Agencification and Fundamental Rights in the EU's Border Management

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Abstract

This paper examines the EU's border management agencies as a manifestation of multi-level governance within the European Union's migration governance system. The paper traces the development of EU agencies within the Area of Freedom, Security and Justice, with particular focus on Frontex from its establishment in 2004 through the landmark reforms of 2016 and 2019. It employs doctrinal analysis to demonstrate how successive crises, including the 2015-migration influx, catalyzed both the operational expansion of Frontex and a heightened emphasis on fundamental rights compliance through the 2019 reform. I further evaluates the accountability and monitoring mechanisms introduced to this end while critically assessing their limitations in terms of transparency and effective oversight. The paper concludes that agencification, while enhancing operational capacity and coordination, simultaneously deepens the complexity of accountability within EU border governance, raising unresolved questions about the balance between institutional autonomy and democratic responsibility.

Keywords: *border management; Frontex; human rights, accountability.*

JEL Classification: K23, K37, K38, H83

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1. Introduction

As noted by Verhoest et al, countries have known the transition from a centralized and tightly integrated public sector to one that is decentralized, structurally decentralized, and increasingly autonomous, resulting in the "separation of policy formulation, implementation, and evaluation processes". Consequently, public administration systems worldwide have evolved into a diverse array of semi-autonomous entities, commonly referred to as agencies[2].

While the European Union stands as a distinctive entity separate from both International Organizations and Nation-States, the phenomenon of Agencification is not exclusive to it. Within the modern EU governance framework, approximately 30

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[2] Koen Verhoest et al., eds., *Government Agencies: Practices and Lessons from 30 Countries* (Palgrave Macmillan, 2012), p. 25, https://doi.org/10.1057/9780230359512.

agencies function across various policy domains[3], each entrusted with unique mandates. These agencies play a crucial role in implementing EU policies and initiatives, spanning areas such as environment, health, transport, or Migration and Border management. Notably, within the realm of Freedom, Security, and Justice, around 9 agencies have been endowed with legal personality[4] and a degree of autonomy commensurate with their assigned tasks. Through their specialized expertise and operational capabilities, these agencies enhance the EU's capacity to address diverse challenges and effectively implement its policies.

Autonomy and discretion besides accountability and responsibility are the two current themes to studying European agencies no matter how different are their classifications. EU agencies, while granted direct powers, must operate within specific legal boundaries and regulatory frameworks. Over time, perceptions of their scope of action have evolved, shaped by legal revisions and jurisprudence from the Court of Justice of the European Union. The Meroni doctrine, established in 1958, once dominated discussions, emphasizing the importance of not delegating extensive discretionary powers to agencies, as it could disrupt the balance of powers within the EU. This doctrine highlighted the need for delegation to be limited to clearly defined boundaries, objectively evaluated against specific criteria. The Romano case illustrated this principle, as concerns were raised about the Belgian institution's delegation of powers. However, in the ESMA case, the Court signaled a shift in doctrine, recognizing the agency as a distinct EU entity with delegated powers subject to predefined conditions and judicial review. The evolution case-law in this matter mirrors the evolving nature of EU governance, balancing effective delegation with safeguards to ensure transparency and effective oversight. Thus, the ESMA case represents a pivotal moment in EU jurisprudence, demonstrating a move towards a more flexible framework for delegation, and more agency autonomy, while upholding mechanisms for legal scrutiny and protection of individual rights.

As the autonomy of agencies garners increasing attention and the proliferation of European agencies continues, it becomes crucial to recognize them not merely as integral components of the EU governance system, but also as products of its inherent complexity. Within this framework, various governance theories and modes are likely to intersect, highlighting the multifaceted nature of the European Union's governance system. And while prominently showcasing a paradigm of multi-level governance, it also draws inspiration from network theory, the tenets of new public management theory, democratic and regulatory governance principles.

In the light of these different theoretical approaches, the study seeks to provide a doctrinal examination of the accountability measures and mechanisms applicable to agencies, with a specific focus on Frontex.

It answers for this purpose three research questions: How is Agencification

[3] Merijn Chamon, "EU Agencies: Does the Meroni Doctrine Make Sense?" *Maastricht Journal of European and Comparative Law* 17, no. 3 (2010): 281–305, https://doi.org/10.1177/1023263X1001700304.

[4] David Fernández-Rojo, *EU Migration Agencies: The Operation and Cooperation of FRONTEX, EASO and EUROPOL* (Edward Elgar Publishing, 2021), https://doi.org/10.4337/9781839109348.

understood within the scope of European migration governance? How has Frontex's adherence to human and fundamental rights legislation evolved over time within the framework of the European Union, and what mechanisms have been implemented to ensure compliance? And what are the gaps and alternatives in addressing Frontex's accountability? Hence, the objective of this research is to delve into the phenomenon of agencification within the EU while shedding light on the challenges associated with holding agencies accountable for violations of fundamental rights amid their expanding discretion. Despite the community's emphasis on safeguarding fundamental rights and the establishment of numerous accountability mechanisms, we hypothesize that their effectiveness is hindered by horizontal incoherence. As such, we seek to explore alternative approaches to addressing accountability in light of the limited efficacy of existing mechanisms in safeguarding fundamental rights.

2. Agencification as a Form of Multi-Level Governance

Scholars have noted the prominent surge of an 'agency fever'[5] while studying the European system of governance. However, it is not a recent trend. As explained by Bengt Jacobsson and Göran Sundström, Agencification is rooted in modern public management reforms, operating according to the distinct spheres of policy formulation and implementation that is entrusted to professional executive agencies[6]. Therefore, agencies are considered to be "formally separate from the central bodies. Nonetheless, they do provide services on behalf of the central authority by the means of their "structural and managerial autonomy"[7]. These same definitions are applicable in the case of EU agencies, since they are structurally separate from EU institutions, performing certain administrative or executive tasks to help carry out European policies. In the EU there are four generic types under which agencies can be classified. Decentralized agencies represent bodies established by secondary legislation to handle specific technical, scientific, or managerial tasks within the European Union. Possessing their own legal identities, these agencies operate indefinitely and are spread across EU member states. Their primary function is to aid in the execution of EU policies and facilitate collaboration between the EU and national governments by consolidating technical and specialized expertise from both EU institutions and national authorities. With the existence of around 30 of these agencies, Frontex is a prominent one.

Executive agencies, on the other hand, assist the European Commission in managing particular tasks associated with EU programs. Operated for a predetermined

[5] Michelle Everson and Ellen Vos, "EU Agencies and the Politicized Administration," in *The Role of EU Agencies in the Eurozone and Migration Crisis: Impact and Future Challenges*, ed. Johannes Pollak and Peter Slominski (Palgrave Macmillan, 2021), 21–51, https://doi.org/10.1007/978-3-030-51383-2_2.

[6] Bengt Jacobsson and Göran Sundström, *Governing State Agencies: Transformations in the Swedish Administrative Model*, SCORE rapportserie 2007:5 (SCORE, 2007), https://sh.diva-portal.org/smash/record.jsf?pid=diva2%3A356442.

[7] Christopher Pollitt and Geert Bouckaert, *Public Management Reform: A Comparative Analysis*, 2nd ed. (Oxford University Press, 2004), https://doi.org/10.1093/oso/9780199268481.001.0001.

period, these agencies are all headquartered in Brussels. Among them are six executive agencies, such as the European Climate, Infrastructure, and Environment Executive Agency, dedicated to overseeing Commission programs aimed at promoting decarbonization and sustainable growth, and the European Education and Culture Executive Agency, responsible for administering funding for education, culture, audiovisual media, sports, citizenship, and volunteering initiatives. Furthermore, Common Foreign and Security Policy agencies play a vital role in executing the EU's common foreign and security policy, including its common security and defense policy, as well as other aspects of EU external action. This category encompasses three agencies: the European Defence Agency, the European Union Institute for Security Studies, and the European Union Satellite Centre. Lastly, European Atomic Energy Community Treaty agencies were established to coordinate national nuclear research programs for peaceful purposes, provide expertise, infrastructure, and financing for nuclear energy projects, and ensure adequate and secure supplies of nuclear energy. The two agencies within this domain are the Euratom Supply Agency and the Fusion for Energy Joint Undertaking[8].

2.1. The Development of European Agencies

The emergence of Agencification within the European Union is often attributed to the necessity for the EU to undertake new functions. Concurrently, member states aim to curtail the direct allocation of functions to the European Commission and mitigate the progression of supranationalism[9]. European documents portray agencies as distinct entities within EU institutions tasked with administrative, scientific, or technical functions, categorizing them into groups. However, there lacks a clear and consistent definition elucidating the fundamental nature of these agencies. The European Commission has outlined in its white paper of governance the attire of these agencies and went forward in clarifying their status. It was made evident that they "were established through regulation to undertake duties explicitly outlined in their founding Acts, all possess legal status, and all operate with a level of organizational and financial independence"[10].

In 2005, the Commission introduced a further refinement–with contradictory effect, contributing to the ambiguity surrounding the concept of agencies. It broadened the definition to include any legal entity designed to facilitate the regulation or the implementation of European affairs and policies at the EU level. However, this definition did not gain traction with legal doctrine or the European Parliament,

[8] EUR-Lex, "European Union Agencies," Glossary of Summaries, accessed October 5, 2026, https://eur-lex.europa.eu/EN/legal-content/glossary/european-union-agencies.html.

[9] Onni Olavi Soivio, "Agencification of the European Union's Migration Response: A Precursor for Divergence Within the EU System?" (master's thesis, Erasmus University Rotterdam, 2021), https://hdl.handle.net/2105/60495.

