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“The European Parliament’s oversight of the agencies of the Area of Freedom,
Security and Justice. Where are we now and where are we heading”

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Abstract

Despite becoming a legislative actor comparable to the Council in terms of competences after the entry into force of the Lisbon Treaty, the European Parliament (EP) still lacks the power to effectively scrutinize the implementation of the EU law and policies by the agencies of the Area of Freedom, Security and Justice (AFSJ). The case of Frontex has demonstrated the extent to which the successful protection of human rights is at stake when it comes to the activities carried out and coordinated by this agency at the external borders to halt irregular migration flows and other illegal cross-border activities. Abuses in this regard have been pointed out by several International Organizations and non-Governmental Organizations, forcing the EU Institutions to act accordingly and reinforce the protection mechanisms within the agency, the fulfilment of human rights standards in its mandate and the conduct of operations, and even the opening of investigations into Frontex’s Executive Director over claims of “harassment, misconduct and migrant pushbacks”.

The aim of this paper proposal is to analyze the current state of affairs of the EP’s powers to scrutiny AFSJ agencies after the progressive enhancement of their mandates in the last decade, and suggest recommendations to enhance the accountability of these agencies to fully respect the principles of the rule of Law and the values on which the EU is based.

Keywords:

European Union, European Parliament, AFSJ, border management, migration policy

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I. Introduction

Despite becoming a legislative actor comparable to the Council in terms of competences and responsibilities after the entry into force of the Lisbon Treaty, the European Parliament (EP) still lacks nowadays the power to effectively scrutinize the implementation of European Union (EU) law and policies by, and the activities of, the agencies of the Area of Freedom, Security and Justice (AFSJ). At this point, the main problem lies in the fact that the AFSJ covers policies that directly touch at the basic principles of the protection of fundamental rights of individuals, along with some “regalian functions of the State”, such as borders and (rule of) law –for some authors, becoming ‘the inferno of the rule of law’². For instance, the case of Frontex has recurrently demonstrated the extent to which the effective protection of human rights is at stake when it comes to the activities organised and coordinated by this agency in the last decade at the external borders to halt irregular migration flows and other illegal cross-border activities. Abuses in this regard have been repeatedly condemned by several International Organizations³, non-Governmental organizations⁴, and the Academia⁵, forcing the EU Institutions to act accordingly and progressively reinforce the protection and safeguards mechanisms within the agency, the fulfilment of human rights standards in its mandate and the conduct of operations⁶, and even the opening of investigations into Frontex’s Executive Director over claims of “harassment, misconduct and migrant pushbacks”⁷, which recently ended up with his resignation⁸.

The aim of this paper is to analyse the current state of affairs of the EP’s powers to scrutiny the work of AFSJ agencies after the progressive enhancement of their mandates in the last decade, and suggest recommendations to enhance their accountability to fully respect the principles of the rule of law and the values on which the EU is founded (art. 2 of the Treaty on the EU, TEU). Indeed, it aims at understanding to what extent the reforms of the founding statutes of the AFSJ agencies operated in the last decade have served to enhance EP’s oversight and, indirectly, reinforced (or not) the transparency and accountability of their activities. On the one hand, the legal and regulatory frameworks and, on the other, the praxis of the EP will be assessed to evaluate whether the gaps identified in the following sections are a matter of lack of competences or, instead, are attributable to the conduct of politics by the EP and the rest of the EU Institutions –with the connivance of the Member States– to fulfil other short-term, security-related issues on the EU agenda. Due to the limited extent of this paper, nevertheless, we will not deal with the role of national parliaments in overseeing the activities of AFSJ agencies in junction with the EP –a shared responsibility introduced by the Lisbon Treaty (art. 12 TEU and Protocols no. 1 and 2) which has been duly analysed elsewhere⁹.

² Ignacio Borrajo Iniesta, ‘El Estado de Derecho en el Espacio de Libertad, Seguridad y Justicia de la Unión’, in D. J. Liñán Noguera and P. J. Martín Rodríguez, *Estado de Derecho y Unión Europea* (Tecnos 2018), p. 263 (own translation).

³ Inter alia, Council of Europe’s Parliamentary Assembly, Res. 1821 (2011), of 21 June 2011, ‘The interception and rescue at sea of asylum seekers, refugees and irregular migrants’, and judgments of the European Court of Human Rights (ECtHR) *Hirsi Jamaa v. Italia*, no. 27765/09 ((ECtHR, de 23 February 2012) and *N.D. v. Spain* and *N.T. v. Spain*, no. 8675/15 and 8697/15 (ECtHR, 3 October 2017).

