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THE AGENCIES OF THE AREA OF FREEDOM, SECURITY AND JUSTICE AND THE RULE OF LAW IN THE EUROPEAN UNION. PERSISTENTLY AT ODDS?

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I. INTRODUCTION — II. LIMITATIONS ON THE OBSERVANCE OF THE RULE OF LAW WITHIN THE AREA OF FREEDOM, SECURITY AND JUSTICE — III. THE PRACTICE OF AFSJ AGENCIES AND THE RULE OF LAW. THE MAIN SHORTCOMINGS OF AN INCOMPLETE GOVERNANCE AND ACCOUNTABILITY SYSTEM — IV. THE ESSENTIAL REFORMS FOR IMPROVING AFSJ GOVERNANCE IN COMPLIANCE WITH THE RULE OF LAW. BY WAY OF CONCLUSIONS — V. BIBLIOGRAPHICAL REFERENCES

ABSTRACT: The article explores the “crisis of the rule of law” in the face of the expansion of the European Union’s (EU) Area of Freedom, Security and Justice (AFSJ). In particular, the “agencification” of policies encompassed under this major EU objective for the present day has led to a lack of transparency and accountability regarding the activities carried out by these agencies, in a context where the adoption of “urgent” measures to ensure public order and internal security has meant the reinforcement of the “security” dimension of the AFSJ at the expense of the effective protection of fundamental rights and freedoms. In view of this situation, certain reforms are deemed necessary to strengthen the European Parliament’s oversight and judicial review, ensuring that EU agencies comply with the same standards of the rule of law as Member States in order to maintain the legitimacy of the European project.

KEYWORDS: Rule of Law, Accountability, AFSJ, Transparency, Frontex.

LAS AGENCIAS DEL ESPACIO DE LIBERTAD, SEGURIDAD Y JUSTICIA Y EL ESTADO DE DERECHO EN LA UNIÓN EUROPEA. ¿EN CONSTANTE CONFLICTO?

RESUMEN: El artículo explora la “crisis del Estado de Derecho” ante el avance del Espacio de Libertad, Seguridad y Justicia (ELSJ) de la Unión Europea (UE). En particular, la “agencificación” de las políticas englobadas bajo este gran objetivo de la UE para el tiempo presente ha llevado a la

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falta de transparencia y rendición de cuentas de las actividades desempeñadas por estas agencias en un escenario en el que la adopción de medidas “urgentes” para asegurar el orden público y la seguridad interior han significado el refuerzo de la dimensión “seguridad” del ELSJ frente a la protección efectiva de los derechos y libertades fundamentales. Ante esta situación, se estiman necesarias ciertas reformas para fortalecer la supervisión del Parlamento Europeo y el control judicial, asegurando que las agencias de la UE cumplan con los mismos estándares del Estado de Derecho que los Estados miembros para mantener la legitimidad del proyecto europeo.

PALABRAS CLAVE: Estado de Derecho, rendición de cuentas, ELSJ, transparencia, Frontex.

LES AGENCES DE L'ESPACE DE LIBERTÉ, DE SÉCURITÉ ET DE JUSTICE ET L'ÉTAT DE DROIT DANS L'UNION EUROPÉENNE. UN CONFLIT PERPÉTUEL?

RÉSUMÉ: Cet article explore la “crise de l’État de droit” face à l’avancée de l’espace de liberté, de sécurité et de justice (ELSJ) de l’Union européenne (UE). En particulier, l’“agencification” des politiques regroupées sous ce grand objectif de l’UE pour le moment a conduit à un manque de transparence et de responsabilité quant aux activités menées par ces agences, dans un contexte où l’adoption de mesures “urgentes” pour assurer l’ordre public et la sécurité intérieure a entraîné le renforcement de la dimension “sécurité” de l’ELSJ au détriment de la protection effective des droits et libertés fondamentaux. Face à cette situation, certaines réformes sont jugées nécessaires pour renforcer la supervision du Parlement européen et le contrôle judiciaire, en veillant à ce que les agences de l’UE respectent les mêmes normes de l’État de droit que les États membres afin de préserver la légitimité du projet européen.

MOT CLES: État de droit, responsabilité, ELSJ, transparence, Frontex.

I. INTRODUCTION

The European Union [...] has incorporated the Rule of Law into the central core of its discourse on values, granting it a function of special significance in the legitimization of the Union’s system².

Confirmed by the Treaty of Lisbon as one of the core values upon which the integration process is founded (Art. 2 of the Treaty on European Union, TEU), the Rule of Law has been progressively “transnationalised” within the European Union³ (EU), nowadays governing and inspiring both the internal and external policies of the Union and its Member States. Nevertheless, since the 2014 Commission’s communication launching a framework to strengthen

² LIÑÁN NOGUERAS, D.J., “La internacionalización del Estado de Derecho y la Unión Europea: una traslación categorial imperfecta”, in LIÑÁN NOGUERAS, D. J. and MARTÍN RODRÍGUEZ, P. J. (dirs.), *Estado de Derecho y Unión Europea*, Tecnos, Madrid, 2018, p. 66.

³ *Ibid.*, p. 62.



the Rule of Law⁴, and the “illiberal democracy” drift experienced in several Member States, attention in recent times has been focused on the effective implementation of its main elements by EU Member States. To execute the task, the Commission has secured its role as “the guardian of the Treaties” in a complex system in which —despite the mechanisms established over the last decade⁵— the intergovernmental logic continues to predominate over the Community one. This trend is evident in numerous aspects, ranging from its right of initiative to launch the procedure —but not to take any decisions, and the limited role played by the European Parliament to the necessary unanimous decision to be taken by the European Council to impose sanctions should any breach be found (Art. 7 TEU).

Against this backdrop, the cases of Poland and Hungary illustrate well the difficulty of initiating any sanctioning procedure —administrative, in the case in question— to link the disbursement of European funds to compliance with the main elements of the Rule of Law through the “conditionality mechanism” for the protection of the EU budget⁶ despite having the

⁴ European Commission, Communication from the Commission to the Council and the European Parliament “A new EU Framework to strengthen the Rule of Law”, COM(2014) 158 final, Strasbourg, 11 March 2014.

⁵ European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions “Strengthening the Rule of Law within the Union. A blueprint for action”, COM(2019) 343 final, Brussels, 17 July 2019; and European Commission, Communication from the Commission to the European Parliament, the European Council and the Council “Further strengthening the Rule of Law within the Union. State of play and possible next steps”, COM(2019) 163 final, Brussels, 3 April 2019. For an overview, see LIÑÁN NOGUERAS, D. J. and MARTÍN RODRÍGUEZ, P. J. (dirs.), *Estado de Derecho...*, *op. cit.*; LÓPEZ ESCUDERO, M., “La protección del valor Estado de derecho en la jurisprudencia del TJUE”, in DE FARAMINÁN GILBERT, J. M., ROLDÁN BARBERO, J. y DEL VALLE GÁLVEZ, A. (coord.), LÓPEZ ESCUDERO, M., HINOJOSA MARTÍNEZ, L. M., MARRERO ROCHA, I. C. y MARTÍN RODRÍGUEZ, P. (eds.), *Unión Europea, principios democráticos y orden internacional. Liber Discipulorum en homenaje al profesor Diego J. Liñán Nogueras*, Tirant lo Blanch, Valencia, 2024, pp. 399-435.

⁶ Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council, of 16 December 2020, on a general regime of conditionality for the protection of the Union budget (Rule of Law Conditionality Regulation) [2020] OJ L 433/1. Cf. ŁACNY, J., “The Rule of Law Conditionality Under Regulation No 2092/2020—Is it all About the Money?”, *The Hague Journal on the Rule of Law*, Vol. 13, 2021, pp. 79-105.

