



EUROPEAN POLICY ANALYSIS

Should They Stay or Should They Go? Frontex's fundamental rights dilemma

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Summary

Since the arrival of more than one million refugees and other migrants in European Union countries in 2015, the European Border and Coast Guard Agency ('Frontex') has undergone a remarkable expansion, both in scale and in the scope of its activities. At the same time, it has been facing an ever more pressing dilemma: Frontex is expected to help control the EU's external borders, but if it carries out operations in a Member State that applies drastic deterrence measures against asylum seekers and other migrants the agency risks becoming complicit in illegal acts. Should it, where such risks arise, withdraw; or stay; or even increase its presence to try to prevent possible fundamental rights violations?

This analysis briefly reviews the role and tasks of Frontex, as well as the existing structures for ensuring accountability, democratic oversight and fundamental rights compliance. It finds that while some progress has been made recently, the existing safeguards still have weaknesses.

Nevertheless, from a fundamental rights perspective and in the context of current migration and asylum policies in the EU, which are characterized by a proliferation of deterrence strategies, there is a lack of positive alternatives to the presence of Frontex in Member States under migratory pressure. Other possible options, such as the use of military forces, private contractors, or no support at all, are unlikely to produce better fundamental rights outcomes.

The analysis concludes that Frontex should be present at the external borders of the EU, where needed. However, essential preconditions for continued or even increased engagement are improved transparency and accountability, broadened democratic oversight of fundamental rights compliance and, ideally, independent EU monitoring of border control practices.

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1. Introduction

The resignation of Fabrice Leggeri as Executive Director of Frontex in April 2022 will certainly be remembered as a major rupture in the history of the European Border and Coast Guard Agency. As his interim successor Aija Kalnaja said in an emotional intervention at the European Parliament in May 2022, Leggeri left a ‘traumatised’ agency, with some of the Agency’s staff refusing to go to work. Kalnaja promised more transparency and openness. But she also warned that a ‘change in culture’ at the agency would take time.¹

Leggeri’s resignation can be seen as the culmination of struggles over allegations of misconduct and a lack of transparency and accountability regarding the agency’s performance of its tasks at certain external borders of the EU. Most notably perhaps, Frontex has been accused of being complicit in, and covering up, ‘pushbacks’² of asylum seekers from Greece to Turkey in 2020 and beyond.³

For years, Greece has been one of the main entry points for asylum seekers and irregular migrants who arrive in the European Union via Turkey. It has also hosted one of the longest and largest Frontex deployments so far in the history of the agency, with hundreds of Frontex officers deployed along Greece’s land and maritime borders. The Greek government has denied that pushbacks have occurred, despite a vast amount of evidence to the contrary, but the allegations alarmed the European Parliament, which set up a working group to scrutinize Frontex and made recommendations to prevent further cases of the agency being involved in potentially illegal measures. In October

2022, the Parliament refused to grant the agency budgetary discharge for the year 2020, citing a ‘magnitude’ of ‘serious misconduct’ and arguing that the Agency had carried out joint border surveillance operations in Greece in sections where, simultaneously, fundamental rights violations were taking place.⁴

‘[...] should Frontex increase its presence at the EU’s external borders in various Member States, even when confronted with risk of witnessing or even becoming entangled in harsh deterrence measures that may violate fundamental rights?’

Against this background, this paper analyses one of the most difficult dilemmas the agency faces, and will continue to face in the months and years to come: should Frontex increase its presence at the EU’s external borders in various Member States, even when confronted with risk of witnessing or even becoming entangled in harsh deterrence measures that may violate fundamental rights? Or should it withdraw from Member States where illicit practices have happened or might occur? To contextualize these questions, the analysis first provides a short summary of the history, evolution and current role of Frontex. It then briefly reviews the oversight, accountability and fundamental rights compliance structures that exist, both internal and external.⁵

¹ Nikolaj Nielsen, ‘Frontex left “traumatized” says caretaking leadership’, *EU Observer*, 30 May 2022.

