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Agencification, Fundamental Rights, and the Non-Delegation Doctrine: Frontex’s Mandate on Trafficking in Human Beings (THB)

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Abstract: This article presents findings from an ongoing study¹ examining Frontex's role in safeguarding human rights for undocumented migrants affected by return policies, as well as for actual and potential victims of trafficking in human beings (THB) who face precarious situations at the intersection of undocumented migration and trafficking dynamics.

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The Lisbon Treaty established the Area of Freedom, Security, and Justice (AFSJ), which has since seen a significantly expanded role for AFSJ decentralised agencies. Despite Member States' (MSs) reluctance to transfer further powers to EU institutions, these agencies have been tasked with supporting national authorities to close implementation gaps in EU border management and asylum policies.

Frontex now conducts substantial operational activities, deploys support teams within MSs' territories, and plays an oversight role. The Court of Justice of the European Union's (CJEU) non-delegation doctrine serves as a litmus test to legitimise Frontex's expanded competencies, ensuring that the Agency's extended powers align with constitutional safeguards.

In critically examining Frontex's adherence to and enforcement of fundamental rights, particularly in the identification and protection of THB's victims, we suggest that a human rights-led approach to THB not only fulfils legal obligations but also enhances law enforcement outcomes.

Effective identification of THB's survivors is essential to ensure individuals receive necessary protections, facilitating their recovery, integration, and safe voluntary return to their home countries with reduced risk of re-victimisation.

Through this analysis, we contribute to the ongoing debate on the Agency's legitimacy, operational accountability, and role

within the broader EU constitutional framework.

Keywords: fundamental rights; human trafficking; EU agencies; Frontex.

Introduction

The Lisbon Treaty, in Article 3(2) Treaty on the European Union (TEU), establishes that the European Union (EU) shall provide its citizens with an Area of Freedom, Security and Justice (AFSJ).

This area encompasses a broad spectrum of policy fields, including border management, asylum, migration, the recognition of judgments in civil and criminal matters, and police cooperation, as outlined in Article 67 Treaty on the Functioning of the European Union (TFEU).

These sensitive issues represent traditional state-centred competences closely tied to national sovereignty and individual rights, nonetheless, the EU holds shared competence in AFSJ matters (Article 4(2)(j) TFEU).

Furthermore, MSs are required to adopt necessary national laws to implement Union acts (Article 291(1) TFEU). Therefore, the quasi-federal EU polity today consists of a highly institutionalised legal system, anchored in judicial review and legal protection, supported by a framework of democratic

scrutiny and parliamentary oversight, primarily exercised through the European Parliament (EP), which operates with governance standards aimed at ensuring transparency and accountability in decision-making (Schimmelfennig, 2010; Bovens, Curtin, Hart, 2010; Hèritier and others, 2019). Yet, growing pressures like rising migratory challenges and cross-border criminality, coupled with normative criticisms of over-constitutionalization and crisis-driven decision-making, have disrupted constitutional patterns and fostered a politics of “necessity” and securitization (Moser, Rittberger, 2022).

Despite the evolution of the AFSJ illustrating MSs' reluctance to cede further power to EU institutions, these challenges have highlighted the need for a coordinated response, leading to the creation of several decentralised European agencies to assist national authorities in effectively implementing AFSJ policies (Fernandez-Rojo, 2021).

The AFSJ comprises a total of nine decentralised agencies, each possessing its own legal personality and specialised mandate which are: the European Border and Coast Guard Agency (Frontex), the European Agency for the Operational Management of Large-Scale IT Systems in the AFSJ (EU-LISA), the European Union Asylum Agency (EUAA), the European Institute for Gender Equality (EIGE), the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA),

the European Police College (Cepol), the European Police Office (Europol), the EU Agency for Fundamental Rights (FRA) and the European Union's Agency for Judicial Cooperation (Eurojust).

While some scholars express concern over the circumvention of constitutional standards due to executive governance and opaque, secretive decision-making (Rittberger, Goelz, 2018; Curtin, 2018; Cross, 2018), our inquiry seeks to contribute to the academic debate surrounding the increasing utilisation of AFSJ agencies by clarifying the Frontex's mandate to protect THB's victims. Our theoretical foundation rests on the assumption that human trafficking and people smuggling should be addressed through a human rights framework.

The AFSJ decentralised agencies have recently been strengthened in relation to MSs to address the implementation gaps in EU border management and asylum policies. Frontex now carries out significant operational activities, deploys support teams within MSs' territories, and plays a supervisory role. We raise critical questions about Frontex's application and enforcement of fundamental rights during its operations, especially in the identification and protection of THB's victims. Our contribution focuses, *ratione personarum*, on European Border and Coast Guard Agency (Frontex) and its in-house Fundamental Rights Office (FRO), and *ratione materiae* on their

role in the identification and protection of THB's survivors. The analysis reflects on the scope of the non-delegation doctrine established by the CJEU, which restricts the delegation of powers from EU institutions, such as the Commission and the Council, to decentralised EU agencies.

The doctrine's impact and implications on the expanding operational role of Frontex is considered. This theory works as a litmus test to understand the extent to which Frontex and its Fundamental Rights Office (FRO) act within their competence. Frontex's accountability to citizens and non-governmental organizations (NGOs) is continually challenged in this evolving landscape (Marin, 2024), prompting the strengthening and full resourcing of its in-house FRO.

Arguably, the Agency and its FRO should become the custodians of constitutional norms-contributing to the formation and reinforcement of principles such as fundamental rights and the rule of law through their policies and actions. A central assertion we make is that human rights-led responses to THB provide effective law enforcement outcomes.

Our discussion emphasises the need for effective mechanisms to ensure that both EU institutions and national authorities are held responsible for their actions and commitments, thereby fostering greater transparency and responsiveness in their efforts to combat human trafficking and protect victims' rights. Our

theoretical argument, - which posits that human trafficking and people smuggling should be approached through a human rights lens -, drives our critical analysis of the operational tasks associated with fundamental rights as delineated by the Agency's specific scope of action and degree of intervention on the ground. This is attributable to the fact that, within Frontex, the FRO has adopted a role that transcends mere adherence to existing human rights standards; it is actively involved in the formulation of mechanisms, guidelines, and internal checks designed to ensure the robust enforcement of these standards.

Our aim is to answer two questions: first, whether Frontex can be held accountable when MSs violate fundamental rights in border management operations; and second, whether the Agency would be permitted to protect THB survivors if no competent national authority intervenes, or if the actions taken by these authorities are deemed insufficient. This reflects the need to balance the roles of EU institutions and MSs, ensuring that agencies merely support or coordinate efforts without encroaching on responsibilities that should remain with national authorities.

Methodologically, our analysis of Frontex's operational tasks is grounded in empirical findings from an expert meeting held at Frontex's headquarters in Warsaw, Poland. This meeting provided valuable insights into Frontex's mandate concerning

the protection of victims of human trafficking and the extent to which this mandate aligns with the principles of the non-delegation doctrine.

