

Policy Brief

Great power warrants great responsibility

Four proposals to strengthen Frontex' accountability

06. December 2019

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#Frontex
#Migration
#FundamentalRights
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A centrepiece of the von der Leyen Commission's promise to deliver a New Pact on Migration and Asylum is creating a "reinforced European Border and Coast Guard Agency [Frontex]". To this end, Frontex received a substantial upgrade of its mandate, personnel and budget, preparing the agency to launch its first operation outside the EU. As a result, Frontex is increasingly confronted with situations that require solid fundamental rights safeguards. To what extent does the Frontex reform demand new accountability measures? And what kind of reinforced mechanism would warrant an adequate degree of accountability for the agency's additional competences?

1 Introduction

Protecting its external borders has become a prime objective of the EU's asylum and migration policy. Measures taken to this end have thereby gone beyond the policy field of migration by touching upon issues of internal and external security as well as on aspects of fundamental rights protection. Whereas the spike in irregular arrivals throughout 2015 and 2016 exacerbated political fault lines across the EU, member states agree on one thing: better management of the EU's external borders has to become a common European responsibility if the Schengen area is to survive intact. Consequently, the Union's Border and Coast Guard Agency (Frontex) has received a substantial upgrade in its resources and responsibilities over recent years. Now a prime EU instrument to address migratory challenges, the agency is gradually expanding the territorial scope of its operations. On 5 October 2018, a status agreement was signed with Albania, allowing Frontex to launch its first operation outside EU territory. A similar agreement was signed with Serbia on 19 November 2019 but the potential reach of such operations is not confined to the EU's immediate neighbourhood.

At the same time, Frontex has been blamed for potential fundamental rights abuses and attempted push backs taking place under its auspices. These allegations run counter to the new Commission's attempt to steer a straight course between expanding Frontex and safeguarding human rights by placing migration management under the portfolio of Promoting the European Way of Life. The new

Commission will not only have to investigate existing accusations against Frontex but, even more, ensure that the planned strengthening of the agency is accompanied by reinforced accountability.

In the light of the agency's gradual expansion since 2016, this policy brief discusses why there is a need for enhanced accountability. It then provides four proposals for a reinforced accountability mechanism that take into account Frontex's excursion beyond EU territory. As a starting point towards enhanced accountability, the Policy Brief argues that it would be helpful to grant non-EU residents access to relevant information (i), strengthen democratic oversight by creating a Joint Parliamentary Scrutiny Group (ii), conclude the EU's accession to the European Convention on Human Rights (iii) and provide common training to Frontex and third country border guards (iv).

2 Why do we need an accountability mechanism for Frontex?

In two successive regulations, the Commission significantly strengthened Frontex personnel, budget and mandate. On 6 October 2016, Frontex formally [became](#) the European Border and Coast Guard (EBCG) Agency and, on 8 November 2019, it was given [permission](#) to start recruiting a standing corps of 10,000 border guards to operate at its direct disposal. In line with the EU's Integrated Border Management (IBM) Strategy, these measures bolster the agency's operational capacity and competences to operate in third countries. Given Frontex' growing presence beyond EU borders, recent [accusations](#) against the agency, put forward by a group of investigative journalists from the [Returns Network](#) and [CORRECTIV](#), blaming Frontex for fundamental rights breaches, underline the need for stronger accountability and better democratic oversight of the agency.

