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WHICH RULE OF LAW FOR THE EXTERNAL BORDERS OF THE EUROPEAN UNION? AGENCIES, INSTITUTIONS, AND THE COMPLEX UPHOLDING OF THE RULE OF LAW AT THE EU'S EXTERNAL BORDERS

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ABSTRACT: This *Article* expands the rule of law crisis narrative to the EU administrative layer. It starts by introducing the context where the agencies have developed; it continues with an operationalization of the rule of law for agencies; in the next section, it places the evolution of the agencies against the background of the low-intensity constitutionalism of the EU legal order and its meaning. It unpacks this concept into the right to effective judicial protection, which is assessed in its constitutional potential in the case law on the Hungarian rule of law; it further continues with an assessment of the case law concerning the instruments of the external dimension of migration and border management, focusing

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on the deference shown by the CJEU. The thesis argued in this *Article* disputes the idea of the consolidation of a coherent approach toward rule of law issues, especially when migration-related policies are concerned. The *Article* concludes with a claim that an effort of constitutional coherence is necessary to support the embedding of the agencies into a more robust rule of law framework.

KEYWORDS: Frontex – rule of law – judicial review – right to an effective remedy – Commission – Court of Justice.

I. INTRODUCTION: THE LOW-INTENSITY CONSTITUTIONALISM OF THE EU AND ITS MEANING FOR AGENCIES

In the governance of migration, the EU administrative level is increasingly vested with operational powers.[1] This represents a shift from the original design of European integration, with the EU acting as a regulator, and the enforcement left in the hands of national bureaucratic bodies. Instead, agencification has become a key-feature of EU integration; consequently, instances of shared administration multiply.[2]

Additionally, in the last years, there have been many reports, investigations, by both European institutions and civil society, criticising the policies and practices implemented by agencies, with Frontex having acquired a highly problematic role in this respect.[3] The main claims concern, in a nutshell, the breach of the legal framework governing its activities, the poor respect for fundamental rights, in the sense of both participation or acquiescence to gross fundamental rights violations committed by states, and the failed mainstreaming of fundamental rights protection into the actual functioning of the agencies.

This *Article* contributes to this debate underscoring the broader constitutional embedding of agencification, exploring the meaning of the constitutionalisation of the EU legal order for the functioning of agencies. In the words of Poiares Maduro, the EU has undergone a process of low-intensity constitutionalism,[4] and the pivotal judgment *Les*

[1] We refer to the European Border and Coast Guard Agency (hereinafter: Frontex) and the European Union Asylum Agency (hereinafter: EUAA), replacing EASO.

[2] D Fernández-Rojo, *EU migration agencies: the operation and cooperation of FRONTEX, EASO and EUROPOL* (Edward Elgar Publishing 2021). See also M Scholten, 'EU Enforcement Agencies' in M Scholten (ed) *Research Handbook on the Enforcement of EU Law* (Edward Elgar Publishing 2023); M Scholten and A Brenninkmeijer (eds), *Controlling EU Agencies: The Rule of Law in a Multi-Jurisdictional Legal Order* (Edward Elgar Publishing 2020).

[3] For a general understanding of the matter see the debate on 'Frontex and the Rule of law' at verfassungblog.de. L Marin, 'Frontex as the epicenter of a rule of law crisis at the external borders of the EU' (2024) ELJ 11; see also the articles of the special issue edited by L Marin, M Gkliati and S Nicolosi (eds), *The External Borders of the European Union: Between a Rule of Law Crisis, and Accountability Gaps* (2024) ELJ.

[4] Poiares Maduro frames the process as characterized by a gradual judicial and political development built upon national constitutional sources and was limited to the control of European and national forms of power, not linked to the creation of a polity. In M Poiares Maduro, 'The importance of being called a constitution: Constitutional authority and the authority of constitutionalism' (2005) ICON 340-342.

Verts,[5] back in 1986, has represented a turning point in the process, legitimising a constitutional narrative of European integration.[6]

This process of low-intensity constitutionalism has concerned, first, national public powers; later, also European public bodies have been limited in their room of manoeuvre because the Court of Justice of the EU (hereinafter: CJEU) had to defend the character and the quality of the newly established European legal order. It is not a case that in the same year as *Les Verts*, the CJEU decided – in *Johnston*– that the right to an effective remedy is an expression of a general principle of law which is also to be taken into consideration in Community law.[7] The very core constitutional identity of the EU is therefore precisely forged on the relationship between public powers - in their double declination of (sub-)national and supranational- and individuals, and it posits that the exercise of public powers is constrained by rules of law; institutions are posited to ensure the respect of those higher rules, among others.

Against the background of previous research framing the emerging rule of law crisis affecting Frontex,[8] this *Article* contributes to the reflection by developing a constitutional law discourse on agencies, in particular unravelling the core tenets of the rule of law, whose pillar is precisely the right to an effective legal remedy.

Rule of law crisis does not only mean the rule of law backsliding by illiberal governments. Challenges to the EU rule of law derive from consolidated institutional and organizational failures in Member States violating norms of EU and domestic constitutional laws;[9] rule of law challenges arise as well if EU agencies do not respect core tenets of the EU rule of law, if the primary legal framework is disregarded because trumped by policy considerations. Secondly, the interest in a rule of law framework is deriving from the fact that fundamental rights litigation is knowing a stasis moment.[10] The merit of the rule of law is that it focuses on the actor exercising public authority, an agency, be it European or domestic, and not on the status or the rights of a migrant.

After this introduction, the *Article* develops the meaning of the rule of law for the EU. The rule of law postulates effective judicial protection, and this tenet must be satisfied also in the context of agencification. In the next section, the *Article* develops the most recent developments on the rule of law, focusing on the rule of law backsliding and on the Hungarian case, as illustrative of a successful example of upholding the rule of law

[5] Case 294/83 *Parti écologiste "Les Verts" contre Parlement européen* ECLI:EU:C:1986:166.

[6] E Stein, 'Lawyers, judges, and the making of a transnational constitution' (1981) AJIL 1; JHH Weiler, 'The Transformation of Europe' (1991) YaleLJ 2403.

[7] Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* ECLI:EU:C:1986:206 para. 18.

[8] L Marin 'Frontex as the epicenter of a rule of law crisis' cit.

[9] E Tsourdi, 'Asylum in the EU: One of the Many Faces of Rule of Law Backsliding?' (2021) EuConst 471.

[10] D Thym 'The End of Human Rights Dynamism? Judgments of the ECtHR on "Hot Returns" and Humanitarian Visas as a Focal Point of Contemporary European Asylum Law and Policy' (2020) IJRL 569. See also D Thym, 'Judicial Dynamism and Its Limits: The Role of National Courts and their Interaction with the CJEU' (August 2024) ADiM Blog adimblog.com.

and the right to effective judicial protection in the context of migration management. This contribution of the EU institutions (Commission and Court of Justice) in preserving the rule of law, is subsequently compared with the activities of the same institutions in the context of external borders, by focusing on the decisions concerning the EU-Turkey deal, and on the very recent case law against Frontex. The *Article* concludes arguing for the non-homogeneous upholding of the rule of law in the context of the European administrative order. Instead, an effort of constitutional coherence is necessary to support the embedding of the agencies into a more robust rule of law framework.

II. The rule of law and its implication in the EU legal order: effective judicial protection

The rule of law has progressively been established as a basic pillar of the EU legal order. In a first foundational moment, the CJEU has developed the core features of the newly established legal system. Among them, primacy concerns the interactions between EU law and domestic legal systems. Primacy requires trust from domestic courts, which has been granted –within a dialogical process- because the EU legal order has developed respecting some values and principles. These have been built by the CJEU in a sedimentary manner with its case law.[11] In a second moment, the rule of law acquired new significance with the accession of democracies whose commitment to the values of liberal constitutionalism has revealed –after the accession- its superficial nature.[12] This has nevertheless contributed to developing the meaning of the rule of law and expanding the toolkit to defend it.

Since *Les Verts*,[13] the CJEU has constructed the EU as a legal order based on the rule of law, implying that the exercise of power is constrained by law. Its core meaning, guaranteeing that the will of the majority does not oppress minorities, is an expression of the democratic principle. Its concrete application is translated into several other principles and rules, including legality, legal certainty, prevention of abuse of power, equality before the law, and access to justice.

As formulated by the Venice Commission, the rule of law "requires a system of certain and foreseeable law, where everyone has the right to be treated by all decision-makers with dignity, equality, and rationality and in accordance with the laws, and to have the opportunity to challenge decisions before independent and impartial courts through fair procedures".[14]

[11] ME Vergara and G Villalta Puig, 'The Quiet Architect Finds its Voice: The Primacy of the Law of the European Union after Press Release No 58/20 of the Court of Justice of the European Union' (2021) EPL 673; A Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004).

[12] G Halmai, 'Illiberal Constitutional Theories' (2021) Jus politicum 135.

[13] *Les Verts* cit para. 23.

[14] Venice Commission of the Council of Europe, Rule of Law Checklist, adopted in Venice at its 106th Plenary Session on 11-12 March 2016, p. 10.

Within the EU, the Commission has framed the EU rule of law as including "(...) legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law".[15] The rule of law is therefore not a single principle but a system of principles and rules and it requires institutions to grant the implementation of those principles.

