Maastricht University
Faculteit der Rechtsgeleerdheid

Maastricht Centre
for European Law

Frontex's Accountability for Fundamental Rights Violations: Redressing the Action for Damages as a Fundamental Rights Remedy

Tânia Ribeiro Coelho

MCEL Master's Thesis Series
No 2026/09

MILE
- Jean Monnet Chair -

Co-funded by
the European Union

This paper was produced as part of a master's thesis project on migration, co-organised in 2024–2025 by the Maastricht Centre for European Law and the Jean Monnet Chair on European Migration Law and Governance.

The MCEL Master's Thesis Series seeks to give excellent students the opportunity to publish their final Master's theses and to make their work accessible to a wide audience.

Those wishing to submit papers for consideration are invited to consult our website and to send their work to mcel@maastrichtuniversity.nl.

Published in Maastricht, March 2026

Faculty of Law
Maastricht University
Postbox 616
6200 MD
Maastricht
The Netherlands

This paper is to be cited as MCEL Master's Thesis Series 2026/09

Abstract

Frontex has become one of the most relevant actors in the EU external border management. Its mandate, powers and resources have increased significantly, as have the challenges concerning its compliance with fundamental rights. However, despite several reports of serious and persisting violations of fundamental rights, effective judicial accountability remains limited within the EU's system of remedies.

This thesis explores the potential and limitations of the action for damages under Article 340(2) TFEU as a mechanism to hold Frontex accountable for fundamental rights violations. It argues that, although traditionally understood as a mechanism primarily aimed at compensating for economic loss, the action for damages may be the only tool available to address the accountability gap in the specific case of Frontex, and more broadly in situations where fundamental rights violations arise from the informal or factual conduct of EU bodies, which often escapes judicial review under other EU procedural mechanisms. This thesis analyses the three cumulative conditions for EU non-contractual liability - unlawfulness, damage and causal link -, and the attribution of conduct in multi-actor environments in the specific context of fundamental rights.

It concludes that, while the action for damages has significant potential as a fundamental rights remedy, its effectiveness is undermined by a highly restrictive judicial interpretation. However, if the CJEU were to adapt the traditional thresholds of the EU non-contractual liability regime to the specificities of fundamental rights and align its case-law with the ECtHR standards, the action for damages could play a decisive role in closing Frontex's accountability gap for fundamental rights violations.

Table of Contents

1 Introduction

1.1 Problem statement

The European Border and Coast Guard Agency ('Frontex') is an EU agency that supports Schengen states in the management of their external borders. While the Member States retain the primary responsibility for the management of their borders, the agency reinforces, assesses and coordinates their actions by providing technical and operational assistance[1]. Since its establishment, Frontex has become one of the most relevant actors in the EU external border management. Its powers, technical, human and financial resources have increased significantly. Since the 2019 European Border and Coast Guard Regulation ('EBCG Regulation') the agency has its own standing corps with executive powers[2].

Despite several reports of serious and persisting fundamental rights violations[3], the expansion of Frontex's powers has not, however, been accompanied by new accountability mechanisms or reforms to the EU's system of remedies. While Member States can be held accountable before their own national courts and other international courts, Frontex can only be held liable before the Court of Justice of the European Union ('CJEU')[4], making it crucial to (re)address the legal remedies available under the Treaties.

Unlike the European Court of Human Rights' ('ECtHR') complaints system, the EU's procedural architecture poses considerable obstacles for individuals to challenge fundamental rights violations. For instance, preliminary rulings under Article 267 of the Treaty on the Functioning of the European Union ('TFEU') do not offer direct access to individuals and depend on the discretion of national courts. The action for failure to act under Article 265 TFEU is hampered by strict admissibility criteria. The action for annulment under Article 263 TFEU is limited by its the standing requirements[5]. In addition, the nature of Frontex's activities poses another challenge: border management activities generally occur in the form of "factual conduct" and do not involve the adoption

[1] Article 7 Regulation (EU) of the European Parliament and of the Council 2019/1896 of Nov. 13, 2019, on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L 295/1.

[2] Recital 5 EBCG Regulation.

[3] There have been several investigations in the recent years regarding Frontex's violations of fundamental rights. See in more detail European Ombudsman, 'Decision closing own-initiative inquiry OI/9/2014/MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex)' OI/9/2014/MHZ (4 May 2015) https://link.europa.eu/tx77dv [accessed 25 August 2025]; European Parliament, 'Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations' (14 July 2021) https://www.europarl.europa.eu/cmsdata/238156/14072021%20Final%20Report%20FSWG_en.pdf [accessed 25 August 2025]; European Anti-Fraud Office, 'Final Report' CASE No OC/2021/0451/A1 (October 2022).

[4] The competence to rule on the Union's liability lies with the CJEU, according to Article 268 TEU. In regard to Frontex, the CJEU's competence is conferred by Article 97 (3) EBCG Regulation.

[5] In particular to prove a direct and individual concern, see Case C-25/62 *Plaumann v Commission* [1963] ECLI:EU:C:1963:17.

of legally binding acts[6]. These constrains render it extremely difficult, if not virtually impossible, to challenge Frontex's conduct under these remedies[7].

The action for damages under Article 340 (2) TFEU, however, has received limited attention as a fundamental rights remedy, as it is primarily perceived as mechanism to recover economic loss. While this remedy presents some limitations, there has been increasing efforts to turn the action for damages into a fundamental rights remedy[8], since it may be the only tool available to address the accountability gap that arises when EU administration is delivered in the form of "factual conduct".

1.2 Research question and aims

It is in light of this background that this thesis answers the following question: *What is the potential and what are the limitations of the action for damages under Article 340 (2) TFEU to hold Frontex accountable for fundamental rights violations?*

The action for damages is provided for in Article 340 (2) TFEU, which reads that "[…] the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties". Yet, while EU law provides an explicit legal basis for the Union's liability, it does not comprehensively define the conditions under which liability is triggered. Instead, it leaves this task to the Court. The Court has consistently held that to establish liability three cumulative conditions are required[9]:

1. the unlawfulness of the conduct,
2. the occurrence of a damage on the part of the victim, and
3. a causal relationship between the unlawful conduct and the damage pleaded.

The Court has not yet, however, developed an approach to the action for damages that is tailored to fundamental rights violations and applies these conditions in the same way as it does for other breaches of EU law[10]. This thesis, therefore, aims to offer a

---

[6] Discussing the legal remedies available to challenge factual conduct: Florin Coman-Kun, 'Legal Protection against Fundamental Rights Breached through Factual Conduct by the European Union' in in Melanie Fink (ed.), *Redressing Fundamental Rights Violations by the EU: The Promise of the 'Complete System of Remedies'* (Cambridge University Press 2024) 318-324.

[7] The limitations of the action for failure to act and the action for annulment to challenge Frontex's wrongdoings were confirmed in recent cases. See Case T-282/21 *SS and ST v. Frontex* [2022] ECLI:EU:T:2022:235; Case T-600/22 *ST v Frontex* [2023] ECLI:EU:T:2023:776.

[8] The potential of liability law to address fundamental rights breaches has been discussed by Angela Ward, 'Damages under the EU Charter of Fundamental Rights' (2012) 12 ERA Forum 589; Nina Półtorak, 'Action for Damages in the Case of Infringement of Fundamental Rights by the European Union' in Ewa Bagińska (ed), *Damages for Violations of Human Rights: A Comparative Study of Domestic Legal Systems* (Springer 2016); Fink M, *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford University Press 2018); Clara Rauchegger, 'Article 47: Damages for Breach of the Charter as a Remedy under the First Paragraph of Article 47' in Steve Peers and Others (eds), *The EU Charter of Fundamental Rights: A Commentary* (2nd edn., Hart 2021); Melanie Fink, Clara Rauchegger and Joyce De Coninck, 'The Action for Damages as a Fundamental Rights Remedy', in Melanie Fink (ed.), *Redressing Fundamental Rights Violations by the EU: The Promise of the 'Complete System of Remedies'* (Cambridge University Press 2024).

[9] The first clear statement of the Court on the conditions requires for the occurrence of liability can be found in Case C-4/69 *Alfons Lütticke GmbH v Commission of the European Communities* [1971] ECLI:EU:C:1971:40 para 10.

[10] Melanie Fink, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable'(2020) 21 (3) *German Law Journal* 532-548.

comprehensive assessment on what these conditions are, what they could be, and how they should be applied by the Court in cases of fundamental rights violations committed by Frontex. In addition, this thesis aims to address what are the rules to allocate liability in multi-actor environments, where more than one actor and more than one conduct can contribute to the damage.

1.3 Methodology and sources

To answer the research question, this thesis adopts a doctrinal methodology[11]. This methodology allows to gather the relevant legal sources, analyse them and apply those findings to answer the research question. In addition, this thesis adopts a normative approach, seeking not only to analyse what the law *is*, but also the law *ought to be*.

Regarding the sources, primary sources of law will be analysed, in particular Article 340 (2) TFEU, but also other relevant provisions of the EU Treaties, the EU Charter of Fundamental Rights ('Charter' or 'CFR')[12], and the EBCG Regulation. The relevant CJEU case-law on Article 340 (2) will be analysed, as well as the case-law of the ECtHR, since the question of liability rights violations has been dealt more extensively by this Court than by the CJEU. Secondary sources on the topic will also be analysed.

1.4 Structure

This thesis is divided into four chapters. Chapter I analyses the "unlawfulness" of the conduct as a condition for EU fundamental rights liability. Chapter II focuses on the "damage" and, in particular, the challenges of evidentiary standards. Chapter III addresses the "causal link" between the unlawful conduct and the damages, in particular the distinction between attribution and causation. Chapter IV focuses on the "attribution" of the unlawful conduct to the responsible actor, in light of the multi-actor environment in which Frontex and the Member States operate. Each chapter is followed by interim conclusions.