In the negotiation over the freezing of EU funds to Hungary as part of the “conditionality mechanism”, the percentage suspended was ultimately reduced to 55%, compared to the



endorsement of the Court of Justice⁷. The suspension of the rights of a non-compliant Member State provided for in Art. 7 TEU appears even more illusory given the traditional obstacles raised by the EU Institutions and some Member States and the “incoherence” that has characterised “the European Union’s political strategy towards the Rule of Law crisis” since the Russian aggression against Ukraine⁸, being the EU caught between political horse-trading and the need for certain decisions to be adopted unanimously. Paradoxically, and with a reasonable degree of credibility, it is at the international level where—at least on the surface—the Institutions have shown themselves capable of regularly monitoring the implementation of the principles of the Rule of Law and the fight against corruption⁹ by certain third countries with which the EU interacts, particularly in relation to accession candidates, the neighbourhood, and recipients of international development cooperation¹⁰, in addition to being one of the priority sectors in international crisis manage-

65% proposed by the Commission, due to the need to obtain Viktor Orbán’s governments favourable vote on sanctions against Russia in the context of the aggression against Ukraine.

⁷ Judgment of 16 February 2022, 156/21 (Hungary/Parliament and Council) and 157/21 (Poland/Parliament and Council), ECLI:EU:C:2022:97. Cf. KÖLLING, M., “The new conditionality mechanism for the protection of the EU budget: does the CJEU judgement give the all-clear?”, ARI 17/2022, Análisis del Real Instituto Elcano, 10 March 2022. Available at: <https://www.realinstitutoelcano.org/>.

⁸ ÍÑIGUEZ, G., “El futuro del Estado de Derecho es el futuro de la UE”, *Política Exterior*, Vol. 36, No. 209, 2022, p. 92.

⁹ The fight against corruption had been a “taboo” at the EU domestic level until the 2004 and 2007 enlargements. For years, there was only a Joint Action on corruption in the private sector (OJ L 358/2, of 31 December 1998), which would subsequently be repealed by Framework Decision 2003/568/JHA (OJ L 192/54, of 31 July 2003), without the corruption of public officials having been addressed in a comprehensive manner. In May 2023, the Commission presented an anti-corruption package, including a proposal for a directive aimed at combating corruption on the basis of Art. 83 TFEU. This new Directive (OJ L 2026/1021, of 11 May 2026) establishes a harmonised definition of corruption and a common level of penalties to sanction such offences. These new rules include bribery in the public and private sectors, misappropriation, trading in influence, obstruction of justice, enrichment from corruption offences, concealment and certain serious violations of unlawful exercise of public function, establishing a new comprehensive legal framework for the first time at EU level.

¹⁰ Cf. DUDLEY, D., “European Union membership conditionality: the Copenhagen criteria and the quality of democracy”, *Southeast European and Black Sea Studies*, Vol. 20, No. 4, 2020, pp. 525-545; MUÑOZ RODRÍGUEZ, M.C., *Democracia y derechos humanos en la acción exterior de la Unión Europea*, Editorial Reus, Madrid, 2010.



ment in which the Union operates as a “security provider”¹¹.

The development and implementation of some internal and external Community policies, however, should have received greater attention (and, possibly, condemnation) from the Institutions for the sake of protecting the guiding principles of the Rule of Law with the necessary resolve, and thereby ensuring their complete “transnationalisation” as a transversal, inspiring and legitimating value of the integration process. In particular, with the creation and progressive enhancement of the Area of Freedom, Security and Justice (AFSJ), the Rule of Law has been permanently challenged or questioned by some of the measures put in place within it, primarily if we take into account the uneven development of its different elements and the predominance of the “security” aspect from the outset¹². This imbalance has emerged with exceptional starkness —if we take a rights-based perspective— in the “common” policy on asylum, immigration and the control of external borders (Arts. 67 et seq. TFEU), in which, in addition to preserving specific decision-making and legislative procedures, the protection of public order and

¹¹ A message that has taken root within the EU institutions, as illustrated inter alia by: Council Conclusions on the Civilian CSDP Compact, 15682/22, 12 December 2022; A Strategic Compass for Security and Defence - For a European Union that protects its citizens, values and interests and contributes to international peace and security, 7371/22, Brussels, 21 March 2022; Communication from the Commission to the European Parliament, the European Council and the Council “Further strengthening the Rule of Law within the Union. State of play and possible next steps”, COM(2019) 163 final, Brussels, 3 April 2019; European External Action Service (EEAS), “Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union’s Foreign and Security Policy”, June 2016, Brussels. Cf. LARSSON, O. L. and WIDEN, J. J., “The European Union as a Maritime Security Provider – The Naval Diplomacy Perspective”, *Studies in Conflict & Terrorism*, Vol. 47, No. 12, 2024, pp. 1724-1746; SMIT, T., “Strengthening EU Civilian Crisis Management: The Civilian CSDP Compact and Beyond”, *SIPRI Insights on Peace and Security*, 2021/5; and TARDY, T., *European Security in a Global Context. Internal and External Dynamics*, Routledge, London, 2009.

¹² MITSILEGAS, V., MONAR, J. and REES, W., *The European Union and Internal Security: Guardian of the People?* Palgrave-MacMillan, Hampshire, 2003; HUYSMANS, J., “The European Union and the Securitization of Migration”, *Journal of Common Market Studies*, Vol. 38, No. 5, 2002, pp. 751-777.

internal security¹³ of the common “area”¹⁴ has prevailed in the adoption of the rules governing it over democratic transparency and plurality in the legislative process.

In this way, the defective operation of some of the guiding principles of the Rule of Law in the EU and its Member States in the development of this common “area” without internal barriers, agreed upon by the Council and the European Parliament as imperfect co-legislators¹⁵ —more often than not with the acquiescence of the Commission, has been strongly criticised by members of the European Parliament (MEPs) themselves, scholars, first-line practitioners, NGOs, and international organisations in some of its key aspects, such as the fight against irregular immigration and integrated management of external borders, and for non-compliance with international commitments regarding asylum seekers, attributable both to Member States and to certain actors¹⁶ of the AFSJ¹⁷. In particular, the conduct of the Euro-

¹³ Cf. BARBOU DES PLACES, S., “Introduction: Public order and public security in EU law. Time for Reappraisal”, *European Papers*, Vol. 9, No. 3, 2024, pp. 1316-1328; CORTHAUT, T., *EU Ordre Public*, Wolters Kluwer, Alphen aan den Rijn, Países Bajos, 2012.

¹⁴ As opposed to the traditional term “territory”, which is still associated with the Westphalian state.

¹⁵ There are still areas reserved for special legislative procedures in the AFSJ in which the European Parliament is merely consulted, such as administrative cooperation (Art. 74 TFEU), residence permits and passports (Art. 77.3 TFEU) and police cooperation (Art. 89 TFEU), or subject to its consent in areas of criminal procedure, such as victims’ rights (Art. 82.2 TFEU) or the incorporation of other “Euro-crimes” (Art. 83.1 TFEU).

¹⁶ In this analysis, we use the term “actor”, in general terms, to refer to those EU Institutions and bodies with competence and capacity to act in the AFSJ, regardless of the name or status they officially receive in primary or secondary law.

¹⁷ Cf. FAGGIANI, V., *La protección internacional de los migrantes en la UE. Estándares de tutela, límites y perspectivas de reforma del derecho de asilo*, Thomson Reuters Aranzadi, Cizur Menor, 2023; FERRER LLORET, J., “La Unión Europea ante el derecho de asilo: a propósito de la sentencia Comisión/Hungría (acogida de solicitantes de protección internacional)”, *Revista de Derecho Comunitario Europeo*, Vol. 68, 2021, pp. 25-66; RUIZ RAMOS, J., “The Right to Liberty of Asylum-Seekers and the European Court of Human Rights in the Aftermath of the 2015 Refugee Crisis”, *Revista Electrónica de Estudios Internacionales*, Vol. 39, pp. 1-46; FINK, M., *Frontex and Human Rights. Responsibility in ‘Multi-Actor Situations’ under the ECHR and EU Public Liability Law*, Oxford University Press, Oxford, 2018; and KTISTAKIS, Y., *Protecting Migrants under the European Convention on Human Rights and the European Social Charter. A Handbook for Legal Practitioners* (2nd edition), Council of Europe Publishing, Strasbourg.



pean Border and Coast Guard Agency (Frontex) at the EU's external borders in recent years and the accusations of fraud and mismanagement, which led to the resignation of its Executive Director at the end of April 2022, have “dynamited” an area of the integration process —the AFSJ— in which the European Commission considers the proper functioning of the Rule of Law to be of “particular importance”¹⁸, triggering a genuine “Rule of Law crisis”¹⁹ and a crisis of legitimacy of the integration process itself on which it rests—at least in theory.

