



ARTICLES

THE EU'S SHIFTING BORDERS RECONSIDERED: EXTERNALISATION, CONSTITUTIONALISATION, AND ADMINISTRATIVE INTEGRATION

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THE NEXT PHASE OF THE EUROPEAN BORDER AND COAST GUARD: RESPONSIBILITY FOR RETURNS AND PUSH-BACKS IN HUNGARY AND GREECE

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ABSTRACT: This *Article* deals with the potential responsibility of Frontex, the European Border and Coast Guard Agency, for human rights violations, through the case studies of the Greek-Turkish and the Hungarian-Serbian border, where systematic human rights violations have been well-reported. Such violations are studied in the context of the activity of Frontex in border surveillance and return operations in Hungary since 2016, and the Rapid Border Intervention launched in Greece in 2020. This *Article* looks, in particular, into the indirect responsibility of the agency through assisting the host state in the commission of a violation, and into its direct responsibility due to exercising a degree of effective control over seconded agents. What is more, it notes the shift after the 2019 amendment of the EBCG Regulation from complicity, as the main form of responsibility for Frontex, to direct responsibility. This shift is brought by the expansion of the powers and competences of the agency, especially with respect to the standing corps of 10.000 border guards, including the agency's own statutory staff, increased use of own large assets (aircrafts, vessels), and an increased role in return operations. The author further reflects upon the role of EU agencies in a model of "mixed government", in insur-

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ing the balance between supranationalisation and intergovernmentalism, and amongst the interests of EU citizens, Member States, and European integration. The conclusion is drawn that, no such balance can be struck before human rights, amongst the core EU values, are properly upheld, and before suitable accountability safeguards are set.

KEYWORDS: border – human rights – migration – Frontex – refugee – *refoulement*.

I. INTRODUCTION

Securing borders, intensifying returns, and enhancing the powers of the European Union (EU) agencies, characterise the current and future course of EU migration management. Frontex, the European Border and Coast Guard Agency (EBCG), is the leading actor in the enforcement of EU border policies across the common Schengen borders and beyond. With its new Regulation of 2019,¹ Frontex moves to its next phase and comes closer than ever to the original vision of the Commission for a fully-fledged European Border Police Corps. Interim, the agency is for the first time under heavy scrutiny from multiple angles, including the European Parliament and the European Anti-Fraud Office for its alleged involvement in human rights violations.²

This chapter critically discusses the human rights sensitivities of the agency's work, focusing on the case studies of Hungary and Greece. The human rights footprint of the agency in the two countries has been a cause for serious concern. This *Article* deals in particular with the role of Frontex in surveillance and return operations in Greece and Hungary and the potential implications for the responsibility of the agency for human rights violations. This discussion is seen in the light of the new operational and organizational competences afforded to the agency by the 2019 amendment of its Regulation, in particular the establishment of a standing corps of 10.000 border guards and a major enhancement in return competences.

The agency's responsibility is dealt with through the applicable principles of responsibility under international law, which in the legal pluralist environment within the EU operates, can prove to be a useful source of inspiration and a valuable guide in the case of Frontex for scholars and courts. Such cross-fertilisation amongst different co-existing legal orders is vital for the protection of human rights and the rule of law.

¹ 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.

² For an overview of all the relevant investigations, refer to I Aversa and M Gkliati, 'Frontex Investigations: What Changes in the EU Border Agency's Accountability?' (30 March 2021) Statewatch Frontex Observatory www.statewatch.org.

II. AGENCIES AND AGENCIFICATION

Frontex is embedded in the more widespread phenomenon of agencification within EU law. Agencies constitute part and parcel of the EU institutional structure³ and their creation is considered as one of the most important institutional developments.⁴ They represent the development of delegation of powers at the EU level starting from the delegation of rulemaking from the Council to the Commission already in the Treaty of Rome.⁵ In the early 1960s, the making of secondary rules was entrusted to management and regulatory committees giving birth to what has been named “comitology” a regime which allowed for a more intergovernmental approach. The Lisbon Treaty reformed the delegation regime, as the non-inclusion of the committees in art. 290 TFEU suggests that they would cease to exist. In several cases, new agencies took the place of Comitology committees.⁶ All in all, their character and role has been taken over by EU agencies.

Agencies play an increasingly important role in EU administration,⁷ while their number, powers, staff and budget continue to grow, especially since the 1990s.⁸ At the time of writing there are 41 EU agencies.⁹

Their *raison d'être* has been studied extensively in the EU agency literature. According to Majone, the creation of agencies fits comfortably in the model of “mixed government”, a *sui generis* constitutional model that is “characterised by the presence in the legislature of the territorial rulers and of the “estates” representing the main social and political interests in the polity”.¹⁰ In the context of the EU, this model aims at the bal-

³ More generally on EU agencies see P Craig, *EU Administrative Law* (Oxford University Press 2012) 140 ff.; M Scholten, *The Political Accountability of EU and US Independent Regulatory Agencies* (Brill Nijhoff 2014); M Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press 2016).

⁴ M Chamon, *EU Agencies* cit. 47.

⁵ Art. 155 TEU.

⁶ P Craig, *EU Administrative Law* cit. 126 ff.

⁷ See the overview provided at www.europa.eu.

⁸ For a picture of the quantitative dimension of agencification see M Chamon, *EU Agencies* cit.

⁹ European Court of Auditors, Annual Report 2018/C-434/01 Notices from European Union Institutions, Bodies, Offices and Agencies 5.

¹⁰ G Majone, ‘Delegation of Regulatory Powers in a Mixed Polity’ (2002) ELJ 320. The term is broader than the related terms of “shared administration” and “joint implementation” also used in the literature, which can be seen as forms of mixed government. “Shared administration” is used in the EU context to describe a desideratum, of a sophisticated system of controls that allows for the exercise of shared tasks. Such a system would connect various types of controls (political, judicial, etc.) belonging to different jurisdictions (EU, national). M Scholten, ‘Shared Tasks, but Separated Controls: Building the System of Control for Shared Administration in an EU Multi-Jurisdictional Setting’ (2019) *European Journal of Risk Regulation*. “Joint implementation” is mainly used in the context of environmental governance reflecting a system of intergovernmental collaboration where goals can be achieved by agents or funding of one country in another country. A Michaelowa, ‘Joint Implementation – the Baseline Issue: Economic and Political Aspects’ (1998) *Global Environmental Change*.

ance between supranationalism and intergovernmentalism, as represented by the core principles of institutional balance, institutional autonomy and loyal cooperation among European institutions and Member States. In particular, agencies fulfil the purpose of balancing institutional autonomy and institutional cooperation in a way that all interests, those of the European people, the states, and that of European integration would be balanced.¹¹ Majone sees them as essential for the professionalisation of governance in advanced economies, while they would strengthen the legitimacy of the Union.¹²

Other writers have opened the discussion on whether the creation of agencies has indeed proven an added value for the management of EU policies,¹³ often from a sharply critical perspective. According to Shapiro, the creation of agencies was a way to circumvent the limitations to further political integration, with essentially supranational bodies, over which the Member States would still maintain a level of control. Shapiro also emphasizes the power of apparently objective “technical truths” that trump politics.¹⁴ These thoughts are particularly relevant to Frontex when considering the difficulties in establishing the responsibility of the agency for wrongdoings *vis-à-vis* the member state.

