

# Between Rule of Law and Reputation

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At the EU external border a rule of law issue has emerged, involving two actors notoriously struggling with the concept: Hungary, whose disregard for EU law and human rights has been [certified by the Court of Justice](#), and Frontex, which has been at the centre of an escalating [row of scandals and allegations](#) concerning maladministration and human rights violations. On 27 January, the Agency made the unprecedented decision to suspend its activities in Hungary.

The choice to withdraw the Agency from Hungary is not a clear, serious, and meditated move in the Commission's action for the rule of law. Nor is it a sign of a coherent and firm intention to put an end to the Agency's engagement in human rights violations at EU borders, since it keeps operating in other frontline Member States with equally problematic issues. It rather represents an attempt to remedy the already compromised reputation of Frontex.

## Frontex's human rights apparatus

When established in 2004, Frontex had no specific focus on human rights protection. Its [founding Regulation](#) did not contain any provisions relating to fundamental rights, except for one, rather generic and throwaway reference in the preamble. The [Regulation currently in force](#), mentions "fundamental rights" 207 times, scattered all across the text, including preamble, enacting part and annexes.

With the entry into force of the Lisbon Treaty in 2009, the Charter of Fundamental Rights of the EU became legally binding on Frontex. The new legal framework, coupled with a growing interest (and criticism) by civil society in the management of external borders, led to a chain of reforms, which, *inter alia*, intervened on the Agency's fundamental rights apparatus. This now encompasses a collective body, the Consultative Forum, and an individual figure, the Fundamental Rights Officer, who is supposed to head a team of Fundamental rights monitors. The fundamental rights toolbox is complemented by a complaint mechanism, an incident reporting mechanism and a fundamental rights strategy.

## The Agency's reputation under attack

Frontex is not new to criticism over human rights, and its 2019 reform does not seem to have brought much improvement. The European Ombudsman, who has been breathing down the Agency's neck for a [long time](#), [opened an inquiry](#) in November 2020 into the new fundamental rights framework, challenging the effectiveness, transparency and practical accessibility of the complaint mechanism, as well as the role of the Fundamental Rights Officer.

Pressure has also repeatedly come from the European Parliament. Most recently, in a [parliamentary hearing](#) held in December 2020, Frontex director Fabrice Leggeri was “grilled” by MEPs, *inter alia*, over the Agency’s alleged role in pushbacks at the Greek-Turkish borders.

Sharp criticism was also voiced over issues of transparency and administration of the Agency’s abundant resources (grown exponentially from an initial [budget of 6 mil. Euros in 2005](#) to [460 mil. Euros in 2020](#)). The way Frontex has spent or not spent its money has often been surrounded by opacity. Recently, while controversies arose over heavy expenditures for [events and dinners in Warsaw](#), the seat of the Agency, disputes involved the failure to select and operationalize the Fundamental rights monitors, which should play a key role in the control over human rights protection at borders. The Agency was under the obligation to recruit at least 40 Fundamental rights monitors by 5 December 2020, but it failed to do so.

Additionally, [recent investigations](#) shed light on Frontex’s non-transparent relationship with the arms industry. Holding its wallet stuffed with EU money, the Agency has reportedly been arranging meetings with unregistered lobbyists representing the weapons, surveillance and biometrics industries, including with actors from non-EU countries, such as Belarus or the United Arab Emirates.

Such misconducts led OLAF, the EU anti-fraud office, to [launch an investigation](#) into Frontex. Ironically, on 11 January 2021, when the Agency unveiled [the new uniform](#) to be worn by its border guards, [media reports revealed](#), in turn, that the offices in the Warsaw-based headquarters had been raided by OLAF.

## Hungary and the rule of law

In its 1997 [Opinion on Hungary’s Membership of the EU](#), the Commission observed that the State presented “*the characteristics of a democracy with stable institutions which guarantee the rule of law*” (§1.3). Notwithstanding this generous conclusion, Hungary has been struggling to comply with European values, becoming, together with Poland, the protagonist of rule of law backsliding in the EU.

Hungary manifested emblematic signs of this phenomenon in the areas of migration and asylum, blatantly disregarding EU law, violating human rights and engaging in a total confrontation with Brussels. Since the 2015 refugee crisis, various infringement procedures have been launched, including, under the Juncker Commission, non-compliance with EU law of [domestic asylum legislation](#), the so-called [LexNGO restricting foreign-funding for NGOs](#), [deprivation of food](#) and [unlawful detention](#) in transit zones, and the [relocation scheme](#). The Von der Leyen Commission, in October 2020, [opened another infringement procedure](#) due to the restrictions on asylum procedures introduced in response to Covid-19.

