

# Accountability of the European Border and Coast Guard Agency: Recent developments, legal standards and existing mechanisms

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## Abstract

This paper looks into the increased capacities, tasks and competences of Frontex (the European Border and Coast Guard Agency), brought about by the 2016 legislative reform. We examine whether this development was accompanied by an accountability regime of equal strength. The existing accountability mechanisms are measured against the standards of European Union (EU) primary and secondary law. The paper assesses the political, administrative, professional and social accountability of Frontex, including parliamentary oversight and the newly introduced individual complaints mechanism. The final part of the paper focuses on legal accountability, a strong, yet highly complex, form of accountability. There, we introduce the concept of systemic accountability and investigate possible courses of legal action against Frontex. In sum, Frontex is subject to moderately increased scrutiny under its renewed founding Regulation and to various EU accountability mechanisms of general application. But several procedural and practical hurdles could render legal accountability difficult to achieve in practice.

## Keywords

Frontex, European Union, interception, accountability

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## 1. Introduction

External border control was placed at the forefront of the changing landscape of European Union (EU) migration law. To counter what was widely perceived by the EU and Member States' administrations as a mass influx of third country nationals seeking protection in the EU, the EU Member States agreed on reinforcing the management of the external borders of the EU.<sup>2</sup> First, this was done by increasing the capacities, tasks and competences of Frontex (the European Border and Coast Guard Agency), the EU regulatory agency which was established more than a decade ago to assist Member States in cooperation on external border protection.

The research question which this paper seeks to answer is whether this development was accompanied by putting in place a stronger accountability regime. What are the existing accountability mechanisms, and does the framework live up to the claim put forward in the preamble to the new European Border and Coast Guard (EBCG) Regulation, that 'extended tasks and competences of the Agency should be balanced with (...) increased accountability'?<sup>3</sup>

For several reasons, the Agency is a particularly interesting subject of accountability studies. The intergovernmental character of Justice and Home Affairs in the EU (the so-called third pillar until the 2009 Treaty of Lisbon) precluded strict scrutiny afforded by the general principles of EU law for years. In conjunction with lacking competences and sovereignty reservations, this led to a history of unaccountable intergovernmental ad-hoc working groups preceding Frontex.<sup>4</sup> At the same time, there have been persistent allegations that Frontex is unaccountable, although its actions may have repercussions for the exercise of human rights of vulnerable people on the move. It can also be argued that accountability conflicts with the Agency's independency and its limited mandate.<sup>5</sup> The technocratic, depoliticised, expertise-driven character of agencies are said to be their *raison d'être*. Yet at first sight accountability to another entity inevitably reduces the discretion rendered to agencies.

Indeed, there are incidents demonstrating a practical need for accountability, especially when human rights are at stake. In fact, the work of the Agency, especially in dealing with vulnerable groups of people (i.e. people attempting to the EU in an irregular manner), is sensitive to human rights violations. Human rights at stake include, among others, the right to *non-refoulement*, the right to life and the right to asylum, access to an effective remedy, as well as the right to privacy and data protection. The 'shoot first' allegations last year gathered public attention, where the alleged disproportionate and frequent use of firearms in Frontex-led joint operations were revealed by investigative journalists and subsequently challenged by Members of the European Parliament.<sup>6</sup> Moreover, debriefing guidelines from the 2012 Joint Operation Hera targeting vulnerable groups of migrants to detract information were recently made public.<sup>7</sup>

To answer the research question set out above, the first section highlights changes made by the 2016 reform in external border management. The second section clarifies our notion of the concept of accountability. In the third section, accountability standards derived from EU primary and secondary law are applied to the Agency and contrasted with the mechanisms in place. Legal accountability, a strong yet highly complex kind of accountability, is dealt with in the fourth and final part of this paper, where we set out to introduce the concept of systemic accountability and investigate possible legal actions against Frontex.

There are certain limitations to the remit of this paper. First, it focuses on the accountability of the Agency against the background of possible human rights violations that may arise during its operations. Other breaches of EU or international law, for instance, the law of the sea, fall out of the scope of this paper. Secondly, it does not discuss national accountability mechanisms or the accountability of Member States participating in Frontex operations. Thirdly, it assesses the existence and restrictions of accountability mechanisms without considering how they perform in practice. Lastly, we do not set out to provide an exhaustive answer to the question of which level of accountability would be needed to render the exercise of authority sufficiently legitimate.

<sup>2</sup> More precisely, one should speak of the borders between the countries within the Schengen area and non-Schengen countries. The Schengen area comprises EU Member States, excluding the United Kingdom, Ireland and Cyprus as well as Bulgaria, Croatia and Romania. The Schengen area also includes the non-EU Member States Iceland, Norway, Switzerland and Liechtenstein

<sup>3</sup> Regulation (EU) 2016/1624 of the European Parliament and of the Council on the European Border and Coast Guard (...) [2016] OJ L 251/1 (EBCG Regulation), 14th recital of the Preamble.

<sup>4</sup> Such as the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA and SCIFA+); see Carol Harlow, *Accountability in the European Union* (Oxford University Press, 2002) 41ff; and Andrew W. Neal, 'Securitization and Risk at the EU Border – The Origins of Frontex' (2009) 2 *Journal of Common Market Studies* 333, 338ff.

<sup>5</sup> In this vein, cf. EBCG Regulation, 14th recital of the Preamble: 'The extended tasks and competences of the Agency should be balanced with strengthened fundamental rights safeguards and increased accountability'; see Harlow, *Accountability in the European Union* (Oxford University Press, 2002) 75. The issue of accountability gains even more prominence after the enhancement of powers and competences of Frontex and those of other EU agencies, for example in European banking supervision.

<sup>6</sup> Zach Campbell, 'Shoot First: Coast Guard Fired at Migrant Boats, European Border Agency Documents Show', *The Intercept* (22 August 2016). Available at: <<https://theintercept.com/2016/08/22/coast-guard-fired-at-migrant-boats-european-border-agency-documents-show>> (accessed 14 August 2017).

<sup>7</sup> 'Press release: EU Border Agency Targeted "Isolated or Mistreated" Individuals for Questioning', *Statewatch* (16 February 2017). Available at: <<http://www.statewatch.org/news/2017/feb/eu-frontex-op-hera-debriefing-pr.htm>> (accessed 14 August 2017).

## 2. Setting the scene: Frontex and the 2016 reform of EU external border management

Following the abolition of the internal borders within the Schengen area, strengthening the controls at the common external Schengen borders became a priority of the EU Member States. While each state remained responsible for the management of its part of the external borders, cooperation among Member States was deemed essential. To this end, an EU agency responsible for coordinating the management of the external borders was established in 2004. Frontex is based in Warsaw and it is tasked with enhancing operational cooperation among Member States in managing their parts of the external borders. It mainly does so by organising, managing, (co)financing and providing training for joint surveillance operations at the external sea, air and land EU borders, and joint return operations, aimed at the efficient deportation of migrants not permitted to stay in the territory of the EU Member States. Joint operations are hosted by a Member State or arguably even a third neighbouring country (Article 54(3) EBCG Regulation), while other EU Member States make available personnel or technical equipment to the operation and, more generally, to the Agency itself. The work of the Agency is strongly intelligence-driven as the drafting of the operational plan is based on thorough risk analysis and the processing of information, among others collected by the European Border Surveillance System (commonly known as EUROSUR), managed by Frontex.

Since 2004, the Frontex Regulation has been amended several times. It has further been supplemented by other EU law instruments.<sup>8</sup> Through this process the Agency's powers and competences have gradually increased. Most recently, in 2016, a new regulation on EU external border management was adopted, the EBCG Regulation. Following the increased numbers of migrants arriving into the EU in 2015 and 2016, the governments of the EU Member States declared that shortcomings in border management (incapacity and unwillingness to act, especially by Southern European Member States) called for closer cooperation and enhanced competences of EU actors involved. Strengthening external border control was thought to alleviate the problem of sharing and determining responsibility for handling asylum claims and accommodating protection seekers.

The new EBCG Regulation consists of the national border and coast guards and the EBCG Agency (Article 3 (1)).<sup>9</sup> The Agency still assists the Member States in managing external borders and facilitates their cooperation. As before, Frontex's role remains managerial and coordinating. Although the Member States retain primary responsibility for border management, there is a shift towards responsibility shared with the Agency as reflected in Article 5 of the Regulation.

Frontex is the focal point and information hub in EU external border control. It manages surveillance systems, gathers and processes information from all actors involved and places liaison officers in the Member States as well as coordinating officers in ongoing EU-led operations. The Member States in turn have a duty to cooperate and to share information<sup>10</sup> and to comply with the Agency's strategies and activities.<sup>11</sup> Those now include vulnerability assessments (Article 13) and emergency interventions (Article 19). Among other developments, the growth in staff and budget, the enhanced role in migration management and returns as well as the fundamental rights complaints mechanism deserve mention.<sup>12</sup>

In sum, the network model has not changed. Still, the new Regulation tasks Frontex with a more proactive, stronger supervisory and standard-setting role. Those new features introduce a certain hierarchy between the Agency and the Member States' authorities.

Before the 2016 reform is evaluated in terms of accountability, it is crucial to clarify how we understand accountability and which standards we will subsequently apply to Frontex.

## 3. The concept of accountability

To frame accountability, we distinguish three layers of norms. First, there is substantive law which creates primary obligations by an obligor towards an obligee. A classic example in this regard would be provisions bestowing human rights. Second, the law of responsibility determines who is bound under which circumstances and how conduct can be attributed. Above the national plane, those rules are either specific to a particular forum (e.g. the EU or the system established by the European Convention on Human Rights, see Article 1 ECHR) or they rely on the concept

<sup>8</sup> The changes include the RABITs Regulation (2007), two amendments to the founding Frontex Regulation (2007 and 2011), the EUROSUR Regulation (2013) and the Frontex Sea Operations Regulation (2014); cf. Jorrit Rijpma, 'The Proposal for a European Border and Coast Guard: Evolution or revolution in external border management? Study for the LIBE Committee', PE 556.934 (2016) 11–13. Available at: <[www.europarl.europa.eu/RegData/etudes/STUD/2016/556934/IPOL\\_STU\(2016\)556934\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556934/IPOL_STU(2016)556934_EN.pdf)> (accessed 14 August 2017).

<sup>9</sup> Unless otherwise specified, all Articles cited in this paper refer to those of the EBCG Regulation.

<sup>10</sup> Arts 9ff.

<sup>11</sup> Inter alia, it is the Agency's task to establish a technical and operational strategy for integrated border management (Article 3 (2)). All national strategies will have to comply with it (Article 3 (3)). Although cooperation outside the Agency's remit remains possible, this is limited to action compatible with the Agency's activities.