Actually, in contrast to the rights-based order established in the framework of the Council of Europe, the AFSJ has been considered the “hell of the Rule of Law”²⁰. Indeed, although the Commission has identified it as a “founding principle of the Union”²¹, the proper functioning of the Rule of Law has been profoundly overshadowed in the implementation and progressive development of the AFSJ since its proclamation at the beginning of this century as a “priority objective”²². Particularly, in certain policies that make up this complex and ambitious objective for the Union in the twenty-first century—such as migration policy, the management of external borders and the maintenance of public order and internal security—we observe how the main principles or “parameters” governing the Rule of Law, as conceived

¹⁸ EUROPEAN COMMISSION, Communication from the Commission to the Council and the European Parliament “A new EU Framework to strengthen the Rule of Law”, COM(2014) 158 final, Strasbourg, 11 March 2014, 2014, p. 4; and European Commission, Communication from the Commission to the European Parliament, the European Council and the Council “Further strengthening the Rule of Law within the Union. State of play and possible next steps”, COM(2019) 163 final, Brussels, 3 April 2019, p. 1.

¹⁹ MARIN, L., “Frontex and the Rule of Law Crisis at EU External Borders. A Question of Legal Design?”, *Verfassungsblog*, 5 September 2022.

²⁰ BORRAJO INIESTA, I., “El Estado de Derecho en el Espacio de Libertad, Seguridad y Justicia de la Unión” in LIÑÁN NOGUERAS, D. J. and MARTÍN RODRÍGUEZ, P. J. (dirs.), *Estado de Derecho y Unión Europea*, Tecnos, Madrid, 2018, p. 263.

²¹ European Commission, Communication from the Commission to the Council and the European Parliament “A new EU Framework to strengthen the Rule of Law”, COM(2014) 158 final, Strasbourg, 11 March 2014, 2014, p. 4.

²² LIÑÁN NOGUERAS, D. J., “El Espacio de Libertad, Seguridad y Justicia” in MANGAS MARTÍN, A. and LIÑÁN NOGUERAS, D. J., *Instituciones y Derecho de la Unión Europea*, 11th edition, Tecnos, Madrid, 2024, p. 95.



within the EU²³ and in the Council of Europe²⁴, are enormously distorted by a multilevel system of governance and accountability that falls short of the minimum ideal required in any “Community of Law”²⁵, especially as regards the practice followed by some of those actors.

The objective of this article is to analyse how the progressive enhancement and expansion of the AFSJ in different areas of action has called into question some of the fundamental pillars of the transposition of the Rule of Law in the EU both horizontally and vertically. In this analysis, particular attention will be paid to the progressive “agencification” process on which the AFSJ multilevel governance system is based. To this end, we will focus on the study of Frontex, an agency which —since its creation in the former “first pillar”— has attracted all the attention and criticism from NGOs and scholars as one of the opaqueness actors in the AFSJ²⁶. Far removed from the

²³ According to the Commission, these are: legality, which implies a transparent, accountable, democratic and pluralistic legislative process; legal certainty; the prohibition of arbitrariness of executive powers; independent and impartial courts; effective judicial review, including respect for fundamental rights; and equality before the law. Subsequently, the Commission would add, with greater precision, penalties for corruption and separation of powers. Respectively, European Commission, Communication from the Commission to the Council and the European Parliament “A new EU Framework to strengthen the Rule of Law”, COM(2014) 158 final, Strasbourg, 11 March 2014; and European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions “Strengthening the Rule of Law within the Union. A blueprint for action”, COM(2019) 343 final, Brussels, 17 July 2019, p. 3.

²⁴ Among the parameters identified by the Venice Commission of the Council of Europe, we find legality, legal certainty, prevention of abuse of power, equality before the law and non-discrimination, and access to justice. Additionally, Rule of Law Checklist. European Commission for Democracy through Law (Venice Commission), “Rule of Law Checklist”, adopted by the Venice Commission at its 106th Plenary Session.

²⁵ *Inter alia*, Judgment of the Court of Justice of 23 April 1986, Les Verts/European Parliament, 294/83, EU:C:1986:166; Judgment of the Court of Justice of 29 April 2004, Commission of the European Communities/CAS Succhi di Frutta SpA, 496/99, EU:C:2004:236; and Judgment of the Court of Justice of 18 July 2013, European Commission and Others/Yassin Abdullah Kadi, 584/10 P, 593/10 P and 595/10 P, EU:C:2013:518.

²⁶ MITSILEGAS, V., “Border Security in the European Union: Towards Centralised Controls and Maximum Surveillance” in BALDACCINI, A., GUILD, E. and TONER, H. (coords.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Hart Publishing, Oxford, 2007, p. 375.

current approach, in which focus seems to have been placed on Member States, compliance with the principles of the Rule of Law concerns not only their responsibility in the implementation of EU law and policies, but also the accountability and transparency of all the AFSJ actors. This is because, on the one hand, they are operating in a legal and policy area of shared competence according to the Treaties²⁷; and, on the other hand, at an institutional and operational level of multilevel governance, and of shared responsibility²⁸, of the common “area”. In particular, we will analyse through the lens of governance theories²⁹ what are the implications of the absence of explicit position in the instruments established for safeguarding the Rule of Law on the responsibility of AFSJ actors, and how they must be the first to observe them to ensure the full “transnationalisation” of its principles in the EU. This change would be nothing more than one of the most effective means to legitimize the European integration process as a whole by means of amending the controversial and uneven development of the AFSJ.

II. LIMITATIONS ON THE OBSERVANCE OF THE RULE OF LAW WITHIN THE AREA OF FREEDOM, SECURITY AND JUSTICE

The case law in the development of the AFSJ has been rich in examples that distort compliance with the Rule of Law³⁰. In particular, the EU and its

²⁷ Art. 3 TEU; and 4.j) and Title V of the Treaty on the Functioning of the EU, TFEU. Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (OJ C 326, of 26 October 2012, p. 1).

²⁸ This has been recognised, for example, in Art. 7 of the Frontex Regulation, which stipulates that “integrated European border management [is] a shared responsibility of the Agency and of the national authorities”.

²⁹ Cf. HOOGHE, L. and MARKS, G., *Multi-Level Governance and European Integration*, Rowman & Littlefield Publishers, Inc., Lanham, 2001; and LUCARELLI, S. and SPERLING, J., *Handbook of European Union Governance*, Edward Elgar Publishing, 2025.

³⁰ From different perspectives and areas within the AFSJ, BORRAJO INIESTA, I., “El Estado de Derecho en el Espacio...”, *op. cit.*; MARINAI, S., “The scrutiny of Frontex’s operations: analysis of the EU judicial and non-judicial mechanisms available”, *Peace & Security – Paix et Sécurité Internationales*, No. 13, January-December 2025, pp. 1-35; and SAENZ PEREZ, C., “What about fundamental rights? Security and fundamental rights in the midst of a rule of law breakdown”, *New Journal of European Criminal Law*, Vol. 13, No. 4, 2022, pp. 526-545.



