

## ARTICLE

# Crying Wolf Too Many Times: The Impact of the Emergency Narrative on Transparency in FRONTEX Joint Operations

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Crisis-driven EU policy in recent years fits within a securitisation narrative, in which the claim of public security threat outweighs fundamental rights and their accountability safeguards. Under this policy development, Frontex, the EU Border and Coast Guard Agency, has experienced an impressive expansion in its powers and competences, without the equivalent enhancement of accountability safeguards. This article focuses in particular on the issue of transparency as a fundamental right and an element of social and political accountability. Specifically, it examines how lack of transparency in complex multi-actor structures, such as Frontex joint operations, can result in gaps in accountability and impact the enforcement of basic fundamental rights of EU citizens and migrants.

Using a conceptual perspective of accountability and securitisation, and highlighting specific gaps in transparency in the context of Frontex joint operations, this article aims to show how the lack of transparency has been determined by the situation of emergency and has continued to remain unaddressed due to a constant state of institutional emergency, feeding back into the perpetuation of the securitisation narrative.

**Keywords:** Frontex; transparency; securitisation; crisis; borders; fundamental rights

## 1. Introduction

Whether it is the Lampedusa shipwreck, the Syrian war, terrorism, or Covid-19, the EU migration policy in recent years is heavily crisis-driven. It seems to be in a constant state of emergency, responding spasmodically to perceived threats that change guise, but fit comfortably within a well-designed narrative of securitisation, understood as the political connection of migration to societal dangers, or the political construction of migration as a security issue.<sup>1</sup> Within it, the need for public security vis-à-vis external threats outweighs fundamental rights and the core democratic priority of accountability and oversight of public institutions.

The EU Border and Coast Guard Agency (EBCG or Frontex or the Agency) has experienced, since its establishment in 2004, an impressive expansion of its powers and competencies, holding the largest budget amongst all EU agencies. Regrettably, the expansion of its mandate was not coupled with an equivalent enhancement of accountability safeguards, including transparency safeguards. More generally, the lack of transparency has been widely problematised especially in light of the reported involvement of the Agency in human rights violations.<sup>2</sup>

This article focuses in particular on the issue of transparency as a fundamental right and an element of social and political accountability. Specifically, it examines how lack of transparency in complex multi-actor structures in the area of migration management, such as Frontex joint operations, can result in gaps in accountability and impact the enforcement of basic fundamental rights of EU citizens and migrants.

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<sup>1</sup> Jef Huysmans, 'The European Union and the Securitisation of Migration' (2000) 38 *Journal of Common Market Studies* 751.

<sup>2</sup> European Parliament, LIBE Committee on Civil Liberties, Justice and Home Affairs, 'Working Document; Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations' (2021) <<https://www.statewatch.org/media/2590/ep-frontex-scrutiny-group-final-report-14-7-21.pdf>> accessed 23 December 2021.

Following the 2019 enhancement of the Agency's mandate, the series of media reports implicating Frontex in fundamental rights violations in 2020, and the subsequent investigations from multiple angles, including the European Parliament, the European Ombudsman, and the European Anti-Fraud Office, the topic of the accountability of the Agency is more pertinent than ever.

The added value of this paper in academic literature is twofold. First, it analyses the identified problem from a conceptual perspective of accountability and securitisation and, second, it highlights specific gaps in transparency in the context of Frontex joint operations and identifies ways of addressing them. It aims to show how the lack of transparency has been determined by the situation of emergency and has continued to remain unaddressed due to a constant state of institutional emergency, leaving, thus, sizeable gaps in accountability.

In particular, much criticism has been expressed over the years about the 'veil of secrecy' that covers the work of the Agency, but this is the first attempt to take a closer look and systematise our knowledge of these transparency gaps. Issues regarding access to documents, the transparency register, and the role of the Consultative Forum are covered in particular. Moreover, the analysis leans, on the one hand, towards the EU legal framework on fundamental rights, including the right to good administration and the freedom of information and, on the other hand, towards a conceptualisation of the perpetuation of the securitisation paradigm.

This article first explains the means of data collection and analysis used throughout, before documenting the step-by-step development of the Agency and how this is directly linked to a variety of crises. It then explores how the idea of securitisation is used by the Agency to justify both its indispensability and its lack of transparency. The importance of transparency as an element of accountability and a legal obligation is then argued, and specific gaps in Frontex's compliance with transparency obligations are outlined, before conclusions are drawn.

Data collection and analysis draw from the study of academic literature on Frontex, transparency, crisis, securitisation, relevant EU legislation and case law, and reports of EU institutions (Frontex, European Parliament, EU Ombudsman). The following varied methods contribute to the participant observation methodology: informal written and oral communication with pro-transparency organisations and researchers between 2019 and 2021, direct observation, collective discussions, self-examination, and results from workshops and meetings undertaken between April 2019 and July 2021.

In this period, corresponding with a research project investigating the transparency and accountability of EU decentralised agencies,<sup>3</sup> Statewatch has made fourteen access to documents requests to the Agency.<sup>4</sup> This article draws upon Statewatch's findings and the experience of other journalists and transparency organisations and researchers, as registered by the authors. Simultaneous requests for documents and information have allowed for the triangulation of responses and results, both from Frontex's Public Access to Documents Department (PAD), and its press office, building a testimony of transparency gaps.

## 2. The Development of Frontex Through Crisis and Securitisation

The following sections showcase the relationship between on the one hand, the securitisation paradigm and its perpetuation by the Agency, and on the other hand, its constant growth through crisis and the lack of transparency into its work.

### 2.1. Finding One's Place in Emergency Politics

Language surrounding migration policies often emphasises a humanitarian need for decisive responses,<sup>5</sup> but core amongst the priorities of each set of policy measures is securitisation, according to which exceptional and extraordinary situations, described as crises, require new security measures. Migration is

<sup>3</sup> 'EU justice and home affairs agencies' (Statewatch, 2021) <<https://www.statewatch.org/projects/eu-justice-and-home-affairs-agencies/>> accessed 16 September 2021.

<sup>4</sup> Since January 2021, such requests have been made by staff members or volunteers with EU residency or citizenship. Statewatch has also made one request to the European Data Protection Supervisor concerning documents originating with Frontex, which have therefore been subject to a Frontex PAD decision on disclosure. This figure does not include Confirmatory Applications submitted following refusal of requests.

<sup>5</sup> Silja Klepp, 'Italy and its Libyan Cooperation Program: Pioneer of the European Union's Refugee Policy?', (Blog Middle East Institute 1 August 2010) <<https://www.mei.edu/publications/italy-and-its-libyan-cooperation-program-pioneer-european-unions-refugee-policy#edn35>> accessed 16 September 2021; Katja Franko Aas and Helene O.I. Gundhus, 'Policing Humanitarian Borderlands: Frontex, Human Rights and the Precariousness of Life' (2015) 55(1) British Journal of Criminology 1–18.

an issue, according to critical security studies,<sup>6</sup> that has come to be seen as a security threat by virtue of its representation.<sup>7</sup> As a socio-political construct,<sup>8</sup> it has been moved from 'ordinary' to 'emergency' politics,<sup>9</sup> thus justifying 'emergency measures' that would otherwise not have been acceptable.<sup>10</sup>

Even before the turn of the century, a wider understanding of security (new security studies) included societal issues, such as migration, in 'a new framework of analysis',<sup>11</sup> which saw migration entering the EU security agenda in particular.<sup>12</sup> This trend has been consolidated in migration policies and practices of the EU and its Member States, especially following the civil war in Syria and the wider implications of the Arab Spring.<sup>13</sup> Political science, international relations and legal scholars have shown that migration governance in Europe (and the Global North more generally) has become synonymous with the management of a security crisis, which is manifested as 'processes of bordering'<sup>14</sup> and deterrence.<sup>15</sup>

## 2.2. Frontex as a securitising agent

The securitisation trend is undeniably established in EU policies of migration management and the development of Frontex can be clearly traceable within it. In fact, Frontex is a common agent of this securitising move, projecting migration as a threat for the EU and its people.<sup>16</sup> This move is more than anything a 'speech act', where the securitising actor convinces its audience of the level of the threat in order to proceed with exceptional emergency politics.<sup>17</sup>

Securitisation narratives and the conflation of migration management and border control goals have introduced crime control into the Agency's mandate, including combatting cross-border crime and terrorism, intensifying cooperation with Europol, and data mining for security purposes.<sup>18</sup> Frontex has transformed from an agency to assist Member States in dealing with irregular border crossings, into a policing body with analytical influence on policy on cross-border crime and terrorism, with executive powers, including the use of force and weapons by its own personnel.<sup>19</sup> Nevertheless, its work is not fully independent from the Member States, as the border guard teams operate under the instructions of the host Member State and its operations heavily rely on the cooperation of host and participating Member States.

