for organising training sessions on the codes. The Ombudsman considers that Frontex's commitment to the principles set out in the European Code of Good Administrative Behaviour could be made more visible to Union citizens and, therefore, suggests that Frontex provide links to both that Code and its own Code of Good Administrative Behaviour on the homepage of its website.



(B) Transparency, dialogue and accountability

20. The Ombudsman attaches great importance to the need to promote transparency and to increase accountability in the EU administration. This requirement is reflected in, among others, the EU legislation on public access to documents, which expressly mentions the Ombudsman as a review body. It is also reflected in the Ombudsman's extensive powers of investigation, which enable him thoroughly to clarify the facts and issues which arise during his inquiries.

21. In view of the above considerations, the Ombudsman asked Frontex to provide additional information and to answer the following questions:

"a) I note that Frontex's website does not contain any section on access to documents held by the agency. How does Frontex deal in practice with requests for public access to documents? What are its rules, guidelines and/or practical arrangements for handling such requests? Please provide examples, such as the main correspondence in the Agency's handling of the last three requests for public access to documents dealt with under the relevant Frontex rules and/or Regulation 1049/2001. (The substance of Frontex's decision in these examples will not be examined, as this is not the purpose of this visit.)

b) Does Frontex produce an annual report (internal or external) on its handling of public access to documents?

c) Does Frontex operate, or intend to operate, a public register in the sense of Article 11 of Regulation 1049/2001?

d) Frontex handles a vast amount of information and data. Its website is user-friendly and contains a large volume of data, publications and information relating to Frontex's main activities, more particularly in the "Governance documents". Regulation 1049/2001 strictly speaking only applies to 'documents'. How does Frontex deal with requests for information? Please provide us with information concerning the feedback Frontex's services receive from users and stakeholders regarding access to information."

22. In its presentation on 4 October 2012, Frontex put forward that, apart from maintaining contacts with the general public, it also maintains, through special platforms (networks and one-stop-shops), contacts with stakeholders (the EU Member States border authorities, experts and researchers) and mass media. Therefore, requests for information are dealt with through the above platform and via a special box on its website. In 2011, Frontex received approximately 500 written requests for information from the general public and stakeholders, in addition to approximately 750 written requests from the press. Frontex also receives visitors and it organises visits for press representatives to the operational areas in the Member States hosting its operations.

23. Frontex planned to update, by the end of 2012, the information structure of its website, which will be more user-friendly. A new version of the merged Code of Conduct for Frontex staff will be published, as well as public service principles and explanations on access to documents and information. In this respect, the right to complain to the European Ombudsman will be mentioned.

24. In reply to the questions relating to access to documents, Frontex explained that it deals with all the requests it receives in accordance with Regulation



1049/2001. 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.”*

25. Frontex further explained its administrative circuit for handling requests for access to documents and information submitted by citizens and media.

26. The requests for access to documents are usually submitted electronically, by e-mail. They are first dealt with by the Information and Transparency Sector, which may consult other sectors. The answers are drafted by the Information and Transparency Sector and signed by the Head of the Legal Affairs Unit. This process takes no longer than 15 days. The confirmatory applications are dealt with by the Head of the Legal Affairs Unit. Requests for Frontex documents related to job applications and tenders by the applicants concerned are dealt with in a similar way, by the Human Resources and Procurement sectors, respectively. Frontex receives a small number of requests for access to documents (in 2011, Frontex received and processed 17 official requests for its documents) and full access is given in 80-90% of the requests. Frontex gave examples of the last three requests for access received before the Ombudsman's visit. They were all fully granted in 1 to 5 days. In Frontex's annual General Report, there is a section on “Transparency and access to information”. As of yet, there is no public Register of Frontex documents but there are plans to create one.

27. The Ombudsman notes that the confirmatory applications for access to documents appear to be dealt with by the same person (namely, the Head of the Legal Affairs Unit, who is the Data Protection Officer of the Agency and who also signs the replies to initial applications), and he encourages Frontex to change its practice. The Ombudsman also notes Frontex's plans to start operating a public register of its documents, and would appreciate being informed of the specific date it expects the register to start operating.

28. The Ombudsman applauds the fact that Frontex provides the public with a vast amount of information mainly relating to its core activities, as well as with information regarding financial and organisational matters, on its website. It has adopted a proactive approach to the dissemination of information, principally through online publications, and by organising visits for the press to the countries hosting its operations and by receiving researchers' visits on a regular basis.

