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Now even more so: A double NO on May 15, for all those who can vote and those who should be allowed to

On the resignation of Frontex Executive Director Fabrice Leggeri

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Now he is finally gone. The resignation of the Executive Director of the European border management agency Frontex, Fabrice Leggeri, was long overdue and yet a surprise. After all, since the first allegations against the agency became public in autumn 2020, Leggeri had clung to his post, showed neither awareness of the problem nor of wrongdoing, and could apparently rely on the fact that neither the EU member states nor the European Commission were interested in weakening the agency by toppling its executive director. For: the Agency is currently in a decisive phase of its transformation into the first uniformed European police force.

This significant development in the European project is also the subject of the Swiss Frontex referendum on 15 May 2022. Only superficially is it about increasing the Swiss contribution to the

agency to CHF 61 million. The real issue is whether an agency that is already lacking democratic control and that operates with impunity at Europe's borders should be given even more competences and personnel. Leggeri's resignation has underlined this untenable state once again.

But the European Commission is now trying to present the resignation of the Executive Director as a liberating blow and claims that the blame for the multiple scandals lies solely in the person of the Executive Director. This is, of course, just as false as the threat of Schengen expulsion if Switzerland were to vote against the expansion of the agency's competences and budget. But it underlines the determination with which the Commission wants to push ahead with the massive expansion of the agency and to prevent any debate. For this reason, too, it had repeatedly backed Leggeri in the last 18 months, when more and more investigative revelations about the agency became known in the media.

But at the end of April 2022, the pressure became too great. The Management Board, the body that is supposed to supervise and control the agency, which has the sole power to dismiss the Executive Director and in which the participating states as well as the Commission are represented, had already had a 200-page report from the European anti-corruption agency OLAF for weeks. This report has not yet become public, but it was repeatedly said that it proved the misconduct of several people at the top of Frontex. The report mainly dealt with the question of whether Frontex was involved in pushbacks - i.e. illegal and often violent deportations of people seeking protection at Europe's borders - or at least knew about this practice of national border guard units, but concealed this knowledge and thus tolerated and implicitly supported the violence. In addition, the report also seems to deal with allegations of misconduct and harassment within the agency. According to all

that is known so far, Leggeri, but also his office manager Thibault de La Haye Jousselin, are said to have cultivated a very authoritarian style of leadership, which aimed at centralising power and competences even further around the Executive Director and which left little room for dissent or discussion. There is also the question of whether funds were misused. In short, the accusations paint a picture of an agency that is uncontrollable and does not feel bound by European law.

Contested from the start

The European movements of anti-racism and solidarity with migrants, NGOs as well as critical research have eyed Frontex with suspicion since its foundation in 2004. For already twenty years ago, it became apparent that the Europeanisation of migration and border policy through the Treaty of Amsterdam (1997), and in particular through the founding of the Frontex agency, was initiating a development that was problematic for various reasons. On the one hand, the agency networked actors from police, military and intelligence milieus and, on the other hand, brought them together with arms companies that discovered the business field of Europeanised, technologised border control that emerged in the 2000s. At the same time, an increasingly powerful actor in migration control emerged with the agency, which, however, de-politicised this deeply political question by arguing that it was only addressing technologies of Europeanised border management. Last but not least, with the agency, a European executive body emerged that is neither hemmed in by the legislature, the judiciary nor by its own supervisory regime. Thus, from the very beginning, the Agency was a relevant example of the often stated democratic deficit of the European Union in the form of an executive branch that took on a life of its own.

However, it was difficult to relate this rather abstract critique to the agency's practice. For by design, the agency remained rather in the background. The day-to-day work of border control and surveillance continued to be carried out by the border guard institutions of the member states. And the additional border control operations of the agency at various locations on Europe's border were coordinated and financed by it, but they were again carried out by the member states.

