

FRONTEX: THE MAKING OF A 'SUPER AGENCY'

RSA and PRO ASYL analysis of the evolution of the agency following the new (2019) Regulation

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TABLE OF CONTENTS

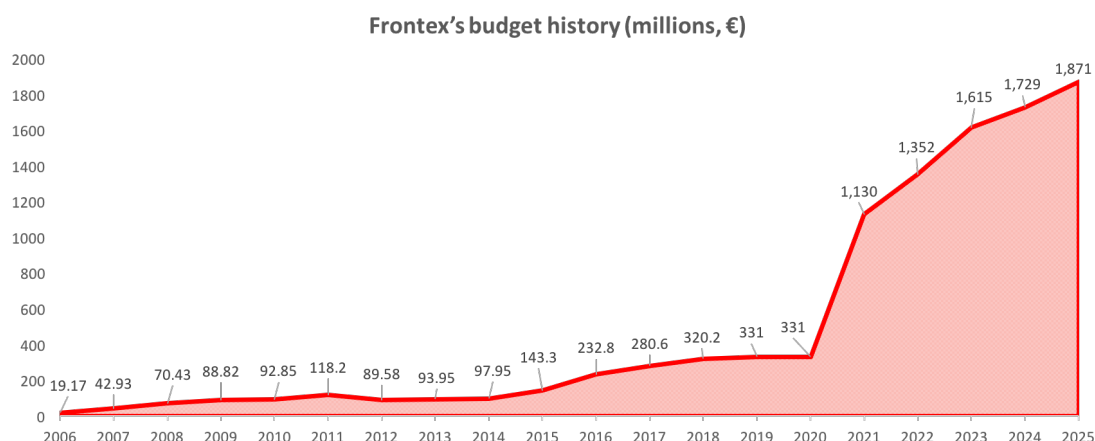
Introduction: The new Frontex Regulation	3
The composition of Frontex's standing corps	5
Building up of own operational means	6
Central player in an expulsions' mechanism	10
A 'big data' administrator.....	11
Accountability questions	13

INTRODUCTION: THE NEW FRONTEX REGULATION

On 13 November 2019, the Council of the European Union and the European Parliament adopted the new Regulation on the European Border and Coast Guard Agency (Frontex),¹ three years following the agency's last reform.² The new Regulation will come into force on 4 December 2019 and will make Frontex the strongest and best financed agency in the history of the European Union (EU).

The new Regulation aims to increase the agency's autonomy and to reduce operational dependency of the agency on EU Member States (MS). For this purpose, the Regulation expands the agency's capacity and mandate in three main respects.

First, the agency will now be able to hire and deploy its own statutory staff. By 2027, such staff will create together with contributions of the MS **a standing force of 10,000 border guards**.³



Parallel to this, Frontex is already working on jointly acquiring **technical equipment** with particular MS, which it will be able to deploy according to operational needs. This possibility had already been laid down in the 2016 Regulation⁴ but only lately started being implemented by the agency. The ownership of the equipment, as well

1 Regulation (EU) 2019/1886 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 (hereafter "Frontex Regulation") [2019] OJ L295/1.

2 Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard [2016] OJ L251/1. For a detailed analysis of the new Regulation, see Marianna Gkliati, 'The new European Border and Coast Guard: Do increased powers come with enhanced accountability?', EU Law Analysis, 17 April 2019, available at: <https://bit.ly/2OlgiNu>.

3 Article 5(2) and Annex I Frontex Regulation.

4 Article 39 Regulation 2016/1624.

as the terms of availability, will be spelled out on bilateral agreements between the agency and the partner MS.⁵

Second, the Regulation also places Frontex at the core of the creation of an effective expulsion mechanism at EU level. The agency's **mandate expands significantly to include all aspects of return procedures**. Frontex will be able to technically and operationally support MS in certain pre-return and return-related activities e.g. identification, interpretation services, acquisition of travel documents, advice on the implementation of the Return Directive.⁶ For this purpose, the agency will deploy its own staff, comprising return escorts, return specialists and return monitors from the ranks of 10,000 standing corps.⁷ It will also establish liaison officers in third countries, with priority being awarded to the "fight against illegal immigration and the return of returnees" to those states.⁸

Third, the new Regulation assigns the agency as the **administrator of a set of surveillance and data systems** in order to increase efficiency and interoperability of border control. EUROSUR, a system already administered by Frontex in Warsaw, created to provide near-live time operational oversight of EU's external frontier, is now incorporated under the agency's mandate.⁹

The Regulation also tasks Frontex with creating and operating a centralised return management platform for processing all information related to return procedures.¹⁰

The agency will also be responsible for setting up and running the European Travel Information and Authorisation System (ETIAS) Central Unit, an inter-operable system granting authorisation to travel to the external borders of the MS.¹¹

This document analyzes the transformative process set off by the new Regulation. The evolution of Frontex into a super-agency is examined through the expansion of its human resource capacity, an examination of its investment strategy in infrastructure and services, a description of its emerging role as a key surveillance data administrator and returns operation manager, and concludes with an analysis of questions and concerns regarding accountability and legal issues that will inevitably define the character of the agency in the years to come.