² There is no internationally agreed definition of the term pushback, but the United Nations’ Special Rapporteur on the human rights of migrants describes pushbacks as ‘various measures taken by States, sometimes involving third countries or non-State actors, which result in migrants, including asylum seekers, being summarily forced back, without an individual assessment of their human rights protection needs, to the country or territory, or to sea, whether it be territorial waters or international waters, from where they attempted to cross or crossed an international border’. United Nations, General Assembly, ‘Report on means to address the human rights impact of pushbacks of migrants on land and at sea’, A/HRC/47/30, 12 May 2021.

³ Nick Waters, Emmanuel Freudenthal and Logan Williams, ‘Frontex at Fault: European Border Force Complicit in ‘Illegal’ Pushbacks’, *Bellingcat*, 23 October 2020.

⁴ European Parliament resolution of 18 October 2022 with observations forming an integral part of the decision on discharge in respect of the implementation of the budget of the European Border and Coast Guard Agency for the financial year 2020 (2021/2146(DEC)).

⁵ In addition to academic and policy literature, this analysis was informed by a conversation with the Fundamental Rights Officer of Frontex, Jonas Grimheden, in November 2022.

2. EU Agencies and the evolution and tasks of Frontex

The EU started establishing decentralized agencies in 1975. There are currently 35, with their headquarters spread across Europe. EU agencies have their own legal personalities, are normally set up for an indefinite period, and their general task is to contribute to the implementation of EU policies. They also support cooperation between the EU and national governments by pooling technical and specialist expertise and knowledge.⁶ In the political system of the EU, agencies have been described as ‘in-betweeners’ or ‘hybrids’ because they operate between EU institutions, particularly the European Commission, and the Member States.⁷

Frontex was first established by the Council of the European Union in 2004 as the *European Agency for the Management of Operational Cooperation at the External Borders*. The regulation establishing it stated that ‘effective control and surveillance’ of the EU’s external borders was a matter of ‘utmost importance’ to the Member States.⁸ Accordingly, there was a need for ‘promoting solidarity between Member States in the field of external border management’, and the creation of an agency, assisting Member States with implementing the operational aspects of external border management, including the return of third-country nationals illegally present in the Member States, constituted an important step in this direction.

During the ‘refugee crisis’ of 2015, unusually high numbers of people, many of them refugees from Syria, arrived in the EU to apply for international

protection. They often travelled by boat from Turkey and crossed the EU’s external border into Greece. Migration pressures were also high on other routes, such as the Central Mediterranean route from Libya to Italy and Malta. To restrict and better manage such movements, the EU and its Member States discussed a number of proposals to reform the Common European Asylum System.⁹ The European Council also made an informal migration deal with Turkey to limit the number of asylum seeker arrivals in the EU.¹⁰

‘In November 2019, the EU decided to strengthen the existing border agency and transform it into a *European Border and Coast Guard Agency* with wider tasks, more resources and a new legal mandate.’

Most reform proposals put forward by the European Commission did not advance because of vastly different attitudes among the Member States, notably concerning the idea of a fairer sharing of the responsibility to accept and examine asylum applications. However progress was made in the area of border control. In November 2019, the EU decided to strengthen the existing border agency and transform it into a *European Border and Coast Guard Agency* with wider tasks, more resources and a new legal mandate.¹¹

⁶ European Union, ‘Types of institutions and bodies’ https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/types-institutions-and-bodies_en.

⁷ Ellen Voss, *EU Agencies on the move: challenges ahead*, Swedish Institute for European Policy Studies report 2018:1; Florin Coman-Kund, ‘Frontex, the Rule of Law and the Quest for Accountability’, *Verfassungsblog*, 6 September 2022.

⁸ ‘Council Regulation (EC) No 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’, OJ L 349 (25 November 2004).

⁹ Bernd Parusel, ‘Pieces of the Puzzle – Managing Migration in the EU’, European Liberal Forum/Fores, 2020.

