Co-funded by the
Erasmus+ Programme
of the European Union

Jean Monnet Network on EU Law Enforcement
Working Paper Series

THE RISE OF EU MIGRATION AGENCIES: STRIKING A BALANCE BETWEEN ENFORCEMENT NEEDS AND ACCESS TO JUSTICE

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I. Introduction: The Expansion of Enforcement Tasks of EU Migration Agencies

The process of 'agencification' in European Union (EU) law[1] has not skipped the Union's policy fields of asylum, migration and border control. Decentralised European agencies, such as the European Agency for Law Enforcement Cooperation (Europol), the European Union Border and Coast Guard Agency (Frontex), and the European Union Asylum Agency (EUAA) – the replacement of the European Asylum Support Office (EASO) – have been playing an increasingly important role in enforcement the relevant EU legislation adopted within the Area of Freedom, Security and Justice (AFSJ).[2] While political or pragmatic reasons may have guided the Member States' preference for the establishment of these agencies,[3] the main rationale for the creation of these bodies lies in their capability to effectively assist the Member States in ensuring adequate levels of enforcement of EU law rules in an area which has been notably characterised by a 'protracted implementation deficit'.[4]

As well noted in scholarly literature, EU migration agencies have witnessed a tremendous development of their mandates, tasks, and activities over the past decades.[5] What is noticeable is that their powers have advanced incrementally both in breadth (number of powers) as well as in depth (type of powers). This is the case not only for the work that these agencies perform *within* the EU, but also for their international operations. Through frequent modifications of their legal mandates, EU migration agencies have acquired more prominence and leadership, progressing from a 'reactive to a proactive' approach – from a traditional role of coordination to a new one of initiative and decision – asserting thereby their autonomy and leadership, both inside and outside Europe.[6]

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[1] See, *inter alia*, Merijn Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press, 2016).

[2] Sergio Carrera, Leonhard den Hertog & 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, 337-358; Elspeth Guild *et al.*, *Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies. Frontex, Europol and the European Asylum Support Office* (European Parliament 2011).

[3] Montserrat Pi Llorens, 'El nuevo mapa de las agencias europeas del Espacio de Libertad, Seguridad y Justicia' 2017 *Revista de Derecho Comunitario Europeo* 56, 85

[4] D. Thym, 'Pitfalls of the Law, Politics and Administrative Practices in the Reform of the Common European Asylum System' EU Asylum and Immigration Law and Policy Blog, 9 February, 2017, at: <https://eumigrationlawblog.eu/pitfalls-of-the-law-politics-and-administrative-practices-in-the-reform-of-the-common-european-asylum-system/>.

[5] See, for example, Marco Scipioni, 'De Novo Bodies and EU Integration: What is the Story behind EU Agencies' Expansion?' 2018 *Journal of Common Market Studies* 56, 769.

[6] David Fernández-Rojo, *EU Migration Agencies: The Operation and Cooperation of FRONTEX, EASO and EUROPOL*, (Edward Elgar Publishing 2021) 11-12.

The empowerment of EU migration agencies undoubtedly boosts the operational efficiency of these bodies and enables them to further EU policy objectives.[7] While officially designed to support Member States in implementing relevant legislation and their EU law obligations, these agencies are progressively engaging in activities that may infringe upon migrants' fundamental rights. Frontex has, allegedly, been involved in pushing back and returning migrants to third countries, who are, thus, left deprived of access to the European territory and to adequate remedies for harm suffered.[8] EASO has been conducting interviews with asylum seekers in Greece and delivering opinions on the (non)admissibility of the merits of asylum claims,[9] illustrating unresolved issues of coordination with national asylum authorities regarding legal remedies for migrants. This situation results in obstacles for migrants relating to adequate access to justice.[10]

Despite their potential in contributing to enhancing the correct implementation and enforcement of relevant EU rules, this paper aims to explain how to reconcile the enforcement needs with access to justice safeguards in light of the expanding mandate of EU migration agencies. To that end, the paper will firstly unfold the concept of access to justice (Section II) and highlight the concerns that the expansion of the EU migration agencies' operational mandate – also in its evolving external mandate – brings about for access to justice (Section III). Secondly, after synthesising the problems encountered, the paper concludes with some potential solutions to remedy the challenges related to ensuring access to justice (Section IV).

II. Access to justice and EU migration law

The expanding mandate of EU migration agencies has sparked lively debates about its implications on the migrants' fundamental rights. Whereas these implications have been analysed from trough the lens of EU and international responsibility,[11] the analysis from the perspective of access to justice has remained limited and significantly underdeveloped.

The notion of access to justice is generally not defined in relevant legal texts,[12] although it is broadly understood as a concept which entails both substantive and procedural components and a number of core rights.[13] The concept traditionally refers to access to the law, in the sense of access to the set of rights which a legal system offers, including the right to be informed about these rights.[14] As part of the overarching obligation to ensure adequate pathways to justice, European law scholarship has considered the notion one-dimensionally, namely as access to a court, thereby including the right to a fair trial or effective remedy before an independent and impartial tribunal.[15] It is, therefore, crucial to stress that access to justice gives individuals the opportunity to enforce their individual rights, and that it ensures their continued protection, enabling them to hold executive authorities

[7] See, for instance, F. Coman-Kund, 'Europol's International Exchanges of Data and Interoperability of AFSJ Databases', *European Public Law* 2020/26, 202.

[8] Waters, Freudenthal and Williams, 'Frontex at Fault: European Border Force Complicit in 'Illegal' Pushback' Bellingcat (23 October 2020), available at: <https://www.bellingcat.com/news/2020/10/23/frontex-at-fault-european-border-force-complicit-in-illegal-pushbacks/>.

[9] Nicolosi and Fernández Rojo, 'Out of Control? The Case of the European Asylum Support Office', in M. Scholten and Brenninkmeijer (eds), *Controlling EU Agencies. The Rule of Law in a Multi-jurisdictional Legal Order* (Edward Elgar, 2019) pp. 177-195.

[10] Terlouw, 'Access to Justice for Asylum Seekers' in Grütters, Mantu and Minderhoud (eds.) *Migration on the Move. Essay on the Dynamic of Migration* (Brill/Nijhoff, 2017), pp. 247-266.

[11] See e.g. Fink, *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford University Press, 2019).

[12] Mendez Pinedo, 'Access to justice as hope in the dark. In search for a new concept in European law', (2011) *International Journal of Humanities and Social Science*, pp. 9-19;

[13] Cappelletti and Garth, 'Access to justice: the newest wave in the worldwide movement to make rights effective' (1978) *Buffalo Review* pp. 182.

