

Guest editorial: The external borders of the European Union: Between a rule of law crisis and accountability gaps

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1 | THE MANAGEMENT OF THE EU'S EXTERNAL BORDERS AND ITS RULE OF LAW PITFALLS

The management of the external borders of the EU has become a vulnerable and contested policy: civil society organisations denounce the systemic violence occurring at the borders,¹ involving both EU agencies and Member States' authorities. European institutions and bodies scrutinise the activities of these agencies as well as their impact and effectiveness,² and litigation against these agencies is gaining momentum.³ Migration management has emerged as one of the most divisive and decisive topics for the 2024 European Parliament elections, shaping political discourse and influencing voter priorities across the continent.

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¹See, e.g., G. Christides, K. van Dijken, S. Lüdke and M. Popp, 'Scandals Plunge Europe's Border Agency into Turmoil' (*Spiegel International*, 5 February 2021), at: <<https://www.spiegel.de/international/europe/missteps-and-mismanagement-at-frontex-scandals-plunge-europe-s-border-agency-into-turmoil-a-d11ae404-5fd4-41a7-b127-eca47a00753f>> (accessed 19 July 2024).

²See, inter alia, European Parliament, Committee on Civil Liberties, Justice and Home Affairs (LIBE), 'Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations', Rapporteur: Tineke Strik, 14 July 2021; European Court of Auditors (ECA), 'Frontex's support to external border management: not sufficiently effective to date', Special Report No. 8/2021, 7 June 2021, at: <<https://www.eca.europa.eu/en/publications?did=58564>> (accessed 19 July 2024) and, more recently, European Data Protection Supervisor (EDPS), 'Audit Report on the European Border and Coast Guard Agency (Frontext)', 24 May 2023, <https://edps.europa.eu/data-protection/our-work/publications/audits/2023-05-24-audit-report-frontex_en> (accessed 19 July 2024).

³For a concise overview, see S. Nicolosi, 'Frontex and Migrants' Access to Justice: Drifting Effective Judicial Protection?' (*Verfassungsblog*, 7 September 2022), at: <<https://verfassungsblog.de/frontex-and-migrants-access-to-justice/>> (accessed 19 July 2024).

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The new European Parliament will have to deal over the coming years with the implementation of the ten new Regulations and Directives of the new Pact on Migration and Asylum,⁴ as well as the revised Schengen Borders Code.⁵ The challenge will be to ensure effective governance of this area while adhering to the fundamental EU values and the Rule of Law.

Such challenges of this sharply contested policy area are vividly illustrated by the fierce debate concerning EU Integrated Border Management and the European Border and Coast Guard Agency (Frontex). Over the past years, Frontex has come under scrutiny following media and civil society allegations of breaches of fundamental rights under international and European law,⁶ including pushbacks,⁷ disrespect of its legal mandate and a track record of poor transparency and limited accountability.⁸ This storm of official investigations, concluded by the report of the EU Anti-Fraud Office (OLAF),⁹ led to the resignation of the Frontex Executive Director, Fabrice Leggeri, in April 2022.¹⁰ Though undisclosed for months, the (eventually leaked) OLAF report ultimately confirmed severe mismanagement issues and violations of the Frontex founding Regulation and operational rules by its former Executive Director, casting doubts over the quality of the internal oversight and accountability mechanisms of the Agency.¹¹

Despite the attempts of the Agency to erase its 'shadows from the past',¹² allegations of ongoing pushback practices within the operational area of Frontex joint operations are not quelled. On 14 June 2023, just a month after the Cutro boat disaster in Southern Italy,¹³ yet another migrant boat sank off the coast of Greece in an attempt

⁴Regulation (EU) 2024/1356 of the European Parliament and of the Council of 14 May 2024 introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, OJ L, 2024/1356, 22.5.2024; Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013, OJ L, 2024/1351, 22.5.2024;

Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, OJ L, 2024/1348, 22.5.2024;

Regulation (EU) 2024/1349 of the European Parliament and of the Council of 14 May 2024 establishing a return border procedure, and amending Regulation (EU) 2021/1148, OJ L, 2024/1349, 22.5.2024;

Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147, OJ L, 2024/1359, 22.5.2024;