5 Article 64(9) Frontex Regulation.

6 Article 48(1) Frontex Regulation.

7 Recital 58 and Article 2(16) Frontex Regulation.

8 Article 77(3) Frontex Regulation.

9 Articles 18 et seq. Frontex Regulation.

10 Articles 48(1)(a)(i) and (d) and 49 Frontex Regulation.

11 Article 10(1)(af) Frontex Regulation.

THE COMPOSITION OF FRONTEX'S STANDING CORPS

Contrary to the impression created that Frontex will hire 10,000 officers to man its operations in the future, the majority of Frontex officers will still be deployed from contributions and secondments of MS officials. This means that the number should be treated as a political declaration and not a strict budgeted commitment. Nevertheless, the agency will hire enough statutory personnel to enable it to plan and execute operations with extended autonomy. The breakdown detailing how personnel will occur during the build-up of the agency's standing corps is described in a revised financial statement circulated to MS by the General Secretariat of Council of the EU on 22 May 2019.¹²

According to the document:

*The operational staff of the European Border and Coast Guard standing corps means border guards, return escorts, return specialists and other relevant staff employed by the European Border and Coast Guard Agency, seconded to the Agency by the Member States or provided for short term deployment by the Member States to act as members of border management teams, migration management support teams or return teams having executive powers.*¹³

Staff of the standing corps are separated into four categories:¹⁴

1. Statutory staff recruited by Frontex

The number of the agency's operational staff within the corps is expected to grow from 750 in 2019 to 3,000 by 2027. "Frontex border guards will wear uniforms, carry a service weapon and will have executive powers. This means that the officers will be able to perform tasks such as verifying a person's identity and nationality, allowing or refusing entry into the EU, patrolling between border crossing points".¹⁵

It will consist of 50% contracted agents and 50% temporary staff. The corresponding staff costs are estimated on 200 euro per day of deployment, subject to 40% reduction in case of long-term deployment.

"Staff recruited under this category will be able to act as members of the teams deployed from the European Border and Coast Guard standing corps to carry out border control and return tasks, including those with executive powers"¹⁶. An initial €40,000 training per person will be followed by a €10,000 follow up training annually.

12 Council of the European Union, Proposal for a [Frontex Regulation] – Revised financial statement following the Provisional Agreement between the co-legislators, 8354/19, 22 May, 2019, available at: <https://bit.ly/2QOUi61>.

13 Article 2 (16) Frontex Regulation.

14 Article 54(1) and Annex I Frontex Regulation.

15 Frontex, 'Become a Frontex Border Guard - We are recruiting!', available at: <https://bit.ly/33hxRJl>. See also Article 55(5) Frontex Regulation.

16 Council of the European Union, Proposal for a [Frontex Regulation] – Revised financial statement following the Provisional Agreement between the co-legislators, 8354/19, 22 May, 2019, available at: <https://bit.ly/2QOUi61>.

The recruitment of the first 700 officers has already begun. The plan is to complete recruitment and training within 2020 and having them deployed by January 2021.

2. Operational staff seconded by Member States for a long-term duration

This type of operational staff is expected to grow from 400 in 2021 to 1,500 by 2027. The Regulation foresees that the seconded staff will be permanently deployed in the different operational areas. Also, in this category, a €200 daily compensation rate is set out, subject to 40% reduction in case of long-term deployment. Close to €5,000 will be invested for the training needs of seconded staff annually per staff member.

3. Operational staff deployed by Member States for a short-term duration

This category of operational staff is also expected to gradually increase within the European Border and Coast Guard standing corps from 3,600 members in 2021 to 5,500 in 2027. Similarly to previous categories, the same average daily rate applies (€200 per day), calculated for 30 days per month, covering up to maximum 4 months of deployment. However, contrary to Category 1 and 2, the deployment costs are not subject to the 40% reduction applicable in case of long missions.