This work is structured into five distinct sections. The first and last sections are devoted to the introduction and the conclusion. Section two analyses the development over the years of the “agencification” phenomenon within the AFSJ and the CJEU’s non-delegation doctrine. Section three builds on the section two by examining how Frontex’s role in the fundamental rights domain aligns with the principles of the non-delegation doctrine. Similarly, section four critically examines whether Frontex’s mandate in combating human trafficking complies with the same doctrine.

The “agencification” phenomenon in the Area of Freedom, Security, and Justice (AFSJ) and the CJEU non-delegation doctrine

The development of the Justice and Home Affairs (JHA) area can be traced back to the entry into force of the Maastricht Treaty, which marked a significant shift in the role of European institutions in matters related to justice and home affairs. The Lisbon Treaty significantly restructured the EU's institutional framework, elevating the Area of Freedom, Security, and Justice (AFSJ) to a central role.

Article 3(1) TEU outlines the EU's overarching goals, including peace promotion and citizen well-being, while Article 3(2) specifically addresses the AFSJ, emphasising the need for free movement within the EU alongside the respect for external borders and effective crime prevention. This shift from Article 2 TEU to Article 3 TEU highlights the AFSJ's increased importance in shaping EU policy and operational strategies.

With the Lisbon Treaty, the AFSJ was integrated into Title V of the TFEU, establishing a shared competence between the EU and MSs. Article 2(2) TFEU allows both the EU and MSs to legislate in this area, provided MSs do not conflict with EU law. This framework promotes coordinated approaches to justice and security while upholding the principle of subsidiarity, emphasising the AFSJ's vital role in the EU's governance structure. In terms of enhancing democracy and accountability within the AFSJ, the entry into force of the Lisbon Treaty has reinforced the application of the principle of direct effect in this domain (Craig, 2010).

Framework decisions have been abolished, and all legislative measures within the AFSJ are now adopted through regulations, directives, and decisions via the ordinary legislative procedure. This procedure entails

“the joint adoption of a regulation, directive, or decision by the European Parliament and the Council, based on a proposal from the Commission,”

thereby strengthening the democratic legitimacy of AFSJ governance². Nevertheless, since the entry into force of the Treaty of Amsterdam EU decentralised agencies have started to become key institutional players in assisting national authorities in implementing AFSJ policies and facilitating cooperation. Amendments were introduced to replace framework decisions and mitigate the intergovernmental approach, which had resulted in a democratic deficit. The European Commission highlighted that

“agencies have proved particularly relevant in the field of shared competences when the implementation of new policies at Community level needs close cooperation between Member States and the EU.”³

These agencies are now shaping the AFSJ, deepening European integration, and ensuring effective and uniform implementation of EU laws and policies at national and local levels.

Yet, the Lisbon Treaty did not fully resolve the so-called phenomenon of “agencification”, which relates to the creation of specialised EU agencies to handle specific tasks (De Búrca, 2005) The expression refers to new forms of governance which emerged as innovative governance structures transcending traditional law-making paradigms (Scott, Trubek, 2002; Crum, Curtin, 2015). Under the conventional model, the European Commission proposes legislation, which is then enacted by the Council and European Parliament, while the Court of Justice of

²Article 289 (1) TFEU.

³European Commission, European agencies – The way forward, COM(2008) 135 final, 11.03.2008, p. 5.

the EU review the legality of such legislation. In the context of new governance, it is increasingly acknowledged that this dichotomy is adopted in a more flexible and indeterminate manner to effectively address contemporary challenges and resolve unforeseen issues (Scott, Trubek, 2002).

In fact, the establishment of decentralised EU agencies aims to assist national authorities in effectively implementing AFSJ policies to overcome growing pressures, such as rising migratory challenges and cross-border criminality. However, due to their growing mandate under this governance model, agencies which were established to provide expert advice and information to European institutions, without possessing any direct law-making authority, (Majone, 1997; De Búrca, 2005) have emerged “as the recipients of discretionary powers, along with the authority to issue legally binding decisions” (Scholten, Van Rijsbergen, 2014).

Political accountability plays an important role in this domain as through its mechanism, the EU seeks to address the democratic deficit by ensuring that its institutions remain answerable to the public through the European Parliament (Harlow, 2002). Legal accountability is also essential, as the agencies’ growing power and evolving mandates have made their actions increasingly subject to judicial oversight, especially in the AFSJ. In fact, with the entry into force of the Treaty of Lisbon, the “acts of bodies,

offices or agencies of the Union producing legal effects vis a vis third parties”, became subject to legality review under Article 263 TFEU.

To ensure that the agencies are not given overly broad or discretionary powers, particularly in areas where they could make policy decisions, which are reserved for the EU legislative institutions, the CJEU has introduced the non-delegation doctrine which originated from the 1958 *Meroni* case⁴ and was further developed in the *Short-Selling* ruling⁵.

In *Meroni* (Harlow, 2002) the CJEU delineated the constitutional conditions under which the delegation of powers is permissible (Chamon, 2011). The *Meroni* ruling has influenced the legal framework for how powers can be delegated within the EU and that executive powers cannot be delegated to agencies, as such delegation is not sanctioned by the Treaties (Crum, Curtin, 2015).

Although *Meroni* did not explicitly address the delegation of powers to EU agencies, but rather to private law entities, and was made under the ECSC, both scholarly literature, EU institutions, and subsequent CJEU rulings have recognised that the decision established a legal constraint on conferring general rulemaking, enforcement, and adjudication competences upon

⁴CJEU, 9/56, *Meroni & Co., Industrie Metallurgische S.p.A. v. High Authority*, 13 June 1958, ECLI:EU:C:1958:7, I-00133.

⁵CJEU, C-270/12, *United Kingdom v. Parliament and Council*, 22 January 2014, ECLI:EU:C:2014:18, published in the electronic reports of the cases.

EU decentralised agencies (Fernandez-Rojo, 2021).

According to *Meroni*, EU agencies cannot be granted discretionary powers that involve making policy choices. Delegated powers must be specific, clearly defined, and limited in scope to prevent agencies from making decisions that should be made by EU lawmakers (e.g., the Parliament and the Council). Twenty years after *Meroni*, the CJEU in *Romano*⁶ further refined the limitations set out in the earlier *Meroni* decision. *Romano*, which was decided under the EEC Treaty, reinforced the principle that only the institutions established by the Treaties can exercise decision-making powers.

The Court held that delegating decision-making authority to bodies outside the institutional framework of the EU was unlawful under the Treaties. This ruling emphasised that such bodies could offer advice or make non-binding recommendations, but they cannot adopt legally binding decisions that directly affect individuals.

Romano placed restrictions on the scope of the agencies' powers and clarified that EU agencies could not be delegated powers that are reserved for the EU institutions, such as legislative or executive decision-making authority, without an explicit Treaty basis.

Both *Meroni* and *Romano* established a legal framework that

⁶CJEU, Case 98/80, Giuseppe Romano v. Institut national d'assurance maladie-invalidité, ECLI:EU:C:1981:104, I-01241.

sought to prevent the delegation of core decision-making functions to external bodies unless explicitly allowed by the Treaties and thus only clearly defined executive powers subject to strict supervision could be delegated (Fernandez-Rojo, 2021). This was intended to preserve the principle of institutional balance and accountability within the EU legal system (Türk, 1996).