Regulation (EU) 2024/1358 of the European Parliament and of the Council of 14 May 2024 on the establishment of 'Eurodac' for the comparison of biometric data in order to effectively apply Regulations (EU) 2024/1351 and (EU) 2024/1350 of the European Parliament and of the Council and Council Directive 2001/55/EC and to identify illegally staying third-country nationals and stateless persons and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, amending Regulations (EU) 2018/1240 and (EU) 2019/818 of the European Parliament and of the Council and repealing Regulation (EU) No 603/2013 of the European Parliament and of the Council, OJ L, 2024/1358, 22.5.2024;

Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 laying down standards for the reception of applicants for international protection, OJ L, 2024/1346, 22.5.2024;

Regulation (EU) 2024/1347 of the European Parliament and of the Council of 14 May 2024 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted, amending Council Directive 2003/109/EC and repealing Directive 2011/95/EU of the European Parliament and of the Council, OJ L, 2024/1347, 22.5.2024;

Regulation (EU) 2024/1350 of the European Parliament and of the Council of 14 May 2024 establishing a Union Resettlement and Humanitarian Admission Framework, and amending Regulation (EU) 2021/1147, OJ L, 2024/1350, 22.5.2024.

⁵Regulation (EU) 2024/1717 of the European Parliament and of the Council of 13 June 2024 amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, OJ L, 2024/1717, 20.6.2024.

⁶Bellingcat, 'Frontex at Fault: European Border Force Complicit in "Illegal" Pushback' (23 October 2020), <<https://www.bellingcat.com/news/2020/10/23/frontex-at-fault-european-border-force-licit-in-illegal-pushbacks/>> (accessed 19 July 2024).

⁷European Parliamentary Research Service, 'Addressing pushbacks at the EU's external borders', Briefing, October 2022.

⁸European Ombudsman, Decision in Case OI/4/2021/MHZ on how the European Border and Coast Guard Agency (Frontex) complies with its fundamental rights obligations and ensures accountability in relation to its enhanced responsibilities, 17 January 2022. See also Decision Case 1452/2022/MHZ on how the European Border and Coast Guard Agency (Frontex) ensures respect of the rights of migrants in 'debriefing' interviews, 3 July 2023.

⁹FragDenStaat, 'OLAF Final Report on Frontex', leaked in October 2022 at: <<https://fragdenstaat.de/dokumente/233972-olaf-final-report-on-frontex/>> (accessed 19 July 2024).

¹⁰Frontex, Management Board conclusions from the extraordinary meeting of 28–29 April 2022, at: <<https://www.frontex.europa.eu/media-centre/news/management-board-updates/management-board-conclusions-from-the-extraordinary-mb-meeting-of-28-29-april-2022-n08YV>> (accessed 19 July 2024).

¹¹As summarized in S. D'Auria, 'OLAF report confirms the allegations about Frontex's serious misconducts and irregularities' (2023) *Ius In Itinere*, at: <<https://www.iusinitinere.it/olaf-report-confirms-the-allegations-about-frontexs-serious-misconducts-and-irregularities-43902>> (accessed 19 July 2024).

¹²European Border and Coast Guard's Agency (FRONTEX), 2022 In Brief, 28 February 2023, at: <<https://frontex.europa.eu/publications/2022-in-brief-XZDZ71>> (accessed 19 July 2024).

¹³See Amnesty International, 'Italy: New investigation reveals damning details about preventable drownings' (2 June 2023), at: <<https://www.amnesty.org/en/latest/news/2023/06/italy-new-investigation-reveals-damning-details-about-preventable-drownings/>> (accessed 19 July 2024).

to cross the Mediterranean Sea.¹⁴ An estimated 650 passengers were then lost at sea, marking one of the deadliest migrant tragedies in the history of Europe. The circumstances of these shipwrecks raise questions regarding the involvement of the national authorities and Frontex and their respective responsibilities for failure to rescue. One month after the incident, the European Ombudsman opened a new own-initiative inquiry into the role of Frontex in search and rescue (SAR) operations in the Mediterranean Sea.¹⁵

