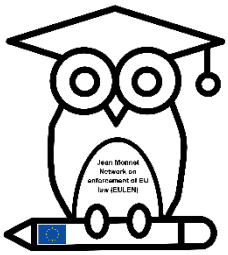

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Which rule of law for EU migration agencies?

The right to effective remedy between *realpolitik* and deference

Luisa Marin*
Marie Curie Fellow
European University Institute

Abstract:

Next to a well-known rule of law backsliding problem within the EU, there is growing concern of an actual rule of law 'bubble' also in the emerging EU composite administration occurring in the context of migration management. This framework is employed to explain recent tendencies as result of the agencification process of the AFSJ, process which is seen as a crisis management tool from institutions. Frontex and the EU Asylum Agency are core actors in these contexts, since they are increasingly vested with new competences, their budgets grow significantly, and every new crisis proves to be an occasion to device new policies stretching the powers of EU agencies to the boundaries of their legal mandates.
This paper aims at expanding the rule of law discourse to the emerging EU administrative layer, to explore and device conceptual avenues which should support a process of embedding of the EU migration agencies into a more robust constitutional context. It starts introducing the context where the agencies have developed; it continues with an operationalization of the rule of law for agencies; in a next section, it places the evolution of the agencies against the background of the low intensity constitutionalization of the EU legal order, and its meaning. It unpacks this concept into the right to effective judicial protection, which is assessed in its constitutional potential in the context of the Hungarian rule of law crisis case-law; it further continues with an assessment of the case law concerning the instruments of the external dimension of migration and border management, focusing on the deference shown by the CJEU. The article concludes with a claim that an effort of constitutional imagination is needed to support the embedding of the agencies into a more robust rule of law framework.

Keywords: Frontex - EUAA – rule of law – effective judicial review – Court of Justice – deference

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1. The metamorphosis of EU migration agencies, between crises, hybridity, and escapes from the rule of law

In the policies related to the governance of migration there is an emerging EU administrative level with increased operational powers. This represents a shift from the original design of the European integration, with the EU acting as a regulator, and the enforcement left in the hands of national bureaucratic bodies. The EU was therefore the source of new legislation but had limited administrative competences. Instead, this original integration paradigm has been radically modified. Agencification has become a feature of EU integration and this has concerned also the policies falling within the broader framework of migration management. More recently, there has been a growth which has concerned both agencies, European Border and Coast Guard Agency (hereinafter: Frontex) and European Union Asylum Agency (hereinafter: EUAA), though the pace and quality of evolution of Frontex is not comparable to the EUAA, the recently reformed asylum agency, replacing EASO. This consolidation of the EU administrative level is conducted along the lines of a *sui generis* Europeanization of competences, in the sense that the European administrative level adds upon the domestic ones, with a strong dimension of hybridity; this 'uncertainty' or ambiguity is for some aspects attractive for the Member States, as they often remain in control of the process with a final say on a decision or operation.[1]

Against the background of this transformation or evolution of the European administrative layer, it can even be discussed if this metamorphosis is in compliance with the treaties[2] and if the remedies in place are sufficient to give protection to individuals. In other words, in light of the new functions performed by the EU administration, we have to ask the question if the system of remedies set in place by the treaties is adequate and sufficient to the functions it has to exercise, precisely against the background of two aspects: 1) the activities of the administration affects persons, individually and /or collectively; 2) individuals must dispose of effective remedies in order to be able to protect their legal positions.

Additionally, in the last years, there have been many reports, investigations and civil society reactions to the policies and practices that have involved agencies. The main claims concern, in a nutshell, the poor respect for fundamental rights, in the sense of a failed mainstreaming of fundamental rights protection into the actual functioning of the agencies, with Frontex having acquired a highly problematic role in this respect. Instead, the main claim against the EUAA is that it often operates in circumstances where fundamental rights are not adequately respected. Another core challenge concerns the adequacy of the scrutiny mechanisms for these newly emerging composite administration practices. Though composite administration is a trend of European administrative law, in the policies of migration and borders we have some specificities, i.e., the operational nature of the activities of the administration and the interplay with core state's interest such as controlling access of foreigners to the territory.[3]

Zooming on the ever-expanding Frontex, it is since years under the scrutiny of media and civil society for allegations of breaches of international and European fundamental rights, disrespect of its legal mandate and a track record of poor transparency and limited accountability. Lately, the number of lawsuits against its activities is raising, which is the sign of coordinated efforts of the civil society organizations and activists. Very recently, probably because of the presentation of an OLAF report in February 2022, the Executive Director of Frontex has resigned.

Overall, the latest developments suggest the reflection on the embedding of the agencies into the EU rule of law. This is especially relevant if put in the context of some trends detected in their evolution. First, agencies are employed as crisis management tools,[4] to deliver results and to by-pass the obstacles left on the grounds by the stalemate on more structural reforms which are difficult to achieve: this is the case of the enduring faith of the

[1] Jorrit Rijpma, Hybrid Agencification in the Area of Freedom, Security and Justice, and its inherent tensions: the case of Frontex, in Madalina Busuioc, Martijn Groenleer, Jarle Trondal (eds.), The Agency Phenomenon in the European Union: Emergence, Institutionalisation and Everyday Decision-making, Manchester: Manchester University Press, 2012.