[10] European Commission, *The Operating Framework for the European Regulatory Agencies*, COM(2002) 718 final, December 11, 2002, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52002DC0718.

particularly its differentiation between regulatory and executive agencies. Subsequently, EU institutions adopted an alternative approach, emphasizing the concept of decentralized agencies. The latter approach underscored the significant degree of autonomy granted to agencies, as they operate independently from EU institutions and are not structurally related to it. However, this autonomy poses challenges in precisely defining agencies without resorting to vagueness.

Therefore, Merijn Chamon proposed a more constructive and comprehensive definition of European agencies, characterizing them as "permanent bodies, under EU public law, established by the institutions through secondary legislation, and endowed with their own legal personality"[11]. Namely, to briefly explain this definition, EU agencies are permanent entities because they are established without a predetermined end date, thereby forming an integral part of the EU's institutional framework. Unlike some executive agencies whose lifetimes are determined by the Commission and subject to extensions, EU agencies are created with an indefinite duration. Additionally, their classification as EU public law bodies, is meant to ensure their alignment with EU legal principles and institutions.

These agencies are established through secondary legislation–since they cannot be found in treaties but are not in contradiction with them, providing a clear legal basis for their roles and operations within the EU. Notably, EU agencies possess separate legal personalities, granting them distinct legal competencies and obligations. Which is a characteristic that distinguishes them from other EU bodies that lack such legal status, such as the European Security and Defence College. Categorizing these legal entities was subject to a variety of approaches despite the existing categorization of the European Commission.

Scholars have proposed different typologies, each with its own merits and drawbacks. Temporal classifications, for instance, attempt to align agencies with historical periods but often offer limited analytical value due to the lack of correlation between establishment time and key characteristics. Structural approaches focus on agency pillars but also have limitations in capturing the full spectrum of agency functions. In contrast, functional typologies distinguish agencies based on the tasks they perform, such as information dissemination or regulatory functions, offering valuable insights into their operational roles[12]. Instrumental classifications, on the other hand, center on the agency's decision-making authority, categorizing them as non-decision-making, operational, or decision-making agencies[13], which helps in understanding their level of autonomy and impact within the EU framework.

Autonomy and discretion besides accountability and responsibility are the two

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[11] Merijn Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press, 2016), https://doi.org/10.1093/acprof:oso/9780198784487.001.0001.

[12] Andrea Ott et al., *EU Agencies and Their International Mandate: A New Category of Global Actors?*, CLEER Working Papers 2013/7 (T. M. C. Asser Instituut, 2013), https://cdm21069.contentdm.oclc.org/digital/api/collection/ppl1/id/52584/download.

[13] Paul Craig, *EU Administrative Law*, 3rd ed. (Oxford University Press, 2018), https://doi.org/10.1093/oso/9780198831655.001.0001.

current themes to studying European agencies no matter how different are their classifications. Although EU agencies may be granted direct powers, they are required to adhere to specific boundaries outlined by legal principles and a broader regulatory framework. Perceptions of their sphere of action have not only evolved through legal revisions but also throughout the jurisprudence of the Court of Justice, of the European Union or the Court of Justice of the European Communities previously.

In 1958 the Meroni doctrine was a dominant doctrine that portrayed delegation of a wide margin of powers to agencies impossible as it might hinder the balance of powers within the European Community since "the balance of powers which is characteristic of the institutional structure of the community [is] a fundamental guarantee granted by the treaty in particular to the undertakings and associations of undertakings to which it applies", and therefore "to delegate a discretionary power, by entrusting it to bodies other than those which the treaty has established to effect and supervise the exercise of such power each within the limits of its own authority, would render that guarantee ineffective"[14]. In other words, it is acceptable, in accordance with the court's perspective, for organizations to delegate executive powers with clearly defined boundaries that can be objectively evaluated against specific criteria established by the delegating authority. However, delegating powers that grant extensive discretionary authority, potentially enabling the delegate to make policy decisions, is not permissible. Such delegation effectively replaces the choices of the delegator with those of the delegate, resulting in a transfer of responsibility. Thus, while delegation is a necessary aspect of organizational functioning, it must be executed within the bounds of the delegating institution's authority to maintain accountability and effective governance[15].

Echoing the Meroni doctrine's principles, both the Court and the Advocate General argued, in the Romano case, against the delegation that the Administrative Committee allocated to the Belgian "Institut national d'assurance maladie-invalidité", citing concerns over its compatibility with EU treaties and the established doctrine. In this affair, the Belgian insurance institution recalculated the pension of Mr. Romano using two different exchange rates due to the decrease of the Italian currency at the time compared to the Belgian one. It justified the use of different rates by referring to decision No 101 of the Administrative Commission on Social Security of Migrant Workers, which provided guidelines and instructions regarding the calculation of pensions or other benefits for migrant workers, including provisions on how to handle currency fluctuations or exchange rate adjustments.

Later on, the ESMA case, manifested a pivotal shift in EU doctrine regarding the delegation of powers to agencies. While initially challenged by the UK for purportedly granting ESMA excessive discretionary authority, the Court's response marked a nuanced evolution from the principles outlined in the Meroni case law. Contrary to the UK's assertion, the Court upheld the essence of the Meroni doctrine but

[14] *Meroni & Co., Industrie Metallurgiche, SpA v. High Authority*, case 9/56, judgment of June 13, 1958, ECLI:EU:C:1958:7, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61956CJ0009.

[15] Ana Kozina et al., "The Delegation of Executive Powers to EU Agencies and the Meroni and Romano Doctrines," *Pravnik* 51, no. 102 (2017): 67–82, https://hrcak.srce.hr/en/192603.

demonstrated a willingness to adapt it to contemporary circumstances. This adaptation was underscored by three significant considerations: firstly, the recognition of ESMA as a distinct EU entity established by legislative mandate; secondly, the acknowledgment that ESMA's delegated powers were circumscribed by predefined conditions and criteria, thus curbing its discretion; and thirdly, the affirmation that ESMA's actions were subject to judicial review, aligning with the principles of accountability and legal oversight[16]. This nuanced approach reflects a pragmatic response to the evolving complexities of EU governance, balancing the need for effective delegation with safeguards to ensure transparency and adherence to legal norms. The ESMA case thus signifies a pivotal moment in EU jurisprudence, indicating a shift towards a more flexible framework for delegation while maintaining robust mechanisms for legal scrutiny and protection of individual rights within the EU's institutional architecture.

Definitely, to ensure the protection of the EU law and individual rights, EU agencies undergo means of control and accountability. In this context, Michelle Everson and Ellen Vos, distinguish three types of control: ex-ante, ongoing and ex-post control. Ex ante control involves establishing legal frameworks through founding regulations, delineating the scope of agency powers and the roles of governing bodies, with the European Parliament and the Council primarily engaged in legislative oversight. Ongoing control, on the other hand, entails direct supervision by agency principals to guide their actions and reduce autonomy, often facilitated through mechanisms allowing for real-time monitoring and intervention. Ex post control, crucial for retrospective evaluation, encompasses various forms of accountability, including managerial, political, administrative, financial, and judicial oversight. Despite the absence of ministerial responsibility, emerging concepts like “horizontal responsibility” and “public accountability” are gaining traction, highlighting the evolving nature of accountability mechanisms within EU agencies[17]. However, challenges persist, including complexities in accountability frameworks and potential tensions between agency autonomy and effective oversight, reflecting the ongoing dynamic between EU institutions and Member States. Ultimately, a balance must be struck to ensure that EU agencies operate transparently, responsibly, and in accordance with democratic principles.

2.2. The Development of Migration Agencies as Decentralized Agencies

The Area of Freedom Security and Justice has been lately characterized by the rising number of EU agencies that function in its sphere in accordance with the article 4 of TEU that introduces the “principle of sincere cooperation” between the member states and the Union, in order to “assist each other in carrying out tasks which flow from the Treaties”[18]. Moreover, factors such as the elimination of internal borders,

[16] Everson and Vos, “EU Agencies and the Politicized Administration”.
[17] Everson and Vos, “EU Agencies and the Politicized Administration”.
[18] Consolidated Version of the Treaty on European Union, art. 4(3), *Official Journal of the European Union* C 326 (October 26, 2012): 18, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012M004.

heightened migratory challenges at Europe's external boundaries, increased asylum requests, and the surge in transnational criminal activities have surpassed the capacity of individual national authorities to address them effectively. Consequently, to bolster Member States and enhance collaboration, the establishment of numerous decentralized European agencies emerged as a viable solution[19].

In this same context, the European Border and Coast Guard Agency has both regulatory and operational tasks by offering technical expertise and informational assistance to both the Member States and the European Commission and playing a pivotal role in effectively realizing the objectives of the Area of Freedom, Security, and Justice. Its operational sphere of action by assisting the states technically is what differentiates it from other agencies that might fall under the same categorizations.

The evolution of EU agencies within the sphere of justice and security has undergone a notable transformation over the years, transitioning from mere facilitators of information exchange to providers of operational support. Europol, established in 1998, initially focused on fostering collaboration among Member States through the sharing of intelligence, relying on voluntary contributions from national authorities. However, its role has since expanded to encompass operational tasks, particularly in combating illegal migrant smuggling.

In 2004, Frontex emerged with the aim of enhancing the management of external borders and coordinating actions among Member States in border-related matters. Similarly, the establishment of EASO in 2010 aimed to strengthen cooperation among Member States on asylum issues and ensure the effective implementation of the Common European Asylum System. While Europol's existence is explicitly acknowledged in the Treaties, Frontex and EASO were instituted through EU Regulations, leveraging open clauses and sectorial provisions due to the absence of a dedicated treaty section for agency establishment. Despite this procedural variance, the overarching goal remains consistent: to harmonize implementation efforts across Member States while adhering to principles of subsidiarity and proportionality[20].

Scholars have analyzed Agencification as a response to crises within the European Union, particularly in the realms of migration, asylum, and border policy[21]. They argue that crises, such as the financial crisis and the migration crisis, create pressing challenges that national authorities alone cannot effectively address. As a result, the establishment and strengthening of EU agencies emerge as pragmatic solutions to enhance coordination, streamline cooperation among Member States, and bolster the EU's capacity to respond to complex and transnational challenges.