⁴ Human Rights Watch, ‘Frontex Failing to Protect People at EU Borders’ HRW News (23 June 2021) <<https://www.hrw.org/news/2021/06/23/frontex-failing-protect-people-eu-borders>> accessed 23 May 2022

⁵ See, for instance, FINK, M., *Frontex and Human Rights. Responsibility in ‘Multi-Actor Situations’ under the ECHR and EU Public Liability Law* (Oxford University Press 2018); and MARINAI, S., ‘The interception and rescue at sea of asylum seekers in the light of the new EU legal framework’, *Revista de Derecho Comunitario Europeo* [2016] 901.

⁶ Frontex, ‘Code of Conduct for return operations and return interventions coordinated or organised by Frontex’ (2018) <https://frontex.europa.eu/assets/Key_Documents/Code_of_Conduct/Code_of_Conduct_for_Return_Operations_and_Return_Interventions.pdf> accessed 23 May 2022

⁷ Darren McCaffrey, ‘Frontex: EU’s border agency probed over harassment, misconduct and migrant pushback claims’ *Euronews* (12 January 2021) <<https://www.euronews.com/my-europe/2021/01/12/frontex-eu-s-border-agency-probed-over-harassment-misconduct-and-migrant-pushback-claims>> accessed 23 May 2022

⁸ Alice Tidey, ‘Frontex chief resigns over misconduct and human rights violations probe’ *Euronews* (29 April 2022) <<https://www.euronews.com/2022/04/29/frontex-chief-resigns-over-misconduct-and-human-rights-violations-probe>> accessed 23 May 2022

⁹ Angela Tacea and Florian Trauner, ‘The European and national parliaments in the area of freedom, security and justice: does interparliamentary cooperation lead to joint oversight?’ (2021) *The Journal of Legislative Studies*, 1; Aidan Wills and Mathias Vermeulen, ‘Parliamentary Oversight of Security and Intelligence Agencies in the European Union’ (European Parliament’s Committee on Civil Liberties, Justice and Home Affairs 2011) <https://www.dcaf.ch/sites/default/files/publications/documents/study_en.pdf> accessed 23 May 2022

In our paper, we will consider too the external dimension of the AFSJ and its (limited) oversight. Indeed, in the last years we have perceived a considerable increase in the AFSJ policies having an external dimension for which the EU has endorsed some programmes, funding and laws targeting at strengthening its external borders and cooperation with third States on particular issues (e.g., migration and border management), as well as external contacts between the agencies and third States' officials to enhance operational and strategic cooperation on fighting certain illegal cross-border traffics in the 'neighbourhood'. Concerning the agencies, the evolution of their mandates, the access to and the exchange of information and personal data, and the working and operational arrangements signed by the agencies with third countries seriously challenge the respect for EU values and the rule of law. Of particular concern is that the EP has a limited power to scrutinize these external activities and informal engagements out of the legal framework both *ex ante* and *ex post*. As we will explore further in the following sections, the implementation of the AFSJ external dimension represents one of the most significant loopholes of parliamentary oversight of the EU integration process, aggravated by the predominance of the Council in this particular area of the AFSJ and the increased autonomy of the agencies vis-à-vis the establishment of relations with third parties.

II. The legal changes after the Lisbon Treaty. The praxis of oversight so far

Until the entry into force of the Lisbon Treaty –and some time after¹⁰, '[t]o gain control over the ongoing activities of the JHA-related agencies and ensure their accountability, the EP [...] applied different strategies to compensate *ex post* for weak *ex ante* legislative involvement, including formal legal procedures as well as informal channels and practices'¹¹. Because, for decades, the EP had the will but not the competences to oversee¹² the whole AFSJ, the Council used extensively its powers to define in an intergovernmental manner the extent and content of the policies covered by the AFSJ and the roles of the agencies operationalizing it, becoming the 'main principal'¹³ in a process of 'agencification' 'designed to consolidate the predominance of member states in the AFSJ'¹⁴. The only formal say that the EP had was budgetary control through the draft of the annual EU budget and as a discharge authority. The Lisbon Treaty, therefore, opened a new 'window of opportunity' for the scrutiny and control of the AFSJ agencies and, in general, the policies covered by this far-reaching objective now fully 'communitarized'¹⁵. As Borrajo Iniesta clearly states:

The European Parliament has moved from being considered a neglected institution in justice and home affairs to becoming the axis of legislation in this area, where the freedom of definition enjoyed by the political power and the need to respect fundamental rights openly affect all the branches of the leafy tree covered by the area of freedom, security and justice.¹⁶

According to the Treaties in force, the EP has thus become co-legislator on an equal footing with the Council to negotiate the legal framework and funding instruments of the AFSJ policies (e.g., articles 79.4, 81-84, 177

¹⁰ In addition to the transitional period established in the Protocol No. 36 [2007, OJ, C326, p. 322], '[...] member states [...] were eager to define the new legal basis for Europol before the Lisbon Treaty was scheduled to enter into force in order to prevent the EP from using its codecision powers' (Trauner, 2012, 792), deliberately postponing thus its full involvement in the establishment of the AFSJ agencies.

¹¹ Florian Trauner, 'The European Parliament and Agency Control in the Area of Freedom, Security and Justice' (2012) *West European Politics*, Vol. 35, No. 4, 787-788.

¹² In this paper we will use interchangeably the terms *control*, *oversight* and *accountability* irrespective their differences concerning their extent and when and by whom they are carried out. Generally speaking, we will take a look at the relationship between an actor and an external agent to whom it has to report and justify its activities, otherwise it might face some kind of consequences. For a detailed analysis on this issue, see for instance Sergio Carrera, Leonhard den Hertog and Joanna Parkin, 'The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability versus Autonomy?' [2013] *European Journal of Migration and Law*, 15 (4) 337.

¹³ Renaud Dehousse, 'Delegation of powers in the European Union: The need for a multi-principals model' [2008] *West European Politics*, 797.

¹⁴ Trauner (n 10) 785.

¹⁵ Some limits remain, however, in certain areas, such as administrative cooperation (art. 74 TFEU), provisions on passports, identity cards and residence permits (Article 77.3 TFEU), and police cooperation (art. 89 TFEU), where a special legislative procedure applies.

¹⁶ Borrajo Iniesta (n 1) 279 (own translation).

and 322 of the Treaty on the Functioning of the EU, TFEU), in addition to its consultative powers in the adoption of the multi-annual financial framework (art. 312 TFEU), its reinforced budgetary powers concerning the definition of the annual budget (art. 314 TFEU), and certain competencies in the EU's external action when concluding international agreements (art. 209 and 218 TFEU). This step forward prompted by the Lisbon Treaty has been key to extend the 'communitarian' method –and, at least theoretically, its spillover logic– to (most of) the formerly intergovernmental policies covered by the AFSJ. Indirectly, it has also enhanced the role of the EP in their definition, implementation and oversight through a series of parliamentary activities, mainly under the responsibility of the Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee). Indeed, EP's oversight takes the form of political debates, exchanges of views and oral and written questions to the members of the College of Commissioners and/or the directors of the agencies in the framework of the ordinary legislative procedure, on a regular basis (e.g., presentation of the annual reports and the State of the Union address), or when an issue arises to the public agenda. Additionally, the EP regularly organizes hearings with representatives from the law-enforcement authorities, judiciary, Academia and think-tanks and civil society organizations to discuss particular topics on the political agenda.

These political and oversight initiatives are examined primarily within the LIBE Committee, but they also focus the attention of other committees with responsibilities on particular issues, such as budget control and discharge (Budgetary Control Committee, CONT), constitutional and legal affairs (JURI and AFCO, respectively) and foreign affairs (AFET). Some issues of relevance on the EU agenda or highly contested/politicized¹⁷ come also to the Plenary for political debate –and not only for ratification of decisions taken by LIBE Committee, such as it was the case of the 'Return Directive' in 2008 or the 2013 and the current reform of the Schengen evaluation and monitoring mechanism, which has become a dividing issue between the two biggest parties in the EP¹⁸. Moreover, the EP can also draft 'own-initiative reports' and resolutions on issues falling under its competence (art. 225 TFEU¹⁹), create commissions of inquiry to investigate alleged contraventions or maladministration of EU law (art. 226 TFEU²⁰), or to bring proceedings for annulment before the Court of Justice to request the annulment of certain provisions of legislative acts (art. 263 TFEU)²¹.