4. Reserve for Rapid Reaction (operational staff provided by Member States for rapid border interventions)

A capacity of 1,500 officers to be maintained until 2024. This reserve can only be activated for rapid border interventions (so far only two such interventions took place), therefore no regular financing for such operations is budgeted except in the form of the already existing "financial operational reserve"¹⁷.

BUILDING UP OF OWN OPERATIONAL MEANS

While co-ownership of operational means was already set out in the 2016 Regulation establishing Frontex, the agency has only lately taken steps to implement these provisions. The reasons for this is related to legal as well as budgetary constraints. An update of the budget for 2019 and 2020, as well as the expectation of a massive increase of available financial resources from 2021 onward, appear to have contributed to a shift in the strategy of the agency regarding procurement of equipment and services.

17 Council of the European Union, Proposal for a [Frontex Regulation] – Revised financial statement following the Provisional Agreement between the co-legislators, 8354/19, 22 May, 2019, available at: <https://bit.ly/2QOUi61>.

A detailed analysis of contract notices announced during 2019, **the vast majority occurring at the second half of the year**, by the agency suggests that Frontex is front-loading on procurement of equipment and services necessary for the operationalisation of deployed personnel. Part of the contracts also correspond directly to the expansion of the agency's activity into third countries.

A framework contract for the "Provision of Mobile Office Containers and Associated Services in Albania, Serbia, Bosnia and Herzegovina and the Republic of North Macedonia"¹⁸ was awarded on 23 July 2019 for €500,000 to ITBM LLC company based in Pristina, Kosovo.

A similar contract for the "Provision of Mobile Office Containers and Associated Services in Cyprus, Kosovo, Moldova, Montenegro and Ukraine"¹⁹ was initially declared void as no tenders or requests to participate were received or all have been rejected by 3 October 2019.

A number of other tenders announced during the summer aim to acquire the equipment of Frontex-deployed personnel. A €400,000 contract for the Supply of Heart Beat Detectors (HBD) for Border Checks, opened in August 2019.²⁰

The same month, another tender for purchase of cooled handheld thermal cameras for border surveillance s opened, for a €4 million value excluding VAT.²¹

In September and October 2019, two contracts had also been awarded for purchasing vehicles needed for Frontex operational activities. One in Slovenia, by the Ministry of Interior, regarding the supply of four special patrol off-road vehicles (SUV) from 1.600 cm³ to 2.000 cm³. The 2,9 million SUV contract is financed by the Internal Security Fund and is intended for operations related to Frontex activities.²²

A second contract was awarded to the Italian company TEKNE Srl to provide vehicles for migration management support purposes in Europe and North and West Africa, for €2 million.²³

A number of contracts opened by Frontex or other EU agencies aim to improve access to data, infrastructure and equipment that will enhance the surveillance capacity of the agency. An investment also directly correlating to the incorporation of EUROSUR - the mass near time surveillance of all EU external Frontier system - into the agency's mandate.

18 <https://ted.europa.eu/udl?uri=TED:NOTICE:343568-2019:TEXT:EN:HTML&src=0>

19 <https://ted.europa.eu/udl?uri=TED:NOTICE:463323-2019:TEXT:EN:HTML>

20 <https://ted.europa.eu/udl?uri=TED:NOTICE:336353-2019:TEXT:EN:HTML&tabId=1>

21 <https://ted.europa.eu/udl?uri=TED:NOTICE:366030-2019:TEXT:EN:HTML&src=0>

22 <https://ted.europa.eu/udl?uri=TED:NOTICE:415151-2019:TEXT:EN:HTML&src=0>

23 <https://ted.europa.eu/udl?uri=TED:NOTICE:487436-2019:TEXT:EN:HTML&src=0>

For example, on 26th of July a €2.300.000 euro contract was awarded to ESRI Polska for purchasing access to the Transportation Network Spatial Vector Data along the EU External Borders²⁴.

On 8 August 2019, the European Maritime Safety Authority announced the direct award of a contract, due to absence of competition for technical reasons, to acquire licenses "for the use of TerraSAR-X/Tandem-X and PAZ Synthetic Aperture Radar (SAR) images." The licenses procured, of a total cost of 20 million euro shall be used "primarily to support maritime surveillance activities"²⁵.

