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THE SCRUTINY OF FRONTEX'S OPERATIONS: ANALYSIS OF THE EU JUDICIAL AND NON-JUDICIAL MECHANISMS AVAILABLE

Simone MARINAI[1]

ABSTRACT: The enhanced operational powers attributed to the European Border and Coast Guard (Frontex) have made it increasingly urgent to identify mechanisms for monitoring respect for fundamental rights in the Agency's actions. In this paper, the Agency's external control mechanisms and the implementation practice that has developed in recent years have been addressed. Thus, the external judicial and non-judicial mechanisms have been analysed separately in order to assess the adequacy of existing instruments to ensure effective protection of the fundamental rights of migrants with which Frontex interacts in the performance of the tasks entrusted to it.

KEYWORDS: Frontex, European Border and Coast Guard Agency, Fundamental Rights, Accountability Mechanisms.

EL ESCRUTINIO DE LAS OPERACIONES DE FRONTEX: ANÁLISIS DE LOS MECANISMOS JUDICIALES Y NO JUDICIALES DISPONIBLES EN LA UE

RESUMEN: El aumento de las competencias operativas atribuidas a la Guardia Europea de Fronteras y Costas (Frontex) ha hecho cada vez más urgente la identificación de mecanismos de control del respeto de los derechos fundamentales en las actuaciones de la Agencia. En este trabajo se han abordado los mecanismos de control externo de la Agencia y la práctica de aplicación que se ha desarrollado en los últimos años. Así, se han analizado por separado los mecanismos externos judiciales y no judiciales con el fin de evaluar la adecuación de los instrumentos existentes para

[1] Associate Professor of EU Law, Department of Law, University of Pisa, mail: simone.marinai@unipi.it. This article is part of the activities carried out within the Jean Monnet Module "Mechanisms of Accountability in the Application of the EU Pact on Migration and Asylum", supported by the European Union under the Erasmus+ Programme (No. 101238329 — MAC-EUPACT).

garantizar la protección efectiva de los derechos fundamentales de los migrantes con los que Frontex interactúa en el desempeño de las tareas que tiene encomendadas.

PALABRAS CLAVE: Frontex, Agencia Europea de la Guardia de Fronteras y Costas, Derechos fundamentales, Mecanismos de rendición de cuentas.

LE CONTRÔLE DES OPÉRATIONS DE FRONTEX: ANALYSE DES MÉCANISMES JUDICIAIRES ET NON JUDICIAIRES DISPONIBLES AU SEIN DE L´UE

RÉSUMÉ: Les pouvoirs opérationnels accrus attribués à l'Agence européenne de garde-frontières et de garde-côtes (Frontex) rendent de plus en plus urgente l'identification de mécanismes permettant de contrôler le respect des droits fondamentaux dans les actions de l'Agence. Le présent article examine les mécanismes de contrôle externe de l'Agence ainsi que la pratique de mise en œuvre qui s'est développée ces dernières années. Les mécanismes externes judiciaires et non judiciaires ont ainsi été analysés séparément, afin d'évaluer l'adéquation des instruments existants pour garantir une protection effective des droits fondamentaux des migrants avec lesquels Frontex interagit dans l'exécution des missions qui lui sont confiées.

MOTS-CLÉS: Frontex, Agence européenne de garde-frontières et de garde-côtes, droits fondamentaux, mécanismes d'*accountability*.

I. INTRODUCTION: THE INCREASED RISK OF FRONTEX INVOLVEMENT IN VIOLATIONS OF MIGRANTS' FUNDAMENTAL RIGHTS

The mandate of the European Border and Coast Guard Agency was significantly extended by the adoption of Regulation 2019/1896[2]. Indeed, the operational and executive powers of the Agency have been increased. The formation of a permanent corps of 10,000 border guards with executive powers was envisaged, with the capacity to assist Member States in managing

[2] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) 1052/2013 and (EU) 2016/1624, OJ L 295, 14 November 2019, p. 1. For an overview of Frontex's functions see among others Fink, M., *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law*, OUP, Oxford, 2018; Acosta Sánchez, M.A., "Reglamento 2019/1896/UE sobre la guardia europea de fronteras y costas: ¿Frontex 3.0?", *IEEE,* Documento de Opinión No. 111, 2019, pp. 646-666; Vitiello, D., *Le frontiere esterne dell'Unione Europea*, Cacucci, Bari, 2020, p. 93 ff.; Fernández Rojo, D., *EU Migration Agencies: The Operation and Co-operation of FRONTEX, EASO and EUROPOL*, Edward Elgar Publishing, Cheltenham-Northampton MA, 2021, in particular at p. 87 ff.; Acosta Penco, T., *La intervención directa de la Guardia de Fronteras y Costas: de la mera coordinación a la actuación subsidiaria en las fronteras exteriores de la Unión Europea*, Iustel, Madrid, 2023; Raimondo, G., *The European Integrated Border Management. Frontex, Human Rights and International Responsibility*, Hart Publishing, Oxford, 2024, p. 33 ff. See also Report from the Commission to the European Parliament and the Council on the evaluation of Regulation (EU) 2019/1896 on the European Border and Coast Guard, including a review of the permanent corps, doc. COM (2024) 75 final, 2 February 2024.

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their external borders. Frontex now has the capacity to organise and coordinate joint operations, pilot projects and border interventions in order to support the Member States of the Union in the management of their external borders. It was also given increased competences in the field of migrant return procedures and the possibility to deploy staff in operational activities on the territory of third countries that do not share common borders with Member States of the European Union[3]. The involvement of Frontex personnel in joint operations with third countries can be particularly problematic when the latter are not members of the Council of Europe and therefore not bound by the European Convention on Human Rights and, in general, when they have problems from the point of view of respecting human rights.

The criticism aimed in recent years at Frontex, including when it operates in the Mediterranean Sea, is well known[4]. It has been accused, for example, of being involved in blockades at the Aegean border or of having used drones and aircraft to allow the Libyan Coast Guard to intercept boats, even though asylum-seeking migrants are at risk of being exposed to systematic abuse if they are returned to Libyan territory.

The need to strengthen guarantees for the protection of fundamental rights in Frontex's actions has grown, as the expansion of the Agency's operational powers has heightened the risk that its activities may interfere with migrants' rights. Thus, the institutions of the Union have introduced, through successive interventions, modifications to the Agency's governance, leading to the creation of a Fundamental Rights Office (FRO), fundamental rights observers and a Human Rights Consultative Forum. At the same time, mechanisms have been introduced within the Agency itself to ensure respect for human rights in the context of its activities. These include, for example, the establishment of a strategy and a plan of action on fundamental rights; a

[3] On issues related to the possibility for Frontex to deploy operations on the territory of third states, see e.g. Santos Vara, J., "The Activities of Frontex on the Territory of Third Countries: Outsourcing Border Controls Without Human Rights Limits", *European Papers*, 2023, pp. 985-1011.

[4] Report of the Special Rapporteur on the human rights of migrant, *Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants*, doc. A/HRC/29/36, 8.5.2015; European Parliament, LIBE Committee, Frontex Scrutiny Working Group, *Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations*, 14 July 2021; OLAF, *Final Report*, case No. OC/2021/0405/A1, Olaf.03(2021)21088.

complaint mechanism that any individual who believes his or her fundamental rights have been violated can trigger; the recognition by the Executive Director of the Agency the power to revoke funding for the Agency's activities and to suspend or terminate its activities if he or she believes that violations of fundamental rights or international protection obligations have taken place in the course of its activities.

The introduction of the aforementioned mechanisms within Frontex's internal legal framework represents a significant step towards ensuring respect for fundamental rights. However, meaningful oversight cannot be achieved unless it is external to the Agency[5]. For this reason, this paper focuses on the external judicial and non-judicial mechanisms applicable to monitoring the Agency's activities, as well as on the implementing practices that have emerged in recent years. Regarding the former, the most recent cases brought before the Court of Justice of the European Union should be examined to assess the adequacy of existing instruments for ensuring effective action against Frontex. Regarding the latter, their capacity to compel Frontex to respect fundamental rights in the context of its own actions, despite their non-binding nature, will have to be assessed.

II. JUDICIAL REMEDIES AGAINST FRONTEX ACTION

The margins for validating potential violations of fundamental rights committed by Frontex before the Court of Justice are particularly narrow[6]. Although, from a formal point of view, the express reference to the possibility of challenging the acts of European Union bodies introduced in Article 263 TFEU by the Lisbon Treaty has clarified the uncertainties that previously surrounded the reviewability of their actions[7], there is no doubt that the

[5] For an overview of the Agency's internal and external control mechanisms, see Ingravallo, I., "Gli strumenti di controllo sul rispetto dei diritti fondamentali nelle attività operative di Frontex", *Quaderni AISDUE*, 2024, No. 2, pp. 255-274.