Consequently the delegation of open, discretionary, or normative functions to agencies is prohibited, as it would compromise the institutional balance established by EU law (Fernandez-Rojo, 2021).

Nevertheless, the CJEU's non-delegation doctrine has undergone significant modulation over the years. The expanding powers of EU agencies have not only placed considerable strain on the original *Meroni* requirements but have also prompted the Court to adopt a more lenient interpretation. (Jacque, 2004; Curtin, 2005; Chiti, 2009).

More recently, the Short-Selling ruling⁷ has reaffirmed the relevance of the *Meroni* and *Romano* doctrine, clarifying the extent to which powers may be constitutionally delegated to EU agencies. It has provided valuable insights into the constitutionality of EU agencies and clarified the extent to which these bodies may assist EU institutions and MSs in policy

⁷CJEU, C-270/12, *United Kingdom v. Parliament and Council*, 22 January 2014, op. cit.

implementation and decision-making.

The Court was tasked with determining whether the broad regulatory and supervisory competences delegated to the European Securities and Markets Authority (ESMA) complied with the long-standing *Meroni* doctrine. For the first time, the CJEU explicitly evaluated the legality of delegating powers to EU agencies, i.e. the trend of “agencification”.

The UK government challenged Article 28 of the ESMA Regulation, claiming that the Agency's power to ban short-selling was too broad and violated the *Meroni* and *Romano* doctrines, as well as Articles 290 and 291 TFEU. Despite the lack of explicit legal provisions in the Treaties, the CJEU rejected these claims, stating that the delegation of powers to ESMA was lawful, due to specific conditions that limit its authority.

The Court noted that unlike the *Meroni* case, which involved private entities with wide discretion, ESMA is an EU body with defined and reviewable powers. The CJEU opted not to focus on Articles 290 and 291 TFEU but instead established a “parallel delegation system”, suggesting that the possibility of delegating powers to EU agencies is implicit in Articles 263, 265, and 267 TFEU (Bergström, 2015).

Thus, the *Short-Selling* judgment reflects a contemporary interpretation of the non-delegation doctrine in the post-Lisbon

context, allowing significant delegation of legally binding and general powers to EU agencies, as long as their exercise is well-defined, limited by specific conditions, and subject to judicial review. The core tenet of the *Meroni* doctrine—prohibiting the delegation of wide discretionary powers that involve policy choices—remains intact. However, the conditions for delegation established by *Meroni* have been considerably relaxed, raising questions about future adaptations to accommodate the growing competencies of EU decentralised agencies.

The powers delegated to agencies must be amenable to judicial review, ensuring accountability. This means agencies' actions should be subject to legal scrutiny to ensure they are operating within the bounds of the law. The underlying rationale of the *Meroni* doctrine have been preserved by “a less rigid set of criteria” given the legal accountability guaranteed by Article 263 TFEU (Griller, Orator, 2010).

This governance shift signifies a transformative evolution in the European Union's approach to governance, wherein agencies assume a pivotal role in facilitating legislative processes while preserving a clear delineation from formal law-making functions. This development highlights the complexities of contemporary governance, enabling agencies to contribute to policy formulation and implementation within the constraints of the non-delegation theory whose aim is the respect of legislative

bodies' traditional prerogatives. In this context, agencies serve as essential intermediaries, bridging the gap between the political and administrative dimensions of EU governance, enhancing the overall effectiveness and enforcing constitutional norms (Majone, 1997).

Upholding the non-delegation doctrine in examining Frontex's Operational Role on fundamental rights

The key question this section seeks to address is whether the expanded operational responsibilities and cooperation of Frontex and its Fundamental Rights Office (FRO) are as constrained and conditional as the powers of the European Securities and Markets Authority (ESMA), detailed in *Short-Selling* when applying the *Meroni* doctrine to EU agencies.

According to Article 28(2) of Regulation 236/2012, ESMA's actions are subsidiary; it can only take measures if no competent national authority has intervened, or if the actions taken by these authorities are deemed insufficient. Moreover, Article 28(3) requires ESMA to consider how significantly its measures address threats to the orderly functioning of financial markets and improve the capacity of national authorities to monitor these threats.

Similarly, we question whether Frontex's expanded roles in managing complex migration and border security issues is in

line with the non-delegation doctrine, which serves to maintain the balance between EU institutions and MSs, ensuring that agencies only support or coordinate actions without taking over responsibilities that should remain with national authorities or EU institutions. The exponential growth and empowerment of EU agencies in general, and Frontex in particular, have significantly challenged the *Meroni* doctrine.

The establishment of Frontex was justified on the legal basis provided by Article 77(2)(d) TFEU. Although this Article does not explicitly mention the creation of an agency, it confers the EU the mandate to develop

“any measure necessary for the gradual establishment of an integrated management system of the external borders”.

This provision underscores the legal rationale for Frontex's creation, as it emphasises the need for coordinated efforts to manage external border security. Through secondary legislation, Frontex's mandate has been reinforced.

The Agency now conducts significant operational activities, deploys support teams within MSs, and assumes a supervisory role. In fact, Article 10 Regulation 2019/1896 states that Frontex's tasks are no longer limited to operationally supporting and coordinating the competent national authorities' implementation responsibilities. However, paragraph 24 of Regulation 2019/1896's preamble captures a critical principle of governance, stating that

“the extended tasks and competence of the Agency should be balanced with strengthened fundamental rights safeguards and increased accountability and liability, in particular in terms of the exercise of executive powers by the statutory staff”.

This balance is vital for maintaining public trust and ensuring that the rights of all individuals are respected, particularly those who are most vulnerable and ensuring that any exercise of power is legitimate and justifiable. The expanding tasks of Frontex should be accompanied by strengthened safeguards for fundamental rights, along with enhanced accountability, liability and administrative arrangements that develop constitutional norms through its policies and actions. This could be viewed as an example of administrative constitutionalism; however, a detailed analysis lies beyond the scope of this contribution (Metzger, 2013; Cohn, 2016; Lindseth, 2021).

A concise overview of the Agency’s functions and historical evolution will provide essential context for examining whether its expansion and empowerment remain consistent with the *Meroni* doctrine and stay within the boundaries of Paragraph 24 of Regulation 2019/1896. The European Border and Coast Guard Agency (Frontex) was established in 2004, and originally named European Agency for the Management of Operational Cooperation at the External Borders. Its aim was to

“facilitate and render more effective (...) the management of external borders”⁸.

⁸Article 1 (2) Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. OJ L349/1,

Since the start of its operations in 2005, Frontex has faced significant criticism from both the civil society organisations and human rights activists regarding its record on fundamental rights (Fischer-Lescano, Tohidipur, Löhr, 2009; Papastavridis, 2010; Loschi, Slominski, 2022). Frontex's founding Regulation (Regulation 2007/2004) included only a single, vague reference to fundamental rights⁹.