[11] Regarding the chosen methodology see Laura Lammasniemi, *Law Dissertations A Step-by-Step Guide* (2nd edn, Routledge 2021) 66–67.
[12] Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.

2 Unlawfulness as a condition for fundamental rights liability

For EU liability to arise, there must first be an unlawful conduct on behalf of the EU. The condition of unlawfulness has changed considerably over time. The Court's early case-law had established that for administrative conduct the simple unlawfulness was sufficient for liability to arise, whereas liability for legislative conduct could only be triggered in case of a "sufficiently flagrant violation of a superior rule of law for the protection of the individual". This was the so-called *Schöppenstedt* test[13]. However, *Bergaderm*[14] marked two important changes. The Court established that a rule does not need to be superior to give rise to liability. This means that liability can arise from breaches of *any* provision binding under EU law, including fundamental rights obligations guaranteed in the Charter, as general principle of Union law, or developed in secondary legislation[15]. Moreover, it abandoned the dichotomy between legislative and administrative measures and determined that the "sufficiently serious breach" requirement was to be applied to all measures. In *Bergaderm*, the Court therefore established that the condition of unlawfulness is qualified in two ways:

1. the rule infringed must be intended to confer rights on individuals and
2. the breach must be sufficiently serious[16].

2.1 Provisions intended to confer rights on individuals

While the Court gives little guidance as to the precise characteristics to qualify a rule as one "intended to confer rights on individuals", the Court has interpreted this condition quite generously[17].

The most important requirement is that the provision at stake serves the protection of individuals, rather than the general public[18]. The inclusion of individuals within a provision's protective scope is, however, a matter of degree[19]. In *Kampffmeyer*, the Court clarified that a provision can be considered as conferring rights on individuals, even if their protection is not its sole purpose[20]. The main requirement is that the rule

[13] Case C-5/71 *Zuckerfabrik Schöppenstedt v Council* [1971] ECLI:EU:C:1971:116, para 11.
[14] Case C-352/98 P *Bergaderm and Goupil v Commission* [2000] ECLI:EU:C:2000:361.
[15] For comprehensive analysis of the Court's case-law in this regard see Fink, *Frontex and Human Rights* (n 8) 239-242.
[16] Case C-352/98 P *Bergaderm* (n 14), para 42.
[17] Sacha Prechal, 'Protection of Rights: How Far?' in Sacha Prechal and Bert van Roermund (eds), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford University Press 2008) 178; For a detailed analysis of the Court's case-law in this area, see also Pekka Aalto, *Public liability in EU law: Brasserie, Bergaderm and beyond* (Hart Publishing 2011) 111–132, 158–176.
[18] Case T-415/03 *Cofradía de pescadores "San Pedro" de Bermeo and Others v Council* [2005] ECLI:EU:T:2005:365, para 86; Prechal (n 16) 163-164.
[19] Prechal (n 17) 265.
[20] The Court pointed out that "the fact that [the interests at stake] are of a general nature does not prevent their including the interests of the individual undertakings such as the applicants', see Joined Cases 5, 7, 13-24/66 *Kampffmeyer and Others v Commission* [1967] ECLI:EU:C:1967:31, p 262-263; This wide interpretation has been confirmed in other cases, such as Joined Cases C-178/94 to C-190/94 *Dillenkofer and Others v Bundesrepublik Deutschland* [1996] ECLI:EU:C:1996:375, para 39; Case T-341/07 *Sison v Council* [2011] ECLI:EU:T:2011:687, para 47; Case T-437/10 *Gap granen & producten v Commission* [2013] ECLI:EU:T:2013:248, para 22.

conferring rights on individuals has the protection of individuals as its dominant purpose[21].

While it is indisputable that EU fundamental rights have been developed first and foremost with the protection of the individual in mind, this requirement has to be established for each right specifically[22].

2.1.1 The Charter of Fundamental Rights

For instance, not all provisions of the Charter articulate rights, as one may assume. The Charter differentiates between rights and principles. Article 52 (5) states that principles, as opposed to rights, require an implementation by legislative or other acts and "shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality". In essence, principles contain obligations that may only be transformed into judicially cognisable rights through legislation, whereas rights already protect "directly defined individual legal situations"[23]. Thus, only violations of Chater rights trigger the EU's liability, whereas principles do not.

The Charter itself does not assign the provisions therein to the categories of rights or principles. Nonetheless, the rights guaranteed by the Charter that are usually at stake during Frontex's operations, such as the right to life (Article 2), the prohibition of torture and inhuman treatment of torture (Article 4), the right to private and family life (Article 7), the right to asylum (Article 18), the prohibition of *refoulement* (Article 19) are considered subjective rights that individuals may rely on to seek compensation for damages suffered as a result of a breach thereof[24].

2.1.2 Secondary legislation

Besides breaches of fundamental rights obligations enshrined in the Charter, the EU's liability can also arise from breaches of fundamental rights obligations developed in secondary legislation. Thus, provisions of the EBCG Regulation, as well provisions from other related instruments, could give rise to liability, as long as they have the protection of individuals as main purpose.

2.2 Sufficiently serious breach

A breach of Union law does not lead to liability, "however regrettable that unlawfulness may be", unless it qualifies as "sufficiently serious"[25]. This decisive test

---

[21] For instance, this criterion seems to have motivated the Court to deny the existence of individual rights in Case C-222/02 *Peter Paul and Others v Bundesrepublik Deutschland* [2004] ECLI:EU:C:2004:606.
[22] Ward (n 8) 598.
[23] Case C-176/12 *Association de médiation sociale* [2013] ECLI:EU:C:2013:491, Opinion of AG Cruz Villalón, para 68.
[24] Fink, *Frontex and Human Rights* (n 8) 244; while the nature of the right to asylum is disputable, the interpretation of the right to asylum as a subjective right has significant support in the literature, see in more detail María-Teresa Gil-Bazo, 'The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's law' (2008) 27 (3) Refugee Survey Quarterly 33; Salvatore Fabio Nicolosi, 'Going Unnoticed? Diagnosing the Right to Asylum in the Charter of Fundamental Rights of the European Union' (2017) 23 European Law Journal 94.
[25] Case T-384/11 *Safa Nicu Sepahan v Council* [2014] ECLI:EU:T:2014:986, para 50; Case C-440/07 P *Commission v Schneider Electric* [2009] ECLI:EU:C:2009:459, para 160; Joined Cases C-501/12 to C-506/12, C-540/12 and C-541/12 *Specht and Others* [2014] ECLI:EU:C:2014:2005, para 99; Case C-118/08 *Transportes Urbanos y Servicios Generale* [2010] ECLI:EU:C: 2010:39, para 30.

refers to whether the Union "manifestly and gravely disregard the limits of their discretion"[26]. In the general public liability regime, this criterion consists of two components. The first one is the extent of discretion the authority enjoys. The second one is the obviousness ("manifestly") and reprehensibility ("gravely") of the breach. However, if this criterion is applied to fundamental rights, it means that there is unlawful breaches of fundamental rights that lead to damages but may not be "obvious or reprehensible enough" for liability to arise.

The extent of discretion of public authorities, in the context of fundamental right discretion, is limited. Article 52 (1) CFR establishes that any interference must be provided for by law and requires interference to be necessary and proportionate to the aims pursued. The Court itself has consistently held that in the context of fundamental rights, discretion of public authorities is considerably reduced or even non-existence[27]. Therefore, during Frontex's operations, authorities are usually considered to act with little to no discretion to interfere with fundamental rights.

The central issue of this condition is whether a mere breach of fundamental rights automatically qualifies as sufficiently serious *per se* or whether it also needs to be qualified as obvious and reprehensible to trigger liability.

2.2.1 The CJEU's inconsistent approach

The Court has not been clear on whether the "sufficiently serious breach" test applies in fundamental rights cases.

In some cases, the Court considered that a mere breach of fundamental rights qualified as sufficiently serious *per se,* either because public authorities already enjoy discretion in the area of fundamental rights[28] or because fundamental rights law already includes a balancing exercise in determining whether a breach has occurred[29]. The later argument refers the "test" set out in Article 52 (1) CFR.

In such cases, the Court does not seem to establish any additional criteria that needs to be fulfilled to consider that an interference with fundamental rights going beyond what is permissible under Article 52 (1) CFR is sufficiently serious. The Court usually assesses whether the interference at stake was "disproportionate and intolerable" or "disproportionate and unacceptable"[30]. If the "and" is read as a confirmation rather than an additional requirement, this would suggest that any

[26] Case C-352/98 P *Bergaderm* (n 14) para 43.
[27] Case C-440/07 P *Schneider* (n 25) para 166; Case T-384/11 *Safa Nicu* (n 25) paras 32-36, 60.
[28] Case T-48/05 *Franchet and Byk v Commission* [2008] ECLI:EU:T:2008:257, para 219; Case T-138/14 *Chart v EEAS* [2015] ECLI:EU:T:2015:981, para 114; Case T-217/11 *Staelen v European Ombudsman* [2015] ECLI:EU:T:2015:238, para 86; Case T-412/05 *M v European Ombudsman* [2008] ECLI:EU:T:2008:397, para 143.
[29] Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising v Commission and ECB* [2016] ECLI:EU:C:2016:701, paras 69-70; Case C-611/12 P *Giordano v Commission* [2014] ECLI:EU:C:2014:2282, para 49; Case T-16/04 *Arcelor v Parliament and Council* [2010] ECLI:EU:T:2010:54, para 153; Joined Cases C-120/06 P and C-121/06 P *FIAMM and Others v Council and Commission* [2008] ECLI:EU:C:2008:476, paras 183-184; Case C-295/03 P *Alessandrini and Others v Commission* [2005] ECLI:EU:C:2005:413, para 86; Case T-30/99 *Bocchi Food Trade International v Commission* [2001] ECLI:EU:T:2001:96, para 80.
[30] Joined Cases C-120/06 P and C-121/06 P *FIAMM* (29), paras 183-184; Case T-16/04 *Arcelor* (n 29), para 153; Case C-295/03 P *Alessandrini* (n 29), para 86; Case T-30/99 *Bocchi Food* (29), para 80.

disproportionate interference, i.e. a mere breach, is intolerable or unacceptable, hence obvious and reprehensible enough to make the breach at stake sufficiently serious[31].

