Draft recommendation

of the European Ombudsman in his own-initiative inquiry OI/5/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex)

The background to the own-initiative inquiry

1. Article 228 of the Treaty on the Functioning of the European Union empowers the European Ombudsman to conduct inquiries on his own initiative into the activities of the Union institutions, bodies, offices or agencies.

2. On 1 December 2009, by virtue of the entry into force of the Treaty of Lisbon, the Charter of Fundamental Rights of the EU became legally binding on Frontex, which is an EU agency.

3. Subsequently, following extensive discussions and in response to concerns and expectations voiced by civil society, on 25 October 2011, the European Parliament and the Council adopted Regulation 1168/2011/EU ('the Regulation')[1], which further enhances the role of Frontex and explicitly provides that it shall fulfil its tasks in full compliance with the Charter of Fundamental Rights. The Regulation requires Frontex to put in place certain administrative mechanisms and instruments to promote and monitor compliance with its obligations as regards respect for fundamental rights.

4. In view of the new legal framework under which Frontex operates and the considerable interest taken by civil society in the EU's management of external borders, including its fundamental rights dimension, the Ombudsman considered it useful to seek to clarify, by means of an own-initiative inquiry, how Frontex implements the above-mentioned provisions.

[1] Regulation (EU) No 1168/2011 of the European Parliament and the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ 2011 L 304, p. 1.

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The subject matter of the inquiry

5. In his letter opening the present inquiry, the Ombudsman referred to Article 26a of the Regulation[2] and asked Frontex to inform him of its position regarding the following five items.

1 The Fundamental Rights Strategy

(i) What is the current state of affairs as regards the adoption of Frontex's Fundamental Rights Strategy?

(ii) Which measures has Frontex taken, or envisages, to put in place an effective mechanism for monitoring respect for fundamental rights in Frontex's activities?

(iii) Taking into account that Frontex is involved in coordination and support activities on the territory of the Member States, could Frontex please explain its understanding, possibly also by way of examples, of the reference to "all the activities of the Agency", referred to in Article 26a(1) of the Regulation?

(iv) Does Frontex consider that the development of an effective mechanism for monitoring fundamental rights should include a complaints mechanism for persons affected by Frontex's activities? (*See also 3 (ii) and 5 (ii) below*).

2 Codes of Conduct

The Regulation provides for the adoption of Codes of Conduct applicable to all operations, such as a code concerning (a) procedures intended to guarantee the principle of the rule of law and respect for fundamental rights and (b) the return of third country nationals who are physically present in EU Member states without valid documents.

(i) Could Frontex please explain how it sees the relationship (a) between its Fundamental Rights Strategy (see point 1 above) and these codes of conduct; and (b) among the different codes themselves?

[2] Art 26a of the Regulation reads as follows:
"*1. The Agency shall draw up and further develop and implement its Fundamental Rights Strategy. The Agency shall put in place an effective mechanism to monitor the respect for fundamental rights in all the activities of the Agency.*
2. A Consultative Forum shall be established by the Agency to assist the Executive Director and the Management Board in fundamental rights matters. The Agency shall invite the European Asylum Support Office, the Fundamental Rights Agency, the United Nations High Commissioner for Refugees and other relevant organisations to participate in the Consultative Forum. On a proposal by the Executive Director, the Management Board shall decide on the composition and the working methods of the Consultative Forum and the modalities of the transmission of information to the Consultative Forum.
The Consultative Forum shall be consulted on the further development and implementation of the Fundamental Rights Strategy, Code of Conduct and common core curricula.
The Consultative Forum shall prepare an annual report of its activities. That report shall be made publicly available.
3. A Fundamental Rights Officer shall be designated by the Management Board and shall have the necessary qualifications and experience in the field of fundamental rights. He/she shall be independent in the performance of his/her duties as a Fundamental Rights Officer and shall report directly to the Management Board and the Consultative Forum. He/she shall report on a regular basis and as such contribute to the mechanism for monitoring fundamental rights."

(ii) What is the current state of affairs as regards the adoption of these codes of conduct?

3 The Fundamental Rights Officer ('FRO')

(i) What does Frontex consider should be the FRO's precise responsibilities and duties?

(ii) Does Frontex foresee that the FRO could be competent to receive complaints from individuals concerning respect for fundamental rights by Member States and/or Frontex?

(iii) Has the Management Board already appointed the FRO and, if not, what is the procedure and the timeframe for doing so?

4 European Border Guard Teams/The Coordinating Officer

The Regulation refers to European Border Guard Teams and requires that they shall, in the performance of their tasks and the exercise of their powers, fully respect fundamental rights.

(i) Given that these teams appear to be composed of representatives of both Frontex and the Member States, who will be responsible for possible failures of these teams fully to respect fundamental rights, and

(ii) What is the role of the Coordinating Officer in this respect?

5 Termination of joint operations and pilot projects

Pursuant to Article 3(1a) of the Regulation, Frontex may, after informing the Member State concerned, terminate joint operations and pilot projects if the conditions to conduct those joint operations or pilot projects are no longer fulfilled. The Executive Director shall suspend or terminate, in whole or in part, joint operations and pilot projects if he or she considers that violations of fundamental rights or international protection obligations are of a serious nature or are likely to persist.

In light of these provisions:

(i) Could Frontex please explain what procedures and criteria it will use to identify possible violations of fundamental rights or of international protection obligations which are of a serious nature, or are likely to persist?

(ii) Does Frontex envisage establishing a mechanism by which (a) persons claiming to be affected and/or (b) other persons, may complain to Frontex about violations of fundamental rights or international protection provisions?

(iii) In case the Executive Director decides to suspend or terminate an operation or pilot project, which other steps could Frontex, in line with its mandate, envisage to help remedy the detected violations of fundamental rights and international protection obligations?

The inquiry

6. On 6 March 2012, the Ombudsman opened the present own-initiative inquiry and requested an opinion from Frontex by 31 May 2012. To the extent that Frontex had already adopted the policies, procedures and codes mentioned in points 1 and 2 above, he asked Frontex to provide him with copies thereof. In his opening letter, the Ombudsman also informed Frontex that, during his inquiry, he could consider publishing Frontex's opinion on his website in order to give interested third parties the opportunity to make observations. He

moreover pointed out that he had decided to inform the national ombudsmen who are members of the European Network of Ombudsmen of his inquiry.

7. Frontex submitted its opinion on 17 May 2012.

8. On 18 June 2012, in view of the subject matter of his inquiry and the specialised mandate of the European Union Agency for Fundamental Rights (henceforth referred to as 'FRA'), the Ombudsman forwarded Frontex's opinion to that agency and invited it to submit any comments by 30 September 2012.

9. On 19 July 2012, the Ombudsman published a statement on his website in which he pointed out that, taking into account the interest which civil society had taken in his inquiry, he considered it appropriate and useful to make Frontex's opinion available on his website. He also stated that he realised that his inquiry raises a number of technical issues which Frontex's opinion addresses in some detail. He moreover indicated that he is aware of the specific interest taken in his inquiry by organisations active in the area of the protection of fundamental rights. In these circumstances, the Ombudsman invited interested parties, and in particular NGOs and other organisations specialised in the area covered by his inquiry, to submit observations on Frontex's opinion by 30 September 2012.