But working in the background did not mean that the agency had no influence. The launch of Eurosur - the European Border Surveillance System - in 2013 was the result of a feasibility study by the agency, which examined the networking of various border surveillance technologies such as drones or satellites. The agency's influence was even more serious in 2014, when Italy had to end the military-humanitarian operation *Mare Nostrum* in the Central Mediterranean under pressure from the European Union. The official goal of the operation was to stop the deaths of migrants in the Mediterranean, which was temporarily successful. But after a year, *Mare Nostrum* was terminated and replaced by the Frontex operation *Triton*, which once again prioritised the protection of the EU's external borders over the protection of human lives. Promptly, the death toll in the Mediterranean rose.

Crisis winner Frontex

Surprisingly, however, the agency was absent for months in the summer of migration 2015. At the beginning of 2015, Leggeri had warned that hundreds of thousands of migrants were waiting in Libya to make the crossing to Italy. With this, he proved on the one hand that the forecasting abilities of the so-called risk analysis, which are often praised by the agency, were dubious at best, and on

the other hand, his statement must be seen as a deliberate attempt to exert political and dishonest influence. But after that, not much was heard from the agency, which in retrospect is certainly a stroke of luck. A scenario in which the agency would have tried to stop migration movements with all the means at its disposal could only have led to misery, violence and death.

Nevertheless, Frontex was the biggest beneficiary of these turbulent months. As late as December 2015, the European Commission proposed a massive expansion of the agency's competences. Instead of its coordination function, it would now direct the new construct of a *European Border and Coast Guard*, and was given its new name, the *European Border and Coast Guard Agency*. The new regulation also codified how *border management was* to be carried out in the European Union and granted the agency initial supervisory functions. A second, even more comprehensive extension of competences took place in 2019. Not only did the new regulation merge Frontex with Eurosur, providing the agency with a comprehensive technical system of border surveillance. Above all, the agency received the competence and the budget to build up a *standing corps* of 10,000 European border guards by 2027.

The importance of this new regulation for European integration cannot be overstated. For the first time in its history, the European Union is creating a uniformed law enforcement agency to be deployed on a daily basis at Europe's borders. The introduction of this insignia of statehood, normally the subject of meticulous debate in the European project, went ahead without much debate, however, and was based on a rather vague article in the Lisbon Treaty granting the EU the competence to take measures for common border management. Whether this really meant that important constitutional issues such as democratic legitimacy and a

functioning separation of powers were allowed to fall by the wayside must be doubted.

New methods

But even beyond these large, constitutional questions, an alliance of activism, critical research and journalism had long before begun to document that the European system of border control led to violence and death.

Already in 2008, a first demonstration took place in front of the agency's headquarters in Warsaw[1] , while the 2009 Noborder Camp on the Greek island of Lesbos trickily provoked the Greek coast guard to demonstrate in broad daylight in the port of Mytilini how they carry out pushbacks on the sea.[2] The protest against and criticism of European migration policy, whether inside or outside Europe's borders, increasingly included criticism of Frontex and thus ensured that the agency became known to a wider audience in the first place. The media also became increasingly interested in this unusual institution of the European Union.

An important breakthrough was the work of *Forensic Architecture/ Forensic Oceanography*, which in individual cases, such as the 2012 case of the Left-To-Die boat, was able to meticulously trace how certain actions and omissions in the multi-actor system of the European border regime produced a catastrophe with a fatal outcome.[3] But above all, the work plausibilised the new possibility of being able to drag the violence of the European border into the spotlight of a critical public.

Since 2014, the *Alarmphone* network[4] has documented cases in which protection seekers were turned back, first in the central

Mediterranean and later also in the Aegean. The *Border Violence Monitoring Network*[5] in turn documented indications and testimonies of violent pushbacks at land borders, such as the Greek-Turkish land border or the borders between Croatia and Bosnia and Herzegovina. This systematic documentation work created alternative databases on what was occuring at Europe's borders, which made new research approaches possible.

The Freedom of Information activities of Luisa Izuzquiza and Arne Semsrott (Semsrott and Izuzquiza 2018) proved to be a similar methodological innovation. They had started to increasingly request documents from the agency, based on the EU's Freedom of Information legislation. Thus, an archive of internal Agency documents slowly emerged, but most importantly, knowledge of these new methods and possibilities spread.