In other cases, however, the Court suggested that even if a breach of fundamental rights was found to exist, that breach would only give rise to liability if it was obvious and reprehensible[32]. The General Court has also implied this view when it noted that neither the Chater nor the European Convention on Human Rights ('ECHR')[33] "preclude that the Community's non-contractual liability be made subject [...] to the finding of a sufficiently serious breach of the fundamental rights invoked by the applicant"[34].

Thus, the Court's case-law does not allow more general conclusions as to whether, or under what circumstances, it would consider fundamental rights violations that occur during Frontex's operations as sufficiently serious *per se*. However, it has been argued in the literature that this could depend on the type of rights involved[35]. If that's the case, the violation of fundamental rights committed during Frontex's operations could automatically be considered sufficiently serious, given the nature of the rights at stake.

Nevertheless, even if the Court would require fundamental rights violations to be obvious and reprehensible to be considered sufficiently serious, it would have to assess, *inter alia*, the clarity of the provision in question[36]. Some fundamental rights obligations that apply during Frontex's operations have already been clarified either by the EU Agency for Fundamental Rights[37] or by the ECtHR, in particular the obligations that arise from the prohibition of *refoulement*[38]. Since the Court would have to take such clarifications into account, breaches of such fundamental rights are more likely to be considered obvious and reprehensible. This is especially the case in light of Article 52 (3) CFR, which requires the EU to offer the same level of protection as the ECHR in areas

---

[31] If the "and" would be read as being additional that would allow more extensive interferences than Article 52 (1) of the Charter allows. Therefore, the confirmatory reading seems to be the only one in compliance with fundamental rights law. See this argument in Fink, *Frontex and Human Rights* (n 8) 264.

[32] Case T-341/07 *Sison* (n 20), paras 75-80; Case T-351/03 *Schneider Electric SA v Commission of the European Communities* [2007] ECLI:EU:T:2007:212, paras 154-156; Case T-384/11 *Safa Nicu* (n 25), paras 32-36, 60-67.

[33] European Convention on Human Rights [ECHR], Rome, 4 November 1950.

[34] Case T-341/07 *Sison* (n 20) para 81.

[35] Ward (n 8) 267.

[36] In order to determine the obviousness and reprehensibility of a breach, the Court usually analysis, *inter alia*, the clarity of the provision in question, difficulties in its interpretation, the complexity of the situation and its impact on the application of the provision, and the existence of case-law of the Court on that matter. For a detail discussion of each of these components see Fink, *Frontex and Human Rights* (n 8) 244-261.

[37] European Union Agency for Fundamental Rights, 'Fundamental Rights Report 2016' (27 May 2016) https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-fundamental-rights-report-2016-2_en.pdf [accessed 25 August 2025]; European Union Agency for Fundamental Rights, 'Asylum and migration into the EU in 2015' (29 May 2016) https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-fundamental-rights-report-2016-focus-0_en.pdf [accessed 25 August 2025].

[38] See, for example, *Soering v The United Kingdom* App no 14038/88 (ECtHR, 7 July 1989); *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011); *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012); *Tarakhel v Switzerland* App no 29217/12 (ECtHR, 4 November 2014).

where the Charter guarantees the same rights. Thus, despite the Court's case-law being unclear and inconsistent, violations of fundamental rights that occur in the context of Frontex's operations are likely to be considered as sufficiently serious, regardless of whether the test applies or not.

2.2.2 The problem of the "sufficiently serious breach" test in the fundamental rights context

This thesis argues, nevertheless, that the "sufficiently serious breach" test should not be applicable to the fundamental rights context for three reasons[39].

First, the right to an effective remedy under Article 47 CFR requires the Union to make complaint mechanisms available for any rights violations, regardless of whether they are "serious" or not[40]. In the context of Frontex's operation, most of border management activities occur in the form of factual conduct, meaning that their lawfulness is not reviewable under the action for annulment. Therefore, if the "sufficiently serious breach" test is applied in the context of fundamental rights, factual conduct may, in light of the virtual absence of other alternative available procedures, escape judicial review altogether. This could constitute a possible violation of Article 47 CFR and contravene the "complete system of remedies" that the CJEU prides itself to have established[41]. In this regard, some scholars argue for a more lenient approach of the conditions for the EU's damages liability on the basis of Article 47 CFR by refraining from applying the "sufficiently serious breach" requirement under certain circumstances[42].

Second, this requirement is unnecessary for the fundamental rights context. The rationale behind the "sufficiently serious breach" test is to ensure the "room for manoeuvre and freedom of assessment" that public authorities need to fulfil their functions in the general interest whilst ensuring that third parties do not "bear the consequences of flagrant and inexcusable misconduct"[43]. However, a fundamental rights analysis already includes a balancing exercise between individual and public interest, pursuant Article 52 (1) CFR, making it unnecessary to repeat this exercise under the "sufficiently serious breach" test[44].

Third, the factors that the CJEU uses to determine a "sufficiently serious breach", may also be unsuitable for fundamental rights. In particular, the clarity of the provision requirement poses a significant challenge to EU liability for fundamental rights violations arising from EU conduct. To be applicable, abstract fundamental right must generally be "translated" into concrete fundamental rights obligations. This process of

[39] Fink, Rauchegger and De Coninck, 'The Action for Damages as a Fundamental Rights Remedy' (n 8) 49-53.
[40] On the right to an effective remedy as guaranteed in Article 47 of the Charter see Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1200–1201.
[41] Since *Les Verts*, the CJEU has consistently held that the Treaties on which the EU is based have established a "complete system of legal remedies" designed to ensure effective judicial protection. See Case C-294/83 *Les Verts v European Parliament* [1986] ECLI:EU:C:1986:166, para 23.
[42] Timo Rademacher, 'Factual Administrative Conduct and Judicial Review in EU Law' (2017) 29 European Review of Public Law 430-435.
[43] Case T-351/03 *Schneider* (n 32) para 125; Case C-392/93 *The Queen v H.M. Treasury, ex parte British Telecommunications* [1996] ECLI:EU:C:1996:131, para 40.
[44] This balancing exercise can be inferred from several cases cited above (n 29).

concretisation has largely taken place in relation to the Member States, either by the CJEU's case-law, by the case-law of domestic constitutional courts by virtue of Article 52 (4) CFR, or by the ECtHR by virtue of Article 52 (3) CFR. However, it is still unclear whether this process of concretisation is tailored for non-state actors, like Frontex[45]. The lack of case-law on the EU as a duty-bearer of fundamental rights obligations can constitute a significant barrier to this test.

Therefore, the Court should adopt an approach tailored to fundamental rights and determine that fundamental rights violations are always sufficiently serious.

2.3 Interim conclusions

As analysed in this section, liability can arise for breaches of *any* provision that is binding under EU law, as long as such provisions are intended to "confer rights on individuals". The most important requirement is that the provision relied on must have the protection of individuals as its main purpose, which must be established in *casu*. In addition, it was found that the rights guaranteed by the Charter that are usually at stake during Frontex's operations, may be considered subjective rights that individuals can rely on to seek compensation for damages suffered as a result of a breach thereof.

However, the core obstacle encountered in lodging a successful action for damages concerns the Court's insistence on the "sufficiently serious breach" test. While liability law in general is flexible enough to argue that fundamental rights are automatically sufficiently serious, the Court's case-law does not allow an assumption that this is always the case. This raises serious concerns to the fundamental rights context. First, it is incompatible with the right to an effective remedy enshrined in Article 47 CFR, given that, in light of the virtual absence of other remedies, fundamental rights violations that do not meet the threshold of this test would remain unchallenged. Second, a fundamental rights analysis already in itself includes a balancing exercise between individual and public interest. Thus, the test is deemed unnecessary when fundamental rights violations are concerned. Third, there is still a significant uncertainty surrounding the scope of the EU's specific fundamental rights obligation, which makes it nearly impossible to meet the clarity requirement employed by the Court to determine whether a "sufficiently serious breach" has occurred. The Court should, therefore, adopt a consistent approach and determine that fundamental rights violations are always *per se* sufficiently serious.

[45] For a practical example of this limitation see Case C-136/24 P *Hamoudi v Frontex* [2025] ECLI:EU:C:2025:257, Opinion of AG Norkus, para 62.

3 Damage and the unattainable evidentiary standards

In addition to the unlawful conduct, the EU's liability requires a damage on the part of the victim. It is settled case-law that the damage has to be actual and certain, meaning that it cannot be hypothetical or future, unless it is established that it will occur[46]. It is sufficient that the existence of the damage is certain, even if the amount is not[47].

The damage may be material, i.e. a reduction of the person's assets or a loss of profit, and the compensation ideally restores the monetary situation to what it would have been in the absence of the unlawful conduct, or non-material, i.e. damage which can consist of physical or mental suffering, feelings of injustice and frustration, or even injury to reputation[48].

In the fundamental rights context, the breach itself constitutes the damage, which, by its nature, usually consists of non-material harm. Nonetheless, such violations may give result in both material and non-material harm.

The core issue relating to this condition is not the determination of the damage itself, but rather the burden, standards and methods of proof of fundamental rights violations committed during Frontex's operations. In this regard, two core issues are to be given particularly attention: the burden of proof and the principle of the unfettered assessment of evidence.

3.1 The [impossible] burden of proof

The principle of *ei incumbit probatio qui dicit, non qui negat* is a long-standing rule, according to which the damage alleged, and the causal link must be proven by the claimant and not the respondent. However, in certain cases, this general rule may be reversed by shifting the burden of proof to the respondent.