The establishment of Frontex did not transfer responsibility for managing external borders from MSs to the Agency. Instead, it aimed to enhance the integrated management of external borders, which remains the main responsibility of the MSs¹⁰.

The legal basis for Regulation 2007/2004 were Maastricht Treaty's Articles 62(a) - which addressed adopting measures for crossing MSs' external borders, particularly standards and procedures for checks on persons - and 66 - which called for the Council to adopt measures for cooperation between MSs' and the Commission.

Regulation 2007/2004 developed provisions of the Schengen *Acquis*, which abolished checks at internal borders and established a single external border¹¹.

25/11/2004.

⁹Regulation (EC) 2007/2004 of the European Council of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, recital 22.

¹⁰Article 1(1) Council Regulation (EC) No 2007/2004.

¹¹Art 17 et seq. of The Schengen *acquis* as referred to in Article 1(2) of Council Decision 1999/435/EC of 20 May 1999. L239, 22/09/2000.

Changes were introduced in 2011 following the entry into force of the Lisbon Treaty. Regulation 1168/2011 amended the founding Frontex Regulation, enhancing the Agency's capabilities in several critical areas: over joint operations, technical equipment, risk analysis, and research and development¹².

It established the Fundamental Rights Officer (FROer) alongside a Consultative Forum, an advisory body on Fundamental Rights, which was adopted in September 2012, by Frontex Management Board, as working methods. The Consultative forum started its activities in 2013¹³ by advising the Executive Director and the Management Board on fundamental rights issues¹⁴.

It consists of a wide range of stakeholders from various sectors, including the UN Refugee Agency (UNHCR) and the Council of Europe (CoE), European Union Agency for Fundamental Rights (FRA) and the European Asylum Support Office (EASO), Civil Society Organizations such as Amnesty International, the International Commission of Jurists (ICJ), and the Red Cross and Representatives from national human rights bodies. The

¹²Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. OJ L. 304/1, 22/11/2011.

¹³Frontex, 'Management Board decision No. 18/2012' on the working methods of the Frontex Consultative Forum and the modalities of the transmission of information to the Frontex Consultative Forum (26 September 2012) www.frontex.europa.eu

¹⁴Arts 26 (a)(2) and 26 (a)(3) of the Regulation 1168/2011 op. cit.

forum was tasked with developing and implementing the Code of Conduct for all participants in its operational activities, outlining the obligations of officials involved in Frontex operations¹⁵, and the Fundamental Rights Strategy (FRS)¹⁶.

These measures marked a significant step forward in the Agency's human rights framework and were introduced because of persistent advocacy by human rights-focused actors, who consistently reminded EU institutions and governments that compliance with international law during border control operations is essential for Frontex's legitimacy (Slominski, 2013).

Regulation 2016/1624 repealed 2007/2004 Regulation and renamed the Agency as European Border and Coast Guard (Frontex)¹⁷. Frontex was tasked with further enhancing its supervisory and operational functions to ensure the effective implementation of European integrated border management¹⁸. The 2016 Regulation elevated the status of the Consultative Forum by incorporating it into the “administrative and management structure of the Agency”.

¹⁵Frontex, Code of Conduct: For all Persons Participating in Frontex Operational Activities (21 March 2011) www.frontex.europa.eu

¹⁶Frontex, ‘Fundamental Rights Strategy’ (31 March 2011) www.gdr-elsj.eu.

¹⁷Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC. OJ 251/1, 16/09/2016.

¹⁸Paragraph 5 of Regulation (EU) 1624/2016.

Regulation 2016/1624 strengthened Frontex's operational autonomy to reduce its reliance on resources and personnel from MSs.

In 2019, Regulation 2016/1624 was amended by Regulation 2019/1896, to give new extended powers to ensure a high level of safeguard of internal borders¹⁹, but emphasis was placed on fundamental rights. Article 1 stresses that the management of external borders must fully respect

“fundamental rights while increasing the efficiency of the Union return policy”²⁰.

The fundamental rights mandate and capabilities of the Agency were significantly expanded. These changes were supported by both legislative and practical efforts to ensure full compliance with fundamental rights across all Frontex activities, which included the Fundamental Rights Officer—alongside a Consultative Forum on Fundamental Rights. However, Article 99 of 2019 Regulation clarified that the Forum is not part of Frontex’s administrative and management structure and serves only as an advisory body.

The Agency is now authorised to issue implementing measures and intervene in MSs whose actions or omissions jeopardise the Schengen area. Paragraph 57 of the 2019 Regulation’s preamble states that when external border control is so ineffective that it

¹⁹Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 1624/2016. OJ L295/1, 14/11/2019.

²⁰Article 1 Regulation (EU) 2019/1896.

risks compromising the Schengen area, and a Member State either fails to act on a vulnerability assessment or does not request or implement sufficient support from the Agency, a coordinated, swift response at the EU level is needed.

To mitigate these risks and enhance Union-level coordination, the Commission should propose to the Council a decision outlining the measures the Agency must implement, requiring cooperation from the Member State. Given the sensitive nature of these measures, which may impact national powers, the Council should have the authority to adopt the decision.

The Agency will then create an operational plan with the Member State, which should support the decision and plan's implementation. There are two considerations. The first is that the Agency's practical ability to intervene is uncertain, especially if a Member State strongly resists assistance within its sovereign territory. Due to the sensitivity of this enhanced operational power, Regulation 2019/1896 outlines the Agency's right to intervene in a deliberately vague manner, balancing the need for effective border management with MSs' reluctance to cede sovereignty (Fernandez-Rojo, 2021). The second consideration is that the Agency's discretion is constrained by the Council's decision, which means that the mandate granted to the Agency is limited rather than broad, aligning it with the principles of the non-delegation doctrine.

By contrast, Article 55 (7) of Regulation 2019/1896 grants the Agency's staff executive powers, such as verifying migrants' identities, approving or denying entry, issuing visas, and conducting border patrols. While these powers support a more integrated administration of the EU's external borders, they also involve significant discretion, raising concerns about the doctrine of non-delegation, considering that the Treaties' provisions assign ultimate responsibility for internal security to MSs²¹. However, if these executive tasks are balanced with

“strengthened fundamental rights, safeguards, and increased accountability and liability”
(as stated in Paragraph 24 of the preamble to Regulation 2019/1896), they would comply with the doctrine of non-delegation.

The present Frontex's system for protecting and monitoring fundamental rights is built on several key components. Firstly, the Fundamental Rights Officer (FROer) and a team of monitors play a crucial role in assessing Frontex's compliance with fundamental rights, including during return operations. They provide guidance and support, while promoting human rights within the framework of European integrated border management. The Fundamental Rights Officer (FROer) was first designated in Regulation 1168/2011 which established that Frontex should appoint a FROer. The officer was hired on 27

²¹Ibidem.

September 2012.

Regulation 2019/1896 in Article 109 (1) emphasises that the appointment of the independent FROer should be a task of the management board and that the officer should report and contribute to monitoring fundamental rights. The FROer's mandate has been reinforced by Article 80 of Regulation 2019/1896 which states that

“the Agency, with the contribution of and subject to the endorsement by the fundamental rights officer, shall draw up, implement and further develop a fundamental rights strategy and action plan, including an effective mechanism for monitoring respect for fundamental rights in all the activities of the Agency”²².