Most importantly concerning the task of overseeing the protection of the rule of law and fundamental rights, the EP also has a say in the establishment and further enhancement, budget and –therefore, indirectly– personnel, and scrutiny of the activities of the agencies due to the Lisbon provisions and their subsequent normative developments. Now the Treaties (art. 85 and 88 TFEU) and the regulations establishing the agencies²² provide the EP with the power to create and strengthen the role of the AFSJ agencies²³, define their personnel and budgets (art. 314 TFEU and agencies' regulations; e.g., art. 59 Frontex Regulation), and – 'although the EP does not have uniform powers to summon AFSJ agency directors'²⁴– invite the directors of the agencies to report annually on their activities. Indeed, in the last decade, even if the EP has been one of the supporters of the 'agencification' of the AFSJ –along with the Commission, it has also done so by demanding more sources of control and accountability in exchange for a higher degree of autonomy. For instance, in the

¹⁷ '[...] contestation [...] can occur within political institutions while in politicization a topic becomes the object of public discussion'. Tapio Raunio and Wolfgang Wagner, 'Contestation over Development Policy in the European Parliament' [2021] *Journal of Common Market Studies*, Vol. 59, 20-21.

¹⁸ 'European Parliament rejects EPP attempt to make internal borders within the Schengen area permanent' (29 November 2018) <<https://www.socialistsanddemocrats.eu/newsroom/european-parliament-rejects-epp-attempt-make-internal-borders-within-schengen-area>> accessed 23 May 2022

¹⁹ Additionally, Rule No. 54 of the Rules of Procedure of the EP, 9th Parliamentary term, September 2021. Available at <https://www.europarl.europa.eu/doceo/document/RULES-9-2021-09-13_EN.pdf>

²⁰ At the time of writing, the EP created the Committee of Inquiry to investigate the use of Pegasus and equivalent surveillance spyware. All the information at <<https://www.europarl.europa.eu/committees/en/pega/home/highlights>>

²¹ For instance, Case C-133/06, *European Parliament v Council of the European Union* [2008] 2008 I-03189.

²² In particular, the case of Frontex according to 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 [2019] OJ L295/1.

²³ Another one is being discussed at the time of writing these lines to fight money-laundering and terrorism financing. See Proposal for a Regulation of the European Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010, 2021/0240(COD), COM/2021/421 final, Brussels, 20.7.2021.

²⁴ Aidan Wills and Mathias Vermeulen (n 8) 74.

current reform of the Europol Regulation²⁵, the EP agreed to enhance its potential to process and analyse data –even coming from private entities, while respecting privacy and under the direct supervision of the European Data Protection Supervisor (EDPS), who will oversee Europol’s personal data processing operations, and work together with the agency’s Data Protection Officer²⁶. The same ‘suspicions’ were expressed by the Members of the EP (MEPs) as regards the reforms of Frontex²⁷ and Eurojust²⁸, while other AFSJ-related initiatives were openly supported with less caution²⁹.

As a result, the EP has gained an evaluation role *ex ante*³⁰, during³¹ and *ex post*³² of the AFSJ agencies which contrasts with the previous limitations imposed by the former Treaties and regulations, although more of the general oversight powers are held hand-in-hand with the national parliaments through an inter-parliamentary committee –with all the negative consequences it might have³³, including the Joint Parliamentary Scrutiny Group (JPSG) on Europol, composed of representatives of the European and of national Parliament (art. 51 Europol Regulation) and meeting twice a year³⁴, ‘within the framework of an interparliamentary committee meeting’ for Eurojust (art. 67 Eurojust Regulation³⁵); or general inter-parliamentary cooperation in the case of Frontex (art. 112 Frontex Regulation), the missing ‘Holy Grail’. Furthermore, upon their appointment, the candidate directors are ‘invited’ to make a statement before the competent committee or committees of the EP and respond to the questions posed by MEPs, and the EP has gained access to classified information, personal data and work files of the agencies, although with several limitations (see below).

²⁵ Commission, ‘Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/794, as regards Europol’s cooperation with private parties, the processing of personal data by Europol in support of criminal investigations, and Europol’s role on research and innovation’ (Communication) COM (2020) 796 final.