In the Court's case-law some examples can be found where the burden of proof was reversed to give the claimant a fair procedure. For instance, in cases of anti-discrimination and equal treatment[49], the Court has established that where there is a prima facie case of discrimination, the burden of proof shifts to the respondent[50].

---

[46] Case C-611/12 P *Giordano* (n 29) para 36; Case C-243/05 P *Agraz and Others v Commission* [2006] ECLI:EU:C:2006:708, para 27; See referring to the 'actual damage' Case C-51/81 *De Franceschi v Council and Commission* [1982] ECLI:EU:C:1982:20, para 9; Joined Cases 256/80, 257/80, 265/80, 267/80 and 5/81 *Birra Wührer v Council and Commission* [1982] ECLI:EU:C:1982:18, para 9; referring to the 'real and certain damage' Case T-384/11 *Safa Nicu* (n 25) para 70.

[47] Case C-243/05 P *Agraz* (n 46) para 36; CJEU, Case C-611/12 P *Giordano* (n 29) para 40.

[48] For instance, in *Franchet*, the Court awarded EUR 56,000 in compensation for the non-material damage suffered, including the "experienced feelings of injustice and frustration" and "a slur on their honours and their professional reputation on account of the unlawful conduct". See Case T-48/05 *Franchet* (n 28) para 441.

[49] Case C-109/88 *Handels og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss* [1989] ECLI:EU:C:1989:383, paras 52-54; C-127/92 *Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health* [1993] EU:C:1993:859, paras 14-18; C-381/99 *Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG.* [2001] ECLI:EU:C:2001:358, paras 52-54.

[50] The Court's case-law on the reversal of the burden of proof is not limited to anti-discrimination cases and can also be found in cases of consumer protection, see C-175/21 *Harman International Industries* [2022] ECLI:EU:C:2022:895, paras 50 and 72; C-293/04 *Beemsterboer Coldstore Services* [2006] EU:C:2006:162, paras 37-46.

However, the Court has not yet adopted a similar approach to fundamental rights violations committed during Frontex's operations. For instance, in cases of alleged collective expulsion, individuals are in vulnerable positions, usually at sea and without access to communication, whereas Frontex is equipped with surveillance technology and has easier access to the evidence necessary to rebut the claimants' allegations. However, despite the significant challenges that applicants may face in presenting evidence, the Court has not yet developed a tailored approach to burden of proof in these cases.

The obstacles that the burden of proof may present for applicants were raised in *Hamoudi v. Frontex*[51]. The applicant claimed, *inter alia*, that Frontex had specific knowledge of the collective expulsion and failed to report it and to take appropriate measures. In spite of all the evidence presented by the applicant[52] and the official report published by the European Anti-Fraud Office[53] corroborating it, the General Court dismissed the action and found that the applicant failed to prove the damage, as the evidence produced "was manifestly insufficient"[54]. The applicant appealed the order, and the case is now pending before the Court of Justice[55].

The high evidentiary threshold imposed by the Court is disproportionately strict and has received extensive criticism in the scholarship[56]. In contract, in collective expulsion or *refoulement* cases[57], the ECtHR has established that once an applicant has presented prima facie evidence the burden of proof shifts to the respondent State, since the absence of individualised treatment by the respondent State makes it extremely difficult for applicants to provide evidence of their involvement in the events at issue. This prima facie threshold usually requires two elements[58]. First, a specific, consistent, generally coherent and credible individual account. Second, general contextual evidence relevant to the applicant's claim, i.e. official reports that corroborate the version of events submitted by the applicant.

The "impossible proof" that is placed on the claimant under the general principle of the burden of proof ultimately renders the action for damages ineffective. Given the imbalance between the parties in accessing evidence, the Court should reverse the burden of proof in such cases. In particular, to ensure compliance with the ECHR

[51] Case T-136/22 *Hamoudi v. Frontex* [2023], ECLI:EU:T:2023:821.

[52] The applicant relied on the following evidence: i) his own witness statemen; ii) a Bellingcat media article, published on 20 May 2020, and, in particular two YouTube videos included in the article; iii) four colour screenshots taken from those videos; See Case T-136/22 *Hamoudi v Frontex* (n 51) para 37.

[53] European Anti-Fraud Office, Final Report on Frontex (n 3).

[54] Case T-136/22 *Hamoudi v Frontex* (n 51) para. 39.

[55] Case C-136/24 P *Alaa Hamoudi v Frontex* [pending].

[56] Joyce De Coninck, 'Shielding Frontex 2.0: The One with the Impossible Proof', (Verfassungsblog, 30 January 2024) < https://verfassungsblog.de/shielding-frontex-2-0/> accessed 25 August 2025; Antje Kunst, 'Hamoudi v Frontex, an EU Courts pushback case: Shifting the burden of proof and a duty to assist the Court (a duty of candour?)'(EU Law Analysis, 28 February 2025) <https://eulawanalysis.blogspot.com/2025/02/hamoudi-v-frontex-eu-courts-pushback.html> accessed 25 August 2025.

[57] *N.T. v Spain* App no 8675/15 and 8697/15 (ECtHR, 13 February 2020); *M.H. and Others v Croatia* App nos 15670/18 and 43115/18 (ECtHR, 18 November 2021); *G.R.J. v Greece* App no 15067/21 (ECtHR, 3 December 2024); *A.R.E. v Greece* App no 15783/2 (ECtHR, 7 January 2025).

[58] *N.T. v Spain* (n 57) paras 85-86; *M.H. and Others v Croatia* (n 57) para 268; *G.R.J. v Greece* (n 57) para 190; *A.R.E. v Greece* (n 57), paras 214-228.

minimum standards by virtue of Article 52 (3) CFR. The action for damages would benefit if such approach would be adopted by the Court.

In his Opinion, Advocate-General Norkus also emphasised that the burden of proof in cases of collective expulsions cannot be placed on the claimant since "concrete evidence of collective expulsion, if it exists at all, may be [exclusively] in the hands of the alleged perpetrators rather than of the victims"[59].

The Advocate-General then developed three cumulative conditions that must be met to reverse the burden of proof in collective expulsion cases. First, the claimant must have presented prima facie evidence[60]. Second, there must be a clear and structural imbalance between the parties in accessing evidence[61]. In cases of collective expulsions, there is a presumption that the claimant is at a disadvantage in presenting evidence while the respondent is in a more privileged position to rebut the claimant's allegations[62]. However, the presumption was considered to not be applicable to actors other than the Member States, like Frontex, given that such actors have "limited powers" as compared to authorities of a Member State and it is not immediately clear whether they are or not in a more privileged position to rebut the claimant's allegations[63]. Third, the failure to shift the burden of proof must render ineffective the claimant's fundamental rights while a shift would not undermine the respondent's[64].

This Opinion might mark a positive development and pave the way for the CJEU to lower the burden of proof threshold to prima facie evidence. Nevertheless, by not applying the presumption of a clear and structural imbalance between the parties in collective expulsion cases to Frontex, the Advocate-General overlooked the actual imbalance of powers that exist in these types of operations. Frontex undoubtedly has a presumed privileged position in accessing evidence regarding events that take place within operations it coordinates and supervises. Suggesting otherwise undermines Frontex's fundamental rights obligations under the Charter and the EBCG Regulation[65].

This argument is also extended to other fundamental rights violations committed during Frontex's operations, since the imbalance between parties is structural: individuals are inherently in a weaker position to access evidence, whereas Frontex has easier access to evidence directly linked with its activities. The presumption should, therefore, be applicable to Frontex and the burden of proof should be reversed once the applicant presents prima facie evidence. Moreover, the Court should also consider the contextual evidence that corroborates the applicant's version of the facts in line with the ECtHR's approach.

---

[59] Case C-136/24 P *Hamoudi v Frontex*, Opinion of AG Norkus (n 45) para 51.

[60] Ibid para 57.

[61] Ibid para 59.

[62] Ibid para 61.

[63] Ibid para 62.

[64] Ibid para 60.

[65] Antje Kunst, 'Hamoudi v Frontex: Advocate General Norkus' Opinion - Reversing the Burden of Proof and the Presumption of Frontex's Privileged Access to Evidence' (EU Law Analysis, 19 April 2025) <https://eulawanalysis.blogspot.com/2025/04/hamoudi-v-frontex-advocate-general.html> accessed 25 August 2025; Agostina Pirello, 'Tilting the Scales The Burden of Proof When Power Wears an EU Uniform' (Verfassungsblog, 15 May 2025) <https://verfassungsblog.de/tilting-the-scales/> accessed 25 August 2025.

It is clear from this part of the Opinion that there is still some reluctance in applying the Member State's fundamental rights' obligations developed by the ECtHR to non-state actors, which remains a significant barrier to hold Frontex accountable under the action for damages. It would be a welcomed step forward if the Court of Justice took the chance and used its decision to clarify whether this presumption is applicable to Frontex.

3.2 The unfettered assessment of evidence

The principle of the unfettered assessment of evidence is a prevailing principle under EU law, according to which the probative value of evidence is an exclusive prerogative of the Court[66].

It is settled case-law that the evidential value of a document, depends on several factors, such as "the origin of the document, the circumstances in which it was drawn up, the person to whom it was addressed, its content, and whether, according to those aspects, the information it contains appears sound and reliable"[67]. Regarding the witness statements, "their reliability and credibility must […] be borne out by their clarity, precision and overall consistency"[68]. The applicant's own witness statement has little probative value[69].

However, the Court has not adapted these evidentiary standards to the specific obstacles that applicants may face in the context of Frontex's operations. For instance, in *Hamoudi*, the document relied upon concerned the applicant's own statement. The Court dismissed the evidence as unreliable, on the basis that the applicant had not identified the other individuals subject to the expulsion, that he did not remember the exact date of the push-back and that the applicant's statement had been drafted more than one year after the alleged expulsion[70].