Today, the Fundamental Right Office is an independent body with a staff of sixty-five, no longer limited to a single individual. It serves as an in-house monitoring office, overseeing and investigating all activities involving Frontex. The FRO's independence has been criticised as the Fundamental Rights Officer is appointed by the Management Board of the Agency (Tas, 2022). However, the FROer is recruited by the Management Board not by the Executive Director and the sixty-five members present different backgrounds coming from NGOs, academia, police force, Ministries, etc.²³

²²Article 80 Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624. OJ L295/1, 14/11/2019.

²³Expert meeting between the authors of the present contribution and the FRO staff, 6th March 2024, Frontex headquarter, Warsaw, Poland.

The FRO is mandated to operate independently, acting autonomously without taking any instructions from MSs²⁴; this independence ensures that it can uphold and monitor fundamental rights obligations impartially, reinforcing Frontex's accountability to EU legal standards rather than national interests. It is the task of the Management Board to ensure that the FROer exercises full independence in their role, particularly in monitoring the Agency's compliance with fundamental rights and fostering a culture of respect for these rights within the Agency²⁵.

The Management Board is required to act upon the recommendations outlined in the FRO's report, which is based on the monitors' findings²⁶.

Certainly, the FRO's independence could be jeopardised by lack of resources and reluctance of MSs to cooperate with the office. The importance of the FRO has been highlighted by the Ombudsman which stated that

“the presence of an FRO representative in the European Surveillance Room is of particular importance in the context of maritime emergencies detected in

²⁴Article 1(1 and 2) of the Management Board Decision 6/2021 of 20 January 2021 adopting special rules to guarantee the independence of the Fundamental Rights Officer and his or her staff. Reg. No. 116. https://www.frontex.europa.eu/assets/Key_Documents/MB_Decision/2021/MB_Decision_6_2021_adopting_special_rules_to_guarantee_the_independence_of_the_FRO_and_his_or_her_staff.pdf accessed on 1/11/2024.

²⁵Art 1(3).

²⁶Frontex European Border and Coast Guard Agency 2022 in brief, p. 26. https://www.frontex.europa.eu/assets/Publications/General/In_Brief_2022/2022_in_brief.pdf, accessed on 01/11/2024.

the context of Frontex's surveillance"²⁷.

FRO's mandate as explained by the current Fundamental Rights Officer is

"basically looking at what Frontex is doing and to some extent at the interface with the Member States. When I move too far into the Member States, there's a lot of reluctance from the Member States, because typically the Agency is just providing support to the Member States. It would be very attractive if we were the FBI and just came in and solve all the problems and could investigate everything. That's of course not how it works"²⁸.

Therefore the FRO tasks include the following activities: (1) providing advice on fundamental rights issues within Frontex activities; (2) maintaining and managing a record of possible fundamental rights incidents in the course of Frontex operations; (3) overseeing the operational activities of the Agency; (4) monitoring and analysing the implementation of a Fundamental Rights Strategy; (5) observing operations while they are taking place; (6) participating in internal Frontex discussions; (7) accessing all relevant documents, incident reports and individual complaints to prevent and react adequately to fundamental rights violations; (8) handling complaints received by the Agency in accordance with the right to good administration.

Secondly, the Fundamental Rights Strategy serves as a foundational framework, aligning its activities with fundamental rights, outlining the Agency's obligations under EU and

²⁷Decision on how the European Border and Coast Guard Agency (Frontex) complies with its fundamental rights obligations with regard to search and rescue in the context of its maritime surveillance activities, in particular the Adriana shipwreck (OI/3/2023/MHZ)", 25/02/2024, para. 91.

²⁸Expert meeting between the authors of the present contribution and the FRO staff, 6th March 2024, Frontex headquarter, Warsaw, Poland, Participant 1.

international law and detailing how fundamental rights should be integrated into border management operations. In February 2021, Frontex adopted an updated and more detailed Fundamental Rights Strategy, which replaced the 2011 version²⁹.

Thirdly, the Strategy is operationalised through an Action Plan, which offers practical safeguards for ensuring the protection of fundamental rights in all aspects of Frontex's work, from risk analysis and search and rescue operations to cooperation with third countries.

Fourthly, to handle potential violations, Frontex employs a Serious Incident Report (SIR) procedure. This mechanism requires immediate reporting of any situation that may involve breaches of fundamental rights, EU law, or the Agency's Codes of Conduct. The Fundamental Rights Officer and their team manage these reports, ensuring that all incidents are properly addressed.

Moreover, Frontex has a complaints mechanism that allows individuals who believe their fundamental rights have been violated by the Agency's staff to submit complaints for review. Additionally, although highly criticised for not providing a "viable alternative to sound political and legal accountability" (Loschi, Slominski, 2022), the Consultative Forum on

²⁹Frontex, 'Fundamental Rights Strategy' (14 February 2021), www.frontex.europa.eu

Fundamental Rights still offers independent advice to ensure Frontex respects and promotes fundamental rights in all of its operations. Finally, the Agency has implemented a supervisory mechanism on the use of force. This framework monitors the application of force by Frontex staff, ensuring compliance with legal standards and requiring reporting of any incidents involving the use of force by the standing corps.

These safeguards are designed to ensure that the Agency operates within its “support” competence, without assuming responsibilities that should remain with national authorities or EU institutions.

Frontex’s mandate in combating human trafficking and the non-delegation doctrine

This section examines whether combating human trafficking is part of Frontex’s core mandate and aligns with the non-delegation doctrine, which limits the Agency's role to support and coordination, leaving primary responsibilities to national authorities or EU institutions. Paragraph 20 of Regulation 2019/1896’s preamble highlights that the implementation of the Regulation does not alter the division of competence between the EU and Member States or their obligations under various international treaties. It notably omits references to the UNCTOC Protocol on Trafficking in Human Beings³⁰, the

³⁰Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially

Council of Europe Convention on Trafficking in Human Beings³¹, and the EU Trafficking Directive 2011/36/EU³². This absence raises questions about the integration of human trafficking considerations within the broader framework of international obligations listed in the regulation.

Indeed, the UNCTOC Protocol in Article 2(b) states that THB victims should be protected “with the full respect for their human rights”. Paragraph 7 of EU Trafficking Directive’s preamble emphasises that the Directive adopts a “human rights approach to the fight against trafficking in human beings” and paragraph 1 of the amending Directive 2024/1712’s preamble states that THB is

“a gross violation of fundamental rights and is explicitly prohibited by the Charter of Fundamental Rights of the European Union”.

However, the Trafficking Directive and the Recast one are addressed to the Member States and not to EU Agencies.

In 2021, the EU Commission launched the EU Strategy to fight against THB for the years 2021-2025³³, which underscored that

Women and Children (known as the Palermo Protocol), supplementing the United Nations Convention against Transnational Organized Crime United Nations, Treaty Series, vol. 2237, p. 319; Doc. A/55/383.