Six years into the political crisis that developed around the summer of 2015, framed as the 'refugee crisis', and while the number of arrivals has substantially decreased,<sup>20</sup> the turn in European politics towards intolerance, protectionism and securitisation seems to have permanently shaped the EU's response to

<sup>6</sup> Ole Waever, Barry Buzan, and Jaap De Wilde, *Security: A New Framework for Analysis* (1st edn, Boulder: Lynne Rienner Publishers 1998); Sarah Léonard, 'EU border security and migration into the European Union: FRONTEX and securitisation through practices' (2010) 19(2) *European Security* 235.

<sup>7</sup> EEAS, 'Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union's Foreign and Security Policy', 20, <[http://eeas.europa.eu/archives/docs/top\\_stories/pdf/eugs\\_review\\_web.pdf](http://eeas.europa.eu/archives/docs/top_stories/pdf/eugs_review_web.pdf)> accessed 15 December 2021.

<sup>8</sup> Alexander Wendt, 'Anarchy is what states make of it: the social construction of power politics' (1992) 46(02) *International Organization* 391–399.

<sup>9</sup> Waever, Buzan and de Wilde (n 6) 24.

<sup>10</sup> Polly Pallister-Wilkins and Julien Jeandesboz, *Crisis, enforcement and control at the EU borders* (1st edn, Routledge 2014) 115.

<sup>11</sup> Waever, Buzan, de Wilde (n 6).

<sup>12</sup> Ole Wæver and David Carlton, *Identity, migration and the new security agenda in Europe*, (Pinter Publishers 1993).

<sup>13</sup> Julien Jeandesboz and Polly Pallister-Wilkins, 'Crisis, routine, consolidation: The politics of the Mediterranean migration crisis' (2016) 21(2) *Mediterranean Politics* 316–320.

<sup>14</sup> Polly Pallister-Wilkins, 'Interrogating the Mediterranean 'Migration Crisis'' (2016) 21(2) *Mediterranean Politics* 311–314.

<sup>15</sup> Thomas Gammeltoft-Hansen and James Hathaway 'Non-refoulement in a World of Cooperative Deterrence' (2015) 53(2) *Columbia Journal of Transnational Law* 235–284; Thomas Gammeltoft-Hansen, Nikolas Feith Tan, 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy' (2017) 5(1) *Journal of Migration and Human Security* 30–40.

<sup>16</sup> Sarah Léonard, 'The creation of Frontex and the politics of institutionalization in the EU external borders policy' (2009) *Journal of Contemporary European Research*, 371–388, 239; Vittoria Meissner, 'The European Border and Coast Guard Agency Frontex After the Migration Crisis: Towards a "Superagency"?' in Johannes Pollak, Peter Slominski (eds), *The Role of EU Agencies in the Eurozone and Migration Crisis: Impact and Future Challenges* (European Administrative Governance, Palgrave Macmillan 2021) 151–174.

<sup>17</sup> Waever, Buzan and de Wilde (n 6) 24–25; Andrew W. Neal, 'Securitization and Risk at the EU Border: The Origins of FRONTEX' (2009) 47(2) *Journal of Common Market Studies* 340–356.

<sup>18</sup> Samuel Hartwick 'Frontex: From Coordinating Controls to Combating Crime', (EU Crim 2/2020 134–138, 14 July 2020), <https://eucrim.eu/articles/frontex-coordinating-controls-combating-crime/> accessed 15 December 2021.

<sup>19</sup> European Commission, 'Report on the proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Council Joint Action no.98/700/JHA, Regulation 1052/2014 of the European Parliament and of the Council and Regulation 201/2016/1624 of the European Parliament and of the Council' COM (2018)0631 – C8-0406/2018 – 2018/0330(COD).

<sup>20</sup> Statistics can be found at multiple sources, including Frontex, Migratory Map, <https://frontex.europa.eu/we-know/migratory-map/> accessed 15 December 2021.

migration, so that border control has become today's equivalent of migration management.<sup>21</sup> The effects on human and refugee rights can be dire, putting the right to non-refoulement at risk, impeding access to protection and turning the Mediterranean into 'the world's deadliest border'.<sup>22</sup>

These six years have ushered in two major expansions of Frontex's mandate and resources. The Agency has been steadily equipped with enhanced powers and competences, reflecting the realisation of the main goals of the EU Agenda on Migration presented in 2015, which focuses on maximising EU support on border control.<sup>23</sup> Frontex has come to embody, in the public debate, the securitisation characterising EU migration policies.<sup>24</sup> Crises had also been used as opportunities for expansion of the Agency before the 2015 'refugee crisis', while the precise identity of the 'crisis' varies at any given time.

For instance, with the death toll in the Mediterranean rising between 2012 and 2013, and as the narrative focused on the 'crisis of deaths at sea', the 'considerable life-saving potential in situations of distress at sea' became central to the institutional discussion about EUROSUR,<sup>25</sup> a pan-European surveillance system, which integrates all maritime surveillance facilities of the Member States and is coordinated by Frontex.<sup>26</sup> The system was presented and promoted in 2013 as 'protecting migrants' lives'.<sup>27</sup> The EUROSUR proposal, however, had already been presented in 2011, and it then had only had one mention of 'protecting and saving lives' in the preamble.<sup>28</sup>

In 2013, the shipwreck of Lampedusa, in which over 350 people lost their lives, shocked public opinion in Europe and heavily occupied the political debate in Brussels. The EU institutions chose to increase Frontex's budget to cover an extensive search and rescue operation, Triton, covering the Mediterranean from Cyprus to Spain.<sup>29</sup>

In response to the 2015 'refugee crisis', that had been of fundamental influence in EU policies more generally, a new European Border and Coast Guard (EBCG) was introduced, ushering in a largescale expansion of mandate and budget for Frontex.<sup>30</sup> Frontex's own staff was more than doubled, and it was given access to staff and equipment pools supplied by Member States.

The securitisation narrative was further perpetuated in the coming years. Even though the number of arrivals had significantly dropped, three years later the EBCG Regulation was again amended to expand the mandate and competencies of the Agency, this time adding combatting terrorism to its objectives, as the

<sup>21</sup> Nick Perre, Myrthe de Vries, Hannah Richards and Mariana Gkliati, 'Refugee Crisis: three perspectives on the makings of a crisis (Refugee Law Initiative Blog on Refugee Law and Forced Migration, 2018) <<https://rli.blogs.sas.ac.uk/2018/04/16/refugee-crisis-three-perspectives-on-the-makings-of-a-crisis/>> accessed 15 December 2021; James Hathaway, 'The Emerging Politics of Non-Entrée' (1992) 40 *Refugees*, 90–91; Thomas Gammeltoft-Hansen, 'The Ugly Duckling: Denmark's Anti-Refugee Policies and Europe's Race to the Bottom' (Huffpost, 2016), <[https://www.huffpost.com/entry/denmark-refugee-europe\\_b\\_9574538?guccounter=1](https://www.huffpost.com/entry/denmark-refugee-europe_b_9574538?guccounter=1)> accessed 16 September 2021.

<sup>22</sup> International Organisation for Migration, 'Four Decades of Cross-Mediterranean Undocumented Migration to Europe; A Review of the Evidence, 2017' <[https://publications.iom.int/system/files/pdf/four\\_decades\\_of\\_cross\\_mediterranean.pdf](https://publications.iom.int/system/files/pdf/four_decades_of_cross_mediterranean.pdf)>.

<sup>23</sup> European Commission, A European Agenda on Migration, 2015 <[https://www.consilium.europa.eu/media/21933/euagendaformigration\\_trustfund-v10.pdf](https://www.consilium.europa.eu/media/21933/euagendaformigration_trustfund-v10.pdf)> accessed 23 December 2021; Perre, de Vries, Richards and Gkliati (n 21).

<sup>24</sup> See for grassroots opposition to Frontex, Leila Giannetto, 'Advocacy Groups targeting the heart of EU Agencies. Frontex in the Focus' in Doris Dialer and Margarethe Richter (eds), *Lobbying in the European Union. Strategies, Dynamics and Trends* (Springer 2019) 156, 157.

<sup>25</sup> European Commission, 'Impact Assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council establishing the European Border Surveillance System (EUROSUR)' SEC (2011) 1538 final 9; Parliamentary Question, E-006760/2011; answer given by Ms Malmström on behalf of the Commission (28 July 2011) <[https://www.europarl.europa.eu/doceo/document/E-7-2011-006760\\_EN.html?redirect](https://www.europarl.europa.eu/doceo/document/E-7-2011-006760_EN.html?redirect)> accessed 23 December 2021.