¹⁰ According to the deal, which is technically merely a ‘statement of cooperation’ between EU member states and Turkey, irregular migrants attempting to enter Greece would be returned to Turkey, and Turkey would try to prevent new migratory routes from opening. In exchange, EU Member States would resettle Syrian refugees from Turkey, finance reception and integration measures for Syrians in Turkey, among other promises. See Kyilah Terry, ‘The EU-Turkey Deal, Five Years On: A Frayed and Controversial but Enduring Blueprint’, Migration Policy Institute, 8 April 2021.

¹¹ Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, OJ L 295 (14 November 2019).

In terms of financial resources, the agency has grown rapidly. Starting with an annual budget of just €6 million in 2005, ten years later its budget was €142 million, and in 2022 it had €754 million at its disposal. Frontex currently employs over 1,900 people, making it one of the biggest EU agencies. Among the staff there are over 900 members of a ‘standing corps’ who can be deployed in field operations and are allowed to carry service weapons.¹²

‘Frontex has changed from a relatively “traditional” EU agency with supporting and coordination tasks into a powerful administrative and enforcement body entrusted with significant capacities and powers.’

As the Frontex Regulation of 2019 indicates, the tasks of the Warsaw-based agency are manifold and include border surveillance operations and assistance to Member States in the identification, registration and screening of migrants arriving at the EU’s external land and sea borders. Frontex also supports national border checks at airports, deploys equipment, and – upon the request of a Member State, or on its own initiative and with the agreement of the Member State concerned – returns people who are not entitled to stay in the EU to their home countries. Frontex has also started carrying out missions in non-EU countries, conducts risk analysis and gathers intelligence on migration flows, including through international networks of its own.¹³ In sum, Frontex has changed from a relatively ‘traditional’ EU agency with supporting and coordination tasks into a powerful administrative and enforcement body entrusted with significant capacities and powers.

The ‘hybrid’ or ‘in-between’ nature of Frontex is visible in several respects. As in the cases of other EU agencies, there are representatives of the

Member States and of the European Commission in the Frontex Management Board, which takes strategic decisions. The operational standing corps of Frontex consists of the agency’s own staff and staff seconded by the Member States on short-term or long-term bases. In ‘joint operations’ at an EU external border, Frontex works together with the national border forces of the concerned Member State and must apply both EU law and national law. This can give rise to a number of challenges, uncertainties and problems concerning legal review and accountability. For outsiders, including oversight bodies, it can be difficult to understand who does what and when, and who is responsible for what, and on what legal basis. While this may in principle apply to other EU agencies as well, it is particularly worrying in the case of Frontex because its operations can have strong and immediate impacts on the fundamental rights of individuals, who may, for example, be allowed or not be allowed to cross a border; be allowed to or prevented from applying for asylum; or be removed from the territory of a Member State.

3. Rules on accountability, transparency and control

The construction of EU agencies as hybrids – serving and operating under both EU institutions and Member States – can make controlling and holding them to account a complicated task. Most EU Agencies lack an explicit legal basis in the EU Treaties and a general legal framework concerning their set-up, operation, and powers.¹⁴ They are typically created through individual pieces of secondary law (e.g. an EU regulation), which for each agency reflect certain specificities of the policy fields they are operating in and set out the legal boundaries of the agencies’ respective tasks, actions, powers and finances and also determine who they are accountable to.¹⁵ It has been argued that the dynamic evolution of European administrative integration, including through decentralized agencies, has not always been matched by sufficient consideration for legal certainty and effective accountability. This can lead to accountability

¹² Frontex, ‘Key Facts’ <https://frontex.europa.eu/about-frontex/faq/key-facts/>, accessed on 26 September 2022.

¹³ The agency’s tasks are listed in Article 10 of the Frontex Regulation (EU) 2019/1896.

¹⁴ David Fernández-Rojo, *EU Migration Agencies: the Operation and Cooperation of FRONTEX, EASO and EUROPOL* (Cheltenham: Edward Elgar Publishing, 2021), 5.