10. Between 20 July and 2 October 2012, the Ombudsman received a total of 18 contributions which were submitted by international organisations, NGOs, a national Ombudsman and private individuals[3]. On 26 September 2012, the FRA submitted comments on Frontex's opinion.

11. The Ombudsman published on his website the full text of the above-mentioned contributions[4] as well as the FRA's comments.

The Ombudsman's analysis and conclusions

Preliminary remarks

12. The Ombudsman notes that, throughout his inquiry, frequent reference has been made to Codes of Conduct concerning Frontex activities. For the sake of clarity, the Ombudsman deems it useful to point out that it is necessary to distinguish between two different Codes of Conduct, namely, (i) a general Code of Conduct for all persons participating in Frontex activities, which has already been adopted (henceforth referred to as the 'Code of Conduct'), and (ii) a Code of Conduct to be adopted specifically for joint return operations (henceforth referred to as the 'Joint Returns Code').

[3] They were, in an alphabetic order: (1) Amnesty International; (2) Caritas Europa; (3) Committee on Migration, Refugees and Displaced Persons of the Parliamentary Assembly of the Council of Europe; (4) Consultative Commission on Human Rights (Commission Nationale Consultative des droits de l'homme - FR); (5) European Network of Legal Experts (Trans Europe Experts); (6) Mr Apostolis Fotiadis; (7) the Greek National Ombudsman; (8) Mr George Habib; (9) Human Rights Watch; (10) Immigration Law Practitioners' Association (ILPA); (11) Independent Monitoring Boards (IMB); (12) Jesuit Refugee Service Europe; (13) Dr Luisa Marin (University of Twente - NL; (14) Meijers Committee (Standing committee of experts on international immigration, refugee and criminal law); (15) Red Cross; (16) Mr Paolo Ruwindu; (17) Statewatch and Migreurop (joint contribution); (18) Mr Pierre Georges van Wolleghem.

[4] The publication took place after obtaining the contributors' consent.

13. At the outset, the Ombudsman wishes to thank all contributors for their very useful comments and ideas.

14. The Ombudsman appreciates that some contributors submitted to him information on alleged infringements of fundamental rights in specific Frontex operations. In particular, some contributors underlined the importance of implementing the Code of Conduct in these operations.

15. The Ombudsman fully shares the view that it is important to implement the Code of Conduct. As regards specific instances of infringements of fundamental rights, including the provisions of the Code of Conduct, however, the Ombudsman recalls that the focus of his own-initiative inquiry is Frontex's systemic framework of operation. Therefore, his present inquiry does not extend to specific instances of alleged non-compliance. These, however, may constitute the subject of complaints submitted to him for inquiry.

A. Frontex's opinion concerning the actions related to the promotion of, and respect for, fundamental rights pursuant to the Regulation

16. In its opinion, Frontex provided detailed replies in relation to the following issues: Fundamental Rights Strategy; Codes of Conduct; Fundamental Rights Officer; Consultative Forum; European Border Guard Teams, and Termination of joint operations and pilot projects.

17. Frontex stressed that a Drafting Committee[5] prepared the **Fundamental Rights Strategy** (the 'Strategy') which was endorsed by its Management Board on 31 March 2011. The Strategy serves to mainstream fundamental rights in all Frontex activities and thus to promote fundamental rights in what Frontex referred to as a "*European border guarding culture*".

18. On 29 September 2011, with a view to implementing the Strategy, the Frontex Management Board adopted a Fundamental Rights Action Plan (the 'Action Plan'). The Action Plan outlines the operational activities (into which the objectives of the Strategy have been integrated) and lists specific actions in the main fields of Frontex's activities. Frontex enclosed a table which lists all of the said actions. They are structured along the following main fields of Frontex's activities: operational activities (risk analysis, joint operations, joint return operations), capacity building (training, research and development) and horizontal activities (such as external relations, communication and dissemination).

19. The Agency stated that the implementation of the actions contained in the Action Plan will be monitored by means of the **Fundamental Rights Annual Progress report**, which will form the basis for future reviews of the Strategy. The FRO and the Consultative Forum on Fundamental Rights will take part in the review.

[5] The Drafting Committee was composed of Member State representatives and representatives of the European Commission, the FRA, the UNHCR, the International Organisation for Migration ('IOM') and Frontex.

20. In reply to the Ombudsman's question on an **effective mechanism for monitoring respect for fundamental rights**, Frontex submitted that such mechanism will be constituted through interaction between the Consultative Forum (composed of fundamental rights organisations and institutional partners), the Fundamental Rights Officer, the mechanism for suspending and terminating joint operations and pilot projects, and the Executive Director's powers as the Appointing Authority making the final decision.

21. As regards the Ombudsman's question about its understanding of "***all activities of the Agency***", Frontex pointed out that this concept had been used before in the Code of Conduct. Article 2(b) of the Code of Conduct defines "*Frontex activity*" in the following manner: "*... any activity coordinated or led by Frontex within the framework of its tasks as described in the Frontex Regulation, including Joint Operations, Pilot Projects, Joint Return Operations, and Trainings.*"

22. As to the possibility of providing for a **complaints mechanism** for persons affected by its activities, Frontex pointed out that its task is "*only to coordinate the cooperation of the EU Member States and Schengen Associated Countries*". As a consequence, only Member State authorities perform activities which may affect individuals' rights. Frontex also highlighted that it does not have any executive powers. These are vested in the Member State authorities alone. Persons claiming that their rights have been violated by these authorities may therefore make use of "*both national and EU mechanisms to file a complaint*". Nevertheless, internal procedures allowing for individuals to inform it of possible infringements of fundamental rights are in place. These procedures include (i) reporting obligations imposed on participants in Frontex activities, (ii) an incident reporting system, and (iii) a new standard operating procedure requiring full consideration of reports, from any source and submitted via any means, of possible fundamental rights violations in Frontex coordinated activities.

23. Frontex stated that it adopted the **Code of Conduct** on 21 March 2011, that is before the Regulation entered into force. It contains provisions on respect for and promotion of fundamental rights and international protection issues in the course of Frontex's activities. Frontex specified that the Code of Conduct "*is in use during Frontex coordinated joint operations and pilot projects. It is annexed to Operational Plan and is binding for all persons participating in all Frontex activities*". Among other things, the Code of Conduct provides for sanctions in case its provisions are infringed. Sanctions range from immediate removal from a Frontex activity to disciplinary measures. Frontex pointed out that, in line with the amended Regulation, it is currently revising the Code of Conduct so as to reflect the views of the Consultative Forum. It added that, as required by the amended Frontex Regulation, there will be a separate Code for joint return activities, that is, the Joint Returns Code.

24. Frontex submitted that the Codes of Conduct are "*one of the many instruments of the overall Fundamental Rights Strategy*".

25. Commenting on the relationship between the Codes of Conduct, Frontex explained that the two Codes will apply to joint return operations coordinated by it. As regards the Joint Returns Code, it will consist of a general set of rules similar to those contained in the (general) Code of Conduct and specific rules focusing on the particularities of joint return operations. Frontex added that it already applies "*best practices*" to joint return operations.

