



ARTICLES

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

edited by Evangelia (Lilian) Tsourdi, Andrea Ott and Zvezda Vankova

FRONTEX'S CONSULTATIVE FORUM AND FUNDAMENTAL RIGHTS PROTECTION: ENHANCING ACCOUNTABILITY THROUGH DIALOGUE?

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ABSTRACT: Frontex has been heavily criticized for disregarding fundamental rights in its border management from the outset. To address this critique, the EU legislators established a Consultative Forum on fundamental rights to provide independent advice in fundamental rights matters. Despite the importance of this issue, little effort has been made to study the role and impact of the Consultative Forum. Addressing this research gap, this *Article* seeks to answer whether the Consultative Forum has improved Frontex's fundamental rights accountability. Theoretically, we will combine the concept of accountability elaborated by Bovens and the notion of dialogues, allowing us to assess the interaction of the Consultative Forum with the various fora which are supposed to hold Frontex to account. As a special form of communication, dialogues focus on the giving and taking of various sorts including information, arguments and justifications. We argue that the status of the Forum and its possibility to engage with internal and external stakeholders on a regular basis provide an opportunity to strengthen

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The authors would like to thank the guest editors of this *Special Section*, Andrea Ott, Evangelia (Lilian) Tsourdi and Zvezda Vankova, for making this *Special Section* happen and for all their helpful comments on various drafts of this *Article*. We finally wish to thank, for editorial assistance, Michael Phan.



dialogues with and between Frontex's accountability fora. While the impact of these accountability dialogues has been modest so far, we nonetheless acknowledge their normative potential to enhance the accountability of Frontex.

KEYWORDS: Frontex – Consultative Forum – accountability – EU Border Management – fundamental rights – EU agencies.

I. INTRODUCTION

Since its inception, Frontex has been confronted with harsh criticism for disregarding human rights principles: while EU policy-makers have expected Frontex to tackle the problem of external border protection, civil society organisations and human rights groups have continued to raise concerns over the agency's behaviour with regard to fundamental rights.¹ Frontex had initially tried to reject this criticism, arguing that it only has a supporting or coordinating role and is therefore not responsible for fundamental rights protection.² Since the early 2010s, however, it has gradually become more sensitive to this concern. After introducing legally non-binding instruments such as a Code of Conduct and a Fundamental Rights Strategy, Frontex Regulation 1168/2011 established a Fundamental Rights Officer (FRO) and the Consultative Forum with a view to assist the Executive Director and the Management Board in fundamental rights matters.³ Despite these institutional innovations, human rights groups have continued to criticize Frontex for human rights violations in the course of its border operations.⁴ Accordingly, many scholars claim that the Consultative Forum is primarily a public relations exercise for Frontex, reflecting only a shallow or rhetorical commitment to fundamental rights without any corresponding efforts to improve fundamental rights protection in practice.⁵ However, despite this

¹ E Papastavridis, 'Fortress Europe' and FRONTEX: Within or Without International Law? (2010) *ActScanJurisGent* 75; A Fischer-Lescano, T Tohidipur and T Löhr, 'Border Controls at Sea: Requirements Under International Human Rights and Refugee Law' (2009) *IJRL* 256; M Fink, *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford University Press 2018).

² S Keller and others, 'Which Guarantees for Human Rights? A Study Conducted by Migreuropa on the European External Borders Agency in View of the Revision of its Mandate' (March 2011) Greens/EFA in European Parliament www.migreurope.org 22; M Fink, 'Frontex: Human Rights Responsibility and Access to Justice' (30 April 2020) EU Immigration and Asylum Law and Policy blog eumigrationlawblog.eu.

³ Regulation (EU) 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) n. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, art. 26(a)(2).

⁴ See e.g. the alleged involvement of Frontex in push backs in the Eastern Mediterranean, K Fallon, 'EU border force "complicit" in illegal campaign to stop refugees landing' (24 October 2020) *The Guardian* www.theguardian.com; Frontex, 'Frontex launches internal inquiry into incidents recently reported by media' (27 October 2020) frontex.europa.eu.

⁵ N Perkowski, 'There Are Voices in Every Direction: Organizational Decoupling in Frontex' (2019) *JComMarSt* 1182; S Carrera, L Vosyliute, V Mitsilegas and J Allsopp, *Policing Humanitarianism: EU Policies Against*

broad criticism, there has been little scholarly effort to assess how the Consultative Forum has affected Frontex's accountability for ensuring compliance with fundamental rights standards. Addressing this research gap, we will examine how the creation of the Consultative Forum has contributed to Frontex's accountability.

In doing so, the study combines Bovens's concept of accountability⁶ with the notion of "dialogue" introduced by scholars such as Bohman, Roberts or Gkliati and Rosenfeldt.⁷ Dialogue is a special form of communication that opens up a space for deliberation including the "giving and taking of various sorts".⁸ This approach enables us to analyse the communicative interaction between the Forum and the various accountability fora of Frontex. Specifically, by exchanging information, arguments and justifications not only with actors who are inclined towards Fundamental Rights Protection (e.g. FRO or human rights groups) but also with more securitization-oriented actors (e.g. Frontex's Executive Director or Management Board), the Consultative Forum has contributed to mutual knowledge sharing, learning processes within and among fora which are expected to hold Frontex to account. While the Forum's impact on the accountability of Frontex has been modest so far, we acknowledge its potential to trigger accountability dialogues with and between Frontex's accountability fora.

Empirically, we examine relevant activities of the Consultative Forum in the periods from 2013 to 2019. Besides the relevant academic literature, our analysis reviews a broad range of primary sources including Consultative Forum annual reports as well as relevant documents by the European Ombudsman, the European Court of Auditor, the European Parliament (EP) and Non-Governmental Organizations (NGOs). In addition, we draw on 13 semi-structured interviews with various members of the Consultative Forum, the FRO and international organization conducted between June 2019 and May 2020.⁹ We will argue that the creation of the Consultative Forum within Frontex's institutional architecture has enabled fundamental rights-oriented actors to enter into an institutionalised dialogue with internal and external stakeholders on a regular basis with a view to improve the fundamental rights accountability of Frontex. While the Consultative Forum has so far not significantly enhanced the accountability of Frontex, these accountability dialogues have

Human Smuggling and their Impact on Civil Society (Hart Publishing 2019) 47; D Fernandez-Rojo, 'The Introduction of an Individual Complaint Mechanism within Frontex: Two Steps Forward, One Step Back' (2016) *Belgian Journal for Governance Studies and Public Law* 225.

⁶ M Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) *ELJ* 447.

⁷ J Bohman, *Public Deliberation: Pluralism, Complexity, and Democracy* (MIT Press 1996); NC Roberts, 'Keeping Public Officials Accountable through Dialogue: Resolving the Accountability Paradox' (2002) *Public Administration Review* 658; M Gkliati and H Rosenfeldt, 'Accountability of the European Border and Coast Guard Agency: Recent Developments, Legal Standards and Existing Mechanisms' (Refugee Law Initiative Working Paper 30-2018).