[6] On this subject, see e.g. Fink, M., "Why it is so Hard to Hold Frontex Accountable: On Blame-Shifting and an Outdated Remedies System", *Ejiltalk*.org, 26 November 2020.

[7] On this subject, see e.g. Volpato, A., "Judicial Review of the Acts of EU Agencies: Discretion Escaping Scrutiny?", *CERiM Online Paper Series*, No. 1, 2019.

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nature of these actions continues to affect the practical possibility of ensuring full and effective judicial control before the Court of Justice[8].

A fundamental issue in the exercise of such control stems from the fact that, according to the Regulation establishing Frontex, the Agency's mandate may, depending on the circumstances, entail varying degrees of involvement in decisions affecting individuals. The Agency may be called upon to coordinate joint operations involving one or more Member States or third countries at the external borders, to organize rapid border interventions, to deploy its standing corps (composed partly of statutory staff directly employed by the Agency and partly of staff seconded by individual Member States) as part of migration management support teams, to provide technical and operational assistance in support of search and rescue operations at sea, and to assist Member States facing challenges related to their return systems[9].

Ordinarily, members of the teams exercise their powers exclusively under the control and in the presence of border guards or other personnel of the host Member State. However, the latter may also authorize them to act on its behalf, thereby allowing them to take decisions denying entry and, where appropriate, to use force on its territory even in the absence of national border guards. Moreover, the host Member State may authorize members of such teams to adopt decisions to refuse entry and decisions refusing visas at the border, also acting on behalf of the Member State concerned[10].

When Frontex personnel act under a delegation from an individual Member State, the activities carried out should be attributed to that State. However, it is not always easy to determine when the personnel in question are acting on behalf of the Member State and when, instead, they are acting in their own capacity, which would imply that responsibility for the actions lies with Frontex. Given that Frontex is, by its very nature, required to closely cooperate

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[8] On the possibility of applying the principle of effective judicial protection to Union Agencies, see Prechal S. and Widdershoven, R., "Principle of effective judicial protection", in Scholten, M. and Brenninkmeijer, A., *Controlling EU Agencies. The Rule of Law in a Multi-jurisdictional Legal Order*, Edward Elgar Publishing, Cheltenham, Northampton, 2020, pp. 80-97. On the specific issue of protection mechanisms against possible violations of fundamental rights in the action of the Agencies, see Meyer, F., "Protection of fundamental rights in a multi-jurisdictional setting of the EU", in Scholten, M. and Brenninkmeijer, A., *op. cit.*, pp. 134-156.

[9] See Article 36 of Regulation 2019/1896.

[10] See Article 82, paras. 4, 8, 10, 11, of Regulation 2019/1896.

with national authorities responsible for controlling the external borders in the implementation of Union law, it may, in practice, prove difficult to determine who is to be held accountable for the contested conduct, particularly when the activity is carried out jointly within the context of a composite procedure[11].

This is especially true with regard to factual actions, such as the pushback of an individual or an interview conducted with a migrant intercepted at the border[12]. The situation is further complicated by the fact that, if the conduct has been carried out by a national authority, it may be subject to review before a domestic court. Conversely, if the conduct (or omission) is attributable to Frontex, it must be subject to review before the Court of Justice.

As for the specific remedies that may be brought before the Court of Justice, and which will be examined in more detail in the following paragraphs, some preliminary considerations can already be anticipated.

As for the action for annulment, the main difficulty stems from the fact that the human rights violations that can be attributed to Frontex are often caused by operational actions of the Agency, with the result that it may be difficult, or even impossible, to identify the act to be challenged. In addition, there are well-known limits to the legal standing of natural and legal persons to bring the instrument in question. With regard to actions for failure to act, it may be difficult to identify an obligation to act that could be the subject of review. With respect to actions for non-contractual liability, the main difficulties lie in the allocation of the burden of proof in cases of collective expulsions involving Frontex and in the establishment of a direct causal link between the unlawfulness of the conduct and the damage caused by Frontex's act or omission.

1. Actions for annulment

The cases concerning actions for annulment against act adopted by Frontex are few. This is because, as already noted, the operational powers

[11] See Fink, M., Rauchegger, C. and De Coninck, J., "The Action for Damages as a Fundamental Rights Remedy", in Fink, M. (ed.), *Redressing Fundamental Rights Violations by the EU. The Promise of the 'Complete System of Remedies'*, Cambridge University Press, Cambridge, 2024, pp. 36-63, 56.

[12] See Eliantonio, M., "Composite Procedures, the Violation of Fundamental Rights, and the Availability of Sufficient Remedies in the Multi-level EU Judicial Architecture", in Fink, M. (ed.), *Redressing Fundamental Rights Violations by the EU*, pp. 345-365, 358 ff.

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exercised by the Agency in external border control normally take the form of *de facto* conduct rather than binding legal acts that can be subject to challenge[13].

The instrument of an action for annulment has, in any case, been used to review Frontex's refusal of requests for access to documents considered useful for verifying respect for fundamental rights in the Agency's actions. In this regard, reference can be made to two separate judgments of the General Court of the Union: the first, handed down on 27 November 2019 in the *Izuzquiza and Semsrott v. Frontex* case[14], and the second, handed down on 24 April 2024 in the *Naass and Sea-Watchv. Frontex* case[15].

In *Izuzquiza and Semsrott v. Frontex*, Frontex's decision to refuse access to documents containing information relating to the name, flag or type of each vessel used in the Central Mediterranean within the scope of Joint Operation Triton in the period from 1 June to 30 August 2017 was challenged. In *Naass and Sea-Watch v. Frontex*, on the other hand, the decision of Frontex to refuse access to documents relating to aerial surveillance activity carried out by the Agency in the Central Mediterranean on 30 July 2021, within the scope of operation Themis, aimed at verifying its possible involvement in the refoulement of a vessel on the high seas to Libya, was challenged.

In both cases, the General Court recognised that Frontex may legitimately refuse to disclose the requested documents on grounds of public security under Article 4(1) of Regulation 1049/2001[16]. As Frontex argues, indeed, access

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[13] Nicolosi, S.F., "Frontex and Migrants' Access to Justice: Drifting Effective Judicial Protection?", *VerfBlog,* 7 September 2022; Vitiello, D., "Poteri operativi, *accountability* e accesso alla giustizia nella gestione integrata delle frontiere esterne dell'Unione europea. Una prospettiva sistemica", *I Post di AISDUE*, *Sezione "Atti convegni AISDUE"*, No. 10, *Quaderni AISDUE*, 8 February 2023, pp. 226-254, 239; Nicolosi, S.F., "The European Border and Coast Guard Agency (Frontex) and the limits to effective judicial protection in European Union law", *European Law Journal*, 2024, pp. 1-17, 10.

[14] General Court, judgment of 27 November 2019, case T-31/18, *Izuzquiza and Semsrott v. Frontex*. Commenting on the judgment, see Knäbe, T. and Caniard, H.Y., "Public Security Revised. Janus, Triton and Frontex: Operational Requirements and Freedom of Information in the European Union, *Case Note Under Case T-31/18* Luisa Izuzquiza and Arne Semsrott v European Border and Coast Guard Agency (Frontex)", *EJML*, 2021, pp. 332-358.

[15] General Court, judgment of 27 November 2019, case T-205/22, *Naass and Sea-Watch v. Frontex.*

[16] Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJEC L 145, 31 May 2001, p. 43.

to the documents may be refused if they contain information concerning the operational area and technical equipment used, as well as crucial details concerning the situation at the external borders of the Union to the extent that these may enable criminal organisations to adapt their *modus operandi* to circumvent border surveillance in ongoing and future operations. However, this does not exempt Frontex from providing the explanations necessary to understand the reasons why access to the requested documents could specifically undermine the protected interest. In light of the circumstances of the case, in the judgment of 24 April 2024, the action for annulment has been partially upheld insofar as —with reference to some requested documents— Frontex had not adequately explained the reasons for refusing to disclose them to the applicants[17].

Another possible use of the action for annulment relates to the possibility that, following the activation of the pre-litigation procedure aimed at contesting Frontex's failure to fulfil its obligation to act, the latter has adopted a position that precludes the bringing of an action for failure to act before the Court of Justice of the European Union.