26. As regards the state of affairs concerning the revision of the Code of Conduct, Frontex submitted that this process depended on the establishment of the Consultative Forum but stated that work on the revision process is at a very advanced stage.

27. Frontex submitted that the **Fundamental Rights Officer** is an independent staff member who reports directly to the Management Board and performs a monitoring role. The FRO also regularly reports to the Consultative Forum (the 'CF') and to the Executive Director who is the appointing authority.

28. The FRO and the CF have access to all information concerning respect for fundamental rights, and their activities are complementary. While the FRO exercises a monitoring function, the CF offers strategic guidance and pools information. The tasks of the FRO include, for instance, contributing to an effective monitoring mechanism and setting up and maintaining a record of possible fundamental rights breaches.

29. Frontex stated that an answer to the question as to whether the FRO could receive complaints from individuals concerning respect for fundamental rights is expected only once the fundamental rights monitoring mechanism has been fully defined.

30. As regards the timetable for appointing the FRO, Frontex stated that a vacancy notice was published at the end of April 2012 and that the FRO was expected to be chosen by autumn 2012.

31. As for the CF, Frontex explained that its role is to assist the Executive Director in fundamental rights matters and to serve as a knowledge and expertise resource for the development and promotion of respect for fundamental rights. Its precise membership, tasks and working methods are to be decided at an inaugural meeting. According to Frontex, its membership is limited to civil society organisations, international organisations and EU agencies specialised in fundamental rights. The inaugural meeting of the CF was scheduled to take place in September 2012.

32. Frontex pointed out that the amended Frontex Regulation stipulates that, in the performance of their tasks and in the exercise of their powers, **European Border Guard Teams** (the 'EBGT') must fully respect fundamental rights.

33. Frontex referred to the following four main tools designed to prevent infringements of fundamental rights in this regard.

(1) The **Operational Plan** provides for (i) reporting obligations concerning fundamental rights breaches and (ii) training of participants, prior to deployment, in EU and international law, including fundamental rights. Furthermore (iii) the Code of Conduct constitutes an integral part of the Operational Plan and seeks to promote professional values based on the rule of law and respect for fundamental rights, and sets out relevant principles. In addition, the Operational Plan (iv) provides for standard operating procedures for the reporting of serious incidents.

(2) **Shared responsibility over the members of EBGTs**

The pool of EBGTs is constituted by border guards made available by the Member States. However, this staff is made available to Frontex on a temporary basis, is not qualified to perform border control functions, and is deployed for coordination

tasks only, with an eye to fostering cooperation between the host and the participating Member States. Members of EBGTs may only perform tasks under instructions from and, as a general rule, in the presence of, border guards of the host Member State. In case a member fails to respect fundamental rights, the matter will be examined by the host Member State and/or Frontex, as well as by the member's home Member State. Thus, members of EBGTs are subject, at the same time, to instructions from the host Member States and to disciplinary measures by the home Member State.

(3) **Profile of the members of the EBGT pool**

On the basis of a thorough internal assessment, Frontex has developed specific expert profiles for future members of the EBGT pool. The profiles reflect fundamental rights and international protection obligations that all participants in Frontex operations are required to adhere to. They also require prior experience in the requested field, as well as previous training, in particular, on how to apply fundamental rights in practice. The profiles have to be approved by the Management Board. Following nomination to the pool, Frontex will provide training on EU and international law, including fundamental rights. While they are bound to respect the eligibility criteria defined in the profiles, the Member States themselves are responsible for the selection and nomination of experts to the EBGT pool.

(4) **Training prior to deployment of all participants**

Frontex is duty-bound to provide training to all participants in Frontex operations prior to deployment. Training focuses on relevant EU and international law, including fundamental rights and access to international protection (principles of non-discrimination, *non-refoulement*, and the right to asylum) as well as relevant guidelines. It stated that different levels of training are being provided.

34. Frontex also submitted that all Operational Plans make provision for a **Frontex Coordinating Officer** (the 'FCO'), whose task essentially is to foster cooperation and coordination between host and participating Member States. For instance, the FCO acts as an interface between Frontex and the host Member State, monitors the implementation of the Operational Plan and the Code of Conduct, and plays a key role in the follow-up to the reporting of serious incidents.

35. As regards the **termination of joint operations and pilot projects**, Frontex stated that it has set up an internal task force to draft a standard operating procedure (the 'SOP') in order to ensure respect for fundamental rights in the above operations. The SOP will be publicly available once adopted.

36. In spite of the fact that the SOP has not yet been finalised, Frontex provided the following information.

37. Frontex considered that "*violations of fundamental rights cannot be predicted before they actually happen and cannot be systematised*". Consequently, it did not develop "*strict criteria as such to identity those possible violations of fundamental rights or international protection obligations. These can only be assessed on a case by case basis and the expertise of the FRO will be crucial in this regard*". The SOP therefore will concentrate on ensuring that incidents involving possible fundamental rights breaches are reported and evaluated at all stages of operation activities. As it stands, the SOP foresees five steps in order to respond to Article 3a of the Regulation: (i) internal preparation; (ii) provisions in the

Operational Plan; (iii) incident reporting; (iv) dealing with information obtained through incident reporting in-house; and (v) response and action. Frontex stated that additional preventive measures aim at making stakeholders aware of the risks involved in operations. These risk assessments, for instance, take into account intelligence on countries of origin, transit routes and neighbouring countries and involve various departments within Frontex as well as the FRO.

38. As regards the issue of identifying alleged violations of fundamental rights, Frontex referred to a detailed internal procedure, and highlighted the importance of (i) reporting obligations for all participants and reporting possibilities for third parties; (ii) the manner in which reported information is dealt with in-house; and (iii) the assessment of information received by the stakeholders concerned.

39. Frontex considered that its broad approach involving the identification and prevention of possible violations would allow an appropriate response to such violations and, in this regard, again highlighted the importance of specialised training.

40. As regards the issue of a complaints mechanism for persons affected by fundamental rights violations, Frontex pointed to the possibility for third parties to report possible violations to it. It also emphasised that it would deal with any complaint about fundamental rights violations and that it would give "*appropriate consideration*" to such complaints. At the same time, Frontex highlighted that it has no authority to decide on individual cases, since these fall within the competence of the Member States concerned.

41. As for the measures Frontex could take in case of detected violations of fundamental rights, it stated that it could, for instance, "*address letters of concern or warning letters to Member States concerned, discuss the matter at the Management Board level or report to the Commission, withdraw or reduce financial support, take disciplinary measures, and suspend or terminate operations, termination being a measure of last resort.*" Frontex further explained that, due to the complexity of operations involving a number of political and operational issues, it would not always be appropriate to suspend or terminate an operation, and the Executive Director must decide on the basis of reports presented to him by Frontex staff.

B. The observations submitted by the participants to the public consultation

42. These observations may be summarised as follows.

43. In *Caritas*'s view, an effective complaints mechanism in respect of Frontex operations is needed. NGOs active in the field could contribute to the practical monitoring of Frontex operations. Frontex staff should inform all migrants and refugees intercepted in operations coordinated by Frontex of their rights. The *Meijers Committee* ('MC') underlined the importance of accountability mechanisms through which Frontex's compliance with fundamental rights may be scrutinised. *Independent Monitoring Boards* ('IMB') pointed out that it is not clear whether Frontex is responsible for complaints about operations under Frontex's control.