Agencification is seen as a means to pool resources, expertise, and institutional capacity, thereby enabling a more coherent and coordinated approach to crisis

[19] Fernández-Rojo, *EU Migration Agencies*.
[20] Fernández-Rojo, *EU Migration Agencies*.
[21] Vittoria Meissner, "The European Border and Coast Guard Agency Frontex After the Migration Crisis: Towards a 'Superagency'?" in *The Role of EU Agencies in the Eurozone and Migration Crisis: Impact and Future Challenges*, ed. Johannes Pollak and Peter Slominski (Palgrave Macmillan, 2021), 151–74, https://doi.org/10.1007/978-3-030-51383-2_7.

management[22]. Therefore, the creation of agencies can also be seen as a further step in integration where supranational bodies play a crucial role in shaping and implementing common policies in the EU. In the realm of migration and home affairs there are currently six decentralized european agencies, namely: "CEPOL, EUAA, EMCDDA, eu-LISA, Europol, EBCGA (FRONTEX), and the Research Executive Agency"[23]. In the analysis of Tsourdi of European migration and border governance, "joint implementation patterns" were noticed as an integral functional aspect of EU migration governance agencies, notably Frontex and EASO. In other words, decentralized agencies within the European Union collaborate in a manner that exemplifies the emergence of a new form of governance, characterized by multi-level coordination and cooperation. In the times of crisis management, they could operate within their specific mandates but often overlap in areas of common interest regarding border management and security.

Moreover, through joint initiatives and information sharing, they create a networked approach to addressing challenges that transcend national borders since they work on both sides: on the EU side as regulatory agencies and the national side by providing operational and technical assistance. For example, while FRONTEX focuses on external border control, EASO deals with asylum processing, and Europol tackles transnational crime, their efforts intersect in areas like migrant smuggling and organized crime networks. This interconnectedness fosters a synergy where each agency leverages its expertise and resources to complement the work of others, resulting in a more comprehensive and effective response to shared threats. At the same time, this collaboration occurs across multiple levels of governance, involving national authorities, EU institutions, and the agencies themselves, reflecting the interplay between supranational and national interests in shaping EU policy and governance structures[24]. Therefore, the process of Agencification within the EU can be interpreted as the introduction of a novel governance paradigm, profoundly shaped by the crises it seeks to tackle.

3. Frontex and Fundamental Rights' Protection

3.1. The evolution of Frontex

Frontex or the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, was established by the regulation number 2007/2004 reformed later in 2007, "with a view to improving the integrated management of the external borders of the Member States

[22] Evangelia (Lilian) Tsourdi, "Beyond the 'Migration Crisis': The Evolving Role of EU Agencies in the Administrative Governance of the Asylum and External Border Control Policies," in *The Role of EU Agencies in the Eurozone and Migration Crisis: Impact and Future Challenges*, ed. Johannes Pollak and Peter Slominski (Palgrave Macmillan, 2021), 175–203, https://doi.org/10.1007/978-3-030-51383-2_8.
[23] European Commission, Directorate-General for Migration and Home Affairs, "Agencies," accessed October 5, 2026, https://home-affairs.ec.europa.eu/about/agencies_en.
[24] Verhoest et al., *Government Agencies*.

of the European Union"[25]. The establishment of the Agency has been subject to scholarly scrutiny within the framework of the securitization of EU migration policy. In this vein, S. Léonard has illuminated a novel approach to securitization within the EU's management of irregular migration, particularly exemplified by the crisis that unfolded in Ceuta and Melilla, as well as the Canary Islands, during 2005-2006. By observing securitization trends across EU practices, it becomes evident that "Commissioner Franco Frattini indicated that the EU would provide the Spanish government with operational assistance as fully as possible in order to deal with what he described as 'an urgent and difficult situation' [which]... was eventually implemented through a joint operation coordinated by the new European Agency for the Management of Operational Cooperation at the External Borders of the Member States"[26]. Other scholars paid attention to the 9/11 events and the increasing fear with terrorism attacks among Member States, as a factor explaining the securitization approach, on which Frontex's creation was perceived[27]. The Agency underwent successive evolutions in 2011, 2016, and 2019, expanding its scope of operations. The evolution of Frontex has prompted scholars to characterize its transformation as that of a "superagency"[28]. When studying Frontex, another important feature to discover is the complexity of its actions. Definitely, the execution of the European Integrated Border Management constitutes a collaborative effort between Frontex and the Member States. While the Member States maintain primary responsibility for overseeing their external borders, Frontex plays a pivotal role in bolstering, evaluating, and aligning their efforts in implementing EIBM measures. In pursuit of this objective, the agency undertakes a multifaceted array of interconnected tasks. Frontex's operational mandate is augmented by its functions in policy guidance, oversight, and capacity-building initiatives[29].

In the beginning, Frontex has been perceived as a coordinator[30] in order to guarantee an effective management of the European Union external borders. The terrorist attack of the 9th of September was for some scholars a pivotal factor to relating migration management with security issues. Hence, Boswell, has studied the political discourse in some European Member states to show the process of securitization of migration. It has become a "commonplace to observe that 9/11 has had far-reaching consequences for the framing of debates on immigration in Europe",among which the

[25] Council Regulation (EC) No 2007/2004 of October 26, 2004, establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *Official Journal of the European Union* L 349 (November 25, 2004): 1–11, https://eur-lex.europa.eu/eli/reg/2004/2007/oj/eng.

[26] Sarah Léonard and Christian Kaunert, *Refugees, Security and the European Union* (Routledge, 2019), https://doi.org/10.4324/9780429025976.

[27] Andrew W. Neal, "Securitization and Risk at the EU Border: The Origins of FRONTEX," *JCMS: Journal of Common Market Studies* 47, no. 2 (2009): 333–56, https://doi.org/10.1111/j.1468-5965.2009.00807.x.

[28] Meissner, "Towards a 'Superagency'?"

[29] Davide Petrillo, "Le contrôle des frontières dans l'espace Schengen à la lumière des droits nationaux et européen" (PhD diss., Université de Strasbourg and Università degli Studi di Firenze, 2021), https://doi.org/10.70675/cc1d8b72z8870z4ec4zb9b5zf7a7d6213bca.

[30] Satoko Horii, "It Is about More than Just Training: The Effect of Frontex Border Guard Training," *Refugee Survey Quarterly* 31, no. 4 (2012): 158–77, https://doi.org/10.1093/rsq/hds015.

call of the reinforcement of measures by leaders like UK Home Secretary David Blunkett and German Interior Minister Otto Schily to facilitate the detention and expulsion of foreign nationals suspected of terrorist affiliations[31].

Securitization theory appeared at first in the nineties with scholars like Ole Wæver and Buzan. At its core, "the introduction of 'securitization' has aimed at putting emphasis on the construction of intersubjective understandings, within discursive processes, pointing to a threat and subsequently justifying exceptional measures"[32]. Spearheaded by the Copenhagen School, the framework was introduced in the seminal work, 'Security: A New Framework for Analysis', in 1998 elaborated by Barry Buzan, Jaap de Wilde and Ole Wæver. Departing from conventional notions, they proposed a constructivist approach wherein security is not an objective reality, but a contested notion shaped through a process of securitization. This process unfolds through securitizing speech-acts, where an actor designates certain issues as existential threats to a referent object, prompting the advocacy for extraordinary measures to address the perceived danger. This transformative discourse engenders security agendas through collective acceptance within society, underscoring the intersubjective nature of securitization. Central to this process are several key elements: the referent object, representing entities deemed vital for survival; existential threats, which vary across different security sectors; securitizing actors, predominantly political figures and institutions; speech acts, serving as direct communication to shape societal perceptions of security; and extraordinary measures, invoked to address emergent threats beyond ordinary legal frameworks[33].

A novel conceptualization of securitization was suggested by S. Léonard and C. Kaunert , diverging from the traditional framework proposed by the Copenhagen School. Unlike the narrow focus on security as mere survival regarding protection from physical threats or military aggression, this new framework advocates for a broader understanding that encompasses a spectrum ranging from normalcy to existential threat. This shift allows for a more nuanced examination of security dynamics across diverse sectors beyond the military realm. Moreover, while the Copenhagen School primarily emphasizes securitization through speech acts, the securitization framework, as suggested by the scholars, extends the scope to include securitization through practices and association. Hence, security dynamics can be constructed not only through discourse but also through tangible actions and associative relationships. In the context of the EU migration policy, this broader understanding of security implies that security concerns extend beyond traditional notions of protecting borders from external threats.

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[31] Christina Boswell, "Migration Control in Europe After 9/11: Explaining the Absence of Securitization," *JCMS: Journal of Common Market Studies* 45, no. 3 (2007): 589–610, https://doi.org/10.1111/j.1468-5965.2007.00722.x.

[32] Kyriakos Mikelis, "Securitization: Theoretical Underpinnings and Implications," in *European Union Security and Defence: Policies, Operations and Transatlantic Challenges*, ed. George Voskopoulos (Springer, 2021), 39–54, https://doi.org/10.1007/978-3-030-48893-2_3.

[33] Krisztina Juhász, "Securitization of Migration in Hungary and the Case of Endless State of Crisis Due to Mass Migration," *International Journal of Arts, Humanities & Social Science* 1, no. 4 (2020): 122–39, https://ijahss.net/assets/files/1599773159.pdf.

Studying the nature and historical development of institutions is important in order to comprehend the securitization tendencies beyond the mere discourse analysis and measures of exception. Therefore," all the main activities of Frontex can be considered to be securitising practices"[34].

