Systemic accountability of the European Border and Coast Guard: the legal responsibility of Frontex for human rights violations

Gkliati, M.

5 Theoretical Framework (II): Accountability

1 Introduction

Like the previous one, this chapter is also devoted to the theoretical framework, which supports this study, focusing in particular in the concept of accountability. Here, the distinction between responsibility and accountability becomes apparent, and the exact colours and connotations under which accountability is seen are described.

The relevant questions for Chapter V are: What is accountability? Should Frontex be held accountable, and what is the appropriate conceptual framework for dealing with its accountability in EBCG operations?

Ultimately, I propose an accountability framework that best fits the needs of a joint cooperative endeavour, such as the EBCG. In particular, I open a conceptual discussion on accountability and argue for the passing from a model of *individualist accountability* to one of *systemic accountability*. In this way, I aim to replace the dominant mono-actor paradigm on accountability, which allows for blame-shifting and accountability gaps, with a more holistic approach that involves all actors responsible for the harm.

2 Accountability and its different readings

Inevitably, in complex-structures, the more actors are involved, the hazier the responsibility of each actor becomes. It is then that concrete attribution of responsibility and effective accountability structures are necessary, Bovens notes, to avoid responsibility becoming 'as slippery as a squid in a fish market bin'.[1]

As, Hannah Arendt has remarkably observed, 'There are no such things as collective guilt and collective innocence; these terms make sense only if applied to individuals'.[2] In this sense, 'responsibility' and 'accountability' remain void if they cannot be attributed concretely to one or several actors.

All actors must take responsibility for their conduct, in the sense of *Role-Responsibility or responsibility as task,* and in this context, take all action necessary to avoid a possible harmful result. The attribution of responsibility in the sense of *Liability-Responsibility or responsibility as accountability* needs

1 L. Winner, *Autonomous Technology: Technics-out-of-control as a Theme*, Political Thought, MIT Press, 1978.

2 H. Arendt, *Personal Responsibility under Dictatorship*, The Listener, 6, 1964, p. 185.

to be ultimately addressed before a judicial forum. Legal accountability is necessary in order to constitute the fundamental rights safeguards practical and effective. The following section deals with this issue and introduces the concept of *'systemic accountability'* to support that the attribution of joint responsibility to the agency and the member states should be investigated by the courts.

Thus, having established that the agency can, in fact, be held responsible for human rights violations, especially in light of the difficulties created by the *problem of many hands,* the next step is to deal with the accountability of the agency, starting from the conceptual understanding of accountability in its different forms. The goal is to help reach a good understanding of accountability and delineate the concept, distinguishing it from that of responsibility and establishing the particular angles from which it is examined in this study.

2.1 Accountability as answerability: the importance of the rule of law

Accountability is used in public discourse as an umbrella concept, which has come to stand for several concepts ranging from responsibility to honesty and transparency. Attempts to clarify the term in scholarly literature have resulted in conceptual confusion with several authors providing their own definition of accountability, which ultimately hinders the production of cumulative knowledge. However, two main developing tendencies can be identified in these different definitions: one that understands accountability as a 'virtue' of public actors and one that sees it as a 'social mechanism' for answerability.[3]

The former, *accountability as virtue*, refers to the evaluation of the conduct of public actors on the basis of a set of benchmarks, i.e. judging whether an actor has behaved in an accountable manner.[4] It is understood as a positive quality of the actor, to some extent resembling Bovens' *Responsibility as virtue*, discussed in the previous chapter. In this sense, transparency and proper administrative conduct can be considered elements of an accountable behaviour in the sense of *accountability as virtue*.

This understanding is most common in US discourse, while the term is used in Commonwealth and continental discourse most often in the second sense, *accountability as a social mechanism for answerability.* For these authors, *accountability is a social mechanism designed for bringing an actor before a forum to give account for decisions on how governance is being exercised, or to answer*

3 M. Bovens, D. Curtin, P. 't Hart (eds.), *The Real World of EU Accountability. What Deficit?*, Oxford: Oxford University Press, 2010, p.p.: 32-34; E. Fisher, *The EU in the Age of Accountability*, 24 Oxford Journal of Legal Studies, 2004.

4 M. Dubnick, *Seeking Salvation for Accountability*, Paper presented at the Annual Meeting of the American Political Science Association, 2002; J. Koppell, *Pathologies of Accountability: ICANN and the Challenge of ''Multiple Accountabilities Disorder''*, Public Administrative Review, 65/1: 94-107, 2005.

to charges, and finally, suffer consequences in case of misconduct.[5] More simply, *accountability* means *being held to account before a forum*. It is in this sense that accountability is most commonly used in this study. However, the *accountability as virtue* understanding infiltrates the analysis when discussing transparency into the work of the agency.[6]

Moreover, seen from another perspective, while for scholars of governance, public administration, and political science a discussion on accountability revolves around the 'Three Es', Economy, Efficiency, Effectiveness,[7] lawyers prefer the language of the rule of law. For Majone, accountability is equal to a strong system of judicial review,[8] while Oliver defines it as follows (a rule-of-law-like definition):

> *'a framework for the exercise of state power in a liberal-democratic system, within which public bodies are forced to seek to promote the public interest and compelled to justify their actions in those terms or in other constitutionally acceptable terms (justice, humanity, equity); to modify policies if they turn out to not have been well-conceived; and to make amends if mistakes and errors of judgment have been made'*.[9]

According to this perspective, accountability is related to the rule of law. In a system of separation of powers, where the branches of liberal democratic government need to balance out against each other (institutional balance doctrine), the rule of law is an essential ingredient of democracy.[10] In fact, it has been described as the 'hallmark of democratic governance'.[11]

Based on these understandings, the accountability of agencies and Frontex, in particular, has been examined in a range of relevant analytical frameworks. In one of the most well-known studies, Wolff and Shout use a legitimacy-based model and examine the hierarchical, administrative and legal control that the agency is under, as well as the functional cooperation with peer groups. They further evaluate the effectiveness, flexibility and

---

5 Bovens, Curtin, and 't Hart 2010, p.: 34; A. Schedler, 'Conceptualizing Accountability', in A. Schedler, *The Self-Restraining State: Power and Accountability in New Democracies*, Boulder: Lynne Rienner Publishers 1997, p. 17; G. Haydon, 'On Being Responsible', *The Philosophical Quarterly* 1978, 28 p.p.: 46-57; D. Beetham and C. Lord, Legitimacy and the European Union, London: Longman, 1998. R. Mulgan, *Holding Power to Account, Accountability in Modern Democracies*, London: Palgrave Macmillan 2003, p. 8.

6 Section 3.3.

7 To the extent that effectiveness is discussed in this study, it is meant in the context of accountability rather than public administration.

8 G. Majone, *Causes and Consequences of Changes in the Mode of Governance,* 17 Journal of Public Policy, 1997, p.p.: 139, 160; G. Majone, *The rise of the Regulatory State in Europe*, 17 W. European Politics 77, 1994.

9 D. Oliver, *Government in the United Kingdom: The Search for Accountability, Effectiveness and Citizenship*, Milton Keynes, Open University Press, 1991, p.p.: 10, 28.

10 D. Dyzenhaus, *Reuniting the Brain: The Democratic Basis of Judicial Review,* 9 Public Law Review, 1998, p. 98; Harlow 2002, p.p.: 144, 145.

11 Bovens, Curtin, and 't Hart 2010, p. 5. Bovens refers to Mulgan 2003.

subsidiarity of its output.[12] More studies have examined the issue from a similar public administration and governance approach,[13] while others have focused on more specific administrative mechanisms of the agency, such as the Frontex Fundamental Rights Consultative Forum,[14] or its individual complaints procedure.[15] The present study, starting from the same premises, sees accountability as connected to justice and the rule of law, and implements it primarily through legal channels, while also examining other forms of accountability.

2.2 A supranationalist starting point on accountability

The goals of accountability within the European Union (EU), seen as *accountability as a social mechanism for answerability*, vary in accordance with the different perspectives on EU integration or governance, i.e. supranationalism, intergovernmentalism, and the regulatory regime analysis. We may take a brief look at each of these approaches in order to determine the goal of accountability in this study.

This study follows the supranationalist school of thought. While EU governance is still closely connected to the notion of the nation state, there is yet a certain autonomous core with strong discretionary powers. While accountability at the national level remains important, in a supranationalist reality, accountability is needed at the appropriate decision-making level. i.e. at the level of EU organs and institutions of the EU as a whole. From a *supranationalist* perspective, the EU and its organs are seen as autonomous actors that should be held accountable directly in their own right. EU agencies, in particular, should be accountable to the Commission, the EU Council, the European Parliament (EP) and the Court of Justice of the European Union (CJEU). [16] Since 2009, the list of accountability fora also includes the European Court of Human Rights (ECtHR), at least as far as the EU's accession to the ECHR is still a realisable goal.[17]

Contrariwise, for intergovernmentalists, the bond with the nation state is of utmost importance. It is the EU member states that principally and ultimately control the drafting and the execution of EU policies. Thus, accountability should be built on the basis of the national delegations being held to

12 Wolff and Schout 2013.

13 Pollak and Slominski 2009; D. F. Rojo, Evolution of the Operational Tasks of Frontex, EASO and Europol towards an Integrated Border Management. Migration And Asylum Administration in the European Union?, PhD thesis, 2018; V.A. Schmidt, *Democracy and Legitimacy in the European Union Revisited: Input, Output and 'Throughput'*, Political Studies, 61, 2013, 2–22.

14 *L. Giannetto, Advocacy Groups targeting the heart of EU Agencies. Frontex in the Focus*, in D. Dialer, M. Richter (eds.), Lobbying in the European Union. Strategies, Dynamics and Trends, Springer, 2019.

15 Fernández-Rojo 2021.

16 Bovens, Curtin, and Hart 2010, p.p.: 23, 24, 28, 29.

17 Article 6 TEU.

account back home, i.e. national parliaments, elections, referenda, national constitutional courts. While the focus should be on the domestic level, EU-focused systems of oversight are only supplementary, if not counterproductive. From this point of view, it would be sufficient for EU agencies to answer to their management boards, which are composed by member states representatives,[18] while more meticulous answerability mechanisms should be sought with respect to the member states themselves. These can extend from national administrative and political bodies to domestic and European or international courts.

Diametrically opposed to the former two perspectives, proponents of the *regulatory regime* view advocate that the EU is merely a results-oriented regulatory regime. From that point of view, the accountability deficit is not denied, but is considered an issue that does not fit the EU's construction by design. In other words, the accountability discussion is rather irrelevant because the EU is not a state or would-be state, but a bureaucracy, a regulatory regime that is not supposed to give account to the majorities, as it is not elected. Legitimacy is acquired by providing optimal solutions to existing problems, which solutions promote the common welfare. In fact, limited accountability options may prove beneficial for the more efficient achievement of the goals, as opposed to the sacrifice of tough choices on the political altar of democratic authorisation. This approach envisages to replace political organs with technical experts and depoliticise decision-making mechanisms. It places emphasis on administrative accountability (management boards composed of experts, Court of Auditors, etc.) and transparency rather than judicial accountability.[19] Under this approach, we should not attempt to address accountability issues at the EU level, as the role of the EU, its agencies and institutions was never intended to be such. This seems to be the angle from which Frontex has often argued with respect to its own responsibility, namely that it is only a bureaucratic regulator with no actual operational powers.