In addition, there were new results from research. In 2018, legal scholar Melanie Fink was able to show that external legal review of the agency's actions by national or European courts is also *de facto* impossible (Fink 2018). Also in 2018, my colleague Lena Karamanidou and I were able to demonstrate that the new, expanded agency was not subject to any substantial accountability and transparency obligations. The agency's internal mechanisms to guarantee compliance with fundamental rights in agency operations, or to allow for ex post review, were found to be essentially ineffective and inconsequential (Karamanidou and Kasparek 2020). And in my ethnography of the agency, I was also able to show that this construct of a European agency points to a technocratic European governance that has been deliberately pursued by the Commission since the 2000s (Kasparek 2021).

Thus, from 2017 onwards, there was growing evidence that Frontex favoured or supported national border management

practices that contradicted international refugee law, the European Charter of Fundamental Rights and European law. It was also clear that there were high legal and administrative hurdles to holding the agency accountable.

Scandals

Leggeri's resignation proved that the criticism of the agency after the summer of migration had been justified. The massive expansion of the agency's competences and budget in the absence of control and oversight accelerated a development in which the agency and especially its executive director apparently felt that they were untouchable and that the end - stopping migration to Europe - justified the means - particularly violent pushbacks. This was also reflected in the fact that the agency apparently began to move beyond the law in other activities as well.

The creation of a *toxic workplace environment* in the agency as described above seems to be the least of the accusations. Leggeri also deliberately obstructed the recruitment of 40 so-called fundamental rights observers, as required by the 2019 regulation. He was so brazen that even the Commission lost patience with him, which resulted in an exchange of letters worth seeing.[6] Furthermore, it seems that the leadership of the agency deliberately bullied the head of the fundamental rights department in the agency out of office. The latter had repeatedly demanded the withdrawal of Frontex from operations in which fundamental rights were obviously violated. But Leggeri did not want to comply with these demands. The head was then apparently cold-called, and her post effectively remained vacant for many months and was only filled by a confidant of the executive director in autumn 2020.

The process of creating the agency's standing corps, i.e. 10,000 border guards by 2027, was also fabulously botched.[7] Applicants were first told that they would be hired, then the next day they were turned down by email. When they arrived in Warsaw, they were parked in the barracks of the Polish Border Guard and forgotten. And because of the failure to create a hygiene concept, the corona virus spread among the new recruits. The agency also failed to create regulations that would allow reserve members to own, carry and transit firearms. It is also alleged that the agency spent millions on dysfunctional software and never took recourse against the manufacturers.

In the autumn of 2020, the first media reports emerged,[8] which addressed these events,[9] but above all the question of the agency's involvement in pushbacks. It is not clear whether it was these reports that brought the anti-corruption authority OLAF onto the scene. In any case, OLAF searched the offices of Leggeri and his office manager in early December 2020, seized extensive documents, sealed the rooms and questioned agency staff. This was the beginning of OLAF's investigation, which led to the more than 200-page report that ultimately prompted Leggeri's resignation.

However, it was a long road until then. The agency's management board launched a quick internal investigation into the allegations, but could neither confirm nor refute some of the allegations. Apparently, the agency had not handed over all the necessary documents to its own board. The investigation in the LIBE Committee of the European Parliament by the *Frontex Scrutiny Working Group* also led to the ambivalent result that a direct involvement of the agency in pushbacks could not be confirmed, but that the agency definitely knew about pushbacks and did not

do anything about it. There were also various investigations by the European Ombudsperson.

Leggeri maintained all along that the accusations were unjustified, brazenly claiming that pushbacks do not occur at all in the Aegean. This despite the fact that even the UNHCR estimates many hundred cases per year.[10] Leggeri refused all attempts at clarification and only made concessions where there was no other way. In April 2022, OLAF finally completed the report in question and handed it over to the agency's Board of Directors. There it lay for several weeks until further media reports[11] were able to show, through a clever combination of f*reedom of information requests* to an internal database of the agency with activist documentation that Frontex not only tolerates and tacitly accepts pushbacks in the Aegean, but also systematically erases this knowledge from its own databases. At this point, the pressure was finally too much. The board of directors, which met a few days after these important revelations, decided to open disciplinary proceedings against Leggeri. He forestalled this by resigning.