These emerging forms of transparency and accountability, which are the fruit of concerted efforts of civil society, investigative journalism and engaged academia, do raise important questions about the compliance and respect of the legal framework by agencies, in particular concerning the protection of fundamental rights at the external borders of the EU. It is precisely this 'implementation gap' between the law and agencies' operational activities that exposes structural challenges in the accountability mechanisms and weaknesses in access to justice. Other EU agencies of the Area of Freedom, Security and Justice (AFSJ), such as the European Union Agency for Law Enforcement (Europol) and the European Union Agency for Asylum (EUAA), face similar gaps in accountability.¹⁶ The increasing inter-agency cooperation expands the significance of those gaps: in this respect, the case of the known 'hotspots' in liminal areas of the EU is paradigmatic.¹⁷ Additionally, the increased digitalisation of external border controls (e.g., with the European Travel Information and Authorisation System (ETIAS)),¹⁸ and its reliance on artificial intelligence technologies, complicates the efforts to scrutinise the discretion exercised by those actors.

In this emerging line of research, scholarship has already raised issues concerning the emergence of a rule of law crisis beyond the rule of law backsliding by illiberal states, pointing fingers at systemic deficiencies in asylum and border management.¹⁹ However, the rule of law crisis at the EU's external borders goes beyond the threats to fundamental rights protection.²⁰ The rule of law is here understood as a principle of governance in which agencies and entities (state and non-state; public and private) operate according to enforceable laws, independently adjudicated, and consistent with international human rights norms and standards. As a general principle of the EU legal order and a foundational EU value,²¹ the concept of the rule of law encompasses fundamental rights protection as well as access to justice and accountability, thereby serving as a restraint to abuse of power, prevention of serious violations of the law, and creation of a legal and social order where impunity is not tolerated. The core function of the rule of law in the EU legal order is, therefore, to constrain the discretion exercised by state and EU administrations alike within the frameworks of the law, including fundamental rights norms. The safeguarding of the rule of law needs to be founded on a system of effective checks and balances that can ensure accountability in case of a breach of the legal framework. To sum up, accountability is closely related to the rule of law. Thus, the rise of shared administration

¹⁴See the Editorial in *The Guardian*, 31 July 2023, at: <<https://www.theguardian.com/commentisfree/2023/jul/31/the-guardian-view-on-investigating-a-migrant-tragedy-bereaved-families-deserve-the-truth>> (accessed 19 July 2024).

¹⁵European Ombudsman, 'Ombudsman Asks Frontex about Role in Rescue Operations after Greek Boat Tragedy', 26 July 2023, at: <<https://www.ombudsman.europa.eu/nl/press-release/en/172857>> (accessed 19 July 2024).

¹⁶S. Tas, *Overseeing Supervision: Europol's processing and exchanges of personal data*, PhD thesis (Fiesole, European University Institute, 2023); R. Minder and H. Foy, 'EU asylum agency accused of covering up "irregularities"' (*Financial Times*, 20 September 2022).

¹⁷European Communication, Communication from the Commission on A European Agenda on Migration COM(2015) 240 final.

¹⁸N. Vavoula, 'Digitalising the EU Migration and Asylum Policy: A Case Study on Information Systems' in E. Tsourdi and Ph. de Bruycker (eds.), *Research Handbook on EU Migration and Asylum Law* (Edward Elgar Publishing, 2022). See, also, A. Musco Eklund, 'Rule of Law Challenges of "Algorithmic Discretion" & Automation in EU Border Control: A Case Study of ETIAS Through the Lens of Legality', (2023) 25 *European Journal of Migration and Law*, 249.

¹⁹E. Tsourdi, 'Asylum in the EU: One of the Many Faces of Rule of Law Backsliding?', (2021) 17 *European Constitutional Law Review*, 471–497. I. Goldner Lang and B. Nagy, 'External Border Control Techniques in the EU as a Challenge to the Principle of Non-Roulement', (2021) 17 *European Constitutional Law Review*, 442–470. In 2019, F.L. Gatta, 'Migration and the Rule of (Human Rights) Law: Two "Crises" Looking in the Same Mirror', (2019) 15(1) *Croatian Yearbook of European Law & Policy*, 99–133, established a link between rule of law backsliding of illiberal governments and the migration rule of law crisis. Another interesting analysis on external borders, employing the paradigm of preventive justice, is given by V. Mitsilegas, 'The EU External Border as a Site of Preventive (In)justice', (2022) 28 *European Law Journal*, 263–280. For a different angle, see, also, D. Kochenov and S. Ganty, 'EU Lawlessness Law: Europe's Passport Apartheid from Indifference to Torture and Killing'. Jean Monnet Working Paper No. 2/2022 (2 January 2023), available at: <<https://ssrn.com/abstract=4316584>>; M. Ioannidis and A. von Bogdandy, 'Systemic Deficiency in the Rule of Law: What it is, what has been done, what can be done', (2014) 51 *Common Market Law Review*, 59–96.