A day afterwards a voluntary transparency notice issued by the European Satellite Center (SatCen) based in Spain, announced a similar "Subscription to the DigitalGlobe's SecureWatch Service for the Acquisition of Very High Resolution Imagery"²⁶. As mentioned in the notice, SatCen is buying the € 300,000 euro subscription to the DigitalGlobe's service for the "in order to fulfill its mission under the service level agreement signed by and between SatCen and Frontex". The service, referring mostly to defense and intelligence services, provides the capacity to transfer the "highest resolution satellite imagery to your existing imagery exploitation software", meaning it can directly feed into the EUROSUR system.

In July 2019, Frontex also renewed another major contract related to surveillance services. Specifically, it topped up a contract running since early 2019 of an initial value of 27 million euro, with an additional 9 million. The top up was considered necessary since funds covering the hours of service acquired by a consortium of private contractors were running out²⁷. A large part of this manned aerial service was delivered for surveillance purposes in the South Mediterranean. According to Matthias Monroy, a researcher on security issues the last two years: The flights of this „Multipurpose Aerial Surveillance“ (MAS) are feeding into the surveillance system EUROSUR, with which Frontex monitors all external borders of the European Union and its „pre-frontier area“. EUROSUR provides so called Fusion Services, including satellite reconnaissance and drone flights."²⁸.

Most importantly, on 18 October 2019, Frontex initiated a tender "to acquire aerial surveillance services by the means of Medium Altitude Long Endurance Remotely Piloted Aircraft System (MALE RPAS) for maritime purposes."²⁹ The service will be delivered in Greece and/or in Italy and/or in Malta within a framework contract signed between Frontex and the contractors. The aerial surveillance service shall include reliable close to real time live data streaming and data sharing capacity in the requested formats. Frontex is looking for a complete service providing all the necessary technical and human resources". This follows the completion of other

24 <https://ted.europa.eu/udl?uri=TED:NOTICE:350772-2019:TEXT:EN:HTML&src=0>

25 Among other multiple tasks, they will provide integrated services for Frontex such as satellite image feasibility planning and tasking, including short notice and emergency requests. See <https://ted.europa.eu/udl?uri=TED:NOTICE:373922-2019:TEXT:EN:HTML>

26 <https://ted.europa.eu/udl?uri=TED:NOTICE:375803-2019:TEXT:EN:HTML>

27 <https://ted.europa.eu/udl?uri=TED:NOTICE:338734-2019:TEXT:EN:HTML&src=0>

28 <https://digit.site36.net/2019/09/27/does-frontex-arrange-illegal-push-backs/>

29 <https://ted.europa.eu/udl?uri=TED:NOTICE:490010-2019:TEXT:EN:HTML>

contracts awarded to private contractors for complete drone services since the end of 2018 that have been delivered by military corporations³⁰.

The agency's intention is to split the contract of 50 million euro to three contractors, thus being able to cover the entire geographical area mentioned in the description of the tender. It will have a duration of 24 months and could be renewed maximum 2 times, each time for a period of one year. Based on this contract the agency could approximately invest 100 million euros for drones in the next four 4 years.

Ongoing investments in big systems are also streamlined with the upgrade of an ongoing contract between Greece's Ministry of Maritime Affairs and the Italian company Cantiere Navale Vittoria S.P.A. for the provision of four modern coast guard vessels of a total value of € 55,5 million (excluding VAT)³¹. The contract is pursued as an Internal Security Fund Greek national program specific objective titled "Frontex Equipment" and is part of the co-owned systems Frontex will be able to operate in coordination with EU member states. Under this scheme - , occurring as a solution to legal barriers Frontex faces d to deploy its own equipment - , the agency will be able to request the dispatch of the equipment according to its operational team. Operational and managerial details are to be arranged based on an agreement between the two parts, Frontex and the MS.

A similar tender opened in Italy in October 2019 regarding the purchase of a patrol vessel for € 32 million. The contract will be co-funded by the EU and there us an option for ordering further boats for the value of € 97 million, meaning potentially an additional three vessels. The vessels will be equipped with instruments that will allow among other purposes, to be used in operations where Frontex participates³².

Significant investment has also been directed in fulfilling the role of Frontex as a key tool to the returns apparatus put in place by the EU. On March 2019, an one million euro upgrade of an older running contract, was awarded to Air Charter Service Ltd "in order to carry out the short notice return flights."³³

Also, in August 2019, a new framework contract notice of 10 million value was announced "for organising emergency return flights"³⁴.

On November 21st a contract of € 1,640,000 was awarded to 'Lazaris A. Gomos D. OE' for "transfer services by sea for passengers from Mytilini to Dikili provided by individual ship fully reserved for Frontex and availability of the ferry for trainings conducted on board at the port of Mytilini". The term "Passengers" most possibly meaning returnees under the EU-Turkey deal framework³⁵.