Thus, in the context of the same discussion on accountability within a joint operation, the three different perspectives on EU governance, set different goals of accountability. While the intergovernmental and the regulatory regime approaches focus on the accountability of member states, a supranationalist approach puts the accountability of the EU and its institutions at the centre of attention. A more extreme version of supranationalism would set the accountability of states entirely aside, as it would

18 Bovens, Curtin, and Hart 2010, p.p.: 21, 22, 28; The management board of Frontex is composed of representatives of the heads of the border authorities of the 26 EU Member States that are signatories of the Schengen acquis, and two members of the European Commission. Non-EU member states that participate in the Schengen acquis participate with limited voting rights. Frontex website: http://frontex.europa.eu/about-frontex/organisation/management-board/.

19 Bovens, Curtin, and Hart 2010, p.p.: 24-26, 28, 29.

not consider state sovereignty and would only be concerned with the EU's accountability. This study takes a more moderate approach towards supranationalism, which leads us to seek the pathways for the accountability of Frontex, without disregarding that of the member states.

2.3 Types of accountability as a social mechanism for answerability

As established in the previous sections, this study adopts the more commonly European approach that sees accountability as a mechanism for answerability and one that originates from supranationalist foundations, accepting that the level of autonomy that EU agencies enjoy justifies the need for accountability at the EU level. In adopting a primarily legal approach, it sees accountability as connected to the rule of law, but also complemented by other types of non-legal accountability.

These principles are honoured in the definition offered by Bovens, according to which accountability is *'a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences'*.[20] Bovens' definition as well as the subsequent analytical framework developed by Bovens, Curtin and Hart have become a common foundation for contemporary research on accountability[21] and are also followed in this study, as they successfully represent the qualities of the European part of the schism in the accountability debate, i.e. *accountability as a social mechanism for answerability*. Its well-rounded nature allows it to encompass the focus of previous frameworks, such as hierarchical control and democratic legitimacy, and move beyond them to cover a variety of different fora and accountability arrangements.

According to this analytical framework, accountability may be exercised in a range of different fora.[22] Depending on the answer to the question 'Accounting to Whom?', the authors distinguish between five different types of accountability: a) political or democratic accountability, b) administrative accountability, c) social accountability, d) legal accountability, and finally, e) professional accountability.

Firstly, in parliamentary systems, political or democratic accountability is among the highest levels of control. Elected and appointed public authorities are answerable to their political superior either minister and prime minister or president, and most importantly to the parliament, acting as representatives of the people. In their role as 'holding power to account', the media can also be considered fora of political accountability.

---

20 M. Bovens, *New Forms of Accountability and EU-Governance*, Comparative European Politics, 5(1), 2007, p. 107.

21 e.g. Horii 2018), p. 211.

22 Bovens, Curtin, and Hart 2010, p.p.: 41-44.

Secondly, social accountability can be seen, not merely as a separate category, as presented by Bovens, but even as a second branch of democratic accountability. It envisages accountability directly to the public through non-governmental organisations and other interest groups, unions, and other stakeholders that together form civil-society. This type of accountability is not as coherent and cannot impose immediate sanctions in the strict sense of the word. Nevertheless, the long-term consequences of this loose accountability mechanism, are powerful enough to motivate behaviours such as corporate social responsibility, transparency, open government, and public reporting.

Thirdly, the technocratic nature of public administration requires independent supervision by quasi-legal fora on administrative and financial issues. Such fora of administrative accountability can be independent authorities at the national, regional or international level, courts of auditors, ombudspersons, and other external authorities reviewing issues of fraud, efficiency, and effectiveness.

Fourthly, legal accountability may be seen as a synonym to judicial review, i.e., the courts' power to review the legality of administrative acts, and in case of unlawfulness, annul the act and award reparations. In the language of Bovens, it represents answering before a judicial forum. In the same line of thought, Dawn Oliver sees legal accountability as a duty for the public authority to 'explain and justify its actions in legal terms if sued in the courts'; a duty that is 'enforceable by action in the courts at the instigation of those affected' and that it is followed by an obligation 'to make amends'.[23] For courts, accountability reflects their task to uphold the rule of law in the sense of reviewing the legality of administrative action and putting public power under judicial scrutiny. For individuals, it means being able to challenge administrative action before courts, if it conflicts with a higher law, in the case of Frontex, mainly the EU Charter and the ECHR.

The fifth and final level of accountability identified by Bovens is professional accountability. This entails the enforcement of formally accepted professional codes of conduct by professional associations and networks, management boards and disciplinary tribunals on a peer-review basis.

In sum, in political accountability account is to be rendered to elected representatives, political parties, voters, and media. In administrative accountability the forum becomes the auditors, inspectors, and controllers, while in professional accountability, this forum is the professional peers. Social accountability is owed to interest groups, charities, and other stakeholders. Finally, the forum for legal or judicial accountability is courts. This theoretical framework is applied and the different types of accountability are analysed with respect to Frontex in section 3.

23 Oliver 1991, p. 26.

2.4 The relationship between accountability, responsibility and liability

In short, understanding *accountability as a social mechanism for answerability* and inspired by the analytical framework developed by Bovens, Curtin and Hart, I use the term 'accountability' in the sense of 'answering for decisions on how governance is being exercised'. Several forms of accountability can be identified, such as administrative, democratic, and social accountability. However, when the acts of governance directly affect individuals' rights, accountability may not remain at the political or administrative level. Then, the need arises for 'legal accountability', i.e. the actor's subjection to substantive legal control and formal judicial mechanisms of accountability. Therefore, legal accountability is the focal point of this book.

Responsibility is understood here, mainly in the sense of *Liability-Responsibility,* in terms of attributing blame for causing harm. It should be highlighted that similarly with accountability, the focus is on 'legal responsibility', rather than political or moral, referring to the principle that the breach of an engagement involves an obligation to make reparation.[24]

In other words, for the purpose of the present study, while 'responsibility' refers to the obligation for reparations in case of breach of an engagement, 'accountability' would be the possibility to be held responsible, to answer for breaches of international obligations before courts.

'Verantwortlichkeit' and 'Verantwortung' in German or 'υπευθυνότητα/ευθύνη'and 'λογοδοσία' in Greek, translated as 'responsibility' and 'accountability' respectively, are concepts interconnected that together and never in the absence of one another help construct a functional society. Accountability is the essence of responsibility. As elegantly put by Bovens: 'In the absence of a forum, our thinking about responsibility runs into trouble.'[25]

Related to legal responsibility is also the concept of liability, which suggests that someone is liable to pay on account of an act for which she is legally responsible.[26] The concept of liability may seem similar to accountability. One may even be tempted to use the two interchangeably, as liability is often the consequence of holding an actor to account, especially if we are talking about legal accountability. However, this is only one of the possible ways of holding someone to account before courts, although admittedly the most common one in general judicial practice. However, the concept of legal accountability is indeed broader as it can also include other remedies such as the legality review by the CJEU.

24 Chorzow, *Germany v Poland*, p. 21.
25 Bovens 1998, p.p.: 26, 27.
26 Chapter IV.

3 The answerability of Frontex before legal and non-legal fora

In applying the theoretical framework presented in the previous sections, the following paragraphs aim to assess the ability of the existing normative framework to ensure the agency's overall accountability. Regarding the different accountability fora, even though the present study predominantly focuses on legal accountability, it would be deficient if it did not include an overview of the other types of accountability, namely, administrative, democratic, professional, and social accountability.

3.1 Non-legal accountability

The partial assessment of non-judicial forms of accountability is deemed essential for the following reasons. Firstly, in principle, in a holistic view of accountability, the more ground is covered by other forms of accountability, the less urgent access to the (judicial) system of last resort becomes, without the latter ever losing its primary importance. A rigorous system of non-judicial remedies can potentially act pre-emptively, adding several layers of supervision, which could prevent a violation. This could be the case, for instance, with respect to monitoring mechanisms of administrative accountability that helps the agency implement its positive obligations and prevent a violation. Some of the same mechanisms that allow for the agency to answer for its executive decisions before a forum are also the safeguards that prevent violations, so that ex-post facto judicial remedies can assume a more limited role. Vice versa, the more narrow the protection offered by non-judicial safeguards, the more pertinent and urgent the availability and effectiveness of a system of legal remedies becomes.

Secondly, with regard to remedying human rights violations, the ECtHR has held that the standard of Article 13 ECHR can be met also with a remedy of a non-judicial nature, which is however not the case for the equivalent Article 47 of the Charter. According to the interpretation of the ECtHR, in the absence of judicial remedies, the 'powers and procedural guarantees of the alternative remedies' should also be taken into account in the assessment of an effective remedy.[27] It is also possible that if no single remedy is considered effective in the terms of Article 13 ECHR, a collection of remedies judicial or not may, nevertheless, cumulatively fulfil the requirement.[28]

---

27 D. Shelton, Article 47 – Rights to an Effective Remedy in S. Peers and others (eds), *The EU Charter of Fundamental Rights : A Commentary* (Steve Peers and others eds, Oxford 2014), p. 1202 referencing ECtHR 06 September 1978, Judgment, App. No. 5029/71, (*Klass v Germany*), par. 67 and ECtHR 25th March 1983, App. No. App Nos 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, A/61, (*Silver and Others v the United Kingdom*), par. 113. Article 47 of the Charter leaves no space for non-judicial remedies, requiring a fair hearing by an independent and impartial tribunal previously established by law.

28 Shelton 2014, p. 1202.

Finally, in pragmatic terms, most of the developments with respect to the accountability of Frontex concern these non-legal types of accountability. These efforts on the part of the legislature and of the agency itself should not be ignored. Nevertheless, it should be evaluated whether these efforts are sufficient in practice in ensuring the accountability of the agency in a way that protects human rights and realises the proper allocation of responsibility.

3.2 Democratic or political accountability

The lack of adequate democratic scrutiny of the activities of Frontex has been addressed several times in the academic literature,[29] while it remains a desideratum for institutional actors,[30] and civil society.[31] This section focuses on some of the main points regarding democratic accountability, and does not aim to present a complete summary.[32]

As an EU agency, Frontex needs to justify its actions before the democratically elected institutions, i.e. the EP and the national Parliaments. Already at the early stages of the inception of a European Border Guard in 2006, it was seen as a body, although not vested with law enforcement powers, whose instructions on common standards and joint operations, would have such substantive impact on border control and law enforcement that would require effective parliamentary control. The role of democratic or political control was envisaged for the EP, as the role of national parliaments would only be indirect in the decisions made.[33]

In this respect, it needs to be noted that the involvement of the EP has been strengthened since Frontex was first established. The founding Regulation was adopted by the Council alone, with only consultation by the Parliament, but by the time of the adoption of the 2007 amendment, issues concerning the EU's external borders had become subject to the co-decision procedure.[34] This development concerns the legislative involvement of the EP, which is now actively involved in the negotiations and its agreement is required for the adoption of a measure.[35]

Therefore, in a further development since the agency's establishment, Article 7 has been added to the EBCG Regulation to state explicitly that the agency shall be accountable to the Parliament and the Council. However, the phrase 'in accordance with this Regulation' raises concerns as it could

29 E.g. Fischer-Lescano and Tohidipur 2007, p.p.: 1261, 1262; Baldaccini 2010, p. 236.
30 PACE 2013a, p.p.: 4,5; LIBE 2011, p. 14; House of Lords 2008, p. 30, 31.
31 Meijers Committee 2008, par. III; Amnesty International and ECRE 2010, p.p.: 12-13.
32 For a more comprehensive view on the democratic accountability of Frontex, see Rosenfeld 2017.
33 Monar 2006, Chapter 10, p. 7.
34 Pollak and Slominski 2009, p. 917.
35 The European Parliament's influence is limited, as most operational decisions are not taken on the legislative level. Pollak and Slominski 2009, p. 917.

