



Frontex's evolution from the undisputable to the untenable EU border agency



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EUROPEAN UNION DEBATE MIGRANTS OLAF

Fabrice Leggeri, the Executive Director of the European Union border agency "Frontex", resigned on 29th April 2022 following the release of the initial findings of an anti-fraud investigation. Last February the EU anti-fraud watchdog "OLAF" closed a year-long probe into Leggeri's management over allegations of harassment, misconduct and migrant pushbacks. The investigation reveals how the agency's own reporting system is used to cover-up pushbacks in the Aegean and its direct involvement.

agency had not been matched by a corresponding increase in transparency and accountability. At the end of 2019, Leggeri, a 51-year-old French official who hails from the Alsace region, declared that his organization would not face the same troubles as the European Asylum Support Office (EASO). In June 2018, EASO's executive director had resigned after an investigation by the same OLAF over alleged misconduct in procurement procedures, irregularities in management of human resources and possible breaches of data protection. 17 years after its foundation, Frontex faced the same process. How did it come to this?

Frontex and the accountability problem

The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (from the french *Frontières extérieures*, Frontex) was established by Council Regulation (EC) 2007/2004 in 2004, expanded with Regulation (EU) No 1168/2011. In September 2016, the founding regulation was amended and expanded by Regulation 2016/1624/EU creating the 'European Border and Coast Guard Agency'. Less than two years after, the fourth revision of Frontex regulation was launched, and the new Regulation 2019/1896 entered into force on 4 December 2019. The new Frontex mandate stipulated that the number of EU border guards should double from 1,500 to 3,000 following an evaluation in 2024. Together with the forces of the Member States, Frontex is to reach its full strength of 10,000 border guards by 2027 (Bossong 2019). At the same time, Frontex has experienced a particularly significant growth in its budget, which has risen from merely 6.2 million euros (2005) to 395.6 million euros (2020) (Loschi, Slominski 2022).

The Regulation 2019/1896 and all the narratives that led to its approval granted Frontex the power of resorting to crisis and securitisation narrative to justify the lack of transparency in its work. Since 2015, crises and security rationales have been often exploited by Frontex Executive Director to hamper access to documents, personnel and premises. Often, addressing requests of access by members of the European Parliament during the hearings, Frontex avoided commitments and cooperation, or, if put under pressure, it released documents that were extensively redacted on the ground of exceptions permitted on the basis of public security concerns.

While according to Regulation 2019/1896 Frontex would be subjected to more oversight and legal obligations to uphold fundamental rights, holding Frontex accountable, in particular on grounds of fundamental rights, is the actual issue at stake. While European Member States can be held accountable before their own national courts and before international courts, in particular the European Court of Human Rights (ECHR), this does not apply with Frontex. As an EU body, neither of these options is viable. It can be brought before the Court of Justice of the European Union (CJEU) to account for the conformity of its conduct with EU law (Fink 2020). The nature of Frontex's activities, however, poses a particular challenge. The operational support in border management provided by the

binding texts. In other terms, legal responsibility is often shared between several member states as well as Frontex, which makes it difficult for individuals to lodge a complaint before a court. Hence, until 2021, cases that have been handled by the Court of Justice of the EU do not deal with Frontex operations but with refusals of access to documents or procurement actions and public services. Academics, in particular legal scholars, as well as members of the European parliament have advocated for the establishment of stronger accountability mechanisms, for example specific mechanism that allows individuals to hold Frontex to account ([Fink 2020](#); [Gkliati 2021](#)).

Frontex: from undisputable to untenable border agency

Frontex's expansion of financial and operational resources over the years and especially the increasing operational profile introduced with Regulations 2016/1624 and 2019/1896 set the clock in motion for a long tug of war between Frontex on one side and European parliament, NGOs, and watchdogs on the other side, leading to Leggeri's resignation. Especially after the 2015 so-called migration crisis, the operational profile of the agency has been under strict scrutiny by humanitarian organizations and in particular from members of the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE).

In 2015, against increasing migrations flows at the EU external borders and the reinstitution of border checks by member states throughout 2015 ([Guild et alii](#)), Frontex became the main instrument of the European Commission to avoid the collapse of the entire Schengen acquis. Frontex missions already deployed in Italy and Greece were expanded in both mandates and resources. As a leading agency of hotspots operations established with the European agenda in migration in 2015, Frontex monitored that frontline member states authorities were adequately implementing EURODAC regulation and fingerprinting third-country nationals, to ensure compliance with the Dublin regime and avoid uncontrolled secondary movements ([Loschi, Slominski 2022](#)). In this frame, the agency served not only as an operational device but also as the legal instrument through which introducing sensitive reform in national administrative and police procedures at the borders. The EU Commission included the legal definition of hotspots in Frontex Regulation 2016/1624, an act that allowed the European Commission to avoid parliamentary scrutiny on the establishment of hotspot operations. However, this strict cooperation and indirect protection from Commission to the agency had an expiration date.