[2] David Fernández-Rojo, EU migration agencies: the operation and cooperation of FRONTEX, EASO and EUROPOL, Northampton : Edward Elgar Publishing, 2021.

[3] Sarah Tas, Frontex Actions: Out of Control? The Complexity of Composite Decision-Making Procedures, TARN Working Paper Series 3/2020, June 2020.

[4] 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, Springer International Publishing, 2021. See also Evangelia Tsourdi, Beyond the 'Migration Crisis': The Evolving Role of EU Agencies in the Administrative Governance of the Asylum and External Border Control Policies, ibidem, pp. pp 175–203; Chiara Loschi, Peter Slominski, Interagency Relations and the EU Migration Crisis: Strengthening of Law Enforcement Through Agencification? Ibidem.

Member States on this never-ending process of reinforcing the external borders of the EU, an alternative to the failures of Dublin and of intra-EU solidarity on refugees. Secondly, the evolving mandate of the agencies is precisely expression of this crisis-driven approach, hence the stretching of their mandate to the limits, in some instances. The cycle can be summarized as: occurrence of a 'factor', which triggers a governance crisis; EU institutions react with a solution based on policy or soft law documents (hotspots, EU-Turkey deal), which consequently are turned into a legal reform, for which political momentum is created.

Hence the aim of this article is to contribute to a reflection on how to fill the gap between the practices developed by the agencies and the enabling legal framework, considered both as primary law and secondary law, with the aim of ensuring a more robust embedding of these agencies into the EU constitutional order. In other words, the morphology of the agencies has changed rapidly: what can be done to embed their functioning into a sounder rule of law framework? The underlying premise is that the EU rule of law can become the focal paradigm around which this reflection can be axed, since it can provide the key to understand the core of the challenges of today, which concern the agencies and how they operate.
Why the rule of law? Because in the EU currently there are several rule of law challenges which concern border management and migration, at EU level (Frontex 'bubble'), at Member States' level (Hungary and Greece, just to name some paradigmatic examples), and it can be useful to look at them from a single conceptual framework. Rule of law is not simply about rule of law backsliding by illiberal governments. Challenges to the EU rule of law means also consolidated institutional and organizational failures in Member States in not respecting the norms of EU and domestic constitutional laws;[5] rule of law challenges arise as well if the EU administrative layer (agencies) is not able to respect core tenets of the rule of law, because for example the higher legal framework is disregarded because trumped by policy considerations. Secondly, the interest for a rule of law framework is deriving from the fact that fundamental rights litigation is knowing a stasis moment.[6] International law is marked by fragmentation and EU law has been for long driven by a market integration rationale. Hence, in a perspective of critical legal studies, it is of crucial importance to consider alternative pathways.
The merit of the rule of law is that it focuses on the actor exercising public authority, like an agency, be it European or domestic, and not on the status, on the rights of a migrant. Additionally, the implementation of a rule of law paradigm should concern a broader range of institutions; in contrast to fundamental rights litigation before supranational courts, it goes beyond the dynamic individual – court, which in this case means third country nationals and courts. This dynamic can face some structural limitations, due to the fragmentation of the legal framework where they are embedded and also due to institutional/design constraints (e.g., international or governmental organizations, ECHR). After this introduction of the context where the agencies have developed, the paper continues with an operationalization of the rule of law for agencies; in a next section, it places the evolution of the agencies against the background of the low intensity constitutionalization of the EU legal order, and its meaning. It unpacks this concept into the right to effective judicial protection, which is assessed in its constitutional potential in the context of the Hungarian rule of law crisis case-law; it further continues with an assessment of the case law concerning the instruments of the external dimension of migration and border management, focusing on the deference shown by the CJEU. The article concludes with a claim that an effort of constitutional imagination is needed to support the embedding of the agencies into a more robust rule of law framework.

2. Which rule of law for European agencies 2.0?

Against the background of the low intensity constitutionalization of the EU legal order, the principle of the rule of law has a special role, but also an uncertain definition.
The aim of this article is not to dig into the meaning of the rule of law for the EU. Instead, this section will reflect upon the core tenets which belong to the rule of law and which can be applied in the context of the emerging EU administrative agencies, which is of controlling that the exercise of administrative discretion, expression of autonomy, does not lead to arbitrariness, controlling that the exercise of administrative autonomy is constrained

[5] Evangelia Tsourdi, Asylum in the EU: One of the Many Faces of Rule of Law Backsliding?, (2021) 17(3) European Constitutional Law Review, pp. 471-497.
[6] Daniel Thym, The End of Human Rights Dynamism? Judgments of the ECtHR on 'Hot Returns' and Humanitarian Visas as a Focal Point of Contemporary European Asylum Law and Policy, (2020) 32(4) International Journal of Refugee Law, pp. 569-596.

by the respect of the rule law principles. This is important for the different functions exercised by the agencies, ranging from operational tasks to risk assessment, and also for the emergence of AI-based databases, where agencies play a crucial role. Furthermore, considering that we are faced with composite administrative processes, a crucial objective of this reflection is that scenarios of 'escape from judicial scrutiny' are avoided. Escape from scrutiny would potentially mean escape from law.
This is especially relevant since the new morphology acquired by agencies implies broader scope of activities, way beyond the original coordination and support functions. Now agencies interact with persons: controlling discretion with accountability mechanisms which must be in place throughout the different processes in which the various competences of the agency take place.
On the one hand, Frontex and EUAA do not operate in a legal vacuum. They are embedded into a solid rule of law framework, characterized by some core tenets. These are, first, that all the activities of a body expression of public authority must be reconducted to the law (legality/rule by law); secondly, that the respect of the higher legal framework, including fundamental rights,[7] must be assured (thick legality/ constitutional legality/rule of law); thirdly, that adequate and effective (ex ante and ex post) control mechanisms must be in place, in order to ensure that the legal framework is respected throughout the different competences and stages of the development of a given policy. On the other hand, both agencies operate under political pressures, sometimes in crisis situations, in partial disregard of their legal framework.