⁸ J Bohman, *Public Deliberation* cit. 59.

⁹ For reasons of anonymity, this *Article* uses interview codes, see the annex at the end of the *Article*.

the potential to facilitate the exchange of information and views and to strengthen the collective learning processes regarding fundamental rights protection.

II. THEORETICAL FRAMEWORK

Over the last two decades, scholars have been increasingly concerned with examining the accountability of many EU institutions and bodies such as European agencies.¹⁰ Similarly, political actors such as the EP and the European Commission have advocated to improve the accountability of EU agencies.¹¹ This holds especially true of agencies that operate in the Area of Freedom, Security and Justice (AFSJ) such as Frontex which has not only enhanced its operational scope in the last decade, but has also developed a reputation for undermining or even violating the fundamental rights of refugees and migrants.¹² To analyse the impact of the Consultative Forum on the accountability of Frontex, we draw on the work of Mark Bovens who defines accountability as a relationship between an actor and a certain forum in which the actor provides information, explains and justifies his/her conduct.¹³ In turn, the forum can ask questions, evaluate the conduct of the actor and pass judgement which may result in consequences for the actor.¹⁴ With regard to Frontex, we will assess the following four types of accountability:¹⁵

a) Political accountability: relates to the account to be given before elected representatives and members of national parliaments, the EP and its subcommittees or voters in parliamentary elections.

b) Legal accountability: specifies the relation between an actor and national or EU courts or tribunals. It is based on established legal doctrine and methodology prescribed by statutes or precedent.

c) Administrative accountability: includes auditors and inspectors exercising administrative and financial supervision based on prescribed norms. At the EU level, it includes European Ombudsman or the European Court of Auditors.

¹⁰ C Harlow, *Accountability in the European Union* (Oxford University Press 2002); D Curtin, 'Delegation to EU Non-Majoritarian Agencies and Emerging Practices of Public Accountability' in D Geradin, R Muñoz and N Petit (eds), *Regulation Through Agencies in the EU: A New Paradigm of European Governance* (Edward Elgar 2005) 88; D Curtin, 'Holding (Quasi-)Autonomous EU Administrative Actors to Public Account' (2007) ELJ 523.

¹¹ M Busuioac, *European Agencies: Law and Practice of Accountability* (Oxford University Press 2013) 8 ff.

¹² D Curtin, 'Delegation to EU Non-Majoritarian Agencies and Emerging Practices of Public Accountability Regulation Through Agencies' cit.; M Bovens, D Curtin and P t'Hart (eds), *The Real World of EU Accountability: What Deficit?* (Oxford University Press 2010); M Busuioac, 'European Agencies: Pockets of Accountability' in M Bovens, D Curtin and P t'Hart (eds), *The Real World of EU Accountability. What Deficit?* cit. 87.

¹³ M Bovens, 'Analysing and Assessing Accountability' cit. 450.

¹⁴ *Ibid.*

¹⁵ *Ibid.* 455 ff. In addition, Bovens also discusses professional accountability which deals with relationships to professional associations and disciplinary tribunals. As it does not relevant for Frontex, we will not discuss professional accountability in this *Article*. For further details see M Gkliati and H Rosenfeldt, 'Accountability of the European Border and Coast Guard Agency' cit. 8.

d) Social accountability: defines the relationship with a forum made up of stakeholders, civil society and NGOs, interest groups, charities, and the public at large, encouraged by the rise of internet which allows for the public availability of assessments and reporting results made by stakeholders.

As it is the task of the Consultative Forum, as an advisory body, to assist Frontex and provide independent advice in fundamental rights matters, we will focus particularly on how these contributions have impacted on the various types of accountability. In doing so, we will draw on the notion of dialogue which focuses on the exchange of information, arguments and justifications among the parties concerned. A dialogue can be conceived as a special form of communication in which both sides treat each other as equals and "listen and engage each other fully".¹⁶ Although dialogues are not a means to solve problems, the back-and-forth exchange of information, claims and justification, has the potential to create the necessary conditions for resolving disputes or developing mutual understanding.¹⁷ From such a perspective, the Consultative Forum can be regarded as an institutional space for dialogue that empowers fundamental rights-oriented NGOs, EU agencies or international organizations to cooperate with each other and engage with various EU institutions and bodies as well as with securitized-oriented Frontex officials on a regular basis.¹⁸ Accountability is thus not only a mechanism of control but also a communicative process for an exchange of information, arguments and justifications that works towards mutual learning and understanding.¹⁹ "Being accountable is about being open with stakeholders, engaging with them in an ongoing dialogue and learning from the interaction."²⁰ To facilitate accountability dialogues, it is crucial that the Forum operates on par with Frontex officials, receives relevant information about border practices and has privileged access to important stakeholders inside and outside of the agency such as the FRO, the European Ombudsman or Members of the European Parliament (MEPs). If these conditions are met, the Forum's communicative efforts with the different political, administrative or social fora can strengthen dialogues so that Frontex can be held to account more effectively.

Dialogues occurring within one accountability forum can feed into other fora as well. For example, dialogue between the Consultative Forum and the European Ombudsman may, first, enhance administrative accountability. If, in a second step, MEPs refer to this dialogue in a hearing of the Executive Director before the EP, the same dialogue may (indirectly) also improve political accountability. Institutionalised and regular dialogues

¹⁶ NC Roberts, 'Keeping Public Officials Accountable through Dialogue' cit. 660.

¹⁷ J Bohman, *Public Deliberation* cit. 58 ff.

¹⁸ J S Dryzek, *Deliberative Global Politics. Discourse and Democracy in a Divided World* (Polity Press 2006); AW Neal, 'Securitization and Risk at the EU Border: The Origins of FRONTEX' (2009) JComMarSt 333.

¹⁹ NC Roberts, 'Keeping Public Officials Accountable through Dialogue' cit. 661.

²⁰ M Blagescu, L de las Casas and R Lloyd, *Pathways to Accountability: The GAP Framework* (One World Trust 2005) 11.

initiated and facilitated by the Consultative Forum have the power to provide numerous opportunities to hold Frontex accountable “across the whole range of [...] policies, minor as well as major, routine as well as controversial”.²¹ Specifically, the back-and-forth exchanges between the Consultative Forum and the various accountability fora can strengthen the capacity of the latter to hold Frontex to account. These dialogues are therefore key elements for holding Frontex accountable which is particularly relevant in the absence of sound legal or political accountability mechanisms.