³¹Council of Europe, Council of Europe Convention on Action Against Trafficking in Human Beings, CETS 197, 16 May 2005.

³²Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L. 101/1-101/11; 15.4.2011, 2011/36/EU, 15 April 2011. Recast Directive 2024/1712/EU of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, OJ L. L, 24.6.2024.

³³Communication from the Commission to the European Parliament, the

effectively combating THB necessitates a comprehensive approach that encompasses prevention, protection, prosecution, and conviction of traffickers³⁴.

To achieve this objective and support MSs, the Commission articulated the necessity of establishing a European referral cooperation mechanism, facilitated by EU Agencies that collectively endorsed a joint statement in 2018, committing to collaborative efforts in the fight against trafficking in human beings³⁵.

European agencies cooperating with EU MSs should be well-equipped with ad hoc human rights offices and clear mandates, when they identify undocumented migrants and have the suspicion that they could be actual or potential THB's victims³⁶. Given the European Commission's emphasis on human trafficking as "a grave violation of human rights"³⁷, early identification is crucial to assist and shelter survivors.

Yet, the analysis of the Regulation 2019/1896 seems conclusive in determining that Frontex and its FRO have only support and coordination competence and not shared competence with national authorities, in detecting and protecting THB victims

Council, the European Economic and Social Committee and the Committee of the Regions on the EU Strategy on Combatting Trafficking in Human Beings. COM (2021) 171 final, 14/04/2021.

³⁴Ibidem, p. 2.

³⁵Ibidem, p. 14.

³⁶Ibidem, p. 13.

³⁷Ibidem, p. 12.

during their border's activities. Article 3(1)(a) of Regulation 2019/1896 states that the European integrated border management includes, amongst others, "measures" to prevent crimes such as migrant smuggling and human trafficking. It specifies that border controls should include mechanisms and procedures for identifying vulnerable individuals and unaccompanied minors, as well as those in need of international protection or seeking to apply for it. These measures also encompass providing information to such persons and ensuring appropriate referrals³⁸.

Moreover, Article 4 states that in carrying out their activities, Frontex shall respect the principle of non-refoulment and in para 4 affirms that

"the participating units shall address (...) victims of trafficking in human beings (...) persons in need of international protection and other persons in a particularly vulnerable situation".

All operational plans for joint operations supported by Frontex include provisions related to the referral of vulnerable persons. Disembarkation marks a critical juncture where potential victims of human trafficking must be identified and safeguarded from exploitation by traffickers. Failing to differentiate between potential victims and criminals during this process could leave individuals vulnerable to trafficking or trapped in exploitative situations with no means of escape³⁹.

³⁸Article 3(1)(a) of Regulation 1896/2019.

³⁹Expert meeting between the authors of the present contribution and the FRO staff, 6th March 2024, Frontex headquarter, Warsaw, Poland, Participant 2.

The identification of actual and potential victims of human trafficking is within the scope of Regulation 2019/1896. However, it is clear from other provisions that Frontex's competence is to support MSs. For example, Article 10(q) of the Regulation clearly establishes a support role without explicitly referencing "human trafficking".

This Article directs Frontex to cooperate with Europol and Eurojust within their respective mandates, supporting MSs in situations requiring heightened technical and operational assistance at external borders, particularly in the fight against cross-border crime and terrorism. Similarly, paragraph 5 of the Regulation's preamble reinforces Frontex's mandate

"to effectively support Member States on the ground in their efforts to protect external borders, combat cross-border crime, and significantly enhance the effective and sustainable return of irregular migrant".

Moreover, Paragraph 40 of the Regulation's preamble specifies that Frontex should conduct risk analyses based on an integrated model, built on information from MSs to assess trends, routes, and volumes related to border control and associated threats. This includes unauthorised movements of third-country nationals, cross-border crime, and trafficking in human beings. In this paragraph, there is an explicit mention of "human trafficking" in the identification of risks to enable MSs to take necessary measures to improve external border management, as part of a unified European response to border-related threats.

By contrast, paragraph 41 emphasises Frontex's role in

preventing and detecting cross-border crime, specifically listing “human trafficking” as an example. Nevertheless, its mandate in this paragraph is qualified by the language, stating that Frontex may act only

“where it is appropriate for it to act and where it has obtained relevant information through its activities [at the external borders]”.

This limitation suggests that Frontex’s contribution in “preventing and detecting human trafficking” is contingent upon the relevance and availability of information directly related to its border activities. Moreover, this paragraph mandates Frontex to

“coordinate its activities with Europol, which is the Agency responsible for supporting and strengthening Member States' actions and their cooperation in preventing and combating serious crime affecting two or more Member States”.

The reading of this paragraph appears to confer on Frontex some preventive and detective functions in relation to human trafficking, owing to its cross-border nature. Hence, the prevention and identification of THB victims is within the competence of Frontex, within the limitation highlighted in paragraph 40. This suggests that the 'parallel delegation system,' established in the *Short-Selling* judgment, applies to Frontex's delegation of competence, as the exercise of these powers seems to be clearly defined, restricted by specific conditions, and open to judicial review. To reinforce this assumption, FRO staff have clarified that their role is limited to reporting a victim to national authorities, without the Agency’s involvement in the referral

mechanism, which remains the responsibility of those authorities. As a result, the consequences of non-referral are often overlooked by the FRO as here stated by a FRO monitor:

“If we have identified that a person possesses some indicators (potential personal vulnerabilities to be a THB victims) that the officer did not see, we refer the person to the team leader who should refer them to their own authority. How can we check that the referral was made? Well now we have access to activities and documents (...) If the officer has referred three people, we can check the final report of the screening activities and if there is only one referral, there is something missing. It is likely that the team leader did not refer the other two people because he considered that they were not victims. However, it is not always possible. Sometimes the referral is just done orally. We are emphasising the importance to put the referral in writing into the report. In this way we will ensure accountability and will ensure that we can check whether the referral happens or not, because we cannot always be on the spot. These are the actions we can take as part of the process, which is very limited”⁴⁰.

Moreover, Article 37(4) of Regulation 2019/1896 specifies that joint operations or rapid border interventions which aim at

“the prevention of cross-border crime, focusing on the fight against migrant smuggling or trafficking in human beings, and migration management, focusing on identification, registration, debriefing and return”,

are initiated at the request of MSs. Again, this highlights that the

Agency’s competence in preventing migrant smuggling and human trafficking is primarily of “support”. Frontex assists MSs

but does not operate independently, indicating that its role is of a

facilitator and coordinator rather than a concurrent actor in

tackling these crimes. However, the FRO in monitoring Frontex’

activities in joint operation is attempting to have a more active

role in protecting fundamental rights. As affirmed by a FRO

officer:

⁴⁰Expert meeting between the authors of the present contribution and the FRO staff, 6th March 2024, Frontex headquarter, Warsaw, Poland, Participant 3.

“we are monitoring all Frontex activities in the joint operation and on this basis, we are gathering our findings and make some concrete recommendations on how to improve the promotion and protection of fundamental rights, so it's not only about incidents as such, it's also about what we can do better in identifying gaps, identifying things that we can improve as well”⁴¹.