II.1. Rule of law and effective judicial protection

The provisions of the Charter of Fundamental Rights of the European Union (Charter) which have translated this core value into rules (art. 19 TEU and art. 47 of the Charter) are of crucial importance for the actual implementation of the rule of law into practice, for example by complementing existing administrative internal remedies (e.g., complaints mechanism to Fundamental Rights Officer in Frontex, or Consultative Forum in Frontex or Ombudsman at European level) with external -and necessarily judicial- oversight mechanisms. If the former are expression of the right to good administration (art. 41 Charter), judicial review is an expression of one of the pillars of the rule of law paradigm. Indeed, the combined provisions of art. 19 TEU and art. 47 of the Charter establish that the rule of law framework is essentially operationalised through effective judicial review. The right to effective judicial protection is a cornerstone of the rule of law, and therefore, the realisation of the objectives of the EU in full respect of its commitment to the constitutional values and principles requires that its activities take place in a context where judicial review is ensured on all acts and activities, including those of its institutions, bodies, offices, and agencies of the Union (art. 263 TFEU) which have legally binding effects or which affect the position of third parties. Together with the rules that define the conditions and boundaries for exercising those powers, effective judicial review contributes to ensuring respect for the European primary legal framework.

In this context, it is important to elaborate on the significance of the judgment *Associação Sindical dos Juízes Portugueses*,[16] where the Court has stated that the tangible expression of the values of the rule of law is a task for both the CJEU and the national courts and tribunals. Therefore, it is upon the Member States to ensure that EU law is applied in their territories with a guarantee of effective judicial protection. More precisely, "[t]he very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law".[17]

This section demonstrates that, next to an initial foundational phase where the low-intensity constitutionalism of the EU legal order was instrumental to its consolidation in

[15] Communication COM (2014) 158 final from the Commission of 11.3.2014 on A new EU Framework to strengthen the Rule of Law, p. 2.

[16] Case 64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* ECLI:EU:C:2018:117.

[17] *Ibid.* para. 36.

relation to the legal orders of the Member States, the same principles and pillars have been reinstated when the values have been challenged within domestic legal orders. For these reasons, the respect of effective judicial review mechanisms seems to be co-essential to the respect of the rule of law and should therefore apply to all the activities of the EU, including those exercised by its agencies. The core question to be examined in this context is how to translate the requirements of direct judicial review of the acts of the Union to this field of analysis.[18]

II.2. The rule of law and its meaning for agencies

The agencification of the EU administrative space triggers the issue of rule of law application to EU agencies exercising executive powers. Rule of law requires that such powers do not operate arbitrarily; in contrast, it postulates that agencies' activities are constrained by law and subject to a system of scrutiny and oversight; furthermore, it implies that legal remedies and procedures must be in place to review the legality of the measures adopted.[19]

Within the framing of European constitutionalism, the requirement of legal accountability should apply to the activities carried out by agencies, since these are expressions of the EU executive power and must be held accountable to multiple actors, including EU institutions;[20] furthermore, while coordinating and supporting the tasks of Member States' administrations when implementing EU law and policies, they do interact with individuals.

Irrespective of the type of activity they carry out, be it of direct enforcement or of support,[21] their activities must be subject to accountability mechanisms, including adequate and effective judicial oversight in courts. This is a legal standpoint which is expression of the early interpretation of EU law by the CJEU, as embodied in the case law *Meroni*, *Romano*, and *Short-Selling*.[22] Later judgments, while adjusting the *Meroni* doctrine to the evolution of agencification, did not fully abandon the legacy of *Meroni*.[23]

[18] Indirect judicial review via the preliminary reference procedure cannot be deemed to be effective based on the interpretation adopted by the CJEU of this instrument. For similar observations, see G Gentile, 'Ensuring Effective Judicial Review of EU Soft Law via the Action for Annulment before the EU Courts: a Plea for a Liberal-Constitutional Approach' (2020) EuConst 466.

[19] C Harlow, *Accountability in the European Union* (Oxford University Press 2002) 144-167.

[20] D Curtin, 'Delegation to EU non-majoritarian agencies and emerging practices of public accountability' in D Geradin and N Petit (eds), *Regulation Through Agencies in The EU. A New Paradigm Of European Governance* (Edward Elgar Publishing 2005) 88.

[21] D Curtin and M Egeberg, 'Tradition and innovation: Europe's accumulated executive order' (2008) West European Politics 640.

[22] Case 9-56 *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* ECLI:EU:C:1958:7; Case 98/80 *Giuseppe Romano v Institut national d'assurance maladie-invalidité* ECLI:EU:C:1981:104; Case C-270/12 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union (Short Selling)* ECLI:EU:C:2014:18.

[23] M Simoncini, '"Live and let die?" The Meroni doctrine in 2023' (26/09/2023) EU Law Live eulawlive.com.

For this purpose, we should consider that agencies involved in enforcement and operational activities, typical of migration, do carry out *activities* of executive nature, expression of their mandates. While the Treaties refer to *acts* of bodies, offices and agencies, all administrative activities must be subject to forms of judicial review: this is a *lacuna* of the Treaties that must be filled with their evolutionary interpretation. The second element we should consider is that these activities do take place according to and after *acts* of administrative nature.

The argument put forward here is supported also by the doctrine of accountability, which distinguishes between ex ante and ex post accountability mechanisms. Also in this perspective, the role of effective judicial protection must be strengthened because judicial review can be seen as compensating for limited *ex ante* accountability mechanisms, which can be claimed to be applicable also to EU agencies.[24]

Having explained the interconnection between the rule of law and judicial protection in the constitutional framework of the EU, the next section will expound on the rule of law crisis that is unfolding within backsliding Member States to test to which extent supranational institutions are upholding the rule of law and its tenets.

III. The rule of law and democratic backsliding of illiberal Member States

The phenomenon of the so-called rule of law backsliding has been unfolding in the EU for quite some time now and has reached worrying levels of severity.[25] Scholars have investigated the issue with a peculiar focus on Poland and Hungary, which have been in the spotlight as the major "rule of law breakers" among the EU Member States. In this framework, one of the most debated questions was (and is) the capacity and preparedness of the EU to tackle, correct, and sanction the violation of the rule of law and of the other values enshrined in art. 2 TEU. EU institutions have tried to make use of both the existing apparatus, as already designed in the Treaties, and newly established instruments.

[24] C Harlow, *Accountability in the European Union* cit. *Mutatis mutandis*, Deirdre Curtin reasoned over input and output legitimacy and ex ante and ex post accountability mechanisms, pointing out the specificity and challenges of judicial accountability in the context of the ECB accountability mechanism. In D Curtin, 'Linking ECB Transparency and European Union Accountability', in ECB Legal Conference 2017: Shaping a new legal order for Europe: a tale of crises and opportunities (2017) ecb.europa.eu 83 ff.

[25] Literature on the rule of law backsliding has been growing exponentially in the last years. Among many others, see D Kochenov and L Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) EuConst 512; L Pech and KL Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) CYELS 19; M Claes, 'Editorial Note: How Common are the Values of the European Union? (2019) Croatian Yearbook of European Law and Policy VII; K Lenaerts, 'New Horizons for the Rule of Law Within the EU' (2020) German Law Journal 29; L Pech, 'The Rule of Law in the EU' in P Craig, G de Burca (eds), *The Evolution of EU Law* (Oxford University Press 2021) 307; L Pech, 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law' (2022) Hague Journal on the Rule Law 107.

The EU rule of law toolbox, thus, is a mix of old and more recent components. This section aims to highlight how supranational institutions, have been active in upholding the principles of the rule of law.

III.1. The rule of law crisis in the EU: overview and countermeasures

The erosion of the rule of law and other EU founding values has started to become increasingly evident in Hungary and Poland in the last decade. For this reason, the analysis will focus on the period covering the last two Commissions, *i.e.* the one of 2014-2019, led by Juncker, and the one of 2019-2024, led by Von der Leyen.

The Juncker Commission made use of both art. 7 TEU and the infringement procedure to face rule of law-related issues. Ultimately, the same Commission conceived new tools which have been later finalized by the Von der Leyen Commission. The procedure under art. 7 TEU was triggered in 2017 against Poland, for the first time.[26] The European Parliament, which backed up the Commission's action,[27] launched the same procedure against Hungary the following year.[28] While the activation of art. 7 against the Polish State was mainly linked with the issue of the various threats to the independence of the judiciary posed by the reforms passed by the ruling party "Law and Justice" (*Prawo i Sprawiedliwość*), the action against Hungary was associated with a broader variety of criticalities, including functioning of the constitutional and electoral system, corruption and conflict of interests, weakening of fundamental freedoms, protection of minorities, and – for what is of particular interest for the purpose of this *Article* – fundamental rights of migrants, asylum seekers and refugees.[29] These include the use of unlawful and arbitrary detention, automatic removals to Serbia, lack of access to asylum procedures, and effective remedies. The Hungarian case contributes to the argument developed here, *i.e.*, showing that when rule of law backsliding within states intersects with asylum and borders policies, then we have mobilisation of supranational institutions.

[26] See Proposal for a Council decision COM(2017) 835 final from the Commission of 20 December 2017 on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law. This move had been preceded by the attempt by the Juncker Commission to open a dialogue with the Polish Government in January 2016 under the Rule of Law Framework, *i.e.* a process of continuous dialogue with the Member State concerned, whereby the Commission interacts and keeps the European Parliament and Council regularly informed.