<sup>12</sup> For further details, see Sergio Carrera and Leonhard den Hertog, 'A European Border and Coast Guard: What's in a name?' (2016), CEPS Paper in Liberty and Security in Europe 88, 1, 11ff. Available at: <[www.ceps.eu/publications/european-border-and-coast-guard-what%E2%80%99s-name](http://www.ceps.eu/publications/european-border-and-coast-guard-what%E2%80%99s-name)> (accessed 14 August 2017); Rijpma (footnote 7) 14–25; and Herbert Rosenfeldt, 'Establishing the European Border and Coast Guard: All-new or Frontex reloaded?', EU Law Analysis (16 October 2016). Available at: <<http://eulawanalysis.blogspot.de/2016/10/establishing-european-border-and-coast.html>> (accessed 14 August 2017).

of international responsibilities of either states or international organisations according to international customary law.<sup>13</sup> Third, and arguably dependent on the first and the second layer, there is accountability. We submit that, in the absence of any legal definitions understanding accountability as an 'obligation to explain and justify conduct to a forum and face consequences',<sup>14</sup> this quote from Bovens provides us with a useful working definition. It is a follow-up to responsibility and a supplementary set of norms establishing compliance with standards and mechanisms. By means of ex-post control, accountability legitimises the exercise of authority and controls it. Accountability prevents abuse of the exercise of authority and helps to improve it.<sup>15</sup>

In essence, accountability describes a concept comprising different fora, relationships and consequences. Still, all three layers of norms are needed to ensure compliance with legal obligations and effective protection. Substantive law, responsibility and accountability depend on each other. Attribution is a pre-condition for accountability<sup>16</sup> and difficulties in determining responsibility continue at the accountability level. However, the two are often confused or used interchangeably.<sup>17</sup>

Accountability can be further specified in relation to the forum:<sup>18</sup>

- political accountability: towards elected representatives, political parties and voters;
- administrative accountability: towards auditors, inspectors and controllers;
- professional accountability: towards professional peers and associations;
- social accountability: towards interest groups, charities, stakeholders and the public at large;
- legal/judicial accountability: towards courts and tribunals.

Eventually, mapping out accountability for the purpose of this paper is not only about terminology. Without a legal definition in place, a shared understanding is key to avoid the danger of arbitrariness and of political opportunism. Otherwise, accountability might rightly be accused of being 'one of those golden concepts that no one can be against (...), a garbage can filled with good intentions, loosely defined concepts, and vague images of good governance'<sup>19</sup> or, as it was also termed, just another 'political feel good standard'.<sup>20</sup>

## 4. Frontex's accountability under EU law

Here we find a fragmented picture. There is no single comprehensive norm or concept setting out accountability standards, but instead various EU law provisions corresponding to the multiple fora to which accountability can be rendered.<sup>21</sup> In addition, accountability gaps in law and practice, alongside several unanswered questions, remain.

The following part identifies accountability standards and mechanisms, first regarding the EBCG framework itself and, secondly, regarding EU primary law obligations and their implementation in secondary law. This part leaves out legal accountability. We will address that separately in the final part of the paper.

### 4.1 The EBCG framework: Novelty resulting from the 2016 reform

The new EBCG Regulation contains various provisions related to accountability.

<sup>13</sup> According to ARIQ, responsibility for an organisations arises if there is a breach of an obligation under international law and if this breach is attributable to the international organisation; see Matthias Hartwig, 'International Organizations or Institutions, Responsibility and Liability' in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2012) Vol 6.

<sup>14</sup> A more exhaustive definition in line with Bovens' understanding perceives accountability as a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his conduct, the forum can pose questions and pass judgement, and the actor may face consequences; see Mark Bovens, 'Analysing and Assessing Public Accountability – A conceptual framework' (2006), European Governance Papers (EUROGOV) C-06-01, 9ff. Available at: <[http://edoc.vifapol.de/opus/volltexte/2011/2459/pdf/egp\\_connex\\_C\\_06\\_01.pdf](http://edoc.vifapol.de/opus/volltexte/2011/2459/pdf/egp_connex_C_06_01.pdf)> (accessed 14 August 2017). Bovens' conceptual framework has gained considerable support in legal scholarship, cf. E. Madalina Busuioc, *European Agencies: Law and practice of accountability* (Oxford University Press, 2013) 46–53; Amélie S Pomeon, 'Frontex and EBCG – a Question of Accountability' (Master's thesis, Radboud University Nijmegen, 2016) 9–11.

<sup>15</sup> According to Bovens 'Analysing and Assessing Public Accountability – A conceptual framework' (2006) 25, accountability is a means to legitimise the exercise of authority; to control public authority, prevent abuse, enhance learning capacity and make governance more effective.

<sup>16</sup> Ben J. J. Crum and Deirdre M. Curtin, 'The Challenge of Making European Union Executive Power Accountable' in Simona Piattoni (ed.), *The European Union: Democratic principles and institutional architectures in times of crisis* (Oxford University Press, 2015) 63, 69ff. For now we assume that an act or omission can be attributed to Frontex, but note that this is not clarified by the EBCG Regulation. Although Article 5 (1) EBCG Regulation promisingly talks about Integrated Border Management being a 'shared responsibility of the Agency and of the national authorities', this cannot be understood as entailing international responsibility, but rather as a general obligation to undertake the necessary steps to fulfil the tasks assigned to the actors involved by the operational plan in joint operations and the EBCG Regulation more generally.

<sup>17</sup> See, for example, Pomeon, 'Frontex and EBCG – a Question of Accountability' (Master's thesis, Radboud University Nijmegen, 2016) 13ff.

<sup>18</sup> Bovens, 'Analysing and Assessing Public Accountability – A conceptual framework' (2006) 15ff.

<sup>19</sup> *Ibid.*, 5, 7.

<sup>20</sup> Busuioc, *European Agencies: Law and practice of accountability* (Oxford University Press, 2013) 45.

<sup>21</sup> Pomeon 'Frontex and EBCG – a Question of Accountability' (Master's thesis, Radboud University Nijmegen, 2016) 9 dissents, holding that accountability is 'not completely accepted as a concept of European law yet' but fails to identify its occurrence or common legal basis. In fact, for the purpose of this paper we submit that a plethora of accountability related provisions and principles exist rather than a single coherent principle.

#### 4.1.1 Preamble to the Regulation

During the negotiations on the new Regulation, the European Parliament's rapporteur proposed quite boldly to add that:

The European Border and Coast Guard is also responsible, as the coordinator, and remains fully accountable for all actions and decisions under its mandate. The Commission, in cooperation with the Agency, the Council and relevant stakeholders, shall further analyse provisions related to accountability and liability and redress any potential or actual gaps connected to activities of the Agency.<sup>22</sup>

According to the explanations to the proposed amendments, the rapporteur considered it

necessary to increase the accountability of the future Agency by providing for more information to be made available to Parliament and the general public. More transparency is necessary to increase legitimacy and to avoid false impressions as to the role of the Agency.<sup>23</sup>

The wording builds on the Fundamental Rights Strategy of the Agency (para. 13), which continues to stay in place but is considered a legally non-binding self-commitment or soft law at the best. Still, the proposed change to the draft Regulation did not survive the ensuing triologue among the legislating EU organs. It was thus not included in the final text, although it resonates in the 14th recital of the Preamble: that 'extended tasks and competences of the Agency should be balanced with (...) increased accountability' – which, obviously, does not carry a comparable legal or even political force.

#### 4.1.2 Article 7 EBCG Regulation

According to Article 7, 'the Agency shall be accountable to Parliament and to the Council in accordance with this Regulation'. Interestingly, the Commission does not feature in the list. An explanation would be that Frontex's independence was always meant to guard against the Commission's influence rather than that of other EU organs or the Member States.

The wording sounds promising in terms of accountability, but, on scrutiny, the second part of the sentence – 'in accordance with this Regulation' – renders the provision merely declaratory. It must be read as 'foreseen by this Regulation'. In other words, accountability exists only to the extent explicitly contained in the Regulation. If anything, Article 7 could bear legal significance in the opposite direction. That would be the case if an accountability mechanism relying on Parliament or the Council as fora contradicted the Regulation. Assuming this mechanism would be established by EU secondary or tertiary law, the Regulation would prevail in exempting the Agency from that accountability. Article 7 at least acknowledges that the Agency is subject to accountability considerations and indicates that such exist in the Regulation.

#### 4.1.3 Individual complaints mechanism

For a long time, the European Ombudsman and the European Parliament had been advocating for an individual complaints mechanism.<sup>24</sup> This call was finally answered in the new Regulation. Article 72 introduces the possibility for individuals to submit a complaint if they feel that their fundamental rights have been violated by actions of staff involved in EBCG activities.<sup>25</sup>

At the initial stage, the Fundamental Rights Officer (FRO) records the complaint and decides on its admissibility. Admissible complaints against the Agency's staff are examined by the Executive Director (ED), while admissible complaints against Member States' staff are forwarded to the competent national authorities. Meritorious complaints have to be followed-up 'appropriately' either by the ED or the Member States' authorities, which report back to the FRO (Article 72 (6) and (7)). How the FRO ensures an appropriate follow-up, especially of complaints against national border and coast guards, is not further specified in the Regulation and remains to be seen.

Another problem area is the relationship between the complaints mechanism and judicial remedies. Complaints can be submitted irrespective of other remedies (Article 5 (5) of the Agency's Rules on the Complaints Mechanism). Overall, the terminology deployed on the actual decision on the complaint is very vague. Does it have legal effect or is the decision taken within a self-contained regime with a view to internally correcting deficiencies that adversely affect human rights? A progressive understanding would be that the decisions constitute acts reviewable by other EU organs.

22 Amended proposal for the EBCG Regulation, cf. European Parliament, Committee on Civil Liberties, Justice and Home Affairs, 'Report on the proposal for a regulation of the European Parliament and of the Council on the European Border and Coast Guard (...)' [2016], PE578.803v02-00, 39, Art. 5 (3a).

23 European Parliament, Committee on Civil Liberties, Justice and Home Affairs, 'Report on the proposal for a regulation of the European Parliament and of the Council on the European Border and Coast Guard (...)' [2016], PE578.803v02-00, 130.

24 European Ombudsman, 'Special Report in Own-initiative Inquiry OI/5/2012/BEH-MHZ Concerning Frontex'. Available at: <<http://www.ombudsman.europa.eu/en/cases/specialreport.faces/en/52465/html.bookmark>> (accessed 15 August 2017).

25 Pomeon (footnote 13) 87ff, 102ff; Rosenfeldt (footnote 11); Rijpma (footnote 7) 30f; see also further specification by Frontex, 'The Agency's Rules on the Complaints Mechanism; Annex 1 to the Decision of the Executive Director No. R-ED-2016-106 (6 October 2016). Available at: <[http://frontex.europa.eu/assets/Complaint/Annex\\_1\\_-\\_Frontex\\_rules\\_on\\_the\\_complaints\\_mechanism.pdf](http://frontex.europa.eu/assets/Complaint/Annex_1_-_Frontex_rules_on_the_complaints_mechanism.pdf)> (accessed 14 August 2017).

