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Frontex actions: out of control?

The complexity of composite decision-making procedures

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Frontex actions: out of control? The complexity of composite decision-making procedures

Sarah Tas

Abstract

Frontex operations can have important consequences on an individual's life, and they should consequently be subject to an efficient control in order to offer adequate legal protection to the victims. These operations include the participation of the agency, but also various other actors. They offer thus an interesting case-study on the relationship between an EU agency and other participating actors.

The paper seeks to shed the light on the actions coordinated by Frontex, thereby illustrating the composite nature of Frontex decision-making procedures and operations. The objective of this article is to analyse the legal and administrative implications of Frontex operations as they manifest before the European, international and domestic courts. In the end, the paper will offer a case study, in which the legal and administrative implications explored above will be mapped onto the new phenomenon of 'hotspots'. The aim is to elucidate the impact of these considerations in an ever more complex and fragmented multi-actor situation that 'hotspots' represent.

Keywords

Frontex, composite nature, transparency, judicial review, administrative review, hotspots

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Introduction

‘Instead of trying to rescue us they were taking photos, and while we were trying to get on the ship, they hit me. They slapped me twice. This was the rescue’.¹ ‘After the police hurt me, I can’t walk. I was crawling on the ground and when the police see me, they came to me and started kicking me in the legs.’² ‘We asked the woman, what was on the paper because it was in Italian. She didn’t translate and we didn’t understand what we signed.’³

These are only three of the numerous testimonies one can find online as to the treatment of migrants and refugees in operations in which Frontex participates. Frontex is a well-known European Union (EU) agency which evolved in a very sensitive environment, in which core principles of EU and international law are engaged and fundamental rights (FR) pressurized. For several years, it attracted significant attention for its alleged involvement in FR violations. Its powers have been greatly increased with the introduction of the European Border and Coast Guard (EBCG) Regulation,⁴ and continued to be reinforced with the adoption of the new Regulation in 2019.⁵ Pursuant to this, the agency will have increased operational powers⁶ and capacities.⁷ In some situations, it will even be able on its own initiative to intervene and deploy a EBCG,⁸ and as such ‘substitute’ a Member State (MS).⁹ Additionally, the agency’s mandate in processing and exchanging data with EU bodies and third countries was reinforced.¹⁰ These new powers must be accompanied by effective control mechanisms, most importantly judicial review and marginally, administrative remedies. Consequently, the paper intends to answer to the question of whether efficient mechanisms are in place in order to control actions taken by EU agencies, such as Frontex, in composite decision-making procedures?

¹ Ali Bilgic, ‘Push-Back and the Violence of Frontex’ (*Civil Society Futures*, 5 December 2017) <<https://civilsocietyfutures.org/push-back-violence-frontex/>> accessed 30 October 2019.

² ‘Illegal Push-Backs and Border Violence Reports’ (StateWatch 2019).

³ *ibid.*

⁴ ‘Regulation (EU) N° 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard’ OJ L 251.

⁵ 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.

⁶ Merijn Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration - Oxford Scholarship* (Oxford University Press 2016).

⁷ Steve Peers, ‘EU Law Analysis: The next Phase of the European Border and Coast Guard: Towards Operational Effectiveness’ (*EU Law Analysis*, 8 October 2018) <<http://eulawanalysis.blogspot.com/2018/10/the-next-phase-of-european-border-and.html>> accessed 11 November 2019.

⁸ Recital 48 of the 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.

⁹ Edouard Dubout, ‘Les enjeux constitutionnels du pouvoir de substitution de l’agence Frontex’ (2017) 53 *Revue trimestrielle de droit europeen* 457.

¹⁰ *ibid.*

The article intends to answer this question by taking into account the specific nature of the EU landscape and the EU agencies' contemporary mode of operating, namely in a fragmented landscape in which various actors will cooperate in an opaque manner (II). In order to address the issue of control, the paper will first look at the legal remedies available for individuals seeking judicial redress in court (III), before looking at the administrative mechanisms in place (IV). Lastly, the new approach of 'hotspots' will be developed as a case-study to describe an even more complex and fragmented realm in which Frontex is operating (V). The conclusions drawn regarding Frontex operations equally apply in this new system and the challenges are exacerbated within it.

The nature of Frontex actions

Frontex, as an EU agency, has various tasks listed within its founding Regulation.¹¹ Frontex essentially coordinates, organises and even initiates missions of control, surveillance, police and return to the external borders of the EU, under the responsibility, in principle, of the host State.¹² For the purpose of this article, Frontex actions will include joint operations (JO), pilot projects, rapid border intervention teams (RABITs), return operations and interventions as well as 'hotspots'.¹³ The 'hotspots' approach will however be discussed in a separate section of the paper, due to its unique and complex nature. Frontex operations have two defining characteristics that will preclude the effective control of these operations: the 'composite' aspect and the opacity of the operations and their decision-making procedures.

The composite nature of the decision-making procedures

Frontex does not act on its own but works with a number of actors in its decision-making processes. According to its legal framework and practice, the operations in which Frontex participates can be characterized as 'composite' in nature. This characteristic applies to both the establishment and the implementation of the operations. In this regard, vertical cooperation exists between MS and Frontex, as well as horizontal cooperation, between either different MS, or different EU agencies.¹⁴ Two operations will be developed in-depth to illustrate this 'composite' nature: the RABITs

¹¹ Art. 10 of the 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.

¹² Christophe Maubernard, 'Réflexions Sur Les Voies de Recours Devant La Cour de Justice de l'Union Européenne à l'égard Des Actes et Actions de l'agence Frontex' in Constance Chevallier-Govers and Romain Tinière (eds), *De Frontex à Frontex: vers l'émergence d'un service européen des garde-côtes et garde-frontières* (Bruylant 2019).

¹³ Art. 10 of the 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.