29. What the Ombudsman appreciates the most is the fact that Frontex has taken the initiative to improve its already good and citizen-friendly website. He



trusts that Frontex's new website will contain, **on the homepage**, information concerning: (i) how to submit requests for access to documents and requests for information; (ii) the rules applicable to such requests and who is the responsible contact person; and, as promised, (iii) the citizens' right to complain to the Ombudsman. The Ombudsman trusts that this process of improvement will continue and that Frontex will consider making available in all 23 EU official languages at least the homepage of its website, as well as information concerning its functions and language policy. Frontex could thus follow OHIM's good practice in this respect. By greeting citizens who visit the website in their own language and by explaining its functions to them, Frontex would demonstrate clearly that it recognises that all citizens of the European Union have a legitimate interest in its work.

(C) Selection and recruitment

30. With regard to the substance of selection and recruitment decisions, the Ombudsman takes an approach similar to that of the Court of Justice of the EU. This means, among others, that he recognises the administration's wide discretionary powers in selecting its staff. With regard to the procedural aspects of selection and recruitment, the Ombudsman has very actively worked to increase transparency in EU recruitment. His efforts have, for instance, led to enhanced transparency regarding the names of members of selection boards, and more detailed evaluation sheets providing candidates with a better insight into how they were assessed.

31. The Ombudsman noted that Frontex publishes on its website information on its recruitment policy and its recruitment procedures for temporary agents and contract agents (Frontex has no permanent officials). The Ombudsman asked Frontex to provide clarifications on the following issues:

"a) How does Frontex ensure effective communication with candidates to selection procedures concerning the status of their applications and/or the outcome of the selection procedure?"

b) Are the names of selection board members known to candidates? To what extent does Frontex provide job candidates with access to the assessments of their applications?"

c) To what extent does Frontex seek quicker and less formal means of resolving disputes over selection and recruitment decisions than the ones foreseen in Article 90 of the Staff Regulations?"

d) Does Frontex systematically inform candidates in its correspondence that they may complain to the Ombudsman, as provided for in Article 19 of the European Code of Good Administrative Behaviour?"

32. Frontex provided information regarding its recruitment and selection procedures, which are based on the Staff Regulations and Conditions of employment of other Servants, and Frontex internal rules, which are as follows. In 2009, the Executive Director issued two decisions on the procedure governing the engagement and use of (i) temporary staff, and (ii) contract staff. Again, in 2009, the Management Board decided on the rules for national experts seconded to Frontex. On 18 November 2010, Frontex adopted Administrative



Notice No 46/2010 establishing its internal policy on the procedures applicable to the recruitment and selection of temporary and contract staff at Frontex.

33. The entire process of selection takes approximately 4 to 6 months. Candidates are informed about Frontex's open calls for applications on its website and on EPSO's website. For specialised posts and exceptionally, external sources of publication may also be used. The vacancy notice contains defined job duties and requirements.

34. Frontex pointed out a number of measures rendering the selection procedure transparent. For each selection procedure, a selection committee is established ("the Selection Committee"). The Selection Committee is established at the same time or immediately after the vacancy notice is published, and it includes a representative of the Staff Committee. The members of the Selection Committee must sign a declaration of confidentiality and a declaration confirming the absence of any conflict of interest. They apply the selection criteria shown in the vacancy notice and decide on the content of interviews and tests before the names of candidates are made known to them. The Human Resources Recruitment team, which is responsible for checking the eligibility of the applications, presents to the Selection Committee all the applications received, and discusses and verifies with it all non-eligible candidates. The applications are subsequently screened by the Selection Committee, and a list of candidates shortlisted for interviews/tests is drawn up. After conducting interviews and other tests, the Selection Committee agrees on the marks on each of the selection criterion (of a professional and personal nature) according to a pre-established assessment grid ("interview evaluation report"). Subsequently, it recommends the selected candidates and a reserve list of shortlisted candidates to the Executive Director. The latter may ask for additional interviews before making the appointment decision. Information on each stage of the procedure is provided on Frontex's website. Each candidate may receive feedback on a specific step of the recruitment procedure concerning him or her upon request. Candidates invited for interview are informed about the outcome. For this purpose, Frontex uses templates of letters for selected candidates, for candidates put on the reserve list and for candidates who have not been selected. These letters do not contain candidates' evaluation sheets and/or marks.