According to Article 263 (1) of the Treaty on the Functioning of the European Union (TFEU), the Court of Justice of the EU (CJEU) reviews the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties. This review can be initiated by a person who is addressed by the decision. Therefore, the complainant would have standing before the Court. Even if the decision does not qualify as a reviewable act under Article 263 TFEU, it would be possible to introduce judicial review of decisions taken by the FRO or the ED on ground of Article 263 (5) TFEU.<sup>26</sup> In addition, the European Ombudsman could get involved by receiving complaints against decisions taken during the complaints mechanism.<sup>27</sup>

Lastly, the mechanism was criticised for not being fully independent.<sup>28</sup> Admittedly, not even the FRO – who is employed by the Agency – takes the ultimate decision, but instead the ED or the Member States' authorities. Indeed, the mechanism is not meant to be judicial or independent. Rather, it constitutes an administrative, internal review which had been absent to date. As such, it corresponds to the requirements afforded by the right to good administration according to Article 41 of the Charter of Fundamental Rights of the European Union (CFR). In and of itself, the mechanism is not adequate to comply with the standards of Article 47 CFR regarding the right to an effective remedy. Even if it was not established to answer calls for enhanced and effective judicial review, it cannot be used to avoid them. Consequently, and solely regarding the complaints mechanism, the right to good administration according to Article 41 CFR applies and, at a first reading, is at least *de jure* complied with.

#### 4.1.4 Enhanced parliamentary oversight

With the new Regulation, parliamentary oversight was strengthened. Before, the European Parliament could invite the ED to make a report.<sup>29</sup> In the past, members of the Committee on Civil Liberties, Justice and Home Affairs (LIBE) – a standing committee of the European Parliament that is responsible for, inter alia, protecting civil liberties and human rights – were quite surprised to find that not a single Frontex senior official would be available to attend a preannounced public hearing organised by the LIBE Committee.<sup>30</sup>

This is less likely to happen in the future as the amended provision now reads that 'the Executive Director shall also make a statement before the European Parliament, if requested, and report to it regularly' (Article 68 (2)). Of course, this has a touch of self-empowerment of the European Parliament as co-legislator.<sup>31</sup> But certainly one has to give credit to the European Parliament for constantly seeking to strengthen Frontex's human rights ties and accountability mechanisms within the Agency.

## 4.2 EU primary law standards and mechanisms of general application

In addition to the new accountability features contained in the Regulation, other sources of EU law contain accountability standards and mechanisms. According to the hierarchy of norms informing the post-Lisbon constitutional setting of the EU (i.e. the primary law contained in the Treaty on European Union (TEU), the TFEU, the CFR and the unwritten general principles of EU law), institutions set up by secondary law have to comply with primary law standards and procedures.

### 4.2.1 Transparency and social accountability

Transparency as such might not be covered by a narrow understanding of accountability.<sup>32</sup> But it can trigger accountability dialogues with a forum which does not have any formal investigative powers as such. Therefore, transparency in the Agency's work is important to interest groups, stakeholders and the public at large.

Legal bases for transparency are set out in both EU primary and secondary law. According to Article 15 (1) TFEU 'the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible'. Article 11 (2) TEU and Article 298 (1) TFEU require an open European administration to ensure transparent and regular dialogue with civil society. Article 15 (3) TFEU, Article 42 CFR and Regulation (EC) 1049/2001 grant access to EU documents for EU nationals and EU residents.

26 TFEU Art. 263 (5) holds that acts setting up agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these agencies intended to produce legal effects in relation to them. The European Chemicals Agency serves as an example of an integrated CJEU appeals structure against board/agency decisions; cf. Regulation (EC) 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency (...) [2006] OJ L396/1 as amended, Art. 94; see section 4.2.3 in this paper for an in-depth discussion.

27 See David Fernández Rojo, 'The European Border and Coast Guard: Towards the centralization of the external border management?', Blogactiv (7 February 2017). Available at: <<http://eutarn.blogactiv.eu/2017/02/07/the-european-border-and-coast-guard-towards-the-centralization-of-the-external-border-management/>> (accessed 14 August 2017), proposing a Memorandum of Understanding between Frontex and the European Ombudsman to handle complaints against decisions, even if they are inadmissible.

28 Ibid.

29 According to Article 25 (2) of the repealed Council Regulation (EC) 2007/2004 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 [2004], OJ L349/1 as amended (Frontex Regulation), the 'European Parliament or the Council may invite the Executive Director to report on the carrying out of his/her tasks'.

30 European Union Committee, Frontex: The EU external border agency (HL 2007–08, 60) para. 85.

31 Crum and Curtin, 'The Challenge of Making European Union Executive Power Accountable' in Simona Piattoni (ed.), *The European Union: Democratic principles and institutional architectures in times of crisis* (Oxford University Press, 2015) 75.

32 Bovens, 'Analysing and Assessing Public Accountability – A conceptual framework' (2006) 13.

Frontex grants access to documents in accordance with the abovementioned provisions (Article 74). Considering the circumstances of migrants on the move, the right to access documents is still rather weak. Migrants are usually third country nationals who have not (yet) established residency in the EU. Therefore, they do not fulfil the requirements to access EU documents. If access to documents is granted, those documents are often redacted on ground of exceptions permitted in the public interest. As irregular migration is increasingly considered a threat to public security,<sup>33</sup> information on incidents in external border control becomes difficult to obtain.<sup>34</sup>

In addition, EU citizens hold the right to address the EU institutions and receive an answer.<sup>35</sup> With Frontex, any natural or legal person might address the Agency (Article 74 (4)). This is more generous than that required by primary law, but one has to bear in mind that there is no obligation of result. The content of the answer is left to the discretion of Frontex.

The Agency is also obliged to extensively report and give notice to different EU institutions and bodies. It reports to the Justice and Home Affairs Council, a configuration of the Council of the EU, composed of the Ministers of Justice and/or Home Affairs of the EU Member States, and to the EU Internal Security Committee (COSI), comprising representatives from national security services or other relevant Member State authorities. The Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) and various other EU Council preparatory bodies are being kept up to date by Frontex.<sup>36</sup> Within the European Parliament, Frontex reports to the standing committees responsible for the budget and the budgetary control of the EU (BUDG and CONT) and to the LIBE Committee.<sup>37</sup> Frontex reports to the institutions and the general public contain, among other things, the annual report, the external evaluation, progress reports on the Fundamental Rights Strategy, the work programme and general risk analyses. Missing from this list of freely available publications are the operational plans and serious incident reports, both of which are classified as sensitive and confidential.

If one accepts that transparency is a precondition for social accountability because the addressee of the information is yet unspecified, it seems apt to take note of another channel to generate social accountability. Due to growing human rights concerns, the 2011 reform of Frontex introduced bodies to strengthen fundamental rights guarantees in the work of the Agency. Besides the FRO (now Article 71), the Fundamental Rights Consultative Forum was established (now Article 70). Its role *inter alia* is to open up Frontex to the influence and scrutiny of other EU agencies, institutions and NGOs in the field of human rights and migration.

#### 4.2.2 Political accountability

Political accountability owed towards elected representatives and their voters is a key demand of democratic legitimacy when public authority is exercised. Democracy as such is a founding value of the EU and a legal principle at the same time (Articles 2, 10 *et seq.* TEU)<sup>38</sup>. Admittedly, there are no precise obligations stemming from it. The CJEU has not yet given guidance on the principle either. Nevertheless, the Court has stressed the importance of the European Parliament's role in the legislative process and emphasised the administration's accountability towards (EU or national) parliaments.<sup>39</sup>

Regarding Frontex, the European Parliament can summon and question the ED who has to make a statement (Article 68 (2)) and the Council can invite the ED (Article 69 (2)). The members of the Management Board are the heads of the border authorities of the participating Member States. In this capacity they are accountable to their respective ministers who, in turn, are accountable to national parliaments.

#### 4.2.3 Administrative accountability

Administrative accountability is owed towards higher levels of administration if such exists. Often specialised entities such as auditors, inspectors and controllers perform cross-sectional accounting activities as part of their mandate within a system. As for the EU, in the following we distinguish between the role of EU organs, specialised EU institutions, and departments within Frontex.

At the level of EU organs, the Commission is hardly involved in holding Frontex to account. The Commission adopts conclusions on the external evaluation report (Article 81 (2)) and sets up the draft budget, including subsidies for Frontex (Article 75 (7) and (8)). The European Parliament and the Council are the budgetary authorities of the EU (Article

33 Elspeth Guild and others, 'Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office', Study requested by the Directorate General for Internal Policies, PE 453.196 (2011) 88, 99. Available at: <[http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/libe/dv/02\\_study\\_fundamental\\_rights\\_/02\\_study\\_fundamental\\_rights\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/02_study_fundamental_rights_/02_study_fundamental_rights_en.pdf)> (accessed 14 August 2017); for an exhaustive account see Valsamis Mitsilegas, *The Criminalisation of Migration in Europe, Challenges for Human Rights and the Rule of Law* (Springer, 2015) 1ff and especially 11ff with regard to Frontex.

34 As witnessed by comparing redacted serious incident reports of Frontex joint operations and their unredacted counterparts which were inadvertently released in full. See Campbell 'Shoot First: Coast Guard Fired at Migrant Boats, European Border Agency Documents Show', *The Intercept* (22 August 2016) with further references.

35 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, Arts 20 (2) (d), 24 (4).

36 Frontex, 'The Council of the European Union, including Committees and Working groups'. Available at: <<http://frontex.europa.eu/partners/eu-partners/council/>> (accessed 14 August 2017).

37 Frontex, 'European Parliament'. Available at: <<http://frontex.europa.eu/partners/eu-partners/european-parliament/>> (accessed 14 August 2017).

38 Case 238/79, *Roquette*, para. 33, ECLI:EU:C:1980:249.

39 Case C-518/07, *Commission v Germany*, paras 40ff, ECLI:EU:C:2010:125.

314 TFEU). Together they authorise the budget and, even more importantly, grant discharge. The discharge for budget implementation is the decision by which the European Parliament releases the Commission (or any other independent body set up under EU law) from its responsibility for managing a given budget, by marking the end of that budget's execution. This ex-post financial control is exercised by the Parliament upon recommendation of the Council.<sup>40</sup>

Regarding specialised bodies, the Court of Auditors has the power to audit. This means that it examines the accounts of all revenue and expenditure of all bodies, offices or agencies set up by the Union. Its reports, opinions and observations are taken into account by the budgetary authorities.<sup>41</sup> Frontex is also under the scrutiny of the European Anti-Fraud Office (OLAF). OLAF conducts internal anti-fraud investigations, combats fraud in expenditure, corruption and other unlawful activities and can carry out on-the-spot checks. It can make non-binding recommendations on a variety of measures.<sup>42</sup> The European Ombudsman (Article 228 TFEU, Article 43 CFR) receives complaints by individuals against maladministration of any EU body, hence also against Frontex. To have standing, however, the complainant has to be an EU citizen or resident. For this reason, in the context of external border management, the Ombudsman's power to conduct own-initiative enquiries is more relevant and has been used in the past.<sup>43</sup> As illustrated by the ultimately successful calls for a complaints mechanism, such an enquiry can mark the first step or an important component of an accountability dialogue between the accountee and various fora. From a more formal point of view, the consequences of successful complaints or enquiries are very limited still: ultimately the Ombudsman merely publishes findings and reports to the European Parliament and the institution concerned.