<sup>26</sup> Established with Regulation 1052/2013 of the European Parliament and of the Council establishing the European Border Surveillance System (EUROSUR), Council [2013] OJ L 295/11 repealed by Regulation 2019/1896 of the European Parliament and of the Council on the European Border and Coast Guard [2019] OJ L 295/1 (EBCG Regulation).

<sup>27</sup> European Commission, 'EUROSUR: Protecting the Schengen external borders – protecting migrants' lives' (Press Release 2013) <[http://europa.eu/rapid/press-release\\_MEMO-13-1070\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-1070_en.htm)> accessed 23 December 2021; Regulation 1052/2013 of the European Parliament and of the Council establishing the European Border Surveillance System [2013] OJ L 295/1 (EUROSUR Regulation), Article 2.

<sup>28</sup> European Commission, 'Proposal for a Regulation of the European Parliament and of the Council Establishing the European Border Surveillance System (EUROSUR)', COM (2011) 0427 final.

<sup>29</sup> Marie Martin, 'To SAR or not to SAR, part 1: Why is Frontex expected to save lives at sea?' (Statewatch 15 July 2021) <<https://www.statewatch.org/analyses/2021/to-sar-or-not-to-sar-part-1-why-is-frontex-expected-to-save-lives-at-sea/>> accessed 15 December 2021.

<sup>30</sup> Regulation 2016/1624 of the European Parliament and of the Council on the European Border and Coast Guard and amending Regulation (EU) No 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 [2016] OJ L 251/1.

utmost manifestation of securitisation.<sup>31</sup> This aim is included in Frontex's research and risk analysis, while it also became responsible for the processing of the personal data of persons suspected of terrorism, and for cooperating with other international and EU organisations and agencies on combatting terrorism. Moving from Commission proposal to Parliamentary agreement in a record six months, EBCG Regulation filled in the gaps to bring Frontex closer than ever, though by far not fully, to the original conception of a fully-fledged and autonomous European Border Police.<sup>32</sup> While Member States maintain authority and responsibility for joint operations, Frontex was vested with powers to purchase and acquire its own equipment, directly employ its own 'standing corps' of border guards with executive powers, a significantly increased budget, now for the first time counted in billions of Euros, and broader mandates in the fields of surveillance, deportations and cooperation with non-EU countries.<sup>33</sup> According to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) Committee of the European Parliament, 'The Agency's new mandate and its increased resources are a clear and strong response to the challenges faced at the EU's external borders'.<sup>34</sup>

Finally, the 'Moria crisis' in 2020, where Greece's largest refugee camp went up in flames, brought into the spotlight the deplorable reception conditions of tens of thousands of refugees. The Commission's promise for 'No More Morias' was translated into the new EU Pact for Migration and Asylum presented a month later, but naturally already prepared long before the fire.<sup>35</sup> There the call for a stronger role of Frontex in returns and externalisation are central.<sup>36</sup>

The step-by-step development of the Agency has been directly linked to a variety of crises, always using the language of securitisation and protectionism, will be explored in more depth in the following section.

### **2.3. The Instrumentalisation of the Securitisation Discourse to Justify Lack of Transparency**

In its public communication, Frontex often utilises the crisis and securitisation narrative to justify the lack of transparency in its work.

Crisis, including the pandemic, have played a part in limiting access to Frontex documents, personnel and premises. Addressing requests of access by members of the European Parliament during the hearings, the Frontex Executive Director (ED) avoided commitment with the comment 'I will see (sic) with Polish authorities because of the pandemic but in principle I think you should have access to our premises and to documents'.<sup>37</sup>

Eventually, the planned visit of the Frontex Scrutiny Working Group (FSWG) to the Frontex headquarters in Warsaw was conducted remotely, a last-minute change ascribed to Covid-19 precautions, even though the same precautions did not apply to an earlier visit made by the OLAF investigative body.<sup>38</sup>

<sup>31</sup> Regulation 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 [2019] OJ L 295/1; Mariana Gkliati, 'European Border and Coast Guard: The EU force of securitisation in migration governance'. (RLI Blog on Refugee Law and Forced Migration: Refugee Law Initiative 24 April 2019), <<https://rli.blogs.sas.ac.uk/2019/04/24/european-border-and-coast-guard-the-eu-force-of-securitisation-in-migration-governance/>> accessed 15 December 2021.

<sup>32</sup> See for more information in this regard, Mariana Gkliati, 'The new European Border and Coast Guard: Do increased powers come with enhanced accountability?', (EU Law Analysis 17 April 2019) <<http://eulawanalysis.blogspot.com/2019/04/the-new-european-border-and-coast-guard.html>> accessed 15 December 2021.

<sup>33</sup> *ibid.*

<sup>34</sup> European Commission, 'Report on the proposal for a regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Council Joint Action no 98/700/JHA, Regulation (EU) No 1052/2014 of the European Parliament and of the Council and Regulation No 201/2016/1624 of the European Parliament and of the Council' COM (2018)0631 – C8-0406/2018 – 2018/0330(COD).

<sup>35</sup> European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum' COM (2020) 609 final.

<sup>36</sup> Mariana Gkliati, 'Returns in core of the EU Pact on Migration and Asylum and the leading role of Frontex' (Human Rights Here, 10 January 2021) <<https://www.humanrightshere.com/post/blog-series-eu-new-pact-on-migration-and-asylum1#continue>> accessed 15 December 2021; Lilian Tsourdi, 'The New Pact and EU Agencies: an ambivalent approach towards administrative integration.' in edition *EU Agencies, New Pact on Migration and Asylum*, (EU Migration Law Blog, 6 November 2020), <<https://eumigrationlawblog.eu/the-new-pact-and-eu-agencies-an-ambivalent-approach-towards-administrative-integration/>> accessed 15 December 2021.

<sup>37</sup> European Parliament, LIBE Working Group on Frontex Scrutiny 'Frontex Scrutiny Working Group Eighth Hearing' (23 June 2021) <[https://multimedia.europarl.europa.eu/en/libe-working-group-on-frontex-scrutiny\\_20210623-1530-COMMITTEE-LIBE\\_vd](https://multimedia.europarl.europa.eu/en/libe-working-group-on-frontex-scrutiny_20210623-1530-COMMITTEE-LIBE_vd)> accessed 15 December 2021.

<sup>38</sup> Yannis Palaiologos, 'OLAF raided EU border chief's office over migrant pushback claims', (Kathimerini 14 January 2021) <<https://www.kathimerini.com/news/261205/olaf-raided-eu-border-chiefs-office-over-migrant-pushback-claims/>> accessed 15 December 2021.

Moreover, requests for access to documents are 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.<sup>39</sup> PAD frequently refers to ‘the protection of public interest as regards public security’<sup>40</sup> as a reason not to disclose documents (in whole or in part). In one such request made by Statewatch in May 2020, access was denied, based on this exception and those of protection of privacy, and the protection of internal decision-making. The same document was, however, disclosed (with redactions) to another organisation in response to its access to documents request in July of that year.<sup>41</sup> Additionally, throughout documents that are released under access to documents requests, PAD redacts specific information based on Article 4(1)(a) of Regulation 1049/2001. Redactions are frequently extensive enough to render some documents unreadable.

### 3. Transparency as Accountability and a Legal Obligation in Multi-Actor Environments

Accountability is discussed in different terms by different authors and has come to stand for concepts ranging from responsibility to honesty and transparency. The following sections address its understanding in this article as a social mechanism for answerability. They further discuss in more detail transparency as an essential element of social and political accountability.

#### 3.1. Accountability as Virtue and as Answerability

Accountability is discussed in different terms by different authors and has come to stand for concepts ranging from responsibility to honesty and transparency. We can identify two main tendencies in the discourse: one that understands accountability as a virtue of public actors and one that sees it as a social mechanism for answerability.<sup>42</sup>

Accountability as a 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.<sup>43</sup> It is understood as a positive quality of the actor, which includes elements of transparency and proper administrative conduct.

In its second sense, accountability is understood as a social mechanism for answerability, designed to bring an actor before a forum to account for decisions on governance, or to answer to charges and, finally, suffer consequences in the case of misconduct.<sup>44</sup> More simply, accountability as a social mechanism for answerability means being held to account before a forum. Transparency is also an essential part of this understanding of accountability as answerability, as the following sections will show.

#### 3.2. Transparency as Social and Political Accountability

The actions of public actors, especially when their activities are sensitive for human rights, require a high level of scrutiny by civil society. However, ‘civil society’ or ‘the public’ is far from a unified official forum vested with formal monitoring and other accountability-as-answerability-related powers. Transparency, thus, becomes an essential precondition for such monitoring.