3. Setting the scene: the low intensity constitutionalization of the EU and its meaning for EU administration

The analysis will now turn to understating the context, in the sense that it will proceed by exploring the meaning of the constitutionalization of the EU legal order for the functioning of the agencies 2.0. This is not simply searching for the vintage of law, but it aims at unpacking the foundational elements of this evolution.
This process of low intensity constitutionalization[8] has started long ago, and the pivotal judgment *Les Verts*,[9] back in 1986, has represented a turning point, in the sense that it legitimized a constitutional narrative in European integration.
Even if this process has started as a spill-over of the primacy of the EU legal order, the core of this process of constitutionalization is represented, also within the EU, by the nature of the relationship between public powers and individuals, in particular by how the exercise of public powers is constrained, and ensuring that the same are exercised in a manner which is in compliance with the law and which can be monitored and controlled.
The traditional paradigm of the separation of powers into legislative, executive and judiciary is expression of this core idea, which in the common law systems has found translation into the principle of 'checks and balances': in the EU legal order the principle of (inter)institutional equilibrium is the peculiar functional translation of Montesquieu's separation of powers.[10]

This process of low intensity constitutionalization has concerned national public powers. First of all, individuals have been entitled to have rights to be invoked against national public powers: it is the *Van Gend en Loos* rationale which is rooted in the EU legal order. Secondly, also European public bodies have been limited in their room of

[7] See Federico Fabbrini, Fundamental Rights in Europe, Oxford: Oxford University Press, 2014; G. Di Federico (ed.), The EU Charter of Fundamental Rights: from declaration to binding instrument, Springer, 2011.
[8] M. Poiares Maduro frames it as a process of low intensity constitutionalization, as referred in Eoin Carolan, Deirdre Curtin, In Search of a New Model of Checks and Balances for the EU: Beyond Separation of Powers, in Joana Mendes and Ingo Venzke (eds), Allocating authority: who should do what in European and international law?, Oxford; Portland: Hart Publishing, 2018, pp. 53-76.
[9] Judgment of the Court of 23 April 1986, case 294/83, *Parti écologiste "Les Verts" contre Parlement européen*, Recueil de la jurisprudence: 1986 – 1339.
[10] In French scholarship: *principe de l'equilibre institutionnel*. In English scholarship it is known as principle of institutional balance. See Jean-Paul Jacque', The Principle of Institutional Balance, *Common Market Law Review*, 2004, 383-391. About the separation of powers, Vice-President of the European Convention Giuliano Amato stated in February 2002 that Montesquieu has never visited Bruxelles, arguing that the European Commission joins in the exercise of the three powers, legislative, executive and judicial and does not have the exclusive exercise of none of the three. As reported in P. Ponzano, La democrazia in Europa, blogpost 18.10.2018. However, it has been observed that the evolution of the EU governance arrangements has sparkled new interest for the theory of separation of powers. On this issue, see Eoin Carolan, Deirdre Curtin, "In Search of a New Model of Checks and Balances for the EU: Beyond Separation of Powers." Allocating Authority: Who Should Do What in European and International Law?, Ed. Joana Mendes and Ingo Venzke. Oxford: Hart Publishing, 2018. 53–76.

manoeuvre because the Court of Justice had to defend the character and the quality of the newly established European legal order against the background of the limitations of national sovereignties it was asking to the Member States. It is not a case that in the same year has started its constitutional law narrative, it has decided – in the judgment *Johnston* of 1986 – that the right to an effective remedy is expression of a general principle of law which is also to be taken into consideration in Community law.[11]

The very core constitutional identity of the EU is therefore precisely expression of the relationship between public powers - interpreted in their double declination of (sub-)national and supranational- and individuals, and it posits that the exercise of public powers is constrained by rules of law; institutions are posited to ensure the respect of those higher rules, among others.

One of the corollaries of the new narrative initiated in *Les Verts* is that the treaties have set up a complete system of legal remedies. In other words, one of the core meanings of the EU constitutional rule of law is that the EU is a community based on the rule of law, which means conformity with the basic constitutional charter and review mechanisms to ensure this compliance. Secondly, the treaties have designed a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of the measures adopted by the institutions. Thirdly, natural and legal persons are protected against the application to them of the administrative implementation of EU measures that they cannot contest, both before European and national courts, depending on who is implementing the general measures.[12]

Since the first decades of European integration the CJEU has filled the gaps in the system of the Treaties; this activity has been explained with the theory of incomplete contracting, according to which, first, the Masters of the Treaties have established an open systems of integration, and, secondly, they have entrusted the CJEU to act as a trustee of the Member States.[13] Clearly that narrative has been linked with the affirmation of the primacy of EU law in domestic legal orders. Today we have to rely on this narrative to design the toolkit for the effective embedding of the activities of the agencies into the EU rule of law, also when implementing measures might have a complex and composite nature, expression of shared administration.