44. Mr *Paolo RUWINDU* took the view that Frontex's compliance with fundamental rights obligations should be monitored by a fully independent

body and appointing an FRO is not sufficient. Mr *Pierre Georges VAN WOLLEGHEM* stated that, because of its legal basis, Frontex cannot bear responsibility for fundamental rights breaches on behalf of the Member States. As regards the legal possibility of terminating or suspending the joint operations if the conditions guaranteeing respect for fundamental rights are no longer met, he pointed out that it is not clear how such conditions would be determined. Nor is it clear what means are put at the FRO's disposal to effectively oversee respect for fundamental rights. Mr *Apostolis FOTIADIS* pointed out that Frontex legitimises Member States' actions by, for instance, deploying Frontex officers accompanied by a member of the host country border guard and by taking part in the screening of intercepted persons. Suggestions made by Frontex during the screenings regarding the country of origin are formally followed by national border guards. *Dr Luisa MARIN*, Assistant Professor of European law at the University of Twente, submitted as a contribution her academic paper which analyses in detail Frontex's compliance with EU law and fundamental rights. Mr *George HABIB* referred to the Frontex project 'Attica' launched at the Greek-Turkish border in order to assist the Greek authorities in intercepting and returning illegal migrants to the third country of origin.

45. *Red Cross* is concerned that the Strategy and the Action Plan are silent about disciplinary measures to be applied to participants in Frontex operations other than its own staff. Red Cross further pointed out that a clear indication of who, that is, Frontex or the Member State concerned, can be held accountable for fundamental rights breaches in joint operations is also missing in the Strategy. The Strategy does not contain any instructions on the use of personal data collected by Frontex, in particular with regard to their potential transfer to third parties such as EUROPOL or to third countries. The Strategy or the Action Plan should include specific guidelines on how participants in the operations concerned should deal with situations of distress. This could help to ensure that all necessary measures are taken to prevent loss of life of vulnerable people and to provide information in an appropriate way to the authorities and ultimately the families of those who lost their life when crossing EU borders. Finally, Red Cross recommended the implementation of a complaints mechanism.

46. *TransEuropeExperts* ('TEE') considered that the wording used in Articles 19 and 20 the Code of Conduct, which state that the use of coercion and weapons must not exceed what is necessary in relation to the circumstances, leaves ample room for subjective appreciation. According to TEE, the decisions of the Executive Director suspending or terminating joint operations and pilot projects in case of serious breaches of fundamental rights were not clarified in Frontex's reply to the Ombudsman. From this reply, it emerges that such decisions are not applicable to joint return operations, when it is precisely these operations that may be concerned in the first place by fundamental rights breaches. TEE also expressed its dissatisfaction with the part of Frontex's reply which answers the questions on the complaints mechanism for victims of fundamental rights violations. In addition, in its reply, Frontex did not comment on its management of personal data.

47. *Amnesty International* ('AI') was particularly concerned about: (i) the absence of a procedure for filing complaints; (ii) lack of follow-up to incident reporting, and (iii) the insufficient capacity and independence of the FRO. It stated that a mechanism by which complaints concerning Frontex's operations and the conduct of its staff and guest officers, both in the Member States and outside the external borders, can be made directly to Frontex is essential for two reasons. First, because Frontex must take proper steps to detect any breach of

its own legal obligations. Second, because when it coordinates operations, Frontex must monitor compliance with fundamental rights by its own staff, guest officers and those of host member states. AI welcomed Frontex's development of internal mechanisms for staff and guest officers to *report possible violations*. AI noted, however, that it is not clear how reported incidents would be followed up. AI expressed its doubts that disciplinary measures alone, foreseen in Articles 4 and 5 of the Code of Conduct, permit adequate follow-up to violations of fundamental rights. AI questioned the independence of the FRO, given that the office holder is a member of Frontex's staff and has reporting obligations to the Executive Director, who, as the appointing authority, will appraise the FRO's work. It is also unclear how the person occupying this post will have the capacity to fulfil this role alone. AI suggested that, at least, the Consultative Forum should be closely associated with the FRO's work so as to be able to support and assist the FRO in fulfilling her tasks effectively.

48. *Statewatch* and *Migreurop* made a joint contribution. As regards the Code of Conduct, they considered that, since Articles 19 and 20 of that Code, concerning the use of coercion and weapons, provide that coercion and weapons may be used not only in the performance of duties but also in other situations, these situations should be specified. The Code of Conduct is defined by the Strategy as soft law ("*generally accepted standards*"). It is not clear what the legal nature of the Code of Conduct is and whether legal proceedings for fundamental rights violations based on a breach of the Code of Conduct can ever be launched. The drawing up of the Joint Returns Code is welcome, although the legal force of that document is not certain. As regards the FRO, a statement contained in the job description enclosed with Frontex's reply indicates that "[t]*he FRO will be required to make a declaration of commitment to act independently in Frontex' interest*". It remains to be seen whether working in the interest of a specific entity is compatible with the principle of independence. As regards the Executive Director's decisions on the suspension or termination of joint operations where "*conditions to conduct such operations are no longer fulfilled*", Frontex did not give any information on the nature of these "*conditions*" or on the circumstances which may lead the Executive Director to suspend or terminate an operation, partially or fully. In fact, the criteria will be defined and included in the standard operating procedure. However, it is not known if these criteria will ever be made public, subject to review by the Consultative Forum, whether the European Parliament will be informed about them or if they will be regularly reassessed in the light of relevant jurisprudential developments. It is important that the Strategy include clear and comprehensive data protection safeguards, as well as redress mechanisms if the rights of data subjects are violated. Frontex argued in the opinion that "*violations of fundamental rights cannot be predicted before they actually happen*". But, first, some situations where migrants are likely to be in a vulnerable situation can be anticipated. Second, many international and regional conventions and recommendations are available and may be useful in establishing procedural safeguards. Complaints mechanisms and means of redress in cases of fundamental rights violations during Frontex operations are needed. Frontex should not have denied any direct responsibility over the potential violations of fundamental rights that may occur during Frontex activities. It does not seem accurate to state, especially after the revision of the Agency's mandate, that the Agency is a mere coordinator and does not have direct responsibility over the way operations are conducted.

49. The *Immigration Law Practitioners' Association* ('ILPA') took the view that the concrete implementation of fundamental rights and of international protection

obligations in individual cases has been deferred to soft law instruments (such as the Code of Conduct or the Strategy) and the operational plans of each mission, without provision for the establishment of specific procedures, remedies, or any other legally binding guarantees in the body of the main regulations. The Code of Conduct does not make clear that fundamental rights obligations must be met but only requires the promotion of certain conduct in point 5 a. ILPA considered that Frontex should be asked to revise its Strategy and the Code of Conduct to introduce the procedures and legal safeguards necessary to respect individual guarantees in accordance with EU and international law, as required by its founding Regulation – specifically by Articles 2a and 26a thereof.