²⁶ European Parliament, ‘Parliament backs giving more powers to Europol, but with supervision’ *Press Releases* (Brussels, 4 May 2022) <<https://www.europarl.europa.eu/news/en/press-room>> accessed 23 May 2022

²⁷ Art. 6, *Accountability*, of the Frontex Regulation (n 21).

²⁸ Inter alia, art. 67 of the Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA [2018] OJ L295/138.

²⁹ For example, the creation in 2019 of the new database on the past convictions of third country nationals (ECRIS-TCN), to complement the existing European Criminal Records Information System (ECRIS), used to exchange information on the previous convictions of EU citizens.

³⁰ It is foreseen (art. 15 of the 2018 Eurojust Regulation), for instance, that the College of Eurojust will forward the annual and multiannual programming documents to the European Parliament, along with the Council, the Commission and the EPPO. Concerning Frontex and its inputs to the preparation of the multiannual strategic policy cycle for European integrated border management, article 29 of Frontex Regulation stipulates that the Agency shall prepare general annual risk analyses, which shall be submitted to the EP and the Council and the Commission, as well as, every two years, a strategic risk analysis for European integrated border management. Finally, Europol Regulation also states that the Agency will transmit ‘for information purposes’ its multiannual programming and annual work programme (art. 51). On the other hand, the appointment of the agencies’ directors is subject too to a prior exchange of views with MEPs.

³¹ For instance, where a situation requiring urgent action at the external borders arises, the European Parliament shall be informed of that situation without delay as well as of any subsequent measures and decisions taken in response (art. 42 Frontex Regulation).

³² Art. 67 Eurojust Regulation; art. 6 and 65 Frontex Regulation; art. 51 Europol Regulation.

³³ ‘With regard to legislative scrutiny [...] the timing of the meetings and the fluctuating participation of MPs limited the possibility of joint oversight. [...] Concerning the Joint Parliamentary Scrutiny Group over Europol], the cooperation of [national parliaments] and the EP has not evolved among equals. [...] The national parliaments have had a higher level of fluctuation of their participating members, with little follow-up and coordination among themselves. [...]’. Angela Tacea and Florian Trauner (n 8) 15.

Other authors have argued that, despite their interest in scrutinizing the AFSJ agencies, ‘in those cases where national parliaments have been involved in scrutinizing AFSJ Bodies, they have primarily been interested in scrutinizing the work of Europol’ –Aidan Wills and Mathias Vermeulen (n 8) 64, evidencing the politization of the work of some AFSJ agencies.

³⁴ Without any doubt, the most active of the interparliamentary committees established. It met for the 10th time on 28 February 2022. See the full agenda here: <<https://www.europarl.europa.eu/cmsdata/244543/Draft%20Agenda%20EN.pdf>> accessed 23 May 2022

³⁵ The first meeting was held on 1 December 2020. See the agenda at: <<https://www.europarl.europa.eu/cmsdata/215665/draft-programme.pdf>> accessed 22 May 2022

Additionally, the scrutiny of the activities of the AFSJ agencies includes sending delegations to the Member States or to the external borders to identify sources of conflict in the implementation of EU law and fundamental rights, for instance in return operations coordinated by Frontex to avoid inter alia the violation of the *non-refoulement* principle, or to countries under serious migration pressures³⁶. This oversight capacity includes, among others, Frontex obligation towards the EP to forward it ‘a detailed evaluation report’ every six months ‘covering all return operations conducted in the previous semester, together with the observations of the fundamental rights officer’ (art. 50.7 Frontex Regulation). Furthermore, now the EP has become a full-time, reliable co-legislator, the Council has also changed its position concerning the role of MEPs and it might consider their opinions even if it is not necessarily obliged to. For example, in the undergoing reform of the Schengen evaluation mechanism³⁷, the EP is expected to obtain from the Council that delegations to verify the implementation of EU (border) law and restrictive measures at the internal borders over 180 days do not need previous announcement to the concerned Member State(s) –or, at least, a 24-hour short notice, although the Treaty provisions stipulate a mere consultation procedure³⁸. However, it is up to the Council to endorse these modifications as they currently are.

Finally, one of the capacities the EP has used the most even before the entry into force of the Lisbon Treaty has been its discharge powers (art. 319 TFEU). In this sense, once again, the news brings us to the role of Frontex and its accountability, since on 4 May 2022, the EP voted to postpone until the Autumn the discharge of the Agency’s 2020 budget claiming that Frontex was incapable of fulfilling the conditions foreseen in the previous discharge report, as well as the enquiries conducted by the European Antifraud Office (OLAF)³⁹; a concern that was raised the previous financial period.