[14] Greenleaf and Peruginelli, 'A comprehensive free access legal information system for Europe, *UNSW Law Research Paper* No. 2012-9, pp.1-22.

[15] Daminova, ''Access To Justice' and the Development of the Van Gend en Loos Doctrine: The Role of Courts and the Individual in EU Law' (2017) *Baltic Journal of Law & Politics*, pp. 133–153.

accountable for their actions.

Yet, when it comes to the areas of migration and asylum, access to justice is often sorely lacking. Due to the particularly vulnerable circumstances which migrants are in, these individuals often have difficulty finding proper redress for violations of their rights, whether due to a lack of resources, a lack of information about the possibility of lodging complaints, discriminatory and/or inadequate laws, or the general complexity of the emerging EU migration governance. The problem is exacerbated by the growing emphasis on the externalisation of border controls.[16] Starting with the EU-Turkey deal of 2016,[17] aimed at preventing asylum seekers from leaving Turkey for Greece and at obliging Turkey to take asylum seekers back, 'the range of processes whereby European actors and Member States complement policies to control migration across their territorial boundaries with initiatives that realise such control extra-territorially and through other countries and organs rather than their own'[18] has been gaining momentum. Scholars have expressed the concern that these informal and often highly practical arrangements may circumvent fundamental rights responsibilities.[19]

While scholars have emphasised that the traditional understanding of access to justice, as access to remedies, does not capture the complexities of the emerging migration governance,[20] in which the competences of the EU agencies progressively overlap with those of the national authorities, a reconceptualisation of access to justice that contributes to a fairer governance has yet to be designed. As a 'dynamic concept'[21], access to justice has been also considered beyond its strict dimension of access to remedies, to refer more broadly to access to the law,[22] which represents the possibility for people to have access to the rights and entitlements provided by a legal order, more specifically in the EU Charter as well as in the EU secondary legislation. By using this broad conception of access to justice, this paper identifies three most pressing and interrelated problems that hamper access to justice in relation to migration agencies: (1) lack of transparency, (2) incomplete remedies, and (3) lack of control.

First, the realisation of this broader dimension of access to justice is undermined by the lack of transparency surrounding their operations.[23] These agencies do not usually publicly report on the details of their activities. Nevertheless, to protect their fundamental rights, migrants have a great and legitimate interest in obtaining access to documents from these agencies. Transparency is also a precondition to ensure the accountability of any public body.[24] One recurring criticism concerns the absence or malfunctioning of accountability mechanisms.[25] However, this accountability gap is also due to a lack of transparency, which is, therefore, an essential component of access to justice.

Furthermore, the mechanisms designed for individuals to obtain redress for harm suffered by the agencies' activities are incomplete. Whereas the expansion of the mandate of the agencies has made these bodies more prone to infringing fundamental rights of individuals, there has been an insufficient increase in remedy systems.

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[16] European Parliament resolution of 19 May 2021 on human rights protection and the EU external migration policy (2020/2116(INI)).

[17] European Council, EU-Turkey statement, 18 March 2016, Press Release.

[18] Lemberg-Pedersen, Martin; Moreno-Lax, Violeta, 'Border-induced displacement : The ethical and legal implications of distance-creation through externalization' Questions of International Law, Vol. 56, 28.02.2019, p. 5-33.

[19] Carrera, Santos Vara, Strik (eds.), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis. Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar, 2019).

[20] Terlouw, 'Access to Justice for Asylum Seekers' in Grütters, Mantu and Minderhoud (eds.) *Migration on the Move. Essay on the Dynamic of Migration* (Brill/Nijhoff, 2017), pp. 247-266.

[21] Westerveld, Hubeau, & Terlouw, 'Access to justice: a dynamic concept' (2015) 36 Recht der Werkelijkheid,, 169.

[22] Terlouw, 'Access to Justice for Asylum Seekers' in Grütters, Mantu and Minderhoud (eds.) *Migration on the Move. Essay on the Dynamic of Migration* (Brill/Nijhoff, 2017), pp. 247-266.

[23] Gkliati & Kilpatrick, 'Crying Wolf Too Many Times: The Impact of the Emergency Narrative on Transparency in FRONTEX Joint Operations, (2021) 17 *Utrecht Law Review* (Special Issue edited by V. Nagy & S. Nicolosi) 57–72

[24] Meijers Committee, 'Shortcomings in Frontex's practice on public access to documents' (5 October 2021), available at: <https://www.commissie-meijers.nl/comment/shortcomings-in-frontexs-practice-on-public-access-to-documents/>.

[25] Gkliati, 'The new European Border and Coast Guard: Do increased powers come with enhanced account-ability?' (17 April 2019) EU Law Analysis Blog, at: <https://eulawanalysis.blogspot.com>.

Finally, there are problems with regard to the third dimension of access to justice: the possibility of achieving 'justice' beyond the existing body of law.[26] The expanding mandate of EU migration agencies reveals a structural problem in the emerging EU shared administration, which has not been able to allocate complete avenues for accountability.[27] This structural problem has been partly addressed by civil society[28] as well as institutional actors, such as the European Parliament[29] and the European Ombudsman.[30]

A focus on these mentioned three problematic dimensions of access to justice vis-à-vis EU migration agencies can contribute to increasing migrants' safeguards and fulfilling the dynamic nature of access to justice, namely 'to open new scenarios of legal protection.'[31] This reconceptualisation is necessary to address the current divide between the reality of migrants 'in relation to their equality as humans in the order of nature and their inequality within the social/political order of Europe'.[32]

III. EU Migration Agencies and the Problems of Access to Justice

III.1. The European Union Border and Coast Guard Agency (Frontex)

An important player entrusted with the task of managing the EU's external borders is the European Border and Coast Guard Agency, established as Frontex in 2004 with a view to supporting the MS in promoting a more integrated and efficient border management.[33] Besides its *regulatory* tasks, the agency has had the *operational* power to coordinate joint operational activity of MS' border guards.[34] Over the years, subsequent revisions of Frontex's legal framework have expanded the agency's resources as well as its regulatory and operational tasks – both internally as well as externally.[35] Most notably, the 2007 amendment enabled the agency to deploy rapid border intervention teams to MS,[36] the 2011 modification strengthened Frontex's role in joint (return) operations,[37] and the 2016 reform introduced a 'rapid reaction pool' of at least 1500 border guards.[38] Frontex