On the other hand, Neal demonstrated that "Frontex was not the outcome of that securitization, but rather of its failure"[35]. In his analysis, the author diverges from the conventional narrative of securitization, which often revolves around portraying political debates in terms of existential dangers. Instead, he posits that Frontex's inception stemmed from a distinct process. Following the events of 9/11, the EU interconnected terrorism, security, migration, and border management, creating a complex interplay between security imperatives and adherence to established rules. However, Frontex's emergence did not directly result from successful securitization endeavors. Rather, it emerged as a recognition of the inadequacy of existing mechanisms in addressing security issues comprehensively. The discourse surrounding Frontex emphasized the need for more effective management of external borders, moving beyond framing migration as solely an existential threat. Hence, Frontex's establishment signifies a response to security challenges that were not adequately tackled through conventional securitization strategies.

Principal-agent analysis, as driven from Agency theory, is another possible tool that can be utilized in European Studies to explain the delegation of powers to EU agencies. Mainly it allows us to understand the "politics of delegation" as well as the "politics of discretion"[36]. However, as demonstrated by Helena Carrapico and Yichen Zhong, examining the origins and evolution of Frontex reveals that the conventional principal-agent model may initially seem ill-suited for understanding the agency's establishment and growth. Initially limited to facilitating operational coordination among Member States, Frontex's creation through Council Regulation (EC) 2004/2007 does not neatly fit the traditional definition of delegation from either the Council or the Member States, as neither entity possesses the capacity for trans-governmental coordination in border management. However, considering that Frontex's coordinating functions were previously carried out by national authorities within the framework of the External Border Practitioners Common Unit (PCU), the principal-agent model remains relevant, with EU Member States acting as direct principals of the agency. Moreover, the involvement of the Council, European Parliament, and European Commission in the establishment and oversight of Frontex underscores the complex interactions between actors within the principal-agent framework, highlighting the multi-level nature of the European system of governance[37].

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[34] Sarah Léonard, "EU Border Security and Migration into the European Union: FRONTEX and Securitisation through Practices," *European Security* 19, no. 2 (2010): 231–54, https://doi.org/10.1080/09662839.2010.526937.

[35] Neal, "Securitization and Risk at the EU Border".

[36] Tom Delreux and Johan Adriaensen, "Principal–Agent Analysis and the European Union," in *Oxford Research Encyclopedia of Politics* (Oxford University Press, October 5, 2019), https://doi.org/10.1093/acrefore/9780190228637.013.1048.

[37] Yichen Zhong and Helena Carrapico, "The Development of Frontex: Integration through

3.2. Frontex and Fundamental Rights

Ensuring the agency's adherence to fundamental rights, as mandated by European and international law, serves a dual purpose. Not only does it aim to prevent violations of these rights, but it also establishes obligations and penalties to hold accountable those who fail to uphold them.

However, it's essential to note that these provisions apply exclusively to legal entities — entities possessing legal personality and the capacity for accountability. Therefore, a legal person can be defined as „any being to whom the law attributes a capacity of interests and, therefore, of rights, of acts and, therefore, of dutie"[38]. Frontex, positioned as a European agency, its evolution can be conceptualized within the broader context of the EU's pluralization. Therefore, in accordance with article 47 of the Treaty on The European Union, that gives the EU a legal personality, the agency is expected to have its own as well, especially with the development of its discretion sphere. Hence, Frontex, while operating under the umbrella of the EU, "possesses its own distinct legal personality", endowed with "extensive legal capacity" as per the laws of each Member State. This capacity grants it the ability to partake in legal proceedings and to enjoy privileges and immunities akin to those of the EU. Moreover, Frontex is equipped with specific functions and maintains permanent organs; it manages its autonomous budget and fosters relationships not only with other EU agencies and institutions but also with international organizations and third countries[39].

The 2019 regulation focuses on implementing the respect for fundamental rights as a condition to the Agency's operations. Therefore "the European Border and Coast Guard shall guarantee the protection of fundamental rights in the performance of its tasks under this Regulation in accordance with relevant Union law, in particular the Charter, and relevant international law, including the 1951 Convention relating to the Status of Refugees, the 1967 Protocol thereto, the Convention on the Rights of the Child and obligations related to access to international protection, in particular the principle of non-refoulement"[40]. The heightened emphasis on upholding human rights coincides with the implementation of enhanced mechanisms for holding the agency accountable. This adjustment mirrors, as well, its evolving role from a mere coordination body to an agency that actively shares responsibility with member states in safeguarding European external borders.

Today, as stipulated in the 2019 regulation, has become intricately intertwined with the concept of fundamental rights since the first article of the regulation imposes

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Supranationalism," *European Politics and Society* 25, no. 2 (2024): 233–48, https://doi.org/10.1080/23745118.2023.2244384.

[38] Bryant Smith, "Legal Personality," *Yale Law Journal* 37, no. 3 (1928): 283–99, https://doi.org/10.2307/789740.

[39] Giulia Raimondo, *The European Integrated Border Management: Frontex, Human Rights, and International Responsibility* (Hart Publishing, 2024), https://doi.org/10.5040/9781509964574.

[40] Regulation (EU) 2019/1896 of the European Parliament and of the Council of November 13, 2019, on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, *Official Journal of the European Union* L 295 (November 14, 2019): 1–131, art. 80(1), https://eur-lex.europa.eu/eli/reg/2019/1896/oj/eng.

on the agency an obligation to "ensure European integrated border management at the external borders with a view to managing those borders efficiently in full compliance with fundamental rights and to increasing the efficiency of the Union return policy". The protection of fundamental rights, in the context of the latest reform, is based on a strategy that is underpinned by a set of guiding principles, which shape the implementation and oversight of the agency's tasks. Central to this strategy is the paramount importance of respecting fundamental rights, mandated by international and EU law and case-law. Such principles can ensure that migratory challenges at the EU's external borders are addressed with full compliance, with particular attention given to vulnerable persons and groups, including children. The best interests of the child serve as a primary consideration, emphasizing the importance of respecting children's rights and ensuring their voices are heard in decision-making processes. Furthermore, equality and non-discrimination are fundamental, ensuring that all individuals, regardless of their background, receive fair and equal treatment. Moreover, gender equality is integrated into operational activities in order to avoid discriminatory practices[41].

As a pursuit of the strategy implementation mechanisms that started in 2011, the 2019 regulation contains legal provisions that guarantee the protection of fundamental rights during operational activities as well as an imposed code of conduct. Other mechanisms to ensure liability and accountability, include the Fundamental Rights officer and Fundamental Rights monitor, the consultative forum and the individual complaints mechanism.

3.2.1. Legal Obligations to Comply with the Protection of Fundamental Rights

While fundamental rights protection is inherent to the legal framework within which Frontex operates, this section specifically addresses the legal obligations pertaining to the operational activities of the agency and the conduct of its staff.

The obligation of fundamental right's protection in operational activities. Unlike in Regulation 1168/2011, which primarily focused on references to fundamental rights solely within the scope of return operations, Regulations 2016/1624 and 2019/1896 explicitly mention fundamental rights across a broader spectrum of operations. This shift underscores the Agency's expanded mandate and its commitment to upholding fundamental rights in diverse operational contexts[42].

During the period spanning from 2008 to 2011, Frontex underwent a notable transformation in its narrative approach, marked by a gradual shift in its portrayal of migration dynamics. While still acknowledging migration as a security concern, there emerged a discernible effort to reframe language, substituting "irregular" for "illegal"

[41] Frontex, *Fundamental Rights Strategy*, endorsed by the Fundamental Rights Officer January 25, 2021, adopted by the Management Board February 14, 2021, "Guiding Principles", https://www.frontex.europa.eu/assets/Key_Documents/Fundamental_Rights_Strategy/Fundamental_Rights_Strategy.pdf.

[42] Lena Karamanidou and Bernd Kasparek, *Fundamental Rights, Accountability and Transparency in European Governance of Migration: The Case of the European Border and Coast Guard Agency Frontex*, RESPOND Working Paper 2020/59 (2020), 22–26, https://doi.org/10.5281/zenodo.3967784.

in reference to migrants, reflecting broader shifts within the European Union. Despite this linguistic adjustment, Frontex continued to underscore the security implications of irregular migration, often juxtaposing it with organized crime and terrorism. Notably, 2011 witnessed heightened declarations of exceptional situations, aligning with political upheavals in North Africa and increased arrivals in Europe[43], reinforcing the perception of mobility as a security issue. Concurrently, Frontex began incorporating references to fundamental rights more prominently in its reports and press releases, spurred by mounting pressure from the European Parliament. This culminated in the adoption of the agency's Fundamental Rights Strategy and a Code of Conduct in 2011, signaling a proactive commitment to upholding fundamental rights within its operational framework. Thus, as noted by Nina Perkowski, this period witnessed a nuanced interplay between humanitarianism, human rights, and security in Frontex's public discourse, portraying the agency as both a protector of human rights and a responder to security challenges[44].

The 2016 regulation emphasized on the full compliance with fundamental rights in the operational activities of Frontex. However, it does not highlight its importance with the same amount as the 2019 regulation, since the latter made the concept of fundamental rights a core component that integrated border management is built on. In this regard, the 3rd article on the components of the EIBM stipulates that "Fundamental rights, education and training, as well as research and innovation shall be overarching components in the implementation of European integrated border management". In the operational plans for joint operations, at the external borders, subject of the article 38 of the regulation of 2019/1896, the emphasis on fundamental rights permeates every aspect of the operational framework. From delineating tasks and responsibilities to specifying command structures, the plan should precisely outline protocols to ensure the utmost respect for fundamental rights and data protection requirements. Moreover, a robust reporting and evaluation scheme is integrated, with benchmarks established to assess the protection of fundamental rights throughout the operation. Depending on paragraph number 3 (i) of the article, the plan must include, as well, general instructions "on how to ensure the safeguarding of fundamental rights during the operational activity of the Agency", underscoring the paramount importance of upholding these principles in every operational activity. Furthermore, procedures are meticulously laid out to direct vulnerable individuals, such as those in need of international protection or victims of trafficking, to the appropriate national authorities for assistance, thereby ensuring their rights are upheld and protected, as foreseen by paragraph 3 (m).