Member States have been criticised internally and internationally in connection with the guarantee of access to certain procedural rights and fundamental freedoms in the context of integrated management of external borders and the fight against irregular immigration³¹; a dysfunction that, through direct “contamination”, has equally affected the management of legal migration³². Thus, the distortion of the Rule of Law by EU Member States and AFSJ actors in the implementation and reinforcement of an “area” tailored to European and national circumstances —such as the 2015 “refugee crisis” and the consequent reinforcement of the anti-irregular-immigration policy, negatively affecting the Common European Asylum System— has been suitably and regularly discredited, at the EU level, by the European Parliament and the Court of Justice, supported externally by the European Court of Human Rights (ECtHR)³³ and other pan-European and international bodies³⁴.

³¹ *Inter alia*, BIGO, D., “Security and Immigration: Toward a Critique of the Governmentality of Unease”, *Alternatives*, Vol. 27, Special Issue, 2002, pp. 63-92; HUYSMANS, J., *The Politics of Insecurity. Fear, Migration and Asylum in the EU*, Routledge, London, 2006; and NEAL, A., “Securitization and Risk at the EU Border: The Origins of FRONTEX”, *Journal of Common Market Studies*, Vol. 47, No. 2, 2009, pp. 333-356.

³² The reluctance of Member States is also evident in the field of legal migration management, as can be seen in the divergences between the Council and the European Parliament’s rapporteur in the negotiation of the Directive establishing a single application procedure for a single permit authorising third-country nationals to reside and work in the territory of a Member State and establishing a common set of rights for third-country workers legally residing in a Member State (recast) (OJ L 2024/1233, of 30 April 2024, p. 1). In this case, Member States favoured shortening the time third-country nationals may reside without a job, as well as extending the deadline to resolve an application (Bulletin Quotidien Europe, 13104, of 21 January 2023). Cf. BLÁZQUEZ RODRÍGUEZ, I., “El estatuto jurídico de los nacionales de terceros países: de la reacción ante la crisis migratoria a la sinergia necesaria”, *Revista Española de Derecho Internacional*, Vol. 72, No. 1, 2020, pp. 27-51.

³³ On the same case with different approaches, respectively, Judgment of the Court of Justice (Grand Chamber) of 14 May 2020, *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 924/19 PPU and 925/19 PPU, EU:C:2020:367; and Judgment of the ECtHR of 21 November 2019, *Ilias and Ahmed v. Hungary*, ECHR:2019:1121JUD004728715, paras. 163-164. For an analysis of the ECtHR case law on the protection of the rights of migrants, see RUIZ RAMOS, J., “The Right to Liberty of Asylum-Seekers...”, *op. cit.*; and KTIKAKIS, Y., *Protecting Migrants under the European Convention...*, *op. cit.*

³⁴ *Inter alia*, without claim to exhaustiveness, Parliamentary Assembly of the Council of Europe (Parliamentary Assembly), Safe third countries for asylum seekers (Report Doc. 15592),



As regards the European Parliament, although it has been aware of the strengthening of its negotiating position in legislative co-decision scenarios following the entry into force of the Treaty of Lisbon, MEPs and political groups have maintained a rather ambiguous stance. On the one hand, the Parliament has repeatedly censured the disproportionate weight of the “security” component of the AFSJ. Driven by the “strategic orientations” of the European Council and the guidelines of the Council of the EU in legislative negotiation, this “securitarian” approach has had a negative impact in the establishment and further development of the AFSJ, resulting in the adoption of more restrictive EU measures regarding asylum seekers and the effective safeguarding of fundamental rights and freedoms in any Member State governed by the Rule of Law, such as access to effective judicial protection and to asylum³⁵ —without dwelling in this analysis on the specific situation of unaccompanied foreign minors and the non-observance of certain basic protection principles under international law that apply to them regardless of their legal status³⁶. Furthermore, the European Parliament has been par-

July 2022; Parliamentary Assembly, Role of parliaments in implementing the United Nations global compacts for migrants and refugees (Report Doc. 15229), Committee on Migration, Refugees and Displaced Persons, 2021; Parliamentary Assembly, Saving lives in the Mediterranean: the need for an urgent response (Resolution 2305), 2019; Parliamentary Assembly, The large-scale arrival of irregular migrants, asylum seekers and refugees on Europe’s southern shores (Resolution 1805; Recommendation 1967), 2011; and Human Rights Council, Report of the Special Rapporteur on the human rights of migrants (A/HRC/38/41), Geneva, 2018.

³⁵ Among others, European Parliament resolution of 18 June 2025 on the Commission’s 2024 Rule of Law Report (2024/2078(INI)); European Parliament Resolution of 19 May 2022 on the Commission’s 2021 Rule of Law Report (2021/2180(INI)); European Parliament Resolution of 19 May 2022 on the Commission’s 2021 Rule of Law Report (2021/2180(INI)), in particular paragraph 42; European Parliament Resolution of 24 June 2021 on the Commission’s 2020 Rule of Law Report (2021/2025(INI)); European Parliament Resolution of 14 November 2018 on the need for a comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights (2018/2886(RSP)) (2020/C 363/06); and European Parliament Resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)).

³⁶ DURÁN RUIZ, F. J., *Los menores extranjeros no acompañados desde una perspectiva jurídica, social y de futuro*, Aranzadi Thomson Reuters, Madrid, 2021; RUIZ DÍAZ, L. J., “Entre apoyo a la integración y prevención de la radicalización. Una mirada crítica al Plan de Acción de Integración e Inclusión de la Unión Europea”, *Revista Española de Derecho Internacional*, Vol. 73, No. 2, pp.



ticularly critical of the reactive nature and the limited preventive measures adopted in the EU to reverse any threat to the Rule of Law, as well as the traditional absence of unified, clear and public criteria for the Commission to assess Member States' behaviour —criteria that, incidentally, would allow standardised scrutiny and enable the European Parliament to evaluate and compare the progress or setbacks occurring in each Member State³⁷.

On the other hand, the MEPs' tone has been less “confrontational” in the last decade. Indeed, the diverse composition of the European Parliament in these last two legislative terms, by diminishing the majority of the so-called “grand coalition” that has dominated the European political scene for decades, has had the side effect that defending human rights and fundamental freedoms of European citizens, migrants and asylum seekers has been less of a priority than the search for consensus to adopt measures deemed urgent in light of the migration situation since the Syrian crisis. Paradoxically, this trend has been particularly pronounced when it has held legislative competence on an equal footing with the Council —an ambiguity that is equally evident in those special legislative dossiers in which it has merely been consulted or has given its consent. Certainly, save for rare exceptions, the main political groups or “families” in the European Parliament have supported with almost no restrictions each and every advancement in the AFSJ in exchange for obtaining greater oversight of its outcomes by their members³⁸. This “bandwagon mentality” has, somehow, undermined its credibility as a genuinely independent scrutiny actor in practice. The adoption of the New Pact on Migration and Asylum exemplifies well this rule-of-law test for the EU: although the new rules provide greater legal clarity and uniformity in the governance of this policy, it also raises concerns that faster and more restrictive procedures

147-160.

³⁷ See footnote No. 35 for full references to European Parliament Resolutions in the last five years. The adoption, in 2013, of an EU Justice Scoreboard represents a partial response to this longstanding demand of the MEPs. In particular, since then, we have observed the establishment of “an informal rule of law cycle” which falls short of the European Parliament's actual expectations. MAŃKO, R., “The Commission's annual rule of law reports: Five years on (2020-2025)”, European Parliamentary Research Service, PE 779.253, December 2025.

³⁸ RUIZ DÍAZ, L. J., “The European Parliament's Oversight of the Agencies of the Area of Freedom, Security and Justice. Where are we Now and Where are we Heading”, *Cuadernos Europeos de Deusto*, special issue No. 6, 2022, pp. 29-59.



could weaken access to asylum and effective protection of rights if safeguards are not enforced³⁹.