The very core meaning of the EU rule of law rests upon a process of low intensity constitutionalization that relies upon an ought-to-be complete system of legal remedies to ensure the protection of the legal positions of the individuals and other entities concerned. The next section will explore another core meaning of the EU rule of law: effective judicial protection.

3.1. The rule of law and its declinations in the EU legal order: effective judicial protection

After a foundational moment where the core tenets of the EU rule of law have been posited specially to secure the primacy of the EU law in their relations with national domestic systems, the rule of law acquired new significance after the accession of democracies whose commitment to the values of liberal constitutionalism has revealed its superficial nature.[14] This has nevertheless contributed to develop the meaning of the rule of law.

[11] Judgment of 15 May 1986, case 222/84, *Johnston / Chief Constable of the Royal Ulster Constabulary*, ECR 1986 p. 1651.

[12] Judgment of the Court of 23 April 1986, case 294/83, *Parti écologiste "Les Verts" contre Parlement européen*, Recueil de la jurisprudence: 1986 – 1339, paragraph 23 of the judgment:

"It must be first emphasized in this regard that the European Economic Community is a community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the treaty. In particular, in Articles 173 and 184, on the one hand, and in Article 177, on the other, the treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted the institutions. Natural and legal persons are protected against the application to them of general measures which they cannot contest directly before the Court by reason of the special conditions of admissibility laid down in the second paragraph of article 173 of the treaty. Where the Community institutions are responsible for the administrative implementation of such measures, natural or legal persons may bring a direct action before the court against implementing measures which are addressed to them or which are of direct and individual concern to them and, in support of such an action, plead the illegality of the general measure on which they are based. Where implementation is a matter for the national authorities, such persons may plead the invalidity of general measures before the national courts and cause the latter to request the Court of Justice for a preliminary ruling."

[13] Martin Shapiro, The European Court of Justice, in P. Craig, G. De Burca (eds), The Evolution of EU law, Oxford: Oxford University Press, 1999. See also Alec Stone Sweet, The judicial construction of Europe, Oxford: Oxford University Press, 2004.

[14] Gabor Halmai, Illiberal Constitutional Theories, *Jus politicum*, 2021, No. 25, pp. 135-152.

Since *Les Verts*,[15] the CJEU has constructed the EU as a legal order based on the rule of law, implying that the exercise of power is constrained by law. Its core meaning, guaranteeing that the will of majority does not oppress minorities, is expression of the democratic principle. Its concrete application is translated into several other principles and rules, including legality, legal certainty, prevention of abuse of power, equality before the law and access to justice.

As formulated by the Venice Commission, the rule of law "requires a system of certain and foreseeable law, where everyone has the right to be treated by all decision-makers with dignity, equality and rationality and in accordance with the laws, and to have the opportunity to challenge decisions before independent and impartial courts through fair procedures".[16]

Based on the case law of the CJEU, we can argue that the rule of law in the EU requires that legal remedies and procedures must be in place to review the legality of the measures adopted by the institutions.

In a comparative perspective, this is not surprising at all: indeed, the 'codification or consolidation work' of the Venice Commission points in this direction, because this is expression of the consolidation of the constitutional state of the XX century, and the acquired centrality of constitutional courts in domestic systems.[17]

This requirement applies or should apply to the activities carried out by the agencies, since these are expressions of the institutions, or coordinate and complement the tasks of Member States' administrations when implementing EU law and policies. Irrespective of who is the principal of these agencies, *their activities must be subject to accountability and their decisions must be subject to adequate and effective judicial oversight in courts*.

At this purpose, we should distinguish between *activities* of executive nature, which are expressions of the mandate of the same, and, that, as all administrative activities must be subject to forms of judicial review; the second element we should consider is that these activities do take place perhaps after *acts* of administrative nature, or acts which can be considered as part of soft law, because expression of *sui generis* regulatory powers, typical of the EU.[18] Furthermore, if we should distinguish between ex ante and ex post accountability mechanisms, then we should once again strengthen the role of effective judicial protection because judicial review can be seen as compensating for limited ex ante accountability mechanisms, which can be claimed to be applicable also to EU agencies.[19]

In this respect, the provisions of the Charter which have translated this core value into rules (Article 19 TEU and Article 47 of the Charter) are of crucial importance for the actual implementation of the rule of law into practice, for example by complementing existing administrative internal remedies (e.g., complaints mechanism Fundamental Rights Officer in Frontex, or Consultative Forum in Frontex or Ombudsman at European level) with external and necessarily judicial oversight mechanisms.

Effective judicial review is an important component of the rule of law, and therefore, the realization of the objectives of the EU in full respect of its commitment to constitutional values and principles is requiring that its activities are taking place in a context where judicial review is ensured on all acts and activities which have legally binding effects or which affect the position of third parties, in addition to the rules that define the conditions and boundaries for exercising those powers, including respect for the European higher legal framework.

In this context, it is important to elaborate on the significance of the judgment *Associação Sindical dos Juízes Portugueses* in this respect, where the Court has stated that the concrete expression of the values of the rule of law is a task for both the CJEU but also for the national courts and tribunals. Therefore, it is for the Member States to ensure that EU law is applied in their territories with a guarantee of effective judicial protection. More precisely:

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[15] CJEU, *Les Verts*, paragraph 23.