[26] Westerveld, Hubeau, & Terlouw, 'Access to justice: a dynamic concept' (2015) 36 Recht der Werkelijkheid,, 169.
[27]European Parliament, 'European Parliament scrutiny of Frontex' (25 November 2021, available at: <https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2021)698816>.
[28]Human Rights Watch, 'Frontex Failing to Protect People at EU Borders. Stronger Safeguards Vital as Border Agency Expands' (23 June 2021) available at: <https://www.hrw.org/news/2021/06/23/frontex-failing-protect-people-eu-borders.
[29] European Parliament, 'European Parliament scrutiny of Frontex' (25 November 2021, available at: <https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2021)698816>.
[30] European Ombudsman, Decision in Case OI/4/2021/MHZ.
[31] Palombella, 'Access to Justice: Dynamic, Foundational, and Generative', (2021) 34 *Ratio juris*, pp. 121-138.
[32] Velluti, *Questioning legal personhood in EU migration and asylum law* (12 January 2022), available at https://ssrn.com/abstract=4028089.
[33] Council Regulation (EC) 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *OJ 2004/L349/1*, Art. 1(1); See J. Santos Vara, 'La transformación de Frontex en la Agencia Europea de la Guardia de Fronteras y Costas: ¿hacia una centralización en la gestión de las fronteras?', *Revista de Derecho Comunitario Europeo* 2018/59, 148.
[34] J. Rijpma, 'Frontex and the European system of border guards. The future of European border management', in: M. Fletcher, E. Herlin-Karnell & C. Matera (eds.), *The European Union as an Area of Freedom, Security and Justice*, London, New York: Routledge 2017, 219; Here, Schotel's definition of operational powers is used, being 'the physical capacity to intervene directly in tangible reality', see B. Schotel, 'EU Operational Powers and Legal Protection: A Legal Theory Perspective on the Operational Powers of the European Border and Coast Guard', *German Law Journal* 2021/22, p. 627
[35] Santos Vara (n 8) 148; Rijpma (n 9) 220.
[36] Regulation (EC) 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, *OJ 2007/L199/30*.
[37] Regulation (EU) 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *OJ 2011/L304/1*.
[38] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC; See Santos Vara (n 8) 148-149; D. Fernández-Rojo, 'Los poderes ejecutivos de la Guardia

currently operates on the basis of the 2019 Regulation, which reflects an increased operational role for the agency, as it confers executive and coercive powers to Frontex staff and envisages a 'standing corps' that should consist of 10.000 operational staff in 2027.[39] With mentioned revisions to its legal framework, it is also the agency's external dimension that has experienced a great development.[40]

From the outset, Frontex was not only competent to receive observers from third countries, send liaison officers abroad, and independently launch and finance technical assistance project in third countries, but it could also conclude working arrangements with international partners in the framework of the Union's external relations policy.[41] When it comes to the expansion of its external competences, Regulation 2016/1624 and Regulation 2019/1896 most notably introduced and broadened the agency's power to carry out actions *on the territory of a third country* by means of a 'status agreement' concluded between the EU and the respective third country.[42] On the basis of such an agreement, the agency is allowed to 'carry out actions' – for instance, joint operations, border interventions and joint return operations – in the respective third country.[43] On the condition that certain requirements are met, team members are, moreover, allowed to *exercise 'executive powers'*, defined in the agreements as 'powers necessary to perform the tasks required for border control and return operations […] during a joint action'.[44] Such powers include (i) the possibility to *carry service weapons, ammunition and equipment*, (ii) the authorisation to *use force, ammunition and equipment*, and (iii) the authorisation to *consult national third-country databases and access (personal) data*.[45] What appears from this short overview is that both the internal and external powers of Frontex have expanded tremendously over the years, even enabling the agency to exercise operational and executive powers.

Carrying out operational activities and working in an inherently fundamental rights sensitive field, Frontex has not been devoid of controversy regarding its respect for individuals' fundamental rights. Legal scholars, practitioners, civil society organisations, and national and supranational political institutions have time and again brought up Frontex's potential interference with human rights.[46] This polemic reached its peak with the conclusion of a report by the *Office Européen de la Lutte Antifraud*, culminating eventually in the resignation of Frontex's Managing Director Fabrice Leggeri.[47] What should be stressed here is that while fundamental rights concerns already surround the internal activities of Frontex, these concerns are exacerbated when the agency cooperates with non-EU countries. There is a notable difficulty in ensuring that fundamental rights standards are complied with by third countries, which are not bound by EU law and may not even be party to international human rights treaties, such as the European Convention on Human Rights.[48]

In spite of these human rights concerns, the following three problems in relation to access to justice are prevalent in Frontex's internal and external activities.

a) Lack of transparency

Europea de Fronteras y Costas: del Reglamento 2016/1624 al Reglamento 2019/1896', *Revista Catalana de Dret Públic* 2020/60, 184.

[39] 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 (Frontex Regulation), recital 5 and Art. 5(2); L. Marin, 'The Cooperation Between Frontex and Third Countries in Information Sharing: Practices, Law and Challenges in Externalizing Border Control Functions', *European Public Law* 2020/26, 159; Fernández-Rojo (n 13) 193.

[40] Santos Vara (n 8) 173; Fernández-Rojo (n 13) 187-188.

[41] Frontex Council Regulation 2004, Art 14(1)-(2).

[42] Frontex Regulation 2016, Article 54(5); Frontex Regulation 2019, Article 74(2).

[43] See, for example, Status Agreement between the European Union and the Republic of Albania on actions carried out by the European Border and Coast Guard Agency in the Republic of Albania, *OJ 2019*/L46/3 (EU – Albania Agreement), Art. 1(1) jo. 2(1).

[44] See ibid., Art. 4(1) jo. 2(12).

[45] See ibid., Art. 4(5), (6), and (7); Coman-Kund (*supra* n 108).

[46] See Frontex Working Group.

[47] See <https://frontex.europa.eu/media-centre/news/news-release/frontex-statement-following-the-conclusions-of-the-extraordinary-management-board-meeting-tQDU9Z> accessed 22 May 2022.

[48] Omičević 2022 (n x).