III. FRONTEx’S BUMPY ROAD TOWARDS FUNDAMENTAL RIGHTS PROTECTION

Frontex has faced strong criticism for its fundamental rights record from both the general public and human rights groups since the beginning of its operational activities in 2005. The initial 2004 Frontex Regulation contained only one general reference to fundamental rights.²² It was not until March 2011 that Frontex adopted a legally non-binding Code of Conduct for all persons participating in Frontex operational activities, clarifying the obligations of officials participating in Frontex operations.²³ A few days later, Frontex adopted another legally soft law document – its Fundamental Rights Strategy (FRS).²⁴ Like the Code of Conduct, the FRS can be considered a major improvement in the human rights discourse. The adoption of the Code of Conduct and the FRS were the result of the continuous advocacy of human rights-minded actors who regularly reminded EU institutions and governments that observing international law in the course of border control is a crucial pre-requisite for the legitimacy of Frontex.²⁵ The 2011 Frontex recast Regulation not only transformed the FRS and the Code of Conduct into hard law, but it also established a FRO and a Consultative Forum. The Forum was tasked not only with developing and implementing the Code of Conduct and the FRS but also with assisting the Executive Director and the Management Board in fundamental rights matters more broadly.²⁶ In September 2012, the Frontex Management Board adopted the working methods of the Consultative Forum,²⁷

²¹ R Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Palgrave Macmillan 2003) 66.

²² Regulation (EC) 2007/2004 of the European Council of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, recital 22.

²³ Frontex, *Code of Conduct: For all Persons Participating in Frontex Operational Activities* (21 March 2011) frontex.europa.eu.

²⁴ Frontex, ‘Fundamental Rights Strategy’ (31 March 2011) www.gdr-elsj.eu. In February 2021, Frontex adopted an updated and more detailed Fundamental Rights Strategy that replaced the 2011 version, for further details see Frontex, ‘Fundamental Rights Strategy’ (14 February 2021) frontex.europa.eu.

²⁵ P Slominski, ‘The Power of Legal Norms in the EU’s External Border Control’ (2013) *International Migration* 41.

²⁶ Arts 26 (a)(2) and 26 (a)(3) of the Regulation 1168/2011 cit.

²⁷ Frontex, ‘Management Board decision No. 18/2012’ on the working methods of the Frontex Consultative Forum and the modalities of the transmission of information to the Frontex Consultative Forum (26 September 2012) frontex.europa.eu.

which started its activities in the beginning of 2013. The Regulation 2016/1624 transformed the agency into the European Border and Coast Guard Agency, enhancing its supervisory and operational functions with the intention of strengthening the uniform and efficient implementation of EU border management.²⁸ While the 2016 Regulation upgraded the status of the Consultative Forum by including it in the “administrative and management structure of the Agency”, the subsequent 2019 Regulation reversed this decision and made clear that the Forum is not part of Frontex’s administrative and management structure and has only advisory functions.²⁹ To assess the fundamental rights implications of border activities, the EU legislators considered it crucial that the Consultative Forum have “effective access, in a timely and effective manner, to all information concerning the respect for fundamental rights”.³⁰ Yet, its members do not have comprehensive access to fundamental rights-relevant information as they are also expected to sign a so-called “Declaration of Adherence to Professional Secrecy” that requires them not to disclose “any information of a sensitive or non-public nature”.³¹ Furthermore, the Management Board possesses leeway to decide “on the terms of the transmission of information” to the Forum.³²

Notwithstanding these restrictions, the Forum is entitled to carry out on-the-spot visits to joint operations or rapid border interventions and to hotspot areas, return operations and return interventions.³³ The possibility to conduct such field visits allows the Consultative Forum to observe border practices of Frontex operations and engage with Frontex and national border officers on the ground. A Forum member highlighted the considerable initial distrust on the part of Frontex with respect to on-the-spot visits.

“It took time to overcome the lack of confidence between us [the Forum] and Frontex. At the beginning, we negotiated for quite some time; we reassured Frontex we were not monitors, only visitors, and we had to explain that site visits are important to provide solid advice. Before our first visit, Frontex sent to us a 70-page document with instruction about what we are not allowed to do during the visit. Over time, the trust increased and Frontex accepted us”.³⁴

²⁸ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard; D F Rojo, ‘It’s a New Agency. It’s a Federal Agency. It’s the European Border Coast Guard! No Wait... it’s Frontex’ (28 February 2017) EU Law Enforcement eulawenforcement.com.

²⁹ Art. 61(c) of the Regulation 2016/1624 cit.; 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) No 1052/2013 and (EU) 2016/1624, art. 99.

³⁰ Art. 108(5) of the Regulation 2019/1896 cit.

³¹ Frontex, ‘Management board decision No. 18/2012’ cit. 8 ff.

³² Art. 108(2) of the Regulation 2019/1896 cit.; case T-31/18 *Izuzquiza and Semsrott v Frontex* ECLI:EU:T:2021:173.

³³ Art. 70(5) of the Regulation 2016/1624 cit.; art. 108(5) of the Regulation 2019/1896 cit.

³⁴ Interview 13 in the annex of this *Article*.

This provision not only enabled the Forum members to enhance their understanding of the agency's work and its fundamental rights implications, but also to include their findings from the visits in the Forum's annual reports.³⁵ According to the Forum, the "most significant change" brought by the Regulation 2019/1896, is the obligation of Frontex to inform the Consultative Forum of the follow-up with regard to its recommendations.³⁶ In doing so, the EU legislature addressed a long standing complaint by Forum members of not knowing how Frontex has reacted to specific Forum recommendations.³⁷ Another novelty of the regulation is the creation of at least forty fundamental rights monitors under the lead of the FRO who shall constantly assess the fundamental rights compliance of the Frontex.³⁸ Together with the renewed commitment that the FRO should have sufficient financial and human resources, the Consultative Forum was optimistic that these new provisions provide a "unique opportunity" to "prevent and address potential fundamental rights violations" of the agency.³⁹ The Consultative Forum is currently composed of thirteen organizations. The 2019 recast Regulation stipulates that Frontex shall invite the EU Agency for Fundamental Rights (FRA), the European Asylum Support Office (EASO) and the UN High Commissioner for Refugees (UNHCR) to participate in the Consultative Forum. Other Forum members are selected for a period of three years by the Frontex Management Board based on the proposal of FRO and after consulting the Executive Director.⁴⁰ The Consultative Forum elects two chairs who represent the Forum *vis-à-vis* Frontex staff, the Management Board, the FRO and external interloc-

³⁵ It is difficult to establish how many visits Forum members have made over the years. According to anecdotal evidence from a Forum member: "[w]e witnessed return operations in Greece as part of the Poseidon operation, before the implementation of the hotspot approach. We also observed six operations and put the findings in our annual report. Following the operations, we organised focus groups with member state authorities" (interview 2 in the annex of this *Article*).

³⁶ Art. 108(3) of the Regulation 2019/1896 cit.; see also Consultative Forum, *Seventh annual report. Frontex Consultative Forum on Human Rights* (2019) frontex.europa.eu.