Indeed, Leggeri's resignation comes after a series of important processes toward Frontex accountability. Especially after Regulation 2019/1896, Frontex has been under intense and constant scrutiny. Back in 2016, several human rights groups as well as the internal body of Frontex the Consultative Forum for human rights, flagged the risks and unclear support by Frontex at the Hungarian Serbian border. Hungary passed new border control measures in [2016](#) which, amongst others, obliged officers to return migrants apprehended

raised several concerns with regard to the compatibility of Frontex operations with international and European law on fundamental rights. Frontex, despite increasing requests to revise and suspend activities to avoid complicity, decided to continue with operational support. It suspended its activities only in 2021, in the context of strong criticism emerging against the agency. Moreover, the first lawsuit against Frontex brought in 2018 by two activists to the Court of Justice of the EU did not deal with Frontex operations but with refusals of access to documents related to Search and Rescue operations in the Mediterranean, and was not successful (Case T-31/88 Izuzquiza and Semsrott v. Frontex). Frontex indeed claimed that “disclosure of details related to technical equipment deployed in the current and ongoing operations would undermine public security”.

However, since 2020, a number of investigations and accountability actions had created the background for OLAF probe and Leggeri's quitting. Here follows a list of most the relevant steps of this process.

In March 2020, attention has particularly been focused on the modus operandi of the Greek authorities. According to reports related to Greece, pushbacks, sometimes undertaken by unidentified forces wearing uniforms and masks and carrying weapons, have expanded to migrants after arrival on the islands or the mainland. However, direct participation by Frontex in these alleged actions could not be proven. In late 2020, a joint investigation by Bellingcat, Lighthouse Reports, Der Spiegel, ARD and TV Asahi (also known as the Bellingcat report) stated that Frontex planes were near the maritime Greek-Turkish border where alleged pushback operations were ongoing. The reporters claimed to have found evidence that Frontex had knowledge of the pushbacks, did nothing to ensure compliance with legal obligations, and in some cases even cooperated with the authorities carrying out the illegal pushbacks and collective expulsions.

In December 2020, the watchdog Border Violence Monitoring Network (BVMN) compiled a 1,500-page “black book” documenting hundreds of illegal pushbacks by authorities on Europe’s external borders. The same month, the Court of Justice of the European Union ruled that Hungary's legislation on the rules and practice in the transit zones situated at the Serbian-Hungarian border was contrary to EU law. And that the procedure for granting international protection in so far as third-country nationals [...] were in practice confronted with the virtual impossibility of making their application” (Case C-808/18, Commission v Hungary).

Against this context, in late 2020 the Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) decided to investigate the allegations and in January 2021 established the Frontex Scrutiny Working Group (FSWG) to monitor all aspects of the functioning of the agency, including compliance with fundamental rights and accountability towards Parliament. In its first hearing on 4 March, the Working Group questioned Commissioner for Home Affairs Johansson and Leggeri about the

investigation related to the agency's activities in the Aegean Sea; the interpretation of applicable rules for the surveillance of the external sea borders and inquired about the political scrutiny role of the European Commission over the agency. According to the Working Group, Commissioner Johansson appeared eager to listen to the scrutiny activity and criticized the 'reluctance of compliance' with the fundamental rights mandate from Leggeri. A preliminary report flagged out that five push-back incidents have not been clarified due to unclear data provided by Frontex, and stressed the general unsatisfactory attitude and documents provided by the Agency. On Wednesday 28 April 2021, the European Parliament decided to postpone the discharge to the 2019 budget of Frontex, as long as the OLAF investigation and the parliamentary inquiry were still ongoing.

Meanwhile, other investigations were pending or concluded. In April 2021, der Spiegel claimed that Frontex was coordinating with the Libyan Coast Guard to engage in illegal pullbacks. Albeit ED Leggeri claimed during EP hearings Frontex does not work with the Libyan Coast Guard and only informs sea rescue control centres about sea rescue cases, a joint investigation by Lighthouse-Report, Der Spiegel, Libération, and ARD claimed the contrary. Drawing on a variety of data, including available sources from flight and vessel trackers, data from international and NGOs, eyewitness accounts and testimonies from survivors, the reporting parties concluded that Frontex plays a crucial role in the interceptions and return of people fleeing Libya by the Libyan coastguard. The report identified a number of cases in which Frontex planes were present in the vicinity, and likely aware, of boats in distress that were later incepted by Libyan patrol boats, despite data showing that commercial or NGO vessels were present in the area.

Establishment of first accountability procedures against Frontex

Under an administrative accountability action, in November 2020, the European Ombudsman started an own-initiative inquiry on the functioning of the complaint mechanism, which was released on 15 June 2021 and which recommended the creation of an independent mechanism for handling complaints about Frontex operations, while the system established with Regulation (EU) 2016/1624 is an internal mechanism (European Ombudsman, Case OI/5/2020/MHZ). On 7 June 2021, the European Court of Auditors, released its report on the limited effectiveness of Frontex's support to external border management.