First, there is a 'culture of secrecy' revolving around Frontex and the activities it employs.[49] Generally, EU agencies are required to give EU citizens and residents the right to public access to documents, and also have the option to do grant this access to individuals outside the Union.[50] When processing requests for the access to its documents, Frontex shall, thus, adhere to this obligation and, more concretely, disclose objective, detailed, comprehensive, reliable and easily understandable information regarding its work to 'the public and any interested party', save exceptions.[51] In spite of these legal provisions mandating a rather proactive stance from the agency on transparency matters, Frontex has been increasingly resistant to share information regarding its activities, with its especially unsettling 'blanket refusal' to provide access to individuals outside the EU.[52]

In the recent past, Frontex has even 'actively and aggressively' dissuaded activists from improving transparency, by demanding them to pay large amounts of costs in transparency cases before the CJEU.[53] While Frontex has finally created a public register of documents in response to a decision by the European Ombudsman,[54] organisations have noted that this register still does not include all documents it should.[55] These secretive practices may have important ramifications for individuals' possibility to exercise their right to an effective remedy and obtain judicial redress for harm suffered by the agencies' activities.[56] In order to collect evidence on an alleged violation of human rights and argue such a violation before a court, it is first necessary to have sufficient knowledge and information of what the exact activities of the agency has been.[57]

The importance of information is especially prescient for third country nationals affected by the agency's external activities. The opacity characterising Frontex's legal provisions on external activities and the lack of transparency regarding its external cooperation practice are, thus, a serious impediment to ensuring access to justice in regard to Frontex operations.[58]

b) Imperfect remedies

Second, the judicial and agency-specific remedies for third country nationals to obtain redress for harm suffered by Frontex are incomplete. Looking, first, at the intra-agency mechanisms, it is fair to state that fundamental rights safeguards for Frontex activities have improved – at least on paper – with the adoption of Regulation 2019/1896.[59] The Regulation not only envisages a Fundamental Rights Officer (FRO) and Fundamental Rights Monitors (FRM), but also mandates the agency to 'set up and further develop an independent and effective

[49] Jane Kilpatrick & Mariana Gkliati, 'Frontex, secrecy and security: control of information as strategy for institutitonal preservation' (12 October 2021, *EU Open Government*) < https://www.eu-opengovernment.eu/?p=2917> accessed 18 May 2022.
[50] Regulation 1049/2001, Recital 8, Article 2(1) and 2(2).
[51] Regulation 2019/1896, Article 114 (1)-(2); See also Article 10(1)(ad) stating that the agency shall perform the task of 'follow[ing] high standards for border management allowing for transparency and public scrutiny in full respect of the applicable law and ensuring respect for, and protection and promotion of, fundamental rights'.
[52] Elmin Omičević, 'Between Security, Secrecy and Scrutiny: Enigmatic External Activities by European Agencies and Bodies in the Fight against Crime' (*Europeanlawblog*, 24 November 2021) <https://europeanlawblog.eu/2021/11/24/between-security-secrecy-and-scrutiny-enigmatic-external-activities-by-european-agencies-and-bodies-in-the-fight-against-crime/> accessed 18 May 2022.
[53] Statewatch, 'Frontex, secrecy and story-telling: control of information as super-strategy' (29 July 2021, *Statewatch*) < https://www.statewatch.org/analyses/2021/frontex-secrecy-and-story-telling-control-of-information-as-super-strategy/> 19 May 2022, 3.
[54] Frontex, 'Public register of documents', <https://prd.frontex.europa.eu> accessed 19 May 2022; EU Ombudsman, Decision in case 2273/2019/MIG on the European Border and Coast Guard Agency's (Frontex) public register of documents, https://www.ombudsman.europa.eu/en/decision/en/137721.
[55] Statewatch, 'EU: Disappearing documents: Frontex's transparency efforts fall short of requirements' (16 May 2022, *Statewatch*) < https://www.statewatch.org/news/2022/may/eu-disappearing-documents-frontex-s-transparency-efforts-fall-short-of-requirements/> accessed 19 May 2022.
[56] Omičević (n 29).
[57] Omičević (n 29).
[58] Omičević (n 29); Carrera, den Hertog & Parkin (n 1) 357; Guild *et al.* (n 1) 110.
[59] Consultative Forum 2021, p. 27; See Rijpma (n 10) 233 and Carrera, den Hertog & Parkin (n 1) 355 for initial concerns on the fundamental rights mechanisms of Frontex.

complaints mechanism' consisting of various components.[60] However promising these provisions may seem, significant delays exist in the implementation of the safeguards, causing substantial shortfalls in terms of fundamental rights compliance, monitoring and correction.[61] Not only did the appointment of the FRO come very late and has the recruitment of 40 FRM monitors not been achieved yet, but also does the individual complaints mechanism continue to show deficiencies – it lacks accessibility, effectiveness, and independence.[62] Besides the issues related to Frontex's internal mechanisms, judicial redress before the CJEU for harm suffered by Frontex activities is also difficult – if not nearly impossible – to obtain. This alternative option for remedying fundamental rights violations consists of bringing before the Court an action for annulment (Article 263 TFEU) or an action for damages (Article 340 TFEU). Both possibilities are flawed, however. First of all, it is the *factual conduct* by Frontex which sparks concerns over fundamental rights violations. Such conduct cannot, in principle, be reviewed under an action for annulment.[63] Second, while the action for damages may be a more fruitful option, this too requires the necessary legal creativity and flexibility to apply it to Frontex's activities and alleged violations of fundamental rights.[64] Importantly, breaches of fundamental rights by Frontex will have to be 'sufficiently serious', a criterion interpreted strictly by the CJEU, and difficult to prove for Frontex activities.[65] As Fink thus aptly states, there is a 'striking lack of mechanisms for individuals affected by Frontex's activities to hold the agency to account'.[66]

c) Lack of effective oversight

Third, there is a lack of control by EU institutions and extra-judicial bodies over Frontex's activities. On the scrutiny by Union institutions, the current Frontex Regulation states that '[t]he Agency shall be accountable to the European Parliament and to the Council in accordance with this Regulation'.[67] This role of oversight takes many forms and may, for instance, be exercised by reviewing the agency's annual report and interrogating the Managing Director on the basis of that report.

More importantly, the EP has the power to withhold the discharge of Frontex's budget. On 31 March 2022, the Parliament has voted to postpone the discharge on the basis of the OLAF report mentioned above.[68] Moreover, Frontex's Executive Director has testified to the EP Committee on Civil Liberties, Justice and Home Affairs (LIBE) on the allegations on fundamental rights violations.[69] Apart from scrutiny by the EU institutions and sub-committees, the European Ombudsman has also used its powers in respect of Frontex to address concerns related to transparency, fundamental rights, and accountability.[70] While these control mechanisms seem to function generally well on paper, the transparency problem discussed above has a great impact on the potential for EU institutions and other actors to exercise their role of oversight.