[16] Cf Venice Commission, Rule of Law Checklist, adopted in Venice at its 106th Plenary Session. Venice, 11-12 March 2016.

[17] Andrea Pin, Il *rule of law* come problema, Napoli: Editoriale Scientifica, 2021.

[18] P. Rocca and M. Eliantonio, 'European Union Soft Law by Agencies: an Analysis of the Legitimacy of their Procedural Frameworks', *SOLAR paper*, 2019; see also M. VAN RIJSBERGEN; 'On the Enforceability of EU Agencies' Soft Law at the National Level: The Case of the European Securities and Markets Authority'. *Utrecht Law Review* 10 (5), 2014, p. 116-131.

[19] Carol Harlow, Accountability in the European Union, Oxford: Oxford University Press, 2000. *Mutatis mutandis*, Deirdre Curtin reasoned over input and output legitimacy and ex ante and ex post accountability mechanisms, pointed out the specificity and challenges of judicial accountability, namely the adaptability to the reviewability mechanism to ECB accountability challenges and also the expertise of courts. In D. Curtin, Linking ECB Transparency and European Union Accountability, In ECB Legal Conference 2017: Shaping a new legal order for Europe: a tale of crises and opportunities, pp. 83 ff.

> *"The very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law."*[20]

To conclude, the respect of effective judicial review mechanisms seems to be co-essential to the respect of the rule of law and should therefore apply to all the activities of the EU, be they conducted in the context of the AFSJ (Title V TFEU) or of the CFSP (Title V TEU).
The core question to be examined in this context is how to translate the requirements of the direct judicial review of the acts of the Union to this field of analysis. Indirect judicial review via the preliminary reference procedure cannot be deemed to be effective based on the interpretation adopted by the CJEU of this instrument.[21]

3.2. Effective judicial protection at the intersection of the rule of law backsliding in Hungary: the case law on reception conditions and detention of protection seekers

The case law of the CJEU in relation with the Hungarian legislation on migration is worth analysis since it represents an interesting step in the edification of the meaning of the EU rule of law with a strong constitutional embedding. It is suggested that this is particularly interesting since it intersects several issues: the Hungarian rule of law backsliding, taking shape in a contested and repressive Hungarian reception system and the consolidation of the rule of law in the context of the Procedures, Reception and Return Directives. The rule of law backsliding in this country has taken shape also with various instances of direct contestation against EU legal instruments, such as the Relocation Decisions: these have been challenged by Hungary and other Visegrad states, before the CJEU, but without success.
These cases are *FMS* and *Torubarov*:[22] they are relevant since the CJ places boundaries to the activities of national authorities in the implementation of EU law. These boundaries are framed on the respect of legal certainty and of the right to effective remedies and are pervasive, since they affect the domestic legal order, thanks to the primacy and to the effect of the Charter of Fundamental Rights. In all these cases, originated from Hungary, the Court has stated that primacy and the right to an effective remedy require national judges to self-declare their competence in assessing the complaints proposed by migrants. This is required by EU law and should take place even if the domestic law has chosen to disregard EU law.[23]
Furthermore, the Court declines the right to an effective remedy as requiring that if a complaint is decided by an administrative authority, its decision must be subject to judicial review before a judge.[24] It is precisely the reasoning behind this point which is relevant also for our discourse, since the Court further investigates whether the Hungarian administrative authority can be considered as a jurisdiction, because it satisfies the requirement of independence, elaborating on its case law on the independence of the judiciary, such as *Associação Sindical dos Juízes Portugueses*, *Minister for Justice and Equality* (*Défaillances du système judiciaire, case L.M.*), and *A.K. and others* (*Independence of the Disciplinary Chamber of the Supreme Court*).
To sum up, the Court asserts the bases of the functioning of the rule of law, recalling the principle of the separation of powers, and its implications and tenets, arguing that the Hungarian Court does not satisfies this requirement, since it violates the essential content of the right protected by the Charter. Considering the effectiveness of EU law, the CJ legitimates the domestic judges to assess the domestic decision, setting aside a conflicting domestic provision.[25]

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[20] CJEU, Judgment of the Court (Grand Chamber) of 27 February 2018, C-64/16, Associação Sindical dos Juízes Portugueses v Tribunal de Contas, ECLI:EU:C:2018:117.
[21] For similar observations, see Gentile G, "Ensuring Effective Judicial Review of EU Soft Law via the Action for Annulment before the EU Courts: a Plea for a Liberal-Constitutional Approach" (2020) 16 European Constitutional Law Review 466.
[22] Judgment of the Court (Grand Chamber) of 14 May 2020, Joined Cases C-924/19 PPU and C-925/19 PPU, FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság, , ECLI:EU:C:2020:367; Judgment of the Court (Grand Chamber) of 29 July 2019, Alekszij Torubarov v Bevándorlási és Menekültügyi Hivatal, Case C-556/17, ECLI:EU:C:2019:626.
[23] Iris Goldner Lang, 'No Solidarity without Loyalty: Why Do Member States Violate EU Migration and Asylum Law and What Can Be Done?', European Journal of Migration and Law, 2020, pp. 39–59.
[24] Judgment of the Court (Grand Chamber) of 16 May 2017, Berlioz Investment Fund SA v Directeur de l'administration des contributions directes, Case C-682/15, ECLI:EU:C:2017:373.
[25] Iris Goldner Lang, 'No Solidarity without Loyalty: Why Do Member States Violate EU Migration and Asylum Law and What Can Be Done?', European Journal of Migration and Law, 2020, pp. 39–59.