Within Frontex, the Management Board has a double role. On the one hand, it is part of the Agency and is responsible for strategic decision-making of the Agency (e.g. by adopting multi-annual work programmes). On the other hand, it exercises accountability functions insofar as it is endowed with disciplinary authority over the ED and can ultimately dismiss him.<sup>44</sup> The FRO monitors compliance with fundamental rights in Frontex-coordinated joint operations and all other activities (Article 71). To this end, they receive all incident reports and have unfettered access to documents and officials. They can observe Frontex coordinated joint operations *in situ* and participate in internal Frontex briefings, debriefings and discussions. The FRO reports to the Consultative Forum, the ED and the Management Board. They raise human rights concerns regarding ongoing activities within the Agency without playing a publicly visible role. Other accountability fora such as the European Parliament might still profit from their work because they can assume that human rights concerns within the Agency are being followed up and brought to the attention of the decision-making bodies.

In addition, the FRO also plays an important role in the new complaints mechanism discussed above. Problem areas include the limited resources within the Agency and organisational integration as a member of staff of the Agency. Article 71 (2) of the EBCG Regulation clarifies that the FRO shall be independent in the performance of their tasks. This can be understood as both qualifying the execution of office as well as guarding it against improper interferences. Lastly, an independent external evaluation is inscribed into the EBCG Regulation (Article 81). On a four-year cycle, the performance of Frontex, including its fundamental rights record, is assessed. The evaluation is made public.<sup>45</sup>

#### 4.2.4 Professional accountability

Professional accountability is exercised by peer review. It is rooted in the professional training and education individuals received prior to or while working in an agency. Thus, it is linked to a formal qualification and very often expressed by a (compulsory) membership of a professional organisation supervising the quality of its members and their conduct. Professional accountability standards are not regulated by EU primary law or, regarding Frontex, any other law.

In practice, Frontex employees are European civil servants who do not have an ongoing professional affiliation.<sup>46</sup> The Agency as such is not reviewed by professional peers either. This is because it is a singular institution and its role is to review national external border management itself, not to be reviewed by others (apart from the administrative accounting discussed above). Frontex reviews border guards' capacities and performances through vulnerability assessments and coordinating officers in ongoing joint operations.<sup>47</sup>

40 Regulation (EU, Euratom) 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union (...) [2012] OJ L298/1, Art. 208 (2) and EBCG Regulation, Art. 76 (11)

41 TFEU, Arts 285ff and Arts 76, 77 (2) respectively.

42 Regulation (EU, EURATOM) 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (...) [2013] OJ L248/1 and reflected in EBCG Regulation, Art. 77 (1), (3).

43 Cf. European Ombudsman, Decision closing own-initiative inquiry OI/5/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex). Available at: <<https://www.ombudsman.europa.eu/cases/decision.faces/en/52477/html.bookmark>> (and Decision of the European Ombudsman closing own-initiative inquiry OI/9/2014/MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex). Available at: <<https://www.ombudsman.europa.eu/cases/decision.faces/en/59740/html.bookmark>> (accessed 14 August 2018).

44 Arts 68 (4), 69 (2).

45 See COWI, 'External Evaluation of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union' [2009]. Available at: <<http://www.statewatch.org/news/2009/may/frontex-eval-report-2009.pdf>>; and Ramboll Management Consulting and Eurasyllum Ltd, 'External Evaluation of the Agency under Art. 33 of the Frontex Regulation'. Available at: <[http://frontex.europa.eu/assets/Publications/General/Final\\_Report\\_on\\_External\\_Evaluation\\_of\\_Frontex.pdf](http://frontex.europa.eu/assets/Publications/General/Final_Report_on_External_Evaluation_of_Frontex.pdf)> (both accessed 14 August 2017).

46 The special case of national experts seconded to the Agency will not be discussed in this paper.

47 Art. 13 and Arts 21 (2), (3), 22 respectively.

## 5. Legal accountability

Legal accountability is exercised by courts and tribunals established by law. This form of accountability also feeds back into the others – social, political, administrative, professional – as courts give authoritative guidance on the interpretation of EU law. A complete system of legal remedies is necessary to comply with the rule of law as enshrined in Article 2 TEU and in the classic *Les Verts* judgment.<sup>48</sup> Such a system should also be able to afford effective legal protection and access to a fair trial, requirements which in themselves are separate fundamental rights protected under Article 47 (1) CFR and Articles 6 and 13 ECHR.

These rights and principles at times work to improve the legal system (i.e. to make it more accessible to potential claimants). As witnessed in *Les Verts*, for example, the Court occasionally resorts to the rule of law and effective remedies arguments in order to justify a wide or, indeed, novel interpretation of admissibility criteria. At other times, however, the Court interprets the principles as merely describing the (restrictive) status quo. In this line of reasoning, potential gaps in EU judicial protection must be accepted because they reflect the will of the EU Member States enshrined in primary law.<sup>49</sup> To compensate for shortcomings, the Court then reminds the Member States' courts of their obligations under Article 19 (1) TEU to provide effective remedies and to make references for preliminary rulings.

Although a stable system of remedies provided by the domestic courts of the Member States and by the CJEU has been put in place (Article 19 (1) TFEU), it does not provide clear-cut answers in cases concerning the accountability in Frontex operations where multiple actors are involved. This is because the current predominant conceptualisation of the system does not take into account *the problem of many hands*, as described by Dennis F. Thompson,<sup>50</sup> when the lines of responsibility become blurred in complex organisational structures in which many actors are involved. In such situations it is impossible to find one actor that is entirely and independently responsible for the outcome, which instead has rather been achieved collectively.

Before proceeding to the discussion on concrete litigation avenues, the following section will shortly introduce a reconceptualisation, which can produce outcomes that are more in line with the principle of justice<sup>51</sup> and the rule of law.

### 5.1 From individual to systemic accountability

In cases of violations occurring in the context of border controls, the predominant model of accountability may prove inadequate to achieving justice and the rule of law. The traditional approach of answering for human rights violations puts emphasis on the individual applicant and aims at redressing the effects of the violation for them alone. For this contribution, the approach is called *individual accountability*. It is reflected, for instance, in the individual measures ordered by the European Court of Human Rights (ECtHR), mainly in the form of monetary compensation.<sup>52</sup>

Contrary to that, in cases where the ECtHR finds a consistent and systemic violation, it orders general measures to address the structural problems and prevent further violations. This approach requires more attention in cases involving Frontex. Then, structural problems arise and need to be addressed. Individual accountability has its limits and a different type of accountability, which here is named *systemic accountability*, should be considered. Rather than merely remedying the violation for the individual claimant (*individual accountability*), it focuses on the structural issues that underlie and cause or allow the violation to occur. It helps, thus, to prevent similar violations in the future.

In other words, *individual accountability* is no longer adequate to achieve justice when the (human rights) problem is not an individual one but a societal one, being consistent and systemic, and affecting many people. Systemic problems need to be dealt with in a structural manner. In such cases, a *systemic accountability* approach is needed in parallel to *individual accountability*.

Applying the above to human rights violations during Frontex-coordinated operations, individual accountability would be achieved if the affected individuals take legal action against a Member State alone. In this way they would receive compensation and their personal situation would be remedied. However, the promise of *systemic accountability* would remain unfulfilled if all the public authority actors involved, including Frontex, are not held accountable before the Court for their fair share of responsibility. This makes the case for their joint responsibility.

Next to a requirement for achieving systemic accountability, the joint responsibility of different subjects of international law is covered under Article 48 of the ARIO Articles, according to which an internationally wrongful act can be attributed to one or more States or international organisation. According to the UN Special Rapporteur on the Responsibility of International Organizations, if an internationally wrongful act can be attributed to one or more states or international organisation, the actors involved are jointly responsible.<sup>53</sup>

48 Case 294/83, *Les Verts*, para. 23, ECLI:EU:C:1986:166; Case C-50/00, *Unión de Pequeños Agricultores*, paras 40ff, ECLI:EU:C:2002:462; Case C-263/02 P, *Jégo-Quéré*, paras 30ff, ECLI:EU:C:2004:210; Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakat*, para. 281, ECLI:EU:C:2008:461.

49 Case C-263/02 P, *Jégo-Quéré*, para. 36, ECLI:EU:C:2004:210.

50 Dennis F. Thompson, *Moral Responsibility of Public Officials: The problem of many hands* (first published 1980, APSR 74) 905–16.

51 Exceeding the scope of this paper, the normative frame of reference followed here is John Rawls' theory of justice as fairness, cf. John Rawls, *Political Liberalism* (Columbia University Press, 1993).

52 The ECHR and the case law of the ECtHR, although not part of the EU legal system in a strict sense, 'constitute general principles of EU law' (Art. 6(3) TEU). As such, they may provide conceptual guidance in the structure of the theory of systemic accountability.

53 Giorgio Gaja, Special Rapporteur, *Second Report on Responsibility of International Organizations*, DOCUMENT A/CN.4/541, paras 8,9. The joint

## 5.2 Accountability in practice: Litigation routes

Stepping down from the conceptual level into the legal framework in place, the EBCG Regulation is by and large not concerned with legal remedies<sup>54</sup> and as such does not affect the legal framework covering the Agency's accountability. This system of legal remedies, which is *de jure* available through primary EU law, remains unchanged.

The road for the accountability of EU agencies only opened with the Lisbon Treaty, which stipulates an extended jurisdiction of the Court of Justice of the European Union (CJEU), to also cover acts of EU agencies.<sup>55</sup> The CJEU has exclusive competence in disputes relating to the Union's non-contractual liability (action for damages) and exclusive power to rule on EU law, whether this concerns the (genuine) interpretation of EU law (preliminary reference procedure) or the legality review of actions by the EU and its institutions, organs and agencies (action for annulment).<sup>56</sup> This basically amounts to immunity of the EU from the jurisdiction of national courts.

An individual may access the CJEU either in an indirect manner, following the preliminary reference procedure, or through the EU institutions, or directly, bringing an action for annulment and an action for damages or requesting interim measures.<sup>57</sup> In the following sections a short account will be given of the different routes, in an attempt to identify the different courses of action that are possible in the case of Frontex.

### 5.2.1 Indirect access I: The preliminary ruling procedure

First and foremost, the preliminary reference procedure is the most common way to approach the CJEU. It has competence to give preliminary rulings concerning the interpretation of the Treaties and the validity and interpretation of acts of EU Agencies, among other EU bodies and institutions.<sup>58</sup> The limitations of the preliminary reference procedure are broadly known. The individual first needs to go through the domestic procedure and relies on the discretion of the national court to bring the matter before the CJEU.<sup>59</sup> Furthermore, the CJEU in this case has jurisdiction to provide genuine interpretation of the law and acts of the Agency. It cannot find a violation in the given case, nor rule on reparations. The proceedings shall continue at the national level. This indirect instrument is clearly an insufficient way to hold Agencies liable and does not constitute, according to the LIBE Committee, an effective judicial remedy.<sup>60</sup> Nevertheless, it is possible to start judicial proceedings at this level.