35. Each vacancy notice describes the appeal procedure provided for in the Staff Regulations (Article 90(2)). Frontex does not inform candidates about their right to either lodge a complaint with the Ombudsman or bring a case before the Civil Service Tribunal.

36. In this regard, the Ombudsman wishes to encourage Frontex to inform individuals of the two aforementioned possibilities for challenging an unfavourable decision. In addition, the Ombudsman underlines the importance of the review procedure, which allows the selection board concerned to correct its own decision before any contentious procedure starts.

37. Frontex further stated that the names of the members of its selection boards are not disclosed or made public. Only candidates invited for an interview are



informed of the composition of the board. It explained that non-disclosure aims to protect the selection board from outside pressure. It noted that staff members would hesitate to participate in selection boards if their names were publicly known, which would consequently make the recruitment processes less efficient. Having this in mind, Frontex is rather hesitant to disclose this kind of personal data to the public.

38. In this respect, the Ombudsman points out that disclosure of the names of selection board members would be in line with the Court's case-law on the matter. The secrecy of the deliberations and proceedings of selection boards was introduced with a view to guaranteeing the independence of these boards and the objectivity of their proceedings. It protects them from all external interference and pressures⁷. Observance of this secrecy therefore precludes the disclosure of the views adopted by individual members of selection boards. However, the Ombudsman has consistently taken the view that the right to keep secret the individual views of selection board members is not the same as keeping their identities secret⁸.

39. The Ombudsman was therefore pleased to see, that during the discussion, Frontex did not definitively exclude the possibility of making the names of the members of the selection board public, but rather just shared its hesitation in this respect. Indeed, the established practice within both EPSO and the Commission is to disclose the names of selection board members. In the Ombudsman's view, such a practice guarantees transparency in selection procedures; helps to build and maintain public trust in the EU institutions, bodies, offices and agencies; and reassures candidates that the selection procedure has not been vitiated by conflicts of interest. In light of the above, the Ombudsman trusts that Frontex will adopt a decision that the names of selection board members may be disclosed on its website as regards each selection procedure.

40. In addition, he suggests that the relevant letters to candidates concerning the outcome of the selection procedure include: (i) for each candidate, his or her own marks in interviews/written tests; (ii) information on Frontex's internal review procedure; and (iii) for unsuccessful candidates, information on their right to complain to the Ombudsman. In addition, candidates could be informed that they may lodge an administrative complaint pursuant to Article 90(2) of the Staff Regulations and turn to the EU Civil Service Tribunal. The same information, in general terms, could be provided on the relevant section of Frontex website as regards each selection procedure launched.

⁷ See, for example, Case 89/79 *Bonu v Council* [1980] ECR I-553, paragraph 5.

⁸ Decision of the European Ombudsman closing his inquiry into complaint 2586/2010/(ML)TN against the European Personnel Selection Office (EPSO). See also Decision of the European Ombudsman closing his inquiry into complaint 3115/2009/RT against the European Commission; Special Report by the European Ombudsman to the European Parliament following the own-initiative inquiry into the secrecy which forms part of the Commission's recruitment procedures (1004/97/(PD)GG); and Decision of the European Ombudsman on complaint 674/2004/(MF)PB against the European Commission and the European Personnel Selection Office.



(D) Tenders and contracts

41. At the review level, disputes in relation to tender decisions and contractual relationships are most commonly dealt with by the courts. However, over the years, a significant proportion of the Ombudsman's cases has concerned these areas as well. In relation to tenders, the Ombudsman draws inspiration from the Court of Justice's approach, which is to recognise the administration's broad discretionary powers in assessing the substantive aspects of tender proposals, while carefully checking whether it committed a manifest error of assessment, whether it gave valid and adequate reasons for its decisions, and whether it adequately respected applicable procedures and information rights. In relation to contractual disputes, the Ombudsman does not, as such, assess whether there is a breach of contract. He does, however, thoroughly examine whether the administration provided good reasons for its position, and also looks into the fairness of administrative actions or omissions.

42. In view of the above, the Ombudsman wished to be informed of how Frontex handles disputes in relation to these areas.

43. Frontex presented the main elements of the procedure it follows in tender cases. It informed the Ombudsman that its procedure is based on Frontex Financial Regulation, whose Article 74 refers to the provisions of the Financial Regulation⁹ and the Implementing Rules¹⁰. In addition, its procedures are guided by the Commission's relevant Vademecum. Frontex ensures respect for the principles of transparency and equal treatment by making sure that all tenderers are given information simultaneously. Its procedures are fair and transparent.