For its part, the Court of Justice has also emerged (relatively) strengthened from the Treaty of Lisbon. Therefore, primary law enables the Court to continue putting limits on the arbitrary development or application by national authorities of EU law *inter alia* in the framework of restricting irregular immigration and their rights and freedoms⁴⁰, thereby adding to its traditional defence of the main pillars of the Rule of Law within the Union, such as the necessary safeguarding of the European Parliament's legislative prerogatives⁴¹, the right to a fair trial⁴², and the independence and impartiality of courts⁴³. However, the Court has equally expressed in its most recent case law

³⁹ Cf. GONZÁLEZ ENRÍQUEZ, C., “El Pacto de Migración y Asilo en la Unión Europea. Contexto, desafíos y limitaciones”, *Análisis del Real Instituto Elcano*, ARI 59/2024, 10 de mayo de 2024; DE LA ORDEN BOSCH, G., “Pre-Entry Screening and Border Procedures as new Detention Landscape in the EU Pact on Migration and Asylum. The Spanish Borders as a Laboratory for Immobility Policies”, *Peace & Security – Paix et Sécurité Internationales*, No. 12, 2024.

⁴⁰ Without claiming to be exhaustive, before and after the entry into force of the Treaty of Lisbon, Judgment of the Court of Justice (First Chamber) of 28 April 2011, Corte d'appello di Trento/Hassen El Dridi, 61/11 PPU, ECLI:EU:C:2011:268; Judgement of the Court (Grand Chamber) of 19 March 2019, Abubacarr Jawo/Bundesrepublik Deutschland, 163/17, EU:C:2019:218; Judgment of the Court of Justice (Grand Chamber) of 16 November 2021, European Commission/Hungary, 821/19, EU:C:2021:930; Judgment of the Court (Grand Chamber) of 3 June 2025, Kinsa/OB, 460/23, ECLI:EU:C:2025:392; and Judgment of the Court (Grand Chamber) of 1 August 2025, LC and CP/Commissione Territoriale per il riconoscimento della Protezione Internazionale di Roma, Joined Cases C-758/24 and C-759/24, ECLI:EU:C:2025:591.

⁴¹ For instance, Judgment of the CJEU (Grand Chamber) of 5 September 2012, European Parliament/Council, 355/10, ECLI:EU:C:2012:516.

⁴² Judgment of the Court (Grand Chamber) of 31 January 2023, Criminal proceedings against Lluís Puig Gordi and Others, Request for a preliminary ruling from the Tribunal Supremo, 158/21, ECLI:EU:C:2023:57.

⁴³ For instance, Judgment of the Court (Grand Chamber) of 25 July 2018, LM, Request for a preliminary ruling from High Court (Ireland), 216/18, ECLI:EU:C:2018:586. Additionally, European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions “Strengthening the Rule of Law within the Union. A blueprint for action”, COM(2019) 343 final, Brussels, 17 July 2019; European Commission, Communication from the Commission to the European Parliament, the European Council and the Council “Further strengthening the Rule of Law within the Union. State of play and possi-



the “escape clauses” or “legal expedients that acknowledge the limits of the Union’s legal system and of its system of jurisdictional protection”⁴⁴ in other key aspects of the AFSJ beyond the “common” migration policy, such as the potential breakdown of the mutual trust upon which the latter rests in the field of judicial cooperation —the result, more often than not, of “unfinished equivalences, legal fictions and subrogation of requirements”⁴⁵. This would undoubtedly confirm the thesis that, on occasion, in the accelerated political-legislative drive of the AFSJ from its inception, what apparently represents a potential “legal escape route” rather than “a legislative option” —in this case, mutual trust⁴⁶— may arise as a fundamental and structural problem in the functioning of the Rule of Law. This is so because of the “false closure” of the legislative and decision-making processes in the AFSJ, for which, despite the advances achieved through the Treaty of Lisbon towards the extension of their alleged “communitarisation”, the intergovernmental logic continues to prevail —essentially, undoubtedly restrictive⁴⁷— in key aspects for safeguarding the protection of the Rule of Law and the fundamental rights and freedoms of European citizens and migrants. The implementation of the measures adopted under the New Pact on Migration and Asylum will undoubtedly present new opportunities for the Court to intervene in defence of the Rule of Law and to address the security-driven trends observed over

ble next steps”, COM(2019) 163 final, Brussels, 3 April 2019; and European Commission, Communication from the Commission to the Council and the European Parliament “A new EU Framework to strengthen the Rule of Law”, COM(2014) 158 final, Strasbourg, 11 March 2014. Cf. BORRAJO INIESTA, I., “El Estado de Derecho en el Espacio de Libertad...”, *op. cit.*

⁴⁴ MARTÍN RODRÍGUEZ, P. J., “El Estado de Derecho y el sistema jurídico de la Unión Europea”. in LIÑÁN NOGUERAS, D. J. and MARTÍN RODRÍGUEZ, P. J. (dirs.), *Estado de Derecho y Unión Europea*, Tecnos, Madrid, 2018, p. 170.

⁴⁵ *Ibid.*, p. 187.

⁴⁶ MARTÍN RODRÍGUEZ, P. J., “La insoportable levedad de la confianza mutua en el espacio de libertad, seguridad y justicia” in CORTÉS MARTÍN, J. M. and RUIZ YAMUZA, F. G. (coords.), *Retos actuales de la cooperación penal en la Unión Europea*, Dykinson, Madrid, 2020, p. 96; MITSILEGAS, V., “Defining organised crime in the European Union: the limits of European criminal law in an area of ‘freedom, security and justice’”, *European Law Review*, Vol. 26, 2001, pp. 565-581.

⁴⁷ One of those restrictions that has undermined the “common” immigration policy in the last decade is enshrined in EU law: the “right of Member States to determine volumes of admission to their territory of nationals from third countries coming from third countries for the purpose of seeking work, whether employed or self-employed” (Art. 79.5 TFEU).



the past decade.

Against this negative internal backdrop, an additional problem arises in the context of the (increasing) external dimension of the AFSJ. In this specific area, where internal measures to further develop the AFSJ and the Union's external relations converge, the oversight functions of both the European Parliament and the Court of Justice become blurred, clearing the way for the full implementation of the objectives of the (European) Council and the Member States in maintaining internal public order and security, prioritising the former over those principles and values that must govern the Union's external action, including the promotion of the Rule of Law according to the Treaties (Art. 21 TEU). In particular, the preference in recent years for the adoption of informal agreements —such as the 2016 “EU-Turkey Deal”⁴⁸ and the 2023 Memorandum of Understanding between the EU and Tunisia⁴⁹— has been added to the externalisation of controls on irregular immigration within other EU external policies, such as development cooperation and the neighbourhood policy⁵⁰, and to the limited verification capacities of both actors, which, in the case of the European Parliament, are reduced to the approval or consultation of (formal) agreements on readmission and cooperation with third States in other areas covered by the AFSJ (Arts. 79.3 and 218 TFEU). For its part, in the case of the Court of Justice, in addition to the limitations imposed by the Treaties on monitoring the implementation of measures relating to the AFSJ by national authorities (Art. 276 TFEU), it has declared itself incompetent to review the legality of informal agreements, such as the aforementioned “EU-Turkey Deal”, which constitutes “yet another example of the ambushes laid against the Rule of Law when one opts

⁴⁸ EU-Turkey Statement, 18 March 2016. Available at: <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/> (accessed on 5 June 2026).

⁴⁹ Memorandum of Understanding on a strategic and global partnership between the European Union and Tunisia. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3887 (accessed on 5 June 2026).

⁵⁰ In this case, even going against its main objectives and undermining the stabilisation of the region. LIPERI, M. S., “The EU's Externalisation of Migration Management Undermines Stabilisation in the Western Balkans”, *LAI Commentaries*, Instituto Affari Internazionali, 15 April 2019; TRAUNER, F. and KRUSE, I., “EC Visa Facilitation and Readmission Agreements: Implementing a New EU Security Approach in the Neighbourhood”, CEPS Working Documents, No. 290, April 2008.



to act on the margins of the institutional system”⁵¹, as is occurring in the progressive development of the AFSJ in its internal and external dimensions. This trend, however, is not an isolated case; national governments have also opted for this approach of agreements of dubious legality —such as the 2023 Italy-Albania Protocol, which have had to be reinterpreted by the Court of Justice in order to safeguard the rights and freedoms of migrants⁵². Specifically, the limitations on political and judicial oversight are even more obvious in the case of verifying the work of the AFSJ agencies, openly calling into question two of the basic principles of the Rule of Law: transparency and accountability.