Such a path, already suggested by the General Court in *SS and ST v. Frontex*[18], was taken in the *ST v. Frontex* case, where the applicant brought, principally, an action for failure to act and, alternatively, an action for annulment on the ground that the answer given by Frontex to the alleged failure to act had been considered by the Court of Justice as a stance capable of blocking the proceedings for failure to act[19]. The Court, however, also considered the challenge inadmissible in the latter case, on the basis that the applicant's interest in bringing proceedings had not been demonstrated. By his stance (which is the subject of the application), in fact, the Executive Director of Frontex had held that he was not obliged to suspend or cease Frontex's activities in the Aegean Sea under Article 46(4) of Regulation 2019/1896. According to the General Court, the annulment of the contested act would not have had the effect of suspending or ceasing Frontex's activities in the Aegean, but rather that of prompting Frontex to re-examine the conditions for adopting such a decision. Moreover, the annulment of the act in question would not, in any

[17] General Court, *Naass and Sea-Watch v. Frontex*, cited above, paras. 75-79.

[18] General Court, order of 7 April 2022, case T-282/21, *SS and ST v. Frontex*, para. 33.

[19] General Court, order of 28 November 2023, case T-600/22, *ST v. Frontex*.

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event, have facilitated the conditions for the applicant's entry into Greece, since such a decision falls within the exclusive competence of the Member States. Since the harm suffered by the applicant as a result of the contested act was considered to be only hypothetical and future, in the present case the General Court held that there was no interest in the annulment of that act, without it being necessary to ascertain whether the applicant was directly and individually concerned within the meaning of Article 263 TFEU and whether the contested decision constituted an act against which an action for annulment could be brought.

The General Court's order in the *ST v Frontex* case was subsequently upheld on appeal by the Court of Justice, which, by order of 11 October 2024[20], reaffirmed that the applicant had failed to demonstrate how the annulment of the contested position would have conferred a benefit sufficient to establish the necessary interest for the action to be deemed admissible[21]. In doing so, while reiterating its settled case-law[22], the Court adopted an excessively formalistic approach, one that was clearly not oriented toward the protection of migrants' rights. Indeed, if Frontex's involvement in pushback operations at sea were proven, it would not seem unreasonable to assert the existence of a legitimate interest on the part of the person prevented, on that occasion, from reaching Union territory, in seeking the annulment of the act by which the Executive Director defined his or her position, taking the view that there were no grounds to suspend or terminate the Agency's activities.

2. Actions for failure to act

The first case in which Frontex's actions were reviewed through the instrument of an action for failure to act was decided by the General Court of the Union in an order rendered on 7 April 2022 (*SS and ST v. Frontex*)[23]. The applicants sought a declaration that Frontex had unlawfully failed to adopt, based on the relevant power granted to its Executive Director (Article 46(4) of Regulation 2019/1896), a decision to suspend or terminate its activities in the

[20] Court of Justice, order of 11 October 2024, case C-62/24 P, *ST v. Frontex*.

[21] Ibid., para. 48.

[22] Court of Justice, judgment of 7 November 2018, case C-544/17 P, *BPC Lux 2 Sàrl and o. v. European Commission*, para. 28 ff.; judgment of 14 July 2022, joint cases C-106/19 and C-232/19, *Italy v. Council and Parliament (Siège de l'Agence européenne des médicaments)*, para. 55.

[23] General Court, *SS and ST v. Frontex*, *op. cit*.

Aegean Sea region. The application was declared inadmissible because Frontex, after being asked to implement the act in question, took a position stating that it had acted in accordance with human rights and that it had not recorded, in the context of its activities in the region in question, particularly serious incidents such as those required for the applicability of the aforementioned rule. This position rendered the action for failure to act inadmissible.

A further action for failure to act was decided by the General Court by order of 28 November 2023 (*ST v. Frontex*)[24]. Again, Frontex had been asked in the pre-litigation phase to suspend or cease its activities in the Aegean Sea on the basis of Article 46(4) of Regulation 2019/1896. The application was declared inadmissible, first, because the applicant (a Congolese citizen residing in Turkey, who had fled his country of origin and with the intention to seek asylum in Greece) had not proved that he was the anonymous person on whose behalf the non-governmental organisation Front-Lex had sent the letter by which, in the pre-litigation phase, the Agency had been challenged for the alleged omission. In any case, the Court emphasised that, even if such proof had been adduced, the fact that Frontex defined its position in the invitation to act was relevant, thus removing the preconditions for bringing an action for failure to act. Such a conclusion, in itself in line with the settled case-law of the Court of Justice on the conditions for admissibility of an action for failure to act, is perplexing in so far as the General Court did not specify what the content of the statement of position of Frontex's Executive Director was, thus making it difficult to verify if that act could be considered capable of preventing the proposed action from being brought. Additionally, we have already observed that in the proceedings in question, the Court held that the application —put forward alternatively— seeking the annulment of the statement of position of the Executive Director of the Agency was inadmissible for lack of interest[25].

The order issued by the General Court in the *ST v. Frontex* case was subsequently appealed before the Court of Justice. However, at the second instance as well, the action for failure to act was dismissed, the appeal being declared in part manifestly inadmissible and in part manifestly unfounded. In

[24] General Court, *ST v. Frontex*, *op. cit.*

[25] See above, para. 1.

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fact, the Court, with its order of 11 October 2024[26], reaffirmed that an action for failure to act must be declared inadmissible where the institution, body, or agency has defined its position prior to the initiation of legal proceedings, and that the adoption of a measure different from that sought or considered necessary by the applicant —such as a duly reasoned refusal to act in accordance with the call to act— constitutes a definition of position putting an end to the failure to act[27].

The principle reiterated by the Court of Justice —that a reasoned position precludes the possibility of bringing an action for failure to act— is certainly acceptable. However, the judgment does not clarify whether the position taken by Frontex's Executive Director was indeed reasoned or whether, as argued by the applicant, it merely consisted of the Director's statement that he was unable to take a position. If the content of the statement was in fact of this nature, it would be difficult to consider that the requirement of a reasoned position —necessary to preclude the admissibility of an action for failure to act— had been met. It should be recalled that a position may be considered valid only if the institution, body, or agency sets out its view on the act requested: it may expressly refuse to adopt the act, or it may do so implicitly (for example, by adopting a different act than the one requested). However, the position must clearly and definitively reflect the institution's stance on the applicant's request. According to the Court's case-law, if the institution merely states that the matter is still under consideration, this does not constitute a valid position, as such a position must allow the institution's intention to be identified unambiguously. In the present case, the Executive Director did not state that an assessment was ongoing, but rather —at least according to the applicant— claimed to be "'not in a position' to define her position"[28]. If that were the case, it would be difficult to conclude that a valid position had been adopted. On this point, however, the Court did not clarify the actual content of the statement, limiting itself instead to dismissing the claim on procedural grounds[29].

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[26] Court of Justice, order of 11 October 2024, case C-62/24 P, *ST v. Frontex*.

[27] *Ibid*., para. 20.

[28] *Ibid*., para. 14.

[29] For these procedural grounds, see *ibid*., para. 18.

Precisely in light of the fact that the case-law just examined does not appear entirely convincing, there still seems to be room for bringing an action for failure to act in response to the non-use of the instrument provided for by Article 46(4) of Regulation 2019/1896.

In confirmation of this, a new action has been brought as part of strategic litigation aimed at establishing alleged violations of the fundamental rights of migrants committed by Frontex. In particular, the initiative was undertaken with the support of the non-governmental organisations Front-Lex and Refugees in Libya, and was brought on behalf of Mr X.Y., a Sudanese citizen stranded in Libya while seeking international protection. The complaint alleges that the Executive Director of Frontex failed to suspend or terminate the Agency's aerial surveillance activities in the Central Mediterranean, thereby contributing directly and/or indirectly to the unlawful provision of information to Libyan entities involved in refoulement operations at sea. It is further alleged that the Executive Director failed to provide duly justified grounds for not implementing the necessary measures under Article 46(6), or otherwise failed to define the Agency's position in response to the applicant's invitation to act dated 29 May 2024[30]. The case is currently pending before the General Court[31] and may eventually provide further clarification on the scope of application of the action for failure to act as a means of responding to alleged omissions by Frontex.

3. Actions for non-contractual liability

The difficulties encountered in the use of actions for annulment and for failure to act, due first and foremost to the informal and operational nature of Frontex's powers, have led to the view that the prospect of bringing an action for non-contractual liability of the European Union may be the simplest way to provide a remedy to possible violations of fundamental rights committed by the Agency in the course of its own actions[32].

