

Frontex at the epicentre of a rule of law crisis at the external borders of the EU

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Abstract

Next to the rule of law ‘crises’ within Member States, a new facet of this rule of law crisis is emerging at the external borders of the EU, and sees the EU border agency Frontex as its epicentre. This article illustrates the multiple facets of this crisis which concerns Frontex’s functioning and activities, discussing a form of ‘agency capture’ that occurred under the mandate of the former Executive Director and a legal framework ensuring limited monitoring and transparency on operations. Subsequently, the article delves into the constitutional meaning of the rule of law for an agency such as Frontex, both for its significance on relations between authorities and individuals and for the interplay between the rule of law and accountability. The article concludes by calling for a rethinking of the accountability instruments in place, to constrain more effectively the exercise of discretion by agencies.

1 | ‘MIRROR, MIRROR ON THE WALL, WHO IS THE FAIREST OF THEM ALL?’ FRONTEX AS A VICTIM OF ITS OWN SUCCESS

If there is one agency that has witnessed a steady and exponential growth in powers, size and funding, it is the European Border and Coast Guard Agency (hereinafter, Frontex). The Agency was established in 2004, and the pace of reforms has been sustained: relatively minor changes were passed in 2007 and 2011; a last revision in 2019 completed the process initiated in 2016, designing an agency with a target of 10,000 units of personnel for 2027.¹ The

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¹Council Regulation (EC) 2007/2004 (26.10.2004, OJ L 349/25.11.2004); Regulation (EC) No. 863/2007; Regulation (EU) No. 1168/2011, OJ L 304, 22.11.2011, 1–17; Regulation (EU) 2016/1624 of 14 September 2016 on the European Border and Coast Guard (OJ L 251, 16.9.2016, 1); Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard (OJ L 295, 14.11.2019, 1; hereinafter, 2019 Frontex Regulation), in turn repealed Regulations (EU) No. 1052/2013 and (EU) 2016/1624. For an overview of all the reforms, see European Court of Auditors, Special Report 8/2021, ‘Frontex’s Support to External Border Management: Not Sufficiently Effective to Date’, available on the official webpage of the European Court of Auditors, www.eca.europa.eu.

budget, 6.3 million euros in 2005, was approximately 830 million euros in 2023 and will exceed one billion euros from 2025 onwards.²

The reforms of 2016 and 2019 represent the most significant upgrade in the evolution of the Agency, with the consolidation of operational and direct administration powers and the constitution of a standing corps entitled to carry service weapons.³ However, despite these reforms, criticism has been voiced on the persistent mismatch between increased powers and the necessary accountability mechanisms, confirming previous critiques of the agency.⁴ The last couple of years have demonstrated that this analysis was correct.⁵ Furthermore, the finalisation of the reforms of the Pact on Asylum and Migration will increase the significance of these issues because of the increased role of agencies such as Frontex and the EUAA.⁶ This article argues that Frontex is the epicentre of a rule of law crisis occurring at the external borders of the EU, where respect for the rule of law here stands for acting within the boundaries given by the founding regulation and not giving rise to arbitrariness.⁷

The flow of news reports on Frontex has led to multiple allegations of breaches of the EU primary legal framework and of the 2019 Frontex Regulation, which adds to the systematic border violence carried out by Member States' authorities.⁸ More precisely, the conduct of Frontex in joint operation Poseidon in Greece has come under scrutiny, and the former Executive Director (hereinafter, ED), the Frenchman Fabrice Leggeri, has been widely criticised for his approach to the exercise of his mandate. The European Parliament and the anti-fraud watchdog OLAF have investigated the Agency.⁹ After the in-camera presentation of the OLAF report before the Management Board, the ED spontaneously resigned in April 2022.¹⁰

Surprisingly, the reaction of the Management Board was to accept the resignation, considering that 'launching further proceedings against the Executive Director (...) is not necessary anymore, since the outcome of these

²Management Board Decision on the 2005 budget, https://frontex.europa.eu/assets/Key_Documents/Budget/Budget_2005.pdf; Statement of revenue and expenditure for the 2023 financial year—European Border and Coast Guard Agency (Frontex)—amending budget No. 1, at (C/2023/698) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C_202300698; European Commission, Statement of Estimates of the European Commission, 2023, <https://commission.europa.eu/system/files/2023-06/DB2024-Statement-of-Estimates.pdf>.

³V. Meissner, 'The European Border and Coast Guard Agency Frontex after the Migration Crisis: Towards a "Superagency"?', in J. Pollak and P. Slominski (eds.), *The Role of EU Agencies in the Eurozone and Migration Crisis: European Administrative Governance* (Palgrave Macmillan, 2021), https://doi.org/10.1007/978-3-030-51383-2_7.

⁴M. Gkliati, 'The New European Border and Coast Guard: Do Increased Powers Come with Enhanced Accountability?', 17.4.2019, available at www.eulawanalysis.blogspot.com; J. Pollak and P. Slominski, 'Experimentalist but Not Accountable Governance? The Role of Frontex in Managing the EU's External Borders', (2009) 32(5) *West European Politics*, 904–924; A. Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea', in B. Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff, 2010), 229–257.

⁵A confirmation of this can be found here: European Commission, 'Report from the Commission to the European Parliament and the Council on the Evaluation of Regulation (EU) 2019/1896 on the European Border and Coast Guard, Including a Review of the Standing Corps' [hereinafter, 2024 Report on Frontex], COM/2024/75 final, issue 31 and actions 29. See also European Commission, 'Commission Staff Working Document Evaluation Accompanying the Document REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the Evaluation of Regulation (EU) 2019/1896 on the European Border and Coast Guard, Including a Review of the Standing Corps' [hereinafter, 2024 Evaluation on Frontex], SWD/2024/75 final. Both documents were published on 2.2.2024.

⁶D. Vitiello, 'L'ultimo atto: il nuovo Patto sulla migrazione e l'asilo è (quasi) legge', *ADiM Blog*, Editoriale, 31.12.2023, available at www.adimblog.com; L. Tsourdi, 'The EU's New Pact on Migration and Asylum: Three Key Arguments', 14.9.2023, available at www.eulawanalysis.blogspot.com.

⁷K. Lenaerts, 'On Check and Balances: The Rule of Law within the EU', (2023) 29 *Columbia Journal of European Law*, 25.

⁸G. Christides, K. van Dijken, S. Lüdke and M. Popp, 'Scandals Plunge Europe's Border Agency into Turmoil', *Der Spiegel*, 5.5.2021; J. Liboreiro, 'Allegations, Lawsuits and Damning Reports: How Frontex Became the Most Contentious EU Agency', (2021) *Euronews*; Bellingcat, 'Frontex at Fault: European Border Force Complicit in "Illegal" Pushback' (23 October 2020); see also E. Guild (ed.), *Monitoring Border Violence in the EU: Frontex in Focus* (Routledge, 2023).

⁹European Parliament, LIBE Committee, 'Report on the Fact-finding Investigation on Frontex Concerning Alleged Fundamental Rights Violations', July 2021. FragDenStaat, 'OLAF, Final Report on Frontex'. For additional reports on Frontex, see European Court of Auditors, 'Frontex's Support to External Border Management: Not Sufficiently Effective to Date', Special Report. No. 08, June 2020. Available at [Special Report 08/2020: Frontex's support to external border management](https://www.eca.europa.eu/sr082020).

¹⁰G. Christides and S. Lüdke, 'Inside the Final Days of the Frontex Chief', 10.05.2022, *Spiegel International*; J. Pascual and V. Malingre, 'The Story behind Frontex Director Fabrice Leggeri's Resignation', 1.5.2022, *Le Monde*.

proceedings will no longer affect the position of the Executive Director'.¹¹ Even if the top sanction of the Management Board can be the dismissal, this statement is rather ambiguous. It suggests that, in case of suspicion of serious irregularities, the resignation of a top administrator can be a passport to impunity for the Agency.¹² To further complicate this affair, the OLAF report was not disclosed for months, not even at the request of the European Parliament.¹³ Instead, it was leaked by media only in October 2022, confirming the contested allegations.¹⁴ For months, the opacity around the resignation of the former ED contrasted with the need for transparency over the conduct of a top administrator of a 'booming' EU agency, as Frontex is.

The successor of Mr Leggeri, Mr Hans Leijten, has made clear that restoring the reputation of the Agency was his lodestar, declaring adherence 'to three "guiding principles" during his tenure: accountability, respect for fundamental rights and transparency'.¹⁵ Frontex is most criticised and defective on precisely these aspects.¹⁶ Yet, the legal system that has made possible the appointment, operation and misuse of powers enacted by the former ED has not changed. Ever since, media outlets revealed that Frontex is still involved in pushback operations in Greece in the operational area of JO Poseidon.¹⁷ More recently, the Report of the European Ombudsman on the Pylos disaster has questioned also the role of Frontex, since the Agency was aware of the boats but did not act to prevent any fatalities.¹⁸ As one can see, old habits die hard.

The whole mandate of Mr Leggeri (started in 2015 and renewed in 2020) and the saga around his resignation in 2022 exemplify two distinct phenomena: first, the existence of a rule of law crisis inside the European administration dedicated to the management of the external borders; and secondly, the 'Pandoras box' concerning the effectiveness of accountability mechanisms over the Agency that was opened up by the spontaneous resignation of the former ED, exposing the fragility of the system in place, in particular for the wide discretionary powers of the ED and

¹¹Frontex, Management Board conclusions from the extraordinary Management Board meeting of 28–29 April 2022, published on 2022-04-29, available at <https://frontex.europa.eu/media-centre/management-board-updates/management-board-conclusions-from-the-extraordinary-mb-meeting-of-28-29-april-2022-nr08YV> and reported here for its relevance: 'In view of the European Anti-Fraud Office's (OLAF) investigations against three staff members of Frontex including the Agency's Executive Director, the Frontex Management Board met on 28 and 29 April 2022 for an extraordinary meeting in order to decide on the next steps. At this meeting, the Executive Director was given the opportunity to comment on the findings contained in the OLAF report. On the first day of the meeting, he declared his resignation from all his functions with immediate effect and his intention to terminate his employment in the Agency. The Management Board took note of his intentions and concluded that the employment has therefore come to an end. In view of the Executive Director's resignation, the Management Board decided that launching further proceedings against the Executive Director in connection with the OLAF report of 15 February 2022 is not necessary anymore, since the outcome of these proceedings will no longer affect the position of the Executive Director. 'The Management Board will also take the next steps provided by law with regard to the other two staff members referred to in the OLAF report. 'The Management Board clearly states that effective border control and the protection of fundamental rights are fully compatible. The mandate of the Agency is clearly set out in the EBCG Regulation'.