[27] European Parliament Resolution 2018/2541(RSP) of 1 March 2018 on the Commission's decision to activate Article 7(1) TEU as regards the situation in Poland.

[28] European Parliament Resolution 2017/2131(INL) of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded.

[29] *Ibid.* paras. 62-72.

The (mis)use of art. 7 TEU has been widely commented on and criticized by scholars.[30] The European Parliament has criticized the Commission and the Council, for refraining from acting in a coherent, timely, and determined manner.[31]

As regards the infringement procedure, several proceedings have been brought against Poland and Hungary in the context of rule of law compliance. In the case of Poland, a crucial issue at stake has been and is the independence of the judiciary: the Commission has challenged the Polish Law on Ordinary Courts,[32] the Polish Law on the Supreme Court,[33] the disciplinary regime of Polish judges,[34] all for their impact on the independence of the judiciary.[35]

Irrespective of these multiple proceedings, the approach of the Commission has been criticized, as being too soft and inefficient vis-à-vis the breach of the rule of law and other European values in Hungary and Poland.[36] The CJEU, for its part, when "fed" with infringement proceedings by the Commission, has shown a determined approach, placing itself in defense of the values enshrined in art. 2 TEU.[37]

In addition to those already existing and provided for in the Treaties, new tools have been developed for the protection of rule of law. These include the Rule of Law Report and the conditionality mechanism, that has been challenged by Poland and Hungary.[38] While a

[30] S Carrera and P Bárd, 'The European Parliament vote on Article 7 TEU against the Hungarian government. Too late, too little, too political?' (14 September 2018) CEPS Commentary ceps.eu.

[31] European Parliament resolution 2022/2647(RSP) of 5 May 2022 on ongoing hearings under Article 7(1) TEU regarding Poland and Hungary. The Parliament seems to suggest that the behavior of the concerned EU institutions and the way art. 7 was managed pose questions in terms of compliance with the principle of the rule of law by the EU itself. Despite various declarations of intent, by the President of the Commission herself, very little has been done in practice to resume the procedure under art. 7 TEU. President Von der Leyen, for example, affirmed that "*The third option is the Article 7 procedure. This is the powerful tool in the Treaty. And we must come back to it*": see Speech by President von der Leyen at the European Parliament Plenary on the rule of law crisis in Poland and the primacy of EU law, SPEECH/21/5361, Strasbourg, 19 October 2021.

[32] Case C-192/18 *Commission v. Poland* ECLI:EU:C:2019:924.

[33] Case C-619/18 *Commission v. Poland* ECLI:EU:C:2019:531.

[34] Case C-585/18 *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*; C-624/18 CP *(Independence of the Disciplinary Chamber of the Supreme Court);* case C-625/18 DO *(Independence of the Disciplinary Chamber of the Supreme Court)* ECLI:EU:C:2019:982.

[35] The Von der Leyen's Commission followed up on this, by launching infringement procedures on the Polish law on the judiciary preventing domestic courts from directly applying certain provisions of EU law protecting judicial independence, and from putting references for preliminary rulings on such questions to the CJEU. Cf. European Commission Press release IP/20/772 of 29 April 2020, 'Rule of Law: European Commission launches infringement procedure to safeguard the independence of judges in Poland'.

[36] See, in this sense, S Priebus, 'The Commission's Approach to Rule of Law Backsliding: Managing Instead of Enforcing Democratic Values?' (2022) JComMarSt 1533.

[37] For an overview of the case-law of the Court relating to the principle of rule of law, see L Pech and D Kochenov, 'Respect for the Rule of Law in the Case Law of the European Court of Justice. A Casebook Overview of Key Judgments since the Portuguese Judges Case' (2021) SIEPS 3.

[38] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget ('Conditionality Regula-

complete overview cannot be done here, the conditionality mechanism entered into force on 1 January 2021, and covers breaches of the rule of law that affect or seriously risk affecting the sound financial management of the budget or the protection of the financial interests of the Union. In December 2022, for the first time, the Conditionality Regulation was triggered leading to the imposition of measures for the protection of the Union budget against the consequences of breaches of the rule of law in Hungary, concerning public procurement, the effectiveness of prosecutorial action and the fight against corruption in Hungary.[39]

Overall, it is possible to conclude that, in the case of the rule of law backsliding represented by illiberal democracies, EU institutions, and the CJEU in particular, have been ready to uphold the rule of law values and to defend their principles with the toolkit provided for in EU law. Without discussing the merits and the effectiveness of this action, this activism is to be explained with the fact that the very authority of EU law has been and is at stake. The next section will zoom in on the Hungarian case.

III.2. Effective judicial protection at the intersection of the rule of law backsliding in Hungary: the case law on reception conditions and detention of protection-seekers

The case law of the CJEU in relation with the Hungarian legislation and practice on migration and asylum represents an interesting step towards the edification of the meaning of the EU rule of law with a strong constitutional embedding, since the Hungarian rule of law backsliding has entailed, among others, a contested and repressive domestic reception system for migrants.[40] In this context the CJEU has consolidated the rule of law thanks to the implementation and interpretation of the Directives on Returns, Procedures, and Reception.[41] The rule of law backsliding in this country has taken shape also

tion'). Hungary and Poland unsuccessfully tried to challenge the regulation by bringing actions for annulment to the Court of Justice: see Hungary's annulment application in Case C-156/21 *Hungary v European Parliament and Council* ECLI:EU:C:2022:97, and Poland's annulment application in Case C-157/21 *Poland v European Parliament and Council* EU:C:2022:98.

[39] Council Implementing Decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary. The budgetary impact of this suspension amounted to approximately €6.3 billion in budgetary commitments. For an analysis of the link between rule of law and economic sanctions, see G Halmai, 'The possibility and desirability of economic sanction: Rule of law conditionality requirements against illiberal EU Member States' (EUI Working Papers 2018/06).

[40] B Nagy, 'Hungarian Asylum Law and Policy in 2015–2016. Securitization Instead of Loyal Cooperation' (2016) German Law Journal 1053; B Nagy, 'From Reluctance to Total Denial. Asylum Policy in Hungary 2015–2018' in V Stoyanova and E Karageorgiou (eds), *The New Asylum and Transit Countries in Europe During and in the Aftermath of the 2015/2016 Crisis* (Brill 2019) 23–31.

[41] 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 98–107; Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) 60–95; Directive 2013/33/EU of

with various instances of direct contestation against EU legal instruments, such as the Relocation Decisions: these have been challenged by Hungary and other Visegrad states, before the CJEU, but without success.[42]

This case law is particularly functional to the argument made here since it witnesses the effort of the CJEU to contribute to the affirmation and consolidation of the rule of law in the context of migration management in one state which has weaponised migrants to engage in a conflict of sovereignty with the EU, undermining the authority of EU law and its primacy. This conflict of sovereignty has entailed the discussion of categories such as sovereignty, primacy, and national security, as instruments used by Hungary to challenge the authority of EU law in the domestic legal order.[43]

Yet, in a thread of cases, the CJEU has been adamant in its choice of resorting to the categories of European constitutionalism toward Hungary.

The first cluster of cases is represented by *Torubarov* and *FMS*.[44] The first case originated from a Russian national who applied for international protection in Hungary, allegedly being under criminal prosecution in Russia because opposition leader. The second case concerned transit zones situated at the external border of Hungary. Both cases are relevant since the CJEU explicitly placed boundaries to the activities of national authorities in the implementation of EU law, thanks to the resort to the guarantees of the Procedures Directive, which implements the right to an effective remedy as per art. 47 of the Charter, and by providing direct effect to those provisions, entailing the disapplication of the domestic law in conflict with European law. These boundaries are framed on the respect of legal certainty and of the right to effective remedies and are pervasive, since they affect the domestic legal order, thanks to the primacy and to the effect of the Charter. In all these cases, originated from Hungary, the Court has stated that primacy and the right

the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) 96–116.

[42] L Marin, 'Governing Asylum with (or without) Solidarity? The Difficult Path of Relocation Schemes, Between Enforcement and Contestation' (2019) Freedom, Security & Justice: European Legal Studies 55.

[43] For an overview on this conflict, see L Marin, S Penasa and G Romeo, 'Migration Crises and the Principle of Solidarity in Times of Sovereignism: Challenges for EU Law and Polity' (2020) European Journal of Migration and Law 1.