III. The main sources of conflict and the need for further reforms

However, everything in the garden is not necessarily rosy. To start with, the Lisbon Treaty does have a clear gap: while there is a particular reference to the EP’s oversight of Eurojust and Europol (arts. 85 and 88 TFEU, respectively), there is no mention to Frontex in none of the Treaties, an agency whose activities have been particularly scrutinized and subject to criticism since it became operational⁴⁰ in a clear process of contestation/politization of the role of some AFSJ agencies, such as Frontex and Europol. While awaiting the reform of the Treaties to bridge this clear gap, the power to scrutinize Frontex is given to the EP by virtue of the Agency’s Regulation (e.g., art. 6 and 65), but, in this case, the news ran faster than the MEPs in declaring its alleged illicit activities concerning return operations of asylum seekers in the Aegean Sea⁴¹. While the Frontex Scrutiny Working Group (FSWG) ‘did not find conclusive evidence on the direct performance of

³⁶ One of the latest delegations of MEPs paid visit to ‘one of the EU’s most important migration front lines in Greece’. Andreas Rogal, ‘European Parliament delegation completes ‘intense agenda’ following migration fact-finding trip to Greece’, *The Parliament Magazine* (4 November 2021) <<https://www.theparliamentmagazine.eu/news/article/european-parliament-delegation-completes-intense-agenda-following-migration-fact-finding-trip-to-greece>> accessed 23 May 2022

³⁷ Commission, ‘Proposal for a Council Regulation on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing Regulation (EU) No 1053/2013’ (Communication) COM (2021) 278 final.

³⁸ ‘[...] the Council may, on a proposal from the Commission, adopt measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Title [V AFSJ] by Member States’ authorities, in particular in order to facilitate full application of the principle of mutual recognition. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation.’ (art. 70 TFEU).

³⁹ Bulletin Quotidien Europe, No. 12945 - 5/5/2022.

⁴⁰ Inter alia, the most recent published articles: Miguel Acosta, ‘Reglamento 2019/1896/UE sobre la guardia europea de fronteras y costas: ¿Frontex 3.0?’ [2019] Documento Opinión IEEEE; Sarah Léonard and Christian Kaunert, ‘The securitisation of migration in the European Union: Frontex and its evolving security practices’ [2020] *Journal of Ethnic and Migration Studies*, Vol. 48, 1417; and Raphael Bossong, ‘The expansion of Frontex: symbolic measures and long-term changes in EU border management’ [2019] SWP- Deutsches Institut für Internationale Politik und Sicherheit.

⁴¹ Julia Pascual and Tomas Stadius, ‘European border control agency Frontex has been covering up illegal returns of migrants’ (30 April 2022) <https://www.lemonde.fr/en/international/article/2022/04/30/frontex-the-european-border-control-agency-has-been-masking-illegal-returns-of-migrants-in-the-aegean-sea_5982031_4.html>

pushbacks and/or collective expulsions by Frontex in the serious incident cases that could be examined', it also noted some shortcomings when it declared that the Agency 'failed to address and follow-up on these violations promptly, vigilantly and effectively'⁴². This event has clearly undermined the credibility of Frontex before the public opinion, the media, the civil society organizations and the EP itself; a task for the next executive director to work on it.

Another 'grey area' in the complex puzzle of the AFSJ agencies is the formal participation of the Commission in their governance and/or administration bodies as an extension of its administrative powers, and the role given to the EP in the appointment of their directors. For years, 'control of these agencies has become a focal point of inter-institutional struggles'⁴³. For that reason, in the subsequent reforms of their founding regulations the supranational logic after the 'communitarisation' of the AFSJ, and the scrutiny of their activities, have resulted in the entry of representatives from the Commission in their governing bodies. Hence, the Commission has a representative in the Executive Board of Eurojust (art. 16 Eurojust Regulation), with powers *inter alia* to propose a list of candidates for the post of Administrative Director; two representatives of the Commission, 'each with a right to vote' (art. 101 Frontex Regulation) in the Management Board; and one representative in the Management Board of Europol, with the right to vote (art. 10), both of them with similar powers when appointing the director of the agencies and with formal competences when administrative affairs are handled. In the case of the EP, conversely, the relationship with the governing bodies and their appointment has been close to zero. Moreover, besides some general comments in the founding regulations⁴⁴, the EP has no formal power to investigate the candidates for the post of director in his/her appointment procedure, and, if needed, to reject him/her if his/her profile or background does not fit the responsibilities of the post, or to dismiss him/her if serious breaches of EU law are alleged, as it is the case in the appointment of the Commissioners. This shortcoming has been already criticized by the European Council on Refugees and Exiles: '[g]iven the wide prerogatives enjoyed by the [executive director of Frontex], the Parliament, as a democratic institution, should have a formal role [...] in appointing and dismissing' him/her⁴⁵; an old demand that would, once again, call for a reform of the Treaties or the founding statutes of the agencies.