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[30] See front-*LEX and Refugees in Libya filed a legal notice pursuant to Art. 265 TFEU requesting Frontex's Executive Director, Mr. Hans Leijtens, to partially terminate the Agency's aerial surveillance activities in the 'pre-frontier area' in the Central Mediterranean*, available at https://www.front-lex.eu/frontex-complicity-crimes-against-humanity, May 2024.

[31] General Court, action brought on 4 October 2024, case T-511/24, *FM v. Frontex*.

[32] In this regard, see Fink, M., "The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable", *German Law Journal*, 2020, pp. 532-548, who also points out (at

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The first ruling on an action for non-contractual liability brought in respect of facts alleged against Frontex was delivered by the General Court of the European Union on 6 September 2023 (*WS and Others v. Frontex*)[33]. Such a judgment dismissed the action brought by several Syrian nationals who had arrived in 2016 on the island of Milos (Greece) and were subsequently deported to Turkey by the Greek authorities during an operation carried out jointly with Frontex. The main difficulty this case presented was to establish the causal link between the damage and Frontex's conduct. The General Court of the Union held that, according to the legislation applicable to the facts of the case (Regulation 2016/1624)[34], Frontex's duty in these return operations consisted only of providing technical and operational support to the national authorities. Consequently, Frontex could not assess the merits of return decisions, nor was Frontex entitled to rule on applications for international protection. Since, in the view of the General Court, there was no direct causal link between Frontex's conduct and the damage allegedly suffered, the Union judicature avoided examining the further conditions required for the establishment of non-contractual liability (namely, the unlawfulness of the conduct and the existence of damage). One may wonder whether the General Court would have reached the same conclusions had Regulation 2019/1896

p. 547) that in order for the action for non-contractual liability to be a useful remedy to fill the gaps in judicial protection against Frontex action, it would be necessary to adopt 'a fundamental rights-friendly approach' to the instrument in question.

[33] General Court, judgment of 6 September 2023, case T-600/21. Commenting on the judgment of the General Court see e.g. Fink, M. and Rijpma, J.J., "Responsibility in Joint Returns after WS and Others v Frontex: Letting the Active By-Stander Off the Hook", *EU Law Analysis*, 22 September 2023; Passarini, F., "Un (possibile) rimedio giurisdizionale contro Frontex: l'azione per danni nel caso *WS and Others v. Frontex*", *Eurojus*, 2023, No. 4, pp. 71-84; Colombo, E., "Un passo avanti e due indietro: brevi riflessioni circa la responsabilità di Frontex per violazione dei diritti umani alla luce della sentenza *WS e altri c. Frontex*", *BlogDUE*, 5 January 2024; Cornelisse, G., "EU Boots on the Ground and Effective Judicial Protection against Frontex's Operational Powers in Return: Lessons from Case T-600/21", *European Journal of Migration and Law*, 2024, pp. 356-380; Gkliati, M., "Shaping the Joint Liability Landscape? The Broader Consequences of *WS* v *Frontex* for EU Law", *European Papers*, 2024, pp. 69-86.

[34] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard, amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) 863/2007 of the European Parliament and of the Council, Council Regulation (EC) 2007/2004 and Council Decision 2005/267/EC, OJ L 251, 16 September 2016, p. 1.

been applied, which, as noted above, significantly extended the Agency's operational powers. Indeed, under the current legislation, return decisions continue to be the jurisdiction of the national authorities, but, certainly, it can no longer be said that Frontex provides only technical and operational support in relation to those authorities. Besides, the General Court, in limiting itself to stating that it is not within Frontex's competence to adopt return decisions, did not verify whether Frontex's conduct concerned the phase of execution of those return decisions, nor did it seek to qualify the causal contribution of the Agency in the realization of the sustained damage[35]. The General Court's choice to stop at merely asserting the Agency's lack of decision-making powers in the field of return decisions —without, on the other hand, conducting a factual examination of the extent of its powers and obligations in assisting, coordinating, and organising repatriation operations— appears overly simplistic and is therefore to be questioned[36]. Moreover, the General Court, in *WS and Others v. Frontex*, did not consider the question of verifying which conduct was attributable to Frontex and which to the Member State authorities. Especially when it comes to assessing Frontex's liability in the light of the broader powers conferred upon it by Regulation 2019/1896, it would, on the other hand, be reasonable to recognise the possibility of joint liability of Frontex and the Member States, knowing that the imputation of individual conduct in the context of joint operations may not be straightforward. To this end, it might be useful to apply the case law that the Court of Justice has inaugurated with regard to joint and several liability, albeit in a different setting involving the unlawful processing of personal data in the framework of cooperation between Europol and the authorities of a Member State[37]. According to the Court, in order to render Europol or the Member State concerned jointly and severally liable, and in order to enable the individual to obtain full compensation for the damage suffered, it is sufficient for the

[35] In this sense, see Colombo, E., "Un passo avanti e due indietro: brevi riflessioni circa gli strumenti di accertamento della responsabilità di Frontex per violazione dei diritti umani alla luce della sentenza *WS e altri c. Frontex*", *op. cit.,* p. 6 ff.

[36] See Passarini, F., "Un (possibile) rimedio giurisdizionale contro Frontex: l'azione per danni nel caso *WS e altri c. Frontex*", *op. cit*., p. 80.

[37] Court of Justice, judgment of 5 March 2024, case C-755/21 P, *Kočner v. Europol*. For commentary on the judgment, see e.g. de Coninck, J. and Tas, S., "Investigating five dimensions of the EU's liability regime: *Marián Kočner*", *Common Market Law Review*, 2025, pp. 195-214.

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plaintiff to prove that, on the occasion of cooperation between Europol and the Member State concerned, an unlawful processing of data was carried out which caused him harm, without the need to prove also to which of the two entities in question that unlawful processing is attributable[38], unless the Agency is allowed to prove that the damage is not attributable to it. It should be noted, however, that in the case-law in question, the possibility of establishing shared liability is linked to a specific provision contained in the Europol Regulation, which addresses the issue of compensation for damages that cannot be easily attributed to either the Agency or the national authorities. It is not self-evident that such joint and several liability can be automatically transposed to situations involving damages caused by Frontex when it operates jointly with national authorities. Admittedly, Article 7 of the Frontex Regulation expressly refers to shared responsibility between the Agency and national authorities in the context of integrated European border management. However, unlike the Europol Regulation, in the Frontex Regulation no mention is made of the possibility of shared liability in relation to the compensation of damages.

The judgment of the General Court in *WS and Others v. Frontex* has been appealed and the related case is currently pending before the Court of Justice. While awaiting the ruling, it is interesting to note that Advocate General Ćapeta, in her opinion of 12 June 2025[39], emphasized that whereas in the *Kočner v. Europol* case, it was impossible for the individual concerned to demonstrate whether the unlawful processing of data was attributable to Europol or a Member State, in the present case, the same omission can be attributed to both Frontex and Greece[40]. Frontex and the Member States share obligations within joint return operations, and Frontex may be considered responsible for the damage caused by the violation of these obligations, even if a Member State may also be held accountable in parallel for the same harm. Frontex, although unable to assess

[38] Court of Justice, *Kočner v. Europol*, cited above, para. 81.

[39] See Advocate General Ćapeta, opinion of 12 June 2025, case C-679/23 P, *WS and Others v. Frontex (Opération de retour conjointe)*. For comments on the opinion, see Cardenio, G., "*Se Frontex vigilerà sulle nostre frontiere, chi vigilerà su Frontex?* Una lettura combinata delle conclusioni degli Avvocati Generali della Corte di Giustizia dell'Unione europea nei casi *Hamoudi contro Frontex* e *WS e altri contro Frontex*", *Eurojus*, 2025, No. 3, pp. 165-183; Kunst, A., "Advocate General Ćapeta's Opinion in WS and Others v Frontex before the Grand Chamber: The End of Frontex's Shielding? Joint Liability of Frontex and Member States in Return Operations", *EU Law Analysis*, 17 June 2025.

[40] *Ibid*., para. 91.

the merits of return decisions, was at least required to verify the existence of a return decision[41]. If Frontex had conducted this verification and identified the absence of such a decision, it could have prevented the occurrence of damage. Otherwise, Frontex's responsibility would be unduly diminished, and the protection of fundamental rights would be at risk in cases where Frontex and the Member States share obligations within joint return operations[42]. As has rightly been observed, the differing competences of Frontex and national authorities cannot constitute a valid reason to exempt either party from the obligation to ensure the legality of their respective actions[43].