The European Parliament addressed the deterioration of the rule of law in Hungary in 2018, when, for the first time, it voted a [Resolution](#) for triggering Article 7 TEU due to several issues, including “*fundamental rights of migrants, asylum seekers and refugees*”. While the effectiveness of this procedure [has been questioned](#), its political

and reputational significance remains: Hungary challenged the Resolution with an [action for annulment](#), invoking, *inter alia*, a breach of the procedural rules on voting. On 3 December 2020, Advocate General Bobek [delivered his opinion](#) on the case, suggesting the Court to dismiss the action as, in his view, the Parliament did “*nothing wrong with the interpretation of the relevant rules*” (§23).

## Luxembourg, the legal-political battleground

While skirmishes between Brussels and Budapest continue, Luxembourg has become the main legal-political battleground for the rule of law linked to migration and asylum, as the litigation over these policies shows. 2020 marked a row of judicial defeats for the government led by Viktor Orbán. In April, the Court added the final chapter to the “relocation saga”, concerning the intra-EU distribution of compulsory quota of asylum seekers: opened in 2017, when the Grand Chamber [upheld the validity](#) of the solidarity mechanism, thereby dismissing Hungary’s action for annulment; and then closed in 2020, declaring the [State’s failure to fulfil its obligations](#) under EU law.

In May, the Court – here, again, sitting as Grand Chamber – addressed the unlawfulness of the Hungarian border procedures and the [de facto detention of asylum seekers in the transit zone of Röszke](#). Finally, on 17 December, another [Grand Chamber judgment](#) hit Hungary, declaring its failure to comply with EU law by restricting access to asylum procedures, unlawfully detaining protection seekers in transit zones, and illegally removing them to Serbia. Significantly, the Court acknowledged “*the virtual impossibility of making an application for international protection in Hungary*” (§118), thereby certifying the existence of a widespread and systematic unlawful practice.

## Withdrawing from Hungary: to achieve what exactly?

The Grand Chamber’s December ruling is only the tip of the iceberg, certifying Hungary’s multi-year disregard for the rule of law in migration-related matters. While [Hungary ignored the Court’s ruling](#), Frontex was associated with episodes of [human rights violations on the Hungarian territory](#). The allegation of complicity with Orbán’s government was too much to take, the Agency thus decided to [suspend all its activities in Hungary](#).

This is the first time Frontex leaves a Member State, and, yet, the withdrawal from Hungary was not officially announced, but kept under the radar. Only the Commissioner for Home Affairs, Ylva Johansson, publicly [welcomed](#) the measure. Although, formally, the decision rests only with the Agency, was it induced by the Commission? And why?

There are two possible options: Either the withdrawal from Hungary represents a serious and credible choice to disentangle, once and for all, the Agency from human rights violations in the name of the rule of law; or, rather, it is just damage control, in

an opportunistic attempt to restore the Agency's already compromised reputation. The latter appears more likely, for a number of reasons.

The Agency's move came right after Hungary's disrespect of the Grand Chamber's judgement on unlawful pushbacks and the allegations of the complicity of Frontex therein. In other words, its timing suggests the attempt to clean up the image of an EU-body participating in a glaring, blatant and indefensible episode of breach of the rule of law by a Member State.

But this is certainly not the first case of Hungary's unlawful conduct at borders. Significantly, Frontex's Consultative Forum itself previously called for action against Hungary, recommending, in a [2016 report](#), and again in a [2018 report](#), to suspend operational activities due to illicit practices at the borders with Serbia. If it was truly faithful to the aim of preserving the rule of law at borders, the decision to leave Hungary would have come way earlier in time.

Similarly, from a geographical perspective, Frontex should have then withdrawn from Greece, where there have equally been accusations of the Agency's [co-participation in fundamental rights violations](#), whether at maritime borders in the [Aegean sea](#), or at the land borders along the [Balkan route](#).

Finally, Frontex Regulation allows to suspend or *terminate* support to a Member State in case of human rights issues. The Agency's (or the Commission's) choice of a mere suspension of the activities in Hungary, despite the prolonged, well-documented and judicially established violations of human rights obligations, reinforces the impression of a purely temporary and opportunistic move.

But even so, can it pave the way for similar actions in the future? Is the withdrawal of support by Frontex becoming a new, *ad hoc* "sanction" against rule of law violations at borders? The fact that the Agency keeps operating in [Greece](#) or [Croatia](#), where no less serious rule of law and human rights issues have emerged, suggests otherwise.

The Commission and Frontex have turned a blind eye on these Member States. While the former implies delicate issues with Turkey, the latter is in the process of joining the Schengen area, and has even been [commended](#) for the efforts in terms of border controls. But Hungary, with its so openly unlawful conduct, is indefensible. It therefore called for demonstrative action, the impact of which, however, will remain purely symbolic.

The effects on Hungary – if there will be any – could be linked to the intention of achieving its isolation. The Commission has to engage in the difficult and crucial negotiations for the follow-up on the [New Pact on Migration and Asylum](#). Marginalising and stigmatising the main anti-migration firebrand could have been instrumental to preparing the ground and boosting consensus over the announced reforms. Withdrawing Frontex, thus, could have been a signal, sent to Budapest and those states that oppose the European reforms, holding the battle-flag of sovereignty.