¹⁴ Herwig Hofmann, Gerard C Rowe and Alexander Türk, *Administrative Law and Policy of the European Union* (Oxford University Press 2011).

and the JO. The Regulation shows that MS and Frontex are cooperating together in initiating JO and RABITs. Both of these operations need to be requested by a MS. Their operational plans will be designed and agreed to by the MS, Frontex, and in some cases even by other participating MS.¹⁵ Various actors can thus play a role in the operations and their decision-makings. In practice, it will be difficult to determining which actor took the decision or action that affected the rights of an individual. JOs *Hera* and the *Poseidon Sea* Operation show that each operation involves a multitude of actors. Figures 1 and 2 lists the actors involved in the JOs *Hera*.¹⁶ These operations included a mixture of vertical and horizontal cooperation. The numbers of actors involved however will lead to issues of attribution of powers, thereby preventing efficient control of the operations, in the sense that an individual will not know about who to complain, and to whom.¹⁷

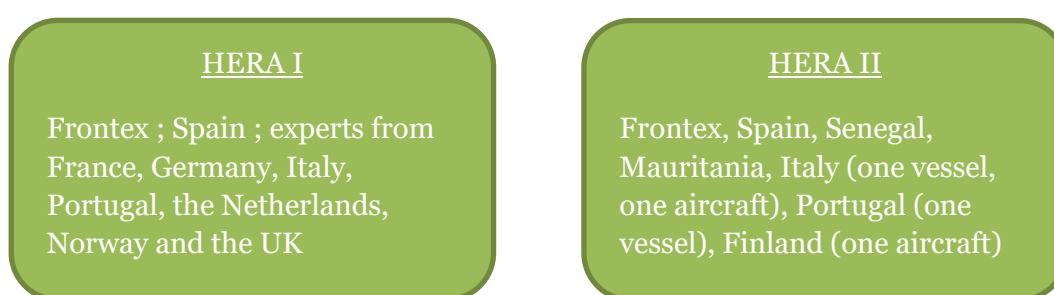


Figure 1 and 2: Operations *Hera I* and *Hera II*

The *Poseidon Sea* Operation follows the same reasoning. The Operation was established to support Greece with border surveillance.¹⁸ Alongside Frontex and Greece, 23 EU and Schengen countries took part in the operation, through air forces, the provision of technical equipment and/or officials.¹⁹ This JO was later transformed into ‘Poseidon Rapid Intervention’, in which experts from various EU MS and Schengen

¹⁵ Art. 37, 38 and 39 of the 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.

¹⁶ ‘News Release: Longest FRONTEX Coordinated Operation - HERA, the Canary Islands’ (19 December 2006) <<https://frontex.europa.eu/media-centre/news-release/longest-frontex-coordinated-operation-hera-the-canary-islands-WpQlsc>> accessed 25 October 2019.

¹⁷ Sergio Carrera and others, *The European Border and Coast Guard: Addressing Migration and Asylum Challenges in the Mediterranean?* (2017).

¹⁸ Amélie Poméon, *Frontex and the EBCGA: A Question of Accountability* (Wolf Legal Publisher 2017) 58.

¹⁹ ‘Focus: Joint Operation Poseidon (Greece)’ (10 October 2016) <<https://frontex.europa.eu/media-centre/focus/joint-operation-poseidon-greece--3ImFxd>> accessed 25 October 2019.

Associated countries participate in the screening, debriefing, fingerprinting and forging of documents.²⁰ There again, it raises the issue of attribution of conduct.

The lack of transparency

Another significant characteristic of Frontex operations is their opacity.²¹ The lack of transparency has been subject of debate for a long time. In fact, very little information is given in the annual reports or news reports, on the past and ongoing operations, and actions carried out by the agency.²² No data exists, for example, on where the individuals were diverted to, nor on who requested international protection.²³

Rules and procedures for accessibility of documents within Frontex were added in the new Regulation. Frontex is subject to the Regulation 1049/2001 when handling application for access to its documents.²⁴ This Regulation limits the accessibility of the documents due to its restricted personal scope. In fact, it only allows citizens of the Union, or person residing or being registered in the EU to access the documents, even if the majority of individuals suffering from harm by Frontex actions will in principle be third-country nationals trying to enter the EU.²⁵ Additionally, it offers various grounds for refusals.²⁶ In practice, refusals have been given when the documents contained sensitive information, or when the disclosure would ‘jeopardize the effective control and surveillance of external sea borders of the EU Member States [...] and ultimately undermine the protection of the public interest’.²⁷

In conclusion, this section has attempted to describe Frontex operations and to demonstrate the complex nature of their procedures. The various actors involved (MS, third countries, EU institutions and other EU agencies), as well as the lack of transparency of the operations, will place a significant burden on individuals to seek

²⁰ ‘Frontex and Greece Agree on Operational Plan for Poseidon Rapid Intervention - Greece’ (*ReliefWeb*) <<https://reliefweb.int/report/greece/frontex-and-greece-agree-operational-plan-poseidon-rapid-intervention>> accessed 25 October 2019.

²¹ Roberta Mungianu, *Frontex and Non-Refoulement the International Responsibility of the EU* (Cambridge University Press 2016) 230.

²² Poméon (n 18).

²³ Andreas Fischer-Lescano, Tillmann Löhr and Timo Tohidipur, ‘Border Controls at Sea: Requirements under International Human Rights and Refugee Law’ (2009) 21 *International Journal of Refugee Law* 256.

²⁴ Art. 74 of the ‘Regulation (EU) N° 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard’ (n 4).

²⁵ Art. 2(1) of the ‘Regulation (EC) No 1049/2001 of the European Parliament and of the Council Regarding Public Access to European Parliament, Council and Commission Documents’ OJ L 145.

²⁶ *ibid.*

²⁷ ‘Request for JO Triton Operation Plan (2015)’ (*AsktheEU.org*, 1 September 2017) <<https://www.asktheeu.org/fr/request/4717/response/14850/attach/5/19.10.2017%20Luisa%20Izuzquiza%20LETTER.pdf>> accessed 5 February 2020.

judicial and administrative redress.²⁸ As a consequence, seeking such a redress is by nature difficult, and even more so for vulnerable individuals. The European Ombudsman rightly noted that ‘persons affected by a Frontex operation are typically under stress and vulnerable and it cannot possibly be expected from them to investigate what is undoubtedly a complex allocation of responsibility’.²⁹

The legal implications of Frontex operations

Every action by public authorities that affects the right of an individual needs to be subject to judicial review in order to offer individuals an adequate judicial protection. When an individual wants to raise a complaint against an action of Frontex, an EU agency, it will fall under the competence of the Court of Justice of the European Union (CJEU). However, when the Court cannot satisfy this control, alternative solutions need to be found, within national or international courts.