³⁷ See Interviews 8, 10 and 11 in the annex of this *Article*.

³⁸ Art. 110 of the Regulation 2019/1896 cit.

³⁹ See Consultative Forum, *Seventh annual report* cit.

⁴⁰ Art. 108(2) of the Regulation 2019/1896 cit.; Since January 2020, the Consultative Forum consists of the following thirteen members: EASO, FRA, UNHCR, the Council of Europe (CoE), the International Organization for Migration (IOM), the Organization for Security and Co-operation in Europe – Office for Democratic Institutions and Human Rights (OSCE ODIHR), Office for the High Commissioner for Human Rights, Amnesty International European Institutions Office, Churches' Commission for Migrants in Europe, International Commission of Jurists, Jesuit Refugee Service Europe (JRS), Red Cross EU Office and Save the Children, see the website of Frontex at frontex.europa.eu. See also Frontex, 'Management Board Decision 26/2019' (14 October 2019) frontex.europa.eu. For an extensive discussion of the relationship between the Consultative Forum and the FRO, see section IV.3 below.

utors and ensure the strategic direction and overall coordination of the Consultative Forum's work.⁴¹ Despite the concerns of some NGOs members about their difficulties to cope with the workload, they stressed the good working atmosphere among Forum members and how their understanding of Frontex has increased over time.⁴²

IV. THE CONSULTATIVE FORUM'S CONTRIBUTION TO FRONTEX'S ACCOUNTABILITY

There is a widespread consensus in scholarly literature that the accountability of Frontex is insufficient.⁴³ By applying Bovens' accountability concept, we can observe that these amendments have affected Frontex's accountability obligations to different fora. In particular, the creation of the Forum has institutionalised fundamental rights dialogues with different internal and external stakeholders on a regular basis. In the following, we discuss the Consultative Forum's impact on the political, legal, administrative and social accountability of Frontex. We argue that the Forum provides an opportunity for dialogue, exchange of views and networking between Frontex and human rights advocates.

IV.1. POLITICAL ACCOUNTABILITY

The European Parliament can be regarded as the main forum for political accountability of Frontex.⁴⁴ Besides a general obligation to inform and report on various issues,⁴⁵ the EP has the right to invite the Executive Director to report *inter alia* on the activities of Frontex and the implementation and monitoring of the fundamental rights strategy. The Executive Director is required to make a statement before the European Parliament and answer parliamentary questions about Frontex activities. Furthermore, the Executive Director has the obligation to report regularly to the appropriate bodies and committees of the EP.⁴⁶

The establishment of the Consultative Forum has not fundamentally improved the political accountability mechanisms of Frontex. The formal status of the Forum, however, has provided an opportunity for the EP, notably the Committee on Civil Liberties, Justice and Home Affairs (LIBE), to invite its members to discuss fundamental rights issues in the

⁴¹ Frontex, 'Working Methods of the Frontex Consultative Forum on Fundamental Rights' frontex.europa.eu. In the past the Forum was chaired by FRA and the JRS (2013-2015) and then by the UNHCR and JRS (2015-2019). The current co-chairs of the Forum are FRA and UNHCR.

⁴² Interview 1, 2, 4 and 10 in the annex of this *Article*.

⁴³ 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; S Wolff and A Schout, 'Frontex as Agency: More of the Same?' (2013) *Perspectives on European Politics and Society* 305; S Horii, 'Accountability, Dependency, and EU Agencies: The Hotspot Approach in the Refugee Crisis' (2018) *Refugee Survey Quarterly* 204.

⁴⁴ Art. 6 of the Regulation 2019/1896 cit.

⁴⁵ *E.g.* arts 42(2) or 50(7) of the Regulation 2019/1896 cit.

⁴⁶ Art. 106(2) of the Regulation 2019/1896 cit.

context of Frontex's various border activities "on a regular basis".⁴⁷ These meetings have proved to be particularly important for NGO Forum members who do not usually enjoy privileged access to the EP.⁴⁸ Over time, the encounters facilitate networking activities and create a regular dialogue between MEPs and the Forum. In particular, the regular meetings allow the Forum to sensitize MEPs to specific human rights problems such as push and pull back practices or the situation of migrants' rights in third countries.⁴⁹

Moreover, the Consultative Forum and the EP have also been in a dialogue concerning on-going legislative work. For example, the Forum recommended the introduction of an effective mechanism to monitor the respect for fundamental rights in all activities of the agency. In particular, it "should also offer an effective complaints mechanism for individuals who consider that their fundamental rights have been violated in the context of a Frontex coordinated operation".⁵⁰ While Frontex has accepted the introduction of a complaint mechanism, it has also opposed the Forum's proposal that the FRO should have executive powers to resolve external and individual complaints. Instead, Frontex suggested, these complaints should be referred to national or EU courts.⁵¹ Along with the Ombudsman and the FRO, the Consultative Forum has exchanged views with MEPs on various occasions in order to push for the introduction of a Frontex complaint mechanism. While the 2016 recast Regulation ultimately adopted an individual complaint mechanism, its design differed from the suggestions advocated by the Forum or the Ombudsman.⁵²

In addition to the Forum's recommendations, some Forum members used their privileged access to the EP to improve their advocacy strategy by submitting independent assessments and recommendations to the LIBE committee.⁵³ These reports and recom-

⁴⁷ Interview 4 in the annex of this *Article*; Consultative Forum, *Annual Report. Frontex Consultative Forum on Human Rights* (2013) frontex.europa.eu 12; see also Consultative Forum, *Seventh annual report* cit.; Consultative Forum, *Fifth annual report. Frontex Consultative Forum on Human Rights* (2017) frontex.europa.eu; Jesuit Refugee Service, 'The Frontex Consultative Forum on Fundamental Rights' (27 June 2013) www.euro-parl.europa.eu.

⁴⁸ Interview 4 in the annex of this *Article*.

⁴⁹ *Ibid.*

⁵⁰ Frontex, Annual report, *Frontex Consultative Forum on Fundamental Rights* (2013) frontex.europa.eu 43.

⁵¹ *Ibid.*

⁵² Art. 72 of the Regulation 2016/1624 cit.; For example, the Forum criticized that the adopted mechanism was unclear with regard to the follow-up of complaints at the national level, the lack of reference to any means of appeal or the unclear link between the mechanism and the power of the Executive Director to suspend border operations, for further details see Consultative Forum, *Fourth annual report. Frontex Consultative Forum on Human Rights* (2016) frontex.europa.eu 20-21.