As the agency dodges access to documents requests by hiding behind security reasons, and as it has on occasions proven unwilling to fulfil its task of fully informing the EP on its activities, the competent authorities

[60] Regulation 2019/1896, Article 109, 110, and 111.
[61] Consultative Forum 2021, p. 26.
[62] Statewatch, 'Frontex: the ongoing failure to implement human rights safeguards' (25 January 2022, *Statewatch*) < https://www.statewatch.org/analyses/2022/frontex-the-ongoing-failure-to-implement-human-rights-safeguards/> accessed 19 May 2022
[63] Melanie Fink, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable', 2020 *German Law Journal* 21, 533.
[64] Fink (n 40) 547.
[65] Fink (n 40) 541, 545, 547.
[66] Fink (n 40) 547.
[67] Regulation 2019/1896, Article 6.
[68] <https://euobserver-com.proxy.library.uu.nl/migration/154639> accessed 20 May 2022.
[69] Consultative Forum 2021, 50.
[70] Consultative Forum 2021, p. 50.

are hampered from performing their oversight functions.[71] Moreover, while the European Ombudsman may have an authoritative influence on Frontex, its recommendations are non-binding, and its activeness in some situations – e.g. the proactive monitoring at external borders – is to be improved.[72]

III.2 European Agency for Law Enforcement Cooperation (Europol)

Labelled as the 'spearhead' of the AFSJ agencfication process and the 'embodiment of an agency with a strong international profile', Europol is a key actor not only in police matters relating to police cooperation but also in migration matters.[73] Established as an international organisation by the MS in 1995, Europol initially possessed only 'minimal operational autonomy' and was 'fully dependent on the willingness of national authorities' to provide it with information by which it could achieve its aims.[74] Subsequent modifications to its mandate added to its competences the power to coordinate and carry out operational tasks – for instance, in the framework of JITs – to assist MS in their national investigations of organised crime.[75]

Through subsequent modifications, it not only acquired novel operational capacities, but also the potential to request MS to initiate, coordinate, or conduct investigative actions. Refusal of national authorities to accede to these requests was possible but would oblige them to inform Europol and state reasons for their refusal.[76] Besides its internal dimension, Europol has also developed an impressive international network over time.[77] Already under its 2009 legal framework, the agency was competent to sign operational and strategic cooperation agreements with external partners. Under the current framework, which has been brought in line with the Common Approach on Decentralised Agencies and the Lisbon Treaty, it is capable of establishing contact points, seconding liaison officers, and signing working arrangements with competent third country authorities.

While these arrangements may not form the basis for international data exchanges, such exchanges are possible on the basis of old cooperation agreements, EU-third country agreements, or on a Commission adequacy decision. When regarding Europol's external competences, it is remarkable that the provisions in its legal framework remain succinct and vague – only mentioning the competence to exchange data with third countries – whereas its cooperation practice demonstrates the agency's ability to provide intelligence development and analytical support to third countries with the active-on-the-spot participation of Europol officers in an international anti-smuggling action.[78] Current negotiations on the Commission's proposal aimed at strengthening Europol's mandate once again show that this 'mission creep' of agency action – both internally as well as externally – is not bound to stop yet.[79]

Fundamental concerns on Europol's compliance with human rights have, however, existed since the nascent stages of the agency's operations, especially with regard to its data exchange activities.[80] Europol's collection, storing, and processing of data may directly violate the fundamental rights of data subjects.[81] In his decision of 3 January 2022, the European Data Protection Supervisor (EDPS) ordered Europol to delete the data

[71] See Report on fact-finding investigation on Frontex concerning alleged fundamental rights violations 2021, 16; Mariana Gkliati and Jane Kilpatrick, 'Crying Wolf Too Many Times: The Impact of the Emergency Narrative on Transparency in FRONTEX Joint Operations' 2021 Utrecht Law Review 17, 69-70.
[72] Markus Jaeger *et al., Feasibility study on the setting up of a robust and independent human rights monitoring mechanism at the external borders of the European Union*, Odysseus Network 2022, 40.
[73] Fernández-Rojo (n 4) 22, 24; F. Coman-Kund, 'Europol's international cooperation between 'past present' and 'present future': reshaping the external dimension of EU police cooperation', *Europe and the world: a law review* 2018/1, 3.
[74] Fernández-Rojo 2021b, p. 4, 24; Fernández-Rojo 2021a, p. 6-8.
[75] Fernández-Rojo 2021a, p. 9-10.
[76] Fernández-Rojo 2021b, p. 78-79.
[77] Coman-Kund (*supra* n 36), p. 3-4.
[78] Omičević (n 29).
[79] See 'Europol negotiating mandate', <https://www.consilium.europa.eu/en/press/press-releases/2021/06/30/europol-council-agrees-negotiating-mandate-on-new-rules-to-strengthen-the-role-of-the-agency/> accessed 11 April 2022; European Commission 2020b.
[80] See, for example, Guild *et al.* (n 1) 43.
[81] Brière 2018, p. 18.

pertaining to individuals with no link to criminal activities.[82] According to the EDPS, Europol had acted in breach of *inter alia* data retention rules, keeping personal data stored for longer than necessary.[83] Such data protection concerns also exist – and are even exacerbated – when the agency exchanges personal data with third countries, as there is a notable difficulty in ensuring that legal safeguards are complied with by partners third countries.[84] The recent *Schrems II* judgment by the CJEU illustrates this. In that case, the CJEU invalidates the legal basis for international data exchanges between the EU and the US, as US law did not ensure a level of protection to citizens that was 'essentially equivalent to that of the CFR'.[85]

On top of this, the so-called interoperability regimes – aimed at increasing interconnectivity of databases – add even more fundamental rights risks to the equation, allowing for 'unprecedented direct access and processing possibilities by Europol of personal data stored in AFSJ databases, including non-law enforcement databases'.[86] It should be noted here, finally, that Frontex's activities may also create tension with other human rights norms. Its coordination and facilitation activities, and especially its operational actions may cause indirect breaches of the right to a fair trial or the *ne bis in idem* principle are possible.[87] The situation is imaginable that Europol-coordinated investigations lead to unlawful arrests and detentions or acts of torture and ill-treatment by third country authorities.[88] In spite of these human rights concerns, the three problems in relation to access to justice, which were discussed above for Frontex, are also apparent in Europol's internal and external activities.

a) Lack of transparency

First, Europol's activities – especially the operational and external ones performed in practice – are insufficiently transparent and bring with them a degree of secrecy.[89] As stated above, the external relations provisions in Europol's constitutive framework are rather broad, vague, and succinct – only referring to the exchange of personal data. Its practice shows, by means of annual reports and press releases on its website, a different story.