²⁰L. Marin, 'Frontex as the Epicenter of a Rule of Law Crisis at the External Borders of the EU', in this Special Issue. See, also, L. Marin, M. Gkliati and S. Tas, 'An "Impossible Trinity"? Frontex, EU External Borders and the Rule of Law' (*Verfassungsblog*, 5 September 2022), at: <<https://verfassungsblog.de/an-impossible-trinity/>> (accessed 19 July 2024).

²¹Case 294/83, *Parti écologiste "Les Verts" v. European Parliament*, ECLI:EU:C:1986:166; Art. 2 TEU.

at the external borders of the EU prompts a reflection upon the oversight and accountability instruments in place to ensure respect for the rule of law, including mechanisms aimed at preventing or adjudicating fundamental rights violations and adequate access to justice for victims of such violations.

This Double Special Issue delves into the complexities of accountability of migration agencies like Frontex. It highlights the consequences of such complexities for access to justice, which emerges as a prominent and overarching feature of the EU rule of law. The articles underscore the inherent difficulties in establishing credible facts, particularly concerning human rights violations associated with border violence.²² The transnational nature of these incidents introduces complexities in documenting and verifying allegations, underscoring the need for enhanced investigative methodologies. These challenges are further compounded by the systemic issues revealed as a rule of law crisis at the external borders. Transparency becomes critical in dismantling this rule of law crisis. Apart from challenging the scope of effective judicial protection, the complexities underpinning the emerging system of shared administration urge an overall calibration of the notion of access to justice, beyond its narrow understanding as access to judicial remedies. This requires an approach that integrates elements of good governance, such as transparency and accountability.²³ Oversight mechanisms, both internal and external, are recognised as fundamental components of ensuring accountability. The articles in this Special Issue collectively echo the need for practical, normative, but also conceptual reforms, especially in light of the correlation between the rule of law crisis and deficiencies in oversight mechanisms. In conclusion, the Special Issue offers a consistent investigation of accountability at the external borders of the EU, bringing together insights that collectively emphasise the need for reforms. From the challenges in establishing facts and ensuring access to justice to the roles of oversight mechanisms, democratic accountability and financial scrutiny, the Special Issue contributes to a comprehensive understanding of the complexities embedded in ensuring accountability. This collective reflection calls for systematic coherence within the EU shared administration to uphold the principles of good governance, transparency and the rule of law.

Despite the multiplicity of threats to legality at the external borders of the EU, a systematic analysis of the different aspects and implications of this rule of law crisis is currently missing. This Special Issue aims to build a reflection on the endogenous rule of law crisis occurring within the European administration. From this perspective, all the contributions shed light on a different and complementary aspect of the many facets of this rule of law crisis, which sees the agency Frontex at its epicentre.²⁴ Furthermore, it offers solutions to improve the overall functioning of accountability mechanisms to safeguard the rule of law in the EU.

Such an analysis is urgently needed for several reasons. Firstly, the crisis unfolding at the European borders and concerning European agencies challenges the claim that the EU is a community based on the rule of law,²⁵ eventually undermining its credibility. Secondly, the rise of shared administration at the external borders of the EU calls for accountability mechanisms to prevent or remedy fundamental rights violations and ensure adequate access to justice for victims of such violations.²⁶ Last but not least, from a broader constitutional perspective, it is essential to observe how supranational institutions react to these policies to understand how European integration is affected by border management and migration developments. Scholarly debates have emphasised that the consolidation of the functions of EU migration agencies has taken place in a context where policy priorities of migration containment and control take precedence over compliance with the EU and international legal framework.²⁷ Allowing these trends to continue unchecked would not only erode the EU's foundational principles but also signify a grave departure from the commitment to uphold the rule of law. It is imperative that these challenges are decisively addressed to prevent any further deterioration of this fundamental pillar of democracy and justice.

²²See E. Guild, 'Frontex and Access to Justice: The Need for Effective Monitoring Mechanisms', in this Special Issue.