[44] Case C-556/17 *Alekszij Torubarov v Bevándorlási és Menekültügyi Hivatal* ECLI:EU:C:2019:626;

Joined Cases C-924/19 PPU and C-925/19 PPU *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság* ECLI:EU:C:2020:367. For a comment on this case-law, see B Nagy, 'Hungary, in Front of Her Judges' in P Minderhoud, S Mantu and K Zwaan (eds), *Caught in Between Borders: Citizens, Migrants, Humans. Liber Amicorum in Honour of Prof. Dr. Elspeth Guild Tilburg* (Wolf Publishers 2019); L Marin, 'La Corte di Giustizia riporta le "zone di transito" ungheresi dentro il perimetro del diritto (Europeo) e dei diritti (fondamentali)' in A Bufalini and others, *Annuario ADiM 2020: raccolta di scritti di diritto dell'immigrazione* (Napoli: Editoriale scientifica 2021).

to an effective remedy require national judges to self-declare their competence in assessing the complaints proposed by migrants. This is required by EU law and should take place even if the domestic law has chosen to disregard EU law.[45]

Furthermore, the Court interprets the right to an effective remedy as requiring that if a complaint is decided by an administrative authority, its decision must be subject to judicial review before a judge.[46] It is precisely the reasoning behind this point that is relevant also for our discourse since the Court further investigates whether the Hungarian law complies with EU law. Being the challenge against a decision assessed by the administrative authority, EU law could be respected only if that authority could be considered independent, which is not the case. Alternatively, that decision must be amenable to judicial review before an independent court.[47] In this reasoning, the CJEU elaborates on its earlier case law on the independence of the judiciary, such as *L.M.* and *A.K.*, and concludes that domestic law does not comply with EU law and therefore must be set aside.[48]

Overall, the Court asserts the bases of the functioning of the rule of law, recalling the principle of the separation of powers, and its implications and tenets, arguing that the Hungarian judiciary does not satisfy this requirement, since it runs contrary the essential content of the right protected by the Charter. Considering the effectiveness of EU law, the CJEU empowers domestic judges to assess the domestic decision, setting aside a conflicting domestic provision.[49]

This case law is relevant because it places paramount importance on the right to an effective remedy, and this could find application also once the CJEU is called to assess the effectiveness of the internal administrative complaints mechanisms which are available against the decision of the agencies. These cases can be considered among the *grands arrêts* of the ECJ, because they develop the spirit of the *Van Gend en Loos*, re-asserting legal relationships between individuals and courts, even when domestic authorities had interrupted them. Secondly, the Court has mandated the domestic judge to find in its domestic system the instrument to fill the gap caused by the breach of the EU legal order, as a system based on the rule of law which means a system of complete legal remedies, be it at domestic or European level. Once again, the Court has filled the gaps in the system, acting as a trustee of the community of the Member States, in the full spirit of European constitutionalism.[50]

[45] I Goldner Lang, 'No Solidarity without Loyalty: Why Do Member States Violate EU Migration and Asylum Law and What Can Be Done?' (2020) European Journal of Migration and Law.

[46] *FMS and others* cit. paras. 109-147. Here the Court refers to its case law on the rule of law in Poland, referring extensively to the requirements elaborated in occasion of preliminary references originated from Poland and Portugal.

[47] *Ibid.* para. 77.

[48] *Ibid.* paras 132-134.

[49] I Goldner Lang, 'No Solidarity without Loyalty' cit.

[50] L Marin, 'La Corte di Giustizia riporta le "zone di transito" ungheresi dentro il perimetro del diritto (Europeo) e dei diritti (fondamentali)' cit.

Another case witnessing the engagement of the European Commission is the infringement proceeding that followed up to this case.[51] In this last case by the CJEU, the Commission has taken the initiative to challenge the Hungarian legislation before the CJEU.

This case is important because it certified the deficiencies of the Hungarian asylum and reception system. More precisely, the CJEU, sitting as Grand Chamber, declared Hungary's failure to comply with EU law by restricting access to asylum procedures, unlawfully detaining protection seekers in transit zones, and illegally removing them to Serbia. Significantly, the Court acknowledged "the virtual impossibility of making an application for international protection in Hungary",[52] thereby certifying the existence of a widespread and systematic unlawful practice of breaches of fundamental rights. While Hungary ignored the Court's ruling, Frontex was associated with episodes of human rights violations on the Hungarian territory. The allegation of complicity with Orbán's government was too much to take, for the Agency's already damaged reputation. It thus decided to suspend all its activities in Hungary: this is the first – and for the time being, the only– time Frontex leaves a Member State. Yet, the withdrawal from Hungary was not officially announced but kept under the radar.[53]

Ultimately, it is here argued that the CJEU is adamant in defending the rule of law in cases of blatant breaches against it, and when primacy is at stake, even when it deals with external borders; in doing so, the Court resorted to its typical toolkit, the one developed in the context of EU law, including the categories of primacy, effectiveness of EU law and setting aside domestic law in conflict with EU law.

In a nutshell, the CJEU deploys its typical toolkit of constitutionalism in cases of direct contestation by a Member State.[54] Here the interesting question is: to which extent is the Court willing to develop the logic of these cases also while deciding on cases concerning other domains, for example, while scrutinizing the activities of the agencies? The analysis will now continue exploring whether other domains of the external borders' policy do convey the same idea of legality, or whether we do witness different approaches.

IV. Two weights and two measures? The "fading legality" at the external borders of the EU and the role of the European Commission

This section aims to focus on the broader contextual and constitutional setting where the policy of external borders is located, by discussing the role of the Commission in enforcing the rule of law at the external borders in a consistent way. The next section will focus

[51] Case C-808/18 *Commission v. Hungary* ECLI:EU:C:2020:1029.

[52] *Ibid.* para.118.

[53] On this topic, see FL Gatta, 'Between Rule of Law and Reputation: Frontex's withdrawal from Hungary' (8 February 2021) VerfassungsBlog verfassungsblog.de.

[54] L Marin, 'La Corte di Giustizia riporta le "zone di transito" ungheresi dentro il perimetro del diritto (Europeo) e dei diritti (fondamentali)' cit.

on the CJEU. The underlying question is whether the policies concerning the external borders are witnessing the emergence of a fading legality in EU law, by, first, assessing the role of the Commission as the guardian of the Treaties, and secondly, the case law of the CJEU in this context, before zooming in on the way the Court is exercising its scrutiny over the agencies, based on the little case law existing on Frontex, in a second instance. Typically, these institutions are the main enforcers of legality of EU law: the Commission has the instrument of the infringement procedure in its hands and the CJEU has always exercised a leading role in interpreting EU law, filling the gaps in the original design of the Treaties and enabling the development of further integration. It is therefore to be expected that, in all the domains of integration, the institutions do act with the same paradigm of legality as the cornerstone of their activities.

This section argues that the Commission is exercising a double role in this domain, one as a policy guide and designer and the second as the guardian of the Treaties. Yet, in this latter function, the Commission fails to integrate respect for fundamental rights in the development of its policies. As such, it contributes to creating its share of challenges to the legality of this domain of EU law and is incapable of bringing integration forward.

The scholarship increasingly criticized the role of the Commission in the enforcement of the EU law in several situations. Since 2015 Member States have been prompt in reinstating checks at the internal borders, and the Commission has been silent in challenging these practices before the CJEU.[55] With the humanitarian crisis between Belarus and Poland, the Commission has quiesced with abuses by Polish authorities and did not intervene to restore respect for most basic humanitarian principles and rules.[56] Similarly, with the Croatian police practices the reaction of the European Commission has been “mild”, in the words of Goldner Lang and Nagy.[57] According to Tsourdi, the Commission is not adequately integrating asylum-related failings in its monitoring processes concerning the rule of law, and more precisely, the first Commission report on the Commission’s annual rule of law report (sept 2020) “does not seem to grasp the intricate links between asylum-related violations, the situation at the EU’s borders and the rule of law”.[58]

Yet, with defiant states, the Commission is rather proactive with infringement proceedings.[59] I argue that this selectivity of the Commission in pursuing infringements is highly problematic, for several reasons. First, if the guardian of the Treaties is not fulfilling

[55] S Solomon and J Rijpma, ‘A Europe Without Internal Frontiers: Challenging the Reintroduction of Border Controls in the Schengen Area in the Light of Union Citizenship’ (2023) German Law Journal.

[56] M Grześkowiak, ‘The "Guardian of the Treaties" is No More? The European Commission and the 2021 Humanitarian Crisis on Poland–Belarus Border’ (2023) Refugee Survey Quarterly 22.

[57] I Goldner Lang and B Nagy, ‘External Border Control Techniques in the EU as a Challenge to the Principle of Non-Refoulement’ (2021) EuConst 442.

[58] E Tsourdi, ‘Asylum in the EU: One of the Many Faces of Rule of Law Backsliding?’ (2021) EuConst.

[59] In respect to Hungary, see the case *Commission v Hungary* cit.

its mandate with the right impartiality, it might result criticized in the exercise of its function, with the consequence of diminishing its credibility.[60] Second, it is of paramount importance that the Commission strives for the emergence of a single rule of law in the European Union. In this respect, a serious and systematic breach of a fundamental right should be declared as such, irrespective of any motivation concerning the state committing the breach toward the Union, be it defiance or not. A different answer might provide an incentive to violate EU law also for other states, and, eventually, it jeopardizes the role of the Commission as policy maker, since it finds itself to operate in a context where the poor enforcement of EU law is systemic. Furthermore, if the legality of the rule of law is not coherently related to an axiological content,[61] it turns into a simulacrum of legality, to a deep detriment of the same. Third, the role of Frontex is also compromised if it does not appear to operate in a strong framework governed by the rule of law. Lacking this, the intergovernmental nature of the Management Board and the hybrid functioning of the Agency will undermine its capacity to act as a "fair" European actor.[62] The inherently political ambit of operation of Frontex will expose even more the political fractures existing among Member States, and in this way Frontex will turn into a sounding board of those fractures, undermining its success.[63] This is especially relevant since the latest reforms have assigned it a supervisory role with vulnerability assessments.

In the next section, the role of the CJEU will be considered.