In the context of return operation, the protection of fundamental rights seems

[43] After the Arab Spring and the civil war in Libya, "detection of illegal border crossings along the external borders of European Union Member States rose sharply, from approximately 104 000 in 2009 and 2010 to nearly 141 000 in 2011 (+35%). The migrants crossing the borders illegally originated mainly from Tunisia (20%), Afghanistan (16%) and Pakistan (11%)." See Frontex, *General Report 2011* (2012), 9, https://www.frontex.europa.eu/assets/Key_Documents/Annual_report/2011/General_Report_2011.pdf.

[44] Nina Perkowski, *Humanitarianism, Human Rights, and Security: The Case of Frontex* (Routledge, 2021), https://doi.org/10.4324/9780429202841.

to be a core principle in both Regulation 2016/1624 and Regulation 2019/1896. Ensuring compliance with these rights is paramount, as outlined in Article 27, paragraph 1 of Regulation 2016/1624 and reiterated in Article 48, paragraph 1 of Regulation 2019/1896. The regulation adopted in 2019 reminds first that the return decisions are the responsibility of the Member states and that the agency shall provide assistance, expertise and resources in the implementation of these decisions. Yet it has to act "in accordance with the respect for fundamental rights, general principles of Union law and international law, including international protection, the respect for the principle of non-refoulement", as expressed in the article 48. Notably, Regulation 2019/1896 introduces a novel approach with the establishment of Fundamental Rights Monitors within Frontex structures, enhancing oversight mechanisms to ensure the protection of fundamental rights. Additionally, both regulations mandate the presence of forced return monitors to oversee the execution of return operations, with Regulation 2016/1624 taking further steps by instituting provisions for the formation of pools of forced-return monitors, thereby reinforcing monitoring efforts[45].

The obligation of Fundamental right's protection within the 'code of conduct'. The article 81 of the regulation 2019/1896 not only imposes the obligation on the Agency in cooperation with Consultative Forum to elaborate a code of conduct applicable to all the agency's participants in all its different activities, but also calls for a "code of conduct for return operations and return interventions, which shall apply during all return operations and return interventions coordinated or organized by the Agency", as mentioned in the second paragraph.

The foundational principles enshrined within Frontex's Code of Conduct embody a steadfast commitment to safeguarding fundamental rights throughout operational endeavors. Article 3 underscores the imperative of legality, mandating compliance with an array of legal references, including international, European Union, and national laws, in addition to adherence to the Code itself. Central to these principles is Article 4, which staunchly advocates for the promotion and protection of human dignity and fundamental rights, transcending distinctions of sex, race, or creed. Article 5 reinforces this commitment by stipulating the obligation to uphold the principle of non-refoulement and ensure access to international protection for those in need, especially vulnerable groups like unaccompanied minors and victims of exploitation. Moreover, accountability is emphasized through Article 7, which places individual responsibility squarely on the shoulders of Frontex participants for their actions. The Code further delineates guidelines for conduct, mandating fairness, impartiality, as well as prohibiting practices that might entail discrimination in treatment such as conflict of interests or abuse of authority. Regretfully, the code does not mention precisely how reports can be addressed when noticing a breach of the code of conduct or human rights violations, as it only mentions in the article 22 that "Participants in Frontex activities who have reason to believe that a violation of the present Code has occurred or is about

[45] Karamanidou and Kasparek, *Fundamental Rights, Accountability and Transparency*, 26, 34–35. See also Regulation (EU) 2019/1896, arts. 48–51.

to occur, are obliged to report the matter to Frontex via the appropriate channels"[46].

The obligation of Fundamental right's protection for the Agency and the Executive director. Ensuring compliance with EU law, including human rights obligations, is paramount for agencies like Frontex and their executive directors.

As an EU agency, Frontex's activities are subject to scrutiny by the European Ombudsman, who investigates, based on the article 228 TFEU, complaints of maladministration within EU institutions and agencies. The Executive Director, is in this context, entrusted with different responsibilities and is important when it comes to the Ombudsman communications and requests. Recently the European Ombudsman, addressed a letter to the Executive Director of the European Border and Coast Guard Agency – Hans Leijtens, concerning the Agency in France, to ask for a better compliance with "its fundamental rights obligations with regard to search and rescue in the context of its maritime surveillance activities" and suggesting "[the establishment of] an independent commission of inquiry to assess the reasons for the large numbers of deaths in the Mediterranean, to learn the lessons from incidents such as the Adriana shipwreck, and to make recommendations on how to protect fundamental rights and the right to life in the response to maritime emergencies; [the assurance of] EU-level consequences for any findings that a Member State authority has failed to comply with its fundamental rights and/or search and rescue obligations in regard to this incident and more generally; and [the reflection] on changes to the legislation setting out Frontex's mandate, which would enable it to play a more comprehensive and proactive search and rescue function"[47].

Although the Ombudsman operates as a non-binding mechanism, the 2019/1896 regulation outlines provisions that impose legal obligations on both the Executive Director and the agency regarding the safeguarding of fundamental rights. Article 48 of the regulation grants the Executive Director discretionary power to suspend activities initiated or supported by the agency. Eventually, should persistent violations of fundamental rights or breaches of the conditions necessary for conducting activities continue, the Executive Director is mandated to cease the agency's activities, contingent upon informing the relevant member states.

Generally, the executive director's role, as outlined in Article 106 of the regulation, is pivotal for ensuring the agency's adherence to fundamental rights. Further than the previous competence of the ED, they are also asked, in the article 106, paragraph 4 (m), "to assess, prior to any operational activity of the Agency, whether there are violations of fundamental rights or international protection obligations that are of a serious nature or are likely to persist". Additionally, they oversee the day-to-day

[46] Frontex, *Code of Conduct for All Persons Participating in Frontex Activities*, arts. 3–7 and 22–23, accessed October 5, 2026, https://www.frontex.europa.eu/assets/Publications/General/Frontex_Code_of_Conduct.pdf.

[47] European Ombudsman, "Letter from the European Ombudsman to Frontex Executive Director 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," case OI/3/2023/MHZ, February 26, 2024, https://www.ombudsman.europa.eu/en/doc/correspondence/en/182672.

administration, ensuring internal compliance through the adoption of administrative protocols. The executive director also plays a central role in evaluating and approving proposals for various operational activities, ensuring alignment with fundamental rights standards. Accountability is also a cornerstone, as the executive director is answerable to the management board and serves as the agency's legal representative.

The Agency is on the other hand responsible for organizing "the appropriate technical and operational assistance for the host Member State and it may, acting in accordance with the relevant Union and international law, including the principle of non-refoulement" as stipulated in the article 36. We can also conclude from the article 36 and 62 that the agency is tasked with training its staff in fundamental rights and "common core curricula upon which the training is based"[48]. Fundamental rights appear to be a principle that the agency should comply with, as noticeable from the 2019 regulation, before and during its activities, in the EU as well as when it comes to cooperating with third countries. Monitoring and accountability mechanisms were furthermore developed in order to reinforce the implementation of this principle.

3.2.2. The Possible Mechanisms for Monitoring of Human Rights and Accountability

The accountability and monitoring mechanisms have been decided through the 2011 and 2016 regulations as a part of implementation of Fundamental rights strategy. The Consultative Forum, Fundamental Rights Officer and Forced Return Monitor were introduced into the agency's framework in 2011, marking a significant shift in its approach to fundamental rights. While the Consultative Forum gained monitoring powers, the Fundamental Rights Officer became integral to shaping the agency's strategy and ensuring compliance with fundamental rights. The individual complaints mechanism was introduced in the regulation 2016/1624.

Consultative Forum. Frontex's operations have long been characterized by intricate decision-making processes. This complexity was particularly pronounced in 2010 when Frontex was primarily perceived as a coordinating entity reliant on both member states and the EU. This perception is underscored by the second paragraph of Regulation 2007/2004, which reaffirms Frontex's role as a coordinating body within the broader European border management framework. The Agency's perception was built on "considering that the responsibility for the control and surveillance of external borders lies with the Member States", and that "the Agency shall facilitate and render more effective the application of existing and future Community measures relating to the management of external borders […] by ensuring the coordination of Member States' actions in the implementation of those measures, thereby contributing to an efficient, high and uniform level of control on persons and surveillance of the external borders of the Member States"[49]. In response to the complexity of addressing the

[48] Karamanidou and Kasparek, *Fundamental Rights, Accountability and Transparency*, 26–27. See also Regulation (EU) 2019/1896, arts. 36(2) and 62.
[49] Council Regulation (EC) No 2007/2004, art. 1(2).

agency's responsibility for violating fundamental rights, a shift was announced with the 1168/2011 regulation, 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. The Fundamental Rights Officer and the Consultative Forum were, hence, instituted to provide support to the Executive Director and the Management Board in matters pertaining to fundamental rights.