²³Nicolosi, above, n. 3.

²⁴Marin, above, n. 20.

²⁵Article 2 TEU; CJEU, Case 294/83, *Les Verts v. European Parliament* (1986) ECR 1339.

²⁶M. Gkliati, 'Shaping the Joint Liability Landscape? The Broader Consequences of WS v Frontex for EU Law' (2024) 9(1) *European Papers*, 69–86.

²⁷Tsourdi, above, n. 19; Goldner Lang and Nagy, above, n. 19.

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EDITORIAL

Guest editorial: The external borders of the European Union: Between a rule of law crisis and accountability gaps

By Luisa Marin, Mariana Gkliati and Salvo Nicolosi

KALEIDOSCOPE 1: The contours of a rule of law crisis at the borders of the European Union

Frontex as the epicenter of a rule of law crisis at the external borders of the EU

By Luisa Marin

Next to the rule of law ‘crises’ within Member States, a new facet of this rule of law crisis is emerging at the external borders of the EU, and sees the EU border agency Frontex as its epicentre. This article illustrates the multiple facets of this crisis which concerns Frontex’s functioning and activities, discussing a form of ‘agency capture’ that occurred under the mandate of the former Executive Director and a legal framework ensuring limited monitoring and transparency on operations. Subsequently, the article delves into the constitutional meaning of the rule of law for an agency such as Frontex, both for its significance on relations between authorities and individuals and for the interplay between the rule of law and accountability. The article concludes by calling for a rethinking of the accountability instruments in place, to constrain more effectively the exercise of discretion by agencies.

EU constitutional dismantling through strategic informalisation: Soft readmission governance as concerted dis-integration

By Violeta Moreno-Lax

This contribution takes issue with what Moreno-Lax has called the ‘constitutional dismantling’ of external migration policy through the tactical informalisation of readmission cooperation. It maps out the strategic use of soft law mediating the tacit approval or active involvement of the main EU actors. The strategy is supposed to enhance policy outcomes but is at the expense of foundational principles. The principles of conferral, institutional balance, and sincere/loyal cooperation impose key constraints on EU/Member State action that the choice for soft law ignores. The author’s main contention is that this is not an unintended consequence, but a deliberate or, at least, tolerated result, amounting to a form of ‘concerted dis-integration’ pursued by the very actors supposed to guard the EU integration project in line with Treaty provisions. The approach denotes the instrumentalisation of legal mechanisms for the advancement of policy objectives, embracing a regulation-without-legitimation paradigm that unravels the EU’s constitutional framework.

Rule of law backsliding within the EU: The case of informal readmissions of third-country nationals at internal borders

By Emanuela Pistoia

The essay deals with the enhancement of the legal framework for informal readmissions at internal borders enshrined in the proposal on an amended Schengen Border Code, which in turn requires enhancing bilateral police cooperation. It focuses on the impact of the new rules on the prohibition on police controls equivalent to border checks to highlight that the case-law of the Court of Justice on the matter creates a huge grey area which is critical for the ideal of a border-check-free Union. Increased use of video surveillance and other technologies also faces the legal bottleneck of the prohibition on police controls having equivalent effects to border checks, as well as raising serious concerns about fundamental rights. It is argued that the situation resulting from these amendments to the Schengen Border Code should be considered in terms of an impending rule of law crisis at internal borders.

Watching the guards: Ensuring compliance with fundamental rights at the external borders

By Jorrit Rijpma

In analysing the enforcement of fundamental rights at the EU's external borders, Jorrit Rijpma highlights the complex dynamics between the EU and Member States in border controls. Despite harmonised regulations and support by Frontex, the security of external borders primarily remains under Member States' jurisdiction. Rijpma examines the EU's available tools for enforcing these rules, aiming to ensure respect for the EU's border *acquis* and maintain the rule of law at external borders.