The Agency performs operational tasks, such as the assistance in individual criminal cases, and does not hesitate to showcase the results thereof.[90] What the precise activities of the Agency entail, how the cooperation with national MS and third country authorities is envisaged, and to what extent Europol's own actions lead to investigations, arrests, and prosecutions, is unclear. Whereas attempts were made to uncover this veil of secrecy by requesting access to documents, there is an abundance of examples in which Europol has refused partial or complete access, mostly on the basis of public security concerns.[91]

Complaints before the European Ombudsman regarding public access to Europol's documents – for instance on its operational tasks in combating illegal migrant smuggling – have made it possible to obtain partial access to some of the Agency's documents.[92] This lack of transparency and the secretive practices by Europol undermine access to justice possibilities for alleged violations of fundamental rights. As the EDPS has stated in relation to data protection, '[t]he right to information is also of utmost importance as it allow the exercise of other data protection rights, including the right to remedies'.[93] If data subjects are, for example, unaware of their data

[82] <https://edps.europa.eu/system/files/2022-01/22-01-10-edps-decision-europol_en.pdf> accessed 20 May 2022.
[83] <https://edps.europa.eu/system/files/2022-01/22-01-10-edps-decision-europol_en.pdf> accessed 20 May 2022, par. 4.22.
[84] Omičević (n 29); Coman-Kund (n 5) 182.
[85] Schrems II; See Omičević (n 29).
[86] Coman-Kund (n 5) 203.
[87] Brière 2018, p. 18; Carrera, den Hertog & Parkin (n 1) 66.
[88] Omičević (n 29).
[89] David Fernández-Rojo, 'Transparencia y control social de las actividades operativas de Europol en la lucha contra el tráfico ilícito de migrantes', 2020 Revista General de Derecho Europeo 51.
[90] See the press-releases on Europol's website, <https://www.europol.europa.eu/media-press/newsroom> accessed 22 May 2022.
[91] Fernández-Rojo (n 65), 168.
[92] See, for example, https://www.ombudsman.europa.eu/en/solution/en/129744
[93] EDPS, Opinion 2/2018, p. 13.

having been processed by Europol, they cannot exercise their right of rectification and erasure of the data.[94] Here, transparency, is thus a fundamental prerequisite to ensure access to justice in relation to Europol's activities.

b) Imperfect remedies

Second, while a couple of complaints mechanisms exist to remedy potential fundamental rights violations by Europol, these may not always be as effective for persons to obtain redress for harm suffered. When data subjects consider that Europol's processing of their personal data does not comply with the Europol regulation, they may – apart from the possibilities to rely on national mechanisms – lodge a complaint with the EDPS, who shall hear and investigate these complaints before informing the data subject of the outcome.[95]

In the case of damage resulting from an unlawful data processing operation, the person in question shall receive compensation for the damage suffered, either under national law by the MS or under Article 340 TFEU by Europol.[96] The action against Europol can be brought before the CJEU, and the action against the MS before a competent national court.[97] Moreover, the general possibility exists for the CJEU to rule on disputes concerning the compensation for damages by Europol staff.[98] While these possibilities in theory provide data subjects a multitude of opportunities to obtain redress, in practice it may be more difficult to actually effectuate these possibilities.

In order to exercise its rights, the data subject must first have knowledge about the data having been processed, something that is hampered by above-mentioned opaque legal provisions and secretive practices. The concerns regarding remedies for Europol's actions are most acute in respect of Europol's external activities.[99] When data is transferred from or to third countries, it is difficult to determine the applicable law and the competent authority to review the legality of the transfer.[100] Data subjects, especially third country nationals, may thus face both practical and legal obstacles to exercising their data protection rights.

c) Lack of effective oversight

Third, challenges have been identified with regard to the control of Europol's actions by institutional and non-institutional actors. Just as was the case with Frontex, Europol must answer to the European Parliament, by means of forwarding annual reports and presenting and discussing the activities through the Director, where the Parliament has the competence to approve or withhold the agency's budgetary discharge.[101] Moreover, national MS' parliaments can also exercise control over the agency's activities, with the possibility to invite the Europol's Director to present and discuss the agency's activities.[102] Furthermore, the Joint Parliamentary Scrutiny Group (JPSG), established by national parliaments and a committee of the European Parliament, politically monitors Europol's activities, including those that may impact the fundamental rights of persons.[103] Whereas much – according to some *too much* –[104] control is exercised over Europol by these institutions, some challenges remain.

[94] EDPS, Opinion 2/2018, p. 13.
[95] Europol Regulation 2016, Article 47(1) and Article 43(1); Actions against decisions by the EDPS may be brought before the CJEU, see Europol Regulation 2016, Article 48; Directive 2016/680, Article 52-54, provides for the possibility for data subjects to lodge complains with supervisory authorities at the national level.
[96] Europol Regulation 2016, Article 50(1).
[97] Europol Regulation 2016, Article 50(1).
[98] Europol Regulation 2016, Article 49(4) in conjunction with 49(3).
[99] Brière 2018, 26.
[100] Brière 2018, 26.
[101] Europol Regulation 2016, Article 60(10).
[102] Europol Regulation 2016, Recital 58.
[103] Europol Regulation 2016, Article 51(1)-(2).
[104] M. Schinina, 'What balance between Eurojust and Europol from a parliamentary angle?', *New Journal of European Criminal Law* 2020/11, 131-132.

First, the EP cannot have access to classified information, if the originator of that information – with Europol, this is mainly the MS – refuses disclosure.[105] The agency's secretive ways of working may, then, too become detrimental for parliamentary scrutiny over Europol's activities. Second, the effectiveness of the JPSG may be hampered by its large size, by several procedural issues, and by the complexity to adopt substantial summary conclusions.[106] Nevertheless, interest from parliaments in exercising their oversight role has been strong, attested also from the big variety of questions posed by them to Europol.[107] Besides the parliamentary control over Europol, the EDPS exercises scrutiny over Europol's activities as well. It may, for instance, warn or admonish the Agency, order it to carry out rectifications, impose a ban on processing operations by the Agency, and refer a matter to the CJEU.[108] After the EDPS had made use of these competences, the EU institutions have initiated to downsize its powers, notably by lowering the situations in which the EDPS must be informed or notified about data transfers by Europol.[109]

III.3 The European Asylum Support Office (EASO) and the new European Union Asylum Agency (EUAA)

In more than a decade of activities, the European Asylum Support Office (EASO) has also witnessed an increasing expansion of its mandate, especially after the migratory pressure of 2015 and the adoption of the European Agenda on Migration and the 'hotspot approach.'[110] The New Pact on Asylum and Migration establishes asylum border procedures for fast-tracking the treatment of an application, in particular in Greek and Italian hotspots (sections of the EU external border with extraordinary migratory pressure that require reinforced and concerted support by EU agencies to the affected Member States). The mandate of the new EU Agency for Asylum (EUAA), which has replaced EASO as of 2022, responds to Member States' growing need for operational support and guidance on the implementation of the common rules on asylum.[111]

