

Frontex return flights. The European Ombudsman's perspective

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I. Own initiative inquiries (OII) concerning Frontex

Article 228 TFEU: The European Ombudsman may investigate maladministration by Frontex.

No complaints but two (so far) clarification OIIs - how Frontex ensures respect for human rights in its activities.

With Regulation 1168/2011 Frontex's activity has turned from pure border management (generally considered as a threat to fundamental rights) into a broader mandate including the protection of human rights.

- OII 2012 (implementation of fundamental rights obligations provided for in Regulation 1168/2011 - the Ombudsman's recommendation for the implementation of an individual complaints mechanism- special report to the European Parliament)
- OII 2014 (exclusively about Joint Return Operations by air).

2014 FIGURES: Frontex returned **13633** people.



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II. OII 2014 concerns respect of fundamental rights and human dignity of individuals being returned.

Frontex legal basis: Article 9 Regulation 1168/2011

Return cooperation

1. Subject to the return policy of the Union, and in particular Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (), and **without entering into the merits of return decisions**, the Agency shall provide the necessary **assistance**, and at the request of the participating Member States ensure the **coordination** or the **organisation** of joint return operations of Member States, including through the chartering of aircraft for the purpose of such operations. The Agency shall finance or co-finance the operations and projects referred to in this paragraph with grants from **its budget** in accordance with the financial rules applicable to the Agency. The Agency may also use financial means of the Union available in the field of return. **The Agency shall ensure that in its grant agreements with Member States any financial support is conditional upon the full respect for the Charter of Fundamental Rights.***



Article 9 of the Frontex Regulation - continued

1a. The Agency shall develop a **Code of Conduct** for the return of illegally present third-country nationals which shall apply during all joint return operations coordinated by the Agency, describing common standardised procedures which should simplify the organisation of joint return operations and **assure return in a humane manner and with full respect for fundamental rights**, in particular the principles of human dignity, prohibition of torture and of inhuman or degrading treatment or punishment, the right to liberty and security and the rights to the protection of personal data and non-discrimination.

1b. The Code of Conduct shall in particular pay attention to the obligation set out in Article 8(6) of Directive 2008/115/EC to provide for an effective forced-return monitoring system and to the Fundamental Rights Strategy referred to in Article 26a(1) of this Regulation. **The monitoring of joint return operations should be carried out on the basis of objective and transparent criteria and cover the whole joint return operation from the pre-departure phase until the hand-over of the returnees in the country of return.**



III. PROCEDURE

- The Ombudsman's opening questions to Frontex;
- Opinion by Frontex and its Fundamental Rights Officer;
- Inspection of Frontex files;
- Contributions from the European Network of Ombudsmen;

As many national ombudsmen have a role to play in JROs, either as monitoring bodies or dealing with complaints, the European Ombudsman asked members of the European Network of Ombudsmen for their input:

*Possible **parallel inquiries** in relation to the monitoring of return operations? What is the ombudsmen **experience** in monitoring? Greater **cooperation** among monitoring bodies would be feasible and desirable?*

*Could better results be achieved by avoiding duplication of monitoring bodies on flights, while also ensuring that **every flight** actually includes a monitoring body?*

Replies from the *Committee on Petitions of the German Bundestag*, the *Regional Ombudsman of the German Land Schleswig–Holstein* and **19 national Ombudsmen**;

- Public consultation on specific issues related to the opinion: Comments from FRA, the UN High Commissioner for Refugees and number of NGOs;
- Closure and Decision - eight proposals for improvement;
- Frontex should reply to the proposals by the end of 2014.



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IV. OBJECTIVES/SCOPE

The Ombudsman wished to establish whether there is scope for :

1. Greater **clarity** as to what Frontex could and should do concretely if fundamental rights violations threatened to occur or occurred during a JRO/ The Code of Conduct for JROs provides for sufficient standards? Could Frontex publish standards for escorts' behaviour as an annex to the Code of Conduct for JROs? Complaints mechanism accessible to returnees? Collecting JROs?

2. BETTER MONITORING: more **effective** (only about half of JROs that have taken place so far have involved independent monitors physically present on board); more **comprehensive** (no common criteria on monitoring so far); more **transparent** monitoring (in relation to how the reports drafted by monitors are taken into account by Frontex); greater **cooperation** among monitoring bodies (at present, there are JROs in which several national monitors each accompany "their" returnee. It is questionable whether this duplication is necessary or effective).

3. Enhanced transparency (documents concerning JROs to be published on the website).

4. The improvement of the Code of Conduct for JROs.

5. *Since opening this inquiry, the situation regarding those seeking to enter the EU has become even more desperate. On 20 April 2015 the European Commission announced a Ten point action plan on migration which included, at Point 8, "Establish a new return programme for rapid return of irregular migrants coordinated by Frontex from frontline Member States". Given the enhanced role proposed for Frontex, this own-initiative inquiry has taken on even more relevance and urgency.*



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V. Identified problems

1. Shared responsibility with the Member States- what Frontex's assisting and coordinating roles mean in terms of protection of returnees' fundamental rights in JROs?

(i) Proactive and Reactive behaviour should be required from Frontex.