This approach is rather restrictive when compared to the ECtHR's case-law. In similar cases, the ECtHR has explained that in assessing the overall credibility of the applicant's claim "there is no necessity for the applicant to prove all facts to such a standard that the adjudicator is fully convinced that all factual assertions are true […]. Where the adjudicator considers that the applicant's story is on the whole coherent and plausible, any element of doubt should not prejudice the applicant's claim"[71]. In such cases, the applicant should be given the "benefit of the doubt". The Court should adapt its approach and lower the probative value of evidence to give applicants the benefit of the doubt.

Furthermore, studies suggest that the impact of trauma and post-traumatic stress in migration-related cases makes it difficult for asylum seekers to recollect coherent and

---

[66] Case T-136/22 *Hamoudi v Frontex* (n 51) para 31; Case T-558/15 *Iran Insurance v Council* [2018] ECLI:EU:T:2018:945, para 153.
[67] Case T-136/22 *Hamoudi v Frontex* (n 51) para 32; Case T-558/15 *Iran Insurance* (n 66), para 154.
[68] Case T-136/22 *Hamoudi v Frontex* (n 51) para 33; Case T-249/20 *Abdelkader Sabra v Council of the European Union* [2022] ECLI:EU:T:2022:140, para 157.
[69] Case T-136/22 *Hamoudi v Frontex* (n 51) para 33; Joined Cases T-533/15 and T-264/16 *Kim and Others v Council and Commission* [2018] ECLI:EU:T:2018:138, para 259; Case T-461/16 *Kaddour v Council* [2018] ECLI:EU:T:2018:316, para 116.
[70] Case T-136/22 *Hamoudi v Frontex* (n 51) para 40-41.
[71] *J.K. and Others v Sweden* App no 59166/12 (ECtHR, 23 August 2016), para 12.

plausible memory, which makes relying on memory to corroborate past events particularly challenging[72]. Scholars argue that this interdisciplinary work between psychology and asylum law should be considered in the credibility assessment made by the Court[73].

Moreover, the fact that the principle of the unfettered assessment of evidence was not subject to the Advocate-General Opinion may be an indication that the CJEU does not intent to adapt such principles to migration-related cases. Therefore, if there is no reversal of the burden of proof, the evidence presented will continue to be dismissed as unreliable, unless the Court adapts its rules on the probative value of evidence.

3.3 Interim conclusions

It follows from the considerations above, that the evidence requirements set in the Court's case-law have not, so far, been adapted to fundamental rights violations and, in specific, for violations that occur during Frontex's operations. The general rules on the burden of proof and the principle of unfettered assessment are deemed unsuitable for these contexts, as they end up limiting the applicant's effective participation and seeking of judicial redress[74]. Thus, the evidentiary rules currently imposed under the general liability regime constitute obstacles to successfully challenging Frontex's involvement in fundamental rights violations under the action for damages, as confirmed in *Hamoudi v Frontex.*

Nevertheless, Article 340 (2) TFEU does not explicitly establish strict criteria as to evidence requirements and leaves the task of conceiving the overall design of the system of evidence in non-contractual liability actions to the Court. There is still a certain room of manoeuvre to adapt the action for damages to the specificities of fundamental rights violations. The action for damages, as provided by the Treaties, is flexible enough to allow the Court to lower the burden of proof to the prima facie evidence and the credibility assessment to the "benefit of the doubt" jurisprudence of the ECtHR. This is especially important under Article 52 (3) of the Charter, which requires the Union to interpret the Charter rights in line with the ECHR and ensure the minimum standards established therein.

[72] Douglas McDonald, 'Credibility Assessment in Refugee Status Determination Credibility Assessment in Refugee Status Determination' (2014) 26 National Law School of India Review 115; Laura Smith-Khan, 'Why refugee visa credibility assessments lack credibility: a critical discourse analysis' (2019) 28 (4) Griffith Law Review 406; Gregor Noll, 'Credibility, Reliability, and Evidential Assessment' in Cathryn Costello, Michelle Foster and Jane McAdam (eds.), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021).

[73] De Coninck, 'Shielding Frontex 2.0' (n 56).

[74] Ljupcho Grozdanovski, 'Evidence as Enabler – or Filter – of Actions Brought by Private Parties Directly before the EU Courts', in Melanie Fink (ed.), *Redressing Fundamental Rights Violations by the EU: The Promise of the 'Complete System of Remedies'* (Cambridge University Press 2024) 70-71.

4 Causal link: the conflated condition

For liability to arise, there must be a causal link between the unlawful conduct and the alleged damage. The CJEU has consistently held that a causal link exists when the infringement of Union law was a necessary and sufficiently direct condition for the damage to occur[75]. In other words, there is no causal link if the same result would have been achieved in the absence of the unlawful conduct[76] or if the breach is too remote or indirect so that the chain of causation is broken[77].

In principle, this applies to fundamental rights violations. However, in most cases, the fundamental rights breach itself is the damage, which makes the damage and causation as a condition for liability unnecessary. The damage and causation typically only play a relevant role where compensation for material damage is (additionally) requested[78].

However, establishing a causal link is more difficult where more than one actor is involved in causing the damage. In the EU's multi-level administration, both the EU and its Member States are responsible for ensuring that fundamental rights are upheld. Thus, when fundamental rights are violated in multi-actor situations, such as Frontex's operations, there may be two potential perpetrators, two courses of conduct, but only one damage to compensate. The assumption would be that this would lead to joint liability for the actors involved. However, in the EU legal system, joint liability is the exception, rather than the rule, which ultimately allows the actors to shift the blame to the others. To address the allocation of liability in such cases, the distinction between attribution and causation must first be clarified.

4.1 The unclear differentiation between attribution and causation

The concepts of attribution and causation fulfil different roles in the allocation of liability. While attribution links the unlawful conduct to the responsible actor, causation links the unlawful conduct and the damage occurred. The tests of attribution and causation are sequential[79]. The author of an unlawful conduct must be identified before it can be assessed whether the unlawful conduct was a sufficiently direct cause for the damage.

Moreover, attribution and causation are assessed at different stages of the proceedings. The attribution of the conduct, to either the EU or a Member State, occurs at the admissibility stage. Since the Court is only competent to rule on the liability of the Union and Union bodies[80], the Court has to establish first whether the conduct

[75] AG Toth, 'The Concepts of Damage and Causality as Elements of Non-contractual Liability' in Ton Heukels and Alison McDonnell (eds), *The Action for Damages in Community Law* (Kluwer Law International 1997) 192; Fink, *Frontex and Human Rights* (n 8) 271.
[76] Case C-319/96 *Brinkmann Tabakfabriken v Skatteministeriet* [1998] ECLI:EU:C:1998:429, para 27-33.
[77] Joined Cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79 *Dumortier v Council* [1979] ECLI:EU:C:1979:223, para 21; Case C-419/08 P *Trubowest Handel and Makarov v Council and Commission* [2010] ECLI:EU:C:2010:147, para 53; Case C-331/05 P *Internationaler Hilfsfonds v Commission* [2007] ECLI:EU:C:2007:390, para 23; Case C-T-107/08 *Transnational Company "Kazchrome" and ENRC Marketing v Council and Commission* [2011] ECLI:EU:T:2011:704, para 80.
[78] Fink, *Frontex and Human Rights* (n 8) 271.
[79] Melanie Fink, 'EU liability for contributions to member states' breaches of EU Law' (2019) 56 (5) *Common Market Law Review* 1235-1237.
[80] Article 268 and 340 (2) TFEU.

complained of is attributable to the Union. If not, the action is considered inadmissible. In contrast, whether or not the unlawful conduct is causally linked to the damage suffered, is to be decided at the substantive stage of the proceedings.

It is worth emphasising that, while attribution is to be addressed at the admissibility stage, the allocation of liability does not appear to be based on attribution rules *stricto sensu*. Instead, the Court usually establishes the origin of the unlawfulness and attributes the damage (not the conduct) to that entity. It allocates liability by "seeking out the action that has the strongest link to the damage"[81].

While the concept of attribution is well developed under international law[82], that is not the case in EU law. In addition to the significant gap in research, the CJEU has not developed a coherent and consistent approach either. In some cases, it conflates the meaning of attribution and causation, using "attribution of conduct" and "attribution of damages" interchangeably[83]. In others, it lists attribution as a fourth (cumulative) condition for the action for damages[84].

The implications that derive from the lack of differentiation between attribution and causation were especially noticeable in *WS and Others v Frontex*[85]. The applicants, despite having declared their wish to apply for international protection upon their arrival to Greece, were returned to Turkey following a joint return operation carried out by Frontex and the national authorities. The General Court concluded that no direct causal link could be established between Frontex's conduct and the alleged damage "since Frontex has no competence either as regards to the assessment of the merits of the return decision or as regards applications for international protection"[86]. The applicant appealed the order, and the case is now pending before the Court of Justice[87].

[81] Fink, *Frontex and Human Rights* (n 8) 276.
[82] International Law Commission, 'Report of the International Law Commission Sixty-third session', UN Doc A/66/10 (26 April-3 June and 4 July-12 August 2011) https://legal.un.org/ilc/documentation/english/reports/a_66_10.pdf [accessed 25 August 2025], outlining the Articles on the Responsibility of International Organizations [hereinafter ARIO].
[83] Case C-175/84 *Krohn v Commission* [1986] ECLI:EU:C:1986:85, paras 19 and 23; Joined Cases C-104/89 and C-37/90 *Mulder and Others v Council and Commission* [1992] ECLI:EU:C:1992:217, para 9; Fink, 'EU liability for contributions to member states' breaches of EU Law' (n 79) 1238-1239.
[84] Case C-282/05 P *Holcim (Deutschland) v Commission* [2007] ECLI:EU:C:2007:226, para 86.
[85] Case T-600/21 *WS and Others v Frontex* [2023] ECLI:EU:T:2023:492.
[86] Case T-600/21 *WS and Others v Frontex* (n 85) para 66.
[87] Case C-679/23 P *WS and Others v Frontex* [pending].