be interpreted as limiting the accountability only to what is explicitly set in the Regulation. In this case, the Regulation would prevail, as lex specialis, over any additional obligations derived from EU secondary or tertiary legislation.[36]

One could also see a role for the EP in its powers to approve the agency's budget. Its influence is, however incomplete since it has only a weak reach into Frontex activities.[37] The control rights of the EP are limited and it does not have access to the most valuable information tools produced by the agency, i.e. its general or tailored risk analyses that are, however, accessible to the Commission and the Council.[38]

Another issue that has been pointed out is that no parliamentary hearing is required before the appointment of the Executive Director.[39] Moreover, Frontex does not seek the approval of the EP before it concludes a working arrangement with a third country, a claim that has been expressed by both the European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE)[40] and PACE,[41] and is also supported by the Frontex Consultative Forum,[42] an independent body of civil society organisations, the role of which will be covered in more detail under social accountability. The EP theoretically has the right to be informed about the content of such agreements, but in practice, these are not being submitted by the agency.[43]

At first sight, an essential power of the EP is its entitlement to invite the Executive Director to report before the LIBE Committee. The inquiry is limited to questions concerning the way the Director is carrying out his tasks (Article 106(2)). In a rare demonstration of its powers, the EP withheld ten million EUR of Frontex's budget for 2013 until the agency took practical steps for the improvement of its search and rescue operations.[44] It also invited the Frontex Executive Director to report on the measures taken by the agency. The Executive Director spoke before the EP in October 2012.[45] In other instances, however, senior Frontex officials have declined such invitations, concerning the specific question of the management of the

36 Gkliati and Rosenfeldt 2018, p. 5.
37 LIBE 2011, p. 24.
38 Pollak and Slominski 2009, p.p.: 917, 918.
39 LIBE 2011, p. 24; Pollak and Slominski 2009, p.p.: 917, 918.
40 LIBE 2011, p. 25.
41 PACE 2013a, p. 3; PACE has also requested that the Fundamental Rights Officer and the Consultative Forum report directly to the EP on human rights concerns in the context of all Frontex activities and on steps taken to address these concerns. PACE 2013a, p. 3.
42 S. Kessler, Co-Chair of FRONTEX Consultative Forum, at the meeting of the Subcommittee on Human Rights of the European Parliament, *Exchange of views on FRONTEX: new responsibilities to protect human rights under the amended regulation*, 16 May 2013.
43 PACE 2013a, p. 14.
44 PACE 2013a.
45 Frontex 2010a.

southern maritime border.[46] This is indicative of the limited reach of this control mechanism, as it is at the discretion of Frontex official whether to answer the call of the Parliament. This power of the EP was strengthened in the EBCG Regulation, which now provides that the Executive Director shall report regularly to the European Parliament (Article 106(2)). Although the language has become more assertive, there are still no consequences envisaged in case the Executive Director does not attend a meeting before the EP. However, the language itself can create political pressure, which could cover some of the previous gaps. For instance, in December 2021 members of the EP asked for the resignation of the Executive Director, Fabrice Leggeri, in light of evidence of the engagement of Frontex in systematic pushbacks by the Greek authorities.[47]

Finally, national parliaments may also have a role in the accountability of Frontex. It can be argued that national parliaments exercise political control since national representatives that participate in the agency's Management Board are always answerable to their national parliament. However, in practice, due to the lack of awareness over Frontex's activities and EU affairs in general, politicians are rarely faced with serious inquiries in their national parliaments.[48] More importantly, although it can do so at its discretion,[49] the agency is under no obligation to report to or in any way inform national parliaments.[50]

3.3 Social accountability

Protection of fundamental rights is an issue that requires a high level of scrutiny by civil society. However, 'civil society' or 'the public' is not a unified official forum vested with formal accountability related powers. Therefore, transparency is an essential precondition to achieve such monitoring. The need for transparency was recognised in the Frontex founding Regulation, which provided that the public shall rapidly be given objective, reliable and easily accessible information with regard to the agency's work.[51] The formulation has become more sober in the EBCG Regulation, which merely makes reference to the agency's annual reporting obligations and its obligations under EU rules on access to documents.[52]

46 LIBE 2011, p. 25; Baldaccini 2010, p. 236; House of Lords 2009, par. 85.
47 Statewatch, *European Parliament: Frontex director should resign, say Socialists & Democrats*, 03 December 2020, https://www.statewatch.org/news/2020/december/european-parliament-frontex-director-should-resign-say-socialists-democrats/.
48 Pollak and Slominski 2009, p. 918.
49 E.g. House of Lords 2016.
50 LIBE 2011, p. 25; Pollak and Slominski 2009, p. 918.
51 Article 28(2) Frontex Regulation.
52 Article 74 EBCG Regulation.

The lack of transparency is often criticised as a structural problem of Frontex,[53] while the EP has spoken of a 'culture of secrecy'.[54] In principle, Frontex, as an EU agency is under the obligation to conduct its work as openly as possible,[55] and provide access to documents to EU nationals and residents.[56]

Frontex publishes annually the general and the work programme reports, which provide a broad overview of activities, along with the general risk analysis, progress reports on the Fundamental Rights Strategy (see below under administrative accountability), and any external evaluation reports. However, as Ghezelbash, Moreno-Lax et al. observe, the structure of the general report was revised in 2008, significantly reducing the level of detail included.[57]

Moreover, although the agency has improved the level of transparency through the information provided in its website, crucial information to evaluate the fundamental rights performance of the agency remains unattainable. Namely, there is no access to information on the agency's specific activities, primarily through the operational plans and serious incident reports or working arrangements with third countries, are highly confidential.[58]

Fundamental in this regard is the right to public access to documents, which is enshrined in Article 15 (3) TFEU, Article 42 CFR and Article 2 of Regulation (EC) 1049/2001. This right is granted across all EU institutions, bodies, and agencies to EU citizens or anyone else residing in the EU. Migrants involved in Frontex operations, however, cannot rely on these rights, as they have in all likelihood not established residence in the EU, and they need to depend on the work of NGOs and investigative journalists.

More importantly, access is often denied, and more often than not the released documents are extensively redacted on the ground of exceptions permitted on the basis of public security concerns.[59] A telling example of this practice that significantly limits the reach of social accountability is the request of the German NGO ECCHR for disclosure of the Operational Plan and Evaluation Report of Operation Hera, which was only partially

53 House of Lords 2008, p. 30; Pollak and Slominski 2009, p. 919; Carrera and Guild 2010, p. 3; Amnesty International and ECRE 2010, p. 12-13; PACE 2013a, p.p.: 1,2; Wolff and Schout 2013, p. 319.

54 LIBE 2011, p. 8.

55 Article 15(1) TFEU; 11(2) TEU and Article 298(1) TFEU.

56 Article 28 Frontex Regulation; Article 42 Charter; Access to Documents Regulation.

57 Ghezelbash, D., Moreno-Lax, V., Klein, N., & Opeskin, B. (2018). Securitisation of Search and Rescue at Sea: the Response to Boat Migration in the Mediterranean and Offshore Australia. International and Comparative Law Quarterly, 67(2).

58 Baldaccini 2010, p.p.: 236, 238.

59 Campbell 2016a; Gkliati and Rosenfeldt 2018, p. 7.

disclosed.[60] According to the information from the agency's annual reports, fewer applications receive full access every year, with the full acceptance rate reaching 13,9 % in 2017. Out of a total of 108 requests, almost 20% received a full refusal, while 60,2% was only awarded partial access.[61]

In combination with the right to access to documents, EU nationals or residents are also entitled to receive an answer when addressing an EU Institution.[62] Any natural or legal person can address Frontex in particular (Article 114). However, it needs to be kept in mind that the obligation to respond is only a formal one, while the content of the response is left to the discretion of the agency, which is also under no obligation of result.[63]

3.3.1 The Frontex Consultative Forum

A milestone reached in 2011 was the creation of the Frontex Consultative Forum on Fundamental Rights (Consultative Forum), an independent body of relevant international and civil society organisations. The Consultative Forum works closely with the FRO and provides guidance and independent advice on fundamental rights matters (Article 108). Nevertheless, the Parliament's initiative for creating an independent Advisory Board on Fundamental Rights that would monitor the activities of the agency was watered down in the final text of the Regulation (Article 109). This Advisory Board, in its initial conception, would be an external body that would have the right to unconditional access to information on joint and RABIT operations including the evaluation reports – information that the EP does not have access to – with the purpose of assisting the agency to respect to fundamental rights. The Parliament's proposal further granted the Advisory Board the power to suspend an operation in case it was considered to be in breach of fundamental rights and international protection obligations. The proposal was turned down unanimously by the Council.[64] The Advisory Board was replaced by a Consultative Forum with limited information rights, while, the power to suspend operations on fundamental rights grounds was given to the Executive Director of the agency. The Consultative Forum, composed of 15 international organisations, EU agencies, and

60 V. Wriedt, D. Reinhardt, ECCHR, *Opaque and Unaccountable: Frontex Operation Hera*, Statewatch, February 2017, http://www.statewatch.org/analyses/no-307-frontex-operation-hera.pdf.

61 Frontex General Reports 2012 – 2017. A good visualisation of this information is found in L. Izuzquiza, A. Semsrott, Frontex transparency: state of play Izuzquiza and Semsrott v Frontex, November 2018, p.p.: 5,10, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwj6urKtj6jjAhWKqaQKHQzxA7QQFjAAegQIAhAC&url=https%3A%2F%2Fec.europa.eu%2Finfo%2Flaw%2Fbetter-regulation%2Ffeedback%2F15674%2Fattachment%2F090166e5bf82536a_es&usg=AOvVaw3D5JWPOCCesKddqKjRFPYQ.

62 Articles 20 (2) (d), 24 (4) TFEU.

63 Gkliati and Rosenfeldt 2018, p. 7.

64 Human Rights Watch 2011.

civil society organisations[65] and its composition is decided by the agency's management board upon the proposal of the Executive Director (Article 108). It was established in October 2012 and published its first Annual Work Programme in January 2013.[66] The independent body that has broader access to the agency's documents and information about the operations, the Consultative Forum (see below under administrative accountability), publishes an annual report presenting the observations and recommendations on the agency's activities regarding fundamental rights.[67]

As the Forum has a consultative role, the agency is not bound by its recommendations. Furthermore, it cannot function as a direct link to civil society, although composed of NGOs, due to the confidentiality obligations of its members.[68] It is only allowed to share information that the Management Board has agreed to transmit and is unable to function as an information link with civil society due to its confidentiality commitments.[69] It is still unclear to which information the members of the Consultative Forum are allowed access, and thus to which extent they will be able to evaluate the impact of the fundamental rights training. Notably, the Consultative Forum has expressed concerns regarding the practices of the agency and the limitations in providing the Forum with access to information.[70]

As a result of the above, we can observe a 'knowledge gap' regarding the compliance of the agency with its fundamental rights and international law obligations. In an effort to increase transparency of its work, Frontex has concluded partnerships with organisations, which can be involved in the activities of the agency in several ways.[71] Frontex concluded in June 2008

65 Council of Europe (CoE), Organisation for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights (OSCE/ ODIHR), United Nations High Commissioner for Refugees (UNHCR), European Union Agency for Fundamental Rights (FRA), European Asylum Support Office (EASO), International Organisation for Migration (IOM), European Council for Refugees and Exiles (ECRE), Red Cross EU Office, Amnesty International European Institutions Office (AI EIO), International Catholic Migration Commission (ICMC), Caritas Europa, International Commission of Jurists (ICJ), Jesuit Refugee Service Europe (JRS), Churches' Commission for Migrants in Europe (CCME), Platform for International Cooperation on Undocumented Migrants (PICUM).