Operating within the framework of the European Border and Coast Guard Regulation, the Consultative Forum serves as a crucial advisory body. Its role involves being consulted by the Agency and its Management Board on various fundamental rights matters, including the development and implementation of the fundamental rights strategy, the operation of the complaints mechanism, the formulation of codes of conduct, and the establishment of common training curricula. Additionally, the Agency is obligated to grant the forum access to pertinent information regarding the adherence to fundamental rights principles. This includes facilitating on-site visits to operational activities and providing updates on the implementation of recommendations put forth by the Forum. In their study, Chiara Loschi and Peter Slominski, explained the Forum as an intersection of two theoretical frameworks: the dialogue notion and the concept of accountability. Both used to "analyze the communicative interaction between the Forum and the various accountability fora of Frontex", in order to "assess how the Consultative Forum has affected Frontex's accountability for ensuring compliance with fundamental rights standards"[50]. They were able to demonstrate that the Consultative Forum functions as a forum fostering dialogue and knowledge exchange between Frontex and diverse 'accountability fora', including human rights advocates, facilitating a robust exchange of perspectives and insights. Through its engagements with a range of internal and external stakeholders, the Forum has established structured dialogues on fundamental rights, reinforcing Frontex's accountability framework across multiple fronts. While the Forum's direct impact on Frontex's accountability remains modest, the dialogues initiated by its members hold promise for bolstering Frontex's overall accountability in upholding fundamental rights standards. Leveraging their expertise and standing, Forum members play a pivotal role in highlighting pertinent fundamental rights issues within Frontex's operations, despite encountering obstacles such as limited access to internal documents and a lack of clear modalities for accessing information.

While Regulation 1168/2011 initially provided a broad framework for information transmission, the specifics were left to be determined by the Executive Director and the Management Board. Consequently, informal arrangements were established, requiring Consultative Forum members to sign confidentiality agreements in exchange for access to Frontex's database and information, facilitated through the Frontex Consultative Forum Secretariat. Operating within the structure of Frontex, this secretariat serves as a conduit for information dissemination. Under the 2014 working arrangements, Frontex committed to providing the Consultative Forum with necessary

[50] Chiara Loschi and Peter Slominski, "Frontex's Consultative Forum and Fundamental Rights Protection: Enhancing Accountability through Dialogue?" *European Papers* 7, no. 1 (2022): 195–214, https://doi.org/10.15166/2499-8249/554.

information for its activities, with provisions for additional requests by the Forum, subject to approval by the Executive Director unless deemed unjustified[51]. The main issue in this case is that we do not know on what basis Frontex decides that an information is irrelevant or unjustified which can contribute to a lack of transparency.

Fundamental Rights Officer. The Fundamental Rights Officer within the framework of Regulation 2019/1896 is designated with a range of significant responsibilities aimed at upholding fundamental rights standards within Frontex's operations. Appointed by the management board after consultation with the consultative forum, the FRO must possess the requisite qualifications, expertise, and experience in fundamental rights.

Among the tasks entrusted to the FRO are contributing to the development of Frontex's fundamental rights strategy, monitoring compliance with fundamental rights, and providing advice to the agency as necessary. Additionally, the FRO is tasked with overseeing the selection and management of fundamental rights monitors, conducting on-the-spot visits to various operational activities, and ensuring that fundamental rights concerns are appropriately addressed. To maintain independence and effectiveness, the FRO reports directly to the management board and cooperates closely with the consultative forum. Furthermore, the management board is responsible for establishing special rules to safeguard the FRO's independence and ensuring that their recommendations are acted upon. Besides this, annual reports on the FRO's activities, including the functioning of the complaints mechanism and the implementation of the fundamental rights strategy, must be published to ensure transparency and accountability. To facilitate autonomy and effectiveness, the FRO is provided with adequate human and financial resources, and the staff appointed by the FRO exclusively report to them, ensuring their ability to act independently in fulfilling their duties. Additionally, a deputy FRO is appointed to assume responsibilities in the absence of the FRO, further ensuring continuity in safeguarding fundamental rights within Frontex's activities. Finally, the FRO is granted, by the means of Article 109 of the regulation 2019/1896, access to all information concerning respect for fundamental rights across Frontex's activities, underscoring their pivotal role in ensuring compliance and accountability[52].

The Individual Complaints Mechanism. The Individual Complaints Mechanism was first established under the provisions of the article 72 of the regulation 2016/1624, on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC. In fact, "Any person who is directly affected by the actions of staff involved in a joint operation, pilot project, rapid border intervention, migration management support team deployment, return operation or return intervention and who considers him or herself to have been the subject of a breach of his or her fundamental rights due to those actions, or any party representing such a

[51] Karamanidou and Kasparek, *Fundamental Rights, Accountability and Transparency*, 47–48.
[52] Regulation (EU) 2019/1896, art. 109.

person, may submit a complaint in writing to the Agency"[53].

To file a complaint with Frontex, individuals must submit a written statement using either the provided complaint form or any other written format of their choice. The complaint will be reviewed by the Frontex Fundamental Rights Officer. Throughout the process, the FRO may request additional information or documentation to clarify the complaint, underscoring the importance of providing contact details. Complaints may be submitted in any language, with forms available in multiple languages such as Arabic, Urdu, Albanian and French . While there is no strict page limit, it is advisable to keep the information concise, preferably within 15 pages. In all cases, individuals should ensure their complaint is lodged within one year of the alleged violation of their fundamental rights, concerning the cases that happened only after the 6th of October of 2016. It is not necessary to exhaust national procedures before approaching Frontex, and submitting a complaint does not preclude seeking recourse through other channels such as national or European Ombudspersons or courts[54]. The 5th paragraph of the article 72, stipulates that complaints that meet the criteria for admissibility will prompt notification to the complainants regarding the registration of their complaint and the initiation of an assessment, with an assurance of a forthcoming response upon availability. Should a complaint be referred to national authorities or bodies, the complainant will receive pertinent contact information. Conversely, if a complaint is deemed inadmissible, the reasons will be communicated to the complainants along with potential alternative avenues for addressing their concerns.

Fundamental rights monitors. The article 110 of the 2019/1896 regulation has created a new category of "statutory staff" that "constantly assess the fundamental rights compliance of operational activities, provide advice and assistance in that regard and contribute to the promotion of fundamental rights as part of European integrated border management"[55].

Assigned by the fundamental rights officer, their tasks encompass a wide range of responsibilities, including "monitoring compliance with fundamental rights and providing advice and assistance on fundamental rights in the preparation, conduct, and evaluation of the operational activities of the Agency"[56]. This task is ensured by closely following the preparation of operational plans, conducting visits to operational areas, and collaborating with coordinating officers to address any concerns related to possible violations of fundamental rights. Hence, they can also have access to all areas of operation and relevant documents, ensuring comprehensive oversight. Additionally, fundamental rights monitors may be nominated as forced-return monitors and are appointed by the fundamental rights officer, operating under their hierarchical supervision while maintaining independence in their duties, as pointed out in paragraph

[53] Regulation (EU) 2016/1624 of the European Parliament and of the Council of September 14, 2016, on the European Border and Coast Guard, *Official Journal of the European Union* L 251 (September 16, 2016): 1–76, art. 72(2), https://eur-lex.europa.eu/eli/reg/2016/1624/oj/eng.

[54] Frontex, "Frontex Complaints Mechanism," accessed October 5, 2026, https://www.frontex.europa.eu/fundamental-rights/frontex-complaints-mechanism/.

[55] Regulation (EU) 2019/1896, art. 110(1).

[56] Regulation (EU) 2019/1896, art. 110(2)(a).

5 of the article 110. In all cases, an obligation is imposed on the agency to recruit and train a sufficient number of fundamental rights monitors to meet operational needs, ensuring they possess the necessary qualifications "taking into account previously acquired […] professional experience in the relevant areas"[57], and continuously develop their skills to uphold the highest standards of fundamental rights protection.

Forced return monitors. The Forced return monitoring was first created by the regulation 1168/2011 in coherence with the Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. In reality, the oversight of forced return procedures was intended to be carried out by national entities, "such as national ombudsperson organizations"[58]. Nevertheless, not all member states could establish these mechanisms when Regulation 2011/1168 came into force.

Return monitors play a pivotal role in ensuring the lawful and humane execution of return operations facilitated by the Agency. Member States regularly inform the Agency of their intended monthly plans for returns, including destinations and assistance needs, allowing the Agency to construct a dynamic operational plan for providing necessary support and reinforcements. This plan, subject to management board approval, outlines the modus operandi of return operations. The Agency may also facilitate coordinating or organizing return operations where transportation and escorts are provided by a third country, ensuring the respect for fundamental rights and non-refoulement principles throughout the process. Each return operation is meticulously monitored by a 'forced-return monitor', ensuring compliance with objective criteria and transparency from pre-departure to arrival. Monitoring reports are submitted to the executive director, the 'fundamental rights officer', and relevant national authorities. In case of concerns regarding fundamental rights, the Agency communicates them to participating Member States and the Commission. Subsequently, the executive director evaluates the outcomes of return operations, providing comprehensive reports to the management board for continual improvement and coherence in future endeavors.

4. Gaps and Alternatives in Addressing Frontex's Accountability

4.1. The Accountability Deficiency of Frontex

The 2019/1896 regulation of Frontex appears to bolster human rights provisions compared to previous reforms in 2011 and 2016. Nonetheless, a primary drawback of these provisions is their lack of specificity. For instance, Article 5 of Regulation 2019/1896 mirrors the provision outlined in Article 6 of Regulation 2016/1624, mandating the agency to uphold "the continuous and uniform application of Union law,

[57] Regulation (EU) 2019/1896, art. 110(7).

[58] Sergio Carrera and Marco Stefan, *Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?* (Centre for European Policy Studies, 2018), https://cdn.ceps.eu/wp-content/uploads/2018/03/Complaint%20Mechanisms_A4.pdf. Cited in Karamanidou and Kasparek, *Fundamental Rights, Accountability and Transparency*, 34.

including the Union acquis on fundamental rights, at all external borders"[59]. It's logical that an EU body tasked with providing expertise and technical support to implement EU policies must adhere to its legal framework, including fundamental rights. Therefore, if such articles fail to address the nuances of implementing EU law by the agency, they may lack substantive value especially with often lacking specificity regarding the attribution of responsibility for actions that may result in harm or violations. Additionally, scholars have identified another constraint within Frontex's legal provisions concerning the safeguarding of fundamental rights. Fundamental rights are indivisible and should be fully guaranteed under all circumstances. However, the articles mentioned earlier appear to concentrate solely on external borders, despite Frontex having operations at internal borders with the aim of "preventing secondary movement"[60]. Predominantly, Fundamental rights are shown to be belonging to the scope of Member states as a reading of the article 7 which stipulates that "Member States shall retain primary responsibility for the management of their sections of the external borders". The introduction of the concept of "shared responsibility" in Regulation 2019/1896 is notable, yet it raises concerns regarding the possible reading of the existence of an unequal distribution of responsibility. This framework potentially allows the Agency to deflect accountability for violations of fundamental rights by placing primary responsibility on the member states. This ambiguity makes it difficult to determine which entity should be held accountable for such actions, leading to a gap in accountability that is both legally and politically problematic[61].