¹²On this topic, see A. di Martino, 'Does the European Union's Rule of Law Require the Criminalization of EU Public Officials? A First Appraisal', forthcoming, in this journal.

¹³Letter by the Chairperson of the LIBE Committee to the Chairperson of the Frontex Management Board, available at [https://www.statewatch.org/media/3149/d-2022-6565_ga\\$perlin_olaf-report.pdf](https://www.statewatch.org/media/3149/d-2022-6565_ga$perlin_olaf-report.pdf); see also the Parliamentary question E-000861/2022 by Erik Marquardt MEP to the Commission, available at https://www.europarl.europa.eu/doceo/document/E-9-2022-000861_EN.html. See also T. Strik, 'European Oversight on Frontex: How to Strengthen Democratic Accountability', *VerfBlog*, 2022/9/08, DOI: 10.17176/20220908-110,526-0. Precisely on this aspect, see L. Salzano, 'The Secretiveness over the OLAF Report on Frontex Investigations: Rule of Law Fading into Arbitrariness?', *VerfBlog*, 2022/9/09, DOI: 10.17176/20220909-110344-0; G. Glouftsiou, 'Performing Secrecy: Hiding and Obfuscation in Frontex's Pushbacks Scandal', (2023) *Journal of Ethnic and Migration Studies*, DOI: 10.1080/1369183X.2023.2226825.

¹⁴FragDenStaat, 'OLAF, Final Report on Frontex'; T. Strik, 'OLAF Report Shows Yet Again How Frontex Systematically Ignores Human Rights', 9.1.2023, *The Parliament Magazine*. See also S. D'Auria, 'OLAF Report Confirms the Allegations about Frontex's Serious Misconducts and Irregularities', (2023) *lusIntinere*.

¹⁵Statement of Frontex Executive Management following publication of OLAF report, 2022-10-14, at <https://frontex.europa.eu/media-centre/news/news-release/statement-of-frontex-executive-management-following-publication-of-olaf-report-amARYy>; statement of the new ED Leijten reported in O. Bizot, 'New Frontex Chief Vows to End Illegal Pushbacks of Migrants at Border', *EuroNews*, 19.1.2023.

¹⁶On this point, the Commission Report and Evaluation quoted above (n. 6) do confirm that serious shortcomings remain over the functioning of the Agency. See also the contributions to the debate 'Frontex and the Rule of Law' that appeared on *VerfBlog* in 2022. See also G. Campesi, *Policing Mobility Regimes: Frontex and the Production of the European Borderscape* (Routledge, 2021); M. Fink, *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford University Press, 2018).

¹⁷J. Rankin and L. O'Carroll, 'EU Calls for Independent Inquiry into Greece "Pushback" of Asylum Seekers', *The Guardian*, 22.5.2023.

¹⁸European Ombudsman, Decision on how the European Border and Coast Guard Agency (Frontex) complies with its fundamental rights obligations with regard to search and rescue in the context of its maritime surveillance activities, in particular the Adriana shipwreck (OI/3/2023/MHZ), 26.2.2024, at <https://www.ombudsman.europa.eu/en/decision/en/182665> [hereinafter, Adriana shipwreck Decision].

for the (limited) internal controls on the way he or she exercises the mandate.¹⁹ This article argues that Frontex is the epicentre of a rule of law crisis occurring at the external borders of the EU.²⁰

Indeed, a recent strand of scholarship has identified a dimension of this crisis in the areas of asylum, refugee protection and border management practices.²¹ The rule of law crisis at the level of the Member States and the one concerning Frontex can be defined as two faces of the same coin, for the ‘hybridity’ characterising Frontex.²² In the framing given by Everson, Monda and Vos, agencies are ‘in-betweeners’, i.e., ‘hybrid’ entities liaising European institutions and national administrations.²³ Compared with other agencies, the closeness to national administrations is even higher in the case of Frontex, because of the concept of shared responsibility embedded in the Regulation and also because of the fact that joint operations are carried out in the territories and under the final direction of the host Member State.²⁴ Lately, this has been recognised by the same European Commission in its 2024 Report on Frontex as an issue that creates challenges for the respect of the legal framework.²⁵

Hence, this article fills a gap in the literature: the increased attention Frontex is receiving is still missing the theoretical perspective of the rule of law framework.²⁶ Framing these occurrences as expressions of a rule of law crisis provides new insights and supports the process of finding the most adequate remedies to such a crisis.

First, I will amply demonstrate that Frontex is an expression of a rule of law crisis at the external borders of the EU (Section 2). Then I will delve into the constitutional meaning of the rule of law for an agency such as Frontex, both in the sense of the significance of the rule of law in the relations between authorities and individuals, and for the interplay between the rule of law and accountability, one of several components of the rule of law, yet very crucial for agencies. Only by setting the rule of law crisis within the context of the EU constitutional framework will it be possible to identify concrete remedies for this crisis (Section 3). I then conclude by asserting that respect for the rule of law requires rethinking the accountability instruments in place (Section 4). This is particularly urgent considering the resounding silence of the Migration and Asylum Pact in this regard.

2 | THE RULE OF LAW CRISIS AT THE EXTERNAL BORDERS OF THE EU: A DIAGNOSIS

2.1 | One or many crises? On rule of law backsliding, systemic deficiencies and Frontex

Beyond the well-known crisis concerning some Member States, rule of law challenges arise if the EU administration (i.e., agencies) fails to respect core tenets of the rule of law, i.e., acting within the boundaries given by the founding

¹⁹See the European Commission Report on Frontex and Evaluation quoted above, n. 6.

²⁰On this point, see L. Marin, ‘Frontex and the Rule of Law Crisis at EU External Borders: A Question of Legal Design?’, *VerfBlog*, 2022/9/05, DOI: [10.17176/20220905-230.813-0](https://doi.org/10.17176/20220905-230.813-0); and also the blogposts of the debate ‘Frontex and the Rule of Law’ in *VerfBlog*. For a different angle, see also D. Kochenov and S. Ganty, ‘EU Lawlessness Law: Europe’s Passport Apartheid from Indifference to Torture and Killing’ (2 January 2023). Jean Monnet Working Paper No. 2/2022 (NYU Law School), Available at SSRN: <https://ssrn.com/abstract=4316584> or <https://doi.org/10.2139/ssrn.4316584>. Another interesting analysis on external borders, employing the paradigm of preventive justice, is given by V. Mitsilegas, ‘The EU External Border as a Site of Preventive (In) justice’, (2022) *European Law Journal*, 1–18. See also F.L. Gatta, ‘Migration and the Rule of (Human Rights) Law: Two “Crises” Looking in the Same Mirror’, (2019) 15(1) *Croatian Yearbook of European Law & Policy*, 99–133.

²¹E. Tsoardi, ‘Asylum in the EU: One of the Many Faces of Rule of Law Backsliding?’, (2021) 17(3) *European Constitutional Law Review*, 471–497. I. Goldner Lang and B. Nagy, ‘External Border Control Techniques in the EU as a Challenge to the Principle of Non-refoulement’, (2021) 17(3) *European Constitutional Law Review*, 442–470. See also F.L. Gatta, above, n. 20.

²²F.L. Gatta, see above, n. 20; J. Rijpma, ‘Hybrid Agencification in the Area of Freedom, Security and Justice and its Inherent Tensions: The case of Frontex’, in M. Busuioac, M. Groenleer and J. Trondal (eds.), *The Agency Phenomenon in the European Union: Emergence, Institutionalisation and Everyday Decision-Making* (Manchester University Press, 2012), 84; F. Coman-Kund, ‘Hybrid EU External Border Management: Frontex, the Rule of Law and the Quest for Accountability’, *VerfBlog*, 2022/9/06, DOI: [10.17176/20220906-230.713-0](https://doi.org/10.17176/20220906-230.713-0).

²³M. Everson, C. Monda and E. Vos (eds.), *European Agencies in between Institutions and Member States* (Kluwer Law International, 2014), 3–8, at 5.

²⁴Art 7 of the 2019 Frontex Regulation; also G. Campesi, see above, n. 16.

²⁵See European Commission, SWD, 2024 Evaluation on Frontex, above, n. 5, 125.

²⁶See the literature referred to above at n. 17. For an early account of Frontex operations read through the lens of the rule of law, see L. Marin, ‘Policing EU’s External Borders: A Challenge for the Rule of Law and Fundamental Rights in the Area of Freedom, Security and Justice? An Analysis of Frontex Joint Operations at the Southern Maritime Border’, 2011 7(4) *Journal of Contemporary European Research*, 468–487.

regulation. This section explores precisely the rule of law crisis internal to the EU administration. I argue that this ‘endogenous’ European variant of the rule of law crisis at the external borders of the EU, of which Frontex is part and parcel, adds to the rule of law backsliding occurring in several Member States, be it in the variant of constitutional capture or of systemic breaches of core provisions of the legal order, such as fundamental rights.²⁷

The first strand of the rule of law crisis is represented by illiberal Member States of Eastern and Central Europe, that, after accession, have neglected the core principles of liberal democracy by enacting reforms dismantling the constitutional state and also acting towards the European Union and its institutions in total defiance of this constitutional order.