Another opportunity to assess whether the Union may incur non-contractual liability for acts or omissions attributable to Frontex was provided by the *Hamoudi v. Frontex* case[44]. The action brought before the General Court under Article 340 TFEU was initiated by a Syrian national who arrived on the island of Samos, Greece, on 28 April 2020, having travelled from Turkey with the intention of seeking asylum. The Greek authorities, upon the applicant's arrival, stopped him and took him back to the sea where, the following day, a Turkish coast guard boat transferred him to Turkish territory where he was detained for ten days before an expulsion order was issued against him and his passport confiscated, forcing him to go underground with the risk of being deported to his country of origin. The possibility of establishing Frontex's responsibility in the operation stems from the fact that, according to the applicant, on 29 April 2020 an aircraft carrying out surveillance activities on behalf of the Agency flew over the scene of the refoulement at sea twice. The interest in the case was linked, *inter alia*, to the fact that —considering the date on which the events took place— Regulation 2019/1896 was applicable to it and, therefore, Frontex's conduct could have been assessed in the light of the broader powers granted to it by that instrument. Expectations for the General Court's ruling was, however, dashed by the fact that the application was believed to be manifestly unfounded by order of 13 December 2023 because the applicant was not able to prove the facts underlying the incident that led

[41] *Ibid.*, para. 79.

[42] *Ibid.*, paras. 92-93.

[43] See Pirrello, A. and Aviat, M., "Frontex Before the Court of Justice: Division of Competences Hampering Liability", *EU Law Live*, 2 July 2025.

[44] General Court, order of 13 December 2023, case T-136/22, *Hamoudi v. Frontex*.

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to the causation of the alleged damage. Thus, the General Court did not need to address the other prerequisites for establishing the non-contractual liability of the Union.

The ruling in question prompts reflection on the obstacles that applicants must overcome in order for their claims to be upheld. It is undeniable that the very context in which pushback operations at sea are carried out makes it difficult for the individuals concerned to provide evidence of the facts underpinning their application. A migrant, often intercepted after a dangerous sea crossing that may have endangered their life, and subsequently returned to the territory of a third country, is hardly in a position to gather the evidence necessary to bring a legal action before the Court of Justice of the European Union. In such cases, given the objective difficulties faced by the applicant in fulfilling the burden of proof, greater flexibility would be desirable[45].

This issue was addressed by Advocate General Norkus in his opinion delivered on 10 April 2025 in the case brought before the Court of Justice following the appeal against the aforementioned order issued by the General Court in *Hamoudi v. Frontex*[46]. The Advocate General emphasized that, in cases of collective expulsions, the concrete evidence of the conduct, if it exists at all, may therefore be in the hands of the alleged perpetrators rather than the victims themselves[47]. Such collective expulsions, in fact, are inherently secret, take place in clandestine circumstances and for this reason make the collection of any evidence difficult. Precisely on the basis of such considerations, the case-law of the European Court of Human Rights related to collective expulsions held that once a claimant has established *prima facie* evidence of his or her collective expulsion or refoulement by a respondent State, the burden of proof should be reversed and shifted to the respondent

[45] On this point, see also De Coninck, J., "Shielding Frontex 2.0. The One with the Impossible Proof", *VerfBlog*, 30 January 2024.

[46] See Advocate General Norkus, opinion of 10 April 2025, case C-136/24 P, *Hamoudi v. Frontex*. For comments on the opinion, see Kunst, A., "Hamoudi v Frontex: Advocate General Norkus' Opinion - Reversing the Burden of Proof and the Presumption of Frontex's Privileged Access to Evidence", *EU Law Analysis*, 19 April 2025; Pirrello, A., "The Burden of Proof When Powers Wears an EU Uniform", *VerfBlog*, 15 May 2025.

[47] *Ibid*., para. 51.

State[48]. However, the Advocate General also questioned to what extent, the case-law of the ECtHR on the reversal of the burden of proof in collective expulsion cases may be applied by analogy in the context of Frontex's action, considering the fact that, in this case, the respondent is not a Member State but an Agency. The Advocate General indeed underlined that a respondent such as Frontex cannot be obliged to prove a negative, which is impossible to prove (it would be a *probatio diabolica*), or to prove something, which from an objective perspective would be wholly unreasonable to require of it, for example where the facts in question are completely outside its sphere of influence and knowledge[49]. According to the Advocate General, only in the event that the claimant has adduced *prima facie* evidence in support of his or her action does the question of the burden of proof and the reversal thereof arise and need to be addressed[50]. Moreover, in order for the burden of proof to shift to the respondent, there must be a clear or structural asymmetry between those parties in respect of their access to evidence: the claimant must face considerable difficulty in adducing evidence, while the respondent must be in a better or more "privileged" position[51]. The failure to shift the burden of proof would deprive the claimant of fundamental rights protected by EU

[48] The Advocate General Norkus refers, in particular, to ECtHR, judgment of 7 January 2025, *A.R.E. v. Greece*, application no. 15783/21. However, the need to alleviate the burden of proof to some extent in cases of collective expulsion had already been emphasized previously by the European Court of Human Rights. See e.g. ECtHR, judgment of 13 February 2020, applications nos. 8675/15 and 8697/15, *N.D. and N.T. v. Spain*, para. 85, according to which "the distribution of the burden of proof and the level of persuasion necessary for reaching a particular conclusion are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake […]. In this context it must be borne in mind that the absence of identification and personalised treatment by the authorities of the respondent State in the present case, which has contributed to the difficulty experienced by the applicants in adducing evidence of their involvement in the events in issue, is at the very core of the applicants' complaint. Accordingly, the Court will seek to ascertain whether the applicants have furnished prima facie evidence in support of their version of events. If that is the case, the burden of proof should shift to the Government […]".

[49] Advocate General Norkus, *Hamoudi v. Frontex*, *op. cit.*, para. 53.

[50] *Ibid.*, para. 58.

[51] *Ibid.*, para. 59.

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law, specifically the right guaranteed under Article 47 of the Charter, whereas such a shift would not prejudice the respondent's rights under that provision[52].

Regardless of the specific case, it is noteworthy that the Advocate General also referred to other areas in which the EU legislator has introduced exceptions to the ordinary rule on the allocation of the burden of proof. This has occurred, for example, in anti-discrimination law[53], in consumer protection legislation[54], and in the context of the Qualification Directive with regard to the burden of proof placed on applicants for international protection[55]. One might consider whether, in light of the upcoming reform of the Frontex founding Regulation —already announced by the European Commission for 2026[56] —it would be appropriate to introduce, at the legislative level, a new exception to the burden of proof in relation to the Agency's operations. Such a change could indeed represent a positive development in facilitating the protection of individuals who claim to have been harmed by pushback operations involving Frontex.

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[52] *Ibid*., para. 60.

[53] See Article 19, para. 1, of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ 2006 L 204, 26.7.2006, p. 23; Article 9, para. 1 of Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ 2004 L 373, 21 December 2004, p. 37; Article 10, para. 1, of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJEC 2000 L 303, 2.12.2000, p. 16; Article 8, para 1, of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJEC 2000 L 180, 19 July 2000, p. 22.

[54] See Article 11, para. 1, of Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, OJ 2019 L 136, 22 May 2019, p. 28.

[55] See Article 4, para. 1, of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ 2011 L 337, 20 December 2011, p. 9.

[56] See von der Leyen, U., *Europe's Choice, Political Guidelines for the next European Commission 2024-2029*, Strasbourg, 18 July 2024, p. 16; Vasques, E. and Genovese, V., "European Union set to reform Frontex again in 2026", *Euronews*, 25 April 2025.

III. NON-JUDICIAL ACCOUNTABILITY MECHANISMS

While, so far, we have focused on the objective difficulties encountered with regard to the possibility of using judicial remedies to enforce violations of migrants' fundamental rights committed by Frontex, it is worth noting the importance that non-judicial accountability mechanisms have gradually assumed in recent years, which have made it possible to highlight shortcomings in the functioning of the agency and thus push for improvements in its actions. In particular, the role played by the European Ombudsman, the European Anti-Fraud Office (OLAF) and the European Parliament should be addressed.

1. The actions of the European Ombudsman

The European Ombudsman, according to the provisions of Article 228 TFEU, is entrusted with the task of opening enquiries —*ex officio* or upon complaint by natural or legal persons resident or established in the territory of the Union— concerning instances of maladministration in the activities of the Union's institutions, bodies, offices and agencies and, therefore, also in the activities of Frontex[57].