66 Frontex Consultative Forum, *Work Programme 2013*, http://www.statewatch.org/observatories_files/frontex_observatory/CF_work_programme%202013.pdf.

67 The Annual Reports (20143– 2019) and Work Programs (2013 – 2021) of the Consultative Forum are available here: https://frontex.europa.eu/fundamental-rights/consultative-forum/documents/.

68 Frontex Consultative Forum on Fundamental Rights, *Working Methods of the Consultative Forum 2017*, https://frontex.europa.eu/assets/Partners/Consultative_Forum_files/CF_Working_Methods_2017.pdf. For an in-depth analysis into the Frontex Consultative Forum, refer to L. Giannetto, More than consultation: Civil society organisations mainstreaming fundamental rights in EU border management policies. The case of Frontex and its Consultative Forum. PhD thesis, University of Trento, 2018.

69 The classification of a document as confidential is decided upon by the agency. Kessler 2013.

70 Consultative Forum 2017, p. 17.

71 Frontex Fundamental Rights Strategy, p. 8.

a cooperation agreement with UNHCR focusing on border guards training on international refugee law and exchange of best practices and expertise,[72] while already since 2007, a liaison officer from UNHCR had been appointed to Frontex with the objective to 'help ensure that border management complies with the international obligations of EU member states'.[73] In practice, however, the UNHCR liaison officer has met with obstacles regarding the provision of information and has stated that 'the UNHCR has little information on joint operations, making it difficult to evaluate the impact of training'.[74] Frontex also concluded an agreement with the EU Fundamental Rights Agency (FRA) in May 2010.[75] On the basis of this agreement, the FRA provides its expert advice on how fundamental rights should be incorporated into the various phases of border operations. The FRA may provide its opinion only upon request and only to the extent requested. Moreover, the participation of these external partners as observers in ongoing operations is not open and depends on a system of invitations and authorisations by Frontex and the member states (Article 78).

3.4 Professional accountability

Professional accountability, a rather soft form of accountability, is owed to professional peers, who knowing the specific characteristics of the trade can monitor, identify and possibly enforce good practices, such as identifying missing migrants during border control operations. Such accountability could be realised through participation in professional associations or disciplinary tribunals. The independence of the agency and the particular nature of its work would not, in principle, allow for many of such fora, especially those that entail enforceable standards for acceptable practice.[76] While the agency participates in fora together with national border authorities, such as the Africa-FRONTEX Intelligence Community (AFIC), these aim to enhance cooperation with third countries and improve the border management capabilities of these countries and do not have a more specific fundamental rights focus. Apart from any informal political-peer pressure that can be developed is such meetings, no formal professional accountability structure is identified.

72 Frontex and UNHCR 2008; Marin 2011, p. 483.
73 Migreurop 2011, p.p.: 29, 30.
74 Migreurop 2011, p.p.: 29, 30.
75 Frontex and FRA 2010.
76 M. Bovens, 'Analysing and Assessing Public Accountability - A Conceptual Framework' (2006) C-06-01, *European Governance Papers (EUROGOV)*, p. 17, http://edoc.vifapol.de/opus/volltexte/2011/2459/pdf/egp_connex_C_06_01.pdf.

3.5 Administrative accountability

The administrative accountability is, without doubt, the most developed form of accountability of Frontex. This concerns oversight systems and mechanisms, which represent the procedural obligations of the agency under the right to an effective remedy and to good administration. It can be exercised by quasi-legal forums 'exercising independent and external administrative and financial supervision and control.[77]

3.5.1 Financial oversight

At the financial level, Frontex has an internal auditor who answers to the Executive Director and the Commission's Internal Audit Service.[78] Apart from that, the European Anti-Fraud Office (OLAF) investigates illegal reception and allocation of funding (Article 117) and the European Court of Auditors exercises control over the budgetary and financial management of the agency (Article 116).[79] The objective of the Court of Auditors is to provide the EP and other relevant authorities with a statement of assurance as to the legality and regularity of the agency's transactions.[80]

3.5.2 External monitoring

Whereas external supervision is strong in financial affairs, the current administrative framework concerning human rights is primarily internal. The Executive Director is first and foremost accountable to the Management Board, to which it submits annual reports. The Management Board may also extend the Executive Directors term once or dismiss him 'in the event of misconduct, unsatisfactory performance or recurring/serious irregularities'.[81]

As far as independent monitoring and control are concerned, an independent external evaluation shall be commissioned by the Management Board every five years, which examines the effectiveness of the agency and the impact of its working practices. An external contractor carried such an evaluation in 2009, but it did not cover human rights aspects.[82] The second

77 Bovens 2006, p. 17.
78 Pollak and Slominski 2009, p. p.: 918, 919.
79 European Court of Auditors 2017.
80 European Court of Auditors 2017, p. 5.
81 Joint Statement of the European Parliament, the Council of the EU and the European Commission on Decentralised Agencies, Common Approach, July 2012, points 17 and 19, https://europa.eu/european-union/sites/europaeu/files/docs/body/joint_statement_and_common_approach_2012_en.pdf; on management boards and accountability, see: M. Buess, *European Union agencies and their management boards: an assessment of accountability and democratic legitimacy*, Journal of European Public Policy-May (2014).
82 COWI Consultants 2009.

monitoring, which took place in 2015, dealt with the agency's implementations under its obligations under the Charter, but only to a limited extent. The report only covered the evaluation of the effectiveness of the internal accountability mechanisms studied here under administrative accountability, such as the FRO. Looking at these safeguards, the report noted that remarkable progress has been made. However, the implementation of these safeguards in practice was found to fall short, focusing in particular to the limited resources of the FRO, the negative perception of the effectiveness of the monitoring mechanisms, and the lack of practical tools for the implementation of the Codes of Conduct.[83] According to the 2019 EBCG Regulation the Commission shall carry out an evaluation every four years starting from 2023, which will include an evaluation of the compliance with the Charter (Article 121).

Amongst the most important proposals during the 2011 amendment, which was regrettably disregarded by the Council, was the Commission's proposal for an external monitoring mechanism of joint return operations.[84] The Commission had even suggested in 2007 that not yet established European Asylum Support Office (established in 2011) could act as such a body. Instead, a Code of Conduct for Joint Return Operations and a Fundamental Rights Strategy were endorsed, while the mandate of EASO is far from the one envisaged by the Commission.[85]

On other aspects of administrative control, if an access to documents request is denied by Frontex, an individual may lodge a complaint with the European Ombudsman (Article 114(5)). The European Ombudsman can receive complaints from EU citizens or residents regarding other types of maladministration against EU institutions and agencies,[86] but its most important power is that of conducting an own-initiative enquiry, which has resulted in the adoption of an individual complaints mechanism, as shown below.

3.5.3 The Fundamental Rights Officer

The 2011 amendment of the Frontex Regulation was a significant step forward with respect to the human rights accountability of the agency. The Fundamental Rights Officer (FRO), who monitors respect of fundamental rights was one of the progressive changes brought by the 2011 amendment.[87] The FRO is a staff member designated by the Management Board.

83 Ramboll Management Consulting and Eurasylum Ltd, *External Evaluation of the Agency under Article 33 of the Frontex Regulation, Final Report*, 2015, p.p.: 85-95.

84 Amnesty International and ECRE 2010, p. 2.

85 Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office.

86 Article 228 TFEU, Article 43 Charter.

87 Article 26(a) Frontex Regulation; Ms Inmaculada Arnaez was appointed Fundamental Rights Officer in 2012.

When it was first introduced, in 2011, the FRO would report directly to the Management Board and the Consultative Forum.[88] In 2016, the obligation to report to the Consultative Forum, which to some extent safeguarded her independence, was removed (Article 109). She has access to all information concerning fundamental rights and is tasked with making observations about the operations of the agency, identifying possible preventive and corrective measures, keeping a record of possible fundamental rights incidents, as well as monitoring and analysing the implementation of the Fundamental Rights Strategy.[89]

However, this like other changes fall short of the original expectations of the European Commission (EC) and the Parliament. During the trilateral negotiations for the adoption of the 2011 amending Regulation, the EP envisaged an independent FRO who would report to the Parliament, but the parties eventually compromised for a FRO employed by the agency, who has a consultative rather than an advisory role.[90] PACE, as well as the Ombudsman, has commended negatively on a lack of independence of the FRO, given that she is a member of the staff of the agency,[91] and asked questions as to her effectiveness, such as: 'How can one person alone monitor all activities and the potential impact on fundamental rights?'[92] Today the Fundamental Rights Officer has become the Fundamental Rights Office, which, nevertheless, remains significantly underfunded and understaffed.[93] In light of her gradually increasing mandate, the FRO's workload has significantly increased without a proportionate increase in the necessary staff and resources, so it has become increasingly difficult for her to fulfil her tasks.[94] The agency recruited additional staff in November 2018 to support the FRO, but this only includes junior staff.

88 Article 26(a)(3) Frontex Regulation.

89 Frontex 2012c.

90 Human Rights Watch 2011. Statewatch, *EU: A drop of fundamental rights in an ocean of unaccountability: Frontex in the process of implementing Article 26(a)*, 15 May 2012, http://www.statewatch.org/news/2012/may/02-eu-frontex-article26a.html; Statewatch and Migreurop 2012, p.p.: 3, 4.

91 PACE 2013b, p. 16; PACE 2013a, p. 3; European Ombudsman 2013b.

92 D. Dumery, *Exchange of views on FRONTEX: new responsibilities to protect human rights under the amended regulation*, meeting of the Subcommittee on Human Rights of the European Parliament, PACE, 16 May 2013.

93 Ramboll Management Consulting and Eurasylum Ltd 2015, p.p.: 92-93; Frontex Consultative Forum on Fundamental Rights, *Fifth Annual Report 2017*, 2018, p. 5, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwiZj4i5y8jhAhVHsaQKHYacDVsQFjAAegQIBBAC&url=https%3A%2F%2Fwww.statewatch.org%2Fnews%2F2018%2Fmay%2Feu-frontex-consultative-forum-on-fundamental-rights-report-2017.pdf&usg=AOvVaw08uVyL8-TC5R5QsZr0OV7w.

94 Frontex Consultative Forum 2018.

3.5.4 The Fundamental Rights Strategy

The Fundamental Rights Strategy (FRS) and the subsequent Codes of Conduct are certainly seen as steps forward in the efforts to ensure respect for fundamental rights in Frontex activities.[95] The former focuses on the operationalisation and mainstreaming of fundamental rights into the agency's work, and the latter promotes professional values based on the principles of the rule of law and fundamental rights. In its FRS, Frontex expresses its commitment to respecting and promoting fundamental rights, considering these elements as unconditional and integral components of effective integrated border management.[96] Whether it is about joint operations or risk analyses underpinning them, they must take into account the 'particular situation of persons seeking international protection, and the particular circumstances of vulnerable individuals or groups in need of protection or special care'.[97] Furthermore, guarantees for fundamental rights and the rule of law are laid down in the Codes of Conduct,[98] which were drawn up in cooperation with the Consultative Forum.[99] The nature of these documents as to whether they are legally binding and give third parties justiciable rights is still uncertain.[100]

However, even if these documents are indeed legally binding, they simply restate the international obligations of the agency.[101] Moreover, the mere existence of rules is not sufficient to guarantee accountability. PACE has noted that '(d)espite the good intentions contained in the Fundamental Rights Strategy, most provisions have not yet been put into practice', and suggests that an independent external mechanism should be set up to control the implementation of the FRS.[102] ECRE also advocates the view that independent monitoring of Frontex operations with the involvement

95 Marin 2011, p. 483.

96 Frontex Fundamental Rights Strategy, Endorsed by the Frontex Management Board on 31 March 2011, p. 1.

97 Frontex Fundamental Rights Strategy, p. 4; A Fundamental Rights Action Plan has also been developed and was adopted on 29 September 2011 as a tool for the implementation of the Fundamental Rights Strategy.