30 <https://www.theguardian.com/world/2019/aug/04/drones-replace-patrol-ships-mediterranean-fears-more-migrant-deaths-eu>

31 <https://ted.europa.eu/udl?uri=TED:NOTICE:347386-2019:TEXT:EN:HTML>

32 <https://ted.europa.eu/udl?uri=TED:NOTICE:498622-2019:TEXT:EN:HTML&src=0>

33 <https://ted.europa.eu/udl?uri=TED:NOTICE:125845-2019:TEXT:EN:HTML>

34 <https://ted.europa.eu/udl?uri=TED:NOTICE:429650-2019:TEXT:EN:HTML&src=0>

35 <https://ted.europa.eu/udl?uri=TED:NOTICE:550866-2019:TEXT:EN:HTML&src=0>

CENTRAL PLAYER IN AN EXPULSIONS' MECHANISM

Contracts to acquire charter flight services for return operation purposes are expected to significantly increase in the coming years. While Frontex is growing to become EU's main tool for establishing an effective expulsions' mechanism, a Council proposal for the agency's forthcoming budget allocation predicts a staggering amount of "EUR 1,75 billion to be added to the Agency's budget for the next MFF (2021-2027) with approximately EUR 250 million per year in view of facilitating the return of 50,000 returnees per year³⁶". Setting targets for returns signifies the agency's efficiency is equated to delivering numbers.

The agency's own reporting shows that the number of returns in the past few years is already quite high given the acute barriers that EU member states face when trying to return third-country nationals to their countries of origin³⁷. In 2017, Frontex co-financed and coordinated 341 return operations by charter flights, during which 14,189 third country nationals were returned. This was a 47% increase in comparison to the number of return operations during 2016.

Still the impression of effectiveness is severely diluted when one adds the details about the Western Balkans in the equation.

According to the agency "the Western Balkans remained the most popular destination region for return operations. In 2017, 236 operations were carried out to this region which constitutes 69% of total return operations organised, 63% of all returnees in 2017 were national of one of the WB countries".



Returns to other third countries weighted in much lower. Georgia (20 flights) or Armenia (10). The numbers are in sharp contrast to those for other non-European third countries like Nigeria (16), Pakistan (11), Egypt (8) or Congo DR and Afghanistan (20).

European Commission statistics about effective return rates during the same year (including return flights as well as other national return operations) suggest that

³⁶ Council of the European Union, Proposal for a [Frontex Regulation] – Revised financial statement following the Provisional Agreement between the co-legislators, 8354/19, 22 May 2019, available at: <https://bit.ly/2QOUi61>.

³⁷ Report to the EU Parliament on Frontex cooperation with third countries in 2017: <http://www.statewatch.org/news/2019/feb/frontex-report-third-countries.htm>.

countries in the Western Balkans complied almost entirely with requests to accept back their nationals.

Returns Rate and Number of Nationals Returned in 2017

Albania	>100%	28,850
Bosnia and Herzegovina	72%	2,680
FYROM	130%	5,580
Montenegro	>100%	820
Serbia	100%	7,920 ³⁸

Although in 2018, nationals returned decreased by 14% the Western Balkans remained as the one single factor inflating the effective returns numbers coordinated by Frontex receiving the highest proportion (47%) of the total return operations³⁹. The total number of flights has increased to 345 and involved a total of 12,245 people.

Mariana Gkliati, a legal researcher specialising in human rights protection, says effective returns to the Balkans depend on specific conditions that might not necessarily apply to other third countries. She notes: "Apart from the obvious and straightforward reason of geographical proximity, returns in European countries are easier because of the well-established relationships of cooperation. This is especially true for the countries that wish to participate in the next rounds of EU enlargement". On the contrary, a similar success with non-European third countries is a bigger challenge. "Whether these ambitions will come to fruition remains to be seen in the coming years, as returns are a highly sensitive topic, which touches upon human rights and political issues, such as the cooperation of destination countries"⁴⁰.

The new Regulation makes returns a top priority for the agency and significantly enhances the agency's relevant pre-return and return-related competences says Gkliati. "Once the new Regulation enters into force, the agency will, apart from organizing, financing and coordinating return flights, also prepare the return decisions and provide its own return escorts. It will also assist in the acquisition of travel documents and in the identification of irregular migrants. Frontex also becomes an information hub, with extended data sharing and processing powers, most of which are meant to facilitate more efficient returns"⁴¹.