The process of agencification has not left the Area of Freedom Security and Justice (AFSJ) untouched. On the contrary, the AFSJ agencies, European Asylum Support Office (EASO), Europol and Frontex, are empowered with diverse activities that keep expanding both via the legislative route and through dynamic development.¹⁵ In fact their powers are beyond regulatory and have become operational, while the agencies enjoy a considerable level of autonomy that is often not balanced against an adequate level of protection,¹⁶ attendance to the rule of law,¹⁷ and accountability safeguards.¹⁸ The EU

¹¹ G Majone, ‘Delegation of Regulatory Powers in a Mixed Polity’ cit. 321 ff.

¹² G Majone, *Regulating Europe* (Routledge 1996).

¹³ A Schout, ‘Agencies and Inspection Powers: The Case of EASA as New or More of the Same?’ in E Vos (ed.), *European Risk Governance: Its Science, its Inclusiveness and its Effectiveness* (Mannheim University Press 2008); A Schout, ‘Framework for Assessing the Added Value of an EU Agency’ (2011) *Journal of Public Policy* 363 ff.

¹⁴ M Shapiro, ‘The Problems of Independent Agencies in the United States and the European Union’ (1997) *Journal of European Public Policy* 276 ff.

¹⁵ JS Vara, ‘The EU’s Agencies: Ever More Important for the Governance of the Area of Freedom, Security and Justice’ in A R Servant and F Trauner (eds), *The Routledge Handbook of Justice and Home Affairs Research* (Routledge 2019) 445-448.

¹⁶ JS Vara and SR Sánchez-Tabernero, ‘In Deep Water: Towards a Greater Commitment for Human Rights in Sea Operations Coordinated by Frontex?’ (2016) *European Journal of Migration and Law* 81-87.

¹⁷ See among others: L den Hertog, *The Rule of Law in the External Dimension of EU Migration and Asylum Policy: Organizational Dynamics Between Legitimation and Constraint* (Wolf Legal Publishers 2014).

¹⁸ D Fernández-Rojo, *EU Migration Agencies: The Operation and Cooperation of FRONTEX, EASO and EUROPOL* (Edward Elgar Publishing 2021); S Carrera, L den Hertog and J Parkin, ‘The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability versus Autonomy?’ (2013) *EJML* 344-345; M Busuioc, *European Agencies Law and Practices of Accountability* (Oxford University Press 2013); M Busuioc, C Curtin and M Groenleer, ‘Agency Growth Between Autonomy and Accountability: The European Policy Office as a “Living Institution”’ (2011) *Journal of European Public Policy* 848-867.

Pact of Migration and Asylum,¹⁹ also fails to address these gaps as it seems to adopt “an ambivalent approach towards administrative integration”, recognizing in part the AFSJ agencies’ increased role, but without fully taking into account their new powers, which can lead to further gaps in accountability.²⁰

Frontex belongs to the third wave of agencies which were created after 2000. Exceptionally and similar to other agencies that came into existence in that period, such as Europol, Frontex was created by Council actions, rather than by Commission initiative. The agency’s ever more important role in the field of EU law has drawn the interest of several authors that have amongst others dealt with the topic from the point of view of EU governance²¹ and the politics of institutionalisation.²² Frontex was initially established with the hybrid character of providing technical assistance to Member States in the implementation of integrated border management and of coordinating joint surveillance operations with the Member States.²³ With the consecutive developments of its mandate, the agency is adopting a more centralised role,²⁴ which is particularly relevant in terms of its potential responsibility in light of human rights violations.

III. ENGAGEMENT IN GREECE IN LIGHT OF PUSH BACKS AND SUSPENSION OF ASYLUM LAW

The continuing presence of Frontex border guard teams in the Evros region of Northern Greece, since the first Rapid Border Intervention in 2010, has been questioned often in terms of its human rights compliance, including accusations of involvement of members of the teams in push backs.²⁵

¹⁹ Communication COM(2020) 609 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 23 September 2020 on a New Pact on Migration and Asylum.

²⁰ E Tsourdi, ‘The New Pact and EU Agencies: An Ambivalent Approach towards Administrative Integration’ (2020) EU Immigration and Asylum Law and Policy eumigrationlawblog.eu.

²¹ S Wolff and A Schout, ‘Frontex as Agency: More of the Same?’ (2013) Perspectives on European Politics and Society 305-324.

²² S Carrera, ‘The EU Border Management Strategy: FRONTEX and the Challenges of Irregular Immigration in the Canary Islands’ (CEPS Working Document n. 26/2007); J Pollak and P Slominski, ‘Experimentalist but Not Accountable Governance? The Role of Frontex in Managing the EU’s External Borders’ (2009) West European Politics 904-924.

²³ J Rijpma, ‘Hybrid Agencification in the Area of Freedom, Security and Justice and its Inherent Tensions: The Case of Frontex’ in M Busuioc, M Groenleer and J Trondal (eds), *The Agency Phenomenon in the European Union: Emergence, Institutionalisation and Everyday Decision-making* (Manchester University Press 2014).

²⁴ JS Vara, ‘The European Border and Coast Guard in the new Regulation: Towards Centralization in Border Management’ in S Carrera, D Curtin and A Geddes (eds), *20 Year Anniversary of the Tampere Programme: Europeanisation Dynamics of the Area of Freedom, Security and Justice* (European University Institute 2020).

²⁵ Human Rights Watch, *Stuck in a Revolving Door: Iraqis and Other Asylum Seekers and Migrants at the Greece/Turkey Entrance to the European Union* (2008) www.hrw.org; Amnesty International, *Greece: The Dublin II Trap: Transfers of Asylum-Seekers to Greece* (2010) www.amnesty.org.

Issues regarding the involvement and the possible responsibility of Frontex for human rights violations became all the more relevant in March 2020 following the opening of the border by the Turkish government that allowed large numbers of people to cross simultaneously. According to the Executive Director of Frontex (ED), Fabrice Leggeri, when the agency was first contacted by the Greek officials to request an intervention, there were 15.000/20.000 people waiting at the land borders in Evros, while around 2.000 people crossed by sea during those first days.²⁶ The numbers dropped considerably in the next days, while many had taken the way back to Istanbul.²⁷

The Greek government responded with mass push backs, the use of excessive widespread violence, including blank bullets and live ammunition, and unlawful detention.²⁸ Reports of push backs continued also after the events at the borders ended, this time involving the transport of people from camps and detention facilities in mainland Greece.²⁹ Moreover, a legislative amendment passed suspending the right to asylum.³⁰ In particular, the new Greek law suspended the registration of asylum claims for the month of March, and stipulated that whoever crossed the Greek border without the appropriate documentation in that period would be immediately returned. This way, Greece introduced push-backs in its formal legislation.

The request of the Greek government from requested emergency assistance, including a Rapid Border Intervention in the area was immediately approved,³¹ and Frontex deployed 100 additional border guards from 22 Member States along with technical equipment (two boats, seven aircrafts, one helicopter, four vehicles equipped with

²⁶ Frontex, 'Statement by the Frontex Management Board' (3 March 2020) europa.eu.

²⁷ G Souliotis, 'Έτσι θα ενισχύσει την Ελλάδα ο Frontex' (2020) www.kathimerini.gr.

²⁸ Human Rights Watch, *Greece: Violence Against Asylum Seekers at Border. Detained, Assaulted, Stripped, Summarily Deported* www.hrw.org; M Stevis-Gridneff, P Kingsley, H Willis, S Almkhtar and M Browne, "'We Are Like Animals": Inside Greece's Secret Site for Migrants' (2020) New York Times www.nytimes.com; J Fisher, 'Migrants Clash with Greek Police at the Turkish Border' (2020) BBC News www.bbc.com; N Keady-Tabbal and I Mann, 'Tents at Sea: How Greek Officials Use Rescue Equipment for Illegal Deportations' (22 May 2020) Just Security www.justsecurity.org.