The decision of the General Court was extensively criticised[88]. Indeed, Article 28 2016 EBCG Regulation[89] establishes that Frontex is prohibited from entering into the merits of the decisions, as these remain the solo responsibility of the Member States. However, Frontex's alleged wrongdoing concerned the execution of the return decision, which is a core competence of the agency. By virtue of Article 28, Frontex is required to provide assistance and coordinate return operations, while ensuring that the operations are carried out with the respect for fundamental rights, in particular the principle of non-refoulment.

However, the Court did not separate the return decision from its execution and did not connect each conduct to their proper author. Instead, it sidesteps the question of attribution and did not explain how its findings, that the Member State alone is competent for such decisions, related to its conclusions regarding the lack of causal link.

Following Advocate-General Ćapeta's Opinion, this decision can be interpreted as if the General Court misunderstood the appellant's arguments in the sense that they were challenging the validity of the return decision, rather than Frontex's omission in verifying whether a return decision existed at all[90].

This implies that the Court misapplied the notions of attribution and causations. If Frontex's conduct was the alleged cause of the damage, the Court could not have examined the causal link between the damage and the conduct of a different actor. In order to conclude that Frontex could not cause the damage claimed, the Court would have to start from the alleged inaction of Frontex (test of attribution) and only then assess whether the unlawful was a direct cause to the alleged damage (test of causality).

The Court could have relied upon multiple tests of attribution"[91]. The "effective control" test could result in the attribution of the execution of the return decision to Frontex, and the attribution of the return decision to the Member State. The "normative control" test would entail, instead, that all conduct as a sequence of the return decision

---

[88] Melanie Fink and Jorrit Rijpma, 'Responsibility in Joint Returns after WS and Others v Frontex: Letting the Active By-Stander Off the Hook' (EU Law Analysis, 22 September 2023) <https://eulawanalysis.blogspot.com/2023/09/responsibility-in-joint-returns-after.html> accessed 25 August 2025; Joyce De Coninck, 'Shielding Frontex: On the EU General Court's WS and others v Frontex', (Verfassungsblog, 9 September 2023) <https://verfassungsblog.de/shielding-frontex/> accessed 25 August 2025; Sarah Tas, 'Op-Ed: "Frontex above the law – a missed opportunity for a landmark judgment on Frontex's responsibility with regards fundamental rights violations: WS and Others v Frontex (T-600/21)' (EU Law Live, 20 September 2023) <https://eulawlive.com/op-ed-frontex-above-the-law-a-missed-opportunity-for-a-landmark-judgment-on-frontexs-responsibility-with-regards-fundamental-rights-violations-ws-and-others-v-frontex-t-600-21/> accessed 25 August 2025; Francesca Partipilo, 'The EU General Court's judgment in the case of WS and Others v Frontex: human rights violations at EU external borders going unpunished'(EU Law Analysis, 22 September 2023) <https://eulawanalysis.blogspot.com/2023/09/the-eu-general-courts-judgment-in-case.html> accessed 25 August 2025.

[89] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC [2016] OJ L 251/1 [hereinafter 2016 EBCG Regulation].

[90] Case C-679/23 P *WS and Others v Frontex* [2025] ECLI:EU:C:2025:427, Opinion of AG Ćapeta, paras 60-63.

[91] Explaining the different tests of attribution: Joyce De Coninck, 'Catch-22 in the Law of Responsibility of International Organizations: Systemic Deficiencies in the EU Responsibility Paradigm for Unlawful Human Rights Conduct in Integrated Border Management' (PhD Thesis, Ghent University 2020).

would be attributable to the Member State. Differently, the "competence" test would connect the conduct to the respective actors based on their Union-based competence. The execution of the return decision would be attributed to Frontex, while the return decision would be attributed to the Member State. If the Court had clarified its stance on attribution, each conduct would have been attributed to the right actor, and a flawed assessment of the causal link would have been avoided.

4.2 Interim conclusions

These findings outline the distinction between attribution and causation and the determining roles each of these concepts fulfil in the allocation of liability. These concepts are particularly relevant to the allocation of liability in multi-actor situations, such as Frontex's operations, where there may be two potential perpetrators and two courses of conduct as causes for the same damage.

However, the Court's inconsistent and incoherent approach to these concepts hampers the effectiveness of the action for damages as a fundamental rights remedy. The obstacles and unresolved issues surrounding attribution and causation have been illustrated in *WS and Other*s. The confusion between these two notions, and the lack of stance on each attribution test the Court relied on, resulted in the Court not linking the right conduct to the right actor and thus erroneously assessing the existence of the causal link, ultimately shielding Frontex from accountability for its wrongdoings.

The Court should develop clear rules of attribution and causation, that reflect the respective fundamental rights obligations of both the EU and its Member States, and the interaction between them in areas of multi-level administration.

5 The attribution of conduct in multi-actor environments

Given the Court's incoherent approach, it is unclear how exactly EU liability law deals with situations where more than one actor is involved in fundamental rights violations, i.e. situations of possible joint liability[92]. Against the lack of explicit rules on attribution, this chapter tries to deduce general rules from the case-law and determine the implications of such findings to the allocation of liability in the multi-actor situations in which Frontex operates.

It must first be determined which type of conduct triggers the Union liability. Then, it must be analysed in which circumstances the Union can incur liability for contributing to violations committed by Member States. For that purpose, a distinction must be made between primary liability, i.e. the liability that directly arises from the violations committed by the Member States, and associated liability, i.e. the liability for contributions as such[93].

5.1 Conduct attributable to the Union

The EU only incurs liability if there is a conduct attributable to the EU, i.e. for conduct "caused by its institutions or by its servants"[94].

The institutions referred to are the ones in Article 13 (1) of the Treaty on European Union ('TEU')[95], but also other bodies "established by the Treaty and authorized to act in its name and on its behalf"[96], including Frontex.

The conduct of servants, i.e. staff members, may also give rise to the Union's liability, if they act "in the performance of their duties". In *Sayag v Leduc*[97], the Court clarified the meaning of this formulation and held that it only includes those acts of servants that "by virtue of an internal and direct relationship, are the necessary extension of the tasks entrusted to the institutions". In other words, the person must be an actual staff member of a Union body and objectively carry out tasks for that Union body in the course of which the infringement occurs.

This definition is rather restrictive[98] when compared to the Court's case-law on State liability, according to which beyond acts that are objectively taken in an official capacity, conduct also qualifies as official when it is reasonably perceived as such by the

---

[92] Discussing joint liability: Wouter Wils, 'Concurrent Liability of the Community and a Member State' (1992) 17 European Law Review 191; Peter Oliver, 'Joint Liability of the Community and the Member States' in Ton Heukels and Alison McDonnell (eds), *The Action for Damages in Community Law* (Kluwer Law International 1997); Fink, 'EU Liability for Contributions to Member States' Breaches of EU Law' (n 79); De Coninck, 'Catch-22 in the Law of Responsibility of International Organizations' (n 91); Joyce De Coninck, *The EU's Human Rights Responsibility Gap: Deconstructing Human Rights Impunity of International Organisations*, (Hart Publishing 2024).

[93] See this distinction in Fink, 'EU liability for contributions to member states' breaches of EU Law' (n 79) 1234.

[94] Article 340 (2) TFEU.

[95] Consolidated version of the Treaty on European Union [2012] OJ C 326/13.

[96] Case C-370/89 *SGEEM and Etroy v EIB* [1992] ECLI:EU:C:1992:482, para 15; Case T-209/00 *Lamberts v Mediator* [2002] ECLI:EU:T:2002:94, para. 49.

[97] Case C-9/69 *Sayag and Others v Leduc and Others* [1969] ECLI:EU:C:1969:37, para 7.

[98] Paul Craig, *EU Administrative Law* (2nd edn, Oxford University Press 2012) 695-696; Fink, *Frontex and Human Rights* (n 8) 282.

addressee[99]. The Court's approach is also considerably narrower than that of the ECtHR. The ECtHR relies on general rules of international law on attribution[100], which cover not only persons that are formally appointed to act for the international organisation, but also those who act under its factual control[101].

In the context of Frontex, Article 97 (4) EBCG Regulation requires agency to make good any damage "caused by its departments or by its staff in the performance of their duties". Yet, in practice, it is difficult to ascertain whether and to what extent Frontex's staff was involved in a specific fundamental rights violation, considering that Frontex's involvement and control may vary in each scenario.

The most undisputed situation where Frontex incurs liability is where its staff members directly violate a person's fundamental rights on the ground. However, not all personnel involved in joint operations are part of Frontex staff.

First, it remains unclear to what extent Frontex can be held liable for the conduct of private actors. While under international law, the conduct of private actors that provide services during Frontex's operation, would qualify as conduct attributable to the international organisation contracting their services, it is unclear whether that conduct would engage Frontex's liability under the Court's case-law. Given the central role of the action for damage in ensuring compliance with the right to an effective remedy, the Court should adopt a broader understanding of the "public sphere", similar to the one applied in international law, as to include conduct that otherwise will remain unchallenged.

Secondly, most of the personnel deployed during Frontex's operations are national officers. The question remains as to whether Frontex can incur liability for contributing to violations committed by Member States.

5.2 The EU's primary liability: the "normative control" threshold

The EU's primary liability arises in situations where liability from violations committed directly by the Member State shifts to the EU. The crucial question that arises is under which circumstances that may occur.

There is an overarching principle that emerges from the Court's case-law: primary liability is allocated to the authority that enjoys legal decision-making power[102]. In other words, on the basis of "normative control". If a Member State acts unlawfully and does not have discretion to make a lawful choice, the Union incurs liability for prima facie Member State's conduct.

While there were two cases where the Court left open the possibility of considering factually binding conduct when attributing Member State conduct to the Union[103], the

[99] Case C-470/03 A.*G.M.-COS.MET Srl v Suomen altio and Tarmo Lehtinen* [2007] ECLI:EU:C:2007:213.