¹⁵ Voss, *EU Agencies on the move: challenges ahead*.

gaps and ineffective legal review, and ultimately fundamental rights breaches and disrespect for the rule of law.¹⁶

In the case of Frontex, the Frontex Regulation of 2019 includes rules on accountability and oversight of the Agency. As regards political accountability, Article 6 of the Frontex Regulation states that the Agency shall be accountable to the European Parliament and to the Council. Frontex also has various reporting obligations to the Commission, the European Parliament and the Council.¹⁷ Through the ‘discharge’ procedure, the Parliament checks the legality, regularity and sound financial management of this and other agencies and also evaluates the extent to which they have contributed to achieving the EU’s policy objectives and operated in line with the EU’s values. The Parliament is also involved in the appointment of the Frontex Executive Director, through a right to conduct hearings with candidates for the post and to recommend the appointment of one of the candidates.

‘OLAF opened an investigation into Frontex in November 2020. It found evidence of serious misconduct and other irregularities at the agency [...]’

In the same way as for other EU agencies, the European Court of Auditors exercises external control of budgetary and financial management. The European Anti-Fraud Office (OLAF) investigates irregularities – including any instances of corruption and misconduct – in the allocation and use of EU funding, and the European Ombudsman can receive and follow up complaints

regarding the denial of access to documents and other types of maladministration.

All these bodies have over the past two-to-three years made use of their powers vis-à-vis Frontex and issued reports. The European Court of Auditors performed an audit of the agency covering the period from the end of 2016 until February 2020. Overall, it found that Frontex’s support for Member States in ‘fighting against illegal immigration and cross-border crime’ was not sufficiently effective.¹⁸ OLAF opened an investigation into Frontex in November 2020. It found evidence of serious misconduct and other irregularities at the agency, which, it reported, hindered its capacity to fully comply with its responsibilities, namely monitoring compliance with fundamental rights in its activities at the external borders, and ensuring respect for, protection, and promotion of fundamental rights.¹⁹ In the same month, the European Ombudsman started an own-initiative inquiry into the implementation of the Frontex complaints mechanism used for reporting fundamental rights violations and the role and independence of the Frontex Fundamental Rights Officer (FRO) in this regard. Its conclusions pointed to a number of shortcomings, including a very low number of complaints, a lack of transparency, a delay in recruiting a sufficient number of fundamental rights monitors, and a lack of cooperation between the FRO and national authorities in Member States.²⁰

4. Structures for fundamental rights compliance

Many of Frontex’s activities have direct and immediate implications for the fundamental rights of individuals, such as persons attempting to cross an external border. Therefore respect for fundamental rights and appropriate monitoring

¹⁶ Coman-Kund, ‘Frontex, the Rule of Law and the Quest for Accountability’.

¹⁷ For more details, see Micaela Del Monte and Katrien Luyten, ‘European Parliament scrutiny of Frontex’, European Parliamentary Research Service, Briefing PE 698.816, November 2021 and Tineke Strik, ‘European Oversight on Frontex – How to Strengthen Democratic Accountability’, *Verfassungsblog* September 2022.

¹⁸ European Court of Auditors, ‘Frontex’s support to external border management: not sufficiently effective to date’, Special Report 08/2021, June 2021.

¹⁹ This report was not officially disclosed but was leaked to media outlets, see for example Giorgos Christides and Steffen Lüdke, ‘Why Der Spiegel Is Publishing the EU Investigative Report on Pushbacks’, *Der Spiegel*, 13 October 2022.

²⁰ European Ombudsman, ‘Decision in OI/5/2020/MHZ on the functioning of the European Border and Coast Guard Agency’s (Frontex) complaints mechanism for alleged breaches of fundamental rights and the role of the Fundamental Rights Officer’, 15 June 2021.

and compliance systems are particularly important for this agency; more so than for many others. This is reflected in the Frontex Regulation, which demands that the Agency guarantees the protection of fundamental rights in the performance of its tasks in accordance with relevant EU and international law.