²⁹ Press Release, *Greece: Documented Pushbacks from Centres on the Greek Mainland* (2020) www.statewatch.org; Border Violence Monitoring Network, *Special Report: Covid-19 and Border Violence along the Balkan Route* (2020) www.borderviolence.eu; R Abdulrahim, 'Greek Police Are Rounding Up Asylum Seekers and Forcing Them Into Turkey, Migrants Say' (20 May 2020) The Wall Street Journal www.wsj.com; F Schmitz, A Kalaitzi and B Karakaş, 'Migrants Accuse Greece of Forced Deportations' (21 May 2020) Deutsche Welle www.dw.com.

³⁰ Greek Government Gazette, 'ΦΕΚ Α'45/2020: Αναστολή της υποβολής αιτήσεων χορήγησης ασύλου' (2020) LawNet lawnet.gr; Refugee Support Aegean, 'Analysis: Rights Denied during Greek Asylum Procedure Suspension' (April 2020) rsaegean.org.

³¹ Tovima, *Rapid Response from FRONTEX to Greek Request of Aid to Guard Eastern Borders* (March 2020) tovima.gr; Frontex Press Release, 'Frontex to Launch Rapid Border Intervention at Greece's External Borders' (2 March 2020) europa.eu; Frontex Press Release, 'Statement by the Frontex Management Board' (3 March 2020) europa.eu.

thermal cameras).³² At the time, 500 members of the EBCG teams had already been active in Greece in the context of the ongoing operation Poseidon in the Aegean sea.³³ In May the operation was extended to July 2020.³⁴

In October 2020 the German news magazine, *Der Spiegel*, published evidence of a push back by Greek border guards, witnessed by a Frontex aircraft, which flew twice over the location of the migrant raft. The agency did not intervene. The journalists provide evidence that supports the complicity of Frontex to six push-backs by the Greek authorities between April and August.³⁵ The agency responded to the mounting evidence of systematic violations before March 2020 by asking the Greek authorities for information and a visit in the area of the Fundamental Rights Officer (FRO) in January 2019.³⁶ Following her visit, she explicitly recommended the suspension of operations in Evros.³⁷

A low number of Serious Incidents Reports, all including the security forces of the host state, has been filed by members of the border guard teams in the context of the agency's monitoring mechanism. The investigations into them attributed no wrongdoing,³⁸ and serious concerns have been expressed as to the effectiveness of the mechanism.³⁹

As the result of public attention due to the media inquiries several investigations have been opened related to the complicity of the agency in human rights violations in the Aegean. Most importantly, a special Scrutiny Group on Frontex has been established at the European Parliament to conduct an in-depth enquiry into the allegations.⁴⁰ The European Anti-Fraud Office (OLAF) has also launched an investigation into alleged misconduct and allegations of migrant pushbacks.⁴¹

In justification of its response, the Greek government has evoked art. 78(3) TFEU, which provides for adoption of provisional measures in emergency migratory situations at the EU's external borders, characterised by a sudden inflow of third country nationals. The requirements, however, of this article are not met in this case. Such provisional

³² G Souliotis, 'Έτσι θα ενισχύσει την Ελλάδα ο Frontex' cit.; Frontex, 'Frontex Launches Rapid Border Intervention on Greek Land Border' (13 March 2020) europa.eu.

³³ G Souliotis, 'Έτσι θα ενισχύσει την Ελλάδα ο Frontex' cit.

³⁴ As announced by Frontex on its Twitter account. See Press release published on twitter.com.

³⁵ G Christides and others, 'EU Border Agency Frontex Complicit in Greek Refugee Pushback Campaign' (2020) *Der Spiegel* www.spiegel.de.

³⁶ K Karamanidou and B Kasperek, 'Consequences and Responses Fundamental Rights, Accountability and Transparency in European Governance of Migration: The Case of the European Border and Coast Guard Agency' (Working Papers 2020) *Global Migration* 62.

³⁷ *Ibid.* 65.

³⁸ *Ibid.*

³⁹ G Christides and others, 'EU Border Agency Frontex Complicit in Greek Refugee Pushback Campaign' cit.

⁴⁰ Multimedia Centre of European Parliament, 'Committee on Civil Liberties, Justice and Home Affairs' (04 March 2021) multimedia.europarl.europa.eu.

⁴¹ G Christides and others, 'Scandals Plunge Europe's Border Agency into Turmoil' (05 February 2021) *Der Spiegel* www.spiegel.de.

measures are to be taken by the EU Council upon the proposal of the Commission and Consultation with the European Parliament. In any case, art. 78(3) TFEU may not suspend the right to asylum or the principle of *non-refoulement*, which is part of customary international law.

Moreover, the Greek law suspending the registration of applications violates refugee and human rights law, which provide no such exception.⁴² In light of this unique situation, UN High Commissioner for Refugees (UNHCR) has issued a statement highlighting that “neither the 1951 Convention Relating to the Status of Refugees nor EU refugee law provides any legal basis for the suspension of the reception of asylum applications”.⁴³ This manifest breach of international and European law refugee and human rights law constituted the environment within which the Frontex intervention took place. Thus, this intervention could not possibly be in accordance with fundamental rights and EU asylum law and is therefore not supported by the agency’s mandate. The legality of Frontex intervention at the Greek-Turkish border has been questioned broadly.⁴⁴

With respect to the push-backs at sea and land, the rights triggered could reach from *non-refoulement*, collective expulsion, seeking asylum and effective legal protection, violence engaging arts 2, 3, and 5 ECHR, or possibly the positive obligation to render assistance to a boat in distress. Moreover, the serious violations during this operation are considered to be systematic. Finally, plans of the Greek governments and the agency have been communicated regarding the returns of those that did manage to cross the borders during that period.⁴⁵ Any future Frontex-coordinated return operation will also face a lack of legal basis if the protection needs of the returnees are not examined.

IV. INVOLVEMENT AT THE HUNGARIAN-SERBIAN BORDER

Another area of concern regarding the involvement of Frontex is the Hungarian-Serbian border. Under legislation introduced in 2015 in Hungary, all applicants that have previously been in a country that Hungary regards safe, including Serbia, are automatically rejected without applying the safeguards required under EU law.⁴⁶ As a result, the Fundamental Right Officer (FRO) reported in 2016 collective expulsions to Serbia, and summary dismissals of asylum claims at transit areas at border crossing points.⁴⁷

⁴² LM Monella, ‘Frontex Operation in Greece “Lacks Legal Basis” after Greece Suspends Asylum Law’ (2020) Euronews www.euronews.com.

⁴³ UNHCR, *Statement on the Situation at the Turkey-EU Border* www.unhcr.org.

⁴⁴ LM Monella, ‘Frontex Operation in Greece’ cit.

⁴⁵ G Souliotis, ‘Έτσι θα ενισχύσει την Ελλάδα ο Frontex’ cit.

⁴⁶ Asylum Information Database, *Country Report: Hungary* (2015) asylumineurope.org.

⁴⁷ Frontex Observations, *Situation at the Hungarian-Serbian Border* (2016) www.asktheeu.org.