The control made by the CJEU: a utopia?

The Treaty of Lisbon explicitly recognized the jurisdiction of the CJEU to review agencies’ acts. It can now review actions of EU agencies, such as Frontex, through different means: an action for annulment, an action for failure to act and an action for extra-contractual liability and damages.³⁰

Action for annulment and failure to act

Individuals can, in principle, request the annulment of a decision of the EU agency or bring an action for a failure to act, if Frontex failed to assist a State in need.³¹ In practice, however, very limited cases before the CJEU concern Frontex. In fact, in order for an individual action to be admissible before the CJEU, two conditions shall be met. First, the individual has to have legal standing, and second, the act or the failure to act needs to be reviewable before the Court. According to the Treaty, the Court is only competent to review acts of agencies producing legal effect *vis-à-vis* third parties, and failures to act, if the agency was called upon to act.³² Frontex has regulatory powers, in that it assists MS and EU institutions in the implementation of a common policy; supervisory powers, due to its vulnerability assessments and finally operational powers, notably in

²⁸ David Fernández Rojo, ‘The Introduction of an Individual Complaint Mechanism within Frontex: Two Steps Forward, One Step Back’ [2016] *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* 226.

²⁹ ‘Texts Adopted - Special Report of the European Ombudsman in Own-Initiative Inquiry Concerning Frontex - Wednesday, 2 December 2015’ <http://www.europarl.europa.eu/doceo/document/TA-8-2015-0422_EN.html> accessed 16 October 2019.

³⁰ Arts. 263(1), 265, 267, 268 and 340 of the TFEU.

³¹ Maubernard (n 12).

³² Art. 265(2) and 263(1) of the TFEU.

setting up RABITs.³³ Consequently, an essential part of its acts and actions do not produce legal effect *vis-à-vis* third parties, notably the purely factual actions,³⁴ and its coordinating and regulatory work.³⁵ Regarding the failure to act, it will be difficult to prove that Frontex was asked to act, especially due to the lack of transparency surrounding its actions.³⁶

With regards to legal standing, the Treaty states that:

‘Any natural or legal person may [...] institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.’³⁷

These conditions also apply for an action for failure to act.³⁸ In that regard, either the act is directly addressed to the individual or the individual has to demonstrate that he is directly and individually concerned, or it is a regulatory act that concerns the individual directly and has no implementing measures. In order to be directly concerned, a direct link needs to exist between the challenged measure or absence of measure, and the infringement of an individual’s right.³⁹ To be individually concerned, the longstanding *Plaumann* test needs to be fulfilled,⁴⁰ according to which a person will be individually concerned only if the decision ‘affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons [...]’.⁴¹ Certain actions taken by Frontex, most notably in its regulatory and supervisory function, will in principle not directly and individually concern a person due to their general nature. And even if they do affect a person directly, it will be difficult to prove so, and they may entail implementing measures from national authorities, since Frontex merely supports MS.⁴² Therefore,

³³ Jorrit J Rijpma, ‘Frontex and the European System of Border Guards: The Future of European Border Management’ in Maria Fletcher, Ester Herlin-Karnell and Claudio Matera (eds), *The European Union as an area of freedom, security and justice* (Routledge 2017).

³⁴ *ibid.*

³⁵ Poméon (n 18).

³⁶ Mungianu (n 21).

³⁷ Art. 263(4) of the TFEU.

³⁸ *ibid* Art. 265(3).

³⁹ Case C-41-44/70, *NV International Fruit Company and others v Commission of the European Communities* [1971] ECLI:EU:C:1971:53.

⁴⁰ Mariolina Eliantonio, ‘Judicial Review in an Integrated Administration: The Case of “Composite Procedures”’ (2014) 7 *Review of European Administrative Law* 65.

⁴¹ Case 25/62, *Plaumann & Co v Commission of the EC* [1963] ECLI:EU:C:1963:16.

⁴² David Fernandez Rojo, ‘Frontex, Easo and Europol: From a Secondary to a Pivotal Operational Role in the Aftermath of the “Refugee Crisis”’ (*CAUGHT YOU RED-HANDED*, 9 April 2019) <<https://caughtyouredhanded.wordpress.com/2019/04/09/frontex-easo-and-europol-from-a->

the actions would escape judicial review by the Court.⁴³ For the other actions, linked essentially to its operational powers, it will still be very difficult to prove that they concern individuals directly and individually. This explains why the cases related to Frontex before the CJEU do not concern actions of Frontex occurring on the field, but rather refusals to access documents⁴⁴ or procurement actions and public services.⁴⁵

Challenges linked to the complex, multi-actor nature of the operations are also worth mentioning. The composite nature of the decision-making and the opacity of the actions make it difficult to determine whether the agency or the MS acted.⁴⁶ As described above, various actors can take part in the operations coordinated by Frontex, and all of them can potentially influence the decision-making procedure. It is essential to determine which act is the final one, since initiative acts, and intermediate measures will not be judicially reviewable, except if they affect the applicant's legal sphere in an independent manner.⁴⁷ This can create a legal vacuum as these acts can also have negative consequences and should thus be subject to judicial control. In any case, in practice, an action before a court is lengthy. Even after a complaint has been made to the court, another year could still pass before the access to documents is granted.⁴⁸ Only then can the original procedure start.

Extra-contractual liability and damages

The final option for individuals is to attempt to engage the extracontractual responsibility of Frontex, under art. 340 TFEU.⁴⁹ The majority of EU agencies, including Frontex,⁵⁰ have a proper legal personality. As such, Frontex is responsible for its own actions, and must '[...] make good any damage caused by its departments or by its staff in the performance of their duties.'⁵¹ In practice, engaging the liability of an EU agency will prove itself to be very difficult. As of today, no agency has seen its responsibility incurred for concrete violations of FR.⁵² The only cases brought before

secondary-to-a-pivotal-operational-role-in-the-aftermath-of-the-refugee-crisis/> accessed 1 October 2019.