III. THE PRACTICE OF AFSJ AGENCIES AND THE RULE OF LAW. THE MAIN SHORTCOMINGS OF AN INCOMPLETE GOVERNANCE AND ACCOUNTABILITY SYSTEM

The practice followed by the main AFSJ agencies over the last decade has exposed the gaps in the current identification of the scope of the Rule of Law in the EU in pursuit of a long-term objective —the common “area” without internal barriers— in which aspects of “security” have prevailed over “freedom” and “justice”. Indeed, the maintenance of public order and internal security of the common “area” has attracted criticism from experts and academic doctrine from the very first moment in which the management of migratory flows and the fight against irregular immigration were framed in “security” terms, the most obvious result being the criminalisation of irregular migration⁵³. Additionally, in parallel, the “agencification” of the

⁵¹ ANDRÉS SÁENZ DE SANTAMARÍA, P., “El Estado de Derecho en el sistema institucional de la Unión Europea: realidades y desafíos” in LIÑÁN NOGUERAS, D. J. and MARTÍN RODRÍGUEZ, P. J. (dirs.), *Estado de Derecho y Unión Europea*, Tecnos, Madrid, 2018, p. 156. In the same vein, CARRERA, S., SANTOS VARA, J. and STRIK, T., *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis. Legality, Rule of Law and Fundamental Rights Reconsidered*, Edward Elgar Publishing, Cheltenham - Northampton, 2019.

⁵² For instance, Judgment of the Court (Grand Chamber) of 1 August 2025, LC and CP/ Commissione Territoriale per il riconoscimento della Protezione Internazionale di Roma, Joined Cases C-758/24 and C-759/24, ECLI:EU:C:2025:591.

⁵³ Cf. MITSILEGAS, V., *The Criminalisation of Migration in Europe. Challenges for Human Rights and the Rule of Law*, Springer, London, 2015; HUYSMANS, J., “The European Union and the Secu-



AFSJ proceeded in an exercise of multilevel governance has prevented the correct attribution of responsibilities (horizontally and vertically) and negatively affected transparency in decision-making at Community level. This “diffuse governance” stemming from agencification⁵⁴ has been particularly evident and characterised by political-legislative haste in the implementation and progressive development of the AFSJ, a field in which, until the entry into force of the Treaty of Lisbon, the European Parliament maintained a marginal position due to a lack of competences in the legislative and political scrutiny domains. The clearest example is the role played by the European Parliament in the limited oversight of the daily activities of the AFSJ agencies within and outside the EU. However, it has not been the only focal point of dysfunction in a deficient verification and accountability system that, in order to respond to recurring critics from NGOs and human right scholars⁵⁵, has been enriched by generic references to the protection of fundamental rights and freedoms and accountability contained in their internal rules (for example, Arts. 80 and 6 of the Frontex Regulation, respectively).

Firstly, as regards political scrutiny and accountability in parliament⁵⁶, MEPs have exercised “soft forms of control”⁵⁷. Moreover, the supervision of the activities of the AFSJ actors has been carried out *ex post* in most cases. Actually, despite the improvements introduced by the Lisbon Treaty in the role of the European Parliament as co-legislator in the large majority of topics covered by the AFSJ, and as a supervisor of compliance with EU law by the Member States, Institutions and agencies —along with national parliaments⁵⁸, the European Parliament still has limited, *ex post* capacities to

ritization...”, *op. cit.*; and HUYSMANS, J., *The Politics of Insecurity...*, *op. cit.*

⁵⁴ ANDRÉS SÁENZ DE SANTAMARÍA, P., “El Estado de Derecho...”, *op. cit.*, p. 146.

⁵⁵ See, for instance, MARINAI, S., “The scrutiny of Frontex’s operations...”, *op. cit.*

⁵⁶ Political scrutiny and accountability of AFSJ agencies also falls, indirectly, on Member States through their representatives in the Standing Committee on Operational Cooperation on Internal Security (COSI), regulated by Art. 71 TFEU and Council Decision 2010/131/EU (OJ L 52, of 3 March 2010, p. 50). Control of Europol by Member States is additionally exercised through the appointment by the Council of its Executive Director, upon a proposal from a shortlist presented by its Management Board (Art. 54.2 of the Europol Regulation).

⁵⁷ ANDRÉS SÁENZ DE SANTAMARÍA, P., “El Estado de Derecho en el sistema institucional...”, *op. cit.*, p. 146.

⁵⁸ Art. 12 TEU and Arts. 69, 81.3, 85.1 and 88.2 TFEU; Protocol No 1.



verify their daily activities, in particular those relating to operations and the enforcement of AFSJ—related measures, including border surveillance and return policy. To this shortcoming we must add that it has been granted an excessively restricted role in the appointment of their directors, with the possibility of removal in case of need or the establishment of accountability mechanisms that sanction the performance of their mandates in accordance with the principles of the Rule of Law and the full guarantee of respect for human rights in the exercise of their responsibilities being disregarded⁵⁹.

In practice, the European Parliament's supervisory powers have been reduced to a bare minimum. Thus, apart from its reinforced role in budget negotiation and in verifying its correct implementation in each financial year (the “discharge procedure”), oversight of the activities of the AFSJ agencies by the European Parliament has been relegated to the organisation of annual or *ad hoc* appearances by executive directors and exchanges of views in periodic or thematic sessions between agency officials, the Commission, the Council's rotating presidency, and MEPs. Meanwhile, at the legislative or *ex ante* oversight level, MEPs have contented themselves with inserting into the Commission's proposals to reinforce the agencies' competences generic provisions on responsibility and accountability and respect for human rights and fundamental freedoms —practically limited to the protection of personal data managed and exchanged by the agencies— and the creation of specific internal compliance bodies in this regard in a futile attempt to defuse criticism directed at the AFJS agencies amid a growing trend towards strengthening their functions, as has repeatedly occurred in the last five years with the EU Agency for Criminal Justice Cooperation (Eurojust)⁶⁰, the EU Agency for Law Enforcement Cooperation (Europol)⁶¹ and, very notably,

⁵⁹ RUIZ DÍAZ, L. J., “The European Parliament's Oversight of the Agencies...”, *op. cit.*

⁶⁰ Regulation 2018/1727 of the European Parliament and of the Council, of 14 November 2018, on the European Union Agency for Criminal Justice Cooperation (Eurojust) and replacing and repealing Council Decision 2002/187/JHA (OJ L 295, of 21 November 2018, p. 138).

⁶¹ In one of the latest reforms of the Europol Regulation, carried out by Regulation 2022/991 of the European Parliament and of the Council, of 8 June 2022 (OJ L 169, of 27 June 2022, p. 1), the agency has seen its functions expanded in the investigation of crimes committed on the Internet or through IT means and in support of national police authorities in conducting and coordinating their investigations, in addition to being able to access personal data provided by private entities and individuals, and to strengthen its position in the planning of the



Frontex⁶². All of this invoking the supposed urgency and necessity of adopting common measures in response to transnational organised crime and the fight against terrorism; a motivation that has allowed the Institutions to adopt rules reinforcing the work and functions of the agencies in record time if compared, for example, with the extension of procedural guarantees in the European judicial area, “the result of a long, slow, complex and progressive process, with advances and setbacks”⁶³.