98 Article 2a Frontex Regulation; Article 81 EBCG Regulation; Frontex, Code of Conduct for all Persons Participating in Frontex Activities, http://www.frontex.europa.eu/assets/Publications/General/Frontex_Code_of_Conduct.pdf.

99 Article 26a Frontex Regulation.

100 Statewatch and Migreurop 2012, p. 3; The CJEU has considered in the past Codes of Conduct (on public access to documents) not merely as internal administrative documents, but as capable of giving third parties justiciable rights. It is also arguable that they only create obligations for the participants in Frontex operations, not Frontex itself. Their obligations are only before the agency, while legal accountability is not covered. Moreover, it is doubtful how far disciplinary sanctions can guarantee compliance with human rights obligations. Frontex 2012c.

101 Human Rights Watch 2011; Statewatch and Migreurop also talk of 'serious shortcomings in the Agency's fundamental rights strategy' Statewatch and Migreurop 2012, p. 17.

102 PACE 2013a, p. 15.

of NGOs is necessary for EU states to be fully equipped to ensure that the management of their external borders respects international refugee and human rights law.[103]

Consequently, the preventive and evaluative guarantees adopted in the legislative revision of 2011 are deemed inadequate by civil society.[104] PACE expressed concerns about whether these changes address all the open human rights questions and whether they are even operable and effective in their limited scope,[105] while the spokesperson of the Green Party of the EP admitted that the measures adopted are 'half-hearted and unconvincing'.[106] Amnesty International and ECRE, joined by the Council of Europe, pointed out that no specific measures are indicated that would ensure compliance despite these affirmations.[107]

3.5.5 The individual complaints mechanism

The main objective with respect to administrative accountability is still an external monitoring mechanism in parallel to the internal mechanisms of the agency. In their report regarding the implementation by Frontex of its fundamental rights obligations, the Ombudsman highlighted the need for a such a monitoring mechanism.

The agency's initial response was that one was already in place, which consisted of the requirement for participants in activities to report infringements, an incident reporting system via the Frontex Situation Centre, and the requirement for full consideration of reports that indicate infringements. Moreover, the Consultative Forum's interaction with the FRO and the mechanism for suspension and termination of operations by the Executive Director were presented by the agency as the core of its internal monitoring mechanism.[108]

The Ombudsman found the agency's response unsatisfactory. First of all, she noted that Frontex should adopt clear guidelines, a clear mechanism, and specific criteria for the suspension or termination of operations and that there is oversight to the decisions of the Executive Director. More importantly, it called for an individual complaints mechanism, arguing that without it, compliance could not be ultimately effective. According to the

103 Refugee Council and ECRE 2007, p. 15.
104 Human Rights Watch 2011.
105 PACE 2013a, p. 3; PACE has since 2011 expressed the view that the then proposed amendments to the Regulation were inadequate to achieve full respect for fundamental rights. PACE 2013a, p. 4.
106 S. Keller, Green spokesperson on migration and home affairs, Green-EFA (European Parliament), *2011 FRONTEX/EU border control, Half-hearted improvements on human rights protection fall short*, 13 September 2011, http://www.statewatch.org/news/2011/sep/ep-greens-frontexeu-border-control-prel.pdf.
107 Socialist Group Spain 2011, p. 19; Amnesty International and ECRE 2010, p. 14.
108 Frontex 2012c.

Ombudsman, to fulfil its fundamental rights responsibilities in accordance with the principles of good administration, Frontex should establish a mechanism for dealing with complaints about infringements of fundamental rights in all Frontex joint operations. The EP also endorsed the need for an individual complaints mechanism.[109]

As a result of the Ombudsman's report, an individual complaints mechanism was introduced in the EBCG Regulation (Article 111).[110] However, it falls remarkably short of the expectations of the Ombudsman. In a systematic study into regional, international, and supranational human rights law, Carrera and Stefan have identified the minimum standards that could qualify a complaints mechanism as an effective remedy.[111] These, as elaborated by the CoE, CPT, EU and UN bodies, include institutional independence, accessibility in practice, adequate capacity to conduct thorough and prompt investigations based on evidence, and a suspensive effect in the context of joint expulsions.[112]

For such a remedy to be considered institutionally independent, the procedure needs to be impartial,[113] while an effective remedy may not be granted 'if complaints are only allowed before the same authority responsible for conducting checks at the EU borders' if that organ's decision is not subject to appeal.[114] Accessibility in practice requires adequate access to information, procedural clarity and fairness, respect for privacy and confidentiality, the possibility for returnees to file a complaint 'either immediately upon arrival or on board the plane prior to arrival', and finally a mechanism that is open to all persons concerned including, apart from the affected individuals, also including the responsible supervisory authorities and anyone who became aware of the violation, such as journalists, NGOs, etc.[115] Such public interest complaints were for the Ombudsman a necessary precondition for an effective complaints mechanism in Frontex operations.[116]

Finally, conducting a thorough and prompt investigation requires adequate capacity both in procedural and in practical terms. Specifically, a 'genuine complaints mechanism' requires transparent procedures, that

109 European Parliament 2015.
110 On some background on the individual complaints mechanism and its evaluation by the EP, see Fotiadis 2016.
111 S. Carrera and M. Stefan, *Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?*, Brussels: Centre for European Policy Studies (CEPS) 2018.
112 S. Carrera and M. Stefan, *Complaint Mechanisms in Border Management and Expulsion Operations in Europe: Effective Remedies for Victims of Human Rights Violations?*, Brussels: Centre for European Policy Studies (CEPS) 2018, p.5.
113 Carrera and Stefan 2018, p. 13.
114 Carrera and Stefan 2018, p. 36.
115 Carrera and Stefan 2018, p. 13.
116 European Ombudsman 2013b.

exclude large margins of appreciation,[117] as well as thoroughness in follow-up procedures.[118] The Ombudsman further suggested that the role of examining the complaints would be entrusted to the Fundamental Rights Officer, who should be resourced accordingly.[119]

Contrary to the minimum safeguards of institutional independence and evidence-based investigation, the Frontex individual complaints procedures is merely an internal administrative procedure. The complaints are received by the Fundamental Rights Officer. She will assess the admissibility of the complaint and register the admissible complaints. This first assessment stage is essentially a judgment on the division of responsibility by the FRO herself, who decides whether a complaint concerns a member state or the agency. In the former case, she forwards the complaints to that member state. Alternatively, she forwards it to the Executive Director. Subsequently, she registers the follow-up measures taken by either the member state or the agency. The Executive Director will further examine the complaint on its merits. The Executive Director is left with considerable discretion to decide on the responsibility of his own staff, since the Regulation does not identify any specific criteria or procedures that need to followed (Article 111). Therefore, it could be argued that the mechanism is independent to the extent that the complaint concerns a member state. However, it is merely an internal system of oversight as far as the allegations against the agency are concerned.[120]

With respect to the appropriate follow-up, the procedure leaves broad discretionary power to the Executive Director. No clear criteria and procedures are identified in the Regulation, which merely stipulates that the mechanism should ensure that the complaints are properly followed-up, without specifying the specific nature of this follow-up.[121] While the Regulation requires that criminal investigations are conducted by the member states as a follow-up to the complaints, the only specific obligation set for the agency is to report on the complaints in the annual report, including 'where possible' the follow-up measures taken.[122]

While other factors such as lack of confidence in the mechanism and its results may also play a role, the low number of submitted complaints raises in itself questions as to the accessibility of the remedy. Carrera and Stefan indicate that only two complaints were registered in 2016, and 13 in 2017,[123]

117 Carrera and Stefan 2018, p. 24.
118 Carrera and Stefan 2018, p. 36.
119 European Ombudsman 2013c.
120 On the independence of the mechanism see also Fernández-Rojo 2017.
121 EBCG Regulation, preambular para. 50.
122 EBCG Regulation, preambular para. 50.
123 Carrera and Stefan 2018, p. 25.

while in 2018 a total of ten complaints was received,[124] a quite low number compared to the indication of incidents shown by NGOs and the agency's own internal serious incidents reports.[125] Among the shortcomings of the mechanism, they note that only signed complaints (not anonymous) are admitted,[126] only by the alleged victim of the violation,[127] which does not allow for a complaint in the context of public interest. Moreover, the complaint needs to be submitted in writing.[128] Finally, the admissibility criteria do not seem to take due regard of the practical difficulties individuals in an irregular situation facing in collecting the necessary evidence, given the overall lack of transparency, and accessing justice; especially in the case that the individual has been subject to return.[129]

It should be further noted that the mechanism concerns the liability of the staff members, i.e. the border guards themselves, rather than examining that of the agency (Art. 72(2) EBCG Regulation). Moreover, it explicitly covers under the definition of 'staff member' only those that work in the agency's headquarters, leaving any complaints against anyone participating in an operation to be addressed by member states.[130]

These shortcomings undermine the capacity of existing administrative bodies to supplement the judicial oversight that must still be made available at the domestic and supranational level. It becomes evident that 'the way in which this mechanism is currently designed is profoundly different from the one indicated (and recommended) by the European Ombudsman'.[131] In the light of these structural shortcomings, the most celebrated perhaps development with respect to the accountability of Frontex fails to meet the existing standards required to qualify it as a non-judicial remedy that can effectively address allegations of human rights violations.

All in all, the foundations have been set in terms of administrative accountability, including the individual complaints mechanism and the FRO. However, these need to be further developed. They need to be vested with supervisory powers, independence and effectiveness guarantees and complemented with a strong external element to achieve true administrative oversight.

---

124 Frontex, Consolidated Annual Activity Report 2018, 12 June 2019, p. 51, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjHy7XJ8PDuAhXF-qQKHad7BfoQFjAAegQIARAC&url=https%3A%2F%2Fwww.europarl.europa.eu%2Fcmsdata%2F185405%2FCAAR%25202018.pdf&usg=AOvVaw2Cx_hrYTZON-N1boU2jSPF8.

125 N. Nau, A. Tillack, *Frontex – Eine EU-Agentur und der Umgang mit den Menschenrechten*, Das Erste, 06 August 2019, https://www.br.de/fernsehen/das-erste/sendungen/report-muenchen/videos-und-manuskripte/frontex-eu-menschenrechtsverletzungen-102.html.

126 Article 5(2) Frontex Rules on the Complaint Mechanism.

127 Article 3 Frontex Rules on the Complaint Mechanism.

128 Article 5(2) Frontex Rules on the Complaint Mechanism.

129 It is telling that only three out of the ten complaints registered in 2018, were declared admissible. Frontex 2019d, p. 51.

130 Articles 4(8), 10(1) Frontex Rules on the Complaint Mechanism.

131 Carrera and Stefan 2018, p. 24.

3.6 Interim Conclusion

An elemental examination of non-legal forms of accountability shows that, despite its promising potential, the existing framework for the non-legal accountability of Frontex cannot secure a sufficient standard of accountability in practice.