44. The forms used to inform tenderers about the assessment of their bids are based on the Commission's relevant templates. There is no information on the possible review of the tender procedure by the European Ombudsman. Such information appears neither in the contract award notice for all open procedures nor in the relevant section of Frontex website. When tenderers make requests for additional information, Frontex provides them with the specific grounds for the rejection of their bid. Frontex deals with requests for further information concerning tenders and contracts as requests for access to documents.

45. When a dispute occurs with a contractor, Frontex applies the rule "clarifications and negotiations first, legal steps later". The contractors may present their views to Frontex, before they take any legal steps. Mediation is possible if previously agreed on in the contract. During the discussion and in reply to a question from the Ombudsman concerning Frontex's practices

⁹ Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ 2002 L 248, p. 1, as amended.

¹⁰ Commission Regulation 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ 2002 L 357, p. 1.



regarding subcontractors who may not always be paid on time by Frontex's contractors, Frontex indicated that, in such situations, it will envisage entering into informal contacts with the contractor and thus intervening.

46. The Ombudsman appreciates that Frontex's tender and contract procedures are fair and, in particular, that there is an internal review procedure. He underlines the importance of giving the Frontex tenderers and contractors a choice of complaining to the Ombudsman. For that reason, all three, that is to say, the relevant section of the Frontex website, the contract award notice for all open procedures and Frontex letters to rejected tenderers, could contain information on his role in receiving complaints.

(E) Ethical issues

47. The Ombudsman examines ethical issues under the following broad subheadings: first, the Public Service Principles; second, conflicts of interest; and, third, whistle-blowing.

Public Service Principles

48. On 19 June 2012, the Ombudsman published the Public Service Principles for the EU Civil Service¹¹. His main aim in publishing the principles was to help build greater trust between citizens and the EU institutions. The principles take account of best practice in the Member States and were established following an extensive period of reflection and public consultation. As the public consultation confirmed, the public service principles are not new, but represent existing expectations of citizens and civil servants. They constitute the fundamental ethical standards that govern the conduct of EU civil servants. The principles also guide them towards the right decision in situations where they should exercise judgment. As such, they constitute a vital component of the administrative culture of service to which the EU institutions adhere.

49. In its presentation on this subject, Frontex referred to its Values, established in 2010, which largely correspond to the Public Service Principles published by the Ombudsman. The Values are: Humanity, Open Communication, Professionalism, Teamwork and Trustworthiness. These five values form the foundation of Frontex activities at all levels. They must be endorsed, shared, lived and performed by its staff and respected by its partners. The Values are described in Frontex's key documents such the Multi-Annual Plan, the Programme of Work, etc. During training on the Code, the Values are also discussed. In 2012, Frontex organised a workshop on ethics for its staff.

50. The Ombudsman acknowledges Frontex's adherence to high ethical standards. The Ombudsman also encourages Frontex to make its Values and the Public Service Principles published by the Ombudsman available on its website. That way, citizens would be informed that Frontex subscribes to those principles.

¹¹ <http://www.ombudsman.europa.eu/en/resources/publicserviceprinciples.faces>



Conflicts of interest

51. Conflicts of interest arise when persons who work for the public administration may be perceived as having an inappropriate personal interest in a matter with which they are dealing. Such conflicts need to be handled appropriately in order to ensure objective decision-making, and to enhance the public's trust in the administration. Recent events and cases show that the EU administration does not enjoy the public's full confidence in relation to this issue.

52. The Ombudsman asked Frontex to provide information concerning the concrete measures it applies in order to avoid conflicts of interest in relation to the following areas: (i) recruitment of staff, including senior staff, and (ii) current and former staff members, in particular, regarding external activities during and after their service at Frontex, in reference to Articles 11, 11a, 12b, and 16 of the Staff Regulations.

53. In its presentation, Frontex pointed out that its Administrative Notice 36/2012 provides guidance on how to understand the concept of conflict of interest. In practice, Frontex ensures that new staff members, selection committee members in the staff recruitment procedures and evaluation committee members in the tendering process sign a declaration confirming that they have no conflict of interest. Frontex plans compulsory training on ethics and conflicts of interest made up of: a general overview of ethics in the framework of the EU administration, and ethics and conflicts of interest in the specific context of Frontex (its mandate, tasks, mission and values). Case studies, examples and simulations are provided. Finally, Frontex pointed out that there is an Internal Control Standards assessment¹².