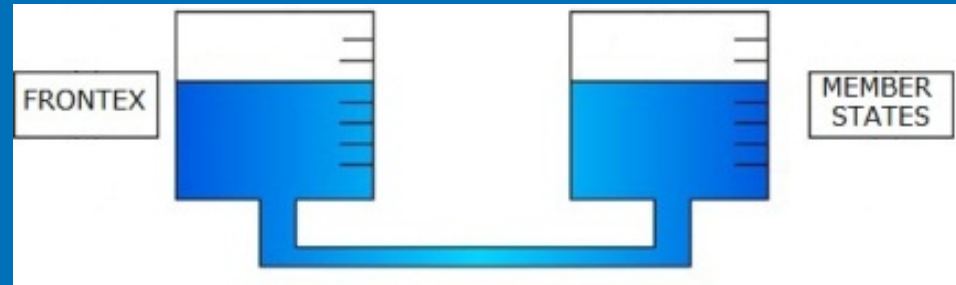
(ii) Frontex is participating in the decision-making; it engages financial and material resources in the JROs: its role is thus not limited to pure coordination.

(iii) Article 9(1) of the Frontex Regulation provides that any financial support from Frontex for the purpose of JROs is conditional upon full respect for the Charter of Fundamental Rights

2. Collecting JROs.



3. The quality of monitoring



- (i) “Representative monitoring” only possible if the information on means of restraint in each Member State is accessible ;
- (ii) A pool of monitors from NGOs or other fundamental rights bodies and independence of monitors;
- (iii) Lack of criteria for independent and efficient monitoring.

4. Article 13.2. of the Code of Conduct – “MSs taking part in a JRO are required to ensure that they have in place an effective forced return monitoring system. Failing to meet this condition could ultimately lead to postponement or cancellation of the participation of the respective MS” .



VI. The Ombudsman's proposals for Frontex improvement

A) Adopt and publish a document describing the actions its **representatives** may take during a joint return operation (JRO) in situations of human rights violations or ill-treatment before or during the flight. This could be included in its *Best practices on JROs* or issued as a separate publication.

B) Produce a **complaint** form for returnees, as well as an information sheet about the complaints procedure, drafted in cooperation with the Member States; co-finance translations of these documents into the most frequently used languages. The information should include contact details of agencies or individuals who might assist returnees to submit a complaint when they are back in the country of return, for example NGOs, *pro bono* lawyers, and third country ombudsmen.

C) Support projects aimed at documenting **the means of restraint** allowed for return operations in each Member State or launch such a project itself; list those restraint means to which it would never agree in a JRO, and make these documents public.



D) Establish a requirement in the JRO Implementation Plan, and scrutinise compliance with it, that families with **pregnant women** and families with **children** are enabled to board the aircraft separately and are seated separately from other returnees.

E) Require, in the pre-JRO procedure, that the compulsory **physical presence of monitors** in the JRO is dealt with in the relevant documents (namely, in the offer of a return flight, the Conditions attached to the acknowledgement of the offer and in the Implementation Plan). Frontex could also make the plan for upcoming JROs public, at least one week in advance, and make it clear on its website that it pays for monitors' presence in the JRO; Frontex could, finally, prepare and publish country sheets on the allowed use of means of restraint in each Member State and provide training for monitors in this respect.

F) Require in the JRO Implementation Plan (or Conditions) that monitors' reports are forwarded to Frontex; **publish on its website**: Frontex's JRO Evaluation Reports, including monitors' observations and Frontex recommendations; the section of the JRO Implementation Plan, which refers to the agreed use of means of restraint; Frontex *Best Practices for JROs*; monitors' reports.



G) Ensure that fundamental rights are respected in so-called **Collecting JROs**; in particular, explain publicly (i) the legal framework for Collecting JROs, including the working arrangements with third countries concluded in accordance with Article 14(2) of the Frontex Regulation, and (ii) how Frontex complies with its own human rights obligations in fulfilling its role as coordinator of Collecting JROs.

H) Revision of the Code of Conduct:

-Article 5 (*Cooperation with returnees*) aims to avoid, or limit to the minimum extent necessary, 'the use of force'. However, this concept is **not explained** in the Code and its application is not sufficiently precise.

-Article 5(2) Member States should be required to give sufficient and clear information to returnees about the JRO, including the possibility to lodge a complaint concerning alleged **ill-treatment** during the operation. The Code should **extend the complaints' scope** to all violations of rights under the Charter and provide for clear guidelines on the complaints mechanism.

-Article 6(2) (*Use of coercive measures*) should require taking appropriate account of the **individual circumstances** of each person such as their vulnerable condition (children, persons with disabilities, HIV positive persons).



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- Article 7 (*Fitness to travel and medical examination*) should require that all returnees be **examined shortly before the flight** and specify the time of this medical examination. It should also limit access to medical information of returnees to medical staff only.
- Article 8(3) (*Escorts*) should require that **escorts undergo training on human rights with a focus on** people with disabilities, women and children.
- Article 9 (*Identification*) should specify that all JRO staff be individually **identifiable by name or identification number** (for example, on a badge). This should facilitate the submission of complaints by returnees and help ensure proper accountability.
- Article 10(1) (*Recording*) should include a disclaimer to the effect that **monitors do not need permission** from the Organising Member State (OMS), Participating Member States (PMSs), Frontex or the company operating the means of transport to photograph, film or record JROs.
- Article 11 (*Medical staff and interpreters*) should ensure that the JRO medical doctor be provided with **full medical record of all returnees**.
- Article 17(3) (*Information procedure and Right to be informed*) should oblige the Frontex Executive Director to **request information from the Member States on the conduct and results of their investigation into the violation of fundamental rights** to ensure both a binding follow-up mechanism and an assessment of the right to an effective remedy and reparation for JRO returnees.



X. Conclusion

Frontex has proven to be a tool that improves the respect for fundamental rights in the JROs. The evolution is, however, not yet complete.

Standards need further development and effective implementation. Transparency should be enhanced.