What could also prove useful is the willingness of the Court to use this procedure to hear questions concerning non-binding instruments, in the sense that they do not have direct legal effects *vis-à-vis* third parties, which could cover, for instance, operational plans or working arrangements of the Agency with third countries.<sup>61</sup>

### 5.2.2 Indirect access II: Complaints to EU organs

A second, rather unconventional, route of indirect access, which nevertheless circumvents the difficulties of the preliminary reference procedure, is submitting a formal complaint with one of the EU institutions and lobbying so that the latter takes direct legal action before the CJEU. The Commission, the Parliament and the Council are considered 'privileged applicants' and they can bring a case to the Court directly, without the need to fulfil any *locus standi* requirements.<sup>62</sup> The effectiveness of this route is disputable, as the individual needs to rely on the discretion of the institutions and the political balances within the Union. The unwillingness of the European Commission to start infringement proceedings against Member States on matters of systematic violations of human rights in immigration and asylum law is notable in this respect. Nevertheless, the possibility exists, depending on the circumstances of a particular case.

### 5.2.3 Direct access I: Action for annulment

An individual may attempt to address the Court directly by bringing an action for annulment. This procedure can be used to ask for the review by the Court of the legality of acts of Frontex<sup>63</sup> on the grounds of infringement of the EU Treaties or of any rule of EU law relating to their application, including the CFR. If the claim is successful, the Court

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responsibility has also been proposed by, among others, G. Goodwin-Gill, 'The Right to Seek Asylum: Interception at sea and the principle of non-refoulement' (2011) 23 *International Journal of Refugee Law* 447; and Guild and others (footnote 32).

54 Minor exceptions: Article 42 (4) concerning civil liability of a Member State and Article 60 EBCG Regulation concerning actions for damages against the Agency.

55 TFEU, Arts 263, 265, 266 and 267.

56 TEU, Arts 19, 268 and 344. Although not expressly stated, Article 268 TEU has been interpreted as conferring exclusive jurisdiction to the CJEU; see Case C-377/09, *Hanssens-Ensch v European Community*, judgment of 29 July 2010.

57 TFEU, Art. 256.

58 TFEU, Art. 267.

59 Only courts and tribunals of last instance are under an obligation to refer the case to the CJEU. In practice, this obligation is often circumvented under the pretence of the *acte clair/acte éclairé doctrine*.

60 Guild and others (footnote 32) 82. Advocate-general Jacobs has articulated the difficulties inherent in the procedure advocating for broader direct access: see Case C-50/00 P, *Union de Pequenos Agricultores* [2002] ECR I-6677.

61 Guild and others (footnote 32) 82.

62 TFEU, Art. 263(2).

63 TFEU, Art. 263; a similar route can be followed with respect to action for failure to act pursuant to TFEU Art. 265.

declares the act void<sup>64</sup> or declares the failure to act contrary to the Treaties.<sup>65</sup> Following the Court's ruling, the Agency will be required to undertake the necessary action in accordance with the EU Treaties in order to comply with the judgment.<sup>66</sup> In case of non-compliance, a monetary penalty can be imposed.

#### 5.2.3.1 The bottleneck of individual standing

The standing requirements of Article 263 TFEU are usually discussed as a thorny issue in accessing the CJEU.<sup>67</sup> Individuals have the status of non-privileged applicants before the Court and their chances of starting a review procedure are considerably restricted. Direct access to the CJEU has been slightly expanded after Lisbon Treaty, but it remains very limited.

The cumulative application of the two criteria of direct and individual concern, combined with their strict interpretation in the case law of the CJEU, leave little space for the individual seeking access to the Court. The alternative to individual concern, introduced with the Lisbon Treaty, that an individual may institute proceedings against a regulatory act which is of direct concern to them and which does not entail implementing measures, has not broadened individual access significantly. In particular, the Court's interpretation of regulatory acts, restricting them to acts of general application, has been criticised on the basis of the soundness of the legal interpretation.<sup>68</sup> The well-established case law of the CJEU leaves little room for hope of the relaxation of the *locus standi* criteria.

#### 5.2.3.2 Short time limit

Finally, in the remote possibility that an individual migrant has standing before the CJEU, the effectiveness of the legal remedy is hindered by the strict time limits: two months from the decision becoming known to the person.<sup>69</sup> This period is very short, especially in the case of irregular migrants who usually face additional obstacles with respect to obtaining information about their legal rights and access to legal aid. This is aggravated if they are held in detention. In addition and after the time limit for bringing a case directly before the Court has expired, the applicants are not allowed to make use of the preliminary reference procedure, unless they can show that they could not have brought an admissible action.<sup>70</sup>

#### 5.2.3.3 Reviewable acts of the Agency

Following the line of argument that Frontex only has a coordinating role in the operations, and that its acts are not final and do not produce legal effects vis-à-vis individuals, it is key to identify acts of the Agency that can be reviewed under Article 263 TFEU. This section attempts to present examples of reviewable acts of the Agency via the interpretation of Article 263 TFEU by legal doctrine and the jurisprudence of the CJEU.

##### *The complaints mechanism as a starting point*

First of all, the reviewability of the decision of the ED in the context of the individual complaints procedure is proposed. As already mentioned, the EBCG Regulation provides for an individual complaints mechanism. The responsibilities of the FRO, as discussed in subsection 4.1.3 show that essentially the FRO decides on the *prima facie* allocation of responsibility. Subsequently, the ED will decide on the complaint itself and will ensure appropriate follow-up, the nature of which has not been adequately specified.

Article 72 does not constitute a system of legality review as such, like the one enshrined in the founding Regulations of other Agencies, such as the ECDC Regulation.<sup>71</sup> It is, after all, most common for the Agencies established by the Council, as opposed to those established by the Commission, not to have specific rules that relate to legality review.<sup>72</sup>

However, there are reasons to suggest that such an individual complaints mechanism is part of a more extensive system of legality review. Specifically, this internal administrative process can be seen as the first line of legality review. Such a system has been exemplified in the founding Regulations of other Agencies, with this first line of legality review being executed either by the Management Board of Agencies or, in other cases, the Commission.<sup>73</sup>

64 TFEU, Art. 264.

65 TFEU, Art. 265.

66 TFEU, Art. 266.

67 For example, Hajlta Rasmussen, 'Why is Art 173 Interpreted Against Plaintiffs?' (1980) EL Rev5, 114; Paul Craig, 'Standing, Rights, and the Structure of Legal Argument' (2003) EPL 9, 493.

68 Steve Peers and Mario Costa, 'Court of Justice of the European Union (General Chamber) Judicial Review of EU Acts after the Treaty of Lisbon; Order of 6 September 2011, Case T-18/10, Inuit Tapiriit Kanatami and Others v. Commission & Judgment of 25 October 2011, Case T-262/10, Microban v. Commission' (2012) 8(1) *European Constitutional Law Review* 82.

69 TFEU, Art. 263 (5).

70 Case C-188/92, *TWD Textilwerke Deggendorf* [1994] ECR I-833; Rene Barents, *Directory of EU Case Law on the Preliminary Ruling Procedure* (Kluwer Law International, 2009), 160.

71 Regulation (EC) No 851/2004 of the European Parliament and of the Council of 21 April 2004 establishing a European Centre for disease prevention and control.

72 Paul Craig, *EU Administrative Law* (2nd edn, Oxford University Press, 2012) 157.

73 *Ibid.*, 157, 158.

This can be concluded looking at the aims and objectives of Article 72 – the will of the drafters – as well as the nature of the mechanism itself, but also by placing the provision within its context and interpreting it in relation to Regulations of other Agencies with respect to the legality review procedure. The mechanism is derived from the recommendations of the European Ombudsman, following an own-initiative inquiry on the implementation by Frontex of its fundamental rights obligations,<sup>74</sup> which also led to the adoption of a resolution by the European Parliament.<sup>75</sup> The Ombudsman called for a ‘monitoring mechanism’. Despite its name, it becomes obvious from the text that it not only concerns monitoring, but also the remedying of violations. The purpose was to promote and monitor compliance with fundamental rights obligations, while the Ombudsman also specifically requested the establishment of concrete measures for the follow-up of complaints.<sup>76</sup> The same aim of monitoring and ensuring the respect for fundamental rights is expressed in the operational provisions of the EBCG Regulation itself (Article 72(1)), as well as in the Explanatory Memorandum accompanying the Proposal. It becomes obvious that the purpose of the provision, supported by the intention of the drafters, is to ensure compliance with fundamental rights in a forum where the legality of acts can be reviewed against human rights standards and possible violations can be remedied. This constitutes the essence of legal accountability in general and the legality review in particular.

In conclusion, the decision of the ED is essentially a decision on the legality of the acts of the Agency. Specifically, they will decide whether the Agency has violated human rights. The same holds with respect to the FRO, who decides on the admissibility of the claim and on the allocation of responsibility.

In cases where an Agency’s founding Regulation empowers the Commission to rule upon issues of legality, that decision of the Commission is reviewable under Article 263 TFEU. It can be argued that the decision of the ED and/or of the FRO is accordingly reviewable in this respect.

#### *Risk analyses determining joint operations*

Secondly, the reviewability of the risk analysis conducted by the Agency (Article 11) could be considered. Frontex has important advisory functions through the research and risk analysis it conducts, which constitute the necessary basis for every operation. The results of the risk analysis are depicted in the operational plan, which is drafted by the Agency and approved by the Member State hosting the operation.

Madalina Busuioc describes such advisory functions as offering scientific advice to Member States upon which they base their decision.<sup>77</sup> Such opinions are not final acts, but rather preparatory; they are, however, essential for the operation, which heavily relies upon them. This advice, although not formally binding, would be hard to disregard due to the research and technical expertise of the Agency.

Such considerations lead Busuioc to the observation that often the boundaries between scientific advice and decision-making become lost in practice and, as a result, the final decision de facto belongs to the Agency. Therefore, she makes the bold suggestion that the legality of non-binding acts should be reviewed. Busuioc’s argument is that although doing that sounds provocative, to hold otherwise would inevitably create an insurmountable gap in the accountability of the ‘de facto operative decision maker’.<sup>78</sup>

Paul Craig agrees that if judicial review is to be effective, it needs to be capable of being applied to ‘the institution that made the operative decision’. He brings an example concerning the supervision of medicinal products developed for use in the EU, where the Commission, as the formal decision-maker, relies heavily upon the recommendations of the European Medicines Agency (EMA). Craig argues that reviewing the Commission’s decision would not suffice, since normally the Commission would simply adopt the recommendation of the Agency without independent input. Therefore, judicial control needs to focus on the reasoning of the recommendation that lies behind the Commission’s decision.