In particular, transparency is the most essential element for social accountability, i.e. answerability directly to the public through the media, non-governmental organisations and other interest groups, unions and other stakeholders that together form civil society. This type of accountability cannot impose immediate

<sup>39</sup> Zach Campbell, ‘Shoot First. Coast Guard Fired at Migrant Boats, European Border Agency Documents Show’, *The Intercept* (22 August 2016), <<https://theintercept.com/2016/08/22/coast-guard-fired-at-migrant-boats-european-border-agency-documents-show/>> accessed 15 December 2021.

<sup>40</sup> Regulation 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/1.

<sup>41</sup> Jane Kilpatrick, ‘Frontex, secrecy and story-telling: control of information as super-strategy’, *Statewatch* (29 July 2021), <<https://www.statewatch.org/analyses/2021/frontex-secrecy-and-story-telling-control-of-information-as-super-strategy/>> accessed 15 December 2021; Regulation 1049/2001, Articles 4(1)(b) and 4(3).

<sup>42</sup> Mark Bovens, Deirde Curtin, Paul ‘t Hart (eds), *The Real World of EU Accountability. What Deficit?* (Oxford University Press 2010) 32–34; Elizabeth Fisher, ‘The EU in the Age of Accountability’, (2004) 24 *Oxford Journal of Legal Studies* 495–503.

<sup>43</sup> Melvin Dubnick, ‘Seeking Salvation for Accountability’, Paper presented at the Annual Meeting of the American Political Science Association, August 29–September 1 2002 <<http://mjdubnick.dubnick.net/papersrw/2002/apsa2002.html>> accessed 31 December 2021; Jonathan Koppell, ‘Pathologies of Accountability: ICANN and the Challenge of “Multiple Accountabilities Disorder”’, (2005) 65(1) *Public Administrative Review* 94–107.

<sup>44</sup> Bovens, Curtin and Hart (eds) (2010) (n 42) 34; Andreas Schedler, ‘Conceptualizing Accountability’, in Andreas Schedler, *The Self-Restraining State: Power and Accountability in New Democracies* (Boulder: Lynne Rienner Publishers 1997) 17; Graham Haydon, ‘On Being Responsible’ (1978), 28 *The Philosophical Quarterly*, 46–57; David Beetham and Christopher Lord, *Legitimacy and the European Union* (Longman, 1998); Richard Mulgan, *Holding Power to Account, Accountability in Modern Democracies* (Palgrave Macmillan 2003) 8.

sanctions in the strict sense of the word, but its long-term consequences are powerful enough to motivate behaviours such as transparency, open government and public reporting.<sup>45</sup>

Transparency is also core to political or democratic accountability, in which parliamentary systems are among the highest levels of control. The most prominent forum for the political accountability of Frontex, as an EU agency, is the European Parliament, the directly elected political institution of the European Union.<sup>46</sup> According to the EBCG Regulation, Frontex is accountable to the European Parliament, and is obliged to report to it to the fullest extent.<sup>47</sup> However, the European Parliament has only weak political control over the Agency, which control heavily depends on the information that the Agency makes available to it.

The FSWG found serious gaps regarding the Agency's obligations on access to information and transparency.<sup>48</sup> During the hearings, the Chair of the Management Board of Frontex appealed for more transparency for material regarding the incidents studied by the special working group of the Management Board (FRaLO).<sup>49</sup> The pledge for transparency was repeated during the hearings by legal experts, the Fundamental Rights Agency, and the NGOs Refugee Support Aegean and Hungarian Helsinki Committee.<sup>50</sup>

There is plenty of room for Frontex improving its record in honouring the right of access to documents. Similarly, it can further open a window into its assessment of the human-rights related Serious Incidents Reports it receives, as well as the justification of the decision of the ED to continue an operation, otherwise to be suspended or terminated due to serious and continuous violations. Among its extensive recommendations, the FSWG called for further openness into the decision to suspend, terminate or not finance an operation in light of fundamental rights violations,<sup>51</sup> with the establishment of clear criteria and procedures and the justification of the decision by the ED.<sup>52</sup> Regarding the Agency's internal serious incidents reports, reports on the use of force and individual complaints, the FSWG determined that they should only be classified as restrained or restricted on a case-by-case basis and only when necessary.<sup>53</sup>

### **3.3. Openness and Transparency as Rights**

Transparency is an integral element of the fundamental right to good administration, as it is enshrined in the Charter of Fundamental Rights of the European Union (Charter).<sup>54</sup> In implementation of this right, EU institutions and agencies should keep proper records and welcome public scrutiny of their conduct, including their compliance with these public service principles.<sup>55</sup>

In principle, Frontex, as an EU agency, is under the obligation to conduct its work as openly as possible, and provide access to documents to EU nationals and residents.<sup>56</sup> Fundamental in this regard is the right to public access to documents, a right granted across all EU institutions, bodies and agencies to European citizens or anyone else residing in the EU.<sup>57</sup> Article 114 EBCG Regulation explicitly makes the Agency subject to Regulation (EC) 1049/2001 when handling applications for access to documents, and provides that the public must rapidly be given objective, reliable and easily accessible information with regard to the Agency's work.

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 on the basis of Articles 20 (2) (d), 24 (4) TFEU. Any natural or

<sup>45</sup> Bovens, Curtin and Hart 2010 (n 42) 41–44.

<sup>46</sup> Leila Giannetto, 'The Borders of Accountability: The Case of FRONTEX', (Thesis, Università degli studi di Trento 2012), <[https://www.statewatch.org/media/documents/observatories\\_files/frontex\\_observatory/leila-giannetto-thesis-frontex-full.pdf](https://www.statewatch.org/media/documents/observatories_files/frontex_observatory/leila-giannetto-thesis-frontex-full.pdf)> accessed 23 December 2021.

<sup>47</sup> EBCG Regulation, Recital 116, Article 6.

<sup>48</sup> European Parliament, LIBE Working Group on Frontex Scrutiny 'Frontex Scrutiny Working Group Second Hearing' (15 March 2021) <[https://multimedia.europarl.europa.eu/en/libe-working-group-on-frontex-scrutiny\\_20210315-1345-COMMITTEE-LIBE\\_vd](https://multimedia.europarl.europa.eu/en/libe-working-group-on-frontex-scrutiny_20210315-1345-COMMITTEE-LIBE_vd)> accessed 23 December 2021.

<sup>49</sup> European Parliament, LIBE Working Group on Frontex Scrutiny 'Frontex Scrutiny Working Group Third Hearing' (23 April 2021) <[https://multimedia.europarl.europa.eu/en/libe-working-group-on-frontex-scrutiny\\_20210429-1500-COMMITTEE-LIBE-1\\_vd](https://multimedia.europarl.europa.eu/en/libe-working-group-on-frontex-scrutiny_20210429-1500-COMMITTEE-LIBE-1_vd)> accessed 23 December 2021.

<sup>50</sup> *ibid.*

<sup>51</sup> EBCG Regulation, Article 46.

<sup>52</sup> European Ombudsman, 'European Conduct of Good Administrative Behaviour' (2002), Articles 22, 23, 24.

<sup>53</sup> *ibid.* 16.

<sup>54</sup> Charter of Fundamental Rights of the European Union [2012] OJ C 326/391, Article 41.

<sup>55</sup> European Ombudsman, n. 53.

<sup>56</sup> Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/1 (TFEU), Articles 15(1),11(2) and 298(1); Charter, Article 42; Regulation 1049/2001.

<sup>57</sup> TFEU, Article 15(3); Charter, Article 42; Regulation 1049/2001, Article 2.

legal person can address Frontex in particular on the basis of Article 114 EBCG Regulation. Transparency is the first step towards seeking answers to any question.

The need for transparency was acknowledged in the Frontex founding Regulation, but the formulation has become more solemn 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. Among the Agency's explicit tasks is also the duty to follow high standards for border management, allowing for transparency and public scrutiny of its operations ensuring respect for, protection of and promotion of fundamental rights.<sup>58</sup>

The decision of the Agency for total or partial refusal of access to requested documents is an act of direct effect conducted by the Agency and can, therefore, be reviewed by the CJEU. Not every unlawful refusal of access to documents constitutes a human rights violation, and the limits and conditions, such as the systematic nature of refusals on the basis of Article 15(3) TFEU will need to be taken into account. Applicants can also bring an action for annulment under Article 263 TFEU against decisions on access to documents taken by the Agency pursuant to Article 8 of Regulation 1049/2001.<sup>59</sup>

### **3.4. Lack of Transparency and 'the Problem of Many Hands'**

When addressing complex structures, such as the European Border and Coast Guard, the attribution of responsibility is not always clear.<sup>60</sup> The multiple actors involved can lead to difficulties in identifying who is responsible for a harmful result, for instance in a case of human rights violations. The political philosopher, Dennis Thompson, describes this as 'the problem of many hands,' a difficulty in pinpointing responsibility.<sup>61</sup>

The problem of many hands, however, is not synonymous with complex organisations and does not always appear when multiple actors are involved. It results from the lack of transparent structures, distinctly defined tasks and responsibilities and gaps in overall openness and transparency. In situations that combine a vague framework, complex structure and lack of transparency, it can become impossible to find one actor that is entirely and independently responsible for the outcome, since the outcome is a collective one. It also becomes practically difficult to distinguish and prove who has contributed, and to what extent, to which particular part of the outcome, and should thus be held responsible for it.