50. *The Committee on Migration, Refugees and Displaced Persons of the Parliamentary Assembly of the Council of Europe* ('PACE') drew attention to the lack of independence and of resources of the FRO, the purely advisory capacity of the Consultative Forum, and the lack of transparency on the criteria to suspend or terminate an operation. PACE distinguished between: sea operations (Frontex has to ensure disembarkation of those intercepted at sea to a place where they are not only physically safe but where their rights, including their right to seek asylum are respected); land border operations (Frontex does not have a monitoring system to ensure respect for fundamental rights on the ground); and air operations (these operations may target specific national groups and this type of targeted intervention raises potential questions of racial discrimination in the Agency's operations). Frontex's legal framework is unclear about its responsibility concerning respect for fundamental rights. According to the Frontex founding Regulation, Member States are legally responsible for the control of external borders. Nonetheless, the same text gives Frontex a legal personality and allows it to enter into arrangements with third countries or international organisations. The Agency regularly claims, however, that it "*only*" coordinates activities, and that it is therefore not in charge. But as coordination involves giving instructions while coordinating, it is, as a result, also responsible for many aspects. Frontex should put in place an effective reporting system to ensure that any fundamental rights breaches are reported by participating officers or Frontex staff members. It is unclear whether the FRO will be able to receive complaints from individuals. The 2011 Frontex Regulation foresees a mechanism of suspension or termination of joint operations and pilot projects in case of serious violations of fundamental rights. However, no criteria have been developed.

51. The *Jesuit Refugee Service* ('JRS') emphasised that Frontex is not the vicarious agent of the Member States but enjoys autonomy as an EU agency. In order to avoid violations of fundamental rights, Frontex is in particular obliged to ensure that, in cases of interception, persons claiming to be in need of protection, or who are evidently in need of protection, are identified and given access to determined procedures. There is no clear division of competences between the FRO and the Coordinating Officer of a European Border Guard Team. The FRO's tasks listed in Frontex's reply to the Ombudsman are rather vague and nonspecific. The Strategy does not provide for an effective monitoring/complaints mechanisms. There should be a mechanism that allows an intercepted or returned person to complain to the FRO or other Frontex officer who should have the power to stop the execution of an operation or at least halt it until a final decision is taken by the Executive Director. In addition, there should be a clear obligation on each person who participates in a Frontex operation to report to the FRO any issues related to fundamental rights and to answer all questions posed by the FRO. Frontex still has to amend its Codes of Conduct to meet the requirements of the 2nd sentence of Article 2a of the

Frontex Regulation. It is surprising that, at the time of its reply and after many years of coordinating joint return operations, Frontex had not yet adopted a specific Joint Returns Code.

52. *Human Rights Watch* ('HRW') contested Frontex's statement in the opinion that "*since violations of fundamental rights cannot be predicted before they actually happen and cannot be systematised, Frontex has not developed a strict criteria as such to identify those possible violations of fundamental rights or of international protection obligations*". HRW took the view that, based upon research and reports, the possibility of such abuses and violations of fundamental rights is clearly foreseeable. HRW also criticized Frontex's statement in its reply to the Ombudsman that its task is "*only to coordinate the cooperation of the EU Member States*" and that, therefore, Frontex's work does not include activities that can affect individual rights. According to Frontex, those activities can only be performed by the competent authorities of the Member States hosting or participating in the operation. HRW pointed out that this interpretation implies that Frontex may never be held accountable for any involvement in fundamental rights breaches.

53. The *FRA* put forward that, since 2010, it has been involved in a number of Frontex-led initiatives (research, training and capacity building, risk analysis, operations) on the basis of its specific agreement with Frontex dated 26 May 2010. In addition, the FRA collects information and data related to fundamental rights issues in Frontex activities, such as border management and return operations.

54. The French Consultative Commission on Fundamental Rights (*Commission Nationale Consultative des droits de l'homme*) ('CNCDH') recommended that Frontex remind crews on vessels flying an EU Member State flag that the right to life must take precedence over management of migratory flows. It pointed out that every application for asylum submitted by every migrant should be examined and that the applicants should be guaranteed "*material conditions in the host country that respect their dignity*".

55. The Greek Ombudsman enclosed with her contribution her special report, dated March 2011, on the treatment of irregular migrants and asylum seekers in the border region of Evros. The Greek Ombudsman stated that she had received complaints from individuals and NGOs concerning Frontex operations in Greece, namely, complaints about access to the asylum procedure, the identification and screening procedure and even the erroneous registration of personal data. In the Greek Ombudsman's view, Frontex's reply to the European Ombudsman shows that there is an urgent need for it to undertake initiatives. The full implementation of the Strategy and of the Codes of Conduct would be an asset in the field of protection of fundamental rights, especially in the border areas of Greece. As regards the joint operations and pilot projects carried out by Frontex together with the Greek authorities, the monitoring mechanism of fundamental rights violations should be established at the EU level in order to investigate and prevent such violations.

C. The Ombudsman's assessment

56. Article 26a(1) of the Regulation provides that Frontex should take two essential measures in order to comply with its obligation to promote and respect fundamental rights: *First*, it should (a) draw up, (b) develop and (c)

implement the Fundamental Rights Strategy. *Second,* it should put in place an **effective mechanism** to monitor respect for fundamental rights in all its activities. In the assessment that follows, the Ombudsman will examine Frontex's position against the background of this obligation. In so doing, he will first address the Strategy, in conjunction with the Action Plan and the Codes of Conduct. He will then assess the effectiveness of existing mechanisms for monitoring compliance with fundamental rights, as these emerge from Frontex's opinion.

Fundamental Rights Strategy, Action Plan and Codes of Conduct

57. In its opinion, Frontex informed the Ombudsman that, on 31 March 2011, its Management Board approved the Strategy. Frontex provided a copy of that document. In order to demonstrate how it implements the Strategy, Frontex also submitted a document entitled "*Fundamental Rights Action Plan*", adopted on 29 September 2011, which refers to 21 actions by means of which Frontex seeks to implement the Strategy. The Agency also stated that the Code of Conduct constitutes "*another instrument*" of the Strategy and explained why.

58. The Ombudsman considers that the Strategy and the Action Plan necessarily need to be read together. It is advisable that all objectives put forward in the Strategy have a concrete corresponding action in the Action Plan. However the Action Plan, contrary to what may reasonably be expected from a document of this nature, is not sufficiently detailed and, rather, elaborates on the objectives indicated in the Strategy instead of explaining how they may be achieved in practice. In addition, there are statements in the Strategy which still require clarification. The Ombudsman trusts that Frontex will agree that a document of such importance as the Strategy should help clarify the reasonable doubts and concerns raised in view of the complicated hybrid structure of Frontex's activities, which involve both this EU agency and the Member States. As the replies to the Ombudsman's public consultation show, doubts and concerns still persist in this area.

59. The main concern is that the Strategy does not clarify Frontex's **responsibility** for possible infringements of fundamental rights which occur in the course of its operations. In points 5 and 7, the Strategy underlines that the Charter of Fundamental Rights of the EU applies to Frontex as an EU agency and that Frontex should, in its activities, (i) respect the rights at stake (the right to physical integrity and dignity, asylum and international protection, *non-refoulement,* effective remedy and the protection of personal data, among others), and (ii) apply the relevant case-law of the Court of Justice of the EU and of the European Court of Human Rights. Point 13 of the Strategy provides that "*Member States remain **primarily** responsible for the implementation of the relevant international, EU or national legislation and law enforcement actions undertaken in the context of Frontex coordinated operations (including Rapid Border Intervention Teams, Joint Return Operations and Pilot Projects)*" and that "*this does not relieve Frontex of its responsibilities **as the coordinator** and it remains fully accountable for all actions and decisions under its mandate*"(emphasis added). The Strategy does not make clear, however, what the precise responsibilities of Frontex as a coordinator are in relation to the issue of compliance with fundamental rights.