V. One, none, or a hundred thousand? Searching for a (coherent) approach in the case law of the Court of Justice

This section tests whether the external dimension of migration policies is witnessing the emergence of a rule of law in line with the premises discussed above, by assessing the case law of the CJEU in this context. It starts from the case law on the EU-Turkey deal before zooming in on the way the CJEU is exercising its scrutiny over the agencies, based on the recent cases against Frontex.[64] It is argued that this case law is illustrative of the lack of a single compass in adjudicating these matters.

[60] Joined Cases C-368/20 and C-369/20 *NW v Landespolizeidirektion Steiermark* and *NW v Bezirkshauptmannschaft Leibnitz*ECLI:EU:C:2022:298. See also P Cebulak and M Morvillo, 'The Guardian is Absent: Legality of Border Controls within Schengen before the European Court of Justice' (25 June 2021) VerfassungsBlog verfassungsblog.de.

[61] See *mutatis mutandis* V Moreno Lax, 'The Axiological Emancipation of a (Non-)Principle: Autonomy, International Law and the EU Legal Order', in I Govaere and S Garben (eds), *The Interface Between EU and International Law: Contemporary Reflections* (Hart Publishing 2019).

[62] M Deleixhe and D Duez 'The new European border and coast guard agency: pooling sovereignty or giving it up?' (2019) Journal of European Integration 41.7.

[63] *Ibid.*

[64] The case law concerning Frontex as employer and as contractor remains out of the scope of this work, because not relevant to our argument.

V.1. The decisions on the EU – Turkey deal: denialism fed by *realpolitik*?

With the EU-Turkey deal, Germany has succeeded in having the support of the EU to achieve a policy target it decided to prioritize, *i.e.*, to curb the arrivals of migrants from the Eastern borders, by agreeing the return to Turkey of all irregular migrants crossing from Turkey into Greek islands.[65] This was supposed to take place in full accordance with EU and international law, excluding any kind of collective expulsion, and in all respect for the asylum rights of protection-seekers. Part of the deal was a special regime for Syrians: for every Syrian being returned, another Syrian would be resettled from Turkey to the EU in light of the UN Vulnerability Criteria. This deal has been criticized for its gross violations of international law obligations,[66] but has been praised by others as necessary.[67] After 2016, the deal was renewed in 2021, and new funding has been provided by the EU to Turkey within this framework.[68] Since it has been applied for several years, perhaps it is rather fair to acknowledge that legal obligations or obligations can arise even from an instrument of informal law.[69]

Contested for many reasons and grounds, the instrument has been challenged by migrants before the General Court (GC) with an annulment action. The order of the GC on the EU-Turkey deal can be framed as a cold shower of *realpolitik*: the GC has denied that the act was an agreement and that it could be attributed to the EU; instead, it was

[65] It is commonly recognised that Merkel has been a crucial sponsor of the deal. See A Albayrak 'German Chancellor Angela Merkel Pushes EU Migrant Deal in Turkey Visit' (23 April 2016) The Wall Street Journal wsj.com; M Karnitschnig and J Barigazzi 'EU and Turkey Reach Refugee Deal' (18 Marc 2016) Politico politico.eu.

[66] C Costello, 'It needs not be like this' (2016) Forced Migration Review 12 ff; S Peers, 'The final EU/Turkey refugee deal: a legal assessment' (18 March 2016) EU Law Analysis eulawanalysis.blogspot.com. On the same topic, G Fernández Arribas, 'The EU-Turkey Agreement: A Controversial Attempt at Patching up a Major Problem' (2016) European Papers europeanpapers.eu 1097; C Favilli, 'Nel mondo dei "non-accordi". Protetti sì, purché altrove' (2020) Questione Giustizia questionegiustizia.it 1; C Favilli, 'La cooperazione UE-Turchia per contenere il flusso dei migranti e richiedenti asilo: obiettivo riuscito?' (2016) Diritti Umani e Diritto Internazionale 405.

[67] D Thym, 'Why the EU-Turkey Deal is Legal and a Step in the Right Direction' (9 March 2016) VerfassungsBlog verfassungsblog.de.

[68] See the analysis by ISPI, 'A Pragmatic Shift: Evolving EU-Turkey Relations' (30 March 2021) ispionline.it; and D Albanese, 'The Renewal of the EU-Turkey Migration Deal', (18 May 2021) ISPI ispionline.it.

[69] On the nature of the deal, see M Gatti and A Ott, 'The EU-Turkey statement: legal nature and compatibility with EU institutional law' in S Carrera, J Santos Vara and T Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* (Edward Elgar Publishing 2019). See also G Fernández Arribas, 'The EU-Turkey Statement, the Treaty-Making Process and Competent Organs. Is the Statement an International Agreement?' (2017) European Papers europeanpapers.eu 33. See also E Kassoti and A Carrozzini, 'One Instrument in Search of an Author: Revisiting the Authorship and Legal Nature of the EU-Turkey Statement' in E Kassoti and N Idriz (eds), *The Informalisation of the EU's External Action in the Field of Migration and Asylum* (TMC Asser Press 2022) 237.

assessed as an act whose paternity could be attributed to the Member States acting outside the EU's sphere of action.[70] The GC judged it was adopted by the Heads of State and Government of the Member States "using the European Council as a mere occasional venue within which to coordinate their action".[71]

As masterfully described by Professor Cannizzaro, the GC simply took the approach of avoidance or denialism as an expression of *realpolitik*, to avoid embarking on answering a complex set of legal and political questions, concerning a "deal" or agreement that was in breach of procedural rules set by the Treaties for its adoption, and secondly, with a dubious compliance with substantive and fundamental rights standards, just to mention some of the main challenges.[72] More fundamentally, even accepting that the solution chosen by the GC could be seen as respectful of the attribution of competences between EU and Member States, it seems problematic to conclude that, despite the presence of the President of the Council and of the Commission, States can decide whether when they gather within the European Council, they act as members of one of its institutions, or in their international capacity. The reasoning of the GC has been unconvincing as to its conclusion that, in such a context, the act was to be attributed to the Member States. The choice to interpret and situate the deal radically out of the scope of EU law has also secured it from other judicial challenges (at EU level), namely for the respect of interinstitutional balance between the institutions, which is an expression of the constitutionalisation of the EU legal order.[73] This aspect is especially problematic for EU law.

The CJEU confirmed by order the judgment of the GC, by dismissing the appeals as manifestly inadmissible or manifestly unfounded, on a proposal from the Judge-Rapporteur and after hearing the Advocate General on its procedural choice. It argued that the appeals were incoherent and not adequately motivated.[74]

However, this position is to be criticised also considering the practice of the implementation of the deal, which is monitored by the Commission.[75] The yearly monitoring by the Commission is indicative of the implementation of an EU instrument, the funding facility for refugees in Turkey, which is one of the elements of the deal.

[70] Case T-192/16 *N.F. v. European Council* ECLI:EU:T:2017:128.

[71] E Cannizzaro, 'Denialism as the Supreme Expression of Realism – A Quick Comment on *NF v. European Council*' European Papers (European Forum Insight of 15 March 2017) europeanpapers.eu 251. On the same line, see S Carrera, L den Hertog and M Stefan 'It wasn't me! The Luxembourg Court orders on the EU-Turkey refugee deal' (15 April 2017) CEPS Policy Insights ceps.eu.

[72] E Cannizzaro, 'Denialism as the Supreme Expression of Realism' cit. See also P Garcia Andrade, 'The External Dimension of the EU Immigration and Asylum Policies Before the Court of Justice' (2022) European Papers europeanpapers.eu 109.

[73] P Garcia Andrade, 'The External Dimension of the EU Immigration and Asylum Policies Before the Court of Justice' cit.

[74] Joined Cases C-208/17 P to C-210/17 P *NF and Others v European Council* ECLI:EU:C:2018:705.

[75] Communication COM(2022) 243 final from the Commission of 24 May 2022: Sixth Annual Report on the Facility for Refugees in Turkey.

Against this background, the argument put forward by the European judges is hardly convincing in terms of legal argumentation. Yet, this choice seems to be illustrative of a different approach chosen by the European judges toward the legal (and political) challenges raised by the deal, an approach of self-restraint and avoidance toward the activities of the EU institutions and the Member States. As to its meaning, this case law is rather problematic in terms of respect for the constitutional setting of the EU, including its institutional balance and the balance of powers and competences between the EU and Member States. In addition, it does not display a coherent approach to dealing with the issues underlying the management of migration, such as fundamental rights, that receive mixed attention across the case law discussed in this *Article*.