That same year the European Commission initiated infringement proceedings against Hungary.⁴⁸ The Court ruled upon the Commission's request in December 2020.⁴⁹ It found that Hungary was in violation of EU rules on access to international protection, as it required applicants to lodge their asylum claim in person exclusively in the transit zones of Röszke and Tompa at the Serbian-Hungarian border. At the same time, access to these transit zones was restricted to only a few people per day, creating, thus, a waiting period of several months. Moreover, the Court found that the systematic detention in the transit zones to which applicants were subjected, constitutes unjustified restriction of liberty, as it failed to observe the conditions and guarantees provided by EU law.⁵⁰ Hungary was also found in violation of EU law for forcibly moving third-country nationals to a strip of land between the Hungarian border fence and the Serbian-Hungarian border with no infrastructure without observing the necessary procedural guarantees. Finally, the Court found Hungary in infringement of EU law for conditioning the right of applicants to remain in the country pending the examination of their asylum claim upon requirements contrary to EU law.

The Commission has started several new infringement proceedings against Hungary regarding its asylum legislation,⁵¹ criminalisation of assistance to asylum seekers and non-provision of food in transit zones,⁵² and restrictions to the asylum procedures pursuant to Covid-19.⁵³

Already since 2016, the Frontex Consultative Forum on Fundamental Rights (CF) and the FRO had repeatedly suggested that the agency withdrew from return operations in Hungary because of the systematic nature of violations of human rights and asylum law.⁵⁴ Their recommendations were rejected by the ED in February 2017 upon recom-

⁴⁸ European Commission, Press release IP/15/6228 *Commission Opens Infringement Procedure against Hungary concerning its Asylum Law* (10 December 2015).

⁴⁹ Case C-808/18 *Commission v Hungary* ECLI:EU:C:2020:1029.

⁵⁰ In an earlier judgment the CJEU had already ruled that the placing of returnees in the Röszke transit zone at the Serbian-Hungarian border must be classified as "detention". Ruling upon the preliminary reference request, the Court held detention there must comply with the requirements of EU law, especially concerning the length of detention, the material reception conditions and the subsection of the detention decision to judicial review. Joined Cases C-924/19 PPU and C-925/19 PPU *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* ECLI:EU:C:2020:367.

⁵¹ European Commission, Press Release IP/18/4522 *Migration and Asylum: Commission Takes Further Steps in Infringement Procedures Against Hungary* (19 July 2018).

⁵² European Commission, Press Release IP/19/4260 *Commission Takes Hungary to Court for Criminalising Activities in Support of Asylum Seekers and Opens New Infringement for Non-Provision of Food in Transit Zones* (25 July 2019).

⁵³ European Commission, Press Release IF/20/1687 *October Infringements Package: Key Decisions* (30 October 2020).

⁵⁴ Frontex CF, Recommendation by the Consultative Forum to the Executive Director and Management Board of the European Border and Coast Guard Agency (2016) www.balkaninsight.com; Frontex, Frontex Observation, field visit to Hungary 13-15 March 2017 www.asktheeu.org; Frontex CF, Fourth Annual Report (2016) frontex.europa.eu; Frontex, 13th Meeting (2017) www.asktheeu.org.

mendation of the European Commission to continue the operations, supporting that Frontex can use its presence to contribute to the improvement of human rights compliance through the monitoring of the situation.⁵⁵ However, the hopes of the Commission did not materialise. Following that, the ED stated that reports of human rights violations were “not confirmed”, referring to the low number of Serious Incidents Reports submitted and the conclusions of the Hungarian authorities, which found no violation.⁵⁶ Moreover, the violations have continued, while reports also implicate a Frontex Finnish dog team.⁵⁷ The number of officers has been reduced, but return and surveillance operations are still being conducted, despite the ongoing infringement proceedings.⁵⁸

In May 2019, the UNHCR raised concerns regarding the role of Frontex in the return from Hungary to Serbia of two asylum-seeking Afghan families.⁵⁹ The families were escorted to the border with Serbia and were given the choice of entering Serbia or being returned to Afghanistan on a Frontex flight.

UNHCR noted that this type of rejection constitutes common practice in Hungary, and at the time of their statement 40 individuals, including Iraqi and Iranian nationals, were held in the pre-removal area of the transit zone and threatened with being returned to their country of origin or coerced to re-enter Serbia. When migrants are not sent back to Serbia, they are being returned in Frontex-coordinated return operations. Empirical research conducted by Statewatch shows that five Frontex-coordinated flights have been conducted from Hungary to Afghanistan deporting 31 persons in the period 2016-2018.⁶⁰ UNHCR characterised the incident of the return of the Afghan families “deeply shocking and a flagrant violation of international and EU law” and urged Frontex “to refrain from supporting Hungary in the enforcement of return decisions which are not in line with International and EU law”.⁶¹ The agency finally suspended its operations in Hungary on 27 January 2021 only after the infringement of Hungary by the Court of Justice of the European Union (CJEU) and under the pressure of the open investigations for its complicity in fundamental rights violations in Greece.⁶²

⁵⁵ European Commission, *Situation at Hungary's Southern Border* (2016) www.asktheeu.org; Frontex, *Letter from Executive Director: Situation at Hungary's southern border* www.asktheeu.org; Frontex, *Letter from the ED to CF: Consultative Forum's request on Chios* (2016) www.asktheeu.org.

⁵⁶ Frontex, Serious Incident Report n. 341 (2016) www.asktheeu.org; Frontex, Serious Incident Report n. 375 (2016) www.asktheeu.org

⁵⁷ A Fotiadis, 'Frontex's History of Handling Abuse Evidence Dogs Balkan Expansionin' (6 February 2020) Balkan Insight balkaninsight.com.

⁵⁸ Frontex, 13th Meeting (2017) www.asktheeu.org; Frontex, 14th Meeting (2017) www.asktheeu.org; *Migration and Asylum: Commission Takes Further Steps* (2018) cit.

⁵⁹ UNHCR, 'Hungary's Coerced Removal of Afghan Families Deeply Shocking' (8 May 2019) www.unhcr.org.

⁶⁰ C Jones, J Kilpatrick and M Gkliati, 'Deportation Union: Rights, Accountability and the EU's Push to Increased Forced Removals' (2020) Statewatch www.statewatch.org 43 ff.

⁶¹ UNHCR, 'Hungary's Coerced Removal of Afghan Families Deeply Shocking' cit.

⁶² N Nielsen, 'Frontex Suspends Operations in Hungary' (27 January 2021) EU Observer euobserver.com.

V. EXPANDING COMPETENCES

Being one of the prominent examples of agencification, Frontex has been experiencing a continuous expansion of its powers, with consecutive amendments of its mandate almost every two years, while its operational capacity has been growing steadily. With the EBCG Regulation in 2016, the agency came closer to a fully integrated scheme of border management. Still the plan fell short of the Commission's original idea of a permanent European Border Police Corps, as the host state still had the lead in the operation and the agency heavily relied on the voluntary contributions of participating states in personnel and budget.⁶³

The next step towards this direction was taken soon after with the 2019 amendment of the EBCG Regulation. Aiming at greater autonomy and operational effectiveness, and moving towards full operational capacity the agency will now have its own equipment and personnel and is vested with an even broader mandate in border surveillance and returns.

V.1. STANDING CORPS OF 10,000 BORDER GUARDS

The most monumental change brought by the 2019 amendment was the establishment of a "standing corps of 10,000 operational EU staff with executive power and their own equipment",⁶⁴ *i.e.* mainly border guards, return escorts, and return specialists.

Currently, Frontex joint operations rely solely on the contributions of Member States. Now, the agency acquires its own operational arm: a EBCG standing corps with broad executive powers, including competence to perform identity checks, intercept persons, authorise or refuse entry, as well as the power to carry weapons. This is meant to form a "reliable intervention force" of agency staff (statutory) and seconded, deployed, or reserve officers (non-statutory).⁶⁵

V.2. RETURNS

Another one of the most highlighted changes concerns the enhancement of the agency's mandate on returns of irregularly staying third country nationals, which has become a top priority. Frontex is now vested with a broad mandate in return-related activities, including, most importantly, providing its own return escorts and return monitors from the standing corps. It has further a considerably increased capacity to acquire its own aircrafts and

⁶³ Further supranationalisation, where European border guards would fully replace national coast guards, would be in violation of the division of competence between the EU and its Member states (art. 72 TFEU). R Mungianu, *Frontex and Non-Refoulement: The International Responsibility of the EU* (Cambridge University Press 2016) 43.