With constitutional capture, Müller has indicated the process of ‘systematically weakening checks and balances and, in the extreme case, making genuine changes in power exceedingly difficult’.²⁸ Pech and Scheppele define rule of law backsliding ‘as the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party’.²⁹ For my argument, I will focus on two core elements of these definitions: the presence of objective reforms in contrast with liberal values and the deliberative process leading to those reforms.

In another perspective, recent scholarship has identified a new strand of this crisis in migration and asylum. Its core elements are the systemic trumping of containment goals over protection obligations and the overall neglect for fundamental rights. As explained by Goldner Lang and Nagy, the rule of law crisis in border management manifests in the arbitrary application of legal notions, such as safe country of origin, first country of asylum and safe third country; the lack of predictability and certainty in their interpretation and implementation is at odds with the functioning of the rule of law.³⁰ In asylum and refugee protection, Tsourdi identified a rule of law crisis in a persistent implementation gap, affecting mutual trust among states, entailing systemic fundamental rights violations, and in the deflection of protection obligations through externalisation practices.³¹

In the perspective developed in this article, the rule of law ‘crisis’ comprises a dimension closely related to rule of law ‘backsliding’ as the ‘constitutional capture’ by illiberal governments,³² a second dimension of systemic deficiencies embedded in the legal framework and a third aspect concerning the dark sides of policy choices and experimental governance, tailoring policies to crises. The next sub-sections will explain these arguments.

2.2 | ‘Agency capture’ as a form of rule of law ‘backsliding’

Under the direction of its former ED, Frontex has experienced a form of ‘agency or organisational capture’, similar to the constitutional capture enacted by illiberal leaders of the ‘backsliding Member States’. With agency capture, I indicate, first, the violations committed by top managers and, second, the intentionality of this process, i.e., the deliberate choice to disregard the legal framework because of personal ideological disagreement with it and defiance of the legal and institutional setting where the Agency is embedded. As demonstrated in the OLAF report, the

²⁷L. Marin, ‘Frontex and the Rule of Law Crisis at EU External Borders: A Question of Legal Design?’, *VerfBlog*, 2022/9/05, DOI: [10.17176/20220905-230,813-0](https://doi.org/10.17176/20220905-230,813-0).

²⁸J.-W. Müller, ‘Rising to the Challenge of Constitutional Capture: Protecting the Rule of Law within EU Member States’ (*Eurozine*, 21 March 2014). For a more comprehensive account, see J.-W. Müller, ‘Should the EU Protect Democracy and the Rule of Law inside Member States’, (2015) 21(2) *European Law Journal*, 141.

²⁹L. Pech and K.L. Scheppele, ‘Illiberalism Within: Rule of Law Backsliding in the EU’, (2017) 19 *Cambridge Yearbook of European Legal Studies*, 3–47, doi:[10.1017/cel.2017.9](https://doi.org/10.1017/cel.2017.9).

³⁰I. Goldner Lang and B. Nagy, see above, n. 21.

³¹E. Tsourdi, see above, n. 21.

³²G. Halmaj, ‘Populism, Authoritarianism and Constitutionalism’, (2019) 20 *German Law Journal*, Special Issue 3, April, 296–313; L. Pech and K.L. Scheppele, see above, n. 29; see also C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (Oxford University Press, 2016); and M. Ioannidis and A. von Bogdandy, ‘Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done’, (2014) 51(1) *Common Market Law Review*, 59–96, <https://doi.org/10.54648/cola2014003>.

management of the Agency had its precise vision of the priorities of the Agency and enacted them, though in contrast with the Frontex Regulation and primary EU law.³³

The core substantive elements of this rule of law crisis are, first, the reiterated breaches of the legal framework governing Frontex, second, the systemic violation of fundamental rights provisions and third, the lack of effective and timely avenues to assert the responsibility of the perpetrators.

Furthermore, I argue that Frontex's Director exercises its powers with wide discretion and little internal and external constraints, partially also due to the limited monitoring of the operational contexts and the lack of transparency surrounding operations.³⁴ Coupled with the inadequate internal oversight by the Management Board, the Director can steer the Agency and operate also in (partial) disregard of the governing legal framework. The evaluation carried out by the European Commission in 2024 confirms this, underlying the ample discretion enjoyed by the ED in enforcing the different instruments concerning the respect for fundamental rights by the Agency.³⁵ Considering that the legal framework has not changed, I argue this can happen again and it remains a structural weakness, which can lead to future breaches.

In particular, the OLAF report on illegal pushbacks has highlighted that several top managers, whose identities are anonymised, have committed failure to follow procedures and processes, failure in their duty of loyalty and failure in managerial responsibilities.³⁶

In substance, the violations amount to a breach of the principle of legality in its most formal meaning, in the sense of violation of the legal framework defining its mandate and framing—in the sense of constraining—its activities.³⁷ Indeed, all exercise of power by public authorities must be exercised in accordance with the law.³⁸

For example, as highlighted above, the EP and OLAF reports have proved the systematic circumvention and violation of the founding Regulation on the duties concerning the assessment and handling of incidents: these are further 'proceduralised' in internal rules such as Standard Operating Procedures on Serious Incident Reporting.³⁹ This was aimed at avoiding initiating Serious Incident Reports on incidents with a potential fundamental rights component and thus the systematic exclusion of the Frontex Fundamental Rights Officer (FRO) from the assessment and handling of the same. The 2024 Evaluation of Frontex has confirmed that the FRO's recommendations are not prioritised, as it happened with the suspension of operations in Hungary that took place long after the FRO suggested it.⁴⁰

In addition to the formal dimension of legality, these practices amount to breaching a more 'substantive' paradigm of legality that integrates core provisions of the higher legal framework, including fundamental rights. This relates to the 'constitutional legality', i.e., the constitutional dimension of the rule of law which affirmed itself during the 20th century.⁴¹ As recalled by President Lenaerts, 'the rule of law within the EU is not an "empty vessel" in which all norms regardless of their content may come "on board"'.⁴² In the EU, this finds expression in the codification of these provisions in the Charter of Fundamental Rights and in the necessity of instruments to protect those fundamental rights, such as judicial review mechanisms.

³³FragDenStaat, [OLAF Final Report on Frontex](#), leaked in October 2022.

³⁴European Commission, SWD, 2024 Evaluation on Frontex, see above, n. 5, 209.

³⁵2024 Report on Frontex, at 74, 181, 183 and 281.

³⁶See FragDenStaat, [OLAF Final Report on Frontex](#), leaked in October 2022, and S. D'Auria, above, n. 14.

³⁷See, among others, A. Pin, *Il rule of law come problema* (Editoriale Scientifica, 2021).

³⁸As formulated by the Venice Commission, the rule of law 'requires a system of certain and foreseeable law, where everyone has the right to be treated by all decision-makers with dignity, equality and rationality and in accordance with the laws, and to have the opportunity to challenge decisions before independent and impartial courts through fair procedures'. Cf. Venice Commission, Rule of Law Checklist, adopted in Venice at its 106th Plenary Session, Venice, 11–12 March 2016. In a comparative perspective, this is not surprising at all: indeed, the 'codification or consolidation work' of the Venice Commission points in this direction, because this is an expression of the consolidation of the constitutional state of the 20th century and the acquired centrality of constitutional courts in domestic systems. Cf. A. Pin, above, n. 37.

³⁹These are Arts 24, 25, 26, 46 and 82 of the 2019 Regulation. See also Annex V to the Regulation.

⁴⁰2024 Report on Frontex, 45.

⁴¹A. Pin, see above, n. 37.

⁴²K. Lenaerts, 'On Check and Balances: The Rule of Law within the EU', (2023) 29 *Columbia Journal of European Law*, 25.

There is abundant evidence of systematic disregard of provisions on fundamental rights from Frontex; I have clustered this evidence into three categories. The first element concerns the freezing and circumvention of the role of the FRO and the classification of incidents. The FRO is the first internal controller of the respect and promotion of fundamental rights in Frontex⁴³; the FRO was deliberately denied access to relevant information, and incidents were classified incorrectly to avoid its involvement, as recalled in the OLAF report. Furthermore, violations of managerial responsibilities concerned the enactment of the 2019 Regulation provisions on the fundamental rights monitors by hindering and delaying their recruitment.⁴⁴ This is an expression of a deliberate choice of directing the Agency in disregard of its fundamental rights obligations, be they codified in the Regulation,⁴⁵ or as an expression of the primary law framework, Treaties and Charter of Fundamental Rights. This is evidence of a rule of law crisis where Frontex is the backsliding agency: I argue that this could—and can still—happen because the legal framework does not guarantee adequate internal and external accountability on the direction provided by its top managers, which enjoy ample discretion in exercising their mandate.⁴⁶

Second, the OLAF report has established that Frontex—cooperating in pushbacks conducted by Greece during Frontex Joint Operations—has been onstage, present and active in situations where violations of fundamental rights, principally by state authorities, do occur. Far from being a practice of the past, these allegations have been reiterated also with the current management. For example, Frontex has been active in operational areas—with surveillance functions—where Libyan authorities carry out pullback operations,⁴⁷ or in Greece, where migrants are still pushed back.⁴⁸ In relation to SAR, also a task of Frontex, the Agency has also been involved in the disasters of Cutro and Pylos, incapable of avoiding the occurrence of a high number of fatalities.⁴⁹ These violations have occurred in different Member States, in liminal border areas, but also outside the territories of the EU. Even when breaches are committed by states, the Agency does not respect its legal framework concerning the internal incident reporting system and follow-up investigations. This applies in situations that entail serious violations of human rights, violations that are not reported and investigated according to the legal framework governing Frontex.