A 'BIG DATA' ADMINISTRATOR

A central aim of investments is to upgrade the capacity of the agency to conduct surveillance and analyse information, a function which while increasing is creating an intelligence component within the structure of the institution itself. This process as well as the serious questions on how the agency intends to implement the surveillance

³⁸ https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20181219_com-2018-856-report_en.pdf

³⁹ Unpublished: "European Border and Coast Guard Agency: cooperation with third countries in 2018".

⁴⁰ Marianna Gkliati, Interview October 2019, Unpublished

⁴¹ Ibid.

capacity it is building up have been illustrated in a report of Privacy International posted on 10 November 2019.⁴²

On 25 September 2019, a tender was announced for "the Provision of Social Media Analysis Services Concerning Irregular Migration Trends and Forecasts (as part of Pre-warning Mechanism)". In the description of the contract it was explained that social media monitoring is to improve risk analysis and support of "planning, conduct and evaluation of joint operations coordinated by Frontex"⁴³.

Privacy International, which has described the tender as a plan to spy on people, has addressed Frontex publicly on whether the announced contract was in line with the Union's Regulation on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies (2018/1725).⁴⁴ No response was received but a few days later the tender was cancelled.⁴⁵

Following the approval of its new Regulation, Frontex is turning into an administrator of various systems and databases that retain, analyse and transfer data. As Gkliati explains, the new Regulation incorporates the EUROSUR under the agency's mandate and it permits its participation in a number of others. She notes: "In the context of its new powers, Frontex can exchange information with EU agencies, including Europol as well as third countries. This, combined with the interoperability-related competencies of Frontex, creates a quite broad mandate for the processing and especially the sharing of data both within the EU and outside, involving EU institutions, agencies, and law enforcement authorities".⁴⁶

The agency is tasked with developing and operating a centralised return management platform for processing all information relevant for returns. This platform will allow automated data transfer, amongst the national return management systems. "The information processed in the centralised platform and also shared with third states may include personal data, biographic data or passenger lists, as well as information obtained during the personal asylum interview. This can prove detrimental for the safety of people seeking protection, while it would undermine the trust that is necessary for the asylum interview to allow applicants to present the grounds for their applications".⁴⁷

Also, Frontex will play a central role to the functions of the European Travel Information and Authorisation System (ETIAS). "ETIAS will carry out pre-travel screening to assess the security and migration risks of travellers who benefit from visa-free access to the Schengen area, and thus allow Member States to deny authorisation to travellers considered to pose a security threat, or a risk in terms of irregular migration or public health".⁴⁸

42 <https://privacyinternational.org/long-read/3288/privacywins-eu-border-guards-cancel-plans-spy-social-media-now>.

43 <https://ted.europa.eu/TED/notice/udl?uri=TED:NOTICE:449580-2019:TEXT:EN:HTML>

44 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018R1725>

45 <https://privacyinternational.org/long-read/3288/privacywins-eu-border-guards-cancel-plans-spy-social-media-now>

46 <http://eulawanalysis.blogspot.com/2019/04/the-new-european-border-and-coast-guard.html>

47 Ibid.

48 <https://frontex.europa.eu/media-centre/focus/etias-what-it-means-for-travellers-what-it-means-for-frontex-deC5mZ>

The agency will be responsible for setting up and running the ETIAS Central Unit which will operate on a 24/7 basis and perform several key tasks, including: "verifying travel authorisation applications with regards to a traveller's identity in cases of a match against one of the databases checked during the automated process, defining, testing, implementing, evaluating and revising specific risk indicators contained in the ETIAS screening rules, ensuring that the data stored in the application files and the data recorded are correct and up to date".⁴⁹

ACCOUNTABILITY QUESTIONS

The expansion of Frontex's capacity is increasingly making clear that people subject to its operations might not be able to seek effective remedy for potential adverse consequences of its actions. Up until now, when a Member State hosted an operation involving deployed officers from another Member State, civil and criminal liability was to be sought, according to the agency's Regulation, with the contributing state. Using this loophole, Frontex was able to avoid for years issues regarding accountability by deferring the issue back to the corresponding capitals, which were expected to investigate and sanction the actions of their own officers committed in a third state⁵⁰. Unsurprisingly, this has never occurred.

The recruitment by Frontex of its own statutory staff that will also be deployed in extraterritorial operations (outside the EU) makes the issue of accountability more complicated. Additionally, a number of services are increasingly commissioned by the agency in Warsaw without the involvement of Member States, including drones and their operators, manned aerial surveillance flights and charter return flights.