⁴³ Poméon (n 18).

⁴⁴ Case T-31/18, *Izuzquiza and Semsrott v Frontex* [2018] ECLI:EU:T:2019:815.

⁴⁵ Case T-591/16, *Wahlström v Frontex* [2018] ECLI:EU:T:2018:938.

⁴⁶ Eliantonio (n 40).

⁴⁷ *ibid.*

⁴⁸ T-31/18, *Izuzquiza and Semsrott v Frontex* [2018] ECLI:EU:T:2019:815.

⁴⁹ Melanie Fink, *Frontex and Human Rights: Responsibility in 'multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford University Press 2018).

⁵⁰ Art. 93 of the 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.

⁵¹ *ibid.*

⁵² Laure Clément-Wilz, 'L'injusticiabilité Des Activités de l'agence Frontex?' (2017) 3 *Revue Trimestrielle de droit européen* 511.

the CJEU relate to staff and procurement cases,⁵³ which are not the focus of this article. The Court has been quite strict in assessing the extra-contractual liability of the EU and EU agencies.⁵⁴ A set of conditions need to be met in order for the extra-contractual liability to be established, that render the proceeding *in fine* ineffective.⁵⁵ First, the individual needs to prove that the agencies' conduct was illegal. Then, a real damage needs to exist and finally a causal link needs to be established between the unlawful conduct and the damage.⁵⁶ It is the individual who will carry the burden of proof and who will need to establish that the actions taken are actually attributable to Frontex and that they affected him.⁵⁷ Once again the opacity and the composite-nature of the operations make it hard for individuals to determine the exact and precise role of Frontex within them.⁵⁸ The delimitation of tasks between Frontex and MS remain unclear in the Regulation and in practice. Consequently, the control of the actions of the agency will suffer from it.⁵⁹

A more effective control made by the national judge?

The new Regulation does not mention the competence of the national courts *vis-à-vis* Frontex activities. The CJEU remains its sole 'controller' and its activities are thus untouchable by the national courts.⁶⁰ Indirectly however, national courts can play a role. Frontex operations will essentially take place within the territory of the host MS, and these 'Member States shall retain primary responsibility for the management of their sections of the external border.'⁶¹ In this regard, the actions coordinated by Frontex, or in which Frontex participates in, can be subject to control before and punished before national judges if they concern national staff.⁶² An example of when the national court could be invoked would be if a national staff member sent back

⁵³ Case T-591/16, *Karl Wahlström v Frontex* [2018] ECLI:EU:T:2018:938; T-583/16, *PG v Frontex* [2017] ECLI:EU:T:2017:344.

⁵⁴ Clément-Wilz (n 52).

⁵⁵ Carole Billet, 'Quelle(s) responsabilité(s) pour l'agence Frontex?' in Patrick Chaumette (ed), *Wealth and miseries of the oceans: Conservation, Resources and Borders Richesses et misères des océans : Conservation, Ressources et Frontières* (Gomilex 2018).

⁵⁶ Case T-556/11, *European Dynamics Luxembourg and Others v EUIPO* [2016] ECLI:EU:T:2016:248.

⁵⁷ Clément-Wilz (n 52).

⁵⁸ *ibid.*

⁵⁹ Billet (n 55).

⁶⁰ Serge Slama, 'Frontex: Un Juge National Aux Abonnés Absents' in Constance Chevallier-Govers and Romain Tinière (eds), *De Frontex à Frontex: vers l'émergence d'un service européen des garde-côtes et garde-frontières* (Bruylant 2019).

⁶¹ Art. 7 of the 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.

⁶² Clément-Wilz (n 52).

individuals to a non-safe third country without carrying out the checks and verifying whether the individual could be granted asylum or international protection in the EU. This situation would result in a violation of FR, namely of the principle of *non-refoulement*, by the national staff and is punishable before national courts.

In practice, however, this subsidiary role of national courts in holding Frontex operations accountable is limited. As described above, the decision-making procedure in actions coordinated by Frontex is opaque and complex. Pursuant to this, it will be difficult to determine whom the action is attributable to.⁶³ Since national courts have no competence to review actions of EU agencies,⁶⁴ the individual will have to establish that the action at stake is imputable to a national staff and not to Frontex.⁶⁵ The composite nature of the operations again makes such a requirement difficult to meet. Additionally, national courts are only competent to deal with violations occurring on their territory. Thus, violations occurring before the entry of the individual in the EU or occurring in operations conducted on the territory or on the sea of a third country, could not be subject to judicial review by national jurisdiction of the EU.⁶⁶ These situations would be once again characterized by a clear legal vacuum.⁶⁷

In sum, the national courts will not be able to provide individuals with adequate judicial protection *vis-à-vis* Frontex actions, due to their limited competences to review actions taken by Frontex.

Towards an efficient solution? The review made by the ECtHR

The EU, Frontex and the MS, when cooperating and participating in operations are applying and accommodating different legal norms, namely national, European and international law, such as the European Convention on Human Rights (ECHR).⁶⁸ Analysing the role of the European Court of Human Rights (ECtHR) could thus be a complementary solution to ensure efficient judicial protection to individuals harmed by Frontex operations. The European legal personality of Frontex was previously established, but only the EU has legal personality in international law.⁶⁹ The EU is still not part of the ECHR⁷⁰ which means that no claim can be brought against the EU.⁷¹ An

⁶³ Carrera and others (n 17).

⁶⁴ Case C-314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECLI:EU:C:1987:452.

⁶⁵ Carrera and others (n 17).

⁶⁶ Elspeth Guild and others, 'Implementation of the EU Charter of Fundamental Rights and Its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office' (European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) 2011) Study.

⁶⁷ Slama (n 60).

⁶⁸ *ibid.*

⁶⁹ Art. 47 of the TFEU.

⁷⁰ Case Op. 2/13, *Opinion 2/13* [2014] ECLI:EU:C:2014:2454.