Although less studied than Frontex, scholars have stressed that there are clear risks of leaving the EUAA unaccountable for recommendation to national authorities about asylum applications.[112] This was already evident in the EASO role in the Greek hotspots. Due to the extraordinary pressure facing the Greek asylum system, EASO was, in practice, responsible for independently conducting interviews, assessing whether the safe third country or the first country of asylum concept applied, and adopting recommendations on the admissibility of international protection applications.[113] While this recommendation has *de jure* no legal effect on Greek asylum officials, EASO's opinion had *de facto* quasi-binding consequences, since the staff of the Greek Asylum Service did not undertake any further assessment, but simply rubber-stamped the agency's decision in regard to the applications for international protection.[114] The European Ombudsman confirmed that there were 'genuine concerns about the quality of the admissibility interviews as well as about the procedural fairness of how they

[105] Schinina (n 82) 132.
[106] Schinina (n 82) 133.
[107] See, for example,
[108] Europol Regulation 2016, Article 43(3)(d), (e), (f), and (h).
[109] Sarah Tas, Europol's 'Big Data Challenge': *A Neutralisation of the European Watchdog* (10 February 2022, *The Digital Constitutionalist*) <https://digi-con.org/companies-liability-for-self-driving-cars-what-about-criminal-evidence/> 22 May 2022.
[110] European Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, 'A European Agenda on Migration, COM(2015)240 final, 13 May 2015.
[111] Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, [2021] OJ L 468/1–54.
[112] Nicolosi and Fernández Rojo, 'Out of Control? The Case of the European Asylum Support Office', in M. Scholten and Brenninkmeijer (eds), *Controlling EU Agencies. The Rule of Law in a Multi-jurisdictional Legal Order* (Edward Elgar, 2020) pp. 177-195.
[113] ECRE Comments on the Commission Proposal for a Regulation on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 COM(2016) 271, at: <https://www.ecre.org/wp-content/uploads/2016/07/ECRE-Comments-EU-Asylum-Agency_July-2016-final_2.pdf>.
[114] Nicolosi and Fernández-Rojo, 2020.

are conducted,' but did not take any further action since the 'ultimate legal responsibility for decisions on individual asylum applications rests with the Greek authorities.'[115]

This evolving practice on the ground illustrates how the three major problems in relation to access to justice have been also unfolding in connection with the activities performed by the EASO and assigned to the EUAA.

a) Lack of transparency

The practice of EASO discloses overlapping competences between the agency and the national asylum authorities. This creates issues of transparency for asylum seekers that are not aware of which authority they will be interfacing nor are they in the position of expressing their consent about the possibility to be interviewed by the agency instead of national authorities. This is a practice that is exacerbated by the EUAA which basically formalises the practice of the EASO. The new EUAA Regulation establishes an asylum reserve pool of a minimum 500 national experts holding different profiles who should be available for immediate deployment in the Member States. As has been highlighted, 'the new Regulation reflects better, but not fully, the agency's enhanced role on the ground which includes agency staff and agency deployed experts independently undertaking actions which involve executive discretion.'[116] The Regulation confirms that the agency will 'facilitate the examination by the competent national authorities of applications for international protection or provide those authorities with the necessary assistance in the procedure for international protection.'[117]

b) Imperfect remedies

The expanded mandate of the EUAA also fueled debates, especially championed by the European Ombudsman, about the need to ensure an internal administrative fundamental rights monitoring mechanism. In an inquiry, launched after further alleged wrongdoings by the EASO experts during interviews, the European Ombudsman concluded that 'EASO's failure to address adequately and in a timely way the serious errors committed' in a particular interview, constituted misconduct and subsequently advised the agency to undertake several improvements to ensure procedural guarantees during asylum procedures.[118] These included, *inter alia*, the recommendation to inform national authorities, 'immediately and systematically' once significant errors have occurred during an interview, and the suggestion to set up an internal complaint mechanism accessible for individuals who come into contact with the agency. In its response to the European Ombudsman, a complaint mechanism has been included in the EUAA Regulation, at the request of the European Parliament.[119]

Article 51 (2) of the EUAA Regulation establishes that 'any person who is directly affected by the actions of an expert participating in an asylum support team, and who considers that his or her fundamental rights have been violated due to those actions, or any party representing such a person, may submit a complaint in writing to the Agency.' Since this complaint mechanism is not designed for claims against a national authority's decision, it is all the more urgent to define the task of the agency and the measure the AST. Otherwise, doubts about its accessibility and effectiveness, due to the agency's overlapping mandate with national authorities are reiterated. Despite the emphasis to ensure adequate follow up, regrettably the Regulation has not established any form of redress for the victims of fundamental rights violations. This is a major lacuna that leaves the system of remedies incomplete.

c) Lack of effective oversight

[115] European Ombudsman, Decision in Case 735/2017/MDC.
[116] E. Tsourdi, 'European Union Agency on Asylum: An Agency 'Reborn'?' *EU Law Live*, No. 98, 30 April 2022, p. 6.
[117] Regulation 2021/2303, Art. 16 (2) c.
[118] European Ombudsman, Decision in Case 1139/2018/MDC.
[119] 2016/0131/COD

Finally, the EUAA Regulation introduces a monitoring mechanism on the 'the operational and technical application of the CEAS'[120] This monitoring system, however, cannot be regarded as a form of political oversight on the agency, as its goal is to 'prevent or identify possible shortcomings in the asylum and reception systems of Member States and to assess their capacity and preparedness to manage situations of disproportionate pressure so as to enhance the efficiency of those systems.' On the contrary, there are still scant improvements as regards the monitoring of the agency.

The EUAA Regulation confirms the intergovernmental nature of the Management Board, as for other agencies. This constitutes a challenge to the independence of the agency. Partly this can be counterbalanced by the establishment of a Fundamental Rights Officer (FRO) and an upgraded role for the Consultative Forum.[121] In particular, the FRO is responsible for ensuring compliance with fundamental rights in all EUAA activities and promoting respect by the Agency of fundamental rights.[122] The FRO is also interfaced by the Executive Director that he Executive Director who 'shall, after informing the host Member State, suspend or terminate, in whole or in part, the deployment of asylum support teams where, inter alia, 'considers that there are violations of fundamental rights or international protection obligations by the host Member State that are of a serious nature or are likely to persist.'[123]

As formerly discussed,[124] the Consultative Forum has the potential to contribute to the social and democratic accountability of the agency, thereby partly remedying the insufficient oversight mechanisms, especially for EASO. While having a rather limited role in the former institutional setup of EASO, the EUAA Regulation[125] enhances the role of the Consultative Forum, despite confirming that it is 'a mechanism for the exchange of information and the sharing of knowledge.' In particular, the Consultative Forum gains more specific tasks of advising the Executive Director and the Management Board on asylum issues,[126] but its real impact can only be seen in the light of the new operational dimension of the agency.