Furthermore, Article 38(3)(l) and (m) stipulate that the operational plan, which is binding on the Agency, the host MS, and the participating MSs, must address all necessary aspects for conducting joint operations. This includes general instructions to safeguard fundamental rights during the Agency's activities, as well as procedures to ensure that individuals in need of international protection, victims of human trafficking, unaccompanied minors, and vulnerable persons are referred to the appropriate national authorities for proper assistance. Hence, Frontex has a key role to play in detecting human trafficking and identifying victims.

Similarly, under Article 40, a MS experiencing intense migratory pressure at external border hotspots can request assistance from migration management support teams for tasks such as screening, identification, registration, debriefing, and, if requested, fingerprinting. Support teams, composed of experts from EU agencies like Frontex, the EUAA, and Europol and overseen by the Commission, may also include specialists in child protection, anti-trafficking, gender-based persecution, and fundamental rights. Interestingly Article 41 allows the Agency's

⁴¹ Expert meeting between the authors of the present contribution and the FRO staff, 6th March 2024, Frontex headquarter, Warsaw, Poland, Participant 4.

executive director to recommend joint operations or rapid interventions when external border vulnerabilities are identified. A Member State must respond within six working days, explaining any refusal. If border issues threaten the Schengen area, the management board and Commission may assess if urgent action is needed under Article 42. Should a Member State fail to act, the Council can, on the Commission's proposal, instruct the Agency to take necessary actions, including rapid interventions, deploying support teams, coordinating with third countries, and organising return operations.

The Commission holds the mandate to initiate a proposal for the Council, which the Agency then executes. This ensures that there is no infringement of the non-delegation doctrine. Article 43 mandates that during deployments, the host Member State or relevant third country provides instructions to teams as per the operational plan. Team members must uphold fundamental rights, including asylum access and human dignity, especially for vulnerable persons, ensuring actions are proportionate and non-discriminatory in accordance with Article 21 of the Charter of Fundamental Rights.

Despite the support role of Frontex, a key provision is Article 46 of the Regulation which expressly deals with breaches of the operational plan or serious violations of fundamental right by Member States, e.g. towards THB's survivors. The executive

director has the authority to suspend, terminate, or decline, in whole or in part, Agency's activities if conditions are unmet. Member States may also request activity termination.

In cases involving rights violations, consultation with the Fundamental Rights Officer is required, and all relevant stakeholders are informed of such decisions. Arguably this is the strongest provision that deals with violation of human rights as the FRO and Frontex are somewhat constrained; they cannot do more than what they are currently doing as stated by the Fundamental Rights Officer:

“The possibility that is foreseen in our regulation is that I would report to the executive director under Article 46 [a MS's violation of human rights] and then the executive director can prevent an operation from starting, stop an ongoing operation. In all of this, in whole or in part, so it doesn't mean that we pull out of the country necessarily, but we could say we don't work with you (...) we don't want to be associated with a country or a situation (...) If the executive director does not take my advice or even doesn't respond to my advice, there's a way for me to ask the management board within a certain number of days to instruct the executive director to fulfill their duties. And of course I can also go to the European Parliament, I could go to media, I could blow whistles if I feel that would be the right thing to do. I mentioned before that I have gone to national court in one case⁴², and I've also made use of the common provisions regulation from 2021 that allows me to complain about how funds were used by national authorities and then they have to explain that to the European Commission. I meet with the European Commission very regularly in the executive board and the management board, I have bilateral meetings with them on a monthly basis. They are very well informed from my side, and I can suggest that they should do things”⁴³.

⁴²Greek border deaths: Frontex management board knew about “systematic” violations. 20/06/2024. On Statewatch <https://www.statewatch.org/news/2024/june/greek-border-deaths-frontex-management-board-knew-about-systematic-violations>, accessed on 28/10/2024.

⁴³Expert meeting between the authors of the present contribution and the FRO staff, 6th March 2024, Frontex headquarter, Warsaw, Poland, Participant 1.

The non-intervention doctrine might explain their reluctance to do more for fear of lacking the mandate. Their competence is of support to the MSs, and as the European Court of Human Rights (ECtHR) has emphasised State Parties have the legal obligation to protect THB's victims, especially undocumented migrants who are particularly vulnerable to exploitation⁴⁴. The main responsibility to protect victims, rests with the state.

In conclusion, the comprehensive system that upholds fundamental rights across all Frontex activities, including measures to address migrant smuggling and human trafficking and to protect victims, has strengthened the Agency's accountability. Article 6 of Regulation 2019/1896 stipulates that the Agency is accountable to the European Parliament and the Council⁴⁵.

The establishment of the Fundamental Rights Officer is a very important development to monitor the respect of human rights when Frontex fulfills its tasks. By contrast, the Consultative Forum which has been established to enhance the political accountability of Frontex, has a very limited effectiveness (Loschi, Sliminski, 2022).

Frontex and its FRO are designed to maintain political accountability through their independence, which is crucial for

⁴⁴ECtHR, Case *Chowdury and Others v. Greece*, Application no. judgement of 30 March 2017, and Case *V.C.L. and A.N. v. United Kingdom* Applications nos. 77587/12 and 74603/12, 16 February 2021.

⁴⁵Article 6 Regulation 2019/1896.

upholding fundamental rights and ensuring that their operations remain insulated from political interference, thereby enhancing their credibility and long-term commitment to their mandates (Crum, Curtin, 2015).

Conclusion

The increasing “agencification” of the AFSJ has expanded the EU agencies’ role in general and Frontex’s mandate in particular, reflecting a more flexible application of the non-delegation doctrine. Although this trend supports Member States’ preference for operational cooperation rather than autonomous agency power, it may clash with national sovereignty and fundamental rights, necessitating stricter oversight. MSs endorse enhanced cooperation among Frontex and similar agencies to address transboundary issues like migration and border security. However, they maintain firm control over the external borders, underscoring the need for mechanisms that hold EU and national authorities accountable for their actions and commitments (Fernandez-Rojo, 2021).

Strengthening the Fundamental Rights Office’s (FRO) mandate to grant greater independence and authority may be essential in ensuring that Frontex operations align with fundamental rights standards (Grimheden, 2025). Currently, the FRO lacks sufficient authority to enforce measures or impose sanctions on

Frontex, limiting its effectiveness. Much of its impact depends on the personal initiative and influence of the FROer. Criticisms against Frontex for allegedly inflating the migration crisis narrative suggest that an enhanced FRO could help mitigate such concerns by improving transparency and accountability (Perkowski, Stierl, Burrige, 2023).

A special budget directly allocated to the FRO for compensation or other remedies to the individuals, as a result of the redress system, could offer remediation to those whose rights are violated and add credibility to the complaint mechanism. Additionally, establishing a formal channel to the European Ombudsman, would reinforce complainants' rights against potential Frontex maladministration.