⁵³ Interview 1 in the annex of this *Article*; see International Commission of Jurists, ECRE and Amnesty International, 'Joint briefing on the European Border and Coast Guard Regulation' (April 2016) www.ecre.org; UNHCR, Comments on the Commission proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) 2007/2004, Regulation (EC) 863/2007 and Council Decision 2005/267/EC (April 2016) www.refworld.org.

mendations by the Forum could in turn be picked up by MEPs in holding Frontex's Executive Director to account. For instance, against the background of an internal inquiry about Frontex's involvement in push-backs of refugees at the Greek-Turkish border, the LIBE Committee stepped up the pressure on Frontex's Executive Director by referring to the Forum's concern about the absence of an effective monitoring system within the agency.⁵⁴ Conversely, the LIBE Committee can use its scrutiny function to publicly point to the Forum's difficulties in conducting its work.⁵⁵ In sum, the activities of the Consultative Forum and its regular dialogue with members of the LIBE committee enhance the control power of the EP over Frontex.⁵⁶ This is particularly important if we bear in mind that the hearings of the Executive Director before the LIBE committee have thus far been perceived as "too shallow and not very substantiated".⁵⁷

IV.2. LEGAL ACCOUNTABILITY

Since Frontex provides support to national border authorities, its operational activities are generally not reviewed by a court. Instead, national border authorities can be held accountable for fundamental rights violation before national courts.⁵⁸ Moreover, legal responsibility is often shared between several member states as well as Frontex, which makes it difficult for individuals to lodge a complaint before a court.⁵⁹ Hence, cases that have been handled by the Court of Justice of the EU do not deal with Frontex operations but with refusals of access to documents⁶⁰ or procurement actions and public services.⁶¹ The establishment of the Consultative Forum as an advisory body in the field of fundamental rights does not remedy Frontex's lack of legal accountability. The Forum has neither the mandate nor the capacity to monitor or assess the fundamental rights compliance of Frontex activities.⁶²

Instead, the Forum mainly deals with "soft issues" that do not directly challenge Frontex's activities and joint operations but engage with Frontex officials on fundamental rights

⁵⁴ See European Parliament, 'MEPs to Grill Frontex Director on Agency's Role in Pushbacks of Asylum-seekers' (30 November 2020) www.europarl.europa.eu; European Parliament, 'Final Mission Report' (5 June 2020) www.statewatch.org.

⁵⁵ See European Parliament, Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations (14 July 2021) www.europarl.europa.eu 9-10.

⁵⁶ Interview 3 and 4 in the annex of this *Article*.

⁵⁷ Interview 3 in the Annex of this *Article*.

⁵⁸ L Karamanidou and B Kasperek, 'Fundamental Rights, Accountability and Transparency in European Governance of Migration: The Case of the European Border and Coast Guard Agency FRONTEX' (Respond Working Papers 59-2020).

⁵⁹ M Fink, *Frontex and Human Rights* cit.

⁶⁰ *Izuzquiza and Semsrott v Frontex* cit.

⁶¹ S Tas, 'Frontex Actions: Out of Control? The Complexity of Composite Decision-making Procedures' (TARN Working Papers 3) 6 ff.

⁶² Interviews 4 and 9 in the annex of this *Article*; Consultative Forum, *Seventh annual report* cit. 17.

issues.⁶³ All the Forum's written output, namely the annual reports and the recommendations, is legally non-binding. Frontex is thus not obliged to comply with these recommendations. Previous to the Regulation 2019/1896, Frontex was also not required to inform the Forum of the follow-ups to its recommendations.⁶⁴ As a consequence, Forum members had no specific knowledge about whether Frontex ultimately followed their recommendations. In the words of some Forum members: "[W]e feel we have very limited impact: our reports are detailed and informed, but we cannot say how and if Frontex is really responding to our recommendations".⁶⁵ It is obvious that such a lack of dialogue between the Consultative Forum and the Executive Director or the Management Board is highly problematic from an accountability point of view. Similarly, some Forum members are concerned that it is often difficult to identify the responsible official in the context of a specific Frontex operation. "[W]e noticed that whenever we tried to identify the responsible person for a specific return, we entered a grey area. We saw that Frontex tried to hide behind the statement 'this is competence of MSs, not ours'. This means that for some operations or parts of operations, it was not possible to identify a responsible person or authority".⁶⁶

There are, however, other instances where we can witness that the work of the Forum can contribute to enhancing the legal accountability of the agency. For example, in 2016, the Forum sent a letter to the Executive Director recommending that Frontex should suspend operational activities at the Hungarian-Serbian border because of fundamental rights violations that "are of a serious nature and are likely to persist".⁶⁷ This was not taken into consideration. As the situation further deteriorated, the Forum reiterated their recommendation to Frontex by referring to relevant jurisprudence of the European Court of Human Rights.⁶⁸ However, the Executive Director rejected the recommendation of the Forum again, thereby demonstrating the "limited power of the Forum".⁶⁹ In December 2020, the European Court of Justice declared that Hungary's asylum process and border practices including push-backs to Serbia were not in accordance with EU law.⁷⁰ In its application, the European Commission used several reports including those from Forum members such as UNHCR and the Council of Europe as evidence in support of its claim that Hungary had failed to fulfil its obligation under EU law.⁷¹ Shortly after the ruling, Frontex announced it

⁶³ Interview 2 in the annex of this *Article*.

⁶⁴ See art. 108(3) of the Regulation 2019/1896 cit. which now requires Frontex to inform the Consultative Forum of the follow-up to its recommendations.

⁶⁵ Interview 11; see also interview 8 and 10 in the annex of this *Article*.

⁶⁶ Interview 2 in the annex of this *Article*.

⁶⁷ See Frontex Consultative Forum on Fundamental Rights, *Fourth Annual Report* (2016) www.frontex.europa.eu 39.

⁶⁸ *Ibid.* 2 referring to ECtHR *Ilias and Ahmed v Hungary* App n. 47287/15 [14 March 2017].

⁶⁹ Interview 10 and 12 in the annex of this *Article*.

⁷⁰ Case C-808/18 *Commission v Hungary* ECLI:EU:C:2020:1029.

⁷¹ Referring to the Consultative Forum recommendation, the Parliamentary Assembly of the Council of Europe also urged Frontex to suspend its operation at the Hungarian-Serbian border, see Resolution

would suspend all operational activities in Hungary.⁷² It is difficult to say to what extent the Court has actually benefitted from the work of the Consultative Forum. Also, in February 2021 a group of human rights activists invited Frontex to act pursuant to Article 265 TFEU and to suspend or terminate its activities in the Aegean Sea Region. To support their argument, they referred to the Forum's unsuccessful recommendations to end Frontex's operation in Hungary.⁷³ Similarly, an action submitted to the Court of Justice of the European Union also pointed to activities of the Consultative Forum with the view to bolster its legal argument.⁷⁴ These cases illustrate how the work of Forum members can also be used in legal proceedings,⁷⁵ thereby modestly enhancing the legal accountability of Frontex. In addition, Forum members also stress the potentially preventive role played by their dialogue with Frontex. "We have had a pedagogical role. When we started, Frontex knew nothing about fundamental rights issues [...] we improved their awareness. As a result, Frontex has adapted the language of fundamental rights and realized that the views of Forum members "are unavoidable to consider".⁷⁶ While this does not mean that Frontex always follows the advice of the Forum, this shows how these institutionalised legal dialogues on (potential) violations of human rights and refugee law, make it clear to the agency that these issues are increasingly difficult to ignore.