Already in 2013, the Ombudsman, Emily O'Reilly, had adopted a position in which she stated that it was not clear in Frontex's Fundamental Rights Strategy what Frontex's responsibilities are when it coordinates Member States's operations[58]. On that occasion, the Ombudsman called for the creation of a complaint mechanism to allow the submission of individual complaints against human rights violations in Frontex operations. Following up on that recommendation, the Union institutions established such a mechanism by Regulation 2016/1624, which is now governed by Article 111 of Regulation 2019/1896. It is not a judicial mechanism, but an administrative mechanism operated by Frontex's FRO to monitor and ensure respect for fundamental rights in all the Agency's activities. The aforementioned complaint mechanism was the subject of another enquiry by the European Ombudsman[59]. During the observation period (2016 to 2021), the number of complaints received

[57] For an overview of the role and functions of the European Ombudsman, see Battaglia, F., *Il Mediatore europeo*, Cacucci, Bari, 2020, which is also referred to for further relevant bibliographic references.

[58] European Ombudsman, Decision of 12 November 2013, case OI/5/2012/BEH-MHZ.

[59] European Ombudsman, Decision of 15 June 2021, case OI/5/2020/MHZ.

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was not particularly high (69, of which only 22 were admissible) and none concerned the actions of Frontex staff members. To enhance the accessibility of the complaint mechanism, the Ombudsman suggested, among other things, that Frontex should explicitly state in all operational plans that participants in operations must accept complaints from individuals claiming to be victims of fundamental rights violations. In its public information material, Frontex should make clearer to potential complainants what the benefits of the complaint mechanism are. Furthermore, more transparency should be ensured regarding the outcomes of complaints and their follow-up.

Of particular relevance is the enquiry carried out by the Ombudsman to assess how the Agency complies with its fundamental rights and transparency obligations under Regulation 2019/1896[60]. At its conclusion, the Ombudsman recommended, *inter alia*, that Frontex ensure greater transparency in relation to its actions by publishing the documents necessary to understand the roles and responsibilities of the actors involved in its operations, for example through summaries of operational plans and parts of the operational plan manuals. With reference to the due diligence procedure developed by Frontex's FRO through which the latter advises the Executive Director before the decision to initiate a new activity or to suspend, withdraw, or terminate an ongoing operation, it is suggested that the FRO also take into account the reports of national human rights bodies and that the results of this procedure, the follow-up to them, and the answers provided by the Executive Director be made public. More publicity should be given to the reports of forced return observers after each repatriation operation. The Ombudsman also suggested improving the supervision of refoulement operations when Frontex personnel are employed in escort activities. The Ombudsman then addressed the respect for migrants' rights during debriefing interviews that are conducted by Frontex in the context of the joint operation Indalo at the Spanish-Moroccan maritime border[61], in order to collect information to be used for risk analysis and for the identification of persons suspected of cross-border crimes. The Ombudsman suggested, among other things, that Frontex should provide interviewees with information on their rights, the possibility of using an interpreter, and the independent complaint mechanism. They should be allowed to re-read and

[60] European Ombudsman, Decision of 17 January 2022, case OI/4/2021/MHZ.

[61] European Ombudsman, Decision of 3 July 2023, case 1452/2022/MHZ.

sign the transcript of the interview. The need to ensure that these guarantees are respected during the interviews should also be specified in the operational plans.

Another enquiry launched on the Ombudsman's own initiative concerned the way in which Frontex complies with its fundamental rights obligations during its search and rescue activities at sea[62]. The enquiry had followed the shipwreck, in June 2023, off Pylos (Greece), of a fishing boat carrying around 750 migrants, which caused an unspecified number of deaths. The Ombudsman highlighted shortcomings in Frontex's *modus operandi* in joint maritime operations and in its aerial surveillance activities. Among other things, it emerged —also in this context— that there was a need for greater clarity on the roles and different responsibilities of Frontex and national authorities. Furthermore, it appeared that it is not ensured that Frontex's fundamental rights observers are sufficiently involved in the decision-making process in maritime emergencies during surveillance activities conducted by the Agency. The Ombudsman made several recommendations, but also noted that if the lack of cooperation of national authorities prevents Frontex from fulfilling its role properly, the Executive Director of Frontex should consider whether or not to continue the ongoing cooperation.

The Ombudsman also dealt on several occasions with complaints concerning Frontex's refusal to allow public access to opinions of its FRO. For instance, an enquiry was opened in relation to the refusal to provide two different reports that the FRO had prepared concerning some of the Agency's operations in Albania[63]. Although it appeared during this enquiry that the reasons invoked by Frontex to justify the non-disclosure of the requested documents were mostly well-founded[64], the Ombudsman considered that not all the information contained in these documents fell within the exceptions invoked and therefore reached the conclusion that Frontex granted even partial access to them. Likewise, following another enquiry initiated by the Ombudsman, Frontex agreed to give wide access (except for some limited parts of the

[62] European Ombudsman, Decision of 26 February 2024, case OI/3/2023/MHZ.

[63] European Ombudsman, Decision of 7 November 2023, case 652/2023/VB.

[64] The exceptions invoked by Frontex, based on Article 4 of Regulation (EC) 1049/2001, cited above, concerned the need to protect the privacy and integrity of individuals, the Agency's decision-making process, public security and international relations.

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document) to a further opinion of its FRO concerning Greece[65]. Requests for access were not always granted. For instance, the Ombudsman found Frontex's refusal to disclose information concerning an investigation into the crash of a drone at sea south of Crete used by the Agency in the framework of Operation Poseidon to support the Greek authorities in controlling their borders was reasonable[66]. The drone had been provided by a private contractor and Frontex had argued that the disclosure of the data would undermine the protection of commercial interests, including intellectual property, as well as public safety since the operational information contained in the document could have been exploited by criminal networks and thus jeopardise future operations. With regard to the further investigation initiated by the Ombudsman following Frontex's refusal to grant access to documents related to the shipwreck off Crotone in February 2023, in which approximately 100 migrants lost their lives, it was acknowledged by the Ombudsman that, in principle, the disclosure of operational information contained in these documents could be exploited by criminal networks, thereby jeopardizing Frontex's activities and endangering public security[67]. Nevertheless, in order to justify denying public access, Frontex must demonstrate that there is a reasonably foreseeable risk that disclosure would genuinely and specifically undermine the purpose of the investigations, rather than being merely hypothetical. General statements are not sufficient to justify the application of this exception, as Frontex did in its confirmation decision. The systematic refusal by Frontex to provide lists of documents identified by the agency as falling within the scope of applicants' requests constitutes a case of maladministration. However, the Ombudsman welcomed the fact that, during the investigation and following the conclusion of Frontex's inquiry into the incident in November 2023, Frontex published the findings of its internal investigation in the form of a serious incident report. It thus emerges that in this case, as in others[68], the intervention of the European Ombudsman has had the positive effect of prompting Frontex to release some of the previously classified documents, thereby promoting greater transparency in the Agency's actions.

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[65] European Ombudsman, Decision of 2 July 2024, case 1885/2023/ACB.

[66] See European Ombudsman, Decision of 27 May 2024, case 632/2024/OAM.

[67] European Ombudsman, Decision of 30 August 2024, case 219/2024/TM.

[68] European Ombudsman, Decision of 30 April 2025, case 1259/2024/NH.

This, of course, does not mean that the issues surrounding the transparency of Frontex's activities have been resolved. As a mere illustrative example, one can refer to the observations made by the Ombudsman regarding Frontex's refusal to grant access to two opinions issued by its FRO, concerning, among other things, the mechanism for reporting serious incidents. In particular, the Ombudsman was not convinced by Frontex's argument that partial access to the two FRO opinions would jeopardize its decision-making processes. In that specific case, the Ombudsman considered that Frontex had failed to demonstrate, in a specific and concrete manner, how disclosing the opinions in question would seriously undermine its decision-making. For these reasons, the Ombudsman recommended that Frontex reconsider its position on the access request, with a view to providing significantly increased transparency[69].