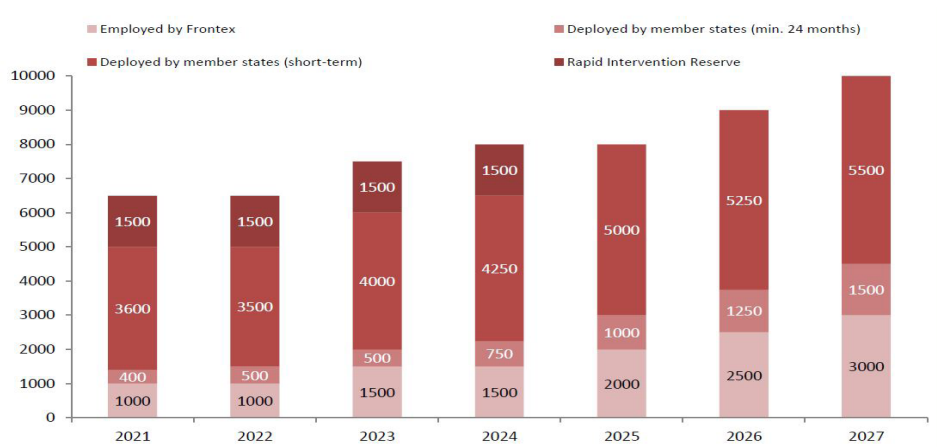
2.1. More powers to more people

The centrepiece of a reinforced EBCG is the agency's proposed standing corps of 10,000 border guards, which is supposed to be operational by 2027 and act under exclusive and direct control of Frontex¹. Since 2016, the number of border guards available to Frontex operations has steadily increased: from a Rapid Intervention Reserve of 1,500 border guards in 2016 to roughly [4,000](#) officers deployed in 2018. However, operational effectiveness continues to depend on the willingness of member states to deploy their personnel. A [report](#) from May 2018, however, found that not even half of the agency's operational capacity was covered in terms of manpower and equipment.

In addition to longer- and short-term deployments from the member states, the standing corps will therefore – for the first time – include operational staff directly employed by Frontex (Graph 1). To this end, Frontex has already started its first [campaign](#) to recruit 700 officers. These border guards will be equipped with similar executive powers as national officers, including the right to perform identity checks, authorise or refuse entry and carry service weapons. Their main task remains assisting national border guards. Yet, unlike national secondees, who remain accountable to their member state, they wear their own uniform and exclusively report to Frontex. Given that Frontex' mandate has thus far been limited to “coordinate” and “cooperate” with member states, the earlier lack of executive powers rendered it difficult to hold the agency accountable. Yet, the wide-ranging competences handed to the new statutory staff reporting directly to Frontex require a re-assessment of the agency's judicial liability.

¹ Commission President Ursula von der Leyen, promised to deliver on this objective already in 2024.

Graph 1: Planned build-up of Frontex’ standing corps



Source: German Parliament, Drucksache 19/12151.

The agency’s strengthened mandate to assist in all stages of returning unauthorised migrants poses a similar ambiguity when it comes to the delineation between operational and executive powers. Whereas member states formally remain responsible for issuing a return decision and processing judicial appeals, Frontex can now prepare return decisions itself. This could lead to an informal influence beyond the agency’s official mandate. Frontex in addition provides its own return escorts and monitors. The agency is therefore responsible for both carrying out and monitoring return operations. This might undermine the [Return Directive’s](#) provision (Art. 8(6)) to guarantee an effective monitoring system, which – according to the Commission’s [handbook on returns](#) – should include the “involvement of organisations/bodies different and independent from the authorities enforcing return”.

2. 2. A larger budget

Along with a strengthened mandate and more personnel, Frontex is set to benefit from a substantial increase in available funding. Under the current proposal for the forthcoming Multiannual Financial Framework (MFF), Frontex will [receive](#) EUR 11.3 billion over the period from 2021 to 2027. The funds for strengthening Frontex will together make up more than 35% of the overall funding under the Migration and Border Management heading in the next MFF. In comparison, Frontex was equipped with a financial envelop of EUR 1.6 billion between 2014 and 2020 or equivalent to only around 11% of the overall funding for the asylum and migration portfolio under the current MFF. Given the substantial increase in available funding for the agency, better democratic oversight and greater transparency is required to ensure that these monies are not merely used for swiftly recruiting officers to the standing corps but for developing high professional standards guaranteeing the protection of fundamental rights.

2. 3. New Frontiers

Bolstering Frontex’ personnel, mandate and budget has prepared the agency for implementing the next phase of the EU’s Integrated Border Management (IBM) strategy. Following measures within the Schengen area and at the EU’s external border, the strategy envisages expanding border control first to neighbouring EU countries and then to countries in the Union’s wider vicinity. Efforts in this direction have already been taken. Since 2016, Frontex deployed three [Liaison officers](#) to Turkey, Niger and Serbia – with 10 additional officers expected to be operating outside the EU by 2020. Frontex further coordinates so-called Regional Risk Analysis Networks (RAN) in the Western Balkans, Eastern European and African countries as well as in Turkey to assist third countries in monitoring their borders. Moreover, the agency provides capacity building and equipment to border management authorities in these countries with comparatively little oversight.