⁷¹ Poméon (n 18).

individual can only bring a case against a MS party to the Convention. Three different examples are worth analysing here. First, the *Hirsi Jamaa* case,⁷² second numerous Greek cases,⁷³ and finally the *J. R. and others v Greece* case.⁷⁴

The *Hirsi Jamaa* case dealt with interceptions at sea and the principle of *non-refoulement*. Italy was intercepting boats carrying refugees and was sending them back to Libya, with which they had concluded a bilateral agreement, without any individual processing and examination of asylum claims. The Grand Chamber unanimously found violations of the ECHR,⁷⁵ on the grounds that the individuals sent back could be subject to ill-treatment in Libya.⁷⁶ The implication of Frontex in these operations was debated. Whilst some accused Frontex of helping in those ‘push-backs’ through *JO Nautilus* (2009),⁷⁷ others such as Frontex expressly denied its participation. Frontex was not mentioned in the case, but this practice of intercepting and diverting back vessels is a practice commonly used by Frontex and the MS participating in its operations.⁷⁸ For example, it has been the case in *JO Hera III*, under which more than thousands of migrants were diverted back to their points of departures.⁷⁹

In the series of Greek cases, the implications of Frontex in the operations were mentioned explicitly by the Court. The three cases concerned essentially the detention conditions in Tycherio, as well as the rejection of the asylum request from the refugees.⁸⁰ In all of these cases, Frontex participated in the operations by interviewing the refugees. It is again the MS, Greece, that was sanctioned for a violation of Art. 3 and 13 of the Convention, rather than Frontex itself.

The last case, *J. R. and others v Greece*, deals with the ‘hotspot approach’. This approach was introduced by the European Commission in the European Agenda on Migration and aims at helping and providing operational assistance on the ground to MS under particular migratory pressure, such as Greece and Italy. The case concerned three Afghan nationals in the Greek hotspot on the island of Chios. The ECtHR found a violation of Art. 5(2) ECHR on the grounds that the refugees were not provided sufficient information about their detention and the available remedies. In this case, an

⁷² Case *Hirsi Jamaa and others v Italy*, App no 27765/09 (ECtHR, 23 February 2012).

⁷³ Case *R.T. v Greece*, App no 5124/11 (ECtHR, 11 February 2016); Case *H.A.A. v Greece*, App no 58387/11 (ECtHR, 21 April 2016); Case *A.Y. v Greece*, App no 58399/11 (ECtHR, 5 November 2015).

⁷⁴ Case *J.R. and others v Greece*, App no 22696/16 (ECtHR, 25 January 2018).

⁷⁵ Arts. 3, 13 and 4 of Protocol no. 4 of the ECHR.

⁷⁶ Júlía Iván, ‘Where Do State Responsibilities Begin and End? Border Exclusion and State Responsibility’ in Maria O’Sullivan and Dallal Stevens (eds), *States, the law and access to refugee protection fortresses and fairness* (Hart Publishing 2017).

⁷⁷ Statewatch, ‘Frontex-Led EU Illegal Migration Technical Mission to Libya’ (2007).

⁷⁸ Melanie Fink, ‘Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding Technical Relationships’ [2012] *Utrecht Journal of International and European Law* 20.

⁷⁹ *ibid.*

⁸⁰ Slama (n 60).

action in which Frontex participated was subject to judicial review. The ECtHR confirmed the ‘shared responsibility’ of the Greek authorities and of Frontex in managing the detention centre,⁸¹ including the reception and residence conditions.⁸² However, once again the scrutinized and penalised person is not the agency, but the MS, and it is the latter that will bear the burden of the responsibility.

Overall, these cases support the claim that a judicial review before the ECtHR would be a viable alternative solution. The Court of Strasbourg tends to be more accessible and adapts to the situation at hand. In that regard, two points shall be discussed. The first one concerns the powers of attorney before the ECtHR in the *J. R. and others v Greece* case. The applicant’s lawyer never met the applicants and had no signature on the application forms. Nevertheless, the Court admitted the application on the basis of *WhatsApp* message and photos taken on mobile phones.⁸³ This is a step towards the protection of migrants, for whom it will be difficult to meet with lawyers, due to their limited freedom of movement as well as their potential immediate return to their country of origin. The second point concerns the burden of proof and illustrates how the ECtHR can help circumvent the opacity of the operations coordinated by Frontex. In fact, in these cases the Court accepted evidence from NGOs and national and international organisations in order to assess the general situation. In *Hirsi Jamaa*, the Court accepted for the first time evidence from NGOs to assess the general situation of Libya.⁸⁴ The same can be noted in the *J.R. and others v Greece* case, in which the Court admitted reports of national and international organisations, as well as findings of the European Committee for the Prevention of Torture in order to assess the situation in the ‘hotspot’.⁸⁵ These reports will help individuals and the Court to shed light on what is happening in practice to render a fair and informed judgment.

In summary, Frontex actions, as an EU agency, cannot be reviewed neither by national courts nor by the ECtHR. The only judicial body competent to deal with them is the CJEU, before which, however, as demonstrated above, the control seems unreachable and illusional. A legal vacuum clearly exists, which is particularly concerning as Frontex operations can impact individuals and violate their FR. The only, however limited, option for harmed individuals who seek redress is to complain about MS and national actions before the national courts and the ECtHR. Hence, new mechanisms were needed and in 2016 an individual complaint mechanism was introduced (IV).

Possibility of administrative review: an alternative solution?

Administrative procedures have been developed for a long time in European countries as an alternative or complement to judicial review and in order to protect the rights and

⁸¹ Case *J.R. and others v Greece*, App no 22696/16 (ECtHR, 25 January 2018).

⁸² Maubernard (n 12).

⁸³ Case *J.R. and others v Greece*, App no 22696/16 (ECtHR, 25 January 2018).

⁸⁴ Case *Hirsi Jamaa and others v Italy*, App no 27765/09 (ECtHR, 23 February 2012).