[100] *Jaloud v. the Netherlands* App no 47708/08 (ECtHR, 20 November 2014), para 98.

[101] Article 2 (d) and 6 ARIO.

[102] Case C-217/81 *Interagra v Commission* [1982] ECLI:EU:C:1982:222; Case C-175/84 *Krohn v Commission* [1986] ECLI:EU:C:1986:85; Case T-786/14 *Bourdouvali and Others v Council and Others* [2018] ECLI:EU:T:2018:487; See these cases in more detail in Fink, 'EU liability for contributions to member states' breaches of EU Law' (n 79) 1240-1244

[103] Case C-146/91 *Koinopraxia Enóséon Georgikon Synetairismon Diacheiríséos Enchorion Proïonton Syn. PE (KYDEP) v Council of the European Union and Commission of the European Communities* [1994] ECLI:EU:C:1994:329, paras 24-27; Case T-786/14, *Bourdouvali* (n 102)

general rule of "normative control" is applied strictly. Thus, the non-binding influence over a Member State's conduct does not render the Union liable. Given that in areas of shared administration Union bodies are not usually empowered to instruct national authorities in a legally binding manner, this means that EU's conduct only very exceptionally gives rise to primary liability[104].

Essentially, there is only one way in which Frontex exercises decision-making control over the conduct of Member States. Joint operations are implemented according to an Operational Plan, adopted by Frontex and the host state. The Operational Plan is legally binding upon all participating parties[105], and it is therefore able to give rise to Frontex's direct liability for fundamental rights violations that result directly from there. However, fundamental rights violations are not legally pre-determined in the Operational Plan, which makes this Frontex's direct liability extremely rare. Beyond the Operational Plan, Frontex does not have the normative power to determine the conduct of Member States.

However, whereas under Union law, the threshold for the allocation of primary liability is based on "normative control", the threshold under international law is based on "factual control"[106]. This means that an international organisation, such as the EU, can be held liable for those who act under its factual control. Even though the application of this rule by the ECtHR has given rise to controversy, it is generally understood to require a degree of "effective control"[107]. For instance, while mere advice is insufficient to attribute conduct, it may lead to responsibility when the circumstances are such that the national authorities have no other choice in practice than to follow it. This approach is more suitable for cases where an actor has *de facto* more power than *de jure* powers, like Frontex.

For example, Frontex can influence the conduct of Member States through the right to communicate its views on instructions to the host state[108]. This allows Frontex to guide and supervise the implementation of the Operation Plan. However, the host State is only required to take these views into consideration and follow them to the extent possible, and it is not legally bound by them[109]. While the right to communicate its views may not give Frontex "normative control", it grants Frontex "factual control". Given Frontex's expertise in border management, access to relevant information and its power to decide on withdrawing financial support, it may be difficult for national authorities to disregard "advice" from the agency[110].

In this context, the Court should adopt a similar approach to that of the ECtHR, which allows greater flexibility in holding Frontex directly liable. In *KYDEP*[111], the Court

---

para 99. See these cases in more detail in Fink, 'EU liability for contributions to member states' breaches of EU Law' (n 79) 1244-1245.

[104] Herwig Hofmann, Gerard Roweand, Alexander Türk A, *Administrative Law and Policy of the European Union* (Oxford University Press 2011) 877.

[105] Article 38 (3) 2019 EBCG Regulation.

[106] Article 6-8 ARIO.

[107] Behrami and Behrami v France and Saramati v. France, Germany and Norway App no 71412/01 and 78166/01 (ECtHR, 2 May 2007); Al-Jedda v. the United Kingdom App no 27021/08 (ECtHR, 7 July 2011); Fink, Frontex and Human Rights (n 8) 157-162.

[108] Frontex itself does not have the power to directly issue instructions to deployed personal.

[109] Article 43 (2) 2019 EBCG Regulation.

[110] Fink, 'The Action for Damages as a Fundamental Rights Remedy' (n 10) 541.

[111] Case C-146/91 *KYDEP* (n 103), paras 24-26.

already acknowledged that the "factually binding" nature of an advice may influence the assessment of liability. While this case was an exception in the Court's case-law, it still confirms the room of manoeuvre for a new approach.

Nonetheless, Frontex's non-binding influence can be relevant to determine liability for associated conduct.

5.3 The EU's associated liability: the risk of blame shifting

The EU's liability for associated conduct arises in situations where contributing to, or not preventing, fundamental rights violations committed by the Member States may render the EU liable.

There are two categories of associated obligations that may give rise to liability[112]. Obligations to supervise require the Union to supervise national authorities when they apply or implement Union law. Obligations to protect require the Union to protect individuals from violations committed by others. Whilst protective obligations strictly impose an obligation to abstain from adopting certain conducts, i.e. negative obligations, the protection of individuals often require an active interference with the course of conduct of the direct perpetrator, i.e. positive obligations[113].

Frontex's associated obligations can be identified in secondary legislation. Article 44 (3) (b) EBCG Regulation requires Frontex to monitor the implementation of the Operational plan, in cooperation with fundamental rights monitors, and to report to the Executive Director where the instructions issued to the teams by the host state are not in compliance with the Operation Plan and fundamental rights. Article 46 (4) and (5) requires the Executive Director to suspend, terminate or not launch activities or the funding of activities if serious fundamental rights violations are concerned, if violations are likely to persist, or if there is a risk that those activities could lead to violations. Article 48 (1) requires the agency to ensure that fundamental rights are respected during return operations. Finally, Article 80 (1) reinforces Frontex's obligation to protect fundamental rights in the performance of its task[114]. Violations of such obligations are, therefore, attributable to Frontex.

However, in light of the principle of conferral, Frontex is only under an obligation to protect individuals from fundamental rights violations as far as this is within its competences[115].

5.3.1 Conditions for the EU's liability for associated conduct

There are two approaches to assess the EU's liability for associated conduct[116]. The first approach is that each actor can only be held liable for their own conduct. This means that EU's liability arises only if the contribution itself fulfils all the conditions for liability. This approach sets the threshold for EU liability too high and neglects the fact

[112] See this distinction in more detail in Fink, *Frontex and Human Rights* (n 8) 322-327.
[113] The ECtHR has developed particularly well the doctrine of positive obligations in regard to the prohibition of *refoulement*, see cases cited above (n 38).
[114] This provision confirms Article 51 (1) CFR, according to which all EU bodies are bound by the Charter.
[115] Article 51 (2) of the Charter; Explanation on Article 51 in Explanations Relating to the Charter of Fundamental Rights [2007] OJ 303/17.
[116] Fink, 'EU liability for contributions to member states' breaches of EU Law' (n 79) 1245-1246.

that multiple actors were involved in causing the damage. Moreover, it creates an accountability gap for situations where the Member State and the EU's conduct fulfil the conditions for liability together, but not separately.

The second approach takes into account the multi-actor context in which such violation occurs. The conduct of the actors involved are assessed as a whole, rather than independently. This means that the EU may incur liability if it contributes to a sufficiently serious breach of a provision conferring rights on individuals, without the contribution itself having to fulfil those conditions. While this may be considered far-reaching, particularly for EU institutions and bodies with general supervisory mandates, this approach is more suitable for shared responsibility and is closer to the general prohibition under Union law of contributing to breaches of others[117]. Moreover, this approach bears some similarities with the concept of "aid or assistance" under international law, according to which States and international organisations are responsible for providing aid or assistance for the commitment of a wrongful act, even if they don't breach a specific obligation prohibiting such assistance[118]

However, the Court seems to follow a moderate version of the first approach. It usually requires the contribution by the EU to fulfil all conditions for liability, while taking into account the extent of the Member State's breach when assessing the conditions[119]. Thus, liability only arises if the contribution itself fulfils the conditions for liability.

5.3.2 Provision intended to confer rights on individuals

Liability only arises if the rule infringed is intended to confer rights on individuals. The requirement is that the provision has the protection of the individual as its main purpose. Obligations to protect, by definition, confer rights on individuals[120].

Regarding specific supervisory obligations, while the Court does not commonly discuss whether the supervisory obligation at stake confers rights on individuals, in some cases it has explicitly confirmed it[121].

Frontex's supervisory imposed by the EBCG may qualify as provisions intended to confer rights on individuals. The obligations to withdraw support, suspend, terminate, or not launch an operation when fundamental rights violations are at stake are clearly designed for the protection of the individual. This can also be argued in respect to the more general obligation to supervise the implementation of the Operation Plan, since it specifically mentions the requirement to monitor fundamental rights compliance.

Moreover, in *Ledra Advertising*, the Court suggested that breaches of supervisory obligations can give rise to liability if the primary obligation breach confers rights on individuals where fundamental rights are concerned[122]. Since the fundamental rights at stake during joint operations confer rights on individuals, this in itself may be sufficient

---

[117] Ibid 146.

[118] Article 26 ARIO.

[119] In *Ledra Advertising* the Court seem to lean towards the second approach. However, it remains unclear whether this decision can be generalized. In more detail Fink, 'EU liability for contributions to member states' breaches of EU Law' (n 79) 1247-1249.

[120] Fink, *Frontex and Human Rights* (n 8) 328.

[121] Joined Cases 5, 7, 13–24/66 *Kampffmeyer* (n 20) p 262-263; Case T-309/10 RENV *Klein v Commission* [2016] ECLI:EU:T:2016:570, para 57-67.

[122] Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising* (n 29).

to render Frontex liable for breaches of its obligations to monitor compliance with fundamental rights.

5.3.3 Sufficiently serious breach

Liability only arises if the breach is qualified as a sufficiently serious breach. Three aspects must be considered to determine the seriousness of a breach of supervisory obligations[123].

First, the extent of the obligation must be determined, since it may be related to the full compliance with Union law or limited to ensure compliance with specific rules[124].