Does European law apply at Europe's borders?

On the occasion of his resignation, Leggeri turned to his staff for the last time. In a letter, he lamented that a new narrative about the agency had been established over the past two years. He maintains that the mandate from the 2019 regulation mandated him to create the EU's first uniformed service to assist member states in border management. The new narrative, however, were “that Frontex’s core mandate should be transformed in practice into a sort of Fundamental Rights Body” that were to monitor what member states do at the EU's external border. However, this

was not compatible with him, which is why he claimed he was forced to resign.

This openly displayed disregard for the validity of fundamental rights in the European Union underlines why Leggeri was unacceptable as the executive director of a European agency. For it must of course not be the case that the director of a European agency perceives fundamental rights as an imposition and refuses to stand up for them. Fundamentally, however, Leggeri actually points to a tension that has characterised the European migration and border regime from the beginning. With the creation of a common European border policy and a Europeanised border through the Schengen Agreements and above all through the Treaty of Amsterdam (1997), the EU had also attempted to break away from a model of national, sovereign power at the border. The professionalisation of *border management* through the creation of Frontex and other means, the introduction of supposedly knowledge-based methods of risk analysis, the codification of the law governing the border through the *Schengen Borders Code,* but above all the promise of a highly technologised border, which was to become effective far beyond the actual border line through networked databases and surveillance technologies, was the European promise to the member states.

However, the summer of migration 2015 revealed the inadequacy of such a Europeanised approach. Various member states, such as Greece, Hungary and Poland, reverted to the old modes of sovereign power of the national border. This included the notion that the state had the sole sovereignty to decide on access to national territory and to enforce it by force if necessary. The slow failure of the EU-Turkey deal that had ended the summer of migration in 2016, the forced refugee migration at the Belarus-Poland border, slowly increasing unauthorised border crossings in

the Balkans therefore led to a creeping normalisation and systematisation of this violence in the form of pushbacks in recent years.

What is currently fatal, however, is that these old rationalities have been combined with the new surveillance technologies to form a machine of systematic and daily pushbacks. The cooperation of the Frontex agency under Executive Director Leggeri with the national border control institutions represents precisely this connection. Often Frontex only provides the information about boats or groups of people on the move, which the agency gains through its surveillance capacities. The dirty and illegal work of pushbacks is then left to member state institutions such as the Greek Coast Guard or even such dubious entities such as the so-called *Libyan Coast Guard*, a militia of the Libyan civil war that switched to migration control at the financial incentive of the EU. And as we have shown in another article, the return to old, Westphalian notions of what constitutes effective border management can also be seen in the drafting process of the 2019 regulation (Kasparek and Karamanidou 2022).

Is it really too much to ask that a European *law enforcement agency* be obliged to enforce European law at the borders of Europe? This is only ostensibly a rhetorical question, because this is precisely the banal requirement that Leggeri no longer wanted to meet. Pushbacks, disproportionate detention of asylum seekers, violence against fleeing persons are not permissible, especially under European law, and are often even subject to criminal prosecution. The agency knows about these daily violations of European law, but it supports and covers up for the perpetrators in a supposed gesture of European solidarity.

This means, however, that the crisis of the rule of law in the EU has a third arena: Europe's borders. For neither Frontex nor the Commission, which could have long since insisted on compliance with European law through infringement proceedings, seem to feel responsible for defending the European rule of law at Europe's borders. Even from the perspective of liberal democracy, this constellation poses a fundamental problem.

Defund Frontex

In my book "Europe as Border" (Kasparek 2021), an ethnography of the agency Frontex, I also trace the long line of co-production between the European project and the European border. In my opinion, the fundamental misery of European migration policy lies in the fact that the EU committed itself about two decades ago to shaping migration policy primarily through the technology of the border and thus to externalising it. But migration policy is always also about governing societies, and should have been negotiated accordingly with regard to the future of European societies. Instead, a supposedly apolitical and technology-oriented agency was created that has since become uncontrollable and poses a threat not only to the rule of law in Europe but also to the democratic character of the European project.