Interestingly, the CJEU in the case law on Hungary qualifies as detention the containment of protection seekers in transit zones, going beyond the limited protection given by the European Court of Human Rights in the *Ilias II* case of November 2019.
This case law is relevant because it places paramount importance on the right to an effective remedy, and this could find application also once the CJEU will be called to assess the effectiveness of the internal administrative complaints mechanisms which are available against the decision of the agencies. These cases can be considered among the 'grands arrêts' of the ECJ, because they develop the spirit of the *Van Gend en Loos*, re-asserting legal relationships between individuals and courts, even when domestic authorities had interrupted them. Secondly, the Court has been proactive in finding in the legal order the instrument to close the breach of the EU legal order, as a system based on the rule of law which means a system of complete legal remedies, be it at domestic or European level. Once again, the Court has filled the gaps in the system, acting as a trustee of the Member States. Here the interesting question is: to which extent is the Court willing to develop the logic of these cases also while deciding on cases concerning other domains, for example while scrutinizing the activities of the agencies?

4. Which rule of law for the external dimension of migration policies? Some ideas and many questions emerging from the recent case law

The aim of this section is to question and test whether the external dimension of migration policies is witnessing the emergence of a rule of law in line with the premises discussed above, by assessing the case law of the CJEU in this context, before zooming in on the way the CJ is exercising its scrutiny over the agencies, based on the little case law existing on Frontex. The case law concerning Frontex as employer and as contractor remains out of the scope of this work, as not relevant for our argument.

4.1. The case law on the EU – Turkey deal: denialism fed by *realpolitik*?

With the EU – Turkey deal, Germany has succeeded to have the support of the EU to achieve a policy target it decided to prioritize, i.e., to curb the arrivals of migrants from the Eastern borders, by agreeing the return to Turkey of all irregular migrants crossing from Turkey into Greek islands. this should have taken place in full accordance with EU and international law, this excluding any kind of collective expulsion, and in all respect for the asylum rights of protection-seekers. Part of the deal was a special regime for Syrians. For every Syrian being returned, another Syrian will be resettled from Turkey to the EU in light of the UN Vulnerability Criteria. This deal has been criticized for its gross violations of international law obligations,[26] and has been praised by others as necessary.[27] Since it continues to be applied five years after its conclusion, perhaps it is rather fair to consider it as a source of legal obligations, and not a mere political statement.
Contested for many reasons and grounds, the instrument has been challenged by migrants before the GC with an annulment action. The Order of the General Court (GC) on the EU-Turkey agreement can be framed as a 'cold shower of *realpolitik*':[28] the GC has denied that the act was an agreement and that it could be attributed to the EU; instead, it was assessed as an act whose paternity could be attributed to the Member States acting outside the EU's sphere of action. The GC judged it was adopted by the Heads of State and Government of the MSs "using the European Council as a mere occasional venue within which to coordinate their action".[29]
As masterfully described by Professor Cannizzaro, the GC simply took the approach of avoidance or denialism as expression of *realpolitik*, to avoid embarking in answering a complex set of legal and political questions, concerning a 'deal' or agreement that was in breach of procedural rules set by the treaties for its adoption, and

[26] C. Costello, It need not be like this, in Forced Migration Review, 2016, p. 12 et seq.; S. Peers, The final EU/Turkey refugee deal: a legal assessment, in EU Law Analysis, 18 March 2016. See also Gloria Fernández Arribas, The EU-Turkey Agreement: A Controversial Attempt at Patching up a Major Problem, (2016) 1(3) European Papers, pp. 1097-1104.
[27] Daniel Thym, Why the EU-Turkey Deal is Legal and a Step in the Right Direction, VerfBlog, 2016/3/09, https://verfassungsblog.de/why-the-eu-turkey-deal-is-legal-and-a-step-in-the-right-direction/, DOI: 10.17176/20160310-103949.
[28] Order of the General Court (GC) of 28 February 2017, case T-192/16, *N.F. v. European Council*, and subsequent appeal before the CJ: Order of the Court (First Chamber) of 12 September 2018 — *NF and Others v European Council*, Joined Cases C-208/17 P to C-210/17 P, OJ C 231, 17.7.2017.
[29] E. Cannizzaro, 'Denialism as the Supreme Expression of Realism – A Quick Comment on NF v. European Council', *European Papers, Insights*, 2017.

secondly, with a dubious compliance with substantive and fundamental rights standards, just to mention some of the main challenges.[30] At the same time, leaving the EU-Turkey deal outside the scope of EU, has exposed the same to challenges at national level; however, and more fundamentally, the choice of the GC stands in contrast with the constitutional rule that EU Member States cannot prejudice the competences of the EU by deciding to act at the international level in a matter where they have conferred their sovereignty to the EU; nor they can decide whether when they gather within the European Council, they act as members of one of its institutions, or in their international capacity. The choice to interpret and situate the deal radically out of the scope of EU law has also secured it from other judicial challenges, namely for the respect of interinstitutional balance between the institutions, which is expression of the constitutionalization of the EU legal order.[31]