60. Moreover, the legal framework applicable to Frontex operations, as described in the Code of Conduct, is indeed not clear[6]. Thus, Article 3(1) of the Code of Conduct requires participants to comply with "*international law, European Union law, the national law of both home and host Member State and the present Code of Conduct*". This provision clearly reflects the complexity of the legal background against which Frontex operations take place. Such complexity, in turn, implies that various jurisdictions determine the lawfulness of actions by participants. At the same time, however, it should be recalled that, pursuant to Article 1(2), the Code of Conduct aims at guiding the behaviour of all participants in Frontex operations. This is also reflected in the foreword to the Code of Conduct by the Executive Director.

61. In light of the above considerations, the Ombudsman suggests that Frontex clarify (i) in a document completing the Strategy, the issue of its responsibility for fundamental rights breaches possibly occurring in its joint operations, and (ii) in the Code of Conduct, the legal framework applicable to the conduct of all participants in Frontex operations. As regards (i), the Ombudsman notes Frontex's argument that it cannot be held responsible for individual infringements of fundamental rights since it only coordinates the activity of the Member States hosting and participating in the operations, and that, in addition, the members of its staff cannot be deemed responsible either, because they have no executive powers in the field of border control. In this respect, the Ombudsman recalls the Commission's statement, made during the inaugural meeting of the CF on 12 October 2012, that the CF, the FRO and "*the ongoing implementation of other guarantees contained in the revised Frontex Regulation, are a welcome and concrete sign that* ***the Agency is fully committed to ensuring respect of fundamental rights, both in its own work, including the joint operations it coordinates, and by the Member States, when participating in those operations***" (emphasis added)[7].

62. Furthermore, the Ombudsman points out that the Action Plan does not identify any measure giving a concrete dimension to the objective foreseen in point 17 of the Strategy, that is, that any **incidents or serious risks** regarding fundamental rights, after having been reported by Frontex staff or participating officers, "***can be acted upon on a case by case basis***". In its opinion, Frontex highlighted the importance of both incident reporting, coupled with concomitant reporting obligations on participants in Frontex operations, and the way reported information is dealt with in-house. However, in the Ombudsman's view, especially the latter aspect could be developed in such a way that, instead of stating that action will be taken on a case-by-case basis, clear principles regarding the possible follow-up to the reported information are established. The relevant statements in the Strategy could reinforce not only the transparency of Frontex actions but also, in practical terms, the effectiveness of the mechanism for monitoring compliance with fundamental rights which is necessarily based on the Strategy.

63. Furthermore, the Ombudsman welcomes points 37-40 of the Strategy, which refer to the transparency of Frontex activities and, in particular, point 37, which provides that the annual progress report on the implementation of the Strategy "*shall*" be made public. The Ombudsman suggests in this respect that the Action

[6] Contribution by Statewatch and Migreurop.
[7] Frontex's press release of 16 October 2012, available at: http://frontex.europa.eu/news/consultative-forum-on-fundamental-rights-elects-chairpersons-at-inaugural-meeting-y3P7uP

Plan could specify when (for instance, the first trimester of the year following the year covered by the report) and by which means this publication will be made available. It could, for instance, specify that the link to the report will be placed on the homepage of Frontex's website.

64. Furthermore, the Ombudsman notes that the Strategy and the Action Plan are silent about disciplinary measures to be applied to participants in Frontex operations who are not members of its own staff (point 32 of the Strategy only provides for sanctions imposed on Frontex staff for infringements of the Code of Conduct). On the other hand, Article 23(2) of the Code of Conduct states that, in case of violations committed by a person deployed by the Member States, the Frontex Executive Director may request Member States (i) to immediately remove the person concerned from a Frontex activity and may expect that the relevant authority of the Member State will use its powers regarding the necessary disciplinary measures, and (ii) if applicable, to remove the person concerned from the respective pool for a defined period. Nevertheless, in order to increase transparency and bearing in mind that the Strategy is the main public document issued by Frontex having a human rights dimension, while the Code of Conduct is more of an operational document addressed to the concerned persons, it would be ideal if the Strategy could include the same provision or at least refer to it.

65. The Ombudsman further shares the view of *Red Cross* that it would have been useful for the Strategy and/or the Action Plan to lay down specific guidelines for participants in joint return operations on how to deal with situations of distress in which intercepted migrants may find themselves.

66. Finally, as rightly noted by many contributors, the Strategy does not refer at all to the protection of personal data of intercepted migrants. The Ombudsman considers it advisable that the Strategy define data protection safeguards, as well as redress mechanisms if the rights of data subjects are breached. Moreover, although the Action Plan includes the title '*Ensuring the adequate protection of personal data*', the description of this action appears to be rather enigmatic and pleonastic ("*Establishment of appropriate measures and procedures regarding processing of personal data ensuring the protection of personal data*"). It would have been better if the Action Plan contained specific implementation measures instead.

67. As for the **Codes of Conduct**, a number of contributors raised doubts about the binding nature of the Code of Conduct applicable to all Frontex operations (adopted in March 2011), questioned the usefulness of seeking to ensure compliance with fundamental rights through disciplinary measures, as foreseen by the Code of Conduct, and criticised the content of certain other provisions. In the remaining paragraphs of this section, the Ombudsman will address these issues. In this respect, the Ombudsman notes that Frontex has in the meantime revised its March 2011 Code of Conduct applicable to all Frontex operations and, in 2012, it adopted a new Code of Conduct for all persons participating in Frontex activities. Article 2 of the new Code of Conduct defines "*Frontex activity*" as "*any activity coordinated or led by Frontex within the framework of its tasks as described in the Frontex Regulation, including Joint Operations, Pilot Projects, Joint Return Operations, and Trainings.*"

68. As regards the legal nature of the Code of Conduct, the Ombudsman takes note of Frontex's statement in its opinion that the Code of Conduct is binding on all participants in Frontex activities[8]. He considers that this statement is borne out by the language used in the Code of Conduct (see, for instance, Article 4 which states that participants "*shall: a) promote and respect human dignity and the fundamental rights of every individual*") and is corroborated by the fact that the Code of Conduct is annexed to Operational Plans. It moreover receives support from Article 23 of the Code of Conduct, which provides for specific sanctions in case of violations of the Code. These may include the immediate removal of a Frontex staff member from an operation. Therefore, in spite of the title 'Code of Conduct', which is used in the Frontex Regulation and which could suggest that the Code of Conduct is not legally binding, the Ombudsman concludes that the Code must be considered to be binding on participants in Frontex operations. However, given that Frontex's relevant statement appears to be contradicted by the information provided in the Strategy, Frontex could consider making the necessary changes to the Strategy so as to reflect the real legal nature of the Code of Conduct.