Although provocative, the argument is convincing and is, in fact, supported by judicial precedent in the case of *Artegoda*.<sup>79</sup> This case is innovative in many respects. Next to developing the essence of the precautionary principle – the obligation for EU institutions ‘to prevent specific potential risks’<sup>80</sup> – the Court also introduced the reviewability of non-binding acts. The case concerned Commission Decisions to withdraw marketing authorisations for medicines of the pharmaceutical company *Artegoda*, which contained amfepramone, an agent with anorectic properties. The Commission based its decision on the opinion of the Committee for Proprietary Medicinal Products (CPMP), a scientific committee of EMA. Although the former Court of First Instance (CFI) of the CJEU, by now renamed the General Court, recognised that the opinion was not formally binding, it considered that the consultation with the CPMP was mandatory and that the Commission was not able to make an individual assessment of the product. It had to base its reasoned

74 Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex. Available at: <<http://www.ombudsman.europa.eu/en/cases/specialreport.faces/en/52465/html.bookmark>> (accessed 15 August 2017).

75 European Parliament resolution of 2 December 2015 on the Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex (2014/2215(INI)).

76 Draft recommendation of the European Ombudsman in his own-initiative inquiry OI/5/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex). Available at: <<http://www.ombudsman.europa.eu/en/cases/draftrecommendation.faces/en/49794/html.bookmark>> (accessed 15 August 2017).

77 Busuioc, *European Agencies: Law and practice of accountability* (Oxford University Press, 2013) 192.

78 *Ibid.*, 193.

79 Cases T-74, 76, 83-85, 132, 137 and 141/00, *Artegoda GmbH v Commission* [2002] ECR II-4945.

80 *Ibid.*, para. 184.

decision on the scientific evidence produced by the CPMP.<sup>81</sup> The Court then held that the first step of the review process was the review of the lawfulness of the scientific opinion.<sup>82</sup>

The Court applied a marginal legality review test, as it is not empowered to examine the substance of the scientific opinion. In particular, it considered the proper functioning of the CPMP, the internal consistency of the opinion and whether there was a comprehensible link between the medical evidence relied on and the conclusions of the scientific committee. In that respect, the CPMP was obliged to refer to the scientific reports on which it based its opinion and explain why it disagreed with the reports and expert opinions presented by *Artegoda*.<sup>83</sup> Finally, the CFI found that the Commission had exceeded its competences and annulled the Commission Decisions.<sup>84</sup>

Applying this reasoning to the case of *Frontex*, it can very well be argued that in a manner comparable to the above, the final decision belongs to the host Member State that has the power of command. However, the advice produced as a result of research and risk analysis conducted by the Agency, although not formally binding, is so influential that it makes the Agency the de facto decision maker. Therefore, the advice should be reviewable.

#### *Frontex's new powers in situations requiring urgent action*

Last but not least, another route to the legal accountability of the Agency is the review of the legality of its advice to the Commission and the Council for imposing measures upon a Member State in case of serious deficiencies relating to external border control. A marked change brought about by the EBCG Regulation is the introduction of a centralised mechanism that deals with situations where control of the external border is rendered ineffective. This would be the result of inadequate measures by the Member State to prevent irregular access which could result in jeopardising the functioning of the Schengen area as a whole.<sup>85</sup> As part of this mechanism, the Council, upon the proposal of the Commission, should adopt a decision identifying measures to be implemented by *Frontex*, for the implementation of which the cooperation of the Member State would be required by the Council. The actions to be taken for the enforcement of these measures would be determined by the Agency, which should then draw up an operational plan in cooperation with the Member State. The Member State does not have discretion as to the implementation of the measures, as non-compliance could trigger the last resort procedure of Article 29 of the Schengen Borders Code. This provision is activated in case of exceptional circumstances that put the overall functioning of the area without internal border control at risk.

Similarly to the example of risk analysis, the Agency's suggestion is formally non-binding but, due to its expertise and specialised knowledge, the suggestion could not be contested, except for political reasons at the Council level.<sup>86</sup> The Council would, however, not be able to contest the effectiveness of the measures from a scientific or technical point of view. This argument is strengthened by the fact that the initial proposal of the Regulation envisaged the imposition of the measures by the Agency alone. Arguably, the levels of the Commission and the Council are not added for the purpose of review or assessment of the proposal, but only as political safeguards due to the hesitation of Member States to accept such a restriction upon their sovereignty. Thus, if these measures result in violations, the reviewability of the proposal of the Agency should be possible.

#### *5.2.4 Direct access II: Action for damages*

What seems to be the most appropriate litigation route is, in fact, the action for damages under Article 340 TFEU. According to this provision, individuals who have suffered loss as a result of the acts of the Agency may demand reparations.

A generous time limit of five years allows applicants to bring a liability action long after the damage has occurred, which can prove particularly helpful in cases of long-lasting national proceedings. The time limit also accommodates the sensitive situation of irregular migrants facing the risk of deportation and other related risks and difficulties.

The Court applies a noncontractual liability test structured around three cumulative criteria. An action for damages can be brought against a) an illegal act of the Union for b) damage, which was c) directly caused by the aforementioned Union act.<sup>87</sup>

##### *5.2.4.1 Procedural obstacles persist*

Once again, it is important to note some difficulties that are inherent to this procedure. First, the burden of proof for proving the damage incurred lies with the applicant.<sup>88</sup> The institution responsible is required to assist the applicant in

81 Ibid., para. 198.

82 Ibid., para. 199.

83 Ibid., para. 200.

84 Case C-39/03 P, *Commission v Artegoda GmbH* [2003] ECR I-7885.

85 EBCG Regulation, Art. 21 in conjunction with Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2016] OJ L77/1, 23 March 2016, p. 1–52, Art. 29 (1).

86 EBCG Regulation, 28th recital of the Preamble.

87 Case C-352/98 P, *Bergaderm* [2000] ECR I-5291, para. 42.

88 Joined Cases 55-59/63 and 61-63/63, *Modena v High Authority* [1964] ECR 211, 229.

accessing information and documentation that is in its possession.<sup>89</sup> Nevertheless, the standard of proof required by the Court has been criticised as disproportionately high, making it excessively difficult for the applicant to produce the evidence.<sup>90</sup>

Secondly, the causal link between the wrongful act and the damage needs to be direct, immediate and exclusive.<sup>91</sup> In other words, liability cannot be established for the EU if the same result could have occurred in the same way even in the absence of the conduct of the institution or Agency.<sup>92</sup> Moreover, the Union's conduct needs to be the sole act which caused the damage, since the latter needs to be the direct and immediate consequence of that act. The act itself exclusively, without the intervention of a third party, needs to have caused the damage sustained by the injured parties.<sup>93</sup>

In this sense, the direct causal link may prove too strict a requirement with respect to Frontex, since its actions usually require a national implementation measure to be completed. The mere involvement of the Member State is sufficient under the Court's case law to break the chain of causation and prevent the liability of the Agency from arising.<sup>94</sup> However, it always needs to be examined, on a case-by-case basis, whether the intervening act was indeed capable of breaking the chain of causation.<sup>95</sup> For instance, in *Krohn* the Court held that when the Member State was not acting independently but was simply carrying out the binding (also *lato sensu*<sup>96</sup>) instructions of the Union, the causal link remained intact and the Court was able to adjudicate on the liability of the Union.<sup>97</sup> Hence, if it can be shown that the host state was implementing decisions taken at the Agency level and that it did not have adequate discretion in carrying out the orders of the Agency, then the illegal act of the state does not constitute the cause of the damage. Therefore, state action does not interrupt the causal link between the act of the Agency and the damage.

In this case, the state can still be held liable via different constructions under national law, the CFR or the ECHR.<sup>98</sup> The Court makes it possible for the liability to be attributed to both the Member State and the Agency if it is proven that the damage was caused equally by both,<sup>99</sup> realising thus the standard of joint responsibility.

#### 5.2.4.2 Joint liability in action for damages

The application of joint responsibility in practice is more challenging than expected. The case law produced by the CJEU on the joint liability of the Union and Member States is barely adequate to give guidance on cases concerning breaches of fundamental rights in the context of Frontex operations, where the responsibility can be attributed to both the Agency and the host Member State. In fact, bringing an action against both actors has many procedural hurdles. An observer has even gone as far as to suggest that there is no place in EU law for concurrent or joint liability.<sup>100</sup>

The lack of case law leaves a gap that could be filled by resorting to international law. By virtue of Article 340 TFEU, the Court should resort to the general principles common to the Member States and draw inspiration from them when examining a claim for damages regarding the non-contractual liability of the EU. The Lisbon Treaty and consequently the CJEU take a comparative law approach in developing the criteria that apply to an action for damages. These general common principles can be extracted from the national laws, but can also share fundamental characteristics, inferred from international law, such as the rules of responsibility enshrined in the ILC Draft Articles, which are recognised as customary international law.<sup>101</sup>

The purpose of the drafters of the Lisbon Treaty was to 'establish a fundamental common law'.<sup>102</sup> This common law already exists as general principles common to the Member States at the international level. Given the absence of a concrete rule at the EU level and the explicit intention of Article 340 TFEU to act in accordance with the general principles common to the laws of the Member States, it may be expected that the CJEU, given the opportunity, will draw strong inspiration from the ILC Draft Articles, in particular the Articles regarding joint responsibility.

89 Joined Cases 29, 31, 36, 39-47, 50 and 51/63, *Usines de la Providence v High Authority* [1965] ECR 911 AR 943-944.

90 A. G. Toth, 'The Concepts of Damage and Causality as Elements of Non-Contractual Liability' in Ton Heukels and Alison McDonnell (eds), *The Action for Damages in Community Law* (Kluwer Law International, 1997) 184.

91 Joined Cases 5, 7 and 13-24/66, *Kampffmeyer v Commission (Kampffmeyer I)* [1967] ECR 245.

92 Case C-358/90, *Compagnia Italiana Alcool v Commission* [1992] ECR I-2457, 2505.

93 *Bergaderm* [2000] ECR I-5291 42.

94 *Guild and others* (footnote 32) 82-86.

95 Case 26/74, *Roquette v Commission* [1976] ECR 677, 687; Toth 'The Concepts of Damage and Causality as Elements of Non-Contractual Liability' in Ton Heukels and Alison McDonnell (eds), *The Action for Damages in Community Law* (Kluwer Law International, 1997) 193.

96 Case C-146/91, *KYDEP v Council and Commission* [1994] ECR I-4199.

97 Case 175/84 *Krohn Import-Export v Commission* [1986] ECR 753, 768 and [1987] ECR 116-120.

98 According to the *Bosphorus* case of the ECtHR, a state that is a member of an international organisation cannot be absolved of responsibility by arguing that it was complying with its obligations in the context of that international organisation. ECtHR, *Bosphorus v Ireland*, Application No. 45036/98, judgment of 30 June 2005.

99 *Kampffmeyer I (Kampffmeyer I)* [1967] ECR 263.

100 A. W. H. Meij, 'Article 215(2) EC and Local Remedies' in Heukels and McDonnell *The Action for Damages in Community Law* (Kluwer Law International, 1997) 282-284.

101 The International Law Commission creates non-binding international instruments. However, the International Court of Justice has consistently relied on the work of the ILC, and in particular in the Draft Articles on Responsibility, declaring them to reflect customary international law; see, for instance, ICJ, *North Sea Continental Shelf (Fed. Rep. Germ./Neth.)*, Judgment, 1969, 3, paras 48, 74.

102 F. Fines, 'A General Analytical Perspective on Community Liability' in Heukels and McDonnell, *The Action for Damages in Community Law* (Kluwer Law International, 1997) 13.