This systematic involvement could take place also if the Agency does not directly act in the process of the serious violations of fundamental rights, since these are committed by State authorities.⁵⁰ We have involvement also when the Agency is having a joint operation and is not exercising any leeway power to influence domestic authorities and steer them to the respect of fundamental rights, for example threatening the use of Article 46 as a (reverse) conditionality. Article 46 provides for different options, from withdrawal of financing up to termination of an operation, and it could be used to provide leeway for the Member State hosting the operation; however, these tools do not tolerate indifference towards fundamental rights violations.⁵¹ This decision is currently entirely in the hands of the ED, and yet it comprises a dimension of political assessment that should be carried out under the scrutiny of European Parliament.⁵² In other words, being in the same context where state guards commit serious violations of fundamental rights does require the Agency to activate itself to suspend or terminate a joint operation. Lacking this,

⁴³According to Art 80 of the Frontex 2019 Regulation, the Agency must have a fundamental rights strategy for the protection and promotion of rights.

⁴⁴See Frontex Management Board, 'Statement of Frontex Executive Management Following Publication of OLAF Report', (2022); S. D'Auria, see above, n. 15.

⁴⁵See, e.g., Recitals 103 and 104 and Arts 1, 3, 46 and 80 of the Frontex Regulation.

⁴⁶2024 Evaluation Report on Frontex.

⁴⁷Alarm Phone, Borderline Europe, Mediterranean—Saving Humans, Sea Watch, 'Remote Control: The EU-Libya Collaboration in Mass Interceptions of Migrants in the Central Mediterranean' (2020). For a more recent account, see Human Rights Watch, 'EU: Frontex Complicit in Abuse in Libya', 12.12.2022.

⁴⁸Helena Smith, 'Greek Government under Fire after Video Shows "Pushback" of Asylum Seekers', *The Guardian*, 19.5.2023.

⁴⁹European Ombudsman, *Adriana shipwreck Decision*, see above, n. 18.

⁵⁰Human Rights Watch, 'Frontex Failing to Protect People at EU Borders' (23.6.2021).

⁵¹See the information on the debate existing within the Agency as reported in *New York Times*, 'Greece Border Abuses Highlight Europe's Clashing Priorities on Migration', 14.2.2023.

⁵²Furthermore, the 2024 Evaluation by the European Commission discusses stakeholders' views on whether the Art 46 decision should reside with the ED alone or be assigned to, or otherwise involve, other actors (e.g., Management Board, Commission or Council). My view is that the current legal framework does not involve adequately the political actors, European and national parliaments, that should exercise oversight on decisions having a component of political discretion.

Frontex should be considered co-responsible for the serious violations of fundamental rights committed by states.⁵³

The third element witnessing a rule of law crisis in Frontex is the lack of internal and external instruments to have these violations ascertained and remedied in an *adequate* time framework.

If serious violations are ascertained only through the input of media, in the first instance, and if the accountability mechanisms in place have not managed to hold the former ED accountable, in both its professional and legal accountability, then we argue that the system is not providing for the necessary antibodies to avoid a new case of agency capture by another ED in the future. The accountability instruments, both internal and external, include the Management Board, the Parliament, the Council and the Commission and the European judiciary. None of these has succeeded in holding the former ED to account and in affecting the course of his activities in due time, during his mandate and after.⁵⁴ Secondly, also the fact that Mr. Leggeri left his position *motu proprio* and can now stand for the 2024 elections at the European Parliament is evidence of an accountability system that is, to say the least, defective.⁵⁵

To conclude, what has happened under the direction of the former ED is a case of agency capture, all in all similar to the constitutional capture enacted by illiberal leaders. It has occurred because the former ED and other top managers have seriously disregarded the legal framework governing and constraining the activities of the Agency, for their ideological disagreement with the legal framework and conflict with other institutions, in breach of professional duties and of the principle of loyal cooperation. Simply put, it was a breach of the rule of law.

2.3 | Systemic deficiencies embedded in the legal framework: How to pierce the veil of multi-actor situations?

In addition to the agency capture highlighted above, Frontex is operating according to a legal framework that embeds systemic deficiencies and challenges to the rule of law.

The first one, expression of its evolution from coordinating agency to a more supranational agency with increased operational and enforcement tasks, is related to its hybridity.⁵⁶ Indeed, the Agency has emerged as an actor 'supporting' EU institutions, mainly the Commission, and the Member States, depending on the specific function considered. While implementing the EU integrated border management policy, Frontex fulfils the function of connecting EU Commission and national administrations and allowing the former to exercise some forms of control, also with the 'right to intervene' envisaged by Article 19 of the Frontex Regulation.⁵⁷

In this respect, the latest reform of 2019 did not fully remedy the typical hybridity of Frontex.⁵⁸ Yet, Articles 4 and 7 confirm it, since the latter provision defines the European Border and Coast Guard as composed of the national authorities of Member States responsible for border management and Frontex. The former provision confirms the shared responsibility of Frontex and national authorities for the European integrated border management, with States retaining the primary responsibility for the management of their external borders, thus substantiating the idea of common external border as portions of juxtaposed external borders, with implications on the Schengen Border Code, the asylum system and the return policy. In this context, Frontex's assistance can be at the request of the

⁵³The third aspect of the violation of fundamental rights is more subtle and refers to the continued failure in mainstreaming fundamental rights protection into its operations, since Frontex disregards the opinions and recommendations of its FRO and Consultative Forum (CF). This means that, in addition to the manifest violations of the prohibition of *non-refoulement* and right to asylum, the Agency is not proactive in integrating fundamental rights into its mandate.

⁵⁴According to the definition of accountability given by Mark Bovens, as 'a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences'. In M. Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework', (2007) 13 *European Law Journal*, 447, at 450; see also M. Bovens, 'Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism', (2010) 33 *West European Politics*, 946, 951.

⁵⁵L. Cater, 'Former Frontex Chief Joins French Far Right for EU Election', politico.eu, 18.2.2024.

⁵⁶F. Coman-Kund, see above, n. 23; J. Rijpma, 'Hybrid Agencification in the Area of Freedom, Security and Justice and Its Inherent Tensions: The Case of Frontex', see above, n. 22.

⁵⁷M. Deleixhe and D. Duez 'The New European Border and Coast Guard Agency: Pooling Sovereignty or Giving It Up?', (2019) 41(7) *Journal of European Integration*, 921–936, DOI: [10.1080/07036337.2019.1665659](https://doi.org/10.1080/07036337.2019.1665659).

⁵⁸F. Coman-Kund, see above, n. 23; M. Deleixhe and D. Duez, see above, n. 57.

States or upon its initiative,⁵⁹ and the founding legal framework precisely embeds this hybridity, making it complex by default to allocate responsibility.⁶⁰

On the operational plan, Frontex is typically involved in multi-actor situations: these make it challenging to allocate responsibility among actors. Depending on the circumstances, these actors can be from Member States, other EU agencies or third states but also private contractors: these complexities have long been disguised under a blame-shifting exercise, mainly between Frontex and Member States, whether host or participating.⁶¹

However, this inherent complexity engrained in the functioning of Frontex has been a plausible ground for avoiding direct responsibility when the Agency was a small entity exercising only a coordinating function, back in 2005.⁶² Today, with a budget of approximately 900 billion euros per year and a target staff for 2027 of 10,000 units of personnel, the story must be a different one.⁶³ Furthermore, Frontex operates in contexts where casualties entail the loss of human life.

This peculiarity in the functioning of the Agency can entail an important rule of law challenge because it jeopardises or at least complicates any attempt at judicial review of the activities of the Agency, which are often operational in nature.⁶⁴ This circumstance finds evidence also in the practice of the Complaints Mechanism, which is therefore a problematic instrument for establishing accountability in the perspective of the right to effective remedies in the hands of concerned individuals, as highlighted in the Evaluation Report on Frontex of 2024.⁶⁵

It is therefore important for the EU and for EU law to redesign new forms of accountability fitting the current evolution of the agency. Academics have engaged in providing solutions to this challenge, for example, designing Guidelines for the allocation of responsibility in situations of shared responsibility which are typical of European integrated border management.⁶⁶ It is, however, crucial that judicial actors mature the necessity to tackle these issues in the case law, to avoid escapes from legal accountability.

Another structural challenge concerns the way the Agency operates, i.e., with limited monitoring and transparency. It cannot be forgotten that the working group set up by the Management Board to investigate several pushbacks which caused turmoil around and within the Agency, called FRaLO, did not manage to ascertain what happened in five critical incidents.⁶⁷ As such, it concluded its report with several question marks and aspects left for clarification. It was only OLAF that could ascertain what had happened and how, but only thanks to the investigative powers it is authorised to exercise, and the reports of OLAF are not public.

It is therefore important that these challenges inherent in the functioning of the Agency be contrasted by practices of effective monitoring and by a legal framework that encourages transparency, which is currently missing.⁶⁸ This transparency might be beneficial for Frontex and instrumental to the allocation of responsibility to Member States, which do not often cooperate with Frontex. Furthermore, these obstacles should not hinder attempts to scrutinise in court the operations where Frontex is involved, unless one accepts significantly limiting judicial review over

⁵⁹Art 7 of the 2019 Frontex Regulation.

⁶⁰M. Fink, see above, n. 16.

⁶¹Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea, 'Final Report of the Frontex Management Board Working Group', hereinafter, FRaLO Final Report, 1 March 2021, available in the Frontex webpage.

⁶²It is sufficient to recall that in *Hirsi* the ECHR asked a question on the role of Frontex, without making any statement in the judgment. See *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, 'Council of Europe: European Court of Human Rights', 23 February 2012, available at <https://www.refworld.org/cases/ECHR,4f4507942.html> [accessed 27 June 2023].

⁶³As provided for in Art 5 of the 2019 Frontex Regulation and Annex I of the same.

⁶⁴B. Schotel, 'EU Operational Powers and Legal Protection: A Legal Theory Perspective on the Operational Powers of the European Border and Coast Guard', (2021) 22(4) *German Law Journal*, 625–649, doi:10.1017/glj.2021.29.