Thus, the question occurs: how will potential violations of fundamental rights or civil and criminal offences committed by Frontex's statutory staff and contractors delivering services be investigated and remedied in the future?

A possibility would be to seek legal action in Poland as this is the country in which the agency has its Headquarters.

However, Monroy suggests this is not possible due to the status agreement signed between Poland and the agency. For example, "MAS flights are not joint action with seconded officers. Instead, they are measures commissioned by the Agency in Warsaw from a charter company. Frontex is therefore also responsible under civil and criminal law for offences committed there. But Frontex officials, as EU officials, benefit from diplomatic privileges and immunities. This is regulated in a seat agreement that the agency has concluded with the government in Poland. All members of Frontex

⁴⁹ Ibid.

⁵⁰ <https://www.newsdeeply.com/refugees/community/2016/11/18/e-u-border-agency-still-unaccountable-on-refugees-rights>

are therefore largely exempt from national jurisdiction for acts carried out in an official role."⁵¹

Similar Status Agreements are signed with non-EU countries that agree to have Frontex missions deployed on their territory. The Status Agreements also provide immunity to Frontex-deployed personnel from the jurisdiction of the host country regarding violations of criminal and civil law s if they have been committed during the course of their duties. The only authority to consider when exactly an offence was committed and thus green light an investigation is the agency's Executive Director. Such agreements have been signed already with Albania and Montenegro and Serbia, while additional ones are pending with North Macedonia, and Bosnia and Herzegovina⁵².

The European Council for Refugees and Exiles (ECRE), a Brussels-based pro-refugee rights organisation, has voiced strong concern "over the potentially extensive powers conferred to Frontex team members under Status agreements. These could be used to prevent irregular migration towards the EU, beyond the EU's physical borders, without independent oversight."⁵³

As the EU is not a signatory to the European Convention on Human Rights (ECHR), the way through Strasbourg and the European Court of Human Rights is also closed for those seeking to legally challenge the actions of the agency.

An alternative would be to present a case to the Court of Justice of the European Union (CJEU) but pursuing an individual's case through Luxembourg is a prohibitive long-term and costly process that the vast majority of people subjected to the actions of the agency would fail to pursue unless they received expert legal support. The difficulties of bringing a case before the CJEU are evident in the first and so far only case brought against Frontex.⁵⁴

Two years after it was lodged, CJEU has rejected the case brought to it by transparency activists regarding disclosure of basic information about vessels participating in Frontex Triton operation⁵⁵. The CJEU upheld the argument of Frontex for not releasing the information and ordered the unsuccessful party to pay the costs. The entire procedure was lengthy and the applicants were left with the choice of either to appeal against the decision or cover legal costs that the court ordered them to cover. This is legal costs of "more than 100,000 euros", including external lawyers that Frontex had called in the proceeding⁵⁶.

51 <https://digit.site36.net/2019/09/27/does-frontex-arrange-illegal-push-backs/>

52 <https://www.consilium.europa.eu/en/press/press-releases/2019/11/19/border-management-eu-signs-agreement-with-serbia-on-european-border-and-coast-guard-cooperation/>

53 <https://www.ecre.org/second-eu-agreement-on-border-cooperation-in-the-balkans-with-more-to-follow/>

54 JUDGMENT OF THE GENERAL COURT (First Chamber) 27 November 2019, In Case T-31/18, Luisa Izuzquiza and Arne Semsrott v. European Border and Coast Guard Agency (Frontex), available at: <http://www.statewatch.org/news/2019/nov/cjeu-frontex-transparency-case-judgment-27-11-19.pdf>

55 Operation Triton 2017 started on 1 January 2017 and ended on 31 January 2018.

56 <https://fragdenstaat.de/en/blog/2019/11/27/frontex-judgement-luxemburg-transparency/>; CJEU JUDGEMENT of 27 November 2019, *ibid.*

The agency's internal procedures are another and usually the first resort for requesting accountability for the actions of seconded as well as statutory or contracted staff. The Frontex complaints mechanism was set up with the 2016 Regulation.⁵⁷ It is also internally controlled by the Executive Director of Frontex and complaints have to pass an admissibility procedure by the Fundamental Rights Officer before a case is opened. If a case is opened, then the contributing MS is requested to investigate its own officers for their actions during their deployment in another MS or from now on in a third country⁵⁸.