⁸⁵ Case *J.R. and others v Greece*, App no 22696/16 (ECtHR, 25 January 2018).

interests of individuals.⁸⁶ Since criticism *vis-à-vis* the lack of judicial protection against Frontex actions arose from every side, notably from the European Ombudsman⁸⁷ and the European Parliament,⁸⁸ new solutions needed to be developed. Consequently, the introduction of an alternative mechanism, the individual complaint mechanism, within the new Regulation was anticipated and necessary.⁸⁹ The aim of that mechanism is to monitor and ensure the respect for FR in the activities of the agency.⁹⁰ The idea of an internal complaint mechanism was not new. One existed already in the old Regulation, under which agency staff and seconded agents could introduce a complaint against violations which occurred during JO.⁹¹ The mechanism, however, was only internal, and excluded complaint from third parties, such as migrants who were the main subjects of any violations. The new mechanism in place offers a direct channel of communication between the affected individual and Frontex.⁹² It is open to every individual who was directly affected by the actions of staff involved in an operation and had their FR violated, as well as any party representing such an individual.⁹³ It does not exist as a function to replace legal remedies, but offers an alternative and complementary solution which can be used alongside any judicial proceedings.⁹⁴ Figure 3 describes in detail the process of the mechanism.

⁸⁶ Barbara Marchetti, 'Administrative Justice Beyonds the Courts: Internal Reviews in EU Administration' in Barbara Marchetti (ed), *Administrative remedies in the European Union: the emergence of a Quasi-Judicial Administration* (G Giappichelli 2017).

⁸⁷ 'Texts Adopted - Special Report of the European Ombudsman in Own-Initiative Inquiry Concerning Frontex - Wednesday, 2 December 2015' (n 29).

⁸⁸ Résolution du Parlement européen du 2 décembre 2015 sur le rapport spécial du Médiateur européen dans l'enquête d'initiative OI/5/2012/BEH-MHZ relative à Frontex (2014/2215(INI)).

⁸⁹ Art. 111 of the 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.

⁹⁰ Art. 1(2) of 'Annex 1 - The Agency's Rules on the Complaints Mechanism' <https://frontex.europa.eu/assets/Key_Documents/Complaints/Annex_1_-_Frontex_rules_on_the_complaints_mechanism.pdf> accessed 16 October 2019.

⁹¹ Elena Mitzman, 'Administrative Remedies in the Area of Freedom, Security and Justice' in Barbara Marchetti (ed), *Administrative remedies in the European Union: the emergence of a Quasi-Judicial Administration* (G Giappichelli 2017).

⁹² Rojo (n 28).

⁹³ Art. 111 of the 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.

⁹⁴ Mitzman (n 91).

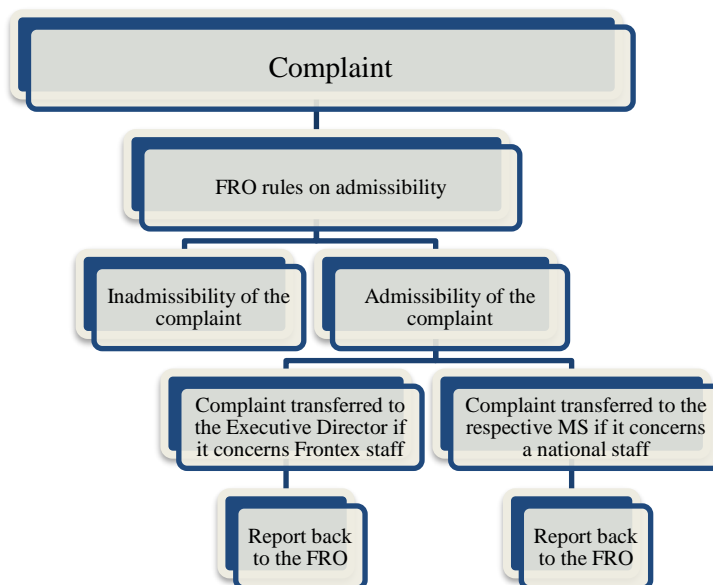


Figure 3: procedure of the individual complaint mechanism

Figure 3 shows that if a complaint concerns a staff member of the Agency, it will be transferred to the Executive Director (ED). If, on the other hand, the complaint concerns a border guard of a MS, that MS will be competent to deal with the complaint. Even if theoretically it simplifies the procedure for individuals, since the complaint will be in any case brought to the same organ meaning the Fundamental Rights Officer (FRO), in practice, the same issues will persist.

Firstly, even if the complaint is brought to a single person, the FRO, the individual will still have to determine to whom the action is attributable.⁹⁵ The same issues relating to the multi-actor complexity of Frontex decision-making mentioned above will continue to occur for these administrative remedies as well. Secondly, the complaint mechanism is an internal one⁹⁶ and has been criticized for its lack of independence and impartiality.⁹⁷ The actors involved in the mechanism are on the one hand the FRO, who is in principle independent but is still appointed by the Management Board, and on the other hand, the ED, who is also appointed by the Management Board.⁹⁸ Their independence is compromised as the Management Board is composed of one representative from each MS and two representatives from the Commission.⁹⁹ It is also

⁹⁵ Simone Marinai, ‘The Interception and Rescue at Sea of Asylum Seekers in the Light of the New EU Legal Framework’ (2016) 20 *Revista de Derecho Comunitario Europeo* 901.

⁹⁶ Slama (n 60).

⁹⁷ Elspeth Guild and others, ‘What Is Happening to the Schengen Borders?’ 26.

⁹⁸ Art. 100 of the 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.

⁹⁹ *ibid.*

the ED who regulates the procedure of the complaint mechanisms,¹⁰⁰ meaning that the rules will be established by the agency and not the Legislature. This will increase the already present lack of independence and will undermine the purpose of the mechanism in place.¹⁰¹ Thirdly, even if the complaint form is put on the website of the agency and even if there is an obligation on border guards to provide awareness of the complaint mechanism to individuals who might want to seek redress, it is difficult to monitor whether this has been done.¹⁰² In practice, individuals who will have been sent back to their country of origin will struggle to submit a complaint and keep direct access with Frontex. The mechanism will thus lose of its efficiency. It also does not allow for the agency to be rendered liable, thereby ineffectively protecting FR.¹⁰³ More specifically, individuals cannot get reparation for damages, and can only hope that administrative and disciplinary measures are taken against the staff member concerned.¹⁰⁴

The fourth limit concerns the limited material and personal scope of the administrative remedy. The mechanism allows individuals to make complaints under specific conditions. Complaints can only be brought over breaches of FR and if an individual is directly affected by the actions.¹⁰⁵ Consequently, it does not include all type of actions; institutional aspect of operations plans could for example not be brought to the FRO as they would not directly affect the individual. The causal link between the actions and conduct of the personnel and the breach of a FR also needs to be established, which itself can prove difficult in certain situations. Regarding the personal scope, third parties not directly affected by a wrongdoing cannot submit a complaint. Also, no mention is made of violations committed by third country staff which can also be part of JO.¹⁰⁶ Lastly, no appeal is offered to the decision rendered by the complaint mechanism.¹⁰⁷ That is true if there is a decision but also if the complaint has simply been declared inadmissible. A real 'legal and administrative vacuum' would exist for an individual who has no legal standing to bring its actions before the CJEU, has no option before either the domestic courts or the ECtHR, and who also had their complaint rejected on grounds of admissibility by the FRO.