⁶⁵Cf. Art 111 of the 2019 Frontex Regulation. See M. Stefan and L. Den Hertog, 'Frontex: Great Powers but No Appeals', in M. Chamon, A. Volpato and M. Eliantonio (eds.), *Boards of Appeal and EU Agencies* (Oxford University Press, 2022), 151–174. See also Evaluation Report on Frontex of 2024, 148–149.

⁶⁶See the project SHARED led by Prof. Violeta Moreno-Lax, which has delivered Guidelines for the apportionment of responsibility in situations of European Integrated Border Management, published at <https://idpbarcelona.net/wp-content/uploads/2024/03/Joint-Guidelines-for-EIBM-SHARED-Project-FINAL.pdf>.

⁶⁷FRaLO Final Report, see above, n. 61.

⁶⁸On the topic, see E. Guild, above, n. 8; L. Salzano, above, n. 14. See also the 'Common Approach on Decentralised Agencies', of 2012, and also E. Vos, *EU Agencies: Common Approach and Parliamentary Scrutiny* (EPRS, 2018).

the activities of an agency⁶⁹ or establishing the responsibility of the management in relation to the wrongdoing that has been proved in the OLAF reports. Consequently, this would mean hampering the functioning of one of the core pillars of the rule of law.

2.4 | Frontex at the epicentre of multiple policy challenges to the rule of law: The dark sides of European Integrated Border Management

Other challenges to the rule of law are the effect of policy choices which weaken the power of law. The first problematic issue is that all the evolutions of Frontex are the product of a certain experimentalism in the governance of so-called EU crises where the European administration is increasingly more involved with direct enforcement of migration containment objectives.⁷⁰ Every crisis provided new impetus and support for strengthening this containment function of the external borders of the EU. The ‘hotspot approach’, i.e., an area where state authorities and EU agencies cooperate, is paradigmatic in this respect, since it has been adopted with a policy document of the Commission.⁷¹ The functioning of the hotspots and the cooperation between EU agencies and national administrations were not regulated with legal instruments. On the ground, there has been a divarication between agencies’ legal mandates and roles and tasks de facto exercised.⁷² This amounts to a deconstruction of the rule of law, because through administrative cooperation agencies exploit or co-create grey zones.

This way of ‘manufacturing’ and handling crises is also a method of pushing forward policies and reforms: it is significant that solutions first tested on the ground later consolidate into legislative proposals. This has happened with the proposal for a Screening Regulation and with the recast of the Border Procedures Directive: to a large extent, they codify in law practices developed in the hotspots.⁷³ However, it should be recalled that the European Court of Human Rights has condemned States for the violations of fundamental rights for their practices of domestic implementation of the hotspot approach, recalling the principle of legality which is an expression of the rule of law.⁷⁴

In these contexts, much of the operational cooperation among agencies, for example between Frontex and Europol, takes place thanks to the operational autonomy of agencies, yet without a clear legal framework: it is the case of the PeDRA system, to name just one example.⁷⁵ PeDRA stands for Processing Personal Data for Risk Analysis, and it started in 2016 as a pilot project of one years duration. It serves for processing personal data collected

⁶⁹While this article has gone to the press, several orders and judgments have been released by the General Court and Court of Justice in lawsuits against Frontex. While an analysis of these pronouncements cannot be done here, it is important to recall them: T-282/21, *SS and ST v. European Border and Coast Guard Agency*, Order of 7 April 2022, ECLI:EU:T:2022:235; Case T-600/21, *WS and Others v. Frontex*, Order of 6 July 2022, ECLI:EU:T:2022:474; and case C-679/23 P, *WS and Others v. Frontex*, Judgment of 06 September 2023, ECLI:EU:T:2023:492; T-600/22, *ST v. Frontex*, Order of 28 November 2023, not yet published; Case T-136/22, *Hamoudi v. Frontex*, Order of 13 December 2023, not yet published; Case T-205/22, *Naass and Sea Watch v. Frontex*, action brought on 15 April 2022. Currently pending.

⁷⁰C. Loschi and P. Slominski, ‘Interagency Relations and the EU Migration Crisis: Strengthening of Law Enforcement through Agencyfication?’, in J. Pollak and P. Slominski, (eds.), *The Role of EU Agencies in the Eurozone and Migration Crisis: European Administrative Governance* (Palgrave Macmillan, 2021), 205–227.

⁷¹European Commission, European Agenda on Migration, 2015, 13.5.2015, COM(2015) 240 final. Then the 2019 Frontex Regulation defines a hotspot area in Art 2, letter 23 as follows:

“‘hotspot area’ means an area created at the request of the host Member State in which the host Member State, the Commission, relevant Union agencies and participating Member States cooperate, with the aim of managing an existing or potential disproportionate migratory challenge characterised by a significant increase in the number of migrants arriving at the external borders’.

⁷²S. Horii, ‘Accountability, Dependency, and EU Agencies: The Hotspot Approach in the Refugee Crisis’, (2018) 37 *Refugee Survey Quarterly*, 204–230.

⁷³See also S. Tas, ‘Datafication of the Hotspots in the Blind Spot of Supervisory Authorities’, in this Special Issue. See also J.-P. Cassarino and L. Marin, ‘The Pact on Migration and Asylum: Turning the European Territory into a Non-territory?’, (2022) 24(1) *European Journal of Migration and Law*, 1–26.

⁷⁴See ECtHR, Judgment 30.3.2023, *J.A. and Others v. Italy*, 21,329/18. See also ECtHR, Judgment 15.12.2016 [GC], *Khlaifia and Others v. Italy* [GC], 16,483/12. For comments, see J. Callewaert, ‘First Assessment of the “Hotspot Approach”: A Prefiguration of the Co-respondent Mechanism? Judgment of the ECtHR in the Case of J.A. and Others v. Italy’, at [https://johan-callewaert.eu/fr/first-assessment-of-the-hotspot-approach-a-prefiguration-of-the-co-respondent-mechanism-judgment-of-the-ecthr-in-the-case-of-j-a-and-others-v-italy/#:~:text=The%20ECTHR%20found%20violations%20of,expulsion%20\(Article%204%20o.](https://johan-callewaert.eu/fr/first-assessment-of-the-hotspot-approach-a-prefiguration-of-the-co-respondent-mechanism-judgment-of-the-ecthr-in-the-case-of-j-a-and-others-v-italy/#:~:text=The%20ECTHR%20found%20violations%20of,expulsion%20(Article%204%20o.)

⁷⁵In the context of experimentalist governance, for the EUAA it has been observed that agencies do relate to and cooperate with national authorities according to the specific situations of the countries observed. S. Tas, see above, n. 61. See also A. Pirrello, ‘The European Union Agency for Asylum: Legal Remedies and National Articulations in Composite Border Procedures’, *European Law Journal*, forthcoming.

during debriefing operations and exchange of data with Europol.⁷⁶ This happens thanks to the operational room to manoeuvre that agencies enjoy, but it lacks a clear legal framework defining the boundaries of this cooperation and of data collection. What supervision is carried out on agencies to ensure they operate within their boundaries and that their greediness for data is monitored? Empirical data suggest that Frontex's data processing is not adequately respecting the EU data protection framework and the EDPS's recent audit on Frontex and the 2024 Evaluation Report have confirmed these issues.⁷⁷ Yet, PeDRA has been operating since 2016.

This is one example of the rule of law challenges emerging from the experimentalism in the governance of crises. The external borders of the EU have become the sites for testing migration containment solutions, into a context of limited monitoring by civil society organisations, of limited protection for fundamental rights. What is most worrisome is that these and other rule of law challenges are manufactured within the territory of the EU: indeed, as I have argued elsewhere, a trend of de-territorialisation and de-legislation is emerging in policies conflating 'border areas' within the territories of the Member States with functions of sorting, detention and overall containment of migrants, thanks to the fictions of non-entry and increased resort to presumptions in accelerated border procedures.⁷⁸

These are internal reflections and projections of a fully fledged externalisation policy that brings several rule of law challenges: next to migration containment policies by proxy, informal cooperation and assistance memoranda or statements convey a disintegration potential and compromise the rule of law, because soft law deals trump hard law obligations.⁷⁹

Secondly, another reason for concern for the rule of law emerges from the fact that Frontex is at the centre of a web of databases, increasingly interconnected and interoperable, that integrate AI technologies into their functioning.⁸⁰ Frontex, for example, is heading the central unit of the soon-to-be-operational ETIAS database.⁸¹ This means that the Agency is called to implement the legal parameters, specified by the Commission with delegated and implementing acts, for example on security threats, with pre-determined risk criteria that, under a veil of technicality, do conceal political choices. This brings new challenges in relation to the emerging 'algorithmic discretion', as framed by Musco Eklund,⁸² such as for example contestability by affected persons of a decision based on the collected data, or even, in the future, (semi-) automated decisions. This type of discretion is even more difficult to scrutinise because of the inherent limits of algorithmic transparency, which is defined as '[i]ncluding traceability, explainability and communication'.⁸³ However, as stressed in the scholarship, transparency does not equate with explainability.⁸⁴

⁷⁶Ministero dell'Interno, 'Standard Operating Procedures (SOPs) Applicable to Italian Hotspots', available at http://www.libertacivilimmigrazione.dlci.interno.gov.it/sites/default/files/alegati/hotspots_sops_-_english_version.pdf.