V.2. Exploring the limits of effective judicial protection within the EU: the litigation against Frontex

In the last months, several orders and judgments have been released by the GC and some are pending before the CJEU in lawsuits against Frontex.[76] The current section will provide an overview, attempting to sketch the lines that guide the case law of European judges. These cases witness the mobilization of victims, lawyers, civil society, and academia against a contested and ever-expanding agency. While the first case of 2019 dealt with transparency, the latest stream of cases concerns judicial oversight and remedies available to assess the compliance of different types of Frontex operations with fundamental rights.[77] Considering the room of manoeuvre of the CJEU and its creative interpretation of EU law, this case law is also informative as to its doctrine in the policy of external border management. Indirectly, it tells us to which extent the EU system of judicial remedies is offering protection to individuals against the activities of the European administration, and on the relation between EU law and human rights or between EU and third-country nationals.

a) Transparency and access to documents: the first lawsuit targeting Frontex activities with a failure to act

A first judgment of the GC of 2019 concerned access to documents, a particularly thorny issue since the operations of Frontex are difficult to monitor, when taking place on the high seas or remote areas, and transparency is of paramount importance for accountability.[78]

Activists Izuzquiza and Semsrott sought access to documents for Joint Operation (JO) Triton, in particular access to documents containing information on the name, type, and

[76] Case T-282/21 *SS and ST v European Border and Coast Guard Agency* ECLI:EU:T:2022:235; Case T-600/21 *WS and Others v Frontex* ECLI:EU:T:2023:492, whose appeal is pending as case C-679/23 P *WS and Others v Frontex*; case T-600/22 *ST v Frontex* ECLI:EU:T:2023:776, whose appeal is currently pending as case C-62/24 P; case T-136/22 *Hamoudi v Frontex*, ECLI:EU:T:2023:821, whose appeal is currently pending as case C-136/24 P; case T-205/22, *Naass and Sea Watch v Frontex*, ECLI:EU:T:2024:266.

[77] The case law concerning Frontex as employer or as contractor falls outside the scope of this analysis.

[78] Case T-31/18 *L. Izuzquiza and A. Semsrott v. European Border and Coast Guard Agency (Frontex)* ECLI:EU:T:2019:815.

flag of every vessel deployed in the Central Mediterranean in the past section of a still ongoing operation. The denial of Frontex has been challenged in court but without success. The Court has sided Frontex on all reasons and grounds and referred in a reiterated manner to its *Sison v. Council* case, where the protection of public security has been deemed as a ground for refusing access to documents. Of all the arguments put forward by the applicants, one could have hoped for a more balanced decision, for example recognising the legitimacy of the public to know operational data concerning past months of a still ongoing operation or concerning parts of the access to documents requested that have been communicated on Twitter by the same Frontex.[79] If the Agency discloses information concerning its activities, why the same process cannot be the result of a request from individuals?

This shows that Frontex enjoys great discretion in deciding what to disclose and that the scrutiny of the GC does not go beyond a certain (low) threshold, *i.e.*, checking for a manifest error of assessment; instead, it adjudicates with a good dose of self-restraint, and it recognises a significant discretion to the Agency. This is worth investigating since the deployment of new and emerging technologies as well as artificial intelligence will entail that agencies will exercise forms of discretion concerning the specification of criteria and technical aspects demanded by the legislation.[80] This requires due monitoring by civil society and institutions, and conversely, some forms of transparency to monitor to activities of the agency.[81]

b) The first lawsuit targeting Frontex activities with a failure to act

Another recent case concerns an action for failure to act against Frontex, brought by two applicants about alleged pushback operations conducted in the framework of the JO Poseidon in the Aegean Sea.[82] The argument by the applicants was that, because of the "violations of fundamental rights or international protection obligations", Frontex had to adopt a decision of withdrawal of the financing, or suspension or termination of the activities in the Aegean, according to art. 46(4) of the Frontex Regulation (EU) 2019/1896.

[79] M Gkliati and J Kilpatrick, 'Crying Wolf Too Many Times: The Impact of the Emergency Narrative on Transparency in FRONTEX Joint Operations' (2021) Utrecht Law Review 57. See also E Frasca, 'Caselaw Commentary of the General Court (European Union), Judgement of 27 November 2019, *Izuzquiza and Semsrott v. Frontex*, T-31/18: Sailing through Transparent Waters? A Comparison between Cases Concerning Public Access to Information Related to Search and Rescue Operations in the Mediterranean' (2020) Cahier de l'EDEM dial.uclouvain.be.

[80] A Musco Eklund, 'Rule of Law Challenges of "Algorithmic Discretion" & Automation in EU Border Control: A Case Study of ETIAS Through the Lens of Legality' (2023) European Journal of Migration and Law 249.

[81] L Marin, 'The deployment of drone technology in border surveillance: Between techno-securitization and challenges to privacy and data protection' in M Friedewald, J P Burgess, J Čas, R Bellanova and Walter Peissl (eds), *Surveillance, Privacy and Security* (Routledge 2017) 107.

[82] *SS and ST v European Border and Coast Guard Agency* cit.

Seized with an action for failure to act, the GC has dismissed the action as inadmissible with an Order of 7 April 2022 on the ground that Frontex had replied to the request of the applicants. The GC deemed that, although the reply did not lead to the results sought by the applicants, it cannot be declared as missing: the action for failure to act concerns, as recalled by the Court, "the failure of the institution concerned to take a decision or to define its position".[83] For this reason, the Court has verified that Frontex has replied to the letter of the applicants,[84] explaining its position and the grounds for a decision taken as per art. 46(4) of the Frontex Regulation. On this basis, the Court rejected the application for failure to act as inadmissible. Furthermore, the Court did not engage in the assessment of the position of Frontex, which could be challenged – so said the Court – with an annulment action, but it evaluated the procedural interaction of the parties, arguing that the steps taken by Frontex do not fulfill the criteria to decide that the Agency has failed to act. While this cannot be objected against from the perspective of EU law, it leads us to observe that the failure to act cannot be considered an instrument to assess the compliance of Frontex activities against the background of the applicable legislation.

Curiously, the GC has left on the table possible alternatives, namely pointing to the annulment action, which however has stringent *locus standi* requirements, as recalled by the same court.[85] In particular, the known criterion of the individual concern will be hard to prove for migrants. A few months later, another chamber of the GC indeed rejected as inadmissible an action for failure to act and annulment, thus confirming that also the action for annulment represents a complicated pathway for applicants.[86]

If this application – as presented by the GC – represents a position that tries to elicit a change in the policy of the Agency, it must be observed that the GC did not assess the merits of the reply or the position taken by the Agency, thus confining its role to a very limited formal scrutiny over the presence (or lack) of a reply.

It can be hoped for that the indication suggested by the Court on the annulment action will be taken onboard by litigants in further lawsuits promoted also to test the scope of the control exercised by the Court once seized by new challenges. However, it is consistent case law of the Court that the *locus standi* criteria of the direct and individual concern are interpreted very stringently: it will be very hard, if not impossible, for a migrant affected by a Frontex JO to prove the fulfilment of these requirements.

For this reason and based on this precedent and of earlier case law, it is hard to imagine how the remedies provided for in arts. 265 and 263 TFEU might be used in the future as tools in the availability of migrants as an effective judicial remedy to verify the compliance of the Agency to the respect of its legal framework.

[83] *Ivi*, para. 22.
[84] *Ivi*, paras. 25-31.
[85] *Ivi*, paras. 23, 33.
[86] *ST v. Frontex* cit.

c) Action for damages against Frontex, for fundamental rights violations in return operations and maritime border controls: WS and others *and* Hamoudi

In another case, *WS and others v. Frontex*, currently under appeal, the GC has been seized with an action for damages against Frontex.[87]

The applicants, Syrian nationals, claimed compensation for damages allegedly suffered concerning a return operation conducted by Greece and Frontex. Removed from Milos to Leros, where they have applied for international protection, they were then removed to Turkey with a joint return operation. They claimed that they suffered material and non-material damages, concerning their removal, because, in their allegations, Frontex violated the Charter, the 2016 Frontex Regulation,[88] and the Frontex' own Standard Operating Procedures.

The Court – after having declared the action as admissible – dismissed it on the grounds, choosing to shield Frontex from liability.[89] This is a worrisome outcome, as the action for damages displayed a good potential for challenging the activities of the agencies in the perspective of the review of legality and compliance with the rule of law, including fundamental rights protection.[90]

In contrast, the GC has decided to focus on the formal element that the final responsibility for the return decision is taken by the state, and consequently, any activity carried out by Frontex in the process of a joint return operation, is not going subject to judicial review, thanks to this formal element.[91] As to the role of Frontex, we can read that its task is merely to provide technical and operational support to the Member States, and that it is the latter that have the competence and responsibility to assess the merits of the return decisions

[87] *WS and Others v Frontex* cit.

[88] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard.

[89] *Ex multis*, J De Coninck, 'Shielding Frontex: On the EU General Court's "WS and others v Frontex"' (9 September 2023) VerfassungsBlog verfassungsblog.de and S Nicolosi, 'The European Border and Coast Guard Agency (FRONTEX) and the Limits to Effective Judicial Protection in European Union Law', (2024) ELJ 149. See also G Davies, 'The General Court finds Frontex not liable for helping with illegal pushbacks: it was just following orders' (11 September 2023) European Law Blog europeanlawblog.eu; T Molnár, 'The EU General Court's Judgment in *WS & Others v Frontex*: What Could International Law on the Responsibility of International Organizations Offer in Grasping Frontex' Responsibility?' (18 October 2023) EJIL: Talk! www.ejiltalk.org; F Partipilo, 'The EU General Court's judgment in the case of *WS and Others v Frontex*: human rights violations at EU external borders going unpunished' (22 September 2023) EU Law Analysis eulawanalysis.blogspot.com; M Fink and J Rijpma, 'Responsibility in Joint Returns after *WS and Others v Frontex*: Letting the Active By-Stander Off the Hook' (22 September 2023) EU Law Analysis eulawanalysis.blogspot.com.