The agency reacted by trying to dissimulate cooperation. To address investigations by journalists regarding the alleged involvement of Frontex with pushbacks in the Eastern Mediterranean, in November 2020, Frontex Management Board established a Working Group on Fundamental Rights and Legal Operational Aspects of Operations (WG FRaLO). In its final report of 1 March 2021, the Management Board concluded that out of the 13 incidents put forward by the Bellingcat report, eight cases had not caused a violation of the Frontex Regulation, and five examined incidents were not yet, or could not yet be clarified. At its extraordinary meeting in May 2021, the Management Board concluded that "the

refoulement, and that it cannot be excluded that the incident has characteristics of a case of unprocessed return and violation of the principle of non-refoulement”.

At the level of legal accountability, in May 2021, a relevant change occurred. In the first human rights case against Frontex, two applicants brought an action against the agency to the European Court of Justice (CJEU), on the grounds that the agency had 'failed to act' in accordance with Article 265 TFEU ([Case T-282/21](#)). This represented a legal precedent with relevant implications. The action is supported by three pleas in law. The first is about 'serious or persisting violations of fundamental rights and international protection obligations in the Aegean Sea Region', which resulted in a 'policy of systematic and widespread attack directed against civilian populations seeking asylum in the EU'. The second is about the agency's failure to fulfil 'its positive obligations under the Charter of Fundamental Rights' or take any action to prevent fundamental rights violations in the context of its operation. The third involves the applicants' claim of having been directly and individually affected by Frontex operations, which resulted in 'unlawful refoulement, collective expulsion, and prevention of access to asylum' ([EPRS Study 2021](#)). The case is still under evaluation.

At the level of political accountability, in July 2021, the Frontex Scrutiny Working Group (FSWG) of the European Parliament's LIBE Committee delivered its [final report](#) with recommendations. These were focusing mainly on ED responsibilities; division of responsibilities between the Agency and Member States in relation to fundamental rights; the importance of strengthening internal mechanisms already existing, namely the Fundamental Rights Officer and the Consultative Forum for fundamental rights; the role of the Management board which has been weak supporter of fundamental rights protection in agency's activities; and finally recommending to the European Commission to engage more proactively to ensure adequate compliance with fundamental rights principles, vis-à-vis the management board, member states, and to apply conditional financial support on bases of humanitarian principles compliance. The report allows for the comprehensive steps for the judicial and non-judicial accountability of the agency and set the framework for the definition of agency's responsibility. This responsibility can be indirect, through assisting Greece or Hungary in the commission of violations, either actively (e.g., technical and financial support) or by omission due to the agency's positive obligations (e.g., failure to suspend or terminate an operation).

All these processes, together with the OLAF probe, created the conditions for Fabrice Leggeri's resignation and the formal and informal condemnation of his management.

What's next?

In a press release on 29th April, Frontex [confirmed](#) Leggeri's departure, [adding](#) that since he had already stepped down, it "is not necessary anymore" to launch further disciplinary procedures. Aija Kalnaja, Deputy Executive Director for Standing Corps Management will lead the Agency until the Frontex Management Board appoints the Executive Director ad

European Commission and the Parliament elsewhere than a new legislative initiative to reorganize Frontex profile. At the same time, Leggeri's resignation comes not only after OLAF probe ended, but also during the French presidency of the European Union (ending on 30th June) and Macron re-election last 22nd April. Beginning of February, Macron, shortly before the Russian invasion of Ukraine and the reformulation of the international political agenda, was advancing the idea of a more operational “Schengen Council” which would evaluate how the border-free area was working but would also take joint decisions and facilitate coordination in times of crisis. One may speculate on the forthcoming political destiny of Leggeri, which could also be considered by the French administration. Leggeri comes from France’s ministry of the interior where he has been heading the division on irregular migration. At the same time, Macron has a history of grandiose statements in denial of reality, from being a supporter of Libyan political reconciliation while violating the UN arms embargo, to peace talks with Putin right before the latter launched the invasion of Ukraine. It would be wise to wait before advancing any speculation. However, French representatives in Brussels do not hide their aspiration for a practical and operational solution to long-standing issues in European Justice and Home Affairs, including the creation of external border buffer zones that should allow for 'third-country nationals processing' without being paralyzed by NGOs or civil society actors. Leggeri himself declared to Die Welt in 2017 that 'By rescuing migrants off the North African coasts, non-governmental organisations are playing into the hands of human traffickers’.

The first comprehensive steps for the judicial and non-judicial accountability of the agency have been taken. Frontex cannot ignore new and unprecedented legal, political and administrative accountability procedures now set in motion. The risk for their repeal and weakening may come from new and urgent needs and rationales linked to the war in Ukraine.

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