Frontex has a Fundamental Rights Officer (FRO), who is mandated with monitoring the Agency's implementation of its fundamental rights obligations and advising the Executive Director on fundamental rights-related issues. The FRO is appointed by the Management Board and is independent within the Agency, and since June 2021 the post has been occupied by Jonas Grimheden. The FRO recruits and appoints the staff of his office, the task of which is to support the agency's work from a human rights perspective and reinforce the respect, protection and promotion of fundamental rights. To monitor the agency's compliance, the FRO can conduct investigations into any Frontex activity and carry out on-the-spot visits. He is also responsible for the statutory complaints mechanism, whereby those who consider that their fundamental rights have been breached may submit a complaint in writing to the agency (Article 111 of the Frontex Regulation). The FRO also provides training on fundamental rights to Frontex staff and representatives of Member States in which the agency operates.

The office of the FRO is supported by fundamental rights monitors who monitor and assess the fundamental rights compliance of the agency's activities, provide advice and assist in implementing and safeguarding relevant provisions. The Frontex Regulation requires at least forty fundamental rights monitors at the agency. While this recruitment took a long time to complete, which led to the criticism from the Ombudsman discussed above, Frontex surpassed the required threshold of forty monitors in autumn 2022.

Frontex also has a Consultative Forum, at present composed of fourteen member organisations:

other EU agencies (the European Union Agency for Asylum and the European Union Agency for Fundamental Rights) and international and civil society organisations such as the United Nations High Commissioner for Refugees (UNHCR), the Council of Europe and the EU Office of the Red Cross. The role of the Forum is to advise Frontex in fundamental rights matters. It has access to internal documents, carries out field missions and publishes an annual report, but Frontex is not bound by the Forum's recommendations. The Forum also functions as a link to broader civil society and the public although this function certainly has limits because the members of the Forum are under confidentiality obligations.²¹ The Forum cooperates with the Office of the FRO.

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Article 46 of the Frontex Regulation, which provides rules for suspending, terminating, or not launching activities, also has an important function as regards fundamental rights. Among other rules, the Article states that the Executive Director shall, after consulting the FRO and informing the Member State concerned, 'withdraw the financing for any activity by the Agency, or suspend or terminate any activity by the agency, in whole or in part, if he or she considers that there are violations of fundamental rights or international protection obligations related to the activity concerned that are of a serious nature or are likely to persist'. When taking such decisions, the Executive Director must take into account relevant information such as registered complaints, reports of serious incidents, reports from coordinating officers, relevant international organisations and EU institutions, bodies, offices and agencies.

²¹ Mariana Gkliati, 'Fragments of Accountability and the Resignation of the Frontex Executive Director', *Verfassungsblog*, 6 September 2022; European Border and Coast Guard Agency (Frontex), *Ninth Annual Report of the Frontex Consultative Forum on Fundamental Rights*, 2022.

In February 2021, Frontex adopted a new fundamental rights strategy, stressing that staff are accountable in their professional conduct to the European Parliament and the Council. The strategy insists that border checks and border surveillance at sea, land and air must be conducted in a way that respects fundamental rights. There is also a serious incident report (SIR) procedure, which obliges participants in Frontex operational activities to immediately report any situation of possible violations of fundamental rights directly to the FRO.

‘Despite these regulations and structures, scholars and experts have argued that there continue to be shortcomings and risks [...]’

Despite these regulations and structures, scholars and experts have argued that there continue to be shortcomings and risks, and that the existing framework for fundamental rights compliance is underdeveloped and piecemeal, amounting to a democratic deficit.²² After all, it was shown that the existing rules and safeguards have not prevented the cases of misconduct, concealing of evidence and intimidation of whistleblowers related to pushbacks in the Aegean Sea, as reported by the media and in the leaked OLAF report.²³ Since the events in 2020, however, the independence guarantees of the FRO have been strengthened and the FRO has engaged more staff.