[90] M Fink, C Rauchegger and J De Coninck, 'The Action for Damages as a Fundamental Rights Remedy' in M Fink (ed), *Redressing Fundamental Rights Violations by the EU: The Promise of the 'Complete System of Remedies'* (Cambridge University Press 2024); M Fink, 'EU Liability for Contributions to Member States' Breaches of EU Law' (2019) CMLRev 56; M Fink, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable' (2020) German Law Journal 532.

[91] *WS and Others v Frontex* cit. para. 65.

and to examine applications for international protection.[92] This appears to be crucial in the reasoning because the GC links responsibility for damages to the power to assess the merits of the return decisions or applications for international protection. The lack of this final responsibility interrupts the causal link between action and (alleged) damage, which is one of the necessary elements to establish non-contractual liability.[93] By doing so, the Court effectively protects Frontex from judicial scrutiny. One could even imagine a case where the decision is fully legitimate, but then during the execution of the decision the Agency mistreats the migrant, for example, beating him/her. According to the GC, an action claiming for damages is to be dismissed because the formal act is correct.

Yet, in contrast, Frontex does not have the final responsibility for the decision, but an important role in different phases of the procedures and legal obligations, deriving from several provisions of EU primary and secondary law. First, the role of Frontex is salient during the execution of the removal, providing technical and operational assistance to the Member State.[94] Furthermore, Frontex has monitoring obligations toward the Member State, also concerning their respect for fundamental rights.[95] Its activities go well beyond a formal decision, and as such, should be scrutinised.

This decision is especially regrettable because it displays a path in the reasoning of the GC that does not adequately consider all the obligations emerging from the legal framework and, at the end of the day, the evolving role of agencies as the pivot between European institutions and national administrations. In doing so, the GC fails to grant respect to the European legal framework.

Another aspect worth being underlined and discussed is that, as demonstrated in the reconstruction made by the GC in the decision, the complaint mechanism provided for in the Frontex Regulation is ineffective: the applicants had to lodge multiple complaints across a time of 3 years. Eventually, FRO could only inform the applicant of the decision of the Greek authorities, *i.e.*, the closure of the internal investigation and its classification as "confidential"; for its part, the applicants were also dissatisfied with the FRO report as it did not point out the role of Frontex in the return operation.[96] Furthermore, the internal complaint procedure does not respect the parameters of the right to an effective remedy (as consolidated by the CJEU in the case law recalled in section 3.2): therefore, a decision of the Fundamental Rights Officer would require a review by a court. This is currently not

[92] *Ibid.* para. 64.

[93] *Ibid.* paras. 66-67.

[94] Arts 27-28 Regulation (EU) 2016/1624 cit.

[95] S Tas,'Frontex above the law – A missed opportunity for a landmark judgment on Frontex's responsibility with regards fundamental rights violations: WS and Others v Frontex (T-600/21)' (20 September 2023) EU Law Live eulawlive.com; M Fink, Expert Opinion: Case T-600/21 WS and Others v Frontex (3 February 2022), available at dx.doi.org.

[96] *WS and Others v Frontex* cit. paras. 6-16.

provided for in EU law.[97] As already stressed, this mechanism does not meet the core principles of functional and structural independence.[98]

This aspect too deserves further analysis, since it has been seen as a crucial tool in the context of the respect of the principle of good administration. Yet, in the case of Frontex, the complaint mechanism is not fulfilling its potential and is therefore not an instrument functional to the achievement of the right to an effective remedy as per art. 47 of the Charter.

In the most recent case, *Hamoudi*, the GC has been seized with another action for damages, this time concerning a pushback operation conducted by Greek authorities in the context of a Frontex joint Operation.[99] In this case, a Syrian national sought compensation for the damage suffered in relation to the fact that, after his arrival on the island of Samos, he has been intercepted by the Greek police and, on the same day, he and others have been sent back to the sea. The day after, the Turkish Coast Guard took him on board and relocated to the Turkish territory. In this context, the applicant argues that an airplane operated by Frontex, engaged in surveillance and reconnaissance operations, flew over the scene twice. On that occasion, two Frontex operations were ongoing in Greece, one rapid border intervention and JO Poseidon.

This case addresses one crucial question concerning the operation of Frontex, *i.e.*, its involvement with the Greek policy of pushbacks and covers the current discussion on the interpretation of art. 46 of the Frontex Regulation on the director's duty to suspend or terminate activities that involve fundamental right violations. It is worth recalling that this constitutes one of the grey areas of its functioning and that, in the recent past, this policy has been under scrutiny by the European Parliament, and, also by an internal investigation set up by the Frontex Management Board.[100] These inquiries, together with a report by OLAF, have proved mismanagement of the Agency and serious violations of the legal framework by the former Executive Director Leggeri, moving him to resign from its function.[101]

[97] M Stefan and L den Hertog, 'Frontex: Great Powers but No Appeals' in M Chamon, A Volpato and M Eliantonio (eds) *Boards of Appeal of EU Agencies: Towards Judicialization of Administrative Review?* (Oxford University Press 2022) 151.

[98] *Ibidem.* See also J Alberti, 'The Position of Boards of Appeal: Between Functional Continuity and Independence', in M Chamon, A Volpato and M Eliantonio (eds), *Boards of Appeal of EU Agencies: Towards Judicialization of Administrative Review?* (Oxford University Press 2022) 245; A Pirrello and M Eliantonio, 'A Board of Appeals for Frontex: Panacea for Violations or Another Patch in the Incomplete System of Accountability?' (2024) ELR 51

[99] *Hamoudi v Frontex* cit.

[100] European Parliament, LIBE Committee, 'Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations', July 2021; see also 'Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea', Final Report of the Frontex Management Board Working Group (1 March 2021) frontex.europea.eu (hereinafter FRaLO Final Report). For additional reports on Frontex, see: European Court of Auditors, Special Report No. 8/2021 'Frontex's support to external border management: not sufficiently effective to date'.

[101] FragDenStaat, 'OLAF, Final Report on Frontex' fragdenstaat.de, leaked in October 2022. Frontex, *Management Board conclusions from the extraordinary MB meeting of 28-29 April 2022* frontex.europa.eu.

Even if the facts of the case might not be related with the operations covered by the OLAF report, just to make one example, it would be expected that the European judges would have devoted attention to this case.

Yet, the GC decided even by order, without holding a hearing with the applicants.[102] It recalled that the core elements of the non-contractual liability are the unlawful conduct, the damage, and the causal link between conduct and damage.

The GC decided that the applicants did not manage to prove, to the standard requested, the damage suffered. The order is mainly focused on explaining that, first, the written statement originated only from the applicant; second, the identity of the applicant is not identifiable from the photographs and videos, and third, that the videos of the Bellingcat report are not sufficiently specific on the events of the case.[103] In other words, much of the decision is devoted to explaining that the Court did not believe in the genuine nature and the quality of the application. Instead of facing the challenges in law, the Court decided to dismantle the facts, by raising the burden of proof to what looks like an exceptionally high standard. Based on this, could another application be more successful, or will it face similar challenges?

Other challenges might arise in the determination of the quantification of the damage requested, in the causal link between Frontex conduct and the damage. In other words, the GC is sending signals to applicants showing that the road toward the recognition of damages concerning the activities of Frontex is tortuous and bumpy. Many obstacles must be faced, and every case is giving the GC the chance to display its arsenal of weapons to dismiss the applications of individuals.

In reality, the issue of shared responsibility is not foreign to EU law. First of all, the current drafting of the Frontex Regulation embeds in art. 7 the shared responsibility of Agency and Member States' authorities for the implementation of European Integrated Border Management (EIBM), including return operations, the management of national sections of the external borders, and the cooperation with third countries.[104] Though the boundaries of the responsibilities between authorities are not clear, can we simply escape from any form of responsibility because a formal decision is not taken by Frontex?

Furthermore, in an appeal concerning Europol, the case *Kočner*,[105] Advocate General Rantos has argued that the joint and several liability of Europol and states' authorities can occur in a case implying liability for joint data processing concerning a leak of data to the media. The decision of the Court has confirmed the interpretation that the Europol

[102] *Hamoudi v Frontex* cit. para. 14.

[103] *Ibid.* paras 42-48.

[104] Such a provision was already laid down in art. 5 of the 2016 EBCG Regulation, according to which Member States ensure the management of their external borders in their own interest and in the common interest of all Member States while the agency supports the application of Union measures relating to the management of the external borders.

[105] Case C-755/21 P *Kočner v EUROPOL* ECLI:EU:C:2023:481.

Regulation has created "in accordance with the intention of the EU legislature to favour an individual who has suffered damage, a set of rules under which Europol and the Member State concerned are jointly and severally liable for the damage suffered as a result of such processing".[106]

Furthermore, in the same case, the CJEU held that those provisions "must be interpreted as not requiring the individual concerned who has established that unlawful data processing has occurred [...] to identify which of the entities involved in that cooperation undertook the conduct constituting that unlawful processing".[107]

Though the *Kočner* case refers to the Europol Regulation, the statement in principle should guide a reflection on Frontex, and if the case, move the legislator to better clarify the legal framework governing joint and several liability for Frontex' activities.