Bovens describes the problem as a practical,<sup>62</sup> but also as a normative one, in highly problematic cases, where the collectivity, with the sum of the actions of its individual members, meets the criteria, but the same cannot be said for all of its individual parts.<sup>63</sup> These are situations where there is no clear division of tasks and formal responsibilities or transparency in the stages of preparation and execution so that the facts, but also the de facto responsibilities, become more or less obvious. This collective outcome can be the case in EBCG operations, especially since the clear a priori division of responsibilities and the lack of transparency are long-standing issues.

The problem of many hands functions as a wall behind which actors may hide their own contribution and shift the blame onto other actors involved. This frustrates the attempts to establish accountability and, consequently, the prevention of misconduct in the future. It is, in this sense, a problem of control.<sup>64</sup>

In fact, the problem of many hands is intrinsically connected to blame-shifting, where the actors involved can take advantage of the confusion in tasks and responsibilities in order to deny their responsibility and blame others. The multiplicity of actors can potentially create confusion as to the bearer of responsibility and may result in gaps in the legal accountability and the effective legal protection of those affected by immigration control.<sup>65</sup>

<sup>58</sup> EBCG Regulation, Articles 10(1) a–d and 74.

<sup>59</sup> Regulation 1049/2001, Article 8.

<sup>60</sup> Mariana Gkliati, 'A Nexus Approach to the Responsibility of the European Border and Coast Guard: From Individual to Systemic Accountability', Criminal Justice, Borders and Citizenship Research Paper No. 3118551, (SSRN 2018) <<https://ssrn.com/abstract=3118551>> accessed 31 December 2021.

<sup>61</sup> David Thompson, 'Moral Responsibility of Public Officials: The Problem of Many Hands' (1980) 74(4) *The American Political Science Review* 905–16. See also Mark Bovens, *The Quest for Responsibility, Accountability and Citizenship in Complex Organizations* (Cambridge University Press 1998) 45.

<sup>62</sup> Bovens (n 61) 47.

<sup>63</sup> *ibid* 47, 48.

<sup>64</sup> *ibid* 49. On the implications of the problem to the liability of Frontex, see further Mariana Gkliati, 'Systemic Accountability of the European Border and Coast Guard: The legal responsibility of Frontex for human rights violations' (PhD thesis, Meijers Series, Leiden University, 2021) 89–90.

<sup>65</sup> European Parliament, Committee on Civil Liberties, Justice and Home Affairs Department, Elspeth Guild, Sergio Carrera, Leonhard Den Hertog, Joanna Parkin (Rapporteurs), 'Implementation of the EU Charter of Fundamental Rights and its Impact on EU



In the case of Frontex, understanding the full range of implications of the command and control structure in practice is undoubtedly constrained by the gaps in transparency, as showcased in the following section. This creates complications regarding the division and allocation of responsibility and inhibits evidence collection. This subsequently creates gaps in accountability, as the different responsibilities can be conflated and hidden behind a veil of secrecy.

## 4. Gaps in Transparency over Frontex Operations

The following sections provide an overview of the most important gaps in transparency in the work of the Agency both towards European citizens and towards the European Parliament, as we have identified them in our research.

### 4.1. Access to Information

The lack of transparency is often criticised as a structural problem of Frontex,<sup>66</sup> while the European Parliament has spoken of a 'culture of secrecy'.<sup>67</sup> Frontex publishes annually the general and work programme reports, which provide a broad overview of activities, along with the general risk analysis, progress reports on the Fundamental Rights Strategy and any external evaluation reports. However, the structure of the general report was revised in 2008, significantly reducing the level of detail included.<sup>68</sup> Information per operation including, amongst others, participating states, budget, or the operational area, that used to be accessible via the Agency's website has now been removed. Furthermore, crucial information to enable the evaluation of the fundamental rights performance of the Agency remains unattainable. Namely, there is no access to information on the Agency's specific activities, primarily to be found in the operational plans and serious incident reports which are highly confidential.<sup>69</sup>

### 4.2. Access to Documents Requests (Freedom of Information)

The issue of lack of transparency becomes most striking when it comes to the right to public access to documents. Frontex often refuses access to documents requests and, more often than not, any released documents are extensively redacted on the ground of public security.<sup>70</sup> The Management Board has decided that, in principle, all documents should be accessible to the public, and only exceptionally restricted, taking into account the sensitive nature of the Agency's tasks.<sup>71</sup> However, according to the information from the Agency's annual reports (from 2012–2017), fewer applications receive full access each year, with the full acceptance rate reaching only 13.9% in 2017. Out of a total of 108 requests, almost 20% received a full refusal, 5.9% was refused, while 60.2% were only awarded partial access.<sup>72</sup> A telling example of this practice

Home Affairs Agencies Frontex, Europol and the European Asylum Support Office (EASO)' (2011) <[http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/libe/dv/02\\_study\\_fundamental\\_rights\\_/02\\_study\\_fundamental\\_rights\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/02_study_fundamental_rights_/02_study_fundamental_rights_en.pdf)> 103; Anneliese Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea', 229–257 in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers 2010) 229–257, 230.

<sup>66</sup> European Union Committee, *Frontex: the EU External Borders Agency. Report with Evidence* (HL 2007–08, 60–III) (United Kingdom, House of Lords), <<http://www.publications.parliament.uk/pa/ld200708/ldselect/lddeucom/60/60.pdf>> accessed 31 December 2021; Johannes Pollak and Peter Slominski, 'Experimentalist but Not Accountable Governance? The Role of Frontex in Managing the EU's External Borders' (2009) 32 *West European Politics* 904, 919; Sergio Carrera and Elsbeth Guild 'Joint Operation RABIT 2010' – Frontex Assistance to Greece's Border with Turkey: Revealing the Deficiencies of Europe's Dublin Asylum System' (Centre for European Policy Studies, November 2010) <<https://www.ceps.eu/ceps-publications/joint-operation-rabit-2010/>> accessed 15 December 2021; Amnesty International and ECRE, 'Briefing on the Commission proposal for a Regulation amending Council Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX)' (Refworld, September 2010), <<https://www.refworld.org/docid/4ca337ca2.html>> accessed 23 December 2021; Parliamentary Assembly of the Council of Europe, 'Resolution 1932, Frontex: human rights responsibilities' (2013) (Doc. 13161) 1–2; Sarah Wolff and Adriaan Schout, 'Frontex as Agency: More of the Same?' (2013) *Perspectives on European Politics and Society* 305–324, 319.

<sup>67</sup> Carrera, den Hertog, Guild and Parkin (n 65).

<sup>68</sup> Daniel Ghezelbash, Violeta Moreno-Lax, Natalie Klein and Brian Opeskin 'Securitisation of Search and Rescue at Sea: the Response to Boat Migration in the Mediterranean and Offshore Australia' (2018) 67 *International and Comparative Law Quarterly* 315.

<sup>69</sup> Baldaccini (n 65) 225–251.

<sup>70</sup> For further details on Frontex responses to specific requests, see 'Access to Documents Requests (Statewatch, Frontex Observatory) <<https://www.statewatch.org/observatories/frontex/access-to-documents-requests/>> accessed 23 December 2021.

<sup>71</sup> Frontex Management Board, 'Decision No 25/2016 adopting practical arrangements regarding public access to the documents held by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (the "Agency")' (2016) <[https://frontex.europa.eu/assets/Key\\_Documents/MB\\_Decision/2016/MB\\_Decision\\_25\\_2016\\_on\\_adopting\\_practical\\_arrangements\\_regarding\\_PAD.pdf](https://frontex.europa.eu/assets/Key_Documents/MB_Decision/2016/MB_Decision_25_2016_on_adopting_practical_arrangements_regarding_PAD.pdf)> accessed 15 December 2021.

<sup>72</sup> Frontex website, <<https://frontex.europa.eu/publications/>> accessed 23 December 2021.

that significantly limits the reach of social accountability is the request of the German NGO European Centre for Constitutional and Human Rights (ECCHR) for disclosure of the Operational Plan and Evaluation Report of Operation Hera, which was only partially disclosed.<sup>73</sup>

Moreover, Frontex has not included in its annual reports for 2018 and 2019 a section on access to documents detailing the number of requests received and their outcome, nor do its annual reports detail the number of sensitive documents held by the Agency, thereby failing to meet its obligations under Article 17 of the Management Board Decision 2016, and Article 17 of Regulation 1049/2001.