Significantly, Article 67 of the new EUAA Regulation establishes that 'the activities of the Agency shall be subject to the inquiries of the European Ombudsman.' This can be read as an attempt to recognise the growing ombudsreview provided of the past few years on EASO activities and to add a guarantee of external oversight on a system that still raises doubts about political independence.

IV. Concluding remarks: Reconceptualising Access to Justice

The previous sections have shown that significant hurdles exist to ensuring access to justice for those affected by EU migration agencies' activities. These hurdles relate to three problematic aspects of access to justice, namely: the lack of transparency and secretive ways of working; an incomplete system of remedies to obtain redress for harm suffered; and insufficient effective oversight over the agencies. Based on the detailed analysis of the threefold problematic dimension of access to justice, this section aims to devise possible solutions, which, while mirroring the stated problems, may contribute to enabling access to justice in respect of the agencies' activities.

First, a recurring problem for all three agencies analysed is the lack of transparency owing to secretive ways of working but also to unclear allocation of tasks between the State authorities and the agency. On the one hand, the lack of full public transparency of the activities these bodies employ is understandable given the areas they operate in and as a corollary the confidentiality of law enforcement-related documents on the basis of security reasons.[127] Nonetheless, on the other hand, this renders access to remedies by individuals and the possibility of scrutiny by oversight bodies extremely difficult.

[120] Regulation 2021/2303, Art. 14.
[121] In this regard see Tsourdi, 2022.
[122] Regulation 2021/2303, Art. 49.
[123] Ibid., Art. 18.
[124] Nicolosi and Fernández-Rojo, 2020.
[125] Regulation 2021/2303, Art. 51.
[126] Ibid, Art. 51 (4).
[127] Jaeger (n 72) 18.

In order to improve transparency and decrease the risk of agencies stretching their legal powers, it is crucial to use the Operational Plans to better circumscribe their legal mandates, tasks, and activities, especially when it comes to operational and external activities performed in practice, given the more fundamental rights sensitive nature of these actions. Furthermore, the agencies should take on a proactive stance when it comes to access to information. Data subjects, for example, should be informed about their data having been exchanged, so as to be able to effectuate data protection rights. Again, this is all the more true for international data exchanges, given the potential augmented risks of countries that are not bound by EU data protection law.

Finally, the need to ensure more transparency ensues from the right to a good administration, enshrined in Article 41 of the EU Charter. This provision establishes that, despite the necessary 'legitimate interests of confidentiality and of professional and business secrecy', every person, including third country nationals, should have full access to all documents and files concerning their dossier. Additionally, the same provision establishes the obligation for any administration 'to give reasons for its decisions.' This also requires a clear allocation of tasks for the individuals to know which authority they have been interfacing themselves with.

Second, whereas significant advances were made over the last few years in terms of fundamental rights safeguards and complaint mechanisms for individuals who suffered harm from the agencies' actions, substantial shortcomings pertain, leaving the system of remedies incomplete and rather asymmetrical in that the three migration agencies show substantial differences as to the design of the complaint mechanisms, ranging from a more sophisticated one within Frontex to more rudimentary forms within the EUAA and Europol. Significant improvements are, nevertheless, necessary in terms of the effectiveness of these individual complaint mechanisms. While the European Ombudsman has stressed that in the case of Frontex the mechanism, regulated by Article 111 of the Regulation, has partly become more accessible,[128] there is the need to embed more safeguards. The system, in fact, cannot be regarded as an effective remedy in the light of Article 47 of the EU Charter and, despite its potential, it still procedurally lacks adequate follow-up and redress. These elements are crucial to enhance access to justice and possibly remedy the inherent limits of the existing EU judicial remedies. In this connection, it is worth stressing that there are limited chances for migrants as to the admissibility of their claims before the Court of Justice, as illustrated by the recent order by the EU General Court in *SS and ST*.[129] Moreover, as explained above, a better approach to transparency leading to a clear demarcation of competences between EU agencies and national authorities can provide more secure avenues for access to justice in terms of access to judicial remedies at the national level.

Ultimately, as regards the lack of effective oversight, the investigation into the EU migration agencies' set-up illustrates existing problems due to the lack of fully independent, accessible, and effective monitoring bodies. It is pivotal that these bodies be guarded against pressure and influence from the agencies, their Directors and Boards – both *de iure* and *de facto*.[130] Continuous efforts should, therefore, be made to ensure the full independence of the FRO, which is still a part of Frontex's institutional structure. Moreover, external actors, such as the European Ombudsman, should play a more prominent and active role in the ongoing monitoring of EU migration agencies' fundamental rights compliance.[131] Finally, as has been mentioned above, that the operational and at times 'factual' nature of the migration agencies' activities does not lend itself well for judicial review by the CJEU. Until this Court does away with its strict criteria as to these matters, it might be best to focus on improving agency-specific complaints mechanisms, external monitoring and correction possibilities, and the access to national Member State or third country courts. In order for these alternatives to be effective, information on what, how, and when, agencies have performed a certain activity, and to what extent their action has led to the infringement in question, will be indispensable.

Judicial oversight of the EU migration agencies is challenging, but it is worth emphasising that political oversight may have a strong potential to ensure accountability. In spite of EU institutions on some occasions

[128] European Ombudsman, Decision in Case OI/5/2020/MHZ.
[129] Case T-282/21, *SS and ST v European Border and Coast Guard Agency*, Order of the General Court (Ninth Chamber) of 7 April 2022.
[130] Jaeger (n 72) 14.
[131] Jaeger (n 72) 40.

having shown their teeth when it comes to fundamental rights infringements by EU migration agencies – for example, the European Parliament's vote to withhold the discharge of Frontex's budget – on other occasions, developments to the contrary are visible. Particularly worrying in this respect is the decision of the institutions to disregard, and even overturn, admonishments to Europol by the EDPS and, even more remarkable, to downsize this bodies' oversight competences in the new regulation proposed for Europol. Finally, it is evident, perhaps even a truism at this point, that the work of bodies conducting oversight over the agencies' activities is significantly impeded by the lack of transparency over what the agencies do in practice. It is important that crucial information, such as the findings of the OLAF report on Frontex's alleged role in pushback operations, be given to democratically elected representatives, so as to allow them to do the job they were tasked for.

In conclusion, a clear set of improvements is necessary to boost the emerging enforcement architecture of EU migration law. This cannot be further developed to the detriment of adequate access to justice and safeguards for migrants.