⁶⁴ State of the Union 2018: A Fully Equipped European Border and Coast Guard, in European Commission Press Release MEMO/18/5715 of 12 September 2018; art. 54(1)(a) EBCG Regulation.

⁶⁵ European Commission Press Release MEMO/18/5715 of 12 September 2018 cit.

vessels. Moreover, return operations (with the exception of return interventions and collecting operations) may be organised exclusively on the agency's initiative (art. 50).

VI. RESPONSIBILITY IMPLICATIONS

When the human rights sensitivities that are inherent in the agency's work materialise into real violations, the need arises to examine the possible contribution of the agency in these violations and establish its potential for legal responsibility.

VI.1. LIABILITY IN EU LAW AND THE EBCG REGULATION

A natural first step in examining these issues is looking into the relevant EU law. The Treaty on the Functioning of the European Union (TFEU) provides the general framework on liability. In particular regarding non-contractual liability the starting point is art. 340(2) TFEU, which stipulates that an EU institution or agency shall make good any damage caused by its servants in the performance of their duties. The agency's own Regulation acknowledged until 2016 only the potential liability of individual team members, rather than that of the agency. Since then, as common in Regulations of EU agencies, it follows the pattern of art. 340(2) TFEU, and also gives jurisdiction to the CJEU for related disputes.⁶⁶

Liability for any damage caused by deployed border guards is attributed to the host state, unless in case of gross negligence or wilful misconduct. Then the host state may turn to the deploying state in order to retrieve the damages it has paid.⁶⁷ No specific rules determine a priori the attribution of responsibility amongst the different actors involved, while neither the EU Treaties or the European Convention on Human Rights (ECHR) contain secondary rules regarding attribution, thus art. 97 EBCG Regulation needs to be actualised within the limited EU public liability regime.

The responsibility of Frontex should be dealt in a pluralist environment, acknowledging the overarching nature of EU law as a *sui generis* regime and *lex specialis*,⁶⁸ but also the fact that EU law does not exist in isolation, given the status of the EU as an international organisation and its place within the international legal order. Integration of this legal framework within a common environment is needed to avoid fragmentation and allow for complementarity and cross-fertilisation. For this reason, the issue of the responsibility of the EU for violations attributed to the agency needs to be studied also within the international framework on responsibility as presented in the International Law Commission (ILC) Draft Articles on the Responsibility of International Organisations (ARIO).

The strict binding nature of the ARIO is limited to those articles that reflect international customary law, while others may codify interpretations found in the case law of in-

⁶⁶ Art. 97(4)(5) EBCG Regulation.

⁶⁷ Art. 84 EBCG Regulation.

⁶⁸ Art. 64 ARIO.

ternational courts. For the rest the ARIO represent the progressive development of international law as interpreted by academic doctrine and less established case law and international practice. Within these limitations the ARIO can be used before the International Court of Justice (ICJ), while they have also been considered extensively by the ECHR and national courts.⁶⁹ They can also be used as a source of inspiration and in a heuristic way to mend existing gaps and aid the interpretation of EU liability law by the CJEU.

This is especially crucial given the fact that EU law and the relevant jurisprudence of the CJEU alone cannot provide a stable and authoritative answers to questions of attribution and the liability of agencies, especially in regard to multiple actors (joint liability).⁷⁰ Thus, while the CJEU cannot apply the ARIO directly, it can draw inspiration from the well-established framework in international law and pro-actively cover existing gaps, especially regarding instances where the responsibility can be attributed to both the agency and the member state. Particular procedural difficulties that result from the jurisprudence of the CJEU concern the binaries of causality and the competent court.⁷¹

Other areas of ever-growing cooperation in the EU system of judicial protection, including the joint execution of EU law, such as cooperation in fiscal matters, also struggle with fragmentation of jurisprudence, affecting in particular the right to an effective remedy, resulting in “inadequate and defective judicial protection”.⁷² More specifically, several authors have identified significant gaps in judicial protection resulting from strict and exclusive judicial competencies in the review of administrative acts.⁷³

Cornelisse and Moraru argue that national legislation that results in shifting the border and intensifying returns, may in fact create more space for legal claims for migrant justice.⁷⁴ The potential for such incremental constitutionalisation that they ob-

⁶⁹ The interaction with the doctrine of positive obligations of the ECHR, its rules on jurisdiction, the accession of the EU to the ECHR and the future of the Bosphorus presumption deserve separate attention and will need to be dealt with in a separate publication.

⁷⁰ Joined cases C-5, 7 and 13-24/66 *Kampffmeyer and Others v Commission* ECLI:EU:C:1967:31.

⁷¹ Case C-101/78 *Granaria v Hoofdprodukschap voor Akkerbouwprodukten* ECLI:EU:C:1979:38; joined cases C-106/87 and C-120/87 *Asteris and Others v Greece and EEC* ECLI:EU:C:1988:457; joined cases C-6/90 and C-9/90 *Franovich and Others v Italy* ECLI:EU:C:1991:428; joined cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame and Others v Germany and United Kingdom* ECLI:EU:C:1996:79; case C-352/98 *P Bergaderm and Goupil v Commission* ECLI:EU:C:2000:361; See for further elaboration, M Gkliati, *Systemic Accountability of the European Border and Coast Guard: The Legal Responsibility of Frontex for Human Rights Violations* (PhD thesis Leiden University 2021) on file with the author 149-161, 211-213, 230-259.

⁷² P Mazzotti and M Eliantonio, ‘Transnational Judicial Review in Horizontal Composite Procedures: Berlioz, Donnellan, and the Constitutional Law of the Union’ (2020) *European Papers* www.europeanpapers.eu 41, 42, 68.

⁷³ G Della Cananea, ‘The European Union’s Mixed Administrative Proceedings’ (2004) *Law and Contemporary Problems* 197-214; M Eliantonio, ‘Judicial Review in an Integrated Administration: The Case of “Composite Procedures”’ (2014) *Review of European Administrative Law* 65 ff. (in particular 96-102).

⁷⁴ G Cornelisse and M Moraru, ‘Judicial Interactions on the European Return Directive: Shifting Borders and the Constitutionalisation of Irregular Migration Governance’ (2022) *European Papers* www.europeanpapers.eu 151.

serve due to the judicial interaction of national courts, can nevertheless, not apply in the case of Frontex, as the CJEU has exclusive competence over the liability of EU agencies.⁷⁵ As a result, their liability cannot be examined by national courts.

Frontex through its joint operations implements a new model of cooperation, where a multiplicity of actors is involved. In such an environment, responsibilities get easily diluted. In particular, “the multitude of intertwining executive competences” creates uncertainty, combined with the lack of information on the operational plans or the actual chain of command in practice.⁷⁶ This, combined with the limited experience of EU law in such cases, has also allowed claims that Frontex may only incur responsibility from wrongful acts conducted by its own staff in Warsaw. A closer look to the rules of attribution and the international framework on responsibility reveals arguments that point both to the indirect and the direct responsibility of Frontex, especially after the latest amendment of the EBCG Regulation.