The communication of Statewatch and other organisations with PAD has proved to be, to an extent, ineffective in obtaining the required information.<sup>74</sup> Inconsistency in responses to different applicants regarding the same request, and misleading or obstructive responses, including false claims that known documents do not exist and that simultaneous requests for several documents are inadmissible, have been identified as common practices.<sup>75</sup>

For instance, documents that have been denied to Statewatch on grounds of privacy and public security, have been released (with redactions) months later to another organisation.<sup>76</sup>

Furthermore, in response to the Ombudsman's inquiry, Frontex claimed that it works proactively to help applicants to articulate requests in a way that will facilitate processing, if applicants do not know the name of a particular document. The experience of requesting organisations shows that such requests for assistance or informal consultations often go unanswered, while requests are summarily rejected on the grounds of not being specific enough and with no proactive attempts to facilitate processing. On at least two occasions (March and October 2021), when challenged by confirmatory application or other consultation, PAD has stepped in to apologise for its mistake. Such attempts to mislead applicants over admissibility of simultaneous requests and of eligible confirmatory applications have also been noted by the Ombudsman.<sup>77</sup>

In 2018, the Agency refused to disclose information regarding the names, flags and types of vessels deployed by Frontex under Joint Operation Triton, to the journalists, Luisa Izuzquiza and Arne Semsrott, on public security grounds, despite the fact that some of the information in question had already been shared publicly via Twitter. The journalists unsuccessfully challenged the refusal by virtue of Article 8(3) of Regulation 1049/2001, as the General Court of the European Union found in November 2019 no violation of the right to access to documents.<sup>78</sup> Following the Court's ruling, Frontex requested the sum of 23,700 EUR in legal fees, which was perceived by civil society as an act of intimidation. In a subsequent application, the General Court ruled that the Agency was unable to justify the size of the requested legal fees and reduced the amount by more than half.<sup>79</sup> In light of this, the LIBE Committee Frontex Scrutiny Working Group (FSWG) recommended that Frontex should waive such legal costs resulting from transparency actions, and refrain from using such practices to dissuade legal action aiming to ensure the fundamental right of access to information.<sup>80</sup>

Lack of access to information has also increasingly become a notable issue for third country residents, given the growing extraterritorial presence of the Agency,<sup>81</sup> who nevertheless do not benefit from the protection offered by Regulation 1049/2001.<sup>82</sup> As a result, individuals with legitimate interests in scrutinising the activities of the Agency in their countries, and possible victims of violations, including recent migrants who have not established residence in the EU or victims of push backs who are, by definition, not in EU territory, lack access to relevant information.

<sup>73</sup> Vera Wriedt, Darius Reinhardt, 'Opaque and Unaccountable: Frontex Operation Hera' (Statewatch, February 2017) <<https://www.statewatch.org/media/documents/analyses/no-307-frontex-operation-hera.pdf>> accessed 15 December 2021.

<sup>74</sup> Kilpatrick (n 41).

<sup>75</sup> *ibid.*

<sup>76</sup> *ibid.*

<sup>77</sup> European Ombudsman, The European Border and Coast Guard Agency's (Frontex) handling of multiple requests for public access to documents made by a single applicant, Case 2067/2020/MIG <<https://www.ombudsman.europa.eu/en/decision/en/143154>> accessed 23 December 2021.

<sup>78</sup> Case T-31/18 *Izuzquiza and Semsrott v Frontex* [2019] ECR II-815, ECLI:EU:T:2019:815.

<sup>79</sup> Nikolaj Nielsen, 'Frontex guilty of inflating legal fees against activists' (EU Observer, 19 April 2021) <<https://euobserver.com/migration/151577>> accessed 15 December 2021.

<sup>80</sup> LIBE (n 2) 16.

<sup>81</sup> Mariana Gkliati, Jane Kilpatrick, 'Frontex cooperation with third countries: examining the human rights implications' (2021) 68 *Forced Migration Review* 16–17.

<sup>82</sup> Regulation 1049/2001, Article 2(2).

Frontex has claimed that it rarely receives such requests from third countries, and that it analyses each one on a case-by-case basis.<sup>83</sup> Nevertheless, identical requests made by one organisation based in France, and one based in Senegal, have received different responses: partial access was given to the former, while denied to the latter.<sup>84</sup>

Finally, in recent years, Frontex has adopted on the basis of copyright a policy of prohibiting individuals from sharing documents released to them without a prior authorisation by the Agency.<sup>85</sup> It is worth noting that the Agency has not, to date, taken legal action in this regard despite systematic publication of released documents by Statewatch and other organisations. However, the attempt to discourage dissemination befits 'a too restricted classification regime [that] reduces transparency'.<sup>86</sup>

The above practices, which are often inconsistent and excessive, have in common a vague public security justification, which rarely allows for tipping the scales in favour of transparency. Social accountability is thus hindered by this secretive stance regarding the right of EU residents to access to documents.

### 4.3. Public Register

Regulation 1049/2001 requires EU institutions to create an electronic publicly accessible register of documents, which will be updated without delay and contain the full metadata (reference number, subject matter and a description of content) of all documents received or created by the relevant institution. Frontex lacks such a register, even though the obligation for it to establish one was present before the establishment of the Agency itself.<sup>87</sup>

The Frontex Management Board, in a Decision of 2014 following an earlier Ombudsman inquiry, referred to such a register,<sup>88</sup> while it noted, two years later, that it remained an outstanding item with no instruction for its creation.<sup>89</sup>

A relevant complaint submitted to the EU Ombudsman by Statewatch resulted in an investigation by the Ombudsman concluded in February 2021.<sup>90</sup> The Ombudsman found that Frontex should update its public register according to principles of good administration, and should publish the number of sensitive documents held that are not included in the register, as required by the applicable rules.<sup>91</sup> Frontex agreed with the Ombudsman's proposal and laid out a number of steps it intends to take to implement the proposal in the short, medium and long term. According to the Ombudsman's recommendations, the register must be user-friendly, complete (meaning that all documents are recorded, if not published, and that no documents are automatically excluded without a case-by-case assessment), and regularly maintained.<sup>92</sup> In the same investigation, no maladministration was found regarding the lack of access to documents by non-EU residents.

### 4.4. Lobbyists' Register

The EBCG Regulation requires Frontex to keep a public transparency register to disclose all meetings with third party stakeholders/lobbyists. To date, Frontex has not established such a register, despite assurances that a transparency register would be developed by early 2021 'at the latest'.<sup>93</sup> Moreover, a 2014 Parliamentary

<sup>83</sup> Email from frontex.europa.eu to Jane Kilpatrick (17 June 2021); Kilpatrick (n 41).

<sup>84</sup> Kilpatrick (n 41).

<sup>85</sup> LIBE (n 2) p 15.

<sup>86</sup> Frontex, FRaLO Working Group, 'Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea; Preliminary Report of the Frontex Management Board Working Group' (FRaLO WG preliminary report) January 2021 <<https://www.statewatch.org/media/1814/frontex-wg-push-backs-preliminary-report.pdf>> accessed 15 December 2021.

<sup>87</sup> Regulation 1049/2001, Article 11.

<sup>88</sup> European Ombudsman, 'Decision of the European Ombudsman closing own-initiative inquiry OI/5/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex)' (2013), <<https://www.ombudsman.europa.eu/en/decision/en/52477>> accessed 15 December 2021; Frontex Management Board, 'Management Board Decision No 3/2014 of 19 February 2014 adopting practical arrangements regarding public access to the documents of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) Art 14' (2014) <<https://www.ombudsman.europa.eu/en/decision/en/52477>> accessed 15 December 2021.

<sup>89</sup> FRaLO WG preliminary report (n 87) 36.

<sup>90</sup> European Ombudsman, 'Decision in case 2273/2019/MIG on the European Border and Coast Guard Agency's (Frontex) public register of documents' (2017) <[https://frontex.europa.eu/assets/Key\\_Documents/MB\\_Decision/2016/MB\\_Decision\\_25\\_2016\\_on\\_adopting\\_practical\\_arrangements\\_regarding\\_PAD.pdf](https://frontex.europa.eu/assets/Key_Documents/MB_Decision/2016/MB_Decision_25_2016_on_adopting_practical_arrangements_regarding_PAD.pdf)> accessed 15 December 2021.

<sup>91</sup> *ibid.*, para. 10.

<sup>92</sup> European Ombudsman (n 90); EBCG Regulation, Article 118.