¹⁰⁰ Agency's rules on the Complaints Mechanism adopted by the Decision of the Executive Director n° R-ED-2016-106.

¹⁰¹ Mitzman (n 91).

¹⁰² Rojo (n 28).

¹⁰³ Slama (n 60).

¹⁰⁴ Billet (n 55).

¹⁰⁵ Art. 111 of the 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.

¹⁰⁶ Fabienne Gazin, 'Peut-on Mettre Du "Vin Nouveau Dans de Vieilles Outres"?' [2017] *Revue trimestrielle de droit européen* 497.

¹⁰⁷ Clément-Wilz (n 52).

Overall, the agency seems to escape any real control by any jurisdiction or administrative mechanism, essentially due to its supporting role to the MS.¹⁰⁸ However, as seen above and as will be described in the part on ‘hotspots’ (V), its role goes beyond merely doubling MS and its actions should be subject to a more stringent judicial and/or administrative review.

An additional layer of complexity: case-study of ‘hotspots’

As already described above, ‘hotspots’ are reception centres established to support MS that are under particular migratory pressure.¹⁰⁹ Ten hotspots are currently active in Italy and Greece.¹¹⁰ Within each of them Frontex, Europol (and sometimes Eurojust) and the European Asylum Support Office (EASO) participate in the process,¹¹¹ each with different tasks described in Figure 4. This approach is a perfect illustration of the new concept of ‘joined-up agency cooperation’ developed in the EU.¹¹²

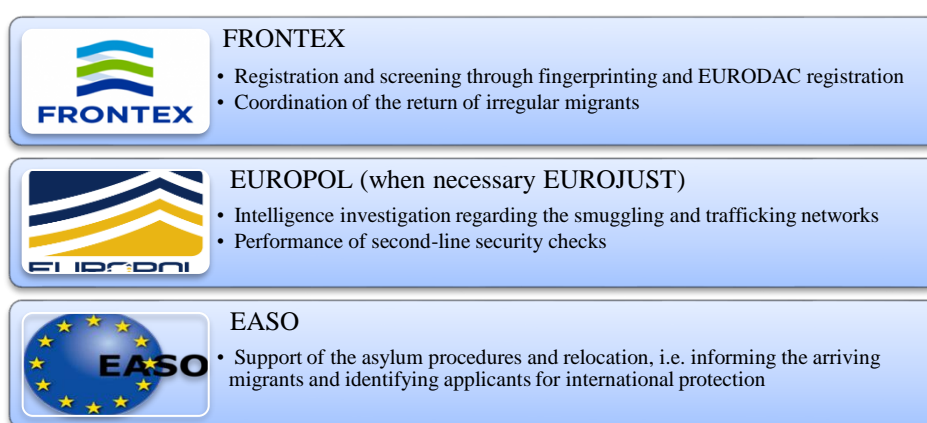


Figure 4: Process within the ‘hotspots’

In theory, their role is supposed to be limited to merely technical assistance to the national authorities. However, in practice the agencies have clear operational competences on the ground.¹¹³ In that regard, Frontex, when it assists in determining the nationality of the disembarked or rescued migrants, can potentially influence the

¹⁰⁸ Slama (n 60).

¹⁰⁹ European Commission, ‘The European Agenda on Migration’, <Communication_on_the_european_agenda_on_migration_en.Pdf.>, last accessed 25 October 2019.

¹¹⁰ Maria Margarita and Katrien Luyten, ‘Hotspots at EU External Borders’ (European Parliamentary Research Service).

¹¹¹ Satoko Horii, ‘Accountability, Dependency, and EU Agencies: The Hotspot Approach in the Refugee Crisis’ (2018) 37 Refugee Survey Quarterly 204.

¹¹² Darren Neville, Sarah Sy and Amalia Rigon, ‘On the Frontline: The Hotspot Approach to Managing Migration’ (European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE) 2016).

¹¹³ Fernandez Rojo (n 42).

Greek officials in taking their final decisions.¹¹⁴ The EASO can also impact an applicant's situation. In some cases, it can determine vulnerability,¹¹⁵ or even conduct admissibility interviews (in Greek hotspots after the EU-Turkey Statement),¹¹⁶ thereby directly influencing final decisions on asylum applications.

The 'hotspot' approach is not regulated by a single legal framework, but indications of it can be found in the Regulation of each participating agency. As a result, the procedures and methods employed in these reception centres, as well as the exact role of each party, remain unclear.¹¹⁷ Additionally, they are put in place in a very sensitive environment, requiring urgency and secrecy, due to the potential risks of prejudicing the outcome of the ongoing and future operations in the hotspots.¹¹⁸ Consequently, criticism has arisen from various UN bodies, civil society organisations and scholars as to the lack of transparency of the 'hotspots' as well as the unclear division of roles and responsibilities between the different parties to the hotspots,¹¹⁹ such as EU agencies and the host MS.¹²⁰ Thus, if the control of more simple actions of Frontex, such as JO, is already very difficult, the monitoring of the more complex 'hotspots' will be nearly impossible. In fact, in hotspots, the actions of three, and sometimes four EU agencies will remain untouched.

The possibility of judicial review?