In particular, the violation of the human rights obligations of the agency constitutes breach of an international obligation that can bring upon the international responsibility of the agency, if the wrongful conduct can be attributed to it. This can be either due to wrongful conduct of its own statutory staff or via exercising effective control over the conduct of seconded personnel.

The agency may still also be held responsible if it has only contributed to an act that is not attributed to it. In the former case, the agency would be directly responsible in application of the principle of independent responsibility, while in the latter it would be indirectly responsible due to aiding and assisting in a violation or due to having direction and control over the wrongful act, in knowledge or presumed knowledge of the circumstances. Frontex may incur responsibility either via an act or via an omission to prevent an internationally wrongful act, given its positive human rights obligations and its widespread supervisory powers.

Until now, arguments in favour of the responsibility of Frontex were mainly based on the exceptional attribution of responsibility that can happen even if the conduct is not attributed to the organisation (indirect responsibility).

VI.2. INDIRECT RESPONSIBILITY

The agency may incur indirect responsibility for a wrongful act that is not attributed to it but solely to the host state, if it has contributed to it, facilitating its commission (art. 14 ARIO). Thus, international responsibility may arise from an act of the agency that does

⁷⁵ *Asteris and Others v Greece and EEC* cit.

⁷⁶ M Fernandez, ‘Multi-stakeholder Operations of Border Control Coordinator at the EU Level and the Application of International Responsibilities’ in T Gammeltoft-Hansen and J Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalization: Transnational Law Enforcement and Migration Control* (Routledge 2016) 239 ff.

not as such constitute an unlawful act under international law, but is linked to one that is conducted by a member state.

Such assistance can also be the result of failing to utilize its monitoring obligations in light of its positive obligations to prevent a violation. This will need to be shown on a case-by-case basis, but in principle, it can be safely argued that the agency can be responsible for “setting the scene that allows the result”.⁷⁷ Vital in this case is whether Frontex knew or should have known about the violation, as this protection is provided not against all threats, but against reliable and predictable threats. Such knowledge can occur through the agency’s own internal and external reporting mechanism, including vulnerability assessments in the context of the Schengen assessment mechanism, serious incidents reports, and the individual complaints mechanism, or via well-documented credible non-governmental organisations (NGOs) and media reports of recurring or systemic violations.

Thus, if it can be reasonably presumed that Frontex has been aware of a violation, or wilful ignored it, it may incur indirect responsibility for assisting in that violation by financial, operational and practical means, or by failing to exercise its positive obligations to prevent it.

VI.3. DIRECT RESPONSIBILITY BEFORE 2019

The responsibility of Frontex can also be engaged directly, if the wrongful act can be attributed to the agency (arts 3 and 4 ARIO). Given that it is the wrongful conduct of the agents and organs of an organisation that can be attributed to the organisation (arts 6-9 ARIO), this concerned until now the Frontex employees, mainly based in Warsaw, as the agency has very few employees on the ground. While the *de jure* agents of Frontex have been few with limited possibilities for engagement in violations, this can also extend to the members of the border guard teams seconded by Member States and their role as *de facto* organs of the agency. The responsibility rule of art. 6 ARIO is to be interpreted broadly to cover any person through whom the agency acts, regardless of the formal status of employment. Looking at the role of deployed border guards through the lens of effective control, persons seconded to Frontex by a member state, can be considered its agents, if it is proven that Frontex exercises effective control over their conduct (art. 7 ARIO).

Even though Frontex will at no point issue instructions directly towards the deployed officers, there are several levels of orders and control that are above the day-to-day command of the operation. The decisive elements on who has effective control over the conduct of the deployed personnel, as they have been interpreted by doctrine and jurisprudence are *a*) retention of disciplinary powers and criminal jurisdiction by the state, *b*)

⁷⁷ GS Goodwin-Gill, ‘The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement’ (2011) IJRL 453.

decision-making power over the wrongful conduct, or in other words, operational command and control in accordance with formal arrangements and factual circumstances (factual control), c) power to prevent a violation of human rights (positive obligations).

The determination of either one of these elements can tip the balance towards the responsibility of either the state or the agency. Adding to the uncertainty over the debate on responsibility, there is no hierarchical order amongst the different elements and they can be balanced differently by different courts.

VI.4. DIRECT RESPONSIBILITY AFTER 2019

While an argument was still to be made before the 2019 amendment of the EBCG Regulation regarding the de facto organs that can also bind the agency with their conduct, the direct responsibility of Frontex via its statutory staff is raised to a primary argument for the responsibility of the agency. The arguments for direct responsibility of the agency, however, are strengthened as the mandate, powers and operational capacity of the agency grow, especially after the amendment of the EBCG Regulation in 2019. This in particular regards the statutory staff, which will have extensive executive powers and operation with the agency's own equipment. In this context they may commit a wrongful act (art. 4 ARIO), that is in breach of an international obligation and affects the rights of individuals (art. 11 ARIO).

The fact that the statutory staff is employed by the agency and Frontex has disciplinary powers over them constitutes them de jure agents that bind the agency with their conduct. Following the principle of independent responsibility, any wrongful conduct of the statutory staff is attributed to Frontex, and thus, gives rise to its responsibility (arts 6-9 ARIO).

The situation of non-statutory staff remains unchanged and arguments concerning indirect responsibility and direct responsibility before 2019 continue to apply.

VII. FRONTEx RESPONSIBILITY FOR OPERATIONS IN HUNGARY AND GREECE

VII.1. SURVEILLANCE OPERATIONS AT LAND AND SEA BORDERS

The many actors involved in a Frontex operation often create confusion as to the bearer of responsibility. The primary responsibility of either Greece or Hungary for violations committed at the border is not contested in this *Article*. In fact, it is often the responsibility of the host state that triggers that of the agency, that can incur responsibility not only as a result of its officers in Warsaw, but also for the conduct of its deployed teams on the ground. This will become all the more apparent when the 2019 Regulation is fully implemented.

When discussing the potential for the responsibility of Frontex for its activities at the Serbian-Hungarian and Turkish-Greek borders, we should first look at its indirect responsibility for aiding and assisting in the numerous violations that have been reported. Un-

doubtably, the facts of each case should be examined individually to make such determinations, but in principle, the agency's international responsibility may arise from an act that is not as such unlawful, but is linked to a human rights violation committed by the host state. Frontex may have a significant role in aiding and assisting in a violation. It finances, organises, coordinates and often initiates operations. It further supports the operations with its research and risk analysis infrastructure, as well as Eurosur.

It should be noted that the requirement is that the aid or assistance has contributed "significantly" to the commission of the act; it does not need to be essential, in the sense that the wrongful conduct could have not been committed without it.⁷⁸ Any of the aforementioned powers and competences and certainly their combination can be regarded as significantly contributing to the commission of a wrongful act during the 2020 Rapid Border Intervention in Greece and the surveillance operations in Hungary, especially after the legislative change in 2015.

As mentioned above, the agency needs to have known of a violation or have presumed knowledge of it. In both cases, the agency had been informed of the systematic nature and the extent of the violations both via independent reporting and via its internal monitoring mechanisms. While the reporting system and the complaints mechanism have failed to live up to the circumstances, the FRO and the CF have painted a vivid picture of the state of human rights compliance and have called for the agency to suspend its operations. Moreover, the legislative changes in both countries, including the non-examination of individual circumstances and blanket dismissal by Hungary of asylum claims of applicants transiting through Serbia, and the unprecedented suspension of asylum in Greece, create an environment, within which operations take place that does not allow, for human rights compliance. Thus, we may conclude that the agency had indeed knowledge of the systematic nature of violations in both countries and it may be found complicit to the extent that it has contributed to them.