⁷⁷EDPS, 'Audit Report on the European Border and Coast Guard Agency (FRONTEX)', (2023), https://edps.europa.eu/system/files/2023-05/edps_-_23-05-24_audit_report_frontex_executive_summary_en.pdf. See also 'The evidence gathered by BIRN point to an effort by the Frontex leadership under Leggeri, backed by the European Commission, to sideline EU data protection watchdogs in order to push through the plan, regardless of warnings of institutional overreach, threats to privacy and the criminalisation of migrants. 'Nayra Perez, Frontex's own Data Protection Officer, DPO, warned repeatedly that the PeDRA expansion "cannot be achieved by breaching compliance with EU legislation" and that the programme posed "a serious risk of function creep in relation to the Agency's mandate.'" But her input was largely ignored, documents reveal'. Quote from L. Stavinoha, A. Fotiadis and G. Zandonini, EU's Frontex tripped in its plan for 'intrusive' surveillance of migrants. Source: https://balkaninsight.com/2022/07/07/eus-frontex-tripped-in-plan-for-intrusive-surveillance-of-migrants/?fbclid=IwAR2TYOdTiaPcdy-JkUxJMKIb28ElxgA-VV47_-jEWAUNDCb7dhNk-GFJ4. See also 2024 Evaluation Report on Frontex, 40.

⁷⁸J.-P. Cassarino, L. Marin, see above, n. 61. See also M. Mouzourakis, 'More Laws, Less Law: The European Union's New Pact on Migration and Asylum and the Fragmentation of "Asylum Seeker" Status', (2020) 26(3-4) *European Law Journal*, 171-180.

⁷⁹V. Moreno Lax, 'The Informalisation of the External Dimension of EU Asylum Policy: The Hard Implications of Soft Law', in E. Tsourdi and P. De Bruycker (eds.), *Research Handbook on EU Migration and Asylum Law* (Elgar, 2022), 282-384.

⁸⁰N. Vavoula, 'Artificial Intelligence (AI) at Schengen Borders: Automated Processing, Algorithmic Profiling and Facial Recognition in the Era of Techno-solutionism', (2021) 23(4) *European Journal of Migration and Law*, 457-484. L. Stewart, 'The Regulation of AI-based Migration Technologies under the Draft EU AI Act: (Still) Operating in the Shadows?', in this Special Issue.

⁸¹A. Musco Eklund, 'Rule of Law Challenges of "Algorithmic Discretion" & Automation in EU Border Control: A Case Study of ETIAS through the Lens of Legality', (2023) 25 *European Journal of Migration and Law*, 249-274.

⁸²A. Musco Eklund, 'Limits to Discretion and Automated Risk Assessments in EU Border Control: Recognising the Political in the Technical, Forthcoming', in this Special Issue.

⁸³AI HLEG, *Ethics Guidelines for Trustworthy AI* (European Commission, 2019).

⁸⁴M. Busuico, D. Curtin and M. Almada, 'Reclaiming Transparency: Contesting the Logics of Secrecy within the AI Act', (2022) *European Law Open*, 1-27, doi:10.1017/elo.2022.47.

Furthermore, interconnecting databases entails forms of erosion of data protection tenets.⁸⁵ However, in relation to the PNR, the Court of Justice has placed limits on resorting to automated processing in situations affecting individuals, and this should guide as well the interpretation of other databases and their boundaries.⁸⁶

A third challenge is represented by border surveillance as a tool for externalisation: here other types of technologies, such as drones, are deployed.⁸⁷ Their necessity for implementing humanitarian objectives has not been proved, as Frontex does not engage in SAR operations. In fact, they are deployed as distancing and surveillance technologies, in the framework of externalisation policies that are fed by the cooperation of Third Countries' agencies. Recently, Frontex's drones have sent location coordinates to Libyan authorities who took charge of the pullbacks.⁸⁸ An action for damages is pending before the CJEU.⁸⁹ Yet, for years drones have been sponsored by the Commission as answering to a humanitarian rationale.⁹⁰ Our early criticism has materialised in the way we anticipated years ago, meaning that drones have been used as distancing technologies to realise pullbacks policies by proxy and neglecting obligations to protect. This is to be connected to the more general trend of deflecting responsibility via externalisation, producing forms of consensual containment and pullbacks by proxy, as argued by Giuffrè and Moreno Lax.⁹¹

The elements highlighted in the sections above have contributed to the argument that Frontex is at the epicentre of a rule of law crisis occurring at the external borders of the EU. As I demonstrated, this crisis has emerged under the direction of Leggeri, as agency capture; yet it is not over. The legal framework has not been reformed, and the management of the Agency enjoys a significant amount of discretion which is not duly constrained by the Management Board. Secondly, its current configuration, expressive of its original hybridity, does not give it the right tools to contrast illegal practices carried out by state authorities: Article 46, meaning also the termination of operations, is not carried out as this might hamper the effectiveness of border management. In a third perspective, Frontex finds itself at a crossroad of multiple experimentalist governance approaches where migration containment stands above the respect of the legal framework. In the next section, we will turn to the meaning of rule of law for an agency such as Frontex.

3 | FRONTEX AND THE RULE OF LAW: RECOGNISING THE PROMISED LAND OF EU CONSTITUTIONALISM

Frontex does not function in a legal vacuum. It operates within a legal framework and according to a founding regulation that provides for precise rules on the functioning of the Agency, including protection and promotion of fundamental rights. Yet, it happens that the internal and external accountability instruments in place do not succeed in constraining the way the top management of the Agency exercises its discretion. This section aims to explore the contextual constraints operating on agencies, starting from the constitutional context, before reflecting on what has gone wrong in the past and exploring the way forward to reinstate effective accountability mechanisms, up-to-date with the new 'morphology' acquired by Frontex. Before zooming in on the meaning of rule of law for agencies, we will reflect on the meaning of the constitutionalisation of the EU legal order as an external constraint to agencification. This is something different from the constitutional constraints of agencification, focusing on the

⁸⁵E. Brouwer, 'Challenges to EU Legality in the Field of Asylum and Migration Law', in C. Kilpatrick and J. Scott (eds.), *Contemporary Challenges to EU Legality* (Oxford, 2021); online edition, Oxford Academic, 17 June 2021, <https://doi.org/10.1093/oso/9780129898050.003.0003>, accessed 26 April 2023; N. Vavoula, *Immigration and Privacy in the Law of the European Union* (Brill, 2022).

⁸⁶CJEU, case C-817/19, *Ligue des droits humains*, ECLI:EU:C:2022:491.

⁸⁷L. Marin and K. Krajčiková, 'Deploying Drones in Policing Southern European Borders: Constraints and Challenges for Data Protection and Human Rights?', in A. Završnik (ed.), *Drones and Unmanned Aerial Systems: Legal and Social Implications for Security and Surveillance* (Springer, 2016), 101–127.

⁸⁸J. Sutherland and L. Pezzani, 'Airborne Complicity: Frontex Aerial Surveillance Enables Abuse', Joint report by Human Rights Watch and Border Forensic (2022).

⁸⁹Case T-205/22, *Naass and Sea Watch v. Frontex*, action brought on 15 April 2022. Currently pending.

⁹⁰L. Marin, 'The Humanitarian Drone and the Borders: Unveiling the Rationales Underlying the Deployment of Drones in Border Surveillance', in B. Custers (ed.), *The Future of Drone Use: Opportunities and Threats from Ethical and Legal Perspectives* (Springer, 2016), 27:115–132.

⁹¹M. Giuffrè and V. Moreno Lax, 'The Rise of Consensual Containment: From Contactless Control to Contactless Responsibility for Migratory Flows', in S.S. Juss (ed.), *Research Handbook on International Refugee Law* (Elgar, 2019); V. Moreno Lax, see above, n. 79.

boundaries that EU law places on the process of agencification and going under the known *Meroni* and *ESMA* doctrine.⁹² In other words, we argue that agencification can find its promised land by exploring more deeply the meaning of EU constitutionalism for the rule of law and its possible implications for agencies.⁹³

3.1 | The EU's low-intensity constitutionalism and its meaning for agencies

As recalled above, I have embraced in the previous section a more substantive interpretation of the rule of law, integrating the legacy of the constitutional experiences of the 20th century, which means the protection of a hard core of fundamental rights and review mechanisms to ensure the integrity of the legal order.⁹⁴ This means that, also within the EU legal order, the starting point of a rule of law discourse is the entrenching of any EU rule of law narrative in the 'low-intensity' constitutionalism of the European legal order.⁹⁵ As explained by Poiares Maduro, this low-intensity constitutionalism is a 'gradual judicial and political development (...) often constructed by reference to national constitutional sources' and, in this interpretation, 'is limited to the control of European and national forms of power'.⁹⁶ This process was made necessary by the effort of cooperation and trust that the European Court of Justice was requiring of Member States under the umbrella of direct effect, primacy and their corollaries.

The process of low-intensity constitutionalisation has concerned, first, national public powers, because individuals have been entitled to have rights to be invoked against national public powers: the very core rationale of *Van Gend en Loos* is precisely this one, and direct effect is the instrument.⁹⁷ By the same logic, European institutions and agencies have also been constrained and limited in the exercise of their powers because the Court of Justice had to defend the character and the quality of the newly established European legal order for the limitations of national sovereignties it was asking of the Member States. This is the essence of *Les Verts*,⁹⁸ the first judgment capturing the essence of the rule of law as 'the basic ideal that neither the EU institutions nor the Member States are above the law', as recalled by Lenaerts.⁹⁹ In the same year as *Les Verts*, the Court of Justice decided, in its judgment in *Johnston*,¹⁰⁰ that the right to an effective remedy is an expression of a general principle of law which is also to be

⁹²CJEU, Case 9–56, *Meroni & Co., Industrie Metallurgiche, SpA v. High Authority of the European Coal and Steel Community*, ECLI:EU:C:1958:7; see also CJEU, C-270/12, *United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council of the European Union*, ECLI:EU:C:2014:18. See M. Simoncini, *Administrative Regulation Beyond the Non-delegation Doctrine: A Study on EU Agencies* (Hart, 2018).