69. In the given context, it should also be noted that Article 3(1) of the Code of Conduct requires participants to comply with the law. Moreover, according to Article 4, participants shall "*promote and respect*" human dignity and fundamental rights. While it is true that Article 5a) only requires participants to *promote*, among other things, the recognition of persons seeking international protection and the provision of adequate assistance to such persons, it would appear that the wording takes into account that these tasks fall within the competence of national authorities. The Ombudsman therefore considers that the Code of Conduct is sufficiently clear in requiring participants to respect and not only promote fundamental rights in their conduct.

70. When drawing attention to the uncertainty surrounding the applicable law (referred to in point 60 above), participants in the public consultation placed particular emphasis on the provisions of the Code of Conduct (2011 version) concerning the use of force, which address particularly sensitive areas from the point of view of fundamental rights. The Ombudsman recalls that Article 19 of the Code of Conduct provides that the use of force should not exceed the minimum degree required by the circumstances for the performance of duties or necessary in legitimate self-defence or in legitimate defence of other persons. Given that "*legitimate self-defence*" or "*legitimate defence of other persons*" appear to be recognised in most legal orders as grounds for the use of weapons also outside the exercise of professional duties, the Ombudsman does not consider them to give rise to serious concern. Still, the fact remains that, due to the uncertainties regarding the applicable law, the actual content of these empowerments may vary between different Member States. As regards the concerns raised about the necessity and proportionality of such provisions, the Ombudsman notes that the use of force and of weapons "*shall not exceed the minimum degree necessitated by the circumstances*" (see Articles 19(2) and 20(2) of the Code of Conduct). It therefore cannot be said that the use of these means is unlimited. At the same time, the Ombudsman considers it advisable to clarify and specify these provisions, since they appear to be formulated in relatively broad terms.

[8] Frontex referred to the version of the code which existed at the time it submitted its opinion, namely, the code adopted in 2011. This statement is obviously valid with regard to the code adopted in 2012, which replaced it.

71. As regards the (specific) Joint Returns Code required by the Regulation, some contributors specifically welcomed the fact that it is being drafted, but reiterated concerns as to its binding nature. Concerning this issue, the Ombudsman refers to his above considerations about the Code of Conduct. Some contributors also stated that it is surprising that the Joint Returns Code is not yet in place, even though Frontex has been coordinating joint return operations for years. In this regard, the Ombudsman recalls that the obligation to draw up the Joint Returns Code only flows from the Frontex Regulation, as amended in 2011. He notes that its drafting is underway and at an advanced stage and trusts that Frontex will adopt the Joint Returns Code within a reasonable time. As regards the content of that Code, the Ombudsman considers that it would be useful if the Joint Returns Code included a provision outlining its relationship with the Code of Conduct.

Effective mechanism to monitor respect for fundamental rights in all its activities

72. Frontex submitted that an effective mechanism to monitor respect for fundamental rights in all its activities will be set up through interaction between (i) the Consultative Forum; (ii) the Fundamental Rights Officer; (iii) the mechanism for suspending and terminating joint operations and pilot projects; and (iv) the Executive Director's powers as the Appointing Authority making the final decision. In the assessment which follows, the Ombudsman will focus on possible complaints mechanisms after reviewing the substantive conditions for terminating and/or suspending joint operations and pilot projects.

73. As for the **termination of joint operations and pilot projects**, the Ombudsman recalls that, pursuant to Article 3(1a) of the Regulation, the Agency may, after informing the Member State concerned, terminate joint operations and pilot projects "*if the conditions to conduct those joint operations or pilot projects are no longer fulfilled*". The Executive Director shall suspend or terminate, in whole or in part, joint operations and pilot projects if he/she considers that such violations of fundamental rights or international protection obligations "*are of a serious nature or are likely to persist*".

74. The Ombudsman notes that the aforesaid possibilities of suspending or terminating operations involve a considerable degree of discretion and rest on a legal appraisal of what, in most instances, will amount to complex factual circumstances.

75. In view of these considerations, the Ombudsman welcomes the establishment of an internal task force charged with drafting an SOP to ensure respect for fundamental rights in the above-mentioned operations. He also welcomes Frontex's declaration that it intends to make the SOP public as soon as it becomes available.

76. At the same time, as suggested in point 61 above, Frontex's position to the effect that an identification of possible fundamental rights violations is exclusively a matter to be decided on a case-by-case basis could be modified, and possible fundamental rights violations could be clearly presented to the concerned agents with reference to the European Charter of Fundamental Rights. Moreover, the Ombudsman recommends that Frontex adopt concrete guidance, clarifying the actual meaning of formulations such as "*if the conditions to conduct those joint operations or pilot projects are no longer fulfilled*" and violations of fundamental rights or international protection obligations which "*are of a serious nature or are likely to persist*". In line with the contribution of the *Committee on Migration, Refugees and Displaced Persons*, a clear mechanism

coupled with specific criteria would therefore clearly be preferable. The Ombudsman also considers that making relevant criteria public and thus allowing third parties not directly involved in Frontex activities to report on possible violations could be a further asset[9]. Lastly, the question of the oversight of decisions taken by the Executive Director in this regard remains open[10].

77. The Ombudsman also notes from the contributions received that criticism has been voiced against the non-applicability of the suspension and termination clause to joint return operations. While it appears from Article 3(1a) of the Regulation that the possibilities of suspension and termination foreseen therein only apply to joint operations and pilot projects, it should be noted that this decision was taken by the legislator and, as such, it is not within Frontex's power to change it. Still, the Agency could consider whether there would be room for laying down rules, for instance in the Joint Returns Code, on the termination and suspension of joint return operations.

78. As *regards* ***possible complaints mechanisms and the role of the Fundamental Rights Officer,*** the Ombudsman first points out that the FRO was appointed in September 2012. The Ombudsman underlines the importance of clearly shaping and defining the FRO's tasks, given that, as the *Jesuit Refugee Service* rightly pointed out, the FRO's tasks as listed in Frontex's reply to the Ombudsman are rather vague and nonspecific. This suggests a large margin of discretion in the FRO's decisions. There is also no clear division of competences between the FRO and the Coordinating Officer of a European Border Guard Team. It is advisable that this gap be filled. Finally, the structure of the FRO office as designed by Frontex may give the impression that the FRO is not fully independent. Indeed, her Appointing Authority is the Executive Director, to whom she will have to report and who will appraise her work. In the FRO's job description enclosed with Frontex's opinion, there is a statement that "[t]*he FRO will be required to make a declaration of commitment to act independently in Frontex' interest*". *Amnesty, Statewatch* and *Migreurop* raised doubts as to whether working in the interest of a specific entity is compatible with the principle of independence. *Amnesty* suggested that, as a minimum, the Consultative Forum should be closely associated with the FRO's work so as to be able to support and assist the FRO in fulfilling her tasks effectively. The Ombudsman will put that suggestion forward as a recommendation.