54. The Ombudsman has stated on several occasions that EU institutions, bodies, offices and agencies should do their utmost to avoid not only actual, but also apparent conflicts of interest, in order to maintain public trust and confidence in their activities and to protect their staff from unjustified suspicion. The Ombudsman is satisfied to see that Frontex has adopted an internal guidance for its staff on how conflicts of interest should be identified and avoided. This constitutes an example of good administrative practice. The Ombudsman also notes that Frontex has developed templates for the Declarations of Conflicts of Interest (DoI) for members of the tenders evaluation committees and selection committees in the selection procedures, in addition to DoI for members of its staff. In this regard, it would clearly be appropriate if Frontex could develop specific templates of DoI for the Executive Director, the Deputy Executive Director and seconded national experts, and could ensure that the DoI of the Executive Director and the DoI of the Deputy Executive Director are made available on its website.

¹² IN 2009, Frontex adopted its Internal Control Standards, one of which covers "Ethical and organisational values."



Whistle-blowing

55. The Ombudsman asked Frontex to provide information concerning any arrangements it has in place for internal whistle-blowing and concerning any whistle-blowing cases. He pointed out that Articles 22a and 22b of the Staff Regulations are commonly referred to as the 'whistle-blower provisions'. These provisions have a twofold structure consisting of (a) a duty to report serious wrongdoings to the whistle-blower's own institution or, under certain conditions, to OLAF, and (b) a right also to report the matter to the office-holders of certain other EU institutions, provided that whistle-blower has complied with specific requirements¹³. Articles 22a and 22b define the circumstances in which whistle-blowers are protected against retaliation by the institution for which they work. According to Article 22a, the institution concerned is not permitted to take action to the detriment of the official who disclosed the information, if he or she has acted reasonably and honestly. Article 22b extends this protection to the official who further discloses information to one or more of the five office-holders mentioned therein, that is, to the President of the European Parliament, Commission, Council, Court of Auditors, or the European Ombudsman.

56. In its presentation, Frontex put forward that the concept of whistle-blowing is understood by Frontex as having two dimensions: (i) the staff's duty to report serious misconduct and illegal activity, and (ii) the administration's duty to guarantee the whistle-blowers' protection from adverse consequences. Frontex implements this concept through five "channels": (i) the data protection provisions (Decision of the Executive Director dated 8 September 2008 adopting implementing rules concerning data protection at Frontex); (ii) the administrative and disciplinary rules (Decision of the Management Board dated 27 September 2012 adopting Frontex administrative and disciplinary rules, which provides, among others, that the accused person has access to the file without prejudice to "the legitimate interests of the third parties" and that the identity of whistle-blowers should be kept confidential); (iii) the procedure on "Reporting suspected improprieties"; (iv) the "draft" anti-harassment procedure; and (v) Decision No 2005/17 of the Management Board.

57. Frontex elaborated on its document published on 18 January 2010 and entitled "Reporting on suspected improprieties". This document describes the procedure applicable in cases of whistle-blowing and provides guidance to the staff ("the Guidance"). This Guidance is discussed in the induction training for new staff and in the special workshop on ethics. It is inspired by Articles 22(a) and 22(b) of the Staff Regulations. Any member of Frontex staff (including the seconded national experts) has the duty to report the evidence/facts suggesting possible (i) illegal activity, including fraud or corruption, detrimental to the interests of Frontex or the EU, and (ii) serious failure to comply with the

¹³ Namely, the official (a) honestly and reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and (b) has previously disclosed the same information to OLAF or to his own institution and has allowed sufficient time for appropriate action.



professional obligations of Frontex. The whistle-blowers will be protected from adverse consequences if they could not have "been expected to realise" that their concerns could be unfounded. In cases of doubt, staff could consult the Chief Legal Adviser and/or the Internal Audit Capability. The Guidance indicates the order in which the administrative hierarchy should be informed about suspected irregularities, before approaching the Management Board and OLAF. It summarises the follow-up to be given by the administration and obligations of OLAF as regards the information concerning suspected irregularities. In addition, the Guidance recalls that, if OLAF does not take appropriate action within a reasonable period of time, whistle-blowers have the right to bring their concerns to the Institutions mentioned in Article 22 (b) of the Staff Regulations (including the European Ombudsman). The Guidance contains a warning that *"the staff members' duties of discretion and of loyalty imply that reporting serious improprieties beyond these institutions (e.g. to the press) is not permitted."*

58. Frontex also informed the Ombudsman that, in 2005, its Management Board decided on the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to EU interests. Article 2 of this decision provides that whistle-blowers must *"in no way suffer inequitable and discriminatory treatment as a result of having communicated the information."* Frontex concludes that it provides "an effective whistle-blowing procedure."