The CJ confirmed the judgment of the GC, by dismissing the appeals as manifestly inadmissible or manifestly unfounded, on a proposal from the Judge-Rapporteur and after hearing the Advocate General. It argued that the appeals were incoherent and not adequately motivated. In other words, the CJ decided to criticize the appeals instead of assessing the contested issues of the Order of the GC.[32]

To offer some more contextualization, the analysis should consider the case *X. and X. v Belgium*,[33] where, in a challenge aimed at issuing humanitarian visas at the Belgian embassy of Lebanon in favour of Syrian nationals, the Court of Justice has stated that Belgium was not implementing EU law. Therefore, the humanitarian visas felt outside the scope of UE law and could not trigger the application of the Charter. A different decision in this case would have been difficult since it would have created obligations that states should have complied with. This position of self-restraint and deference toward the political power has been echoed in Strasbourg, at the European Court of Human Rights, with *M.N. and Others v. Belgium*- on humanitarian visas.[34] Both judgments, with different argumentations, support a "restrictive application of the extraterritorial jurisdiction in visa application cases". In both decisions, courts photographed the cleavage existing in international law between one's right to leave a state and the (lack of a) corresponding right to reach another state to seek asylum; both courts do not go beyond that picture, recalling that any decision on the matter of humanitarian visa belongs to a state's sovereignty.[35]

4.2. The litigation against Frontex: a rule of deference?

Currently many cases are pending before the CG against Frontex, and this witnesses the mobilization of civil society and academia against a contested and ever-expanding agency. The analysis will cover two cases, one dated 2019, dealing with transparency, and a more recent order of April 2022 concerning judicial oversight and remedies available to assess the compliance of Frontex operations with fundamental rights.

The judgment of the General Court of 2019[36] concerned access to documents, a particularly thorny issue since the operations of Frontex are difficult to monitor, inherently, and transparency is of paramount importance for accountability. Access to documents has been sought in relation to the JO Triton by activists Izuzquiza and

[30] E. Cannizzaro, 'Denialism as the Supreme Expression of Realism', Ibidem. See also Paula Garcia Andrade, The External Dimension of the EU Immigration and Asylum Policies Before the Court of Justice, in (2022) 7(1) European Papers, pp. 109-126.

[31] Paula Garcia Andrade, The External Dimension of the EU Immigration and Asylum Policies Before the Court of Justice, in (2022) 7(1) European Papers, pp. 109-126.

[32] Order of the Court (First Chamber) of 12 September 2018, *NF and Others v European Council*, Joined Cases C-208/17 P to C-210/17 P, points 12 to 16.

[33] Judgment of the Court (Grand Chamber) of 7 March 2017, *X and X v État belge*, Case C-638/16 PPU, ECLI:EU:C:2017:173.

[34] Similarly, in *N.D. and N.T. v. Spain*- on the Spanish policy of 'hot returns' in Ceuta and Melilla-. Both decisions are Grand Chamber judgements, and date 2020. Similarly, with the cases of *Ilias and Ahmed v. Hungary*, and *Asady and others v. Slovakia*, which addressed the issues of migrant detention in transit zones and on collective expulsions at the borders, respectively, the ECtHR has closed its door to the litigation of fundamental rights of migrants in this historical and political framework.

[35] About the recent case law of the ECtHR Daniel Thym wrote that it represents the "provisional endpoint of an impressive period of interpretative dynamism on the part of the ECtHR, which has played a critical role in the progressive evolution of international refugee and human rights law over the past three decade". See Daniel Thym, 'The End of Human Rights Dynamism? Judgments of the ECtHR on 'Hot Returns' and Humanitarian Visas as a Focal Point of Contemporary European Asylum Law and Policy', International Journal of Refugee Law, 2020, Vol XX, No XX, 1–28.

[36] Judgment of the General Court (First Chamber) of 27 November 2019, Case T-31/18, *L. Izuzquiza and A. Semsrott v. European Border and Coast Guard Agency (Frontex)*, ECLI:EU:T:2019:815.

Semsrott, in particular access to documents containing information on the name, type and flag of every vessel deployed in the Central Mediterranean in the past section of a still ongoing operation. The denial of Frontex has been challenged in court, but without success.
The Court has sided Frontex on all reasons and grounds and referred in a reiterated manner to its *Sison v. Council* case, where the protection of public security has been deemed as a ground for refusing access to documents. Of all the arguments put forward by the applicants, one could have hoped for a more balanced and nuanced decision, for example in relation to operational data concerning past months of a still ongoing operations or concerning parts of the access to documents requested that have been communicated on Twitter by the same Frontex.[37]
This shows that Frontex enjoys a great discretion in deciding what to disclose with the blessing of the GC and that securitization of the external borders it approved by the GC, which does not act proactively to limit the discretion of the agency, nor to balance the different interests at stake. This is worth investigating, since the future developments of the deployment of new and emerging technologies as well as artificial intelligence requires due monitoring by civil society and institutions, and conversely some forms of transparency.[38]
Another recent case concerns an action for failure to act against Frontex, brought by two applicants in relation to alleged pushbacks operations conducted in the framework of the JO Poseidon in the Aegean Sea. The argument by the applicants was that, because of the human rights violations or international obligations, Frontex had to adopt a decision of suspension or termination of the activities in the Aegean, according to Art. 46(4) of the Frontex Regulation (EU) 2019/1896.
Seized with an action for failure to act, the GC has dismissed the action as inadmissible with Order of 7 April 2022. Interestingly, it has left on the table possible alternatives, namely pointing to the annulment action, which however has stringent locus standi requirements. The application has been dismissed because Frontex had replied to the request of the applicants, and the GC deemed that the reply cannot be declared as missing because it does not lead to the results sought by the applicants. Furthermore, the Court did not engage in the assessment of the position of Frontex, but it assessed the procedural interaction of the parties, assessing that the steps taken by Frontex do not fulfil the situation of failure to act. It can be hoped for that the indication suggested by the Court on the annulment action will be taken onboard by litigants in further case law to assess the scope of the control exercised by the Court once seized by new challenges.