2. The investigations carried out by OLAF

Frontex's action was then the subject of intense scrutiny by OLAF. In particular, in November 2020, OLAF, following a number of complaints received, decided to open an investigation into misconduct and irregularities in Frontex's management of incidents and respect for fundamental rights in its activities. In its own report[70], OLAF found, *inter alia*, that the FRO was, in some cases, prevented from accessing operational information and thus absolved from fulfilling its tasks of incident assessment and management. The FRO itself was not assigned to handle cases of serious incident reporting. At times, it was even decided to move Frontex air assets to different operational areas, preventing them from witnessing incidents where violations of migrants' fundamental rights could take place. Furthermore, it was found that Frontex staff members who reported serious incidents to their superiors were ignored by those under investigation by OLAF. The findings of the OLAF investigation, even before the report in question was released[71], prompted the then Executive Director of Frontex, Fabrice Leggeri, to tender his resignation in April 2022. Frontex subsequently acknowledged

[69] See European Ombudsman, Recommendation of 21 February 2025, case 1497/2024/ACB.

[70] OLAF, *Final Report*, *op. cit*.

[71] The report was not made public by OLAF, but was published online by FragDenStaat.de, in cooperation with Der Spiegel and Lighthouse Reports, following an unauthorised leak. On this subject, see Salzano, L., "The Secretiveness over the OLAF Report on Frontex Investigations: Rule of Law Fading into Arbitrariness?", *VerfBlog*, 9 September 2022.

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the findings of the OLAF report and stated in its own press release that the disputed practices belong to the past and that it had embarked on a series of internal reforms to avoid the repetition of similar irregularities[72]. The Agency reminded, *inter alia*, that it had introduced, as of January 2021, a procedure to assess the need to apply Article 46 of Regulation 2019/1896 in cases where alleged violations of fundamental rights or international protection obligations are of a serious nature or may persist. The Frontex Management Board, in July 2022, adopted a decision specifying that the Management Board itself and the Executive Director are required to inform the Consultative Forum following its recommendations and those of the FRO. The procedure for reporting serious incidents was amended in 2021 to allow the FRO to have access to all necessary information in relation to these incidents, and to be automatically assigned as case manager in cases of alleged violations of fundamental rights. In addition, during the summer of 2022, Frontex agreed with the Greek authorities on an action plan to remedy past and present mistakes and to initiate a structured dialogue capable of allowing for a greater focus on the respect of migrants' rights in the operations conducted, thanks to the involvement of fundamental rights actors on both sides.

These are, evidently, steps forward achieved also thanks to the momentum generated by the investigations carried out by OLAF. Nevertheless, such progress cannot yet be fully assessed. It should be noted, in fact, that recently the European Ombudsman, following a complaint related to Frontex's refusal to grant access to the actions undertaken after OLAF's investigations, found —among other things— that such follow-up had indeed been ongoing at the time of Frontex's decision to refuse access and that, in any case, no overriding public interest in disclosure had been demonstrated[73].

3. The role of the European Parliament

The European Parliament has also taken major initiatives in recent years to ensure that fundamental rights are respected in Frontex's work. Since 2021, a working group (called the Frontex Scrutiny Group) was established within the European Parliament's LIBE Committee to monitor all aspects of Frontex's

[72] See Statement of Frontex Executive Management following publication of OLAF report, 14 October 2022, available at https://www.frontex.europa.eu/media-centre/news/news-release/statement-of-frontex-executive-management-following-publication-of-olaf-report-amARYy.

[73] See European Ombudsman, Decision of 4 June 2025, case 1817/2024/MIG.

functioning, including its role and the resources deployed for combined border management. With the new legislature of the European Parliament, since October 2024, the activities previously carried out by that group have, in effect, been continued by the newly established Schengen and Borders Scrutiny Working Group (SBSWG), which more broadly has the mandate to scrutinize the functioning of the Schengen area and European integrated border management, including all aspects of the functioning of the European Border and Coast Guard Agency.

Following a fact-finding investigation to gather information and evidence on alleged violations of fundamental rights in which Frontex was involved, the LIBE Committee Working Group produced a report in July 2021, which identified significant shortcomings in the Agency's actions[74]. Although Frontex was not found to be actively involved in border refoulements, it was highlighted that the Agency was aware of fundamental rights violations committed by the host States of its missions and, despite this, failed to act to prevent such violations. The report contains 42 recommendations that were addressed to the Agency, its Board, the Commission, the Member States, and the Council. Among other things, it is suggested to specify in the operational plans that Frontex be put in a position to monitor the entire mission area in such a way that Member States cannot refuse access to Frontex's fundamental rights observers.

Additionally, the European Parliament used its budgetary powers as a means of pressure to push Frontex to ensure respect for fundamental rights[75]. Indeed, in 2021 and 2022, the Parliament first postponed and then refused to take the discharge decision necessary to approve the Agency's budget for the years 2019 and 2020[76]. The exercise of budgetary functions thus enabled the

[74] European Parliament, LIBE Committee, Frontex Scrutiny Working Group, *Report on the fact-finding investigation on Frontex*, *op. cit*. Commenting on the report, see Gkliati, M., "The first step of Frontex accountability: Implications for its Legal Responsibility for Fundamental Rights Violations", *eumigrationlawblog.eu*, 13 August 2021.

[75] On this subject, see Gigli, M., "The Potential of budgetary discharge for political accountability: Which lessons from the case of Frontex?", *European Law Journal*, 2024, pp. 1-15.

[76] See Decision (EU, Euratom) 2021/1613 of the European Parliament of 28 April 2021 on discharge in respect of the implementation of the budget of the European Border and Coast Guard Agency for the financial year 2019, in OJ L 340, 24 September 2021, p. 324; Decision (EU) 2022/1806 of the European Parliament of 4 May 2022 on discharge in respect of the implementation of the budget of the European Border and Coast Guard Agency

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European Parliament to assess how the Agency fulfilled its tasks in utilizing the budget allocated to it. Among other things, the Parliament had regretted the fact that Frontex had not yet proceeded to recruit at least 40 fundamental rights observers by December 2021. The Parliament had also quoted the media inquiries in which the Agency had been accused of complicity in the illegal refoulement of migrants in the Mediterranean Sea and the comments made in the above-mentioned inquiry of the LIBE Committee Working Group. It was only after noting the steps taken by Frontex to improve the transparency and accountability of its actions, and despite having underlined the critical issues still existing in this regard, that the European Parliament approved the discharge for the financial year 2021[77].

The European Parliament recently acknowledged that Frontex has followed up on most of the recommendations referred to it by the LIBE Committee Working Group[78] and has thus attained a more direct and constant relationship with the Agency to receive from it a constant flow of information on how its operations are conducted[79].

The role of the European Parliament is also pivotal in exerting political oversight over the activities conducted by Frontex. A pertinent illustration of this function can be drawn from the plenary session held in October

(Frontex) for the financial year 2020, in OJ L 258, 5 October 2022, p. 406; Decision (EU) of the European Parliament of 18 October 2022 on the discharge for the implementation of the budget of the European Border and Coastguard Agency (Frontex) for the financial year 2020, in OJ L 45, 14 February 2023, p. 13.

[77] See Decision (EU) 2023/1940 of the European Parliament of 10 May 2023 on the discharge for the implementation of the budget of the European Border and Coastguard Agency for the financial year 2021, OJ L 242, 29 September 2023, p. 457; Resolution (EU) 2023/1941 of the European Parliament of 10 May 2023 with observations forming an integral part of the decision on discharge in respect of the implementation of the budget of the European Border and Coastguard Agency (Frontex) for the financial year 2021, therein, p. 458.

[78] See European Parliament resolution of 14 December 2023 on Frontex, on the basis of the fact-finding investigation carried out by the LIBE Committee's working group on Frontex supervision (2023/2729(RSP)), doc. P9_TA (2023)0483.

[79] In this respect, see Frontex, Management Board Decision 24/2024, of 12 June 2024, adopting the annual activity report 2023 and its assessment, Ref. Ares(2024)4557304 of 25.6.2024, esp. p. 73 where it appears that Frontex, since April 2023, has been sharing quarterly reports on its operations with the LIBE Committee and other committees of the European Parliament and has been participating, on a regular basis, through its Executive Director, in hearings and meetings organised by the various committees of the European Parliament.

2024, during which the then Vice-President of the European Commission, Margaritis Schinas, presented the Commission's position on the management of the European Union's external borders and the related involvement of Frontex[80]. Following this report, representatives from the various political groups delivered statements reflecting their respective positions. The ensuing debate brought to light a plurality of viewpoints, including —in certain instances— severe criticism regarding specific problematic aspects. These included Frontex's cooperation with third countries accused of human rights violations, limitations in the Agency's mandate concerning maritime search and rescue operations, and concerns over its substantial operational expenditures. While the debate did not culminate in the adoption of a legislative act, it nevertheless constituted an essential exercise in democratic scrutiny over Frontex's conduct.