<sup>93</sup> Kilpatrick (n 41).

and Commission agreement,<sup>94</sup> which invites EU agencies to use this framework,<sup>95</sup> has failed to make the Agency give formal notice of a decision to use such a register.<sup>96</sup> The Parliamentary Committee on Budget Control has criticised Frontex in this regard, and this has weighed considerably in its decision to withhold part of the Agency's budget in 2020.<sup>97</sup>

A journalistic investigation revealed in February 2021 that Frontex had held 16 meetings with lobbyists between 2017 and 2019, primarily from the military technology, surveillance and biometrics industries.<sup>98</sup> Around 70% of these meetings conducted by Frontex were with lobbyists that are not on the EU transparency register.<sup>99</sup>

Frontex has been increasingly involved in new procurement procedures and tenders for services, equipment and outsourced projects since the entry into force of Regulation 2019/1896.<sup>100</sup> Without a functioning transparency register, which would allow for the systematic publication of information on meetings with industry representatives or details of discussions held, the contractual dealings of the Agency remain beyond public scrutiny.

#### 4.5. The Consultative Forum

In the 2019 Regulation, the roles of the Parliament, the Fundamental Rights Officer and the Complaints Mechanism were boosted, an important legislative update to administrative accountability structures.<sup>101</sup> However, as noted by the European Ombudsman in her own-initiative inquiry into the effectiveness and transparency of the complaints mechanism of the Agency 'The complaints mechanism can be an effective accountability mechanism only if it is accessible and has the means to conduct independent investigations, which are prompt, thorough and transparent'.<sup>102</sup>

In a measure to improve transparency regarding fundamental rights, the Agency formalised its relationship with civil society organisations with the creation in 2011 of the Frontex Consultative Forum on Fundamental Rights (Consultative Forum), an independent body of relevant governmental and non-governmental organisations and EU agencies.<sup>103</sup>

Originally envisaged as an independent Advisory Board that would monitor the activities of the Agency, with the right to unconditional access to information and the power to suspend an operation in case of serious and persistent violations,<sup>104</sup> the Consultative Forum has today considerably more limited powers.<sup>105</sup> Its composition is decided by the Agency's Management Board upon the proposal of the ED. It has a consultative rather than advisory role and the Agency is not bound by its recommendations. Furthermore, it cannot function as a direct link to civil society due to the duty of confidentiality by which its members are bound.<sup>106</sup> It is only allowed to share information that the Management Board has agreed to transmit and is unable to effectively function as a social accountability mechanism.<sup>107</sup>

<sup>94</sup> European Parliament, European Commission, 'Agreement between the European Parliament and the European Commission on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation' [2014] OJ L 277/11–24, based on Article 295 TFEU.

<sup>95</sup> *ibid.*

<sup>96</sup> European Parliament, 'Resolution with observations forming an integral part of the decision on discharge in respect of the implementation of the budget of the European Border and Coast Guard Agency for the financial year 2019 (2020/2167(DEC)' (2021), para 31, <[https://www.europarl.europa.eu/doceo/document/TA-9-2021-0191\\_EN.html#title3](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0191_EN.html#title3)> accessed 31 December 2021.

<sup>97</sup> *ibid.*, para 31.

<sup>98</sup> Vera Deleja-Hotko, Ann Esswein, Luiza Izuzquiza, Bartholomäus von Laffert, Daneila Sala, Phevos Simeonidis 'Frontex Files' (Frontex Files) <<https://frontexfiles.eu/en.html>> accessed 15 December 2021.

<sup>99</sup> 'The Making of a Border-Industrial Complex' (Corporate Europe Observatory, 5 February 2021) <<https://corporateeurope.org/en/lobbying-fortress-europe>> accessed 15 December 2021.

<sup>100</sup> FRaLO WG preliminary report (n 86), para 31.

<sup>101</sup> EBCG Regulation, Articles 109–111.

<sup>102</sup> European Ombudsman, 'How the European Border and Coast Guard Agency (Frontex) deals with complaints about alleged fundamental rights breaches through its 'Complaints Mechanism' (2021) 4 <<https://www.ombudsman.europa.eu/nl/case/en/57955>> accessed 15 December 2021.

<sup>103</sup> Frontex Consultative Forum, <<https://frontex.europa.eu/accountability/fundamental-rights/consultative-forum/general/>> accessed 15 December 2021.

<sup>104</sup> 'The EU's dirty hands: Frontex involvement in ill-treatment of migrant detainees in Greece' (Human Rights Watch, 2011) <<https://www.hrw.org/report/2011/09/21/eus-dirty-hands/frontex-involvement-ill-treatment-migrant-detainees-greece>> accessed 15 December 2015.

<sup>105</sup> EBCG Regulation, Article 108.

<sup>106</sup> 'Working Methods of the Consultative Forum', (Frontex, 2017), <[https://frontex.europa.eu/assets/Partners/Consultative\\_Forum\\_files/CF\\_Working\\_Methods\\_2017.pdf](https://frontex.europa.eu/assets/Partners/Consultative_Forum_files/CF_Working_Methods_2017.pdf)> accessed 15 December 2021; For an in-depth analysis into the Frontex Consultative Forum, refer to Giannetto (n 46).

<sup>107</sup> Stefan 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).

The role of the organisations in the Consultative Forum is not advocacy, even though lobbying strategies can be relevant,<sup>108</sup> but providing guidance and independent advice to the Agency on matters of fundamental rights.<sup>109</sup> Giannetto shows that civil society organisations have to make a choice between ‘gaining access’ to the organisation or ‘going public’.<sup>110</sup> Nevertheless, even for those organisations that made the choice to participate in the Consultative Forum and ‘gain access’ to Frontex, this access is limited both in terms of the information that members of the Consultative Forum are able to access and in terms of the impact of their consultation on the activities of the Agency. Common constraints that members of the Consultative Forum face are being asked to provide comments on complex policy or technical documents in a short time frame, limited resources of smaller civil society organisations<sup>111</sup> and, importantly, restricted access to information.<sup>112</sup> The Frontex Scrutiny Working Group of the European Parliament found in its investigation into the involvement of Frontex in fundamental rights violations that the Agency does not sufficiently take into account the recommendations and opinions of the Consultative Forum, that it is not actively included in time in the relevant processes, and that the internally established confidentiality rules affect its effectiveness.<sup>113</sup>

#### **4.6. The European Parliament**

Another accountability mechanism that struggles with the lack of transparency by the Agency is the European Parliament. The involvement of the European Parliament has been strengthened since Frontex was first established, since issues concerning the EU’s external borders became subject to the co-decision procedure,<sup>114</sup> while it also has the power to approve the Agency’s budget. Article 7 was added to the EBCG Regulation to state explicitly that the Agency is accountable to the Parliament and the Council.

The EBCG Regulation boosts the role of the European Parliament in democratic scrutiny of Frontex’s activities, as well as enhancing the mandate and role of the Fundamental Rights Officer, and developing the function of the Individual Complaints Mechanism.<sup>115</sup> This should have led to improved transparency between Frontex and the Parliament, within Frontex in relation to its fundamental rights safeguard, and for the public via opportunities to witness and denounce any fundamental rights violations taking place during a Frontex activity. This was, however, not the case, as the findings of the FSWG show.

The effectiveness of the European Parliament, as the most important forum for political accountability, heavily relies on its access to information. The control rights of the Parliament are limited as it has a weak reach into Frontex activities,<sup>116</sup> 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 accessible, though, to the European Commission and the Council.<sup>117</sup> The FSWG observed that, until recently, the Agency had failed to inform the Parliament adequately, which would mainly have received publicly available records.<sup>118</sup> For other types of information, the level of confidentiality required hampered the ability of the Parliament to exercise control over the Agency.<sup>119</sup> Information exchange improved in 2021, as the Agency was obliged to disclose a large number of documents to the FSWG in the context of its investigation. Nevertheless, the confidentiality restrictions which Frontex had imposed made it particularly difficult for the members to study the documents.<sup>120</sup> Moreover, even though the Agency’s ED appeared twice before the Parliament and answered

<sup>108</sup> Leila Giannetto, ‘CSOs and EU Border Management: Cooperation or Resistance? The Case of Frontex Consultative Forum’ (2019) 64 *American Behavioural Scientist* 1614.

<sup>109</sup> Chiara Loschi and Peter Slominski, ‘Frontex’s Consultative Forum and Fundamental Rights Protection: Enhancing Accountability through Dialogue?’ *European Papers* (forthcoming).

<sup>110</sup> Margit Jochum, Hanspeter Kriesi, and Anke Tresch, ‘Going public in the European Union: Action repertoires of Western European collective potential actors’ (2007) 40 *Comparative Political Studies* 48.

<sup>111</sup> Giannetto (n 46) 511, 513.

<sup>112</sup> *ibid.*

<sup>113</sup> LIBE (n 2) 10.

<sup>114</sup> Pollak and Slominski (n 66) 917.

<sup>115</sup> EBCG Regulation, Articles 109–111.