A further point of concern is the influence they have on decision- and policy-making. Via *inter alia* their reports, risk/threat assessments and parliamentary debates or hearings, the agencies exert a clear influence on the Institutions to define AFSJ policies and programmes that was already recognised by the Commission, the Council and the Parliament in a joint statement in 2012⁴⁶, which served to further enhance their role in the implementation of AFSJ policies and EU law thanks to subsequent reforms to strengthen their autonomy. The case of Europol and Frontex in defining the policing cycle and border management exemplify well the influence they exert on the development of AFSJ both domestically and abroad, arguing their expertise and technical capabilities to expand their tasks and functions. Nevertheless, that their expertise might be considered neutral should not be for granted, since their functions, personnel and budget also depend on their 'relevance' in the whole picture of law enforcement at the EU level. This way of proceeding in the consolidation of the agencies might create a sort of 'Leviathan' that is at odds with the principles of the rule of law and accountability.

Additionally, access to information and data gathered and analysed by the agencies, or to the cases they are handling at the time of oversight, is rather restrained and subject to internal rules⁴⁷, limiting thus

⁴² LIBE Committee, 'Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations', PE692.887v01-00 (14 July 2021) 6. For a detailed overview of the mechanisms established to investigate these alleged violations of human rights, see Micaela Del Monte and Katrien Luyten, 'European Parliament scrutiny of Frontex' (2021) European Parliamentary Research Service, PE 698.816.

⁴³ Florian Trauner (n 10) 785.

⁴⁴ For instance, Recital 60 of Europol Regulation states that 'the competent committee of the European Parliament should be able to invite the Executive Director to appear before it prior to his or her appointment, as well as prior to any extension of his or her term of office.'

⁴⁵ European Council on Refugees and Exiles, 'Holding Frontex to account. ECRE's proposals for strengthening non-judicial mechanisms for scrutiny of Frontex', ECRE's Policy Paper 7 (2021) 8.

⁴⁶ 'Agencies also have a role in supporting the decision-making process by pooling the technical or specialist expertise available at European and national level and thereby help enhance the cooperation between Member States and the EU in important policy areas. [...]'. Joint statement of the European Parliament, the Council of the EU and the Commission on decentralized agencies, 19 July 2012.

⁴⁷ These internal rules follow, however, the common guidelines provided by the Commission in their Decisions 2015/443 of 13 March 2015 on Security in the Commission [2015] OJ L72/41, and 2015/444 of 13 March 2015 on the security

parliamentary oversight or subject to particular rules and case-by-case authorisations. For instance, art. 92 Frontex Regulation clearly states that, although '[c]lassification shall not preclude information being made available to the European Parliament', information exchange should fully respect the 'criteria of availability, confidentiality and integrity' (art. 68.6 Frontex Regulation). Similar provisions are foreseen in Eurojust and Europol regulations (art. 72 and 51, respectively). Moreover, Eurojust Regulation openly claims for the respect of its independence in the handle of cases (Recital 62), clearly limiting parliamentary oversight over its running investigations and access to case work files specially sensitive for a concerned Member State⁴⁸. The same rule applies to Europol and Frontex, for which the transfer of personal data is subject to verification 'whether such personal data are required for the legitimate performance of tasks within the competence of the recipient'⁴⁹. The problem here still lies in the 'different cultures of secrecy with some member states having a tendency to overclassify'⁵⁰. If the current proposal to reform Europol to gather information succeeds and the Agency becomes more than 'a cleaning house for information'⁵¹, the strengthened Europol would overcome these limitations and favour the transfer to the EP in a unique exercise of transparency and accountability that is still to see what the final format will be.