The 2016 and 2019 [Regulations](#) now allow for the full implementation of all stages foreseen under the EU's IBM strategy by allowing Frontex to conclude status agreements with third countries. These agreements enable it to carry out joint operations in the partner country. The first Frontex operation outside EU territory was launched on 21 May 2019 in Albania, with which Frontex had previously signed a [status agreement](#) on 5 October 2018. Two more [such agreements](#) were recently signed with Serbia and Montenegro, while negotiations are continuing with Bosnia and North Macedonia. During any third country operation, Frontex officers remain accountable to the same fundamental rights safeguards as under a regular operation within the EU. These are outlined in Frontex' [Code of Conduct](#), which refers to the principle of non-refoulement, special consideration to vulnerable groups as well as to relevant international and European instruments for fundamental rights protection. Command and control structures for joint operations also remain with the authorities of the host country. Nevertheless, two examples illustrate the difficulties in holding Frontex accountable when operating in a third country.

Whereas the Commission must ensure that a national complaints mechanism is in place to hold local police officers accountable, Frontex officers are subject to their own separate complaints procedure. In practice, this makes it increasingly difficult for individuals to assess which mechanism applies to any potential misconduct by officers acting within a joint operation. Moreover, there are few possibilities for the local judiciary or parliament to assess Frontex activities. Under the status agreement with Albania, Frontex officers enjoy immunity from local civil and criminal law. Although their immunity is restricted to acts performed on duty, Frontex' Executive Direction has the discretion to decide whether such acts fall within the scope of their operational mandate. This certification is not only binding on Albanian courts. It is also fairly difficult for democratic institutions to assess such decisions, as operational plans are rarely made available. The European Parliament has [criticised](#) both the delays and lack of detail in Frontex reporting on its operational plans.

2. 4. Protecting the European Way of Life?

These shortcomings are particularly relevant in the light of recent allegations against Frontex. In August 2019, research from the Returns Network cited so-called Serious Incident Reports (SIR), according to which Hungarian police officers stand [accused](#) of having used excessive force against a group of Afghan migrants. A [protocol](#) from Frontex' Consultative Forum on Fundamental Rights further suggests that the agency was aware of illegal pushbacks taking place at the border between Greece and Turkey. Moreover, Frontex staff stand accused of having [violated its own rules](#) on forced returns by having unaccompanied minors returned and making excessive use of body cuffs.

The agency has responded to these allegations by [noting](#) that it can suspend officers deployed to Frontex missions but has no power to conduct investigations within the member states. While the Commission promised to investigate the accusations, its role as guardian of the treaties should require it to establish the necessary means to ensure that principles enshrined in the Charter on Fundamental Rights of the EU are fully respected under Frontex auspices. This is particularly the case given the new Commission's emphasis on linking border management to the promotion (formally protection) of the European way of life – which Commission President von der Leyen [described](#) as being constituted of “the values of the respect for human dignity [...] the rule of law and respect for human rights”. Retaining the possibility of deploying Frontex officers to assist in the member states' border management is a valuable asset, especially with regard to harmonising national standards. Yet, the Returns Network investigation highlights a crucial aspect: Frontex's added value essentially depends on having adequate and reliable measures in place for holding it accountable.

3 Matching power with accountability: ongoing efforts

A number of measures to enhance the agency's accountability have already been introduced by the most recent Frontex regulation. The current text considerably strengthens the agency's political and legal accountability, the Fundamental Rights Officer's competences as well as the individual complaints mechanism.

First, the new regulation provides for the possibility of interparliamentary cooperation between the European Parliament and national parliaments in scrutinising the agency's operations. Frontex' Executive Director and Chair of the management board are required to attend such meetings, when invited, and the agency is obliged to share its annual activity report in this context. The European Parliament must further be informed about the content of any working arrangement with third countries, although the agreement itself is not shared. Moreover, the regulation establishes Frontex's own judicial liability "for any activities it has undertaken", a measure rendered necessary to account for the new executive powers of its statutory staff.

Second, the Fundamental Rights Officer (FRO) is handed several new tasks, including the right to comment on all operational plans and agreements with third countries. The FRO is further tasked with publishing an annual report on fundamental rights compliance in Frontex operations. To this end, the FRO can appoint so-called Fundamental Rights Monitors, who are embedded in all Frontex activities to oversee fundamental rights compliance. The regulation foresees equipping the FRO with 40 Monitors, who will be drawn from the agency's staff and receive specialised training. Given the FRO's additional competences, such promises on concrete numbers are certainly helpful. Yet, they pale in comparison with the 10,000 border guards at the agency's disposal and thus remain insufficient to remedy any operational shortcomings of the FRO.