In a move to better make use of its oversight powers, the European Parliament decided to establish a Frontex Scrutiny Working Group (FSWG) in January 2021 to monitor the functioning of the agency, including compliance with fundamental

rights. The FSWG’s first task was to investigate if Frontex was aware of fundamental rights violations, if so how it had acted upon such knowledge, and to what extent it was actively taking part in pushbacks. The inquiry encompassed internal management, procedures for reporting, and the handling of complaints. In July 2021, the FSWG concluded that there was evidence to support allegations of fundamental rights violations in Member States with which Frontex had joint operations, and that the agency failed to address and follow-up on these violations promptly, vigilantly and effectively. As a result, Frontex did not prevent these violations, nor reduce the risk of future fundamental rights violations. The FSWG also found evidence of incomplete or false information being given to the Parliament, and it came up with recommendations regarding internal procedures at the agency and parliamentary oversight.²⁴

A further criticism that has been made is that the FRO’s internal fundamental rights monitoring has limited effects because of the limited nature of their powers. The FSWG found that the FRO’s opinions and recommendations had been disregarded and that he had been sidelined as internal ‘serious incident reports’ regarding pushbacks by Greece were re-classified.²⁵ Since July 2022, however, the Executive Director and the Management Board are obliged to act on the advice of the FRO, and within 15 or 30 days, depending on urgency.

The complaint mechanism for persons affected by activities of Frontex has certain limits, too, as those who might have complaints likely often find themselves in vulnerable positions and usually on the ‘wrong side’ of the EU’s external borders. In recent years, however, the number of registered complaints has increased, from 18 in 2019 to 27 in 2021.²⁶

²² *Verfassungsblog* published a series of blog posts under the topic ‘Frontex and the Rule of Law’ in September 2022 with entries by Amanda Musco Eklund, Sarah Tas, Laura Salzano, Michele Gigli, Tineke Strik, Salvo Nicolosi, Elspeth Guild, Mariana Gkliati, Florin Coman-Kund and Luisa Marin: <https://verfassungsblog.de/category/debates/frontex-and-the-rule-of-law-debates/> (several of these blog entries are also individually quoted in this paper). See also Roberto Cortinovis, ‘Pushbacks and lack of accountability at the Greek-Turkish borders’, CEPS Papers in Liberty and Security in Europe 2021.01, February 2021.

²³ Waters *et al.* ‘Frontex at Fault’.

²⁴ European Parliament: *Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations*, Working Document PE692.887v01-00, 14 July 2021.

²⁵ Strik, ‘European Oversight on Frontex’.

²⁶ Frontex, *The Fundamental Rights Officer Annual Report 2021*, (Luxembourg: Publications Office of the European Union, 2022) 26.

5. Stay or leave?

To justify its existence, growth and budget, it is obvious that an EU agency the size of Frontex must demonstrate that it fulfills the political expectations directed towards it. This ultimately means that Frontex needs to show that it makes a difference on the ground by helping the Member States to effectively control and secure their borders. At the same time, it must comply with fundamental rights and EU law on borders and asylum. Problems arise when Member States resort to harsh measures to deter unwanted movements of migrants and asylum seekers. There are many signs that this happens frequently in several EU Member States today, with numerous reports about questionable or illegal practices, pushbacks and border violence.²⁷ Whenever deterrence measures at the border go too far and Frontex is present to assist national border guards, it risks becoming part of the problem.

'A crucial question is whether the deployment of Frontex officers to a Member State's external borders increases or decreases the risk of human rights violations [...].'

A crucial question that arises from this is whether the deployment of Frontex officers to a Member State's external borders increases or decreases the risk of human rights violations, such as illegal pushbacks, arbitrary detention migrants or violence by border guards.