The external dimension of the AFSJ constitutes another major limitation on the political oversight exercised by the European Parliament. In particular, it is important to highlight the significant role played by the agencies over the past decade, which has enabled them not only to liaise with authorities in third countries and carry out joint operations (primarily, though not exclusively, with candidate countries), but also to formalise this cooperation through agreements of varying scope with numerous third States and international organisations pursuant to their internal regulations, at the time they have sent and received liaison officers across the world⁶⁴. In this scenario, we observe that the MEPs’ supervisory role is greatly curtailed by the difficulty of accessing complete, up-to-date and accurate information on the operations and activities carried out by the latter under working or strategic cooperation agreements which, in their majority, were signed well before the European Parliament had the authority to be informed prior to their publication, and

multi-annual political cycle against crime, assisting the Council and Commission in setting the Union’s strategic and operational priorities in the fight against crime. A later reform (OJ L, 2025/2611, of 22 December 2025) further strengthened its tasks in preventing and combating migrant smuggling and trafficking in human beings.

⁶² Regulation 2019/1896 of the European Parliament and of the Council, of 13 November 2019, on the European Border and Coast Guard and repealing Regulations 1052/2013 and 2016/1624 (OJ L 295, of 14 November 2019, p. 1).

⁶³ REMOTTI, J. C., “El proceso de formación del Espacio de Libertad, Seguridad y Justicia en la Unión Europea. La lucha contra la delincuencia, cooperación policial y judicial y garantías del debido proceso en el ámbito penal” in FREIXES, T., *Garantías del Proceso Debido y Unión Europea. Implicaciones para los ordenamientos internos*, Centro de Estudios Políticos y Constitucionales, Madrid, 2020, p. 22.

⁶⁴ Europol, for example, has signed operational and strategic agreements and, since May 2017, working arrangements with States and international bodies, as well as with other AFSJ actors and the Common Security and Defence Policy. Agreements available at: <https://www.europol.europa.eu/partners-collaboration> (accessed on 5 June 2026).



which fall, unless they include special provisions or the transfer of personal data, outside the scope of the international agreements under Art. 218 TFEU, for which the European Parliament does have *ex ante* competence⁶⁵. Frontex has, moreover, deployed officers in the territory of third States by virtue of such working and international agreements, as has been the case with Albania⁶⁶. However, given the traditional opacity of Frontex in the conduct of its activities, it seems difficult to believe that the European Parliament can access the full body of information necessary to supervise such operations or the results of the complaints mechanism⁶⁷, beyond the timely appearances of the Executive Director or Agency staff before the relevant European Parliament committee depending on the matter under examination, or the management structure's reaction to information leaked by the press regarding specific cases of malpractice.

For its part, management and administrative oversight of the AFSJ agencies falls upon both the Commission and the European Anti-Fraud Office (OLAF), the Court of Auditors and the European Ombudsman⁶⁸. Specifically, the Commission has exercised direct oversight of the agencies' activities through the members it appoints to their management boards or equivalents and through its role in the nomination of their executive or administrative directors. Thus, these tasks —closed off to the European Parliament⁶⁹— have allowed the Commission to nominate two representatives to the Frontex Management Board with speaking and voting rights, on an equal footing with Member States' delegates⁷⁰, and to play a significant role in the appointment

⁶⁵ Arts. 73 et seq. of the Frontex Regulation, Art. 25 of the Europol Regulation and Art. 56.2.c) of the Eurojust Regulation.

⁶⁶ 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 L 46, p. 3), which is in addition to the Frontex-Albania working arrangement, signed in March 2021 and available at: <https://frontex.europa.eu/we-build/other-partners-and-projects/non-eu-countries/> (accessed on 5 June 2026).

⁶⁷ Art. 111 of the Frontex Regulation.

⁶⁸ Arts. 63 and 77 of the Eurojust Regulation; Arts. 116 and 119 of the Frontex Regulation; and Arts. 60 and 69 of the Europol Regulation, respectively.

⁶⁹ The EP, through the Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee), takes part in the appointment of Frontex Executive Directors through a hearing of the three candidates shortlisted by the Commission.

⁷⁰ Art. 101 of the Frontex Regulation. The Commission has one representative on the Eu-



of the agency's Executive Director —a key figure in the political-operational mechanism of implementing and developing the AFSJ— given the informing, advisory, representative, executive, ordering, scrutinising and supervisory functions recognised for internal measures and Member States⁷¹. However, despite the important functions exercised by executive directors and the sometimes controversial individuals who have occupied the post⁷², the oversight carried out by the Commission or the Agency's Management Board falls far short of the desirable ideal, as demonstrated by the complete absence of accountability in the case of the former Executive Director, Fabrice Leggeri, who ultimately resigned as a result of media pressure⁷³. In this specific case, neither the internal OLAF investigation —leaked to the press⁷⁴— nor the *ad hoc* oversight conducted by the European Parliament⁷⁵, which was denied

rojust College when it acts in a management capacity, who is also present on the Executive Board (Arts. 10 and 16 of the Eurojust Regulation) and one representative on the Europol Management Board (Art. 10 of the Europol Regulation), who also has voting rights.

⁷¹ Arts. 106 and 107 of the Frontex Regulation. Similar functions can be found in Arts. 16 et seq. of the Europol Regulation for its Executive Director, who plays a decisive role in authorising the transfer of personal data (Art. 25.5 of the Europol Regulation), and, to a lesser extent, in Arts. 17 et seq. of the Eurojust Regulation for its Administrative Director, who cedes prominence to the College.

⁷² Following the resignation, in April 2022, of the previous Executive Director Fabrice Leggeri due to allegations of mismanagement and fraud, the newly appointed person, Hans Leijten, has been declared by the European Anti-Fraud Office (OLAF) as a “person of interest” in an ongoing investigation (Fiedler, 2022), as had also been the case with the interim Executive Director, Aija Kalnaja (Vasques, 2022).

⁷³ PASCUAL, J. and MALINGRE, V., “The story behind Frontex director Fabrice Leggeri's resignation”, *Le Monde*, 1 May 2022; MARIN, L., “Frontex and the Rule of Law Crisis...”, *op. cit.*

⁷⁴ The internal report compiled by OLAF, which highlighted the malpractice of certain Frontex officials and the “systematic” attempts by the Management Board to conceal it, was leaked by several media outlets, including the German *Der Spiegel*, and can be consulted at: <https://fragdenstaat.de/dokumente/233972-olaf-final-report-on-frontex/> (accessed on 5 June 2026).

⁷⁵ The LIBE Committee established the Frontex Scrutiny Working Group (FSWG) in early 2021, with the aim of permanently monitoring the Agency's activities. In July of that year, the FSWG published a report based on its research during its first months of work in which it criticised certain practices followed by Frontex staff contrary to the rule of law and the observance of fundamental rights and freedoms, largely coinciding with the main NGO investigations and press leaks. The report is available at: https://www.europarl.europa.eu/cms-data/238156/14072021%20Final%20Report%20FSWG_en.pdf (accessed on 5 June 2026).



access to the resulting report on the grounds of confidentiality of the file alleged by the Commission⁷⁶, were sufficiently adequate in the face of potentially endemic situations of violation of the fundamental rights and freedoms of migrants in the conduct of the operations coordinated by the Agency, including the controversial “pushbacks” at the external borders and the return operations to “safe third countries”⁷⁷.

Finally, as regards judicial and legality review, the Court of Justice faces clear limitations in supervising the execution of the activities of the AFSJ agencies under the Treaties, which are added to the classic generic restrictions inherited from earlier rules in relation to the law enforcement bodies of the Member States “regarding the maintenance of law and order and the safeguarding of internal security” (Art. 276 TFEU). To some extent, the Agencies’ Regulations have addressed some of the gaps in primary law as regards the judicial responsibility of their staff in the exercise of their functions with respect to third parties, particularly concerning the protection of personal data managed and transferred by them and in contractual or tort matters⁷⁸. In the case of Frontex, due to the circumstances in which it has carried out its activities and the criticism it has received since its creation, its Regulation has included specific provisions regarding the civil and criminal liability of members of its teams⁷⁹, and the potential actions that may be brought before the Court of Justice for acts or omissions attributable to the Agency in the

⁷⁶ See Question for written answer, E-000861/2022, to the Commission (Rule 138), Erik Marquardt (Verts/ALE) and the reply offered by the Commissioner for Home Affairs, Answer given by Ms Johansson on behalf of the European Commission, E-000861/2022(ASW). Specifically, the European Parliament’s Committee on Budgetary Control did have access to the document in the context of its scrutiny activities.