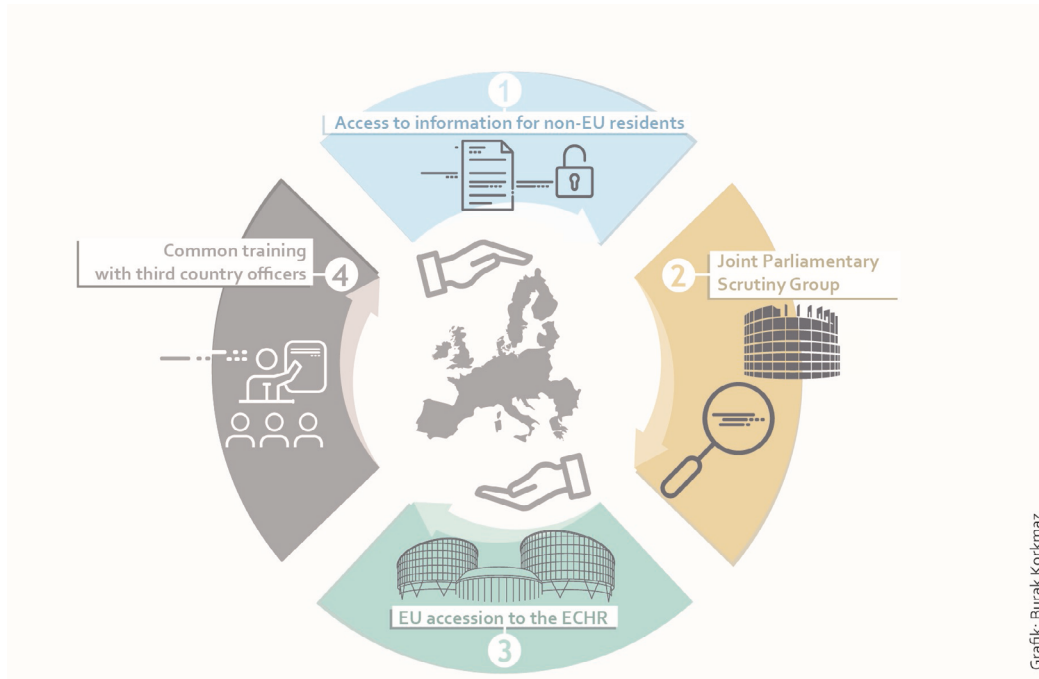
Third, it is laid down that the individual complaints mechanism also applies to Frontex operations in third countries. A standardised complaints form is drafted by the FRO, which can also recommend adequate follow-up procedures – including civil and criminal justice procedures – to the Executive Director. Yet, it is still up to the latter to decide on the nature of the follow-up procedure. It further remains unclear which form of compensation is available to individuals affected by any potential wrongdoing by Frontex officers.

Introducing these measures represents a profound improvement on the rather limited accountability mechanisms previously in place. However, they do not match the agency's substantial increase in additional competences and operational capacity. The Commission's identification of the Western Balkans as the first non-EU area in which Frontex operates illustrates its ambition to deploy Frontex along major migratory transit routes. In practice, this means that Frontex officers will increasingly be confronted with vulnerable groups and deployed to areas with volatile fundamental rights situations. Stronger accountability measures, particularly with an eye to the agency's future operations outside the EU, are thus required.

4 Four proposals to reinforce Frontex' accountability

Developing a reinforced accountability mechanism that takes into account Frontex presence in third countries should build on the improvements contained within the latest regulation. The four measures proposed hereafter should hence serve as starting points to complement existing provisions and suggest new mechanisms to enhance the agency's legal and political accountability.