A final point to raise is the question of the external dimension of the AFSJ, for which the EP's oversight is kept to a minimum. Even though "[...] the externalisation of internal security measures is seen to aggravate deficits in democratic legitimacy and accountability"⁵², due to the undemocratic nature of most of the neighbouring countries with which the EU cooperates on border security and border management, the EP scrutiny over the 'arrangements' concluded by the EU and/or the AFSJ agencies, and the activities carried out by them at the external borders –or even outside the EU's territory⁵³, has been traditionally diminished. For instance, limitations continue in certain areas covered by the external dimension of the AFSJ, such as the 2016 'EU-Turkey deal' to halt migration flows towards the EU, not properly an international agreement subject to EP's consent but with serious financial and human rights issues for the EU. However, some progress has been made in the latest reforms of their founding regulations. Now, for instance, article 76 Frontex Regulation clearly stipulates that any working arrangements between the Agency and competent authorities of third countries needs prior Commission's approval and that the EP will be provided 'with detailed information as regards the parties to the working arrangement and its envisaged content' before its conclusion, as well as concerning the operational activities involving the deployment of liaison officers to third countries 'without delay'. Similar provisions apply to the exchange of classified information with the relevant authorities of a third country or ad hoc releases if there is no arrangement, with the only prerequisite of having an 'equivalent level of protection'.

That said, however, most of the current working and operational arrangements signed by the AFSJ agencies were endorsed well before the entry into force of these provisions. Therefore, neither formal involvement of the EP was required nor informed of their content. Moreover, when the EU has no agreement with third states for instance in the area of migration and border controls, the activities carried out by Frontex have relied on those agreements signed by individual Member States with third countries, out of EP's oversight

rules for protecting EU classified information [2015] OJ L72/53; and the Council Decision 2013/488/EU of 23 September 2013 on the security rules for protecting EU classified information [2013] OJ L274/1.

⁴⁸ 'For accountability purposes, Eurojust shall draw up a record describing the reasons for restrictions that are applied.' Art. 2.4 of the College Decision 2020-04 of 15 July 2020 on internal rules concerning restrictions of certain data subject rights in relation to the processing of personal data in the framework of activities carried out by Eurojust [2020] OJ L 287/1.

⁴⁹ Recital 21 of Regulation 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (Text with EEA relevance) [2018] OJ L295/39.

⁵⁰ Vigjilence Abazi, 'The Future of Europol's Parliamentary Oversight: A Great Leap Forward?' [2014] German Law Journal, 1127.

⁵¹ Ibid. 1127.

⁵² Raphael Bossong and Helena Carrapico, 'The Multidimensional Nature and Dynamic Transformation of European Borders and Internal Security', in Raphael Bossong and Helena Carrapico (eds.), *EU Borders and Shifting Internal Security. Technology, Externalization and Accountability* (Springer 2016) 12.

⁵³ Statewatch, 'Montenegro: Frontex launches second operation on non-EU territory' *Statewatch News* (23 July 2020) <<https://www.statewatch.org/news/2020/july/montenegro-frontex-launches-second-operation-on-non-eu-territory/>> accessed 23 May 2022

powers. The external dimension of the AFSJ and, in particular, the activities carried out by the agencies at the external borders or within the territory of third States is the 'black hole' of EP's oversight, where the EU should pay particular attention to if it wants to be coherent with the general principles guiding its external action (art. 21 of the Treaty on the EU, TEU; art. 205 TFEU).

IV. Conclusions

In the last years, some progresses have been made concerning EP's oversight over AFSJ agencies. It has moved from an almost irrelevant actor in the process of developing the AFSJ to its impact as co-legislator; from merely scrutinizing the budget and having recourse to informal means to overseeing the activities of the agencies and gain access to relevant information and data for its overseeing purposes. In particular, the recent reforms of the founding regulations have increased the oversight powers of the EP, making the most of the Lisbon Treaty provisions. However, some serious concerns arise when it comes to the external dimension of the AFSJ. In this area, we perceive a clear imbalance between, on the one hand, the general principles of the rule of law –including accountability and transparency– and the values on which the EU has been founded, and, on the other hand, the short-term objectives of the AFSJ directly associated with security and the protection of the internal public order. Much work needs to be done to enhance the oversight power of the EP in this 'black area' of the European integration process to revert a situation that would undermine its international credibility and the European project itself.

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