IV.3. ADMINISTRATIVE ACCOUNTABILITY

The institutional architecture of the EU exhibits several "quasi-legal" fora that exercise independent administrative and financial supervision and control.⁷⁷ With regard to Frontex, the most relevant administrative fora are the "external" European Court of Auditors (ECA), the European Ombudsman and the "internal" Management Board and the FRO.⁷⁸ The European Court of Auditors audits Frontex – along with all other European agencies

2299 of the Council of Europe, 'Pushback policies and practice in Council of Europe member States' (28 June 2019) assembly.coe.int para. 17.

⁷² J Barigazzi, 'EU Border Agency Suspends Operations in Hungary' (27 January 2021) Politico www.politico.eu.

⁷³ See above section IV.2; as well as Legal Centre Lesvos, *Immediate Suspension of Termination of Activities in the Aegean Sea Region* www.front-lex.eu 12.

⁷⁴ See Legal Centre Lesvos, *Immediate Suspension of Termination of Activities in the Aegean Sea Region* cit. 16 and 38.

⁷⁵ L Gianetto, *More than Consultation. Civil Society Organisations Mainstreaming Fundamental Rights in EU Border Management Policies: The case of Frontex and its Consultative Forum* (PhD Thesis University of Trento 2018) eprints-phd.biblio.unitn.it 133; L Gianetto, 'CSOs and EU Border Management: Cooperation or Resistance? The Case of Frontex Consultative Forum' (2020) *American Behavioral Scientist* 501.

⁷⁶ Interview 7 in the annex of this Article.

⁷⁷ M Bovens, 'Analysing and Assessing Accountability' cit. 456.

⁷⁸ M Gkliati and H Rosenfeldt, 'Accountability of the European Border and Coast Guard Agency' cit. 8.

– on a regular basis with a view to protect the EU’s financial management.⁷⁹ There are, however, a few special reports in which the ECA explicitly focuses on Frontex or issue areas in which Frontex is considerably involved.⁸⁰ In all these reports, the ECA mainly deals with the effectiveness of certain policy objectives such as hotspots or return but not on their fundamental rights implications. As a result, the work of the Consultative Forum has had no impact on the reports of the ECA. The dialogue between the Forum and the European Ombudsman seems to be more extensive.⁸¹ Generally, the Ombudsman can conduct inquiries, either on his own initiative or on the basis of complaints submitted to him directly or through a MEPs. In cases of maladministration, the Ombudsman enters into a dialogue with Frontex about the matter of concern which ultimately leads to a report that is then forwarded to Frontex.⁸² In addition, the report is also sent to the EP, which further underlines the close links between political, legal and administrative accountability.⁸³ Along with the EP and various human rights groups, the Ombudsman not only has the ability to confront Frontex itself to ensure it acts in accordance with its fundamental rights obligations, but also to invite human rights groups to join this dialogue and offer their position on the matter concerned.⁸⁴ In 2016, following a recommendation by the European Ombudsman,⁸⁵ the EU legislators adopted an individual complaint mechanism within Frontex that is overseen by the FRO.⁸⁶ While from a normative perspective the establishment of a complaint mechanism is a step in the right direction, the actual implementation has been considered suboptimal by various observers or

⁷⁹ See e.g. European Court of Auditors, *Annual Report on EU Agencies For The Financial Year 2019* (2020) www.eca.europa.eu.

⁸⁰ European Court of Auditors, *Report on the Annual Accounts of The European Border and Coast Guard Agency (Frontex) For The Financial Year 2019* (2020) www.eca.europa.eu. In these reports the ECA assesses, *inter alia*, whether the Frontex support in the field of return has been “effective and swift”. Fundamental rights implications of return, by contrast, have not been dealt with by the ECA see European Court of Auditors, *Asylum, Relocation and Return of Migrants: Time to Step Up Action to Address Disparities between Objectives and Results* (2019) www.eca.europa.eu. Similarly, European Court of Auditors, *EU Information Systems Supporting Border Control – A Strong Tool, But More Focus Needed on Timely and Complete Data* (2019) www.eca.europa.eu; European Court of Auditors, *EU Response to the Refugee Crisis: The “Hotspot” Approach* (2017) www.eca.europa.eu.

⁸¹ For an insightful discussion on the relationship between the European Ombudsman and EASO see E L Tsourdi, ‘Holding the European Asylum Support Office Accountable for its Role in Asylum Decision-Making: Mission Impossible?’ (2020) *German Law Journal* 506 and 526-530.

⁸² Art. 228 TFEU.

⁸³ P Magnette, ‘Between Parliamentary Control and the Rule of Law: The Political Role of the Ombudsman in the European Union’ (2003) *Journal of European Public Policy* 677; N Vogiatzis, ‘Frontex: Human Rights Obligations and the Role of the European Ombudsman’ in A Karatzogianni, D Nguyen and E Serafinelli (eds), *The Digital Transformation of the Public Sphere* (Palgrave Macmillan) 303.

⁸⁴ N Perkowski, ‘There Are Voices in Every Direction’ cit. 1193.

⁸⁵ European Ombudsman, *Special Report of the European Ombudsman in Own-Initiative Inquiry OI/5/2012/BEH-MHZ Concerning Frontex* (2013) www.ombudsman.europa.eu.

⁸⁶ Art. 72 of the Regulation 2016/1624 cit.

stakeholders.⁸⁷ The Consultative Forum, in particular, emphasised in two annual reports and several meetings with the Ombudsman that the governing rules of the mechanism should be further specified and – even more importantly – that the FRO should receive adequate resources in order to fulfil its obligations.⁸⁸ In late 2020, the Ombudsman responded to these concerns and suggestions and launched an inquiry triggering further accountability dialogues with Frontex, the FRO, the EP and other stakeholders, notably human rights NGOs.⁸⁹

Internally, accountability dialogues may also take place between the Consultative Forum, the Management Board and the FRO. The Management Board is responsible for taking the strategic decisions of the agency and also appoints the Executive Director.⁹⁰ With regard to the Forum, the Management Board decides on its composition and the terms of the transmission of information to the Forum. The Board may also consult the Forum on any matter related to fundamental rights.⁹¹ The interaction between the Forum and the Management Board is limited. While the chair of the Management Board usually attends the meetings of the Forum and receives the recommendations made by the Forum to the Board, several Forum members have been concerned that the Board has not been interested in a meaningful dialogue but rather in protecting established border practices.⁹² Some Forum members have even stated that the Management Board “doesn’t care” what the Forum thinks.⁹³ This lack of dialogue is also reflected in some Forum members’ view that it is unclear if or how the Board has responded to the recommendations of the Forum.⁹⁴

By contrast, the FRO and other members of the Consultative Forum are in a more constructive dialogue about how to promote Frontex’s fundamental rights approach.⁹⁵ Com-

⁸⁷ See S Carrera and M Stefan, ‘Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?’ (Working Papers 2018) Centre for European Policy Studies www.ceps.eu; C Jones, J Kilpatrick and M Gkliati, ‘Deportation Union: Rights, Accountability, and the EU’s Push to Increased Forces Removals’ (2020) Statewatch www.statewatch.org 52.