Datafication of the hotspots in the blind spot of supervisory authorities

By Sarah Tas

The hotspot approach used to contain asylum seekers at the borders of Europe has been heavily criticised for deplorable conditions and multiple fundamental rights violations. This article dives into an underexplored issue in the hotspots, namely their datafication. It explores the question of the protection of personal data, and supervision of data processing and exchanges occurring in the hotspots. The aim is to analyse whether the supervisory arrangements in place are sufficient to ensure the protection of personal data of individuals at the borders, or whether, as the current European Data Protection Supervisor states, data protection is too often suspended at European Union borders. While supervision is in place to monitor the hotspots, this contribution shows that it remains limited and that many blind spots exist that fully escape any supervision. These blind spots emerge, as will be argued, for example by reasons of the complex legal framework of the hotspots, or of the informal nature of the exchanges of data. This is highly problematic due to the sensitivity of the topic, its relevance for the respect of the rule of law at the external borders and the impact data operations have on a migrant's life.

Limits to discretion and automated risk assessments in EU border control: Recognising the political in the technical

By Amanda Musko Eklund

This article analyses how the automation of border control challenges the rule of law requirement on sufficient limits to discretion by using the idea expressed by the CJEU non-delegation doctrine that it is possible to make a clear distinction between technically complex assessments and political discretion. To illustrate these challenges, the article uses the examples of the ETIAS border control regime and the conferral of discretionary powers to the EU agency, Frontex, to establish the pre-determined risk criteria of an automated risk assessment system. The article argues that not recognising the inherent political aspects of exercising technical powers leads to insufficient limits to discretionary powers in the context of automated risk assessments. Beyond raising serious rule of law concerns of arbitrary exercise of power in border control, the idea that technical assessments and policy choices can be clearly separated enables "algorithmic discretion" as a new form of administrative discretion.

The regulation of AI-based migration technologies under the EU AI Act: (Still) operating in the shadows?

By Ludivine Sarah Stewart

While Artificial Intelligence (AI) is becoming a key element in supporting the migration and border management policies of the European Union and its Member States, so far, AI-based migration technologies have been tested and implemented with limited public scrutiny. In this context, the EU AI Act holds the promise of a regulation in line with the protection of fundamental rights and the rule of law. While Member States are bound by existing EU legislation when deploying AI, the Act represents the first attempt to regulate the use of AI systems in migration and border management. This article examines the evolution of the EU AI Act throughout the negotiation process and its potential to hold actors involved in AI-driven migration technology accountable, thereby promoting the rule of law. It argues that while the regulation offers promising and important elements, a closer examination brings to light important concerns about the ability of the final draft to ensure accountability of the various actors involved.

KALEIDOSCOPE 2: Access to justice and accountability in the emerging European shared administration

FRONTEX and access to justice: The need for effective monitoring mechanisms

By Elspeth Guild

Access to justice depends on the ability of the person who is alleging a breach of human rights to establish to a credible extent the facts of the case. Where the individual is unable to provide supporting documentation about the facts, the claims are likely to be found inadmissible, or at least the defendant's lawyers are likely to seek to have the case dismissed on the basis of no case to answer. The transnational nature of state authorities' violence in external border controls (border violence) complicates the ability of victims to establish what has actually happened. Indeed, victims are often on one side of the border and those seeking to assist them on the other, while border police themselves are most reluctant to assist in establishing facts which may result in liability for themselves. This article examines how the EU can establish effective monitoring mechanisms with the competence to investigate allegations of state agencies' border violence building on existing structures.

The European Border and Coast Guard Agency (FRONTEX) and the limits to effective judicial protection in European law

By Salvatore Fabio Nicolosi

The principle of effective judicial protection is a cornerstone of European Union (EU) Law which is predicated on the existence of a complete system of judicial remedies. However, in light of the growing expansion of the operational powers of EU migration agencies like the European Border and Coast Guard Agency (Frontex) and the consequent fundamental rights concerns, this article challenges the assumption that the EU is based on such a complete system of remedies. By critically reviewing the judicial actions against Frontex before the Court of Justice, this article illustrates the limits to effective judicial protection for migrants attempting to enter the EU and being confronted with actors like Frontex. It will be argued that the lack of an effective remedy potentially suggests a violation of the right to good administration in light of the fact that the right to ask for compensation is also part of the right to good administration. Therefore, it is crucial to explore the potential of the bond between judicial protection and good administration to fix the loopholes within the emerging system of shared administration, in which EU agencies progressively interact with national competent authorities.