More in general, this case shows that joint and shared liability can be a solution that grants that agencies activities do not remain out of control.

d) Results of the case analysis and discussion

The case law concerning Frontex activities in border management and returns displays an attitude of self-restraint of the General Court; to date, there are no decisions of the Court of Justice. In the several cases considered, the GC chose to self-restrain in its task of judicial control on the activities of the Agency. While it must be acknowledged and observed that some of the cases have been dismissed on the basis of a consolidated jurisprudence, other cases could have been seized by the GC as an opportunity to address the substance of the right to judicial remedy in the case of the activities of EU agencies. Instead, this path has not been taken.

This is problematic for several reasons: first, the fact that agencies' tasks do entail operational activities is a peculiarity of agencies operating in the context of Justice and Home Affairs (JHA), and this represents a crucial difference in comparison to more traditional regulatory agencies, that operate through acts of various types and nature, be they formal and informal, or binding and non-binding. However, this peculiarity cannot be a reason to elude and evade the necessary judicial control of their activities.

Secondly, reforms have shaped the evolution of Frontex and other JHA agencies far beyond the mere function of coordination and support, and this is widely acknowledged in the legal framework: as recalled above, art. 7 of the Frontex Regulation provides for shared responsibility of the correct implementation of the EIBM. At the same time, the literature explains this evolution and discusses the emergence of forms of shared administration.[108] Therefore, the choice of the GC to focus on the formal element of the final

[106] *Ibid*. para. 62.

[107] *Ibid*. para. 80.

[108] *Ex multis*, D Fernández-Rojo, *EU migration agencies* cit. and M Scholten, 'EU Enforcement Agencies', in M Scholten (ed) *Research Handbook on the Enforcement of EU Law* (Edward Elgar Publishing 2023) 152; see also M Scholten and A Brenninkmeijer (eds), *Controlling EU Agencies: The Rule of Law in a Multi-Jurisdictional Legal Order* (Edward Elgar Publishing 2020).

decision does imply that a significant share of agencies' "work" remains out of control and is deprived of any form of judicial scrutiny.

Third, the CJEU should take an active role in this context, also to avoid national judges stepping in on these matters. It is of paramount importance that the CJEU clarifies which is the natural judge for the activities of European agencies, especially in the context of multi-actor operations, if the domestic judge or the European one, and if so, which might be the channels to provide applications with effective remedies.

In assessing the case law in matters concerning the external borders – including the decisions on the EU-Turkey deal – there are reasons to doubt that the CJEU deploys the same parameters of legality to assess more "internal" policies.[109] This is worth reflecting on for several reasons. If, on the one side, the management of external borders is a matter of shared competences between EU and Member States, the increased presence of the EU in the territories of the Member States cannot take place to the disadvantage of the rule of law. Rule of law requires effective judicial scrutiny, and this finds an expression in the right to an effective legal remedy. Therefore, the mandate of EU migration agencies must be underpinned by a solid legal background, anchored in the respect of EU primary law. Lacking this, it will be hard to convince states to do the same, and the threat resulting from this approach is affecting the overall idea of the legality of the area of freedom, security and justice (AFSJ). The external borders of the EU cannot be considered as no men's land: the respect of the legal framework on fundamental rights should be guaranteed; undermining the coherence of the legal order goes to the detriment of the same integration.

VI. Conclusions: the difficult emergence of a rule of law for EU agencies, between self-restraint and fading European constitutionalism

This *Article* discusses the constitutional embedding of *agencification*, namely the extent to which it respects the rule of law, recognising the principle of judicial scrutiny as a corollary of the right to effective remedy enshrined in the Charter.

The Treaties were designed having "another world" in mind, *i.e.*, the EU as a regulatory authority and not as an administrative entity. As recalled by Schütze, the original design of the EEC was one of executive federalism in the German style.[110] However, the Treaties are the expression of the theory of incomplete contracting, as argued by Martin

[109] P Garcia Andrade, 'The External Dimension of the EU Immigration and Asylum Policies Before the Court of Justice' cit. Similarly, see V Moreno-Lax, 'EU Constitutional Dismantling through Strategic Informalisation: Soft Readmission Governance as Concerted Dis-integration', in the special issue edited by L Marin, M Gkliati and S Nicolosi (eds), *The External Borders of the European Union: Between a Rule of Law Crisis, and Accountability Gaps* (2024) ELJ.

[110] R Schütze, 'From Rome to Lisbon: "Executive Federalism" in the (New) European Union' (2010) CMLRev 1385.

Shapiro.[111] The CJEU has been entrusted with the power and the instruments to fill the gaps left by the system of the Treaties. In this context, the CJEU has played a proactive role in the construction of a process of legal integration based on the internal market.[112] This action has contributed to the embedding of the new legal order into a constitutional framework, characterised by primacy and autonomy.[113]

The process of constitutionalisation, pressed and accepted by domestic courts, had the merit of securing the emergence of an EU rule of law of a constitutional character. The Charter has been integrated into the case law of the CJEU. One of the core tenets of the rule of law is judicial scrutiny which is embedded in the fundamental right to an effective remedy.

This *Article* has elaborated on the idea of the rule of law from the perspective of the activities of agencies. Agencies must undergo judicial scrutiny, among other forms of scrutiny and oversight mechanisms. Transposing this constitutional narrative to agencies – an effort carried out in this *Article* – entails that EU Treaties have set up a complete system of remedies to ensure the protection of the legal positions of individuals.[114] The gaps and shortcomings of this legal order should be then integrated or amended by the same actors that have contributed to this constitutionalisation. These issues are even more urgent because agencies have grown, Frontex in particular, at an exponential level.

The recent rule of law backsliding, and the answers adopted by EU institutions to face it, also witnesses the core relationship between rule of law and the right to effective legal remedies. In this context, where the primacy of EU law is a legal good to be secured, the CJEU has worn the hat of a constitutional court: the Hungarian case provides an example.[115] However, this statement cannot be generalised: quite in contrast, in the external dimension of migration policies, supranational institutions display a different approach.[116] The case law of CJEU is very oriented toward self-restraint and deference to EU institutions and Member States, especially in litigation where individuals raise a challenge. The judgments on the EU-Turkey deal are an expression of a total deference toward political powers, also in a context where the issues have a constitutional relevance, touching upon the delimitation of competences between EU and Member States, the inter-institutional balance, and the protection of fundamental rights.

[111] M Shapiro, 'The European Court of Justice', in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 1999) 321; A Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004).

[112] E Stein, 'Lawyers, judges, and the making of a transnational constitution' cit.

[113] JHH Weiler, 'The Transformation of Europe' cit.; D Halberstam, 'Joseph Weiler, Eric Stein, and the Transformation of Constitutional Law' in M Poiares Maduro and M Wind (eds), *The Transformation of Europe: Twenty-Five Years On* (Cambridge University Press 2017) 219.

[114] M Fink (ed) *Redressing Fundamental Rights Violations by the EU* cit.

[115] L Marin, 'La Corte di Giustizia riporta le "zone di transito" ungheresi dentro il perimetro del diritto (Europeo) e dei diritti (fondamentali)' cit.

[116] V Moreno-Lax, 'EU Constitutional Dismantling through Strategic Informalisation: Soft Readmission Governance as Concerted Dis-integration' cit.

It is here suggested that the CJEU has had and still has the power to fill the gaps and adjust the system of remedies to the emergence of new situations, considering the evolved morphology of the EU administrative layer.

It is therefore important that European courts face their role in underpinning the legitimacy of the activities of the agencies, with effective judicial scrutiny against the acts and against the activities of the agencies. The case law on Frontex, from access to documents and transparency, to the latest action for damages, is displaying the same attitude of self-restraint. However, this treatment is not justified. If self-restraint toward political issues can be understood, the task of a court – like the GC – should nevertheless be to scrutinise that administrative powers are in full compliance of EU rules and principles. The emergence of an EU administrative layer should respect its normative implications. In full harmony with the constitutional constraints of delegation, as developed by the CJEU in its case law *Meroni*, *Romano*, and *Short-Selling*,[117] delegation of powers to agencies requires a system of adequate and effective accountability mechanisms and judicial oversight, aimed at scrutinising the acts and activities of the agencies.[118] This is even more significant for agencies of the AFSJ increasingly concerned with enforcement powers, entailing the exercise of operational activities, in contrast to traditional administrative activities taking shape in administrative decisions.[119] All the scrutiny exercised by civil society on the activities of EU agencies in migration, and the evidence brought to the fore, raise severe questions on the self-restraint position of European judges.

Furthermore, EU law requires integral implementation and enforcement by the Member States: the same applies to agencies, which must integrate into their activities and policies the respect to the numerous fundamental rights provisions that govern their functioning. An approach of "two weights and two measures" to the implementation of the legal framework undermines the respect of EU law and the same credibility of supranational institutions.

To conclude, the emergence of many declinations of the rule of law in the context of migration goes to the detriment of the implementation of EU law and the credibility of its main supranational institutions. Yet, these should recognise the importance of underpinning the expansion of the agencies' mandate into a more robust constitutional narrative, based on a coherent rule of law doctrine.

[117] M Simoncini, '"Live and let die?" The Meroni doctrine in 2023' cit.

[118] See the contribution of Volpato to the debate on the delegation of EU decision-making powers to agencies: A Volpato, *Delegation of Powers in the EU Legal System* (Routledge 2022).

[119] M Scholten, 'On EU agencies with enforcement powers' (5 October 2023) EU Law Live eulawlive.com.