⁸⁸ Interview 3 and 4 in the annex of this Article; Consultative Forum, *Fifth annual report* cit. 22; Consultative Forum, *Sixth annual report* cit. 21ff.

⁸⁹ European Ombudsman, *Ombudsman Opens Inquiry to Assess European Border and Coast Guard Agency (Frontex) ‘Complaints Mechanism’* (2020) www.ombudsman.europa.eu; European Ombudsman, *Letter from the European Ombudsman to the European Border and Coast Guard Agency (Frontex) Concerning its Complaints Mechanism* (2020) www.ombudsman.europa.eu.

⁹⁰ Art. 100 of the Regulation 2019/1896 cit.

⁹¹ Art. 108(1) and (2) of the Regulation 2019/1896 cit.

⁹² Interview 2, 8, 10, 11 and 13 in the annex of this Article.

⁹³ Interview 10 and 11 in the annex of this Article.

⁹⁴ Interview 2 and 4 in the annex of this Article.

⁹⁵ Interview 2, 3, 4, 6, 9 and 13 in the annex of this Article.

pared to the Consultative Forum, the FRO has a much more privileged position within Frontex and plays a crucial role in the internal complaint mechanism.⁹⁶ There is, however, widespread concern that the FRO has difficulties living up to its potential mainly due to limited resources.⁹⁷ Hence, the Consultative Forum has repeatedly pointed out that the FRO should be better resourced, which also reflects its importance for the Forum as well as the good working relationship between the two bodies.⁹⁸ The FRO assists the Forum in navigating the information flow and refers it to relevant issues such as complaints or serious incident reports. Without this assistance, the Forum would often be unable to identify or process fundamental rights-relevant cases.⁹⁹ Conversely, Forum members provide the FRO with their own expertise on certain issues (return policy; vulnerable groups) and with reports that include relevant information about certain countries.¹⁰⁰

IV.4. SOCIAL ACCOUNTABILITY

This type of accountability deals with the relationship between Frontex and human rights groups, relevant stakeholders or even the public at large. Prior to the establishment of the Consultative Forum, numerous human rights groups monitored the fundamental rights implications of Frontex activities and did so relatively independently. However, since the activities of these fora have not been clearly demarcated from each other, the institutionalisation of the Consultative Forum could have paved the way for a more coherent and authoritative form of social accountability.¹⁰¹ However, Forum members have complained that they have insufficient resources (e.g. lack of their own secretariat)¹⁰² and time available to cope with the Forum's workload.¹⁰³ As one Forum member put it: "NGOs are usually overwhelmed by their own work and projects without having the capacity to

⁹⁶ Art. 99 of the Regulation 2019/1896 cit.; art. 109(2)(b) of the Regulation 2019/1896 cit. One interviewee noted: the FRO can "monitor whatever and wherever she wants" (Interview 2 in the annex of this Article).

⁹⁷ E.g. International Commission of Jurists, ECRE and Amnesty International, 'Joint Briefing on the European Border and Coast Guard Regulation' (April 2016) www.ecre.org 6. At the same time, the Consultative Forum can be invited to visit Frontex Joint Operations, see e.g. Consultative Forum, *Third annual report. Frontex Consultative Forum on Human Rights 2015* op.europa.eu 15 ff.

⁹⁸ Interview 2, 3, 4, 6, 9, 10 and 13 in the annex of this Article; Consultative Forum, *Fifth Annual Report. Frontex Consultative Forum on Human Rights 2017* cit. 22; Consultative Forum, *Sixth Annual Report Frontex Consultative Forum on Human Rights 2018* cit. 21 ff.

⁹⁹ Interview 3, 4 and 6 in the annex of this Article. Frontex's reluctance to disclose documents to the Forum does not only apply to sensitive information but is also induced by the agency's concern not to upset member states, see Interview 2 in the annex of this Article.

¹⁰⁰ Interview 3 in the annex of this Article.

¹⁰¹ M Bovens, 'Analysing and Assessing Accountability' cit. 457.

¹⁰² The secretariat of the Consultative Forum is provided by the FRO, see art. 109(h) of the Regulation 2019/1896 cit.

¹⁰³ Interview 13 and 5 in the annex of this Article.

do much more".¹⁰⁴ In addition, they often lacked the information and knowledge expertise to hold Frontex accountable. While EASO, FRA and the UNHCR had working relations with Frontex prior to the establishment of the Consultative Forum and were therefore familiar with the agency, many of the NGOs struggled to develop an adequate understanding of the agency.¹⁰⁵ In the early years, Frontex was particularly unwilling to enter into a meaningful dialogue with the Consultative Forum and share internal documents with its members. While this has improved recently, Forum members have suggested that Frontex should be more proactive when it comes to providing the Forum with relevant information about border operations.¹⁰⁶

Interestingly, another Forum member complained not about the lack of information, but about the "inflation of information"¹⁰⁷ and the flow of unedited documents that are sometimes conflicting, redundant or confusing. This poses a serious challenge for Forum members who are struggling with their limited resources. At times, the FRO has assisted them in browsing these documents and pointing to relevant issues.¹⁰⁸ Notwithstanding these constraints, Forum members have highlighted that their presence and regular involvement in Frontex's affairs have strengthened their dialogue with the FRO which often serves as a mediator between other Forum members and Frontex. Moreover, it also facilitated the dialogue among Forum members whose various expertise provided an opportunity for mutual learning and networking.¹⁰⁹ They acknowledged that at the beginning of the Forum's establishment "we mainly focused on learning how Frontex actually works [...] what are the main legal implications of Frontex's activities [...] and figure out how the Forum can have an impact to improve training and practices suitable to the agency".¹¹⁰ Here, the "excellent working relations"¹¹¹ and mutual support within the Consultative Forum have also partly mitigated the problems of the heavy workload and the sometimes uncooperative and indifferent attitude of Frontex officials.