Therefore, a fundamental reform of the agency is indispensable. The core of the reform must be a withdrawal of competences and budget, for example in order to finally create and finance a European civilian sea rescue mechanism. And the task of initial reception and registration of protection seekers at Europe's borders must not necessarily be carried out by border guards either. Moreover, the agency must be forced to disclose its internal model of knowledge production, the so-called risk analysis, and have it

independently audited. For, as I have been able to show, its model is riddled with anti-migrant presumptions. However, the most important point of the reform must indeed be that the agency submit to the fundamental rights and laws that apply in the EU and for the agency to also enforce them pro-actively at Europe's borders. In this way, the violence of Europe's borders, the undeclared war against migrants, could finally be brought to an end and the fatal European entanglement between migration policy and the border would cease.

Leggeri's resignation is certainly not suitable to solve these structural problems of European border and migration policy, indeed of the European project as a whole. Rather, what is needed now is a fundamental debate on the way Europe wants to relate to the rest of the world. But such a debate will not come on its own; it is already clear that the Commission, for example, is very quick to place all the blame solely on Leggeri's person, thus nipping structural debates about the future of the European border in the bud. However, anyone who believes that such a debate is necessary (and has Swiss citizenship) should vote NO on 15 May.[12]

Literature

Fink, Melanie. 2018. *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' Under the ECHR and EU Public Liability Law*. First Edition. Oxford Studies in European Law. Oxford & New York: Oxford University Press.

Karamanidou, Lena, and Bernd Kasparek. 2020. „Fundamental Rights, Accountability and Transparency in European Governance of Migration: The Case of the European Border and Coast Guard Agency FRONTEX". RESPOND Working Paper 2020/59.

RESPOND Working Papers - Global Migration: Consequences and Responses.

Kasparek, Bernd. 2021. *Europa als Grenze. Eine Ethnographie der Grenzschutz-Agentur Frontex*. Kultur und soziale Praxis. Bielefeld: transcript Verlag.

Kasparek, Bernd, and Lena Karamanidou. 2022. „What is in a name? Die europäische Grenzschutzagentur Frontex nach dem Sommer der Migration“. In *Von Moria bis Hanau - Brutalisierung und Widerstand*, edited by Valeria Hänsel, Karl Heyer, Matthias Schmidt-Sembdner, and Nina Violetta Schwarz. Grenzregime 4. Berlin Hamburg: Assoziation A.

Semsrott, Arne, and Luisa Izuzquiza. Letter. 2018. „Recommendations for Greater Transparency of Frontex Activities“, 26. November 2018.

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[1] http://no-racism.net/article/2604

[2] https://youtu.be/GjEWq0Cngrk

[3]h ttps://forensic-architecture.org/investigation/the-left-to-die-boat

[4] https://alarmphone.org

[5] https://www.borderviolence.eu

[6] https://www.statewatch.org/media/1708/eu-com-letter-to-frontex-18-12-20.pdf

[7] https://www.politico.eu/article/frontex-growing-pains-europe-migration-border-coast-guards-hiring-chaos/

[8] https://www.spiegel.de/international/europe/eu-border-agency-frontex-complicit-in-greek-refugee-pushback-campaign-a-4b6cba29-35a3-4d8c-a49f-a12daad450d7

[9] https://www.spiegel.de/international/europe/missteps-and-mismanagement-at-frontex-scandals-plunge-europe-s-border-agency-into-turmoil-a-d11ae404-5fd4-41a7-b127-eca47a00753f

[10]h ttps://www.unhcr.org/mt/15415-unhcr-warns-asylum-under-attack-at-europes-borders-urges-end-to-pushbacks-and-violence-against-refugees.html

[11]h ttps://www.spiegel.de/international/europe/frontex-involved-in-illegal-pushbacks-of-hundreds-of-refugees-a-9fe90845-efb1-4d91-a231-48efcafa53a0

[12] https://frontex-referendum.ch/