### 5.2.4.3 Overcoming binary constructions in actions for damages

In practice, as has already been pointed out, procedural rules, particularly rules on attribution of liability and the distribution of jurisdictional competences among the courts, can prove unfavourable to the implementation of the substantive law on joint responsibility. Specifically, the causation criterion for the action for damages (Article 340 TFEU), as discussed above, creates a binary distinction in the attribution of responsibility, where either the Member State or the Agency can be found to have caused the damage.

This binary distinction is also inherent in the jurisdiction split between national and EU courts. On the one hand, Article 340 TFEU is applicable 'only to the Community's liability for any damage caused by its institutions or by its servants'.<sup>103</sup> Furthermore, the CJEU has exclusive competence for claims concerning damages for acts attributed to the European Union.<sup>104</sup> On the other hand, state liability for breaches of EU law is covered under the '*Francovich* liability'. According to the *Francovich* principle of state liability, developed in a case in the field of labour law, in case of breach of EU law attributable to a Member State, which causes damage to an individual, compensation may be claimed before national courts.<sup>105</sup> These rules divide jurisdiction in a such way that actions for damages attributed to the Union are dealt with by the CJEU, and those attributed to Member States are dealt with by domestic courts.

In practice, in a case concerning the joint responsibility of Frontex and a host Member State, the CJEU will apply the causality test to determine who authored the wrongful act that caused the damage. If the Member State was following the instructions of the Agency, the wrongful act will be attributed to the Agency and the case will be dealt with by the CJEU.<sup>106</sup> If it is proven that the Member State had discretion over the implementation of the instructions, it will incur *Francovich* liability and the applicants should bring the case before national courts. This will exclude the liability of the Agency.

Without significant precedent to draw on, we can assume that in a case concerning the responsibility of both Frontex and a Member State, two actions will need to be brought, one at the national level concerning a claim for damages against the Member State, and one before the CJEU, against Frontex.

The Court in its case law has brought the two actions for damages for State and Union liability close. Applying a common test, the Court clarified in *Brasserie*<sup>107</sup> and *Bergaderm*<sup>108</sup> that the same criteria that apply with respect to an action for damages against the State, as specified in *Francovich*, should also govern the Community's liability. While the liability test with respect to the Union's non-contractual liability and State liability are converging,<sup>109</sup> the remedies still remain separate. Two distinct proceedings need to be instituted in different judicial fora with respect to either liability.

This solution does not support joint responsibility and is consequently inadequate to ensure systemic accountability, under which all actors responsible for a violation are answerable. In order to avoid this dead end, more research can be undertaken into the 'subsidiary jurisdiction' of the CJEU, 'which has still to be precisely delineated',<sup>110</sup> and which, after the Lisbon Treaty, is embodied as part of the subsidiary principle in Article 5 (3) TEU.<sup>111</sup> Based on this principle, judicial constructions can be envisaged, where domestic courts and the CJEU engage in judicial cooperation, in the light of the objective of systemic accountability. The specificities and viability of such a scheme are yet to be investigated. Admittedly, such judicial constructions may be complex and difficult to implement. Arguably, the aims of systemic accountability, effective judicial protection and legal certainty would be better served with legislative change that would explicitly provide for the liability of all actors responsible to be examined in the same forum. Nevertheless, a path to joint liability can possibly be found, and even if it is obstructed by strict admissibility requirements, binary rules of causality and court jurisdiction, it can be utilised for strategic litigation purposes.

### 5.2.4.4 A way forward in systemic accountability: Connected proceedings

Regarding the above solution, and to accommodate and reconcile possible conflicting goals (i.e. the objective of systemic accountability, on the one hand, and the national sovereignty and procedural autonomy of domestic courts,

<sup>103</sup> Case 101/78, *Granaria v Hoofdprodukschap voor Akkerbouwprodukten* [1979] ECR 623 at 638.

<sup>104</sup> Case 106-120/87, *Asteris v Greece* [1988] ECR 5515, 5538.

<sup>105</sup> Joined Cases C-6/90 and C-9/90, *Andrea Francovich and Others v Italian Republic* [1991] ECR I-5357.

<sup>106</sup> In *Asteris* the Court dismissed an action for damages against the Communities, ruling that the national authorities had no liability because they had simply implemented Community regulation. The Community did not incur any liability either, as it ruled that 'the technical error' that resulted in the violation was not a serious breach of a superior rule of law. When subsequently the applicants went before Greek courts to seek compensation against the national authorities, the Court of Justice held that national remedies could not be used, because it had already ruled that Greece was not liable; see Joined Cases 194-206/83, *Asteris v Commission* [1985] ECR 2815.

<sup>107</sup> Joined Cases C-46 and 48/93, *Brasserie du Pêcheur SA and Secretary of State for Transport, ex parte: Factortame Ltd and Others* [1996] ECR I-1029, para. 42.

<sup>108</sup> *Bergaderm* [2000] ECR I-5291.

<sup>109</sup> This does not amount to full harmonisation, as less strict conditions for establishing Member State liability may be applicable under national law.

<sup>110</sup> Fines (no. 101) 19, referring among others to Theodor Elster, 'Non-contractual Liability under two Legal Orders' (1975) 12 *Common Market Law Review* 91-100; Andrew Durdan, 'Restitution or Damages: National Court or European Court?' (1976) *European Law Review* 442, 443.

<sup>111</sup> TFEU, Art. 5 (3): 'Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.' See Paul Craig and Grainne de Burca, *EU Law: Text, Cases and Materials* (5th edn, Oxford University Press, 2011) 94, 95.

on the other), we could argue that the need for systemic accountability can be achieved in separate proceedings as long as they are connected. Under this construction, the CJEU would stay the proceedings concerning Frontex until the national court decides on the responsibility of the Member State. This is because the two responsibilities are connected when talking about aiding and abetting in a violation. In principle, having a parallel claim is a reason for inadmissibility of a damages claim at the EU level. The national procedures need to finish first. But if we aim at systemic accountability, the CJEU should pause the proceedings concerning Frontex to take into account the outcome of the national courts concerning the responsibility of the Member State.<sup>112</sup> Subsequently the CJEU would decide whether, and the extent to which, joint responsibility can be assumed.

In fact, this is the solution followed by the Court of Justice in *Kampffmeyer I*, where it held:

Before determining the damage for which the Community should be held liable, it is necessary for the national court to have the opportunity to give judgment on any liability on the part of the Federal Republic of Germany. This being the case, final judgment cannot be given before the applicants have produced the decision of the national court on this matter (...).<sup>113</sup>

At this stage, the national court may request a preliminary ruling, which can only be on a matter of law, and not on whether the Agency was liable as such, as the CJEU cannot in a preliminary reference ruling adjudicate on matters of fact.<sup>114</sup>

The solution of staying the proceedings before the CJEU can present practical difficulties. In *Kampffmeyer*, for example, the applicants had to engage in long legal battles to obtain a remedy before national courts.<sup>115</sup>

Evaluating this solution provided by the CJEU against the standards of joint responsibility and systemic accountability, we note that the Court seems to regard the national authorities as primarily liable, with the Community only incurring subsidiary liability.<sup>116</sup> In *Kampffmeyer*, the Court, in fact, rejected the proposition that the EU and a Member State can be jointly liable. Instead, it stated that the Community would be liable to the extent that the damage was not recoverable from national court proceedings.<sup>117</sup> This has become settled case law of the Court.<sup>118</sup>

Summing up, if such a case were to be brought against a host Member State and Frontex, the judicial precedent indicates that the national court would need to determine the sum to be paid by that State. If the damage is not recoverable at the national level, only then would a review of the liability of the Agency be allowed. This outcome is clearly incompatible with the international regime of responsibility that supports joint liability and contradicts the very purpose of systemic accountability, which suggests that all actors involved in a violation need to answer before a judicial forum.

These objectives can only be fulfilled if the liability of both the Member State and the Union/Agency is determined within the same forum. That could be achieved, as already mentioned, if the CJEU would join the two cases and decide on the joint liability of both actors on an equal basis. An acceptable solution could perhaps be derived from the way the Court deals with mixed agreements concluded by both the EU and its Member States. Those agreements could give rise to joint liability because both actors were acting jointly. *Parliament v Council* serves as an example where the Court held that the Community and its Member States were jointly liable for the fulfilment of any obligation arising from the agreement, since the agreement was concluded together by the Community and its Member States and there were no derogations in the agreement itself pointing to the opposite.<sup>119</sup>

Admittedly, those judicial constructions are complex and difficult to implement. Arguably, the aims of systemic accountability, effective judicial protection and legal certainty would be better served with legislative change in EU law that would explicitly provide for the liability of all actors responsible to be examined in the same forum. Nevertheless, the path to joint liability can be created, and even if it is obstructed by strict admissibility requirements, binary rules of causality and court jurisdiction, it can be utilised for strategic litigation purposes.

### 5.2.5 Direct access III: Interim measures

Lastly, claimants can apply for interim measures, on the basis of Articles 278 and 279 TFEU, which provide for suspension orders and orders for interim measures respectively. Since it can take many months to reach a resolution, the protection would be illusory, especially in the case of migrants who are in urgent need of protection from serious harm, if there was no possibility of immediately suspending a harmful act. This route can prove particularly useful with respect to return operations. It should be noted, however, that these procedures can be used only after the case has been brought before the Court.<sup>120</sup>

<sup>112</sup> As a precondition, legal remedies must be available at the national level, see Case 20/88, *Roquette Frères v Commission* [1989] ECR 1553.

<sup>113</sup> *Kampffmeyer I* [1967] ECR 266.

<sup>114</sup> Case 101/78, *Granaria v Hoofdprodukschap voor Akkerbouwprodukten* [1979] ECR 623 638.

<sup>115</sup> Peter Oliver, 'Joint Liability of the Community and the Member States' in Heukels and McDonnell *The Action for Damages in Community Law* (Kluwer Law International, 1997) 288.

<sup>116</sup> *Ibid.*, 288, footnote 11.

<sup>117</sup> *Kampffmeyer I* [1967] ECR 245

<sup>118</sup> Oliver (no. 114) 291; e.g. Joined Cases C-46 and 48/93, *Brasserie du Pêcheur* (no. 106), *Francovich and Others* (no. 104).

<sup>119</sup> Case C-361/91, *Parliament v Council* [1994] ECR I-625, 661f. Certain mixed agreements expressly allocate competences and thus responsibility for positive breaches either to the Member State or the EU.

<sup>120</sup> Case C-246/89R, *Commission v UK* [1989] ECR 3125.

## 6. Conclusion

We set out to explore the accountability regime to which Frontex is subjected, and what impact the new EBCG Regulation has on holding the Agency to account. First, one should acknowledge the progress that has been made on parliamentary oversight and the complaints mechanism. Second, and at the heart of the matter, the answer is less straightforward. On the one hand, accountability is adversely affected by the split between the national and EU level in the same way that external border control is exercised in the EU. Likewise, accountability relies on established responsibility as a precondition. In this regard, the question of attribution has yet to be determined satisfactorily.<sup>121</sup> On the other hand, Frontex's non-legal accountability framework mostly derives from EU primary and secondary law applying to the EU administration. Therefore, it is, all in all, comparable to those of other agencies. The Agency undergoes a considerable amount of accounting and EU accountability standards prescribed by law are *de jure* upheld. Legislative changes in the last decade have seen improvements in accountability. The European Parliament has assumed a stronger role as a watchdog.