Its contribution may also take a passive form, in the meaning of allowing for the violation to happen, given its positive obligations to prevent a foreseeable violation or similar violations in the future. In this regard, it should be assessed on a case-by-case basis whether the agency has done everything in its power to prevent violations committed by the host state in the context of a joint operation or with the involvement of its border guard teams (e.g. Finnish dog team in Hungary and Danish crew in Greece). What the agency could have done can range from the training of border guards and the instructions given to the teams by the Frontex coordinating officer on the ground, to the appropriate functioning of reporting and complaints mechanisms, including an obligation to investigate when there are substantial grounds for believing that violations are taking place,⁷⁹ and finally, to suspending an operation.

⁷⁸ ARIO commentary to art. 14(6).

⁷⁹ ECtHR *Hirsi Jamaa and Others v Italy* App n. 27765/09 [23 February 2012].

This last option is considered a last resort to be used in serious and persistent violations. In both case-studies the violations had been of a serious and systemic nature, while the agency has since 2016 been receiving strong and repetitive recommendations by the FRO and its CF to suspend its operations in Hungary. According to the letter of the EBCG Regulation this is an obligation for the ED. Nevertheless, the enforcement of this obligation in practice becomes problematic considering that the ED has a considerable degree of discretion, since there are no clear indications or guidelines as to when the conditions for suspending an operation are met. He will balance the human rights concerns with political and operational considerations.⁸⁰

In fact, it has been argued that the presence of Frontex may improve the state of human rights compliance on the ground. This was also the ground upon which the Commission encouraged Frontex to continue its operations in Hungary despite the opposite advice of the FRO and the CF. This was not confirmed by the empirical circumstances in the following years. Similarly, Human Rights Watch notes that in the case of Greece: “European presence would presumably show that it is possible to enforce the border humanely. [...] With the passing of time, we observe that the opposite has happened. That Frontex as an organization is gradually embracing the harsh reality of Greek violations [...]”.⁸¹

The agency has expressed further hopes to that direction regarding the deployment of the standing corps including Frontex statutory staff. The ED said in an interview in *die Zeit* that we could envisage such improvement with respect to incidents of abuse in the Western Balkans, as Frontex will have direct disciplinary powers over its own personnel.⁸² The direct responsibility of the agency is also arguable regarding the degree of effective control exercised by the agency upon the deployed border guard teams. The seconded border guards may be considered de facto organs of the agency if a certain balanced of the following criteria is reached de jure or in practice: *i*) retention of disciplinary powers and criminal jurisdiction, *ii*) decision-making power over the wrongful conduct (formal or factual control), *iii*) power to prevent a violation of human rights (positive obligations).

None of these elements are exclusive and a complete answer calls for a balanced consideration of them all, and always on a case-by-case basis. In principle, it is derived from the EBCG Regulation that the decision-making powers, in the meaning of “who gives the orders” belong mainly to the host state (arts 21(1) and 40(3) EBCG Regulation).

⁸⁰ Parliamentary Assembly, Council of Europe, Resolution 1932 (2013), Frontex: Human Rights Responsibilities; EU Ombudsman, *Letter From The European Ombudsman to the Frontex concerning his draft recommendation - OI/5/2012/BEH-MHZ* ombudsman.europa.eu point 74.

⁸¹ I Mann and N Keady-Tabbal, ‘Torture by Rescue: Asylum-Seeker Pushbacks in the Aegean. How Summary Expulsions from Greece Have Continued with Impunity’ (26 October 2020) Just Security www.justsecurity.org.

⁸² C Lobenstein, P Middelhoff and L Mittel, ‘Letztes Mittel’ (19 February 2020) *Die Zeit* www.zeit.de.

However, the instructions of the host state are not independent, but shall be in implementation of and should comply with the Operational Plan (art. 21(1) EBCG Regulation), which is drafted by the agency. The Frontex Coordinating Officer also communicates the agency's views regarding the instructions of the host state. These views shall be taken into consideration and be followed upon to the extent possible (art. 21(2) EBCG Regulation).⁸³ It has been observed that the teams are in fact deployed "under the supervision of the Frontex Coordinating Officer"⁸⁴ and that he is in fact the one who retains responsibility for the instructions given".⁸⁵

Moreover, Frontex sets the environment on the basis of which operations take place, financing operations, deploying the teams and technical equipment, while it may initiate an operation. It further, conducts research and risk analysis on the basis of which all decisions regarding an operation are made, and coordinates the work of the different Member States. Thus, although Frontex will at no point issue instructions directly towards the seconded officers, there are several levels of orders and control that are above the day-to-day command of the operation.⁸⁶ In the words of Goodwin-Gill, notwithstanding the involvement of another actor, the agency can still be responsible for "setting the scene that allows the result [...]. [...] the EU agency [...] exercises a sufficient degree of effective control; it may not be solely liable for what follows, but it is liable nonetheless".⁸⁷ Thus, it can be argued that Frontex can have effective control over the seconded personnel through a combination of its various operational, organisational, supervisory and other powers.⁸⁸

Still, different levels of control by different actors are interlaced in a way that a singular answer to who has effective control becomes almost impossible. Effective control,

⁸³ Fink observes that the operational plans go in more detail into the control regime, or as it is referred to there, the operational and tactical command and control. However, they don't manage to create a comprehensive or consistent formal regime over the types of authority each actor exercises over the guest officers. M Fink, *Frontex and Human Rights: Responsibility in "Multi-Actor Situations" under the ECHR and EU Public Liability Law* (Leiden University, EM Meijers Instituut 2017) 165.

⁸⁴ S Carrera, L den Hertog and J Parkin, 'The Peculiar Nature of EU Home Affairs Agencies in Migration Control' cit. 340.

⁸⁵ Amnesty International (European Institutions Office) and European Council on Refugees and Exiles (ECRE), Briefing on the Commission Proposal for a Regulation Amending Council Regulation (EC) 2007/2004 6.

⁸⁶ For other authors, the lack of direct instructions to the deployed personnel excludes the possibility of effective control by Frontex. 'Article 7 would require a transfer of certain command or similar powers that allow the organisation to directly determine the conduct in question. Since Frontex is not currently vested with such powers, conduct during Frontex operations is not attributable to the EU' in M Fink, *Frontex and Human Rights* 165.

⁸⁷ G S Goodwin-Gill, 'The Right to Seek Asylum' cit. 453.

⁸⁸ Similar conclusions have been drawn by several authors, among which, A T Gallagher and F David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 347–348; I Majcher, 'Human Rights Violations During EU Border Surveillance and Return Operations: Frontex's Shared Responsibility or Complicity?' (2015) *Silesian Journal of Legal Studies* 60–64.

however, is not necessarily an exclusive quality. The effective control by a member state does not exclude the effective control by Frontex. In fact, the largest portion of effective control belongs to the member state hosting the operation, while participating states may also retain a certain degree of effective control. This non-singular answer as to who has effective control does not lead to a dead-end regarding the attribution of the wrongful conduct. To the contrary, it is the degree of effective control exercised by either party that is important. In case more than one parties are shown to exercise effective control, their responsibility can be determined under dual or multiple attribution. Thus, only if it can be proven that in a particular case, Frontex has exercised adequate effective control over a wrongful conduct, can its direct responsibility be engaged, and that, alongside the responsibility of the host state.

The direct control of Frontex over the operation will be clearer after the standing corps becomes operational, as the members of the agencies statutory staff will be de jure agents of the agency directly binding Frontex with their potential wrongful conduct. In this case, the member state will retain the every-day command and control, and thus, effective control over the agency's staff. This will determine the co-authorship of the act by the host state, thus, making the host state and Frontex jointly liable.