79. Second, the Ombudsman notes that the FRO's duties do no include dealing with individual complaints on violations of fundamental rights. From Frontex's opinion it emerges that, in its view, putting in place a system of reporting/informing about fundamental rights breaches is sufficient to ensure full compliance with its fundamental rights obligations. Indeed, point 17 of the Strategy provides that Frontex will put in place an effective reporting system to ensure that any incidents or serious risks regarding fundamental rights are immediately "*reported*" by Frontex staff/participating officers and that this reporting "*should be the basis for effective monitoring of all* [Frontex] *operations*". The Ombudsman suggests that Frontex reflect upon the issue whether a reporting/informing system may be regarded as a replacement of a complaints mechanism. Reporting obligations and complaints mechanisms are not

[9] Contribution by Statewatch and Migreurop.
[10] Contribution by Statewatch and Migreurop.

alternatives. They constitute rather complementary means to guarantee the effective protection of fundamental rights. In the Ombudsman's view, without the latter, compliance cannot ultimately be effective.

80. Similarly, it has been pointed out that disciplinary measures are not sufficient to ensure compliance with fundamental rights. The Ombudsman shares this view and reiterates the importance of providing for an effective complaints mechanism in this regard.

81. Furthermore, even if, for each operation, Frontex appoints a Coordinating Officer (FCO) who monitors the implementation of the Operational Plan and the Code of Conduct and thus plays a key role in the follow-up to the reporting of serious incidents, this does not eliminate the need for a genuine complaints mechanism open to **all** persons involved, namely, participants in operations who are obliged to report under EU or national rules and also those directly affected by infringements, as well as those who become aware of them (journalists, NGOs etc).

82. In line with the considerations outlined in point 61 above, in the Ombudsman's view, there may be sound reasons for the FRO to consider dealing with individual complaints on fundamental rights infringements. Handling complaints concerning the activity of the staff of a Member State could mean, at least, transferring them to the competent Member State authority or to a national ombudsman controlling that authority. In this respect, the Ombudsman notes the encouraging suggestion by the *Greek Ombudsman*, as regards the joint operations and pilot projects carried out by Frontex together with the Greek authorities, that a monitoring mechanism of fundamental rights breaches should be established at the EU level in order to "*investigate and prevent fundamental rights violations*". As regards complaints concerning the behaviour of Frontex's staff, the Ombudsman recalls that the **European Border Guard Teams** are composed not only of Member State representatives, but also of Frontex representatives. While the Ombudsman has no problem accepting that Frontex staff is not qualified to perform border control functions and is deployed for coordination tasks only, so as to foster cooperation between the host and the participating Member States, this cannot be tantamount to shielding Frontex from responsibility for acts performed by its staff in exercising their coordination tasks. The Ombudsmen trusts that Frontex will agree with his view.

83. The Ombudsman suggests that the FRO could consider the possibility of dealing with individual complaints on infringements of fundamental rights, including **complaints made in the public interest**, concerning all Frontex activities, and that Frontex provide the FRO with adequate administrative support for that purpose. In this regard, he also takes note of Frontex's statement in its opinion that the FRO will have an active role in establishing *in concreto* the mechanism to monitor respect for fundamental rights.

84. As to the **CF**, Frontex defined it as "*a knowledge and expertise resource*". The CF's main task would thus be to offer strategic recommendations and guidance to the Executive Director and the Management Board in fundamental rights matters. As to the CF's monitoring role, the Ombudsman understands that it has competence to (i) deliver an annual report on Frontex's implementation of its fundamental rights obligations, and (ii) receive reports from the FRO. Since

the FRO is also obliged to report to the Management Board and to the Executive Director, the CF, composed of international organisations, EU agencies and NGOs[11], could thus serve to counterbalance the Management Board's and the Executive Director's control over the FRO and ultimately contribute to the FRO's independence.

85. In light of the foregoing analysis, the Ombudsman would like to make certain recommendations to Frontex, with a view to further strengthening its implementation of fundamental rights. They are listed in the draft recommendation below.

C. The draft recommendation

Frontex could consider taking the following further action:

As regards the Strategy

A. clarifying (i) whether it considers itself responsible for fundamental rights breaches within its activities and, if so, under which terms; and (ii) in the Code of Conduct, the legal framework applicable to the conduct of all participants in Frontex operations (point 61 of the Ombudsman's assessment);

B. defining specific data protection safeguards for intercepted migrants, as well as redress mechanisms for data subjects whose rights are infringed. Alternatively, the Action Plan could be supplemented in this respect (point 66 of the Ombudsman's assessment);

As regards the Action Plan[12]

C. identifying measures giving a concrete dimension to the objective foreseen in point 17 of the Strategy, which is that, after having been reported by Frontex staff or participating officers, any incidents or serious risks regarding fundamental rights "*can be acted upon*" (point 62 of the Ombudsman's assessment);

D. specifying (i) the date of publication of the annual progress report on the implementation of the Strategy, and (ii) the means by which it "*shall*" be made public (point 63 of the Ombudsman's assessment);

E. clarifying the sanctions to be applied to participants in Frontex operations who are not members of its own staff (point 64 of the Ombudsman's assessment);

[11] The following organisations are represented on the Forum: Amnesty International European Institutions Office; Caritas Europa; Churches' Commission for Migrants in Europe; Council of Europe; European Asylum Support Office; European Council for Refugees and Exiles; FRA; International Catholic Migration Commission; International Commission of Jurists; International Organisation for Migration; Jesuit Refugee Service; Office for Democratic Institutions and Human Rights; Platform for International Cooperation on Undocumented Migrants; Red Cross EU Office; Un High Commissioner for Refugees.

[12] The Ombudsman notes that the Action Plan provides for its revision "*when the need arises*". He suggests, therefore, that, in order to deal with points C-F, Frontex consider carrying out such a revision.

F. laying down specific guidelines for participants in joint return operations on how to deal with distress situations in which intercepted migrants may find themselves (point 65 of the Ombudsman's assessment);

As regards the Codes of Conduct

G. further clarifying the legal nature of the Code of Conduct (point 68 of the Ombudsman's assessment);

H. clarifying Articles 19(2) and 20(2) of the Code of Conduct (point 70 of the Ombudsman's assessment);

I. including in the forthcoming Joint Returns Code a provision on the relationship between this Code and the (general) Code of Conduct (point 71 of the Ombudsman's assessment);

As regards termination/suspension of operations

J. providing concrete guidance as regards the actual meaning of formulations such as "*if the conditions to conduct those joint operations or pilot projects are no longer fulfilled*" and violations of fundamental rights or international protection obligations which "*are of a serious nature or are likely to persist*" (point 76 of the Ombudsman's assessment);

K. considering whether there would be room for laying down rules, for instance in the Joint Returns Code, on the termination and suspension of joint return operations (point 77 of the Ombudsman's assessment);

As regards the Consultative Forum

L. taking any possible action to encourage the Forum's close cooperation with, and support for, the FRO in fulfilling her tasks effectively (point 78 of the Ombudsman's assessment);

As regards the FRO

M. (i) taking any possible action to enable the FRO to consider dealing with complaints on infringements of fundamental rights in all Frontex activities submitted by persons individually affected by the infringements and also in the public interest, and (ii) providing adequate administrative support for that purpose (point 83 of the Ombudsman's assessment).

The Ombudsman would appreciate it, if the Agency could send a detailed opinion on the above suggestions by 31 July 2013. The detailed opinion could consist of the acceptance of the draft recommendation and a description of how it has been implemented.

P. Nikiforos Diamandouros
Done in Strasbourg on 09 -04- 2013