The European Union Agency for Asylum: Legal remedies and national articulations in composite border procedures

By Agostina Pirrello

In recent years, the European Union Agency for Asylum (EUAA) has been variously involved in the decision-making processes of national authorities deciding on individual asylum applications. In spite of its capability of affecting national asylum procedures and the circumstances in which they are carried out, holding EUAA accountable for its action is prevented by the lack of clear allocations of tasks and the consequent inadequacy of the judicial remedies available. By analysing and comparing the main role played by the Agency in Italy and Malta, this article sheds some light on the different problems of effective judicial protection, which vary and arise differently depending on the tasks performed by EUAA in each national legal system.

Does the European Union's rule of law require the criminalisation of EU public officials? A first appraisal

By Alberto di Martino

This article emphasises the role of criminal law as a strategic form of accountability aimed at safeguarding the EU rule of law, especially when public officials are entrusted with powers that may violate fundamental rights. Abuses committed in the context of border management serve as a case study and a test bench for the more general argument developed in the contribution. It is argued that criminal law—through sanctioning serious abuse of power

irrespective of any lucrative intent—contributes to the legitimacy of policies and actions carried out in the name of the union. As impunity gaps may result from the difficult application of domestic law, the article maintains that it is necessary to stigmatise at the union's level such misdeeds that go beyond cases of mere bad policy or 'maladministration'. It therefore advocates for a directive requiring Member States to criminalise abuse of powers, which are in breach of the rule of law as one of the foundational values enshrined in Article 2 TEU.

Decoding Frontex's fragmented accountability mosaic and introducing systemic accountability - System Reset

By Mariana Gkliati

In response to the involvement of the European Border and Coast Guard Agency (Frontex) in widespread human rights violations, the unprecedented activation of multiple accountability mechanisms led to the resignation of the Executive Director of the agency. Does this development mean, however, that the existing normative framework can ensure the agency's overall accountability? This article, in the spirit of playing with information technology metaphors, meticulously examines the accountability framework of Frontex as a whole. It is based on a holistic understanding of accountability, namely an understanding that includes not only judicial but also non-judicial (administrative, democratic, social) accountability mechanisms that can together safeguard the Rule of Law in the functioning of Frontex. In this context, it problematises the fragmented and ineffective framework of Frontex accountability. This article challenges our traditional notion of accountability and proposes an alternative holistic solution, playing with the metaphorical concept of a 'system reset'. It introduces the model of systemic accountability, which Gkliati defines as accountability that addresses the systemic issues underlying consistent rights violations through focused structural solutions. Systemic accountability can serve as a model for the examination of accountability, not only in Frontex joint operations but broadly in the changing reality of shared administration at the external borders, where a multiplicity of actors is involved, and accountabilities become obscured, leading to systemic violations.

Frontex's expanding mandate: Has democratic control caught up?

By Tineke Strik

This article analyses to what extent the rapid growth of Frontex has been accompanied by adequate democratic accountability, whereby the author draws on her experiences as a Member of Parliament. She elaborates on the safeguards in legislation but also on their application in practice, with a focus on the lessons the Parliament learned from its own inquiry on the role of Frontex in pushbacks. The contribution subsequently puts democratic control to a test on two relatively recent tasks of Frontex: return and external cooperation. Regarding the latter, the Parliament's role is highlighted in the negotiations on the Frontex status agreements between the EU and Mauritania/Senegal. The article answers the question of what obstacles must be overcome, through legislative amendments or changes in practice and culture, for the Parliament to exercise its role effectively. Two of these factors are dealt with more prominently: transparency and cooperation with national parliaments.

The potential of budgetary discharge for democratic accountability: Which lessons from the case of Frontex?

By Michele Gigli

With the discharge procedure of the 2020 budget of Frontex, the European Parliament played a primary role in addressing the policy drift of the most important decentralised agency operating in the area of freedom, security and justice (AFSJ). This case demonstrates the potential of the discharge tool in steering the performance of decentralised agencies at a time when the mandate of these agencies within the EU executive order is affected by a structural accountability deficit. Confronted with a Rule of Law crisis in the AFSJ, the European Parliament has effectively leveraged the evolving normative framework to imbue the discharge process with significant political oversight functions. In this article, I aim to show that a constitutional dimension of the discharge procedure can be conceptualised, enabling the European Parliament to reaffirm its political account-holder role as derived from the Treaties and ensure agencies' compliance with their EU-oriented mandate.

EPILOGUE

Shadow

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