Firstly, it can be observed that there is not one consistent framework of accountability or coherent set of accountability standards and mechanisms. The end result is a loose compilation of several fora that cannot be deemed to be complementing each other like the match of multiple pieces of the same puzzle. We can, thus, hardly talk of a system of accountability. They present rather a fragmented picture.[132]

With regard to the separate fragments, the existing mechanism of political accountability of Frontex presents a serious democratic deficit. Although the involvement of the EP has been strengthened since the creation of the agency, this concerns mainly the legislative process. In the operational field, where many important decisions are made, several gaps still remain, which are exemplified among others in the lack of access to the most important documents produced by the agency, such as operational plans and evaluation reports, and in the lack of enforcement power, which results in a weak parliamentary control. Moreover, there are aspects, such as the conclusion of working arrangements with third countries, that fall completely outside parliamentary scrutiny. At the national level, lack of awareness over the activities of Frontex renders control from national parliaments ineffective and practically non-existent.

With respect to social accountability, despite some improvements concerning the availability of documents in the Frontex website, much is kept from the public eye. Most importantly, the right to access to documents is not adequately applied, as a vast amount of requests are partly or wholly denied on the ground of exceptions in the name of public interest. Moreover, the impact of the Consultative Forum as it stands today is fairly limited. All in all, the veil of secrecy covering the specific activities of the agency, in particular its ongoing operations, does not facilitate proper scrutiny by civil society.

Professional accountability is meant as a soft form of accountability felt as pressure from professional peers to apply good practices in ones' line of work. This is understandably not the standard to aspire to concerning human rights protection. Notwithstanding, the participation of Frontex in such fora (e.g. AFIC) and subjection to the scrutiny of its peers is relatively poor.

Finally, the developments with respect to the administrative accountability of the agency, including proactive inputs, such as the FRO, are

132 Gkliati and Rosenfeldt 2018, p. 4.

the most promising. However, these progressive changes that have been implemented have failed to satisfy the minimum standards of accountability. The definition of accountability, given by Bovens and followed in this study (*accountability is a social mechanism, which is designed for bringing an actor before a forum in order to give account for decisions on how governance is being exercised, or in order to answer to charges, and finally suffer consequences in case of misconduct*[133]) involves questioning and scrutiny of the acts and decisions of an actor by a specific forum, which makes accountability 'fundamentally retrospective'[134] and necessarily involving an element of 'justification, judgement, and consequences'.[135] These elements are absent in the Codes of Conduct, the Fundamental Rights Strategy, as well as the other accountability mechanisms introduced with the 2011 amendment of the Frontex Regulation. Evidently, the monitoring of the FRO is a weak method of scrutiny, as the FRO has limited powers and impact upon the work of the agency. The crown jewel of administrative accountability, the individual complaints mechanism, fails to meet international standards of accessibility, institutional independence, and adequate capacity for evidence-based investigation, while it does not provide a suspensive effect in the context of joint expulsions. While the legislature and the agency itself have created a fertile ground for administrative accountability, the latter cannot be achieved as long as the monitoring mechanisms remain primarily internal, ineffective, and lacking enforcement.

The above assessment shows that the available non-legal forms of accountability are insufficient to ensure the accountability of the agency. Neither their combination nor the respective parts can constitute effective non-judicial remedy in the meaning of Article 13 ECHR, while their pre-emptive functionality is not deemed adequate to prevent violations successfully. Therefore, the need for legal accountability in the form of judicial remedies becomes all the more essential.[136]

Moreover, even if the assessment would have had a more positive outcome, it should be kept in mind that mechanisms, such as complaints bodies cannot substitute for criminal and other judicial remedies, especially when fundamental rights are at stake.[137] The legality of acts of the public

133 Bovens, Curtin and Hart 2010, p.: 34; Schedler 1997, p. 17; Haydon 1978, p. 55; Beetham and Lord 1998; Mulgan 2003, p. 8.

134 Bovens, Curtin, and 't Hart, 2010, p.: 38.

135 Bovens, Curtin, and 't Hart, 2010, p.: 38.

136 The terms 'legal remedy' and 'judicial remedy' are used interchangeably as the focus of legal accountability. They are differentiated from 'non-judicial remedies', such as administrative remedies, which, as shown above, may also constitute an effective remedy in the meaning of Article 13 ECHR.

137 Bovens notes that 'it remains an empirical question to what extent these groups and panels already are full accountability mechanisms because as we saw, the possibility of judgment and sanctioning often are lacking. Also, not all of these accountability relations involving clearly demarcated, coherent and authoritative forums that the actor reports to and could debate with.' Bovens 2006, p. 18.

authorities can only be guaranteed by effective access to judicial review.[138] Based on this logic, the CJEU only recognises legal remedies as the appropriate redress for fundamental rights infringements.[139] Other types of monitoring and redress can only be supplementary to judicial remedies.[140]

Non-legal forms have intrinsically their own deficiencies. The limitations of democratic accountability, for instance, in conducting a systematic and effective investigation, led by political agendas and conducted by non-expert politicians, have been noted by several commentators.[141] Thus, even a perfect system of non-judicial remedies could not replace the need for legal accountability due to the inherently different qualities of each system.

Non-legal accountability, on the one hand, is designed to primarily act pre-emptively and streamline the exercise of monitoring and control. This aims mainly to deterring the violation through applying soft pressure. The primary focus of legal accountability, on the other hand, is to remedy a violation that has taken place and discourage future violations. It does so, by acting retroactively and applying binding measures with stricter, concrete and enforceable consequences. Therefore, as both systems are valuable, one could never replace the other. Even a rigorous system of non-judicial remedies, should be supplemented with a system of effective legal accountability, which is the focus of the following section.

3.7 Legal accountability: From individualist to systemic accountability

Legal accountability, defined as the actor's subjection to substantive legal control,[142] is the last perspective from which the accountability of Frontex can be evaluated, and the main focus of the present study. Before we enter into the evaluation of the system of judicial remedies that constitute the base of the legal accountability of Frontex in Chapter VIII it is essential to question the form that this substantive legal control takes, or in other words, our shared understanding of legal accountability.

This section argues that the proper understanding of accountability for issues concerning EBCG operations should be that of *systemic accountability*, which I define as *accountability aiming at dealing with the systemic issues, which*

138 Peers and Costa 2012, p. 90; *Inuit Tapiriit Kanatami and Others v. Commission*; *Microban v. Commission*.

139 Article 47 Charter; CJEUre 17 January 2013, C-23/12, ECLI:EU:C:2013:24 *(Zakaria)*, par. 40.

140 Carrera and Stefan 2018, p. 27, citing Principle 33, para 4, United National General Assembly, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, A/RES/43/173, 76th plenary meeting, 9 December 1988.

141 Mulgan 2003 Mulgan 2003, p.p.: 60, 61; T. Schillemans, 'Does Horizontal Accountability Work? Evaluating Potential Remedies for the Accountability Deficit of Agencies', *Administration and Society* 2011, 43(4).

142 Bovens, Curtin, and 't Hart 2010, p.p.: 1-5.

underlie and cause or allow for consistent violations, via focusing on structural solutions.[143]

Systemic accountability is proposed as the preferred alternative to our traditional understanding of legal accountability as effective legal protection, which is named here *individualist accountability* and will be discussed in more detail, along with its limitations, in the following section. This choice is justified through legal theory using arguments based on justice and the rule of law inspired by liberal political philosophy. Finally, it is shown how *systemic accountability* complements the Nexus theory, as it fills the gaps left by the latter.

3.8 The traditional approach to accountability and its limitations

When assessing the legal framework on accountability regarding human rights violations, we are used to doing so on the basis of access to justice and effective legal protection, especially looking into the availability of an effective legal remedy. I refer to this approach as *individualist accountability*, i.e. *the traditional approach of answering for human rights violations on the level of the individual applicant with measures that redress the effects of the violation on him/her alone.*

This is the approach on which justiciability is based, especially with respect to civil and political rights. Looking into this approach, we can identify several features of *individualist accountability*. First of all, it puts emphasis on the specific victim(s) of the violation, the individual applicant or group of applicants that bring a case forward, while it is less interested in society as a whole. Second, it is targeted towards a particular incident that caused the harm in question. Third, it is largely designed to address the separate individual responsibilities of distinct actors. Fourth, it aims at a short-term effect that will take place upon the issuing of the judgment. Fifth, it is responsive in nature in the sense that it responds to the call of the victim that needs to take the initiative. Finally, it is a system of redress rather than a system of consequences more broadly, focusing on compensating the individual victim for the sustained damage.

143 It is important to make a terminological distinction, regarding the use of the terms 'systemic' and 'systematic'. According to Oxford dictionary, 'systematic' refers to something done or acting according to a fixed plan or system, and 'systemic' to something relating to a system, especially as opposed to a particular part. Accordingly, while there is reference in this study to 'systematic violations', the proposed accountability approach is named 'systemic'. Similarly, 'individualist accountability'should not be confused with 'individual responsibility'. 'Individual responsibility', as a well-established principle of international law, refers to the responsibility of each particular actor, whether this is a state or international organisation. It is contrasted in this study with 'collective responsibility'. 'Individualist accountability' does not refer to the accountability of an individual actor. It is rather accountability that concerns or benefits an individual rather than society as a whole. This is why 'individualist' is preferred to 'individual' to describe the traditional model of accountability. It is contrasted with 'systemic accountability'.

The type of redress for the individual applicant described above is certainly an essential part of accountability, and this approach may be successful in bringing justice to the individual applicant. Nevertheless, different additional distinctive features are necessary to address problems that are systemic in nature and affect a large number of people. This is especially so when multiple actors are responsible for the harmful result, engaging the *problem of many hands*.

If we were to apply individualist accountability in order to address violations that occurred during an EBCG operation, for instance, a push back, the route to be followed would be for the victim of the violation to come forward and bring a case against the host state before national courts. This would be the preferred course of action for the victim even though Frontex itself could bear responsibility for the violation as well. In particular, if damages were not awarded at the national level, the individual could bring the case before the ECtHR. Provided that the applicant would win the case, they would be awarded damages by the host member state.

In this case, even though the particular individual could benefit from effective legal protection (individualist accountability), the responsibility of the agency would never be examined. This is problematic for a number of reasons, that will be examined in the following section. Moreover, provided that the push back was not an isolated incident, but a repetitive violation, the individualist accountability approach has limited potential to address the systemic issues behind the violations and prevent similar violations in the future, as in an environment of integrated border management the influence of a single state is fairly limited.

The following section explains why the approach of individualist accountability can be of limited value and give reasons in favour of *systemic accountability*.

3.9 A Cue from Rawls' Theory of Justice and Court Practice

The term *systemic accountability* takes inspiration from John Rawls's theory of justice and the practice of the ECtHR. In this section, I use an argument in support of *systemic accountability* emanating from the political philosophy of John Rawls, as a representative example of the dominant liberal political theory. In particular, I use his theory of justice as fairness as a normative frame of reference.

Rawls speaks of justice in the context of his ideal constitutionalism, where responsibility for harm and restoring injustice is derived from our participation in a community under a commonly agreed-upon constitution. The obligations of responsibility, in this case, are due towards the community that exists under that constitution and take the form of legal liability implemented through a particular set of ideal just institutions.