⁹³M. Chamon, 'EU Agencies: Shifting Paradigms of EU Administration', *EU Law Live*, 25/09/2023, <https://eulawlive.com/op-ed-eu-agencies-shifting-paradigms-of-eu-administration-by-merijn-chamon/> talks about constitutional terra incognita. Early on, Ellen Vos talked about constitutional neglect of agencies since Arts 290 and 291 do not refer to agencies. E. Vos, *EU Agencies: Common Approach and Parliamentary Scrutiny*, EPRS, 2018.

⁹⁴A Pin, see above, n. 37.

⁹⁵Poiares Maduro frames it as a process of low-intensity constitutionalism, because it is characterised by a gradual judicial and political development built upon national constitutional sources and was limited to the control of European and national forms of power, not linked to the creation of a polity. In Miguel Poiares Maduro, 'The Importance of Being Called a Constitution: Constitutional Authority and the Authority of Constitutionalism', (2005) 3(2–3) *International Journal of Constitutional Law*, 332–356, at 340–342.

⁹⁶Miguel Poiares Maduro, see above, n. 95, at 342.

⁹⁷Similarly, C. Harlow, *Accountability in the European Union* (Oxford University Press, 2022).

⁹⁸CJEU, case 294/83, *Parti écologiste 'Les Verts' contre Parlement européen*, ECLI:EU:C:1986:166. The judgment *Les Verts*, back in 1986, is a turning point in this respect since the CJEU first used a constitutional narrative to frame the treaties and that 'the treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions'. Paragraph 23 of the judgment states:

'It must be first emphasized in this regard that the European Economic Community is a community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the treaty. In particular, in Arts 173 and 184, on the one hand, and in Art 177, on the other, the treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions. Natural and legal persons are protected against the application to them of general measures which they cannot contest directly before the Court by reason of the special conditions of admissibility laid down in the second paragraph of Art 173 of the treaty. Where the Community institutions are responsible for the administrative implementation of such measures, natural or legal persons may bring a direct action before the court against implementing measures which are addressed to them or which are of direct and individual concern to them and, in support of such an action, plead the illegality of the general measure on which they are based. Where implementation is a matter for the national authorities, such persons may plead the invalidity of general measures before the national courts and cause the latter to request the Court of Justice for a preliminary ruling'.

⁹⁹K. Lenaerts, see above, n. 7

¹⁰⁰CJEU, case 222/84, *Johnston/Chief Constable of the Royal Ulster Constabulary*, ECLI:EU:C:1986:206.

taken into consideration in Community law: the Court contributed to the constitutionalisation of the right to an effective remedy.

More recently, this same narrative has been strongly reiterated in the context of the rule of law crisis described above. In the fundamental judgment *Associação Sindical dos Juizes Portugueses*, the Court of Justice recalled the link existing between the right to an effective remedy and the rule of law, by stating that ‘The very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law’.¹⁰¹

And again, in the more recent case concerning the Conditionality Regulation, the Court stressed the relation between rule of law and other core values of Article 2 TEU, which are legally binding towards all the Member States.¹⁰² As recalled by President Koen Lenaerts, ‘Article 2 TEU is not merely a statement of policy guidelines or intentions. The values it contains are given concrete expression in principles containing legally binding obligations for the Member States’.¹⁰³

This constitutional identity, recently tested also in relation to the Member States’ constitutional systems, has had several implications for the EU as a legal order. First, a core meaning of the ‘EU constitutional rule of law’ is that the EU is a polity based on the rule of law, which means conformity with the basic constitutional charter and review mechanisms to ensure this compliance. Secondly, the treaties have designed a complete system of legal remedies enabling the Court of Justice to review the legality of the measures adopted by the institutions. Thirdly, natural and legal persons are protected from the administrative implementation of EU measures that they cannot contest, both before European and national courts, depending on who is implementing the general measures.¹⁰⁴ In all this process, the CJEU has filled the gaps in the Treaties, becoming the trustee of the Member States, as explained by the theory of incomplete contracting.¹⁰⁵

This very core constitutional identity of the EU, in my argument, should apply also to agencification, which is therefore not embedded in a terra incognita.¹⁰⁶ The constitutionalism of the EU is the promised land embedding agencification. The constitutional constraints to agencification are precisely forged on the relationship between public powers and individuals, and they require that the exercise of public powers be constrained by rules of law; secondly, the scrutiny of acts (and activities) of the agencies must be guaranteed: Article 263 TFEU as reformed by the Treaty of Lisbon reflects this normalisation and therefore requires that effective legal remedies be assured to scrutinise the activities of the agencies.

3.2 | The relation between rule of law and accountability mechanisms for administrative governance

Though the meaning of accountability is broad and can imply the capacity to affect the course of agencies’ actions also during the exercise of their mandates,¹⁰⁷ here I will focus my attention on the bridges between accountability and the rule of law. One of these common grounds is *ex post* legal accountability and the rule of law.

As seen above, the treaties and the low-intensity constitutionalism of the EU mean that the EU rule of law is guaranteed with a legal and institutional toolkit designed to exercise (judicial) review over the conduct of the administrations. In the context of administrative governance, the meaning of the rule of law is, in essence, to ensure that the exercise of administrative discretion—an expression of the autonomy of agencies—does not lead to arbitrariness.

¹⁰¹C-64/16, *Associação Sindical dos Juizes Portugueses*, ECLI:EU:C:2018:117, para. 36. See also K. Lenaerts, ‘The Rule of Law and the Constitutional Identity of the European Union’, available at <https://evropeiskipravenpregled.eu/the-rule-of-law-and-the-constitutional-identity-of-the-european-union/>.

¹⁰²Judgments of 16 February 2022, *Hungary v. Parliament and Council*, C-156/21, EU:C:2022:97, para. 232, and of 16 February 2022, *Poland v. Parliament and Council*, C-157/21, EU:C:2022:98, para. 234.

¹⁰³Ibid. See K. Lenaerts, ‘The Rule of Law and the Constitutional Identity of the European Union’, above, n. 101.

¹⁰⁴CJEU, case 294/83, *Parti écologiste ‘Les Verts’ contre Parlement européen*, ECLI:EU:C:1986:166.

¹⁰⁵M. Shapiro, ‘The European Court of Justice’, in P. Craig and G. De Burca (eds.), *The Evolution of EU Law* (Oxford University Press, 1999). See also A. Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press, 2004).

¹⁰⁶M. Chamon, Op-Ed, see above, n. 93.

¹⁰⁷M. Bovens, see above, n. 54.

Public administrations (including agencies) shall operate under the paradigm of 'limited government',¹⁰⁸ and the case law of the Court of Justice of agencification, recalled above, confirms also its embedding in the constitutional system of the EU: it is for these reasons that *ESMA* appears as a relaxation of *Meroni*.¹⁰⁹

In her seminal work 'Accountability in the European Union', Carol Harlow links the function of the rule of law with accountability instruments and explores the significance of judicial review also in the context of EU administrative governance. Referring to Dawn Oliver's definition of accountability, Harlow argues that accountability and the rule of law are two sides of the same coin and that public bodies must operate according to a constitutional charter, if there is one; writing in 2002, Harlow attributed a special meaning to the principle of checks and balances within the EU legal order. Furthermore, systems of judicial review must be in place to make sure that the activities of the administration can be checked, and redress can be provided, if there is damage. According to this account, the rule of law is the legal translation of accountability. I argue that accountability is instrumental in ensuring respect for the rule of law also in the case of agencies.

In similar terms, discussing how accountability can be enacted, Giandomenico Majone prioritises legal accountability through procedural scrutiny.¹¹⁰ His doctrine is of paramount importance today and also for the European Union, as witnessed by the evolution of the legislative process. Some of his theses are relevant also for Frontex.

Core elements of Majone's doctrine are participation in decision-making, justification, transparency and judicial review. This scholarship refers to classic regulatory agencies, i.e., agencies that act mainly through decisions, for example approving the production of a new medicine. Though Frontex is exercising several functions which are close to law enforcement, I argue that it is important to recall the normative function of constraining the respect of the rule of law through instruments of accountability also for the ever-evolving European migration agencies¹¹¹ and to find similar instruments to fulfil the same goals: the aim is to make sure that agencies are legally accountable for their activities and operations. Openness, transparency and means of scrutiny are tools instrumental to the respect of the rule of law, today as yesterday.¹¹²

3.3 | Frontex and the rule of law: Which way forward?

The previous sections have demonstrated the existence of an endemic rule of law crisis at the external borders of the EU. Frontex is and operates at the epicentre of this crisis. Other agencies are also involved. Criticism has been raised on the mismatch between legal mandate and actual operations in the case of the EU Asylum Agency.¹¹³ Similarly, Europol receives datasets of personal data of migrants, within the PeDRA system. This crisis, considering that Frontex and other agencies do not operate in a legal vacuum, is suggesting that the accountability instruments in place are neither effective nor adequate, often because they are modelled on the original coordination function of the agencies.

¹⁰⁸C. Harlow, *Accountability in the European Union* (Oxford University Press, 2002).

¹⁰⁹M. Simoncini, "'Live and Let Die?' The Meroni Doctrine in 2023", *EU Law Live*, 26/09/2023, <https://eulawlive.com/op-ed-live-and-let-die-the-meroni-doctrine-in-2023-by-marta-simoncini/>.

¹¹⁰G. Majone, 'From the Positive to the Regulatory State: Causes and Consequences of Change in the Mode of Governance', (1997) 17 *Journal of Public Policy*, 139–167, 160, states:

'agencies are created by democratically enacted statutes which defines the agencies' legal authority and objectives; that the regulators are appointed by elected officials; that regulatory decision-making follows formal rules which often require public participation; finally, that agency decisions must be justified and are open to judicial review. The simplest and most basic means of improving agency decision-making is to require regulators to give reasons for their decisions. This is because a giving-reason requirement activates a number of other mechanisms for controlling regulatory discretion, such as judicial review, public participation and deliberation, peer review, policy analysis to justify regulatory priorities and so on'.