In June 2023, Frontex's Fundamental Rights Officer, in response to the Pylos shipwreck, in which more than 600 people died, recommended that the Agency's Executive Director invoke Article 46(4) of the Frontex Regulation. In this contribution we have argued that Article 46(4) offers a robust mechanism for addressing human rights violations by MSs, sending a powerful message to the MS concerned, also in cases involving THB's victims.

The mechanism allows the Executive Director, after consulting with the Fundamental Rights Officer and notifying the concerned Member State, to withdraw, suspend, or terminate

operations if

“violations of fundamental rights or international protection obligations related to the activity concerned (...) are of a serious nature or are likely to persist”⁴⁶.

However, the use of this Article has recently been constrained by the Commission, which has suggested that this remedy should be employed only as a last resort, as it may further undermine the protection of fundamental rights in the MS concerned, if the Agency decides to terminate, suspend, or withdraw financial support for operations. Frontex’s presence could be pivotal in improving the situation, with the Agency and its FRO serving as custodians of constitutional norms. Through their policies and actions, they can contribute to the development and reinforcement of fundamental principles, including human rights and the rule of law⁴⁷.

Thus, a promising function lies with the Fundamental Rights Office. Accordingly, in line with recommendations from the Ombudsman, we would recommend that the Fundamental Rights Officer, either independently or in collaboration with the Executive Director, should be empowered—once a clearly defined threshold has been met and after publicly clarifying the rationale for its determination—to terminate, suspend, or

⁴⁶Greek border deaths: Frontex management board knew about “systematic” violations. 20/06/2024. On Statewatch <https://www.statewatch.org/news/2024/june/greek-border-deaths-frontex-management-board-knew-about-systematic-violations>, accessed on 28/10/2024.

⁴⁷Report from the Commission to the European Parliament and the Council on the evaluation of Regulation (EU) 2019/1896 on the European Border and Coast Guard, including a review of the Standing Corps. COM (2024) 75 final, p. 5.

withdraw financial support for operations in cases of fundamental rights violations⁴⁸.

Currently, the final authority to take such measures rests solely with the Executive Director, while the Fundamental Rights Officer can only recommend the use of Article 46(4). Although the current Fundamental Rights Officer has been highly proactive in this field, we argue that their authority should be formally strengthened, especially in cases where national authorities fail to refer actual or potential victims of human trafficking.

The purpose of this contribution was to explore whether Frontex could be held accountable when MSs violate fundamental rights in border management operations and to examine the Agency's potential role in protecting THB's survivors.

In assessing the balance of competencies between EU institutions and MSs, we have established that Frontex's role is primarily one of support and coordination. Effective mechanisms are essential to ensure that both EU institutions and national authorities are held accountable for their actions and commitments, fostering greater transparency and responsiveness to protect fundamental rights and THB victims' rights. As part of efforts to develop a long-term migration policy, the European

⁴⁸On this point see point a) recommendations of the Ombudsman, Decision, 'How the European Border and Coast Guard Agency (Frontex) Complies with Its Fundamental Rights Obligations in the Context of Its Search and Rescue Activities' Case OI/3/2023/MHZ (26 February 2024) <https://www.ombudsman.europa.eu/en/decision/en/182665> accessed [30/10/2024].

Commission conducts assessments of the Frontex's effectiveness and efficiency every four years, presenting the findings to the European Parliament and the Council⁴⁹.

In February 2024, the Commission adopted an evaluation of the Frontex regulation, along with an action plan to support its implementation⁵⁰.

This legally mandated evaluation assessed the Agency's impact, effectiveness, and efficiency, concluding that despite the challenges posed by the Covid pandemic, the Ukrainian war and the instrumentalization of migration, Frontex has been instrumental in enhancing the management of the EU's external borders while upholding fundamental rights⁵¹.

Effective mechanisms for accountability of national authorities are crucial, and the recent Screening Regulation⁵² exemplifies this by legally mandating each Member State to establish an independent mechanism for monitoring fundamental rights. This mechanism serves two primary purposes, both critical to the integrity of the asylum and migration processes. First, the mechanism is tasked with monitoring compliance with Union

⁴⁹Council Regulation (EU) 2022/922 of 9 June 2022 on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen acquis, and repealing Regulation (EU) No 1053/2012 (OJ L 160, 15.6.2022).

⁵⁰COM(2024) 75 final (Brussels, 2 February 2024) {SWD(2024) 75 final.

⁵¹Ibidem.

⁵²Regulation (EU) 2024/1356 of the European Parliament and of the Council of 14 May 2024 on introducing the screening of third-country nationals at the external borders and amending various regulations [2024] OJ L 179, 22.5.2024.

and international law during the screening process. This includes fundamental principles such as access to asylum procedures, the non-refoulement principle, the best interests of the child, and rules governing detention⁵³.

The importance of compliance with asylum procedures cannot be overstated, especially in an era where migration flows are shaped by factors such as conflict, persecution, and economic hardship; ensuring that individuals have unhindered access to these procedures is vital for protecting their rights. However, a significant oversight remains the lack of reference to the identification and protection of THB survivors, which is also a consequence of these same factors. The second purpose of the monitoring mechanism is to ensure that substantiated allegations of non-compliance with fundamental rights are addressed effectively. This requires MSs to not only launch investigations into credible claims but also to monitor the progress of these investigations. This proactive approach is essential for fostering accountability and ensuring that violations are not overlooked or unaddressed.

The independence of this monitoring mechanism is particularly significant. It enhances the credibility and reliability of oversight processes. When individuals seeking protection can report violations without fear of retaliation or bias, it builds a culture of

⁵³Council of the European Union, 'Implementation of the Screening Regulation: Setting Up an Independent National Fundamental Rights Monitoring Mechanism' (24 May 2024) 10352/24.

trust. An independent mechanism can also hold MSs accountable, urging them to take their obligations seriously and ensuring that fundamental rights are prioritised, and THB's victims protected. The Regulation also requires the EU Agency for Fundamental Rights (FRA) to develop comprehensive guidance to support MSs in establishing and managing independent national monitoring mechanisms. This indicates that MSs can seek assistance from the FRA regarding methodology and suitable training initiatives, which can further reinforce the protection of fundamental rights.

In conclusion, the agencification and expansion of AFSJ agency powers should be accompanied by a corresponding enhancement of accountability mechanisms, which serve to support the exercise of administrative discretion (Marin, 2024) in full respect for fundamental rights. Adopting a human rights approach for THB's survivors is a priority not only for MSs but also for EU agencies like Frontex. While the EU Trafficking Directive and its Recast⁵⁴ are specifically directed at MSs, the Charter of Fundamental Rights applies to all MSs when they implement Union law, as well as to EU institutions and agencies.

⁵⁴Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L. 101/1-101/11; 15.4.2011, 2011/36/EU, 15 April 2011]. Directive 2024/1712/EU of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, OJ L. L, 24.6.2024.

In this context, the Charter of Fundamental Rights provides a crucial guiding framework for both Frontex and the Fundamental Rights Officer (FRO) in managing external border activities. It ensures they remain within their competencies, upholds the Agency's legitimacy, and strengthens operational accountability, reinforcing Frontex's role within the broader EU constitutional framework.

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