The framework of the Rawlsian theory of justice, and in particular his theory of 'justice as fairness', are understood to be at the basis of the political, administrative and judicial structure of modern liberal democracies,

and as such has particular relevance for the present research.[144] According to Rawls, a particular approach to justice, i.e. justice as fairness, should constitute the foundation of the basic structure of society. This theory is based, according to Rawls, on the common understanding of our uncontroversial and intuitive assumptions about justice. He uses the thought experiment of 'the original position' to show that if all people were free from all awareness of the elements that make them individuals and separate them from the rest of the society (personal interests, capabilities, social position etc.), having, however, a basic understanding of a worth-living human life, they would reach an agreement on what is justice. Deciding as (theoretically) free and equal beings, based on rationality and self-interest, in this experiment, people would construct, according to Rawls, two Principles of Justice.[145]

The first principle of justice (liberty principle) reads:

'*Each person has an equal right to a fully adequate scheme of equal basic liberties compatible with a similar system of liberties for all'.*

The second principle of justice (difference principle) reads:

'*Social and economic inequalities are to be arranged so that they are both:*

(a) *To the greatest benefit of the least advantaged, consistent with the just savings principle, and*

(b) *Attached to the offices and positions open to all under conditions of fair equality of opportunity.*'[146]

Rawls's liberalist ideas, especially concerning the application of the two principles in relation to one another, and the higher position he attributes to civil and political rights vis-à-vis social and economic rights, are highly controversial. For the purpose of this study, it is not necessary to tackle

144 Rawls' theory of justice has attracted criticism that other philosophical and sociological theories attempt to address, such as political cosmopolitanism promoting global distributive justice and Young's social connection model of responsibility focusing on structural injustice. Acknowledging the limitations of liberal justice theories as well as the significant contributions of social justice models and the cosmopolitan perspectives on global justice, I limit here my analysis to Rawls' theory of 'justice as fairness', and consider the examination of alternative justice theories as a rich direction for further research. See for instance, I. M. Young, *Responsibility for Justice*, Oxford Scholarship Online, 2011; G. Brock, *Global Justice: A Cosmopolitan Account*, Oxford: Oxford University Press, 2009; C. Jones, *Global Justice: Defending Cosmopolitanism*, Oxford: Oxford University Press, 1999.

145 N. J. de Boer, 'Fundamental Rights and the EU Internal Market: Just how Fundamental are the EU Treaty Freedoms? A Normative Enquiry Based on John Rawls' Political Philosophy', *Utrecht Law Review*, Volume 9, Issue 1 (January) 2013, p.p.: 151-153.

146 Rawls himself has modified these principles. In Political Liberalism, they read as follows: 'Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme, the equal basic liberties, and only those liberties, are to be guaranteed their fair value. Social and economic inequalities are to satisfy two conditions: first, they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least advantaged members of society.' J. Rawls, *Political Liberalism*, New York, NY: Columbia University Press, 1993.

such questions. Limiting myself to the subject at hand, I only deal with the application of the first principle of justice, which is connected to civil rights, such as the ones that are under consideration in the case of migrants in an irregular situation: 'Each person has an equal right to a fully adequate scheme of equal basic liberties *compatible with a similar system of liberties for all*' (emphasis added).

On the basis of the liberty principle, each person's individual rights should be 'compatible with a similar system of liberties for all'. In other words, any particular liberty should fit into a 'theory of people's interests' and should be distributed in the spirit of a 'theory of equal concern for people's interests'.[147] Rawls meant this to be a critique against the utilitarian account of justice. According to Mill and other classic proponents of utilitarianism,[148] the ultimate purpose is the maximisation of net satisfaction, while in his liberty principle, Rawls imposes restrictions on how satisfaction can be achieved. In this sense, claims or interests that cannot fit within a theory of equal concern for the interests of the others are inadmissible.[149]

This approach indicates Rawls's position that the interests of the one are inextricably intertwined to the interests of the many, and a just society can only be achieved through a 'system of liberties for all'. It is this basic principle that forms the premise of a theory of *systemic accountability*.

In particular, *systemic accountability* aims to achieve a 'similar system of liberties for all'. It does not stop at guaranteeing a person's equal rights to a fully adequate scheme of equal basic liberties, as would the case be with individualist accountability. Instead, it goes further to produce structural solutions to systemic problems in society, which can bring broader societal changes. In other words, it aims to produce a similar system of liberties for all.

This perception of justice is also observed in the jurisprudence of the ECtHR. The first principle of justice translates in practice in the rulings of the ECtHR, in particular in the means the Court employs for the reparation of a violation: just satisfaction, individual and general measures.[150] Rawls speaks of a scheme of equal basic liberties for each person. These liberties can be ensured for the individual with the just satisfaction or individual measures of the ECtHR, that can take the form of measures concerning resi-

147 W. Kymlicka, *Contemporary Political Philosophy, An Introduction*, Second Edition, Oxford: Oxford University Press, 2002, p. 139.

148 Kymlicka 2002, p. 42.

149 Kymlicka 2002, p.p.: 42, 139.

150 In Scozzari and Giunta v. Italy, the Court read in Article 46 of the Convention the obligation of states to take individual and general measures to abide by the Court's judgment. ECtHR 13 July 2000, App. No. 39221/98, *(Scozzari and Giunta v Italy), par.* 249.

dence status, or reopening of judicial proceedings.[151] These measures are the manifestation of *individualist accountability*.

The second part of the first principle, however, 'compatible with a similar system of liberties for all' cannot be adequately satisfied with *individualist accountability*. It is in cases, where the Court finds consistent and systemic violations, that it orders general measures, in order to deal with the structural problems and prevent further violations. These general measures are going to be discussed further in the context of *systemic accountability* in Chapter VIII. Without the court ever referring to it, an idea of *systemic accountability* as it is conceptualised here, has found its way intuitively into its case law.

As a matter of fact, seeing the broader picture, Koskenniemi notes that '[f]ar from being merely an academic aspect of the legal craft, systemic thinking penetrates all legal reasoning, including the practice of law-application by judges and administrators.'[152]

Courts around the world, adopt similar approaches, inspired by a generally acceptable perception of justice. For instance, the Colombian Constitutional Court has developed the concept of 'unconstitutional state of affairs'. This describes a situation, where systematic and widespread violations of several constitutional rights that affect a significant number of people have occurred, while the violations of these rights cannot be attributed to only one state authority, but are due to structural deficiencies. The consequence of such a finding would be the request by the Court of the adoption of measures that would ensure the protection not only of those who submitted the claim, but of all individuals in the same circumstances. The Court has applied the concept of unconstitutional state of affairs, inter alia, in the case of internally displaced persons and with respect to individuals held in inhumane detention conditions.[153]

In light of the above, we can argue that *systemic accountability* applied in courts is necessary to achieve justice based on a system of liberties for all.

In other words, *individualist accountability* is no longer adequate to achieve justice when the (societal/human rights) problem is not an individual one but a societal one, being consistent and systemic, and affecting a large number of people. Systemic problems need to be dealt with in a structural manner, since a systemic response to violations would lead to

151 The Committee of Experts for the Improvement of Procedures for the Protection of Human Rights has developed an inventory of individual measures taken by the ECHR bodies. Committee of Experts for the Improvement of Procedures for the Protection of Human Rights (DH-PR), Committee of Ministers of the Council of Europe, 2006, www.coe.int/t/dghl/monitoring/execution/Source/Documents/Docs_a_propos/H-Exec(2006)2_IM_960_en.doc.

152 Koskenniemi, *Study on the Function and Scope of the lex specialis rule and the question of 'self-contained regimes'*, 2004, (ILC(LVI)/SG/FIL/CRD.1 and Add 1), par. 29.

153 M. Langford (ed.), *Social Rights Jurisprudence, Emerging Trends in International and Comparative Law*, Cambridge: Cambridge University Press 2008, p.p.: 148, 149.

a more effective achievement of the first principle of justice, ensuring the same level of satisfaction of these liberties for all members of society. In such cases, a *systemic accountability* approach is needed.

Applying the approach of *systemic accountability* to the case of push back occurring during Frontex-coordinated joint operations, although the affected individuals could have had their situation remedied by getting compensation from a claim brought against the host member state alone, thus achieving *individualist accountability* and the right of the person to a 'fully adequate scheme of equal basic liberties', the promise of *systemic accountability* would remain unfulfilled if all the public authority actors involved, including Frontex, would not bear their fair share of responsibility. It is only thus that structural changes and 'a similar system of liberties for all' can be achieved.

3.10 Systemic Accountability as Limitation of Coercive Power

Legal accountability in EBCG operations apart from justice and substantive human rights challenges also raises issues with respect to the rule of law. I now study this problem through the lens of the rule of law, arguing in favour of *systemic accountability*.[154]

The origins of the rule of law in western philosophy are to be found among the Greek philosophers, Aristotle, Plato, and the Athenian democrats. However, the concept developed at large into its modern form through the philosophical tradition, which was developed during the times of the Enlightenment and liberalism. In light of the early liberal thought, the rule of law is seen as effective limitation to state authority in defence of individual liberties. Emanating from the idea of reason, as opposed to the dominance of human desires and the imposition of the law of the fittest, and the idea of equality before the law, the purpose of the principle of the rule of law is to achieve coherence and avoid arbitrariness in the legal system.[155] It is considered among the foundations of today's liberal-democratic order.

Starting as a 'political ideal',[156] it evolved also through the jurisprudence of the CJEU[157] into a constitutional principle of EU law. The Union is 'founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights'.[158] Dworkin sees the rule of law as the element that binds together the 'seamless web' of the legal order.[159]

---

154 The connection between accountability and the rule of law has also been examined earlier under section 2.2.

155 Further on the conceptualisation of the rule of law in EU migration and asylum policy, Den Hertog 2014, p.p.: 40-85.

156 Den Hertog 2014, p. 40.

157 *Les Verts v Parliament*, par. 23.

158 Article 2 TEU.

159 R. Dworkin, *Taking Rights Seriously*, London: Duckworth 1978.

Different schools of thought attach different interpretations to the concept of the rule of law. Divided into two large categories, we can identify the thin version of the rule of law, which sees the rule of law as formal legality, meaning simply that 'the government should act through laws', and the thick version, where fundamental rights (or at least individual liberties) form part and parcel of the principle of the rule of law.[160]

Respect for fundamental rights and refugee law, as norms or pieces of legislation that effectively limit state authority, is an essential element of the rule of law, which cannot be contested even by proponents of the thin version theories and also fits in the positivist philosophical tradition.

Fundamental rights, including refugee protection, as constitutional principles also enshrined in international treaties, stand high up in the Kelsenian pyramid of norms,[161] while the EU Charter is, since 2009, the key instrument, against which the compliance of the actions of all the institutions, organs and agencies of the EU is to be measured. Also in a thin interpretation, the rule of law has a strong procedural character and requires that a complete system of remedies needs to be put in place with a view of achieving effective judicial protection for the individual.

Den Hertog has shown, through a thorough analysis of the Treaties and the case law of the CJEU, that in the EU, the concept of the rule of law has developed from a thin to a thick version, though not to the extent that the most expansive thick version theories would have hoped for. With respect to the understanding of the rule of law within the context of EU law, Den Hertog adopts the following definition: the rule of law can be understood as 'effective legal remedies to ensure the protection of human rights'. In EU law, fundamental rights were not explicitly part of the rule of law, but the two are 'inextricably linked'.[162]

Key components of the rule of law are also legal certainty and the honouring of legitimate expectations of individuals from public authority. Accountability and clear attribution of responsibility are necessary to achieve the above. Lack of accountability leaves a gap on the rule of law, as shown in the work of Montesquieu[163] and Dworkin,[164] in which the role of the judiciary is central, as an important safeguard for the rights of the individual against unlawful actions of public authority.