The unwillingness of the agency to properly implement the complaints mechanism⁵⁹ as well as concerns about its effectiveness due to the way it is incorporated within the agency have been raised multiple times by NGOs, Frontex's Consultative Forum⁶⁰ and the Fundamental Rights Agency⁶¹, as well as a number of legal experts. The limited capacity of the complaints mechanism is also demonstrated by the very low number of complaints (41 in total) that the mechanism has received up until mid November 2019.⁶²

Additionally, Frontex's internal capacity to monitor its own operations has been seriously questioned lately. The internal reporting scheme of the agency requires any kind of staff deployed (border guard officers, return escorts, return monitors etc.) to file a Serious Incident Report in a case of an irregular situation that potentially involves the violation of fundamental rights. Yet, press investigations have revealed that the system under-performs. For the 501 charter return flights that took place in 2017 and 2018, only one Serious Incident Report has been filed, despite strong evidence of violations happening in at least one other case, that has been recorded by the European Committee for the Prevention of Torture (CPT).⁶³

The issue of the independence of monitoring returns flights has turned into a contested issue regarding the accountability of the agency. The new Regulation does not abide by the safeguards set down in the Returns Directive⁶⁴ (Art. 8(6)) that call for an effective monitoring system. As Gkliati observes: "This refers in particular to the independence of the monitoring mechanism, requiring that the authority that carries out the returns is not the same as the one in charge of monitoring the compliance with fundamental rights".⁶⁵

This remains an open issue that could be resolved one way or the other when the recast process of the Returns Directive eventually concludes. The recast stalled

57 Article 72 of Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard.

58 Frontex 2016 regulation, article 72: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2016:251:FULL&from=EN>

59 <https://www.newsdeeply.com/refugees/community/2016/11/18/e-u-border-, agency-still-unaccountable-on-refugees-rights>

60 An independent body established by the agency's Management Board, which independently advises the Board as well as its Executive Director on issues pertaining to fundamental rights.

61 https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-opinion-ebcg-05-2018_en.pdf

62 Frontex Associated Fundamental Rights Officer, Athens, 21.11.2019

63 <https://euobserver.com/migration/146090>

64 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals,

65 <http://eulawanalysis.blogspot.com/2019/04/the-new-european-border-and-coast-guard.html>

throughout last year as a consequence of the common European Asylum system reform failure and the process will restart this month at the European Parliament LIBE Committee (9 December) which will examine proposals to clarify the safeguards for the existence of independent-external monitors.

In its 2018 report to the European Parliament,⁶⁶ the Fundamental Rights Agency (FRA) recommended the transfer of responsibility to monitor coordinated return flights to an international body with human rights monitoring expertise.

A similar initiative, the Nafplion group, has been launched by national European Ombudsmen and National Prevention Mechanisms which already support Frontex's pool of monitors with expert personnel. The initiative is supported by the Council of Europe.

The *raison d'être* of the Nafplion group as it is spelled out in its founding charter "is the need to set up a mechanism to ensure the external, independent monitoring of Frontex forced-return operations, including the formulation of specific recommendations to the authorities concerned, the follow up to those as well as transparency of the process".⁶⁷

The particularity of this initiative which already consists of four full⁶⁸ and nine with observer status members, is the fact that those involved are not external critics but insider participants to the existing monitoring process. The support of the Council of Europe, the biggest human rights organisations in Europe and a member of Frontex's Consultative Forum, is also an added value.

The aim of the group is to put in place an external/independent secretariat which will also receive the reports drafted by Frontex Pool monitors, complementary to the rest of the process as it happens already. The Group will analyse the reports and produce observations and recommendations to be addressed to the national authorities that carried out the forced return operations monitored and/or to Frontex. Frontex Pool monitor's reports, observations and recommendations as well as reactions received by interested parts will be published on a dedicated website.

Given the Nafplion Group initiative is the most structured approach to the legal gap concerning the monitoring of Frontex coordinated return flights up to date, the response of EU institutions is of critical importance. Until today, they have not responded with enthusiasm. The European Commission has responded that "it is not in discussion"⁶⁹ on the establishment of a parallel monitoring mechanism while . Frontex has declared it is not competent to discuss the issue.

⁶⁶ https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-opinion-ebcg-05-2018_en.pdf

⁶⁷ Charter of The Nafplion Group, (Not published)

⁶⁸ Full Members: Czech Republic, Greece, Italy, Slovenia - Observer Status: Spain, Slovak Republic, Romania, Portugal, Poland, Germany, Cyprus, Austria, Albania

⁶⁹ <https://euobserver.com/migration/146090>

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