Regarding the judicial review of the 'hotspots', whilst the CJEU will be the sole court competent to hear agencies' cases, the notion of it providing any real judicial remedy is fallacious. In fact, EU agencies' actions in the 'hotspots' could influence the final decisions of the Greek or Italian authorities, but intermediate measures will not be judicially reviewable unless they affect the applicant's legal rights in an independent manner.¹²¹ This will be difficult to know and prove in practice. Thus, as of now, no CJEU cases mention the 'hotspots' in any way. As such, only national courts and the ECtHR would consider judicial review of 'hotspots' possible. Once again, the party

¹¹⁴ *ibid.*

¹¹⁵ *ibid.*

¹¹⁶ Horii (n 111).

¹¹⁷ Neville, Sy and Rigon (n 112).

¹¹⁸ David Fernandez Rojo, 'The Lack of Transparency Surrounding EUROPOL and the Hotspots' (*CAUGHT YOU RED-HANDED*, 13 May 2019) <<https://caughtyouredhanded.wordpress.com/2019/05/13/the-lack-of-transparency-surrounding-europol-and-the-hotspots/>> accessed 1 October 2019.

¹¹⁹ Fernandez Rojo (n 42).

¹²⁰ Izabella Majcher, 'The EU Hotspot Approach: Blurred Lines between Restriction on and Deprivation of Liberty (Part I)' (*Oxford Law Faculty*, 4 April 2018) <<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2018/04/eu-hotspot>> accessed 11 November 2019.

¹²¹ Eliantonio (n 40).

under review will however not be one of the EU agencies, but the host MS, namely Greece or Italy. For these two jurisdictions to be competent, the national staff will need to be responsible. The composite-nature of the hotspots and its decision-making will make it difficult to determine to whom the action is attributable to, and in any case solely the national authorities' actions could be reviewed. However, within the hotspots three to four EU agencies will be involved in the operations occurring in the hotspots, and their actions can heavily influence the operations, and should consequently be judicially reviewed.¹²²

Before the ECtHR, two cases mention the 'hotspot' approach: *J.R. and others v Greece* and *Kaak and others v Greece*. It is interesting to note, however, that whilst both cases mention the 'hotspot' approach, they remain essentially silent on the precise role of each EU agency in the management of these reception centres. Whereas the first case mentions briefly the implication of Frontex and EASO in the 'hotspot',¹²³ the second only mentions Frontex,¹²⁴ and none of them mention Europol or Eurojust. Consequently, the ECtHR can be an interesting alternative in order to seek judicial remedy for individuals, but it will not clarify the actions of EU agencies in these centres.

Administrative review as an alternative?

Regarding the administrative remedies available to individuals harmed within the hotspots, administrative mechanisms from Frontex, as well as from the other EU agencies need to be mentioned. The individual complaint mechanism of Frontex has been analysed in depth before, and the analysis identified the limited efficacy of the instrument and its hindrance of adequate protection for the individual.

Another administrative remedy that can apply to every EU agency is the European Ombudsman. Its role is mentioned in the Regulation of the EU agencies. The added value of that mechanism is undoubtedly its flexibility and accessibility.¹²⁵ However, its role is limited on the ground that it cannot adopt legally binding decisions, which ultimately lowers its influence and impact.¹²⁶ Lastly, a final mechanisms exist that will apply specifically to Europol, and Eurojust: the national supervisory authorities and the European Data Protection Supervisor (EDPS).¹²⁷ Nevertheless, these two authorities only play a role when transfer of personal data is concerned, and this will rarely be the ground for judicial review and violation of HR within the 'hotspots'. In any

¹²² Fernandez Rojo (n 42).

¹²³ Case *J.R. and others v Greece*, App no 22696/16 (ECtHR, 25 January 2018).

¹²⁴ Case *Kaak and others v Greece*, App no 34215/16 (ECtHR, 3 October 2019).

¹²⁵ Madalina Busuioc, *European Agencies: Law and Practices of Accountability* (Oxford University Press 2013) 222.

¹²⁶ *ibid.*

¹²⁷ Art. 42 and 43 of the Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on Europol OJ L 135.

case, it does not offer a ‘real control’ as such as these authorities can only, for example, request Europol to erase or change the data and will thus not offer damages as such for the individuals.¹²⁸ In sum, administrative remedies do not appear to be a convincing alternative. In fact, only Frontex seem to have an efficient administrative remedy, and even this one is limited in its scope.

The case-study of the new phenomenon of hotspots demonstrates the ever-growing powers of EU agencies and the challenges that legal and administrative bodies are facing when it comes to controlling them. The ‘hotspots’ show that actions from the majority of the parties involved (the EU agencies) still remain untouched.

Conclusion

This article aimed to demonstrate that the control of actions coordinated by Frontex is very complex, due to the composite-nature of the operations, as well as their opacity. On the judicial level, neither the CJEU, nor the domestic and international courts can ensure an effective control of the actions of Frontex. The agency, and agencies in the case of ‘hotspots’, seem to be immune to any type of judicial review, and the only available remedies for individuals will be to bring a complaint against a MS before domestic courts and the ECtHR. Alternative solutions to judicial review could be found in administrative remedies, such as the European Ombudsman and the individual complaint mechanism. However, once again, these mechanisms are ineffective, because of their lack of binding force and independence. In any case, administrative remedies could not substitute the rights to an effective remedy before a judicial organ but should only complement it.

In the current context, solutions need to be developed on the EU level to palliate this legal and administrative vacuum. Whilst the lack of judicial review of EU agencies actions could be justified originally by the secondary role that they were playing in merely assisting MS, it needs to be readapted to the stronger powers’ agencies are currently being given. Consequently, new mechanisms should be adopted that would ensure efficient judicial protection to individuals. One potential option could be to develop the administrative path and establish independent quasi-judicial internal bodies similar to board of appeals in other EU agencies.¹²⁹ Another solution could be to either develop better cooperation between administrative and judicial bodies, in order to ensure a more complete monitoring of the actions, or to extend the idea of shared responsibility, or even ‘multi-responsibility’ in order for each party involved to bear the burden of its own mistakes. These necessary solutions could however be difficult to implement in practice.

¹²⁸ *ibid.*

¹²⁹ Clément-Wilz (n 52).