59. The Ombudsman agrees with this conclusion. In particular, he applauds the fact that Frontex provides its staff with detailed guidance on the interpretation of Article 22a and 22 b of the Staff Regulations. He suggests that Frontex could complete its already comprehensive Guidance by informing its staff, that in cases where they decide to turn to the Ombudsman by virtue of Article 22 b of the Staff Regulations, he will deal with their concerns in the same procedural way as he deals with complaints. As regards the draft Manual of procedures for the application of the implementing rules on the Frontex policy protecting the dignity of the person and preventing psychological harassment and sexual harassment, which was mentioned by Frontex in its presentation to the Ombudsman on whistle-blowers, he encourages Frontex to adopt the relevant rules without delay.

Summary of the Ombudsman's suggestions

60. On the basis of his visit and the information provided to him by Frontex, the Ombudsman makes the following suggestions:

- a) Frontex could make its commitment to the principles set out in the European Code of Good Administrative Behaviour more visible to Union citizens by providing a link to its own Code of Good Administrative Behaviour and to the European Code of Good Administrative Behaviour on the homepage of its website.
- b) Frontex could already include, on the homepage of its new website, information concerning: (i) how to submit requests for access to documents and



requests for information; (ii) the rules applicable to such requests and the responsible contact person; and, as promised, (iii) the citizens' right to complain to the Ombudsman.

c) The Ombudsman appreciates Frontex's plan to start operating a public register of its documents. He trusts that this will be done without delay.

d) Frontex could consider making arrangements to ensure that confirmatory applications for access to documents are not dealt with by the same persons as the initial applications.

e) Frontex could consider making available in all 23 EU official languages, at least the homepage of its website, as well as information concerning its functions and language policy.

f) Frontex could consider adopting a decision that the names of selection board members may be disclosed on its website as regards each selection procedure¹⁴.

g) Frontex could consider adopting an internal review mechanism for unsuccessful candidates who complain about the selection procedures. A similar procedure could be adopted, *mutatis mutandis*, for unsuccessful applicants in tender procedures.

h) The letter informing a candidate about the outcome of a selection procedure could include the candidate's own marks in interviews/written tests and the individual evaluation sheet. Such information should at least be provided upon request.

i) In addition to the above information, the letter addressed to unsuccessful candidates could also include information on Frontex's internal review procedure and on their right to complain to the Ombudsman. Finally, candidates could be informed that they may lodge an administrative complaint pursuant to Article 90(2) of the Staff Regulations and turn to the EU Civil Service Tribunal. The same information, in general terms, could be provided on the relevant section of Frontex's website as regards each selection procedure.

j) The relevant section of the Frontex website containing information on the contract award notice for all open procedures and Frontex letters to rejected tenderers could contain information on the European Ombudsman's role in receiving complaints.

k) The Frontex Values and the Public Service Principles published by the Ombudsman could be made available on Frontex's website.

¹⁴ Draft recommendation of the European Ombudsman in his own-initiative inquiry OII/4/2012/CK concerning the European Centre for the Development of Vocational Training (Cedefop), available at <http://www.ombudsman.europa.eu/en/activities/visitreport.faces/en/12072/html.bookmark>



l) Frontex could develop specific templates of Declarations of Conflicts of Interest for the Executive Director and top management and it could ensure that the above declarations are made available on its website.

m) Frontex could develop specific templates of Declaration of Conflicts of Interest for its seconded national experts.

n) Frontex could complete its already comprehensive guidance in the document entitled "Reporting on suspected improprieties", published on 18 January 2010, with the information that, in cases where a staff member decides to turn to the Ombudsman by virtue of Article 22b of the Staff Regulations, the Ombudsman will deal with his or her concerns in the same procedural way as when dealing with complaints.

o) As regards the draft Manual of procedures for the application of the implementing rules on the Frontex policy protecting the dignity of the person and preventing psychological harassment and sexual harassment, which was mentioned by Frontex in its presentation on whistle-blowers, the Ombudsman encourages Frontex to adopt the relevant rules without delay.

I would appreciate if Frontex could report back to me by 30 April 2013 on its follow-up to the suggestions listed above.

Nikiforos Diamandouros

Done in Strasbourg on 07 -02- 2013