NGOs and different journalistic investigations have revealed the violations of fundamental rights in Frontex's activities on many occasions. While Frontex often defends itself against accusations of violating fundamental rights by highlighting its complaints mechanism and the lack of concrete findings from investigations, the Hungarian Helsinki Committee's experience with this mechanism has been notably "very bleak". In a specific instance on November 20, 2017, the committee alerted Frontex about the imminent deportation of an Afghan individual whose expulsion order had been annulled by the court on 17 November 2017". Despite providing ample documentation and dispatching a representative to the scene, they were denied access to the client or officers involved. Subsequently, after almost three years of investigation, Frontex's Fundamental Rights Officer acknowledged numerous violations, including the principle of non-refoulement and the right to legal representation. Another incident in May 2019 saw the HHC alerting Frontex about the unlawful deportation of three Afghan families, yet the response from the agency was lukewarm and lacked substantive recommendations, even disregarding established breaches of EU law[62].

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[59] Regulation (EU) 2016/1624, art. 5(1).

[60] Karamanidou and Kasparek, *Fundamental Rights, Accountability and Transparency*, 36–40.

[61] Sara Casella Colombeau et al., *Agence FRONTEX : Quelles garanties pour les droits de l'Homme ? Étude sur l'Agence européenne aux frontières extérieures en vue de la refonte de son mandat* (Verts/ALE au Parlement européen, 2010), https://migreurop.org/IMG/pdf/dossier_frontex-FR.pdf.

[62] Hungarian Helsinki Committee, *Protecting Fundamental Rights or Shielding Fundamental Rights Violations? Evaluating Frontex's Human Rights Mechanisms Related to Hungary*, information note, January 8, 2021, 4–6, https://helsinki.hu/wp-content/uploads/Frontex-human-rights-mechanisms.pdf.

Frontex's complaints mechanism has long been criticized for its limitations. As explained by Lena Karamanidou and Bernd Kasparek, despite some expansion in scope under Regulation 2019/1896 to include omissions by border guards, the mechanism still imposes limitations on who can submit a complaint, placing the burden of proof squarely on the claimant and excluding actions of Frontex personnel in coordinating roles. Hence, it fails to allow submissions in the public interest by NGOs and organizations with valuable information on rights violations. Other limitations include a restrictive one-year time frame, lack of access to legal assistance, and absence of an appeals process against decisions made by the Fundamental Rights Officer. Additionally, there is a lack of clarity regarding follow-up actions by both the FRO and the Executive Director, as well as a dearth of specific time frames for member states to report back on complaints[63]. Another deficiency to this mechanism lies in the fact that "The FRO still lacks the capacity to act independently, and does not have the powers to ensure effective follow-ups at either EU or national level"[64].

On the other hand, despite its crucial function in alerting Frontex to fundamental rights violations, the Serious Incident Report mechanism falls short of efficiency. Agostina Pirrello and Mariolina Eliantonio, highlighted its shortcomings, starting with its ambiguity in defining the criteria for activation, given the lack of a clear definition of "serious incident" within the Frontex Regulation. Additionally, there's uncertainty about the reporting process and its repercussions, especially concerning the limited control over national police forces. Moreover, transparency issues arise as participants in operations are tasked with reporting incidents, while essential details have been withheld by the Agency in previous instances, impeding transparency and accountability efforts[65].

Notwithstanding the constraints posed by the Agency's internal provisions and accountability mechanisms, it is worthwhile to explore avenues for establishing its accountability within the framework of EU law and international law. Additionally, examining the mechanisms for political accountability is essential in this context.

4.2. Possible Application of Accountability in the Case of Violations of Fundamental Rights

As we could demonstrate in the above section, accountability in the context of the EU agencies can be explained theoretically through the lenses of different theoretical frameworks. Hence it can have different types and dimensions. In a

[63] Karamanidou and Kasparek, *Fundamental Rights, Accountability and Transparency*, 31–33, 40–43.

[64] Marco Stefan, and Leonhard den Hertog, "Frontex: Great Powers but No Appeals", in Merijn Chamon, Annalisa Volpato, and Mariolina Eliantonio (eds), *Boards of Appeal of EU Agencies: Towards Judicialization of Administrative Review?* (Oxford University Press, 2022), pp. 151–174, https://doi.org/10.1093/oso/9780192849298.003.0008.

[65] Agostina Pirrello and Mariolina Eliantonio, "A Board of Appeals for Frontex: Panacea for Violations or Another Patch in the Incomplete System of Accountability?" *European Law Review* 49, no. 1 (2024): 51–65, https://research-portal.uu.nl/en/publications/a-board-of-appeals-for-frontex-panacea-for-violations-or-another-/.

multilevel governance context, we noticed the accumulation of different accountability mechanisms in order to reply to the complexity of with taken actions. We figured that, in regard to Frontex, two main categorization can be made, under which we can study the means of holding the agency accountable politically, and within EU and international law.

4.2.1. Legal Accountability

Legal accountability is different from responsibility, it is rather a wider concept. Responsibility is usually used in alternation with liability, and specifically concerns attributing fault for causing harm. The emphasis in this case lies on legal responsibility rather than political or moral. Legal responsibility entails the obligation to provide reparation in the event of a breach of commitment. In other words, responsibility denotes the duty to provide reparations following a breach of commitment, whereas accountability signifies the potential for being held responsible and answering for breaches of international obligations in court[66]. As the Agency is a body of the Union, we suggest starting by analyzing the legal possibilities of addressing its accountability in EU law, but verifying whether it can be held accountable for an unlawful conduct within international law is also important.

The legal accountability of Frontex within EU law. As addressed by the article 263 TFEU, the Court of Justice shall "review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties"[67]. The Court is responsible for reviewing cases of breach of EU law, including the treaties and the Charter.

Actions before the court depend on the category of applicant. In this context, the article 263 TFEU distinguishes between 3 different categories: the first concerns the "actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers". The second are the "actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives". The last category encompasses "[a]ny natural or legal person may, under the conditions laid down in the first and second paragraphs, [instituting] proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures"[68].

In the case of a natural or legal person applicant, the Court of Justice has

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[66] Mariana Gkliati, "Systemic Accountability of the European Border and Coast Guard: The Legal Responsibility of Frontex for Human Rights Violations" (PhD diss., Leiden University, 2021), https://hdl.handle.net/1887/3240559.

[67] Consolidated Version of the Treaty on the Functioning of the European Union, art. 263, *Official Journal of the European Union* C 115 (May 9, 2008): 162, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12008E263.

[68] Treaty on the Functioning of the European Union (TFEU), art. 263, paras. 2–4.

reminded the legal condition that imposes that "the subject-matter of an action for annulment must be of 'direct concern'" which "[affects] directly the legal situation of the individual and leave no discretion to the addressees of that measure [..] resulting from Community rules without the application of other intermediate rules"[69]. Moreover, "[o]nly persons affected by a decision by reason of their individuality or of their special position may be considered as individually concerned for the purpose of bringing an action"[70]. A way of bypassing these challenges, natural persons can use the preliminary reference procedure by which they can ask their national courts to seek the Court of Justice' review on matters of interpretation and implementation of EU law. Among these questions can be addressed the validity of Frontex acts in regard to EU charter. However, it is important to note that the CJEU is not empowered to adjudicate on the factual aspects of the case, determine violations, or award damages. Should such issues arise, the legal proceedings would be required to proceed either within the national jurisdiction or through alternative avenues, such as direct access remedies available before the Court[71].

The action against Frontex can be an action for annulment on the basis of the article 265 TFEU, by which the actions of "bodies, offices and agencies of the Union [...] fail to act"[72] in compliance with EU law. This action is initiated as well by any natural or legal person if it aims to "complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion"[73]. The concept of act was substantially defined by the Court of Justice as "any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position"[74] that can be judged as void in terms of the article 264 TFEU. Hence, as demonstrated by the court, the definition of acts is subject to a broad interpretation encompassing all Frontex's acts regarding third parties. However, as mentioned by Gkliati, building on the argument that Frontex primarily plays a coordinating role in operations, and its actions lack finality and legal impact on individuals, a significant challenge for applicants arises in identifying Frontex acts eligible for review under Article 263 TFEU[75].

Another possible action against Frontex, is the action for damages as stipulated by the article 340 TFEU: "In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their

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[69] *Front national v. European Parliament*, case C-486/01 P, judgment of June 29, 2004, ECLI:EU:C:2004:394, para. 34, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62001CJ0 486.

[70] *Plaumann & Co. v. Commission*, case 25/62, judgment of July 15, 1963, ECLI:EU:C:1963:17, "Grounds of Judgment," section I, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61962CJ0025.

[71] Gkliati, "Systemic Accountability of the European Border and Coast Guard", 214–16.

[72] TFEU, art. 265(1), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12008E265.

[73] TFEU, art. 265(3).

[74] *International Business Machines Corporation v. Commission*, case 60/81, judgment of November 11, 1981, ECLI:EU:C:1981:264, para. 9, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61981CJ0060.