IV. CONCLUDING OBSERVATIONS

The increased operational powers attributed to Frontex by the institutions of the Union, with the intent of fostering the creation of an integrated system for the management of external borders, have made it increasingly necessary to identify mechanisms for monitoring respect for fundamental rights in the Agency's actions. Such a need is likely to increase further should the prospects for the additional strengthening of Frontex, as anticipated by the European Commission, be effectively implemented. Indeed, the President of the Commission, in her political guidelines presented in July 2024 during the vote for her reappointment by the European Parliament, explicitly referred to the necessity of reinforcing the Agency by equipping it with state-of-the-art technologies for surveillance and situational awareness, as well as increasing the number of European border and coast guards to 30,000[81].

While a legislative proposal by the Commission is expected in 2026 with a view to implementing these reforms, the Commission's proposal to amend the Return Regulation has already been published[82]. This latter proposal provides

[80] See European Parliament, *Verbatim report of proceedings*, Strasbourg, 9 October 2024, para. 11, https://www.europarl.europa.eu/doceo/document/CRE-10-2024-10-09_EN.html#creitem1.

[81] See VON DER LEYEN, U., *Europe's Choice*, *op. cit.*, p. 16.

[82] See Proposal for a Regulation of the European Parliament and of the Council establishing a common system for the return of third-country nationals staying illegally in the Union, and

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for the assignment to Frontex, *inter alia*, of tasks to manage and support return operations conducted in return centres located in third countries. It is undeniable that such a scenario may expose Frontex to an increased risk of engaging in practices that contravene the principle of non-refoulement. These and other proposals should not overlook the imperative to enhance mechanisms designed to safeguard fundamental rights during operations coordinated or carried out by Frontex.

In short, the need to establish effective oversight mechanisms —both judicial and non-judicial— is becoming increasingly urgent to ensure that Frontex's activities comply with the obligation to uphold the fundamental rights of migrants and asylum seekers.

In light of this urgency, the paper has explored the existing avenues for holding Frontex accountable and scrutinizing its operations through legal and institutional frameworks. Our legal analysis has highlighted the considerable difficulties claimants face before the Court of Justice of the European Union. Despite the growth of strategic litigation brought by individuals and civil society actors, such actions —whether for annulment, failure to act, or non-contractual liability— have so far not produced the desired effects and have often been dismissed on procedural or evidentiary grounds, or due to the lack of prerequisites for the action brought.

In particular, the action for annulment, being aimed at challenging the legitimacy of acts adopted by the institutions, bodies, or agencies of the Union, is unlikely to be useful for reviewing Frontex's operational activities. These activities, in fact, consist of actions and do not necessarily involve the adoption of a formal act. However, an action for annulment may be relevant for challenging the decision by which the Executive Director of Frontex, at the conclusion of the pre-litigation phase of a failure-to-act procedure, adopts a position by deciding not to suspend or terminate the Agency's activities. To date, this avenue has not been successful, partly due to what we consider to be an excessively restrictive approach taken by the Court of Justice. In particular, we have highlighted —referring to the *ST v. Frontex* case— that the Court of Justice, in its order issued on 11 October 2024, adopted an excessively formalistic interpretation that was not oriented toward the protection of migrant rights, insofar as it held that the applicant had not demonstrated a

repealing Directive 2008/115/EC of the European Parliament and the Council, Council Directive 2001/40/EC and Council Decision 2004/191/EC, doc. COM (2025) 101 final, 11 March 2025.

sufficient interest in the annulment of their situation. In fact, in our opinion, if Frontex's involvement in pushback operations at sea were proven, it would not be unreasonable to assert the existence of an individual interest on the part of the person prevented from reaching the territory of the Union. Otherwise, a more restrictive interpretation would risk insulating Frontex from review precisely in instances where fundamental rights may be most at risk.

Another area where the action for annulment can be effectively employed is in challenging Frontex's refusal to grant access to its documents. While the disclosure of certain documents may be lawfully denied for reasons of public security, it is always necessary that Frontex adequately justifies the rationale behind such refusals in order for them to be legitimate.

Attempts to use the action for failure to act have also failed thus far. The European Court of Justice reiterates the principle according to which a reasoned position precludes the possibility of bringing an action for failure to act. This principle is convincing in theory. The problem is that in specific cases (*ST v. Frontex*), the European Court of Justice did not clarify the content of the position, making it impossible to conclude that a valid stance had been adopted and, thus, that the condition required to bring the proceeding for failure to act had been fulfilled. For this reason, it can be concluded that there still appears to be room to bring an action for failure to act in response to the non-use of the instrument provided under Article 46 of Regulation 2019/1896.

Neither has the action for non-contractual liability proven useful so far in protecting human rights. The use of this instrument can be difficult considering that Frontex, during its operations, often acts in parallel with national authorities that are responsible for controlling the external borders. In similar cases, it may prove difficult to ascertain the existence of a direct causal link between Frontex's conduct and the damage allegedly suffered. On this point, we found particularly compelling the observations made by Advocate General Ćapeta in her opinion delivered on 12 June 2025, in the case *WS and Others v. Frontex*. According to the Advocate General, in cases where Frontex and Member States share responsibilities within joint return operations, Frontex's liability cannot be excluded merely because a Member State may also be held accountable in parallel for the same harm. In fact, the differing competences of Frontex and national authorities cannot constitute a

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valid reason to exempt either party from the obligation to ensure the legality of their respective actions.

We further highlighted that an additional obstacle to the possibility of obtaining the acceptance of a non-contractual liability claim against the European Union stems from the fact that the very context in which pushback operations at sea are carried out makes it difficult for the individual concerned to provide evidence of the facts underpinning their application. In this regard, drawing also on the insights offered by Advocate General Norkus in the case of *Hamoudi v. Frontex*, we focused on the possibility of applying the case law of the European Court of Human Rights, which, under certain conditions, allows a reversal of the burden of proof in cases concerning collective expulsions. Since such a solution cannot be taken for granted, it would be desirable for the Union institutions, on the occasion of the already announced reforms of the Frontex founding Regulation, to seize the opportunity to introduce, at the legislative level, a new exception to the burden of proof in relation to the Agency's operations.

The possibility of scrutinizing Frontex's operations must also be assessed by taking into account existing extra-judicial oversight mechanisms. In particular, we emphasized the important role played by the European Ombudsman, who has undertaken multiple inquiries revealing deficiencies in Frontex's complaint mechanisms, due diligence procedures, interview protocols, and public transparency. Her persistent calls for clarity and accountability —often in response to grave maritime incidents or opaque document refusals— have helped bring latent governance failures to light and encouraged corrective action from the Agency.

OLAF's investigation into misconduct within Frontex further reinforced these concerns. Its findings —including obstruction of the Fundamental Rights Office and manipulation of surveillance deployment— prompted the resignation of Frontex's Executive Director and convinced the Agency to carry out a series of internal reforms. Notably, the Agency has now revised its serious incident reporting procedures and formalized consultation mechanisms with its Management Board and the Consultative Forum.

Equally significant has been the role of the European Parliament, which has deployed both political oversight and budgetary leverage to influence Frontex's conduct. The work of the Frontex Scrutiny Group and the newly established

Schengen and Borders Scrutiny Working Group within the LIBE Committee has led to the issuance of a comprehensive set of recommendations and fostered greater scrutiny of the Agency's relationships with third countries, transparency in operations, and the integration of rights observers. Moreover, the Parliament's refusal to discharge Frontex's accounts for multiple financial years represents a direct institutional challenge and a potent assertion of democratic control.

There is no doubt that the control mechanisms examined (both judicial and non-judicial), especially when assessed as a whole, contribute little by little to consolidating a culture attentive to respect for the fundamental rights of migrants with which Frontex interacts in the performance of the tasks entrusted to it. However, despite these advances, the Agency's structural vulnerabilities and the fragmentation of responsibilities with Member States continue to pose obstacles to genuine accountability. The upcoming reforms to Frontex's founding Regulation therefore offer a crucial opportunity to take further steps forward. Indeed, the legitimacy of Frontex and, more broadly, of EU border governance depends on its ability to reconcile enforcement priorities with the Union's foundational commitment to human rights. Only through an integrated, multi-layered system of oversight —encompassing judicial, administrative, and political dimensions— can the EU ensure that its external border policies reflect the principles of human dignity, justice, and legal certainty that it claims to uphold.

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