In 2021, when the regime in Belarus tried to exert pressure on the EU by encouraging and even actively helping migrants from Iraq and other countries to travel to the Belarusian borders with the EU, Frontex quickly deployed staff to

Lithuania to support their border surveillance and other border management functions.²⁸ Frontex fundamental rights monitors subsequently submitted several reports of collective expulsions of migrants from Lithuania,²⁹ and the Frontex FRO reported restrictions of access to international protection based on amended national legislation, which he considered 'not compliant with EU law'.³⁰ Poland, by contrast, did not request the help of Frontex despite calls from the European Commission for it to do so, and Frontex only managed to carry out some monitoring missions there. A likely reason for the unwillingness of Poland to request a Frontex operation is that Polish measures to prevent migrants and asylum seekers from entering from Belarus did not comply with EU and international human rights and asylum law and that therefore, Frontex might have witnessed unlawful practices, and reported them, as it is obliged to.³¹

These two recent cases of Lithuania and Poland suggest that while Frontex might not always be able to prevent border incidents with a human rights impact, such incidents can at least be documented, reported and followed-up if Frontex is present.

Whether to stay or to leave is not an easy decision, however, and there are rules to follow, such as Article 46 of the Frontex Regulation. As mentioned, the Executive Director can decide to suspend, terminate or not launch an activity in a Member State if he or she considers that there are violations of fundamental rights or international protection obligations related to the activity that are of a serious nature or are likely to persist. In 2021, Frontex suspended most of its operations in Hungary because it could not ensure that it would not become involved in illegal practices. In 2022, there were calls on Frontex to pull out of Greece.

²⁷ Council of Europe, 'Pushed beyond the limits. Four areas for urgent action to end human rights violations at Europe's borders', Recommendation by the Council of Europe Commissioner for Human Rights, April 2022.

²⁸ 'Frontex provides support for Lithuania, Latvia at their borders with Belarus', Frontex news release, 1 July 2021.

²⁹ Nikolaj Nielsen, 'Frontex documents "collective expulsion" in Lithuania', *EU Observer*, 8 October 2021.

³⁰ Frontex, *The Fundamental Rights Officer Annual Report 2021*, 10.

³¹ Adam Bodnar and Agnieszka Grzelak, 'In Poland, where is Frontex?' *Politico*, 4 November 2021.

From a fundamental rights perspective, however, continued presence and engagement could be a better option than termination and withdrawal. The current Frontex FRO, Jonas Grimheden, has himself suggested that continued or even increased involvement of Frontex at the common EU external borders could be preferable from a fundamental rights perspective because the presence of the agency could have a preventive function.³² Furthermore, if Frontex cannot act in a Member State that needs border control support, what other actors might be requested by that Member State to step in and assist instead? The deployment of military forces or private contractors would likely entail greater risks of fundamental rights violations going unnoticed, compared to the involvement of an EU agency. Getting no help at all does not appear to be a suitable alternative either, because national border control structures that come under stress are more likely to resort to harsh or illegal measures than well-staffed and well-supported structures with reliable practices and procedures. There would also be fewer eyes to see what is going on.

A further argument is that Member States can become dependent on the assistance of Frontex, especially if joint operations are going on for a long time. Greece might be a case in point. If Frontex suddenly withdraws, much needed expertise can disappear, which is unlikely to improve the safeguarding of fundamental rights in border procedures.

6. Conclusion

Compared to many other EU agencies, Frontex certainly operates in a particularly difficult environment. It is on the one hand expected to help EU Member States secure their external borders, a task that is sometimes misunderstood as meaning that these borders should be impenetrable. On the other hand, it has to respect the fundamental rights of the persons affected by its operations, which means that they have to be treated in accordance with EU and international law on, for example, human dignity, access to asylum and protection against unlawful expulsion. While there should be no conflict

between these two essential dimensions of its task, the agency has not always been able to navigate them appropriately, as the various reports about misconduct and complicity in illegal deterrence measures against migrants have shown. Few other agencies have grown as much as Frontex over recent years, and few have been faced with comparable amounts of criticism.

'Weighing arguments for withdrawing from Member States where fundamental rights violations are likely to occur against a more proactive approach of staying in such places, it seems that staying and engaging is preferable.'