5. The difficult emergence of a rule of law for EU agencies, between deference and constitutional imagination

The treaties were designed having ‘another world’ in mind, i.e., EU as a regulatory authority and not as administrative entity. However, the treaties are expression of open contracting theory.[39] The CJEU has been entrusted with the power and the instruments to fill the gaps left by this system of open contracting. In this context, the CJEU has played a proactive role in the construction of the integration based on the internal market. This action has contributed to the embedding of the new legal order into a constitutional framework, marked by primacy and autonomy.
Since the EU has gone through a process of low intensity constitutionalization, which had the merit to secure the emergence of an EU rule of law of a constitutional character. The Charter of fundamental rights is since years integrated into the case law of the Court of Justice. In this context, the emergence of an EU administrative layer, taking shape with the agencification, should rest upon the emergence of adequate and effective accountability mechanisms and judicial oversight, aimed at scrutinizing the acts and activities of the agencies. It is here suggested that the CJEU has had and still has the power to fill the gaps and adjust the system of remedies to the emergence of new situations, in light of the evolved morphology of the EU administrative layer.
This paper has elaborated on the idea of rule of law in the perspective of the activities of the agencies. It did so reflecting upon this constitutional narrative of the EU precisely as a resource, and among the core paradigms of

[37] Mariana Gkliati, Jane Kilpatrick, Crying Wolf Too Many Times: The Impact of the Emergency Narrative on Transparency in FRONTEX Joint Operations, Utrecht Law Review, (2021) 17(4), pp.57–72. See also Eleonora Frasca, Sailing through transparent waters? A comparison between cases concerning public access to information related to Search and Rescue operations in the Mediterranean, Cahiers de l’EDEM.
[38] L. Marin, The deployment of drone technology in border surveillance: Between techno-securitization and challenges to privacy and data protection, in Michael Friedewald, J. Peter Burgess, Johann Čas, Rocco Bellanova, Walter Peissl (eds), Surveillance, Privacy and Security, Routledge: 2017.
[39] Martin Shapiro, The European Court of Justice, in P. Craig, G. De Burca (eds), The Evolution of EU law, op. cit.

the rule of law is that EU treaties have set up a complete system of remedies to ensure the protection of legal positions of individuals. If it turns out that this system has gaps and shortcomings, this system should be then integrated or amended by the same actors that have contributed to this low intensity constitutionalization. These issues are even more urgent because agencies have grown, Frontex in particular at exponential level.

The recent rule of law backsliding also witnesses the core relationship between rule of law and the right to effective legal remedies. In this context, where the primacy of EU law is a legal good to be secured, the CJ has taken a constitutional court attitude while rule of law challenges intersects with primacy; the Hungarian case provides an example. However, this statement cannot be generalized: in the external dimension of migration policies, the case-law of CJ is very oriented toward self-restraint and deference to EU institutions and MS, especially in litigation where individuals raise a challenge. Leaving aside the case X. and X. on humanitarian visas, where a different decision by the Court would have the consequence to create legal obligations for states, the judgments on the EU-Turkey deal suggests that the external dimension of migration control is totally left in the hands of politics. This seems to be expression of a total deference toward political powers, also in a contest where there are issues on the delimitation of competences between EU and MS, issues of inter-institutional balance at EU level among institutions, and protection of fundamental rights.

It is therefore important that courts face their role in underpinning the legitimacy of the activities of the agencies, by contributing to realizing effective judicial scrutiny against the acts, and, to some extent, against the activities of the agencies. At first sight, the case law on Frontex, which has touched upon access to documents and transparency, and on failure to act action and the relation between JO and fundamental rights protection has been declared inadmissible to the GC. If the self-restraint toward political issues can be understood, the task of a Court should nevertheless be of scrutinizing that administrative powers are exercised and are adequately scrutinized against the background of EU rules and principles.

To conclude, the analysis has shown the emergence of many declinations of rule of law in this context of migration, and the separation between internal and external dimensions are not that simple, since the cooperation with TCs requires activities by states and European administrations. So far, the CJEU is not using the constitutional twist of its activity to underpin the expansion of the agencies mandate into a more robust constitutional narrative, based on a coherent rule of law.[40]

[40] Daniel Thym, Between "Administrative Mindset" and "Constitutional Imagination": The Role of the Court of Justice in Immigration, Asylum and Border Control Policy, (2019) 44(2) *European Law Review*, pp. 139-158.