[75] Gkliati, "Systemic Accountability of the European Border and Coast Guard", 225.

duties."[76]. The conditions of liability are established in accordance with "the general principles common to the laws of the Member States". The court in its definition of these should hence respect this condition mentioned in the above article. For the EU, liability hinges on three interrelated conditions: the unlawfulness of the conduct, demonstrable damage suffered by the victim, and a clear causal link between the unlawful act and the harm incurred[77]. The seriousness of a breach is gauged by whether Union authorities blatantly exceed their discretion, with gravity determined by the egregiousness or reprehensibility of the transgression. Notably, while fundamental rights violations under EU jurisdiction are subject to similar conditions, the application varies, raising questions regarding the threshold for liability. Frontex, in its role overseeing joint operations, faces liability through action or omission, particularly concerning breaches of positive obligations to protect fundamental rights. Despite its monitoring mechanisms, Frontex's liability rests on its knowledge of, and response to, potential rights infringements, with failure to act appropriately potentially leading to liability. The severity of the breach, coupled with Frontex's discretion in responding, shapes the contours of its liability framework, with clear obligations outlined in instances of serious or persistent violations. Ultimately, the determination of liability for fundamental rights violations by both the EU and Frontex hinges on a complex interplay of legal standards, discretion, and the balance between individual rights and broader societal interests[78].

Accountability for Frontex under EU law remains feasible but often proves elusive, particularly for individuals, given the challenges in delineating the agency's actionable conduct, its intricate decision-making processes, and occasional opacity. Consequently, exploring avenues of accountability under international law emerges as a pertinent endeavor.

The legal accountability of Frontex under International Law. According to Article 6 of the Draft articles on the responsibility of international organizations "The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization"[79]. In accordance with Article 2, an "agent of an international organization" refers to an individual or entity entrusted by the organization to execute

[76] TFEU, art. 340, para. 2, *Official Journal of the European Union* C 115 (May 9, 2008): 193, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12008E340.

[77] "For the European Union to incur non-contractual liability under the second paragraph of Article 340 TFEU for unlawful conduct of its institutions, a number of conditions must be satisfied: the institution's conduct must be unlawful, actual damage must have been suffered and there must be a causal link between the conduct complained of and the damage pleaded." *East West Consulting SPRL v. European Commission*, case T-298/16, judgment of December 14, 2018, ECLI:EU:T:2018:967, para. 109, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62016TJ0298.

[78] Melanie Fink, "The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable," *German Law Journal* 21, no. 3 (2020): 532–48, https://doi.org/10.1017/glj.2020.20.

[79] International Law Commission, *Draft Articles on the Responsibility of International Organizations, with Commentaries* (2011), art. 6(1), https://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf.

or assist in executing its functions, thereby serving as a conduit through which the organization operates. This designation excludes organs of the organization, encompassing individuals or entities tasked with specific responsibilities on behalf of the organization[80]. A key factor in recognizing whether the organ is attributed to an international organization, or another entity is identifying which entity effectively controls. Gkliati, highlighted the emergent necessity of examining specific criteria to determine the manifestation of effective control due to different perceptions between the ECtHR[81] and the IlC. Criteria such as decision-making power, de facto control, disciplinary power retention, and the ability to prevent violations offer insights into assessing this concept. Notably, the degree of control varies, and in the absence of formal arrangements, it necessitates a case-by-case evaluation, considering factors like the extent of care exercised to prevent misconduct[82].

In order to establish the international responsibility of an international organization or its agents, there must be unlawful conduct that constitutes a breach of international law, and that is attributable to the international organization in question. However, a precondition should exist in order to apply international responsibility on Frontex: the international legal personality. In clear provisions, the 2019/1896 attributes legal personality to the agency and that is why it is legitimate to hold it accountable for breaching EU law. Determining if it has international legal personality is, however, not clear.

Through his analysis, T.J. Haakma, demonstrated the possession of international legal personality by Frontex through the examination of two pivotal elements delineated by the International Court of Justice as prerequisites for an organization to attain ILP. Frontex, as delineated by Regulation 2019/1896, enjoys substantial administrative, financial, and legal autonomy, with permanent organs like the Management Board wielding authority over its functions. This structural resemblance to recognized permanent organizations implies Frontex meets the criteria for ILP, which is independence. Secondly, the following requirement for the organization is to possess independent functions executable on the international scope. Frontex's mandate for international cooperation, formalized through agreements with other international organizations and third countries, illustrates its involvement in autonomous international endeavors. However, the debate surrounding the extent of Frontex's autonomy persists, with some asserting its actions are conducted on behalf of the EU rather than autonomously. Hence, despite fulfilling the first element, Frontex might not entirely meet the criteria for ILP due to its intimate association with the EU and its Member States. Therefore "As the rules on responsibility for IOs set out in the ARIO cannot be applied to the Agency, the Agency cannot be found responsible for its extraterritorial activities under International law"[83].

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[80] International Law Commission, *Draft Articles*, art. 2(c)–(d).

[81] *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, applications nos. 71412/01 and 78166/01, Grand Chamber decision on admissibility, May 2, 2007, https://hudoc.echr.coe.int/eng?i=001-80830.

[82] Gkliati, "Systemic Accountability of the European Border and Coast Guard", 167–71.

[83] T. J. Haakma, "Frontex's Responsibility on Fundamental Rights Compliance in Third Countries" (LLM

4.2.2. Political Accountability

As defined by Scholten, political accountability, embodies a dynamic between an actor and a governing body, wherein the actor assumes the responsibility to elucidate and defend their actions. Concurrently, the governing body retains the authority to interrogate, pass judgments, and enforce consequences. His conceptualization delineates three distinct phases: firstly, the dissemination of information, where the actor elucidates their actions; secondly, the engagement in dialogue, during which inquiries are raised and elucidations are furnished; and lastly, the phase of rectification, characterized by the delivery of verdicts and the imposition of repercussions. While it disregards preemptive procedures such as appointment protocols, it underscores the criticality of retrospectively scrutinizing actions and administering remedies or penalties for prior transgressions. Hence, within this narrower construct, accountability centers on evaluating past actions and holding entities or individuals accountable for their behavior[84].

As stated by the article of the regulation 2019/1896, "[t]he Agency shall be accountable to the European Parliament and to the Council in accordance with this Regulation"[85]. This accountability is manifested through reporting mechanisms to both the European Parliament, and the Council. Transparency and accountability are upheld through regular reporting, as Frontex is required to transmit key documents to the European Parliament and the Council, including reports on its activities and working arrangements with EU institutions, international organizations, and non-EU countries. Moreover, Frontex executives participate in hearings organized by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, engaging in discussions and addressing inquiries from members. Additionally, MEPs have the opportunity to visit Frontex headquarters and field operations, enabling firsthand observation and scrutiny of border management practices[86].

Financial accountability serves, on the other hand, as a crucial component of political accountability. The budgetary framework of Frontex, governed by the 2019 Frontex Financial Regulation[87], operates under key principles such as annularity and specialization. Annularity ensures that budget allocations occur on an annual basis following the achievement of budgetary objectives. Meanwhile, specialization ensures that financial allocations are directed towards specific programs and objectives. Furthermore, Frontex undergoes an external audit of its annual accounts conducted by the European Court of Auditors (ECA). This comprehensive audit results in the

thesis, Tilburg University, 2021), 39–40, https://arno.uvt.nl/show.cgi?fid=154899.

[84] Miroslava Scholten, "The Political Accountability of EU Agencies: Learning from the US Experience" (PhD diss., Maastricht University, 2014), https://doi.org/10.26481/dis.20140403ms.

[85] Regulation (EU) 2019/1896, art. 6.

[86] Frontex, "Accountability," accessed October 5, 2026, https://www.frontex.europa.eu/transparency/accountability/.

[87] Frontex Management Board, Decision 19/2019 of July 23, 2019, adopting the Frontex Financial Regulation, reg. no. 8079, annex, arts. 5 and 9, https://prd.frontex.europa.eu/wp-content/uploads/mb_decision_19_2019_adopting_the_frontex_financial_regulation_002.pdf.

production of an annual report, which is then published alongside responses from pertinent bodies, including Frontex. This report forms the basis upon which the European Parliament makes decisions regarding discharge, thereby ensuring transparency and accountability in the agency's financial operations.

5. Conclusion

In a complex system of governance, such as the EU's migration governance, accountability can be understood through different theoretical lenses. It is actually characterized by its diversity of modes, which are often not efficient enough when it comes to holding Frontex accountable for its fundamental rights violations. This inefficiency can be explained by the internal limitation of Frontex's constituent regulation that is characterized by the existence of legal gaps when it comes to the forms of particular application to the EU acquis in its specific operational activities.

Rights are indivisible and should be taken in consideration not only in the scope of operations on the external borders but in all the agency's activities. Establishing a legal accountability for Frontex's activities, in terms of non-contractual responsibility, is feasible within EU law. Action for damages is a prominent mechanism to compensate for the violations of fundamental rights. Moreover, individuals as well as other more privileged actors can initiate an action of annulment by which the CJEU can declare void an act of the Agency. The court's apprehension of the term 'act' was shown to be wide, encompassing all legal acts that produce legal effects, willing to influence an individual legal position.

However, a main limitation to procedures before the Court of Justice might be the conditions of the direct and individual effect of acts, as well the need to exhaust national procedures.

Although accountability under international law seems promising due to the fact that a conduct of an agent or an organ that is related to an International Organization can be attributable to the IO and can engage international responsibility. However, establishing International Legal Personality to the Agency is a constitution that needs to be fulfilled before looking into the possibility of analyzing its international responsibility. This last point is still very much debated, and due to the lack of full independence of the Agency, it seems difficult to attribute International Legal Personality to it.

The applicability of political accountability is an important possibility that might help assuring the responsiveness of the Agency vis-à-vis to its actions. In order to make it more effective, report mechanisms as well as financial control can be used to maintain a beforehand and a posteriori control, despite that such control depends a lot on political will.

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