<sup>116</sup> LIBE (n 2) 24.

<sup>117</sup> Pollak and Slominski (n 66) 917, 918.

<sup>118</sup> LIBE (n 2) 16.

<sup>119</sup> *ibid.* 10.

<sup>120</sup> European Parliament, LIBE Working Group on Frontex Scrutiny hearing of 29 April 2021, Roberta Metsola, 15:04:56: ‘Our assistants, members’ assistants, are not authorised to be granted access to confidential information that is designated as classified and unclassified’ <[https://multimedia.europarl.europa.eu/en/libe-working-group-on-frontex-scrutiny\\_20210429-1500-COMMITTEE-LIBE-1\\_vd](https://multimedia.europarl.europa.eu/en/libe-working-group-on-frontex-scrutiny_20210429-1500-COMMITTEE-LIBE-1_vd)> accessed 15 December 2021.

written questions, both the FSWG and the EU Home Affairs Commissioner, Ylva Johansson, stated that some of his statements 'in Parliament [are] not true'.<sup>121</sup>

## 5. Critical Solutions Towards Openness and Transparency

This section focuses on recommendations aimed at the rectification of the identified transparency gaps as formulated in the latest investigations on Frontex, complemented by the authors' own recommendations.

First of all, Frontex can improve its record in honouring the right of access to documents. It can do so, for instance, by further opening a window to its assessment of the human-rights related Serious Incidents Reports it receives and the justification of the decision of the ED to continue an operation, which should otherwise have been suspended or terminated due to serious and continuous violations. The FSWG has called for further openness into the decision to suspend, terminate or not finance an operation in light of fundamental rights violations,<sup>122</sup> with the establishment of clear criteria and procedures and the justification of the decision by the ED.<sup>123</sup> Regarding the Agency's internal serious incidents reports, reports on the use of force and individual complaints, the FSWG determined that they should only be classified as restrained or restricted on a case-by-case basis and only when necessary.<sup>124</sup>

Moreover, the European Ombudsman in her own-initiative inquiry into the effectiveness and transparency of the complaints mechanism of the Agency found that 'the complaints mechanism can be an effective accountability mechanism only if it is accessible and has the means to conduct independent investigations, which are prompt, thorough and transparent'.<sup>125</sup>

In addition, the FSWG considered the prohibition imposed to individuals from sharing documents released to them without a prior authorisation by the Agency. The FSWG noted that 'the Agency as an EU institution does not fall under the law on intellectual property', and therefore cannot impose this copyright condition on recipients.<sup>126</sup> The Agency has not, to date, taken legal action in this regard despite systematic publication of released documents by Statewatch and other organisations. However, the attempt to discourage dissemination befits 'a too restricted classification regime [that] reduces transparency'.<sup>127</sup>

We further note the need for the Agency to ensure good administrative practices and high standards of public access to documents and, in this light, we set out the following additional recommendations.

First, the Management Board's practical arrangements for the application of Article 114 EBCG Regulation need to be updated to reflect the enhanced need for transparency concerning the work of the Agency given its enhanced powers and capacity following the EBCG Regulation. Frontex should provide greater transparency as regards non-confidential content from operational documents. By showing which entity, Frontex or the host Member State, is involved in what aspects of joint operations, it will be easier to see who should be held accountable for eventual wrongful conduct.<sup>128</sup>

Second, the portal especially set up by the Agency for handling access to documents requests unnecessarily hinders the accessibility of information, as it makes the information accessible only to the person who made the request, while all documents and correspondence are no longer accessible after 15 working days.<sup>129</sup> As the right to access to information is not only an individual right, but a right of the public in terms of social accountability, access to information requests should also be able to be handled by the AsktheEU portal, similar to other EU institutions and agencies, and the documents of successful requests should be able to be shared and uploaded in public portals.

Third, the public register of documents currently available on the Agency's website does not fulfil the legal requirements of Regulation (EC) No 1049/2001. In order for it to do so, the implementation of the

<sup>121</sup> Daniel Boddey and Apostolis Fotiadis, 'EU border force head faces calls to quit over allegations he 'misled' MEPs' *The Guardian* (London, 19 January 2021) <<https://www.theguardian.com/global-development/2021/jan/19/eu-border-force-head-fabrice-leggeri-faces-calls-to-quit-over-allegations-he-misled-meeps>> accessed 15 December 2021; LIBE (n 2) 16.

<sup>122</sup> EBCG Regulation, Article 46.

<sup>123</sup> LIBE (n 2) 12.

<sup>124</sup> *ibid.* 16.

<sup>125</sup> European Ombudsman (n 88) 4.

<sup>126</sup> LIBE (n 2) 15.

<sup>127</sup> FRaLO preliminary report (n 87) 36.

<sup>128</sup> European Ombudsman, European Parliament, LIBE Working Group on Frontex Scrutiny hearing of 21 May 2021, <[https://multimedia.europarl.europa.eu/en/libe-frontex-scrutiny-working-group-meeting\\_20210521-1100-COMMITTEE-LIBE\\_vd](https://multimedia.europarl.europa.eu/en/libe-frontex-scrutiny-working-group-meeting_20210521-1100-COMMITTEE-LIBE_vd)> accessed 15 December 2021.

<sup>129</sup> Lena Karamanidou, 'Request for Consultative Forum minutes, Fundamental Rights Officer Reports and SIRs' (Ask the EU, 25 April 2019) <[https://www.asktheeu.org/en/request/request\\_for\\_consultative\\_forum\\_m#incoming-22259](https://www.asktheeu.org/en/request/request_for_consultative_forum_m#incoming-22259)> accessed 15 December 2015.

EP's recommendation to list all documents produced or held by the Agency in the register is of crucial importance.<sup>130</sup>

Fourth, currently, access to information requests are handled on a 'cross-divisional' basis by staff with different formal responsibilities. These should instead be handled by trained and specialised personnel at the Transparency Office, which should be allocated a specific budget. To ensure better transparency, any refusal of information on security grounds should be vetted by the Fundamental Rights Officer which should also work together with the Transparency Office to verify whether the request for information represents an action in the public interest.

Fifth, given the expansion of operational and non-operational activities of Frontex in third countries, where the standards of protection of the right to access to information are often considerably inferior to those of the EU, the Agency needs to establish procedures that will allow third country nationals outside the EU to access relevant information.

Finally, the Agency should join the long-standing practice of EU institutions to waive legal costs resulting from transparency actions, and refrain from using such practices to dissuade legal action, thereby helping to ensure the fundamental right of access to information.

## 6. Concluding Remarks

Even though the number of arrivals of migrants in the EU does not suggest a crisis situation any more (if it ever did), EU migration management seems to be placed within a perpetual cycle of crises. In a 'post-refugee crisis' environment, Frontex is still in the centre of the response to these crises with consecutive amendments of its mandate and powers every couple of years.

The Agency also has its own role in the perpetuation of the crisis narrative. This is exemplified in this article through the discourse, development and practices of Frontex, but the perpetuation of the securitisation narrative via constant interchanging crises lies at the core of the EU policy for migration management itself.

From the refugee crisis, to the crisis of deaths at sea, terrorism, the Moria crisis, public health crisis, a geopolitical crisis with Turkey, and the most recent crisis in Belarus, EU policy cries wolf at every opportunity. The rationale for existing proposals is adjusted to fit the most recent crisis, and the securitisation narrative is utilised to legitimise the Agency's actions and justify its growth, and to justify the systemic practice of avoiding the disclosure of information to the public, the Consultative Forum and the Parliament.

The above can lead to gaps in accountability and impacts how Member States and the EU deal not only with migrants but also with citizens and their basic right to good governance and freedom of information as well as other accountability mechanisms, such as the Consultative Forum and the European Parliament, and how they can exercise their rights and duties of oversight over public authorities. Essentially, this results in a lack of control over violations from social and political accountability fora and creates gaps in legal accountability, especially in operations that engage 'the problem of many hands,' as the lack of transparency can inhibit the quest for responsibility and accountability for fundamental rights violations during Frontex joint operations.

This is a road that eventually leads to an institutional crisis. There can be no trust, no democracy without oversight and accountability. It is essential to pay attention to how we respond to and how we accept (or not) the securitising move of migration to 'emergency politics', in order to avoid emergency/crisis responses becoming a long-term legacy. A perpetuated crisis narrative can result in the normalisation of securitisation. What was considered emergency politics can, via this normalisation, be moved back to the realm of ordinary politics.

Moreover, transparency and accountability are indispensable, even or especially during a crisis. In the present fast-acting and fast-changing state of affairs we need to ensure that the cure is not worse than the disease and that emergency measures do not escape scrutiny.

## Competing Interests

The authors have no competing interests to declare.

<sup>130</sup> European Parliament (n 97) para 17.

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