The rule of law is not merely concerned, though, with the observance of legal principles, such as human rights for each particular individual (individualist accountability). It is a concept that exists beyond the individual victim and refers to the legal order as such. The observation of the rule of law should characterise the EU legal order, irrespective of the fact that a

160 See further Den Hertog 2014, p.p.: 44-46.
161 H. Kelsen, *Pure Theory of Law*, Reine Rechtslehre 1934.
162 Den Hertog 2014, p. 55.
163 C. Montesquieu, The Spirit of Laws (Το Πνεύμα των Νόμων), P. Kondylis and K. Papagiorgis (translation), Gnosi editions, Athens, 2006.
164 Dworkin 1978.

human rights violation committed jointly by Frontex and a member state can be remedied solely by the member state without the involvement of the EU. Therefore, the underlying focus is that of the system as a whole, while all actors responsible for a violation need to be held accountable, in view of the rule of law.

In particular, Frontex, when it takes part in a violation, should also take part in remedying the situation if the rule of law is to be preserved within the EU legal order. Leaving the agency unaccountable, even though the violation could be remedied by the member state, would create a gap with respect to the rule of law at the EU level.

Such lack of accountability and the accompanying consequences would not allow for prevention of further wrongdoing by Frontex, while it would also affect legal certainly and the legitimate expectations that individuals could have regarding the conduct of the agency.

Use of force is an inherent component of EBCG border operations. Officers participating in operations are allowed to use force, including service weapons and ammunition (Article 55). Such use of force is legitimised as the exercise of political power. However, in a democratic society that operates on the basis of the rule of law, coercion should be used only as last resort[165] and within certain limits, among which respect for human rights. The accountability of those wielding power is the safeguard, put in place to ensure the enforcement of human rights, as limits to power. In this classic rule of law approach, which fits within both the thick and the thin version of the principle, it can be concluded that if the EU is to abide by the rule of law, a systemic approach on legal accountability, covering all actors involved in a violation, is necessary in order to protect individuals against the misuse of coercive powers. Reviewing EBCG operations, in particular, failing to attribute responsibility to all actors involved in the commission of a violation, including the agency, raises challenges with respect to adherence to the rule of law.

3.11 The identifying features of systemic accountability and its practical implementations

In light of the above, it has been argued that *individualist accountability* can lead to the desired outcome of remedying a violation for a particular individual, and can perhaps be reached through less complex, already established judicial avenues. These do not require original academic literature or newly introduced legal arguments that do not guarantee a positive outcome in courts. Nevertheless, other considerations of equal weight allow us to

165 Proportionality plays an important role. Force should be used as last resort especially in the case of extended use of force judged on the basis of the numbers of the affected individuals (e.g. detainees in Greece), but also on the basis of the seriousness of the stakes (possibility of infringement of human rights – even some of the most basic ones (life, torture)).

attach certain value to an approach of *systemic accountability*, seen as a form of accountability that addresses a structural problem. Instances of repetitive violations of a systematic nature that affect large numbers of people,[166] especially when multiple actors are responsible for the harmful result, require an approach with certain distinctive features that are different from those of *individualist accountability*.

The present thesis does not attempt to argue that systemic accountability is a completely new element that needs to be introduced in the legal framework for the first time. Elements of this approach are, of course, found in the way that courts adjudicate. Examples of that are found at the general measures of the ECtHR,[167] or the regime for reparations for victims of gross human rights violations.[168] Moreover, arguing for an approach of *systemic accountability* does not in any way negate the need for *individualist accountability* in the meaning of effective legal protection for the particular individual. In fact, *systemic accountability* encompasses *individualist accountability* and expands further to also address the structural problem behind the violation. The above analysis, based on liberal political theory, shows that the prioritisation of this model of accountability is not a radical proposition outside the existing paradigm in the field. It should, however, be coherently conseptualised and understood, and its features should be distinguished for it to be properly applied.

This section aims to present the particular features of *systemic accountability* with more clarity, along with the practical applications of this model.

We can distinguish the following elements of *systemic accountability*. Such an approach should firstly, be able to act to the benefit of a large number of people, present and future members of a loosely distinct group. Secondly, it should be meant to address not merely a particular violation, but the underlying systemic issues. Thirdly, its effects should be long-term. Fourthly, it should aim to hold accountable all actors responsible for the violation in a manner that reflects the nature of their responsibility (for example, joint responsibility). Fifthly, rather than depending on the initiative of the victim 2005 *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human*

166 Such repetitive violations of individual rights that is of a systematic nature that affect large numbers of people can be the result of a structural deficiency, for instance of the asylum system of a member state (e.g. ECtHR, MSS v Belgium and Greece), of established policy and common practice (e.g. ECtHR, Hirsi Jamaa v Italy) or of the legal framework that results in violations by design (CJEU, Case C-808/18, Judgment of the Court (Grand Chamber) of 17 December 2020, European Commission v Hungary). See M. Gkliati, *The next phase of the European Border and Coast Guard: Responsibility for returns and pushbacks in Hungary and Greece*, in 'Migration and EU Borders: Foundations, Policy Change, and Administrative Governance', Andrea Ott, Lilian Tsourdi and Zvezda Vankova (eds), European Papers (forthcoming).

167 Chapter IX, section 2.4.

168 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147 of 16 December 2005.

Rights Law and Serious Violations of International Humanitarian Law (responsive nature), there is a need for a proactive approach to attain accountability in its own right. Sixthly, it should lead to consequences in the case of misconduct. Finally, its aims should go beyond the redress of the violation for the given applicant, which is only part of this approach, and aim to achieve justice as a system of liberties for all and safeguard the rule of law.

In practice, *systemic accountability* should aim at examining the responsibility of all actors involved in a violation and ensuring that they are all answerable before courts. In the case of EBCG operations, although individuals are able to get compensation via a lawsuit against the host state, the responsibility of the other actors, especially Frontex should not be ignored. This relates to the responsibility of the multiple actors contributing to a violation. As will be shown in the following chapters, the model of *systemic accountability* would support the dual or multiple attribution of a wrongful act to more that one actors to generate their joint responsibility for a violation that is directly attributed to them. It would also highlight the need for other forms of shared responsibility when the contribution of an actor is indirect (e.g. aiding and assisting in a violation). In essense, it would support solutions of collective responsibility rather than linear relationships of individual responsibility.

Moreover, it provides fertile ground for strategic litigation or impact litigation, understood as putting forward a case that, apart from the interests of the individual applicant, also aims at creating broader changes in society. This can also move beyond legal standing as a requirement for accessing the court, and include public interest litigation to raise such rights-based claims that do not only affect isolated individuals but are of greater public concern. Undoubtedly, such impact litigation would not be limited to a remedying or responsive function (depending on the initiative of the victim), but would also be of a proactive and preemptive nature aiming at preventing similar future violations, and protecting not only a specific applicant, but generating effects also for other present and future victims. Such litigation would also aim at generating consequences for the actors responsible for the violation and long-term effects, capable of leading to structural changes. For instance, a successful action for failure to act could lead to the suspension of operations in case of systemic violations or the appropriate application of the agency's monitoring role in order to abide by its positive obligations.

Finally, as systemic problems require structural solutions, *systemic accou*ntability would have been incomplete without solutions outside courts. Even though the present study focuses primarily on legal accountability, structural solutions can only be achieved through a holistic approach that includes the non-judicial forms of accountability. Justice based on a system of liberties for all and the safeguarding of the rule of law needs to be founded in a system of effective checks and balances. Thus, systemic accountability should focus on developing an effective system of accountability mechanisms. The above assessment in section 3 has shown that this is missing in the case of Frontex. What we observe is rather a loose compi-

lation of accountability fora and mechanisms, which due to their gaps, cannot secure a sufficient standard of accountability in practice. Therefore, strengthening administrative, political, and social accountability, through enhancing the powers of the FRO and the CF, reinforcing parliamentary control over Frontex activities, and increasing transparency and external monitoring are necessary steps in the process of *systemic accountability*. These should work together in a complementary manner, so that they constitute together with the judicial avenues for accountability a coherent accountability framework that does not only remedy a given violation, but is able to lead to systemic solutions. Thus, in order to achieve *systemic accountability*, often political decisiveness, administrative changes, legislative amendments and changes in institutional practice and culture will be needed.

4 Conclusion

This chapter discusses accountability *as a social mechanism for answerability, i.e.* a *mechanism, which is designed for bringing an actor before a forum in order to give account for decisions on how governance is being exercised, or in order to answer to charges, and finally suffer consequences in case of misconduct*.

It further looks into the different types of non-legal accountability, identified as democratic or political, social, professional, and administrative. It applies those to Frontex in an effort to assess the effectiveness of the existing normative framework to hold the agency accountable. An elemental examination of these non-legal forms of accountability leads to the conclusion that the existing framework for non-legal accountability does not secure a sufficient measure of accountability. Neither their combination nor the separate fragments can constitute an effective non-judicial remedy in the meaning of Article 13 ECHR, while their pre-emptive functionality is not deemed adequate to prevent violations successfully. Therefore, legal accountability becomes all the more important.

Examining the normative framework within which the legal accountability of Frontex is found, this chapter identifies *individualist accountability*, understood as remedying the violation for a single individual, as the traditional and dominant paradigm of accountability and finds it inadequate for dealing with complex cooperative endeavours such as the EBCG. In this regard, it proposes the replacement of the dominant mono-actor paradigm on accountability, that allows for blame-shifting and accountability gaps, with the more holistic model of *systemic accountability*, defined as *accountability aiming at dealing with the systemic issues that underlie and cause or allow for consistent violations via focusing on structural solutions.*

It has been argued that such an approach is supported by judicial precedent while it would satisfy the requirements for the construction of a just society as understood by Rawls and the principle of the rule of law. *Systemic accountability* translates in concrete cases in starting legal proceed-

ings against all actors involved in a violation, including Frontex. In other words, although individuals can in case of a violation in the context of a joint operation, get the compensation they are entitled to by bringing a case against the host member state, the responsibility of the other actors, especially Frontex should not be ignored. Furthermore, such structural solutions should be streamlined through all different forms of accountability, including external monitoring, an independent individual complaints procedure, a clear legal basis, and transparency. It should finally, focus on strategic litigation, aiming at creating broader changes in society that address the structural deficiencies of the system.

This chapter follows a supranationalist approach to accountability, with the EU and its institutions as its focal point, as opposed an intergovernmentalist or regulatory regime approach that focus on the accountability of member states. From this point of view, *systemic accountability* is the natural choice, as it aims at systemic changes. Vice versa, a *systemic accountability* perspective justifies a supranationalist approach. The EU and its organs, belonging in the system's autonomous core, should be held accountable directly and in their own right.

Finally, the model of *systemic accountability* is complementary to the Nexus theory, as it fills the gaps left by the latter. While the Nexus theory puts forward joint and several liability as the interpretation of joint responsibility and thus solves the *problem of many hands*, it nevertheless, leaves an accountability gap, if applied in EBCG operations, as it fails to hold Frontex to account. *Systemic accountability* fills this gap, as it requires all possible responsible actors to be brought before a judicial forum, focusing on the accountability of the perpetrators rather than merely the compensation of the victim. This completes the picture, as it suggests that reparation can be claimed *from any* of the actors responsible (Nexus theory), but should come *from all* possible (*systemic accountability*).

The Nexus theory and *systemic accountability* need to be substantiated in practice through the examination of the normative framework on responsibility, as well as the legal remedies and judicial review procedures. The following chapters constitute the normative application of the framework developed here. Chapters VI and VII deal with the legal framework on responsibility and the application of the Nexus theory in EBCG operations, while Chapter VIII is dedicated to examining how *systemic accountability* translates in terms of legal remedies.