Over time, Forum members have gained a deeper understanding of what Frontex "does do and does not do"¹¹² and a more nuanced grasp of fundamental rights challenges in border control.¹¹³ While this evidence may support the view that the establishment of the Consultative Forum has enhanced the social accountability of Frontex, the institutionalisation of a dialogue between Frontex and human rights NGOs can also be

¹⁰⁴ Interview 1 in the annex of this *Article*.

¹⁰⁵ Interview 2 in the annex of this *Article*.

¹⁰⁶ Interview 1, 2 and 4 in the annex of this *Article*.

¹⁰⁷ Interview 2 and 12 in the annex of this *Article*.

¹⁰⁸ Interview 10 in the annex of this *Article*.

¹⁰⁹ Interview 2, 3, 4, 5 and 6 in the annex of this *Article*.

¹¹⁰ Interview 1 in the annex of this *Article*.

¹¹¹ Interview 4 in the annex of this *Article*.

¹¹² Interview 2 in the annex of this *Article*.

¹¹³ Interview 1 and 2 in the annex of this *Article*.

regarded as more ambivalent. In fact, the Forum's annual reports are basically the only tool through which the Forum communicates with the general public. As one Forum member put it: "the annual report is our moment of accountability".¹¹⁴ At the same time, the annual reports are also forwarded to the Executive Director and Management Board as well as to lower levels within the Frontex organization.¹¹⁵ While the publication of the annual reports has the potential to contribute to the public dialogue about fundamental rights, it also commits Forum members to working long hours to reach a mutual consensus on the wording of a specific recommendation.¹¹⁶ Some Forum members have observed that the institutionalised involvement in the Consultative Forum nudges them towards "less confrontational" and more diplomatic behaviour towards Frontex which may even compromise the overall goal of accountability.¹¹⁷

V. CONCLUSIONS

Frontex has been and still is criticized for its lack of accountability with regard to fundamental rights protection. As one of the means to address this critique, the EU legislators established a Consultative Forum that should assist the agency in enhancing its accountability. Being an advisory body, the Consultative Forum cannot be regarded as a viable alternative to sound political and legal accountability. The Forum itself has stated that it merely complements the role of the FRO and cannot replace the "necessary oversight by stakeholders such as the European Parliament, national parliaments, national human rights institutions, civil society and the judiciary".¹¹⁸ The creation of the Consultative Forum can be conceived as an institutionalised involvement of relevant international organisations and NGOs in the field of fundamental rights. It provides an opportune structure for constant dialogue between Frontex and the political, administrative or social accountability fora of Frontex and serves as a communication facilitator between the various fora themselves. However, the challenges for the Consultative Forum in contributing to holding Frontex to account are manifold ranging from limited access to internal documents, insufficient resources and the lack of any formal power with regard to fundamental rights violations. As a result, the Forum has to resort to legally non-binding reporting and informal advocacy both inside and outside of Frontex.

Relying on their status as a formal component of the Frontex institutional architecture, Forum members must use their expertise and reputation to raise relevant fundamental rights concerns that emerge in the context of Frontex's activities. The analysis of

¹¹⁴ Interview 1 in the annex of this *Article*.

¹¹⁵ Interview 2 in the annex of this *Article*.

¹¹⁶ Interview 7 in the annex of this *Article*.

¹¹⁷ Interview 10 and 13 in the annex of this *Article*.

¹¹⁸ Consultative Forum, *Seventh annual report* cit.

the empirical data showed that it remains difficult for them to assess to what extent Frontex follows the advice of the Forum and complies with its recommendations.¹¹⁹ In many cases, Frontex has denied access to documents that have been requested by the Forum or – as the Hungarian case demonstrated – has rejected the recommendation to suspend a specific border operation due to fundamental rights concerns. This uncooperative and sometimes even confrontational stance on the part of Frontex has made it difficult for the Forum to have a relevant impact on the agency's activities. Moreover, insufficient resources in terms of personnel, time and administrative support have also hampered the impact of the Consultative Forum on Frontex's accountability with regard to fundamental rights. Despite these difficulties, we observed that the Consultative Forum has the potential to strengthen the accountability dialogues between Frontex and the fora but also among the various fora themselves. Due to its formal status as an advisory body, Forum members get privileged access to documents and powerful stakeholders. With regard to administrative accountability, the excellent working relations between the Forum and the FRO can serve as a case in point here. While the FRO has assisted the Forum to navigate the information flow, thereby helping to reduce the information deficit of many Forum members, the Forum, conversely, has offered its expertise in certain areas (*e.g.* return, vulnerable groups) or has publicly raised its concerns about the FRO's insufficient resources in several annual reports. In this vein, it can be expected that the 2020 establishment of 40 fundamental rights monitors under the lead of the FRO will in turn also benefit the work of the Forum. Considering Frontex's political accountability, there was no indication that the Consultative Forum has led to a fundamental improvement in that regard.

However, and similarly with regard to administrative accountability, the formal status of the Forum has provided an opportunity for the EP, notably the LIBE committee, to invite members of the Forum to discuss fundamental rights issues. These meetings have not only strengthened the power of the EP to hold Frontex to account, they have also improved Frontex's social accountability. By offering NGOs in their capacity the opportunity to enter into a regular dialogue with relevant MEPs, the creation of the Consultative Forum has also enhanced the capacity for NGOs to hold Frontex accountable. The lack of an independent and meaningful legal review mechanism is still the weakest point in Frontex's accountability framework. However, the privileged access to documents and stakeholders may increase the knowledge but also the confidence of the Forum to include relevant evidence in its annual reports that may in turn be used in legal proceedings. While we do not want to argue that this serves as a substitute for a full and proper legal review, the Consultative Forum may nonetheless be regarded as an opportunity to enter into a dialogue with courts, which may slightly improve Frontex's legal accountability. To

¹¹⁹ As said, the 2019 Regulation includes a new provision that obliges Frontex to inform the Forum of the follow-up to its recommendations, see art. 108(3) of the Regulation 2019/1896 *cit.* It remains to be seen, though, how this provision will be implemented.

conclude, we have shown that the work of the Forum can be regarded as a positive, albeit modest, step towards strengthening the accountability of Frontex.

ANNEX: LIST OF INTERVIEWS

No.	Organization	Date of interview	Code
1	International NGO 1	21 June 2019	Interview 1
2	European Agency 1	29 August 2019	Interview 2
3	European Agency 2	28 November 2019	Interview 3
4	International NGO 2	11 December 2019	Interview 4
5	European Agency 2	15 January 2020	Interview 5
6	International NGO 3	16 January 2020	Interview 6
7	International NGO 4	27 January 2020	Interview 7
8	International NGO 5	31 January 2020	Interview 8
9	International NGO 6	15 April 2020	Interview 9
10	International NGO 7	4 May 2020	Interview 10
11	International Organization 1	5 May 2020	Interview 11
12	International Organization 1	5 May 2020	Interview 12
13	International Organization 2	13 May 2020	Interview 13