¹¹¹D. Fernández-Rojo, *EU Migration Agencies: The Operation and Cooperation of FRONTEX, EASO and EUROPOL* (Elgar, 2021).

¹¹²See also the study by E. Vos, *EU Agencies: Common Approach and Parliamentary Scrutiny*, EPRS, 2018, 70 and 'Common Approach on Decentralised Agencies', of 2012, above, n. 68.

¹¹³A. Pirrello, see above, n. 76. See also media news: Politico, 'Watchdog Finds Range of Misconduct at EU Asylum Agency', 20.11.2018; Financial Times, 'EU Asylum Agency Accused of Covering Up "Irregularities"' (2022).

The evolution of the AFSJ agencies beyond this original function, and Frontex is a test case in this respect, suggests the need for a reassessment of the accountability instruments in place, with the target of redesigning them against the background of the new functions exercised by agencies.¹¹⁴ This is especially relevant since the new morphology acquired by agencies denotes a broader scope of activities, implying the exercise of administrative functions, affecting individuals.

First, by prohibiting (individually or collectively) access to the territory, the activities of Frontex affect persons. In turn, affected persons must have effective remedies at their disposal to protect their legal interests.¹¹⁵ Effective remedies are a necessity because they are a tenet of the rule of law, in a liberal democracy where the administration operates under the paradigm of limited government. Even if Frontex does not bear the final responsibility of a decision or for an operation, the responsibility should be shared, if the activities or operations of Frontex are instrumental in the attainment of a given result. This would avoid leaving activities of the European administration deprived of adequate accountability instruments. Furthermore, the embedding of the functioning of European administration in the rule of law means finding in the rule of law toolkit some instruments, and conditionality is one of these. Article 46 of the Frontex Regulation offers instruments to steer the action of domestic authorities, as recalled in the 2024 Evaluation on Frontex.¹¹⁶

Second, the fact that agencies often operate in multi-actor settings does require that accountability instruments be expressions of the different levels of administration involved.¹¹⁷ Composite administrative procedures must be supervised by joint supervisory authorities, in order to make sure that the legitimacy is respected and that the composite nature of the activity is not escaping scrutiny from the appropriate authority.¹¹⁸ The Europol Joint Parliamentary Scrutiny Group is a test case in this respect¹¹⁹ and could serve as a model for a similar body for Frontex, for the important role carried out by domestic actors in European Integrated Border Management.

Third, considering the peculiarity of the operational settings of migration control and border management and the sensitivities related to the respect of human life and of protection seekers, it is important to recall that both transparency—on and from the Agency—and independent monitoring must be enhanced and are instrumental in the respect of the rule of law.¹²⁰ First, right now, the operational context offers limited transparency¹²¹ concerning the implementation of the mandate in actual practices and policies and because there are actual challenges in establishing the facts¹²²; secondly, multi-actor situations typical of these contexts do complicate access to legal protection,¹²³ also as limited opportunities for ex post effective scrutiny, given the complexities underlying judicial challenges at the European level, as recalled in Section 2. Enhanced monitoring on Frontex's operations can be done also thanks to the support of the FRA.

Last, but not least, a major point on which the reflection should focus is that the agency capture observed with the mandate of the former ED suggests that internal accountability is defective. This is in my view an important point on which an encompassing reflection must take place, for several reasons. First, an agency with the budget and the size of Frontex must operate with respect for its legal framework. Second, there is an inherent political element in its

¹¹⁴D. Fernández-Rojo, see above, n. 111.

¹¹⁵S. Nicolosi, 'Frontex and Migrants' Access to Justice: Drifting Effective Judicial Protection?', *VerfBlog*, 2022/9/07.

¹¹⁶2024 Evaluation on Frontex, action 4.1.2.7.

¹¹⁷M. Scholten, 'Shared Tasks, but Separated Controls: Building the System of Control for Shared Administration in an EU Multi-jurisdictional Setting', (2019) *European Journal of Risk Regulation*, 538–553.

¹¹⁸M. Scholten, see above, n. 117.

¹¹⁹F. Coman-Kund, 'Holding Europol Accountable: The Promise and Challenges of (Hybrid) Multilevel Accountability', in A. Arcuri and F. Coman-Kund (eds.), *Technocracy and the Law: Accountability, Governance and Expertise* (Routledge, 2021); A. Tacea and F. Trauner, 'The European and National Parliaments in the Area of Freedom, Security and Justice: Does Interparliamentary Cooperation Lead to Joint Oversight?', (2021) *The Journal of Legislative Studies*, 1–19. See also L. Salzano, 'Unexploited Monitoring Opportunities: Exercising Oversight on Frontex through National Parliaments', *VerfBlog*, 2022/10/28.

¹²⁰E. Guild, 'The Frontex Push-Back Controversy: Lessons on Oversight (Part I)', www.eumigrationlawblog.eu, 19.4.2021; 'The Frontex Push-Back Controversy: What Oversight for Frontex? (Part II)', 22.4.2021, www.eumigrationlawblog.eu.

¹²¹S. Nicolosi, 'Frontex and Migrants' Access to Justice: Drifting Effective Judicial Protection?', see above, n. 116. See also E. Guild, 'What Monitoring for Fundamental Rights at EU Borders? Frontex and Rule of Law', *VerfBlog*, 2022/9/07, DOI: [10.17176/20220907-230,659-0](https://doi.org/10.17176/20220907-230,659-0).

¹²²B. Schotel, see above, n. 64; E. Guild, see above, n. 120.

¹²³M. Fink, see above, n. 16.

functioning that cannot be neglected, and we must go beyond the myth of the neutrality of agencies' activities.¹²⁴ This is especially the case for Frontex. Recognising the political element inherent in the operations and activities of the Agencies and their relationship with law enforcement is also a primary step in order to integrate a component which is the expression of democratically elected bodies. The European Parliament has gained a lot of relevance on the ground, and it is the case to think about how to integrate this relevance into the legal framework, by giving it a more decisive role in the appointment and dismissal of the ED and by integrating the composition of the Management Board with a representative from the EP.¹²⁵

To conclude, having explained the relation between the rule of law and accountability, we can argue that respect for the rule of law should require effective accountability instruments covering the enhanced mandate of the Agency. With a metaphor, all the roads lead to Rome or, in a normative perspective, should lead to Rome. Failing this, the rule of law crisis affecting the European administration will not be solved and will eventually undermine—more broadly—legality within the European Union.

4 | CONCLUSIONS

Frontex finds itself at the epicentre of a rule of law crisis internal to the European administration. This rule of law crisis is different though related to the one endogenous to the Member States and is to be distinguished from rule of law backsliding by defiant Member States and other forms of systematic breaches of the legal framework—including protection of fundamental rights—by domestic authorities committed by a broader range of states. The mandate of the former Executive Director has shown a form of agency capture, which cannot be redeemed by a *motu proprio* resignation, nor mitigated with the good will of its successor to abide by the legal framework. This has revealed the number of powers that has been exercised by a group of persons, basically unsupervised by the Management Board. Furthermore, even with a new leadership, cooperation in pushbacks has not stopped. The evolution Frontex has gone through implies that the Agency finds itself exercising its mandate in situations of often direct contact with individuals and in politically sensitive contexts. It is therefore important, for the overall constitutional coherence of the EU, that the agency exercise its enhanced mandate with respect for the rule of law, which requires that the system of accountability be functional to grant that adequate scrutiny takes place to control its activities. However, it is of paramount importance that this oversight exercised over the Agency can lead to changes, if the legal framework has been breached, with the aim of restoring the legality of the functioning of the Agency. As for *ex ante* controls, the mandate of the former ED has shown the deficiencies in the internal functioning of the Agency. While rethinking *ex post* controls, consideration should be given to key paradigms. First, openness and transparency: operational activities require independent monitoring mechanisms.¹²⁶ Secondly, the design: composite administrative procedures should go beyond the existing model of separated controls.¹²⁷ Third, guarantees: at both the national and supranational levels, the principle of effective judicial remedy is quintessential to the very core of the rule of law.¹²⁸ Decisions affecting the rights of individuals must be controlled with effective administrative and judicial remedies, expression of the principle of effective judicial review.¹²⁹

This growth has not been matched by a corresponding expansion of accountability mechanisms, whose function is to underpin the exercise of administrative discretion into a sound respect for the legal framework, also integrating

¹²⁴M. Simoncini, see above, n. 92.

¹²⁵For example, see the discussion in the study by E. Vos, *EU Agencies: Common Approach and Parliamentary Scrutiny*, EPRS, 2018, 70 and 'Common Approach on Decentralised Agencies', of 2012, above, n. 68.

¹²⁶E. Guild, see above, n. 120.

¹²⁷M. Scholten, see above, n. 117.

¹²⁸M. Bonelli, 'Effective Judicial Protection in EU Law: An Evolving Principle of a Constitutional Nature', (2019) 12(2) *Review of European Administrative Law*, 35–62; see also, *mutatis mutandis*, G. Gentile, 'Ensuring Effective Judicial Review of EU Soft Law via the Action for Annulment before the EU Courts: A Plea for a Liberal-Constitutional Approach', (2020) 16(3) *European Constitutional Law Review*, 466–492.

¹²⁹S. Nicolosi, see above, n. 115 and E. Guild, see above, n. 120.

the respect for some core fundamental rights, such as the right to life. Lacking this, the rule of law crisis which is affecting several states is simply propagating at the European level, undermining the overall legality of European integrated border management. Unfortunately, the measures adopted under the framework of the Pact of Migration and Asylum do not seem to solve these issues, yet they might concur to aggravate this rule of law crisis.¹³⁰

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¹³⁰G. Cornelisse and M. Reneman, 'Border Procedures in the Commission's New Pact on Migration and Asylum: A Case of Politics Outplaying Rationality?', (2020) 26(3-4) *European Law Journal*, 181-198.