⁷⁷ Statewatch has been particularly critical of the negotiations surrounding the proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2024/1348 as regards the application of the “safe third country” concept (OJ L, 2026/463, of 26 February 2026), a text negotiated in record time, despite criticism of the outsourcing of immigration controls without the necessary procedural safeguards and protection of the rights and freedoms of asylum seekers in particular. The case of Afghans returning to their country of origin has been particularly significant. See, for instance, Statewatch Bulletin 12 (2 December 2025 on outsourcing borders, available at: <https://statewatch.org/wp-content/uploads/2026/05/outourcing-borders-12.pdf> (accessed 5 June 2026).

⁷⁸ Arts. 44 and 78 of the Eurojust Regulation; and Arts. 48 to 50 of the Europol Regulation.

⁷⁹ Arts. 84, 85 and 97 of the Frontex Regulation.



performance of its functions⁸⁰. By virtue of this new legislation, which develops primary law and puts an end to a longstanding demand from experts and academic doctrine, several actions for failure to act and for damages have been brought before the Court of Justice against the activities carried out by Frontex and Europol (Arts. 265 and 268 TFEU), without the Court having reached properly the merits of the issues raised⁸¹ until relatively recently⁸².

IV. THE ESSENTIAL REFORMS FOR IMPROVING AFSJ GOVERNANCE IN COMPLIANCE WITH THE RULE OF LAW. BY WAY OF CONCLUSIONS

The preceding analysis reveals, in general terms, the breakdown in the system of governance and accountability established within the AFSJ that calls for an in-depth reform in order to meet the requirements of the Rule of Law in the Union. This is particularly true in relation to the activities carried out by the agencies at a time when their functions and competences have been progressively strengthened through the continuous reform of their internal regulations over the last decade, without a corresponding reinforcement of the mechanisms for political, administrative and judicial supervision and oversight. Actually, in the successive reforms of the AFSJ agencies to enhance their powers, the EU Institutions have confined themselves to including generic references to respect for fundamental rights and freedoms and the creation of internal bodies whose recommendations are insufficiently taken into account by management boards, the Commission, the Council

⁸⁰ Art. 98 of the Frontex Regulation.

⁸¹ In this regard, see in relation to Frontex: cases SS and ST/Frontex, T-282/21 (declared inadmissible by Order of the General Court of 7 April 2022), WS and Others/Frontex, T-600/21 (pending) and Hamoudi/Frontex, T-136/22 (pending); in relation to Europol: Judgment of the General Court (Eighth Chamber) of 27 April 2022, T-436/21, ECLI:EU:T:2022:261, and Order of the Court of Justice (Tenth Chamber) of 7 June 2018, Anastasia-Soultana Gaki/European Union Agency for Law Enforcement Cooperation (Europol), C-671/17 P, ECLI:EU:C:2018:416.

⁸² Judgment of the Court (Grand Chamber) of 18 December 2025, WS and Others/Frontex (Joint return operation) (Case C-679/23 P), ECLI:EU:C:2025:976; and Judgment of the Court (Grand Chamber) of 18 December 2025, Alaa Hamoudi/European Border and Coast Guard Agency, ECLI:EU:C:2025:977. On this, MARINAI, S., “The scrutiny of Frontex’s operations...”, *op. cit.*

or even the European Parliament. This renewal is therefore proposed as an essential action in order to guarantee the complete “transnationalisation” of the Rule of Law in the EU and to ensure that its principles and supervisory instruments apply equally to the AFSJ agencies. This does not, however, prevent the need to continue drawing attention to compliance by Member States with their obligations towards the EU and their international commitments, which are particularly affected in relation to the management of irregular immigration and asylum.

The necessary innovations in this regard must, first and foremost, improve transparency in access to documentation and periodic and comprehensive reporting on the conduct of their activities. As demonstrated by the practice followed by the agencies to date, the lack of transparency has characterised their day-to-day operations, grounded in criteria of political-legislative opportunism —attributable both to the Council and to the European Parliament itself— and by the secrecy and confidentiality of the files managed by the agencies, concerns that considerably undermine the political oversight that the European Parliament and national assemblies can exercise. The creation of the Frontex Scrutiny Working Group is a good step forward in the parliamentary oversight of the activities of an agency particularly burdened by scandals and excesses, but similar measures are lacking in the cases of Eurojust and Europol, whose joint European Parliament-national assemblies’ oversight⁸³ depends, to a large extent, on the interest of both parties in the issues addressed and is shaped by their respective internal parliamentary agendas and dynamics, turning it into an unnecessarily ceremonial and superficial interparliamentary debate. Finally, ensuring that the European Parliament has access to complete and accurate information on the activities of the agencies —currently limited to public reports restricted in terms of content— is another indispensable measure for improving transparency in the implementation and progressive development of the AFSJ.

It is also urgent to improve aspects of accountability and the assumption of responsibility by the managerial and official staff of the agencies in the context of their actions and functions. The same applies to the European Parliament to play a truly meaningful role in the nomination and eventual investigation and dismissal of their senior leadership in cases of systematic

⁸³ Art. 67 of the Eurojust Regulation and Art. 51 of the Europol Regulation.



and repeated non-compliance with their obligations. This deficiency in the governance system is more than questionable from the standpoint of the principles of the Rule of Law in the EU, given the functions and tasks delegated to the agencies by the Member States, and it responds both to the incomplete design of the multilevel governance of the AFSJ as a whole and to the internal organisational structure of the agencies, whose composition follows a clearly intergovernmental logic despite their potential as supranational elements in the implementation of the operational and planning aspects of the development of the AFSJ. To address this shortcoming and, at the same time, to allow the organisational structure to respond to the reality of their operational functions and collaboration in the planning of the policies covered by the AFSJ, new amendments to their rules are required that respond to a clear attribution of responsibilities —shared, according to the Treaties, secondary law and recent Court of Justice jurisprudence— between the Member States and the AFSJ actors, and that both the European Parliament and the Court of Justice possess full powers of political and judicial oversight respectively, eliminating from the Treaty of Lisbon the existing restrictions on their scrutiny functions. Ultimately, what is sought through a better system of governance and accountability is to narrow the current margin of discretion enjoyed by the agencies, particularly in relation to the external dimension of the AFSJ, one of the most entrenched dysfunctions against the principles of the Rule of Law in this area of integration, as demonstrated by the practice followed to date. This is more necessary than ever in order to improve predictability and reduce the scope for interpretation of the rules governing operations coordinated by Frontex, in a situation where, due to short-term interests in controlling irregular migration, countries such as Afghanistan are being considered by AFSJ actors as a “safe third country”.

In light of this deficient panorama, it becomes indispensable to reinforce the role of judicial and political oversight (or counterweight) of both Institutions, in order to rein in the prevailing intergovernmental logic followed by the (European) Council and ensure the most balanced possible development of the AFSJ in all its elements, as well as compliance with the obligations imposed by the Rule of Law both on the Member States and on EU actors. It is, therefore, alarming that the Institutions still think, unidirectionally, about compliance with the principles of the Rule of Law by the Member States and

their translation into the verification instruments established for that purpose, when, given that we are dealing with shared responsibilities in the AFSJ, it is more than desirable to subject the Union's actors to the same principles and supervisory mechanisms. Only then could we speak of the effective "transnationalisation" of the Rule of Law to all areas of the European integration process and, in doing so, guarantee the legitimacy of the European project, preventing both some (Member States) and others (AFSJ actors) from evading their responsibilities by entering into a "grey zone" clearly detrimental to the interests of the Rule of Law, as appears to be occurring on several fronts.

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