Lastly, regarding legal accountability, judicial review may be seen as a last resort and the backbone of accountability. Although such a framework is available *de jure*, we should not overestimate its reach. In the first instance, Frontex accountability encounters general obstacles regarding access to the CJEU. At the moment, before the accession of the EU to the ECHR, the CJEU is solely responsible for reviewing the acts of the Agency. Access to the CJEU is still considerably restricted for individual applicants, even after the Lisbon Treaty. At the same time, the door remains closed for collective actions or *acciones populares*. Accounting for the particular circumstances of the potential victims of the violations discussed in this paper, who do not have regular status, we note that they may therefore be cautious about taking legal action against measures of external border control or do not see how they could benefit from ensuing proceedings in terms of their international protection claim and the regularisation of their legal status. They further often lack the necessary resources, or even access to information and legal aid, or may have been deported from EU Member States' territory. On a very practical level, this raises concerns about access to justice, and the effectiveness of the whole legal accountability framework comes into question.

In the second instance, situations concerning human rights violations which may occur during Frontex operations require handling due to the *problem of many hands*. Where multiple actors are involved and the lines of responsibility may be blurred, the need arises for a system of remedies that accommodate the principles of systemic accountability. The EU legal framework is not yet fully equipped in this regard and gaps in accountability still exist. These gaps could potentially be covered with judicial constructions that create the path towards the joint liability of all actors involved in a violation.

If one accepts that accountability is about *ex post* control, there is leeway to reduce *ex ante* and ongoing control to ensure that the Agency can fulfil its tasks.<sup>122</sup> This way the Agency's independence can be reconciled with accountability standards. Frontex also serves as an example which shows that accountability mechanisms are complementary and that they are mutually reinforcing.<sup>123</sup> This was the case with the EU Ombudsman calling for an individual complaints mechanism, the European Parliament and NGOs advocating in the same direction, and the resulting introduction of such a mechanism. Another recent example is the public release of confidential Frontex documents by *The Intercept*.<sup>124</sup> The European Parliament followed up with an open letter to Frontex and received a response in return.<sup>125</sup> In our submission, this is how accountability dialogues gain momentum, and how they identify weaknesses and initiate change for the better.

In sum, all forms of accountability considered here, some progress has been achieved by the 2016 EBCG reform. To live up to the level of legal accountability required to justify Frontex's key role in external border management and human rights protection, more needs to be done regarding legal remedies that are effectively available against EU acts of external border control.

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121 Maité Fernandez, 'Multi-Stakeholder Operations of Border Control Coordinated at the EU Level and the Allocation of International Responsibilities' in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation* (Routledge, 2017), 238, 247ff; Melanie Fink, 'Salami Slicing Human Rights Accountability: How the European Border and Coast Guard Agency may inherit Frontex' genetic defect', EJIL: Talk! (10 March 2016). Available at: <<https://www.ejiltalk.org/salami-slicing-human-rights-accountability-how-the-european-border-and-coast-guard-agency-may-inherit-frontex-genetic-defect/>> (accessed 14 August 2017); Roberta Mungianu, *Frontex and Non-Refoulement* (Cambridge University Press, 2016) 48ff, 205 ff.

122 Busuioc, *European Agencies: Law and practice of accountability* (Oxford University Press, 2013) 51, 277.

123 *Ibid.*, 263.

124 Campbell, 'Shoot First: Coast Guard Fired at Migrant Boats, European Border Agency Documents Show', *The Intercept* (22 August 2016).

125 Frontex, Letter by Fabrice Leggeri on the recurrent use of weapons by coast guards within Frontex operations (29 September 2016). Available at: <<http://www.statewatch.org/news/2016/oct/eu-frontex-response-letter-to-meps.pdf>> (accessed 14 August 2017).

## 7. Bibliography

- Barents, R. *Directory of EU Case Law on the Preliminary Ruling Procedure* (Kluwer Law International, 2009).
- Bovens, M. 'Analysing and Assessing Public Accountability – A conceptual framework' (2006), European Governance Papers (EUROGOV) C-06-01. Available at: <[http://edoc.vifapol.de/opus/volltexte/2011/2459/pdf/egp\\_connex\\_C\\_06\\_01.pdf](http://edoc.vifapol.de/opus/volltexte/2011/2459/pdf/egp_connex_C_06_01.pdf)> (accessed 14 August 2017).
- Busuioac, E. M. *European Agencies: Law and practice of accountability* (Oxford University Press, 2013)
- Carrera, S. and den Hertog, L. 'A European Border and Coast Guard: What's in a name?' (2016), CEPS Paper in Liberty and Security in Europe 88. Available at: <[www.ceps.eu/publications/european-border-and-coast-guard-what%E2%80%99s-name](http://www.ceps.eu/publications/european-border-and-coast-guard-what%E2%80%99s-name)> (accessed 14 August 2017).
- COWI, 'External Evaluation of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union' (2009). Available at: <<http://www.statewatch.org/news/2009/may/frontex-eval-report-2009.pdf>> (accessed 14 August 2017)
- Craig, P. *EU Administrative Law* (2nd edn, Oxford University Press, 2012).
- Craig, P. 'Standing, Rights, and the Structure of Legal Argument' (2003) 9 *European Public Law* 493.
- Crum, B. J. J. and Curtin, D. M. 'The Challenge of Making European Union Executive Power Accountable' in Piattoni, S. (ed.), *The European Union: Democratic principles and institutional architectures in times of crisis* (Oxford University Press, 2015).
- Fernandez, M. 'Multi-Stakeholder Operations of Border Control Coordinated at the EU Level and the Allocation of International Responsibilities' in Gammeltoft-Hansen, T. and Vedsted-Hansen, J. (eds), *Human Rights and the Dark Side of Globalisation* (Routledge, 2017).
- Fines, F. 'A General Analytical Perspective on Community Liability' in Heukels, T. and McDonnell, A. (eds), *The Action for Damages in Community Law* (Kluwer Law International, 1997).
- Fink, M. 'Salami Slicing Human Rights Accountability: How the European Border and Coast Guard Agency may inherit Frontex' genetic defect', EJIL: Talk! (10 March 2016). Available at: <<https://www.ejiltalk.org/salami-slicing-human-rights-accountability-how-the-european-border-and-coast-guard-agency-may-inherit-frontex-genetic-defect/>> (accessed 14 August 2017).
- Goodwin-Gill, G. 'The Right to Seek Asylum: Interception at sea and the principle of non-refoulement' (2011) 23 *International Journal of Refugee Law* 443.
- Guild, E. and others 'Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office', Study requested by the Directorate General for Internal Policies' PE 453.196 (2011). Available at: <[http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/libe/dv/02\\_study\\_fundamental\\_rights\\_02\\_study\\_fundamental\\_rights\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/02_study_fundamental_rights_02_study_fundamental_rights_en.pdf)> (accessed 14 August 2017).
- Harlow, C. *Accountability in the European Union* (Oxford University Press, 2002).
- Hartwig, M. 'International Organizations or Institutions, Responsibility and Liability' in Wolfrum, R. (ed.), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2012) vol 6.
- Heukels, T. and McDonnell, A. 'Limitation of the Action for Damages Against the Community: Considerations and new developments' in Heukels, T. and McDonnell, A. (eds), *The Action for Damages in Community Law* (Kluwer Law International, 1997).
- House of Lords European Union Committee, 'Frontex: the EU external border agency' (HL 2007–08, 60). Available at: <<https://publications.parliament.uk/pa/ld200708/ldselect/ldecom/60/60.pdf>> (accessed 14 August 2017).
- Meij, A. W. H. 'Article 215(2) EC and Local Remedies' in Heukels, T. and McDonnell, A. (eds), *The Action for Damages in Community Law* (Kluwer Law International, 1997).
- Mungianu, R. *Frontex and Non-Refoulement* (Cambridge University Press, 2016).
- Neal, A. W. 'Securitization and Risk at the EU Border – The origins of Frontex' (2009) 2 *Journal of Common Market Studies* 333.
- Oliver, P. 'Joint Liability of the Community and the Member States' in Heukels, T. and McDonnell, A. (eds), *The Action for Damages in Community Law* (Kluwer Law International, 1997).
- Peers, S. and Costa, M. 'Court of Justice of the European Union (General Chamber) Judicial Review of EU Acts after the Treaty of Lisbon; Order of 6 September 2011, Case T-18/10 Inuit Tapiriit Kanatami and Others v. Commission & Judgment of 25 October 2011, Case T-262/10 Microban v. Commission' (2012) 8(1) *European Constitutional Law Review* 82.
- Pomeon, A. S. 'Frontex and EBCGA – A question of accountability' (Master's thesis, Radboud University Nijmegen, 2016).

Ramboll Management Consulting and Eurasyllum Ltd, 'External Evaluation of the Agency under Art. 33 of the Frontex Regulation'. Available at: <[http://frontex.europa.eu/assets/Publications/General/Final\\_Report\\_on\\_External\\_Evaluation\\_of\\_Frontex.pdf](http://frontex.europa.eu/assets/Publications/General/Final_Report_on_External_Evaluation_of_Frontex.pdf)> (accessed 14 August 2017).

Rasmussen, H. 'Why is Art 173 Interpreted Against Plaintiffs?' (1980) 5 *European Law Review* 112.

Rawls, J. *Political Liberalism* (Columbia University Press, 1993).

Rijpma, J. 'The Proposal for a European Border and Coast Guard: Evolution or revolution in external border management? Study for the LIBE Committee', PE 556.934 (2016). Available at: <[www.europarl.europa.eu/RegData/etudes/STUD/2016/556934/IPOL\\_STU\(2016\)556934\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556934/IPOL_STU(2016)556934_EN.pdf)> (accessed 14 August 2017).

Rojo, D. F. 'The European Border and Coast Guard: Towards the centralization of the external border management?', Blogactiv (7 February 2017). Available at: <<http://eutarn.blogactiv.eu/2017/02/07/the-european-border-and-coast-guard-towards-the-centralization-of-the-external-border-management>> (accessed 14 August 2017).

Rosenfeldt, H. 'Establishing the European Border and Coast Guard: All-new or Frontex reloaded?', EU Law Analysis ( 16 October 2016). Available at: <<http://eulawanalysis.blogspot.de/2016/10/establishing-european-border-and-coast.html>> (accessed 14 August 2017).

Thompson, D. F. 'Moral Responsibility of Public Officials: The problem of many hands' (1980) 74 *American Political Science Review* 905.

Toth, A. G. 'The Concepts of Damage and Causality as Elements of Non-Contractual Liability' in Heukels, T. and McDonnell, A. (eds), *The Action for Damages in Community Law* (Kluwer Law International, 1997).