VII.2. RETURN OPERATIONS

It should, first of all, be kept in mind that the ultimate responsibility for violations occurring in any return flights either to Afghanistan or to Serbia from Hungary belongs to the Hungary itself. The same holds for any returns to the countries of origin or readmission operations to Turkey from Greece regarding applicants whose claims have not been properly examined in the first semester of 2020.

This is the case even if we take into account the extensive powers of the agency newly acquired with the 2019 Regulation. For instance, the agency may now prepare return decisions, but it may not enter into the merits or provide information for such decisions (art. 28(1) EBCG Regulation). Frontex does not have any information about the asylum case files of the returnees. It only collects and processes personal data that are necessary for the purpose of the return operation, which is deleted ten days after the completion of the operation.⁸⁹ If further does not have the mandate to review the asylum claim, and would not, in principle, be responsible for the unlawful return of a refugee, in case of a wrongful examination of their asylum application.

Even though, however, the agency may not enter the merit of return decisions, it is still responsible for ensuring compliance with the principle of *non-refoulement*. On the basis of the principle of mutual trust, the agency operates with a presumption of validity of the decision that has been issued by a member state. This presumption cannot,

⁸⁹ J Pirjola, 'Flights of Shame or Dignified Return? Return Flights and Post-Return Monitoring' (2015) EJML 312.

nevertheless, be irrebuttable.⁹⁰ When structural deficiencies are found in the asylum system of the Member States, as has been the case in Hungary and potentially in Greece in case of any returns that resulted from the suspension of registrations of asylum claims, the presumption can be rebutted. Such deficiencies may result in an asylum and return decision that is in violation of the right to *non-refoulement*, the right to asylum, and the right to an effective remedy.

Frontex cannot be held responsible for the ineffectiveness or outright unlawfulness of the asylum procedures in Greece and Hungary, but it still has a positive duty to ensure compliance with human rights during return operations it coordinates. It can be argued that the agency will be able to better comply with its positive duties when the 2019 Regulation is implemented, as it will be able to conduct return operations with its own escorts and human rights monitors.

Still, however, in the case-studies at hand, the well-reported evidence or structural deficiencies, especially regarding the blanket rejection of applicants that originate or have transited through Serbia, provide legitimate reasons to believe that Frontex should have known of such violations, despite the low number of Serious Incidents Reports and the assurances of the Hungarian government.

By not complying with its positive obligation to take every appropriate action to prevent that or other similar violations, the agency risks being found complicit in the violation. Both UNHCR and the FRO had explicitly stated, years before the CJEU decision, that suspension of return operations in Hungary is necessary for the agency to comply with its fundamental rights obligations.

The new expansive powers of Frontex in the 2019 Regulation, increase the possibility for the agency to be held responsible for violations during returns, especially since return flights will be conducted in the agency's own aircrafts, by the agency's own escorts. It has been found that in practice in Frontex joint operations, when decisions are made that affect a plane or other large asset of a participating state, the consent of that member state is sought. Even though the participating member state does not have formal veto powers over the decision, in practice no decision is made until consensus is reached. Thus, there is a certain level of authority still exercised by the participating member state over its asset, arguably including the personnel deployed in that asset.⁹¹ The same can hold true with respect to operations carried out in large assets owned by the agency, which is expected to be the rule in Frontex flights in the future. It remains to be seen, however, how this will operate in practice and whether the flag state of the plane or vessel will perhaps have operational command and control rather than the agency.⁹²

⁹⁰ Case C-411/10 *N S and Others* ECLI:EU:C:2011:865.

⁹¹ M Fink, *Frontex and Human Rights* cit. 85 and 86.

⁹² Further on Frontex in return operations, see M Gkliati, 'Frontex Return Operations and their Human Rights Implications' in I Soysüren and M Nedelcu (eds), *Deportation of Foreigners: EU Instruments, Nation-State Practices and Social Actors' Involvement* (Peter Lang Editions forthcoming).

VIII. CONCLUSION

The EU has chosen to perceive migration as a threat, and is focusing its efforts in securing its borders, increasingly depending on the work of Frontex. The reach of the agency in European border control makes questions about its responsibility for breaches of fundamental rights of refugees and other migrants more urgent than ever. The mandate and powers of Frontex are continuously growing, while the agency has entered the next phase of its development, that of greater autonomy and operational effectiveness. The broader powers the agency acquired with the 2019 amendment of its Regulation reflect upon the potential for its legal responsibility.

In this *Article*, I studied this potential for responsibility through the two case-studies of the Turkish-Greek and the Serbian-Hungarian border, both areas where systematic violations have been well-reported. Through this examination, I conclude that there is considerable room for the responsibility of the agency even before the implementation of the 2019 Regulation, either through aid and assistance or through effective control.

The responsibility for the agency can be indirect, through assisting Greece or Hungary in the commission of the internationally wrongful act, either actively (*e.g.*, technical and financial support) or by omission due to the agency's positive obligations (*e.g.*, failure to suspend or terminate an operation). It is also arguable that under certain circumstances, the agency may also have a sufficient degree of effective control over the seconded personnel in the two countries, so that they can be considered its *de facto* agents, engaging the responsibility of the agency with their conduct.

I have also examined how the image of responsibility changes after the 2019 amendments are implemented. In fact, we may conclude that the legislative amendment brings a shift of focus from complicity, as the main form of responsibility for Frontex, to direct responsibility. While direct responsibility has also been conceivable before 2019, via effective control over *de facto* organs, now the extent to which the agency will operate with its own personnel and equipment, provides enhanced arguments for its direct responsibility.

Gaps and hindrances still remain with respect to implementing the above and holding the agency to account for reasons that have to do mainly with the inaccessibility of the CJEU to individuals and the liability jurisprudence of the CJEU, issues that fall out of the scope of the present article, which remains in the normative realm of legal responsibility.⁹³

A further conclusion we can draw from the examination of the responsibility of the agency through these two case studies, is that we can derive two types of human rights violations. Those that result from operations, which were executed according to plan, and those that refer to operations going wrong and abuse of powers from the second-

⁹³ More regarding the difficulties in attributing responsibility and holding the agency or its statutory staff to account see ECRE, 'ECRE Comments on the Commission Proposal for a Regulation on the European Border and Coast Guard' (September 2018) www.ecre.org.

ed border guards. While the appropriate monitoring and accountability mechanisms are necessary to address the second type of violations (e.g. Finnish dog team), the structural nature of the former makes it almost unavoidable for the agency to launch or continue an operation without being found complicit. This is the case with respect to the 2020 Rapid Border Intervention in Greece or return operations from Hungary, that constitute dead-ends for the agency.

Finally, at this point we may remind ourselves of Majone's model of "mixed government", where EU agencies fulfil the purpose of balancing institutional autonomy and institutional cooperation in a way that all interests, those of the European people, the Member States, and that of European integration are balanced. The new framework after 2019 contributes to this balance as Member States still maintain a certain level of control while the agency achieves greater supranational autonomy and operational effectiveness that allows it to better fulfil the interest of border management. However, no real balance can be struck before human rights, amongst the core EU values, are properly upheld, and before suitable accountability safeguards are set.

Accelerated returns and border control priorities should not be at the cost of fundamental rights. These securitisation-led developments in the area of migration present inherent tensions with fundamental rights and create challenges for their protection. We should be ready for these challenges. The greater operational effectiveness and autonomy of the agency call for a more robust system of judicial and administrative accountability than ever; one that corresponds to the expansion of powers and competences of the agency and can address its potential responsibility for human rights violations.