Graph 2: Four proposals to reinforce Frontex' accountability



i. Granting access to relevant information to non-EU residents

The cornerstone for enhanced accountability is adequate transparency. Access to relevant information is essential for lodging a legal complaint in case of potential misconduct by Frontex officers. Yet, Frontex has only a limited duty to make its documents available to the public. Applications to access documents are handled under Regulation (EC) 1049/2001. Although the scope of information to be made available by the agency has been extended, the regulation applies only to EU citizens and residents. With Frontex operations now expanded to third countries, directly affected non-EU residents should have equal rights to access these documents. A relevant paragraph should now be added to either the latest Frontex regulation, or to the status agreements negotiated with third countries. This paragraph could also include a reference to the necessity of informing people about their rights during encounters with Frontex officers.

ii. Strengthening parliamentary oversight

Within the current legislative framework, provisions to ensure parliamentary oversight remain fairly vague. The latest Frontex regulation merely states that interparliamentary cooperation between the European Parliament and its national counterparts to scrutinise Frontex “may” take place under Article 9, Protocol 1 of the TEU. These same [legal parameters](#) were applied to establish a Joint Parliamentary Scrutiny Group (JPSG) monitoring the work of Europol. To guarantee effective democratic accountability, a similar group should be established to oversee Frontex operations taking into account a previous evaluation of the Europol JSPG. The Frontex-JPSG should have an explicit mandate to scrutinise the agency’s impact on the fundamental rights and freedoms of each individual affected by Frontex activities. The JPSG should receive all relevant information in relation to Frontex operations and have the right to comment on operational plans in order to ensure sufficient fundamental rights safeguards are included. The Frontex-JPSG should be composed of parliamentarians from the member states and the European Parliament, possibly also the European Ombudsman. To account for Frontex role in the external realm of EU migration policy, the group should also invite parliamentarians from countries with which Frontex has signed a status agreement.

iii. Concluding the EU's accession to the ECHR

The 2019 Regulation has made an important step to hold Frontex directly liable for possible human rights offences committed by its statutory staff. The use of its executive powers thus has to be justified in the light of existing EU law, including the EU's Fundamental Rights Charter. However, the rights enshrined in the Charter and other EU legislation cannot be invoked by non-EU residents. It is therefore difficult for third country nationals affected by external Frontex operations to hold the agency directly accountable for its fundamental rights obligations under the EU treaties. To establish a common legal framework that applies to citizens of, in this case the Western Balkan countries, and to the agency itself, the EU should conclude its accession to the European Convention on Human Rights (ECHR). The European Court of Justice found that a draft accession agreement from 2013 undermined existing EU law and thus rated it negatively. It should therefore be a priority for the new Commission to revise that draft agreement in order to conclude the EU's accession process. This would allow it to put Frontex on an equal footing with the member states when it comes to implementing the frequently cited "shared responsibility" for managing the EU's external borders.

iv. Establishing common training for Frontex and third country officers

Despite recent allegations against the agency, Frontex operations provide added value when it comes to managing the EU's external border. Besides giving technical and operational assistance to local police officers, the agency has helped align national operating principles through standardised training of personnel deployed to Frontex operations, especially with regard to respecting fundamental rights. In face of joint operations between Frontex and police officers from third countries, staff deployed to these missions should undergo common training to ensure high standards in fundamental rights protection and educate staff on the specific cultural and political characteristics of the third country. The current curriculum could be complemented by courses from the EU Fundamental Rights Agency (FRA) or EASO to cater for a broader perspective on the issue of fundamental rights.

5 Conclusion

Current efforts to reform Frontex are predominantly designed to reduce the number of irregular arrivals and to facilitate swifter returns. Both objectives represent the lowest common denominator among EU member states and they can also be found in the political priorities of the new Commission. Strengthening Frontex will hence remain at the core of future EU migration policy. This emphasis on enhancing the agency's operational capacity should be complemented with a reinforced accountability mechanism. Two examples illustrate why. First, the additional competences of the agency – equipping its statutory staff with executive powers, a stronger mandate on returns and being allowed to operate in third countries – require solid democratic oversight and greater transparency. Second, current [proposals](#) to establish closed centres for (pre-) assessing asylum claims at the EU's external border (or even beyond) almost always include plans for Frontex to guard such centres and conduct return operations. The volatile situation in such centres would require the agency to develop substantially stronger fundamental rights safeguards.

The measures foreseen under the most recent Frontex regulation are a step in the right direction, most notably with regard to the Fundamental Rights Officer's competences. Yet, they hardly match the agency's new portfolio of competences, in particular when it comes to holding Frontex officers accountable while operating

in third countries. One should therefore build on the progress made under the latest regulation by fully exploiting its potential and by establishing new accountability structures. The proposals made in this brief can serve as starting points to develop such a reinforced accountability mechanism that matches the agency's growing responsibilities.

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