This paper has identified the question of whether withdrawal or engagement – leaving or staying – is a better option from a fundamental rights perspective as an important dilemma that needs to be addressed urgently. Weighing arguments for withdrawing from Member States where fundamental rights violations are likely to occur against a more proactive approach of staying (or even increasing operations) in such places, it seems that staying and engaging is preferable. If this path is taken, however, the existing internal functions and procedures for fundamental rights monitoring and reporting need to be further developed and strengthened, likewise those for following up on problems and incidents, and receiving and acting on complaints. If, alongside these improvements, transparency and openness towards outside control and oversight bodies were enhanced, and cooperation with different accountability fora, including civil society organisations, were widened, the agency could play a positive role at the EU's external borders by more effectively discouraging or even counteracting misconduct instead of directly or indirectly supporting it.

And improvements in terms of human rights compliance are by no means the responsibility of Frontex alone. Oversight bodies and the public

³² 'Frontex ends Lithuania border surveillance operation', *EU Observer*, 14 July 2022; 'Greece should face more checks over asylum seeker treatment – EU official', *The Guardian*, 31 August 2022.

must also take sufficient interest and time to actively follow the activities of the Agency, and this is not always the case. As the rapporteur for the European Parliament's Frontex Scrutiny Working Group in 2021 indicated, the 'overwhelming workload' of Members of the European Parliament and the proliferation of new migration crises can distract Parliamentarians from solid, permanent scrutiny of Frontex.³³ Moreover, in a political climate where migration is a toxic issue, where a major political goal is to stop irregular migrants and asylum seekers from arriving in the EU at almost any cost, and where migration is considered a weapon or a threat, not all politicians will be enthusiastic about reviewing or questioning deterrence practices at the borders.

'One way forward could be to broaden democratic control by involving national parliaments to a greater degree.'

One way forward could be to broaden democratic control by involving national parliaments to a greater degree. A potential model could be the Joint Parliamentary Scrutiny Group for Europol, which is composed of both national parliamentarians and MEPs.³⁴ It has also been convincingly suggested that, in addition to improved accountability systems for Frontex, the EU should establish an independent system for monitoring human rights compliance at EU borders.³⁵ Another step would be for Frontex to work together with national bodies that can carry out inspections and monitoring on a regular basis, such as national human rights watchdogs or ombudsmen in the Member States. Cooperation with international bodies such as the Council of Europe or the United Nations could also be useful, but so far, the resources of these

bodies to fulfill such tasks have been limited and usually do not stretch beyond isolated inspection missions.

In the long run, one might envisage a reversal of Article 46 of the Frontex Regulation. Instead of suggesting withdrawal from Member States where risks of fundamental rights violations arise, it would demand that Frontex steps in or increases its presence in such Member States to prevent misconduct and try to ensure fundamental rights compliance. An even more visionary idea would be to deploy Frontex to Member States even when they do not request a Frontex operation or mission, if it were necessary from a fundamental rights perspective. This might seem controversial and overly ambitious at this point, but it is not wrong to think ahead and contemplate a 'more EU' scenario as regards external border controls and related aspects, such as the entry and reception of asylum seekers. Again, however, this would require well-functioning oversight and democratic control structures and would likely have to be linked to a standardized EU system of screening and registering asylum seekers at border crossing points and then referring them to asylum or return procedures.

This analysis has raised both urgent and longer-term questions that EU and national lawmakers and Frontex's new leadership should address. If the EU wants to manage migration with full respect for fundamental rights and its own laws, thereby also serving as a model for other world regions, its external borders cannot be zones of lawlessness. Without improved accountability and democratic oversight, whether it withdraws from or remains in zones of potential fundamental rights violation, Frontex will fail to fully live up to its mission and continue to face suspicion and criticism.

³³ Strik, 'European Oversight on Frontex'.

³⁴ Valentin Kreiling, 'A Watchdog over Europe's Policemen: The New Joint Parliamentary Scrutiny Group for Europol'. Jacques Delors Institut (Berlin), 2017; see also Coman-Kund, 'Frontex, the Rule of Law and the Quest for Accountability'.

³⁵ Elspeth Guild, 'What Monitoring for Fundamental Rights at EU Borders?', *Verfassungsblog*, 7 September 2022.