Secondly, supervisory obligations are usually an obligation of means, not an obligation of result. This means that public authorities are only required to act in accordance with what is reasonably expected[125]. Moreover, it follows from the case-law that the Court, when assessing whether there is a breach of a supervisory obligation, seems to take into account the same factors as those to determine the seriousness of a breach[126]. Therefore, to extent that the supervisory obligations are understood as due diligence obligations, it may be assumed that the breach of that supervisory obligation is *per se* sufficiently serious.

Thirdly, there is usually a trigger for supervisory obligations to arise, such as the knowledge that an EU body has, or should have, of a violation. Therefore, if the seriousness of a breach committed by a Member State is more obvious, the EU body failure to adequality react to it is more likely to be considered serious too[127].

In this regard, the ECtHR has held that a duty to intervene arises when the authorities "knew or ought to have known" of a "real and immediate risk" to the rights of an individual[128]. Public authorities are thus required to take all reasonable measures available to them to protect the rights of the individual in question. Reasonable measures are those that "might have been expected to avoid that risk" or that "could have had a real prospect of altering the outcome or mitigating the harm."[129].

It follows from the above that, to assess whether breaches of associated obligations committed by Frontex are sufficiently serious, a number of factors must be assessed. First, whether the agency has knowledge about a violation in the first place. Given Frontex's access to information, its representatives on the ground, and the fact that any instructions that are not in compliance with the Operational Plan must be immediately reported, it is safe to conclude that Frontex usually has or should have knowledge of fundamental rights violations that occur during its operations. This is

---

[123] Fink, *Frontex and Human Rights* (n 8) 331.

[124] For instance, in *Cato*, the Court held that "[t]he fact that the actual conduct of the [national]authorities in the course of events may not be entirely free of blame", did not, "no matter how regrettable", fall within the Commission's supervisory obligation, see Case C-55/90 *Cato v Commission* [1992] ECLI:EU:C:1992:168, para 28.

[125] Joined Cases 5, 7, 13-24/66 *Kampffmeyer* (n 20) p 262; Case C-4/69 *Lütticke* (n 9) para 19; Case C-14/78 *Denkavit Commerciale v Commission* [1978] ECLI:EU:C:1978:221, paras 9-25.

[126] In more detail Fink, *Frontex and Human Rights* (n 8) 336.

[127] In *Ledra Advertising*, the Court suggested that the seriousness of the primary breach is relevant in determining the seriousness of the associated breach. See Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising* (n 29) para 69-75.

[128] *Osman v. The United Kingdom* App no 23452/94 (ECtHR, 28 October 1998), para 116.

[129] *Osman v. The United Kingdom* (n 128) para 116; *Opuz v Turkey* App. No. 33401/02 (ECtHR, 9 June 2009), para 130-136.

sufficient to trigger Frontex's monitoring obligations. In those circumstances, it is required to act. The more obvious and persistent a fundamental rights violation is, the more Frontex is expected to take measure to prevent it and stop it.

If it takes no measures whatsoever, that inaction is likely to amount to a sufficiently serious breach of its monitoring obligations, making Frontex liable alongside the respective state. If it takes some measures, it will be necessary to assess whether Frontex acted with due diligence to respond to the violations at stake. This may include communicating its views to the host Member State, withdraw its financial support, suspend, terminate or not launch the operation.

However, in cases of fundamental rights violations that are serious or likely to persist, Frontex is clearly required to take one of the several measures under Article 46 EBCG Regulation. In those situations, Frontex has a more limited degree of discretion, which makes the breach more likely to be considered sufficiently serious[130].

In practice, however, this assessment may not even be made. In *WS and Others*, the Court did not consider Frontex's obligations under the EBCG Regulation in the first place and, consequently, it also did not engage with these considerations. The Court must first recognise the existence of Frontex's associated obligations, which can only be made in light of a clear attribution test.

5.3.4 Causal link: the "exclusive" causation requirement

Liability only arises when the unlawful conduct was a necessary and sufficiently direct condition for the damage suffered to occur. Liability for breaches of supervisory obligations, by definition, concern an indirect involvement of the EU in a breach directly committed by a Member State. The question is, therefore, whether the fact that a Member State's unlawful conduct was the immediate cause for the damage breaks the chain of causation between the EU's breach of an obligation to supervise and the damage suffered.

The Court's case-law does not provide a consistent answer to this. In some cases, it requires an "exclusive" causation for liability to arise[131]. However, in other cases, the Cout seems to allow several determining causes that decisively contributed to the occurrence of the damage for liability to arise.[132]

This later view has been supported by advocates general[133]. Indeed, it seems to be the most suitable to assess liability for breaches of associated obligations. First, it paves the way for joint liability and prevents an accountability gap in multi-actor situations, where breaches of associated obligations by the EU contribute to the occurrence of the damage primarily caused by the Member State. Second, it recognises

[130] For instance, in Klein, the Court held that the Commission enjoyed no discretion to decide whether to take action, therefore its inaction amounted to a sufficiently serious breach of its supervisory obligations. See CaseT-309/10 RENV, Klein (n 121) paras 43–58.
[131] Case C-419/08 P *Trubowest* (n 77).
[132] Case F-50/09 *Missir Mamachi di Lusignano v Commission* [2011] ECLI:EU:F:2011:55, para 181.
[133] Joined Cases 9 and 12/60 *Vloeberghs v High Authority* [1961] ECLI:EU:C:1961:6, Opinion of AG Roemer; Joined Cases 5, 7, 13-24/66 *Kampffmeyer and Others v Commission* [1967] ECLI:EU:C:1967:8, Opinion of AG Gand, p 279; Case C-4/69 *Alfons Lütticke GmbH v Commission of the European Communities* [1971] ECLI:EU:C:1971:17, Opinion of AG Dutheillet de Lamothe, para 346; Case C-14/78 *Denkavit Commerciale v Commission* [1978] ECLI:EU:C:1978:196, Opinion of AG Mayras, para 2511.

fundamental rights obligations of both the Union and its Member States, which otherwise would be undermined. Third, this approach is the only one that offers full compliance with the right to an effective remedy. If the breach of protective and supervisory obligations would not be considered as also having a sufficiently direct link to the damages suffered and liability for the violation of such obligations was precluded, the rights conferred to individuals through those provisions would be meaningless[134]. This would ultimately threaten the right to an effective remedy, as it would precludes individuals from seeking judicial redress of breaches of rights conferred to them.

However, this was not the approach of the Court in *WS and Others*. Following Advocate-General Ćapeta's Opinion, that decision can be interpreted as if the General Court considered that the return decision is the solo cause for the damaged alleged. Therefore, Frontex could not incur liability for the alleged damages, since it merely supports return operations of Member States[135]. This argument seems to be an assumption that "exclusive" causation might be required for liability to arise, therefore an assumption that there is no room for joint liability between Frontex and the Member States in such cases, which ultimately render ineffective Frontex's associated obligations.

In light of the reasons above, the Court should recognise Frontex's fundamental rights obligations[136] and that failure to comply with those obligations gives rise to liability. Frontex's responsibility is independent from the responsibility of the Member State who received the support, their "respective responsibilities are not exclusive but exist in parallel"[137]. Thus, the Court should adopt an approach according to which several determining causes can contribute to the occurrence of damage for liability to arise and establish joint liability between the EU and the Member States in such cases. In that regard, the Advocate-General recalled that Article 7 EBCG Regulation explicitly establishes shared responsibility between Frontex and Member States. If there is shared responsibility, there can also be joint liability for damages occurred.

Joint liability is not only theoretical under EU law. International law recognises that international organisations and States can be held liable for the same wrongful act[138].

In *Kampffmeyer*[139], the Court of Justice considered that the EU institutions could share liability with the Member States. The recent case *Kočner v EUROPOL* has is particularly important. The General Court dismissed the action due to the absence of an "exclusive" causal link between Europol and the alleged damage[140]. However, the Court of Justice[141] held that Europol and the Member State jointly incur liability for the damages caused by the violation of the applicant's fundamental rights. This case may have far-reaching implications for joint liability under EU law. First, while in this case joint liability was expressly provided for by EU legislation, the Court did not establish a general principle that joint liability must be expressly provided in EU legislation. Moreover, the Europol's joint liability regime may present promising potential as a

---

[134] Fink, 'EU liability for contributions to member states' breaches of EU Law' (n 79) 1258.
[135] Case C-679/23 P *WS and Others v Frontex,* Opinion of AG Ćapeta (n 90) para 60.
[136] Ibid 68-83.
[137] Melanie Fink, 'Expert opinion: case T-600/21 WS and others v Frontex', 2023.
[138] Article 48 ARIO.
[139] Joined Cases 5, 7, 13-24/66 *Kampffmeyer* (n 20).
[140] Case T-528/20 *Kočner v Europol* [2021] ECLI:EU:T:2021:631**.**
[141] Case C-755/21 P *Kočner v Europol* [2024] ECLI:EU:C:2024:202; see also Case C-755/21 P *Kočner v Europol* [2023] ECLI:EU:C:2023:481, Opinion of AG Rantos, para 55.

blueprint for joint liability under EU law, since it relieves individuals of the obligation to demonstrate attribution of unlawful between the Union and Member States[142].

5.4 Procedural challenges to implement joint liability

In addition to these substantive challenges, the procedural implementation of joint liability in the EU's system of remedies also presents a significant obstacle.

These procedural obstacles were illustrated in *Kampffmeyer*. The Court recognised the Community's liability for an unlawful measure taken by Germany. However, since the applicant's had brought parallel actions against Germany concerning the same damage, the Court held that to "avoid the applicants being insufficiently or excessively compensated for the same damage", it was "necessary for the national court to have the opportunity to give judgment on any liability on the part of the Federal Republic of Germany" before the damage for which the Community should be held liable could be determined[143].

This approach is widely criticised[144]. First, the length of the proceedings makes it particularly difficult for applicants to obtain compensation in due time, which raises concerns from the perspective of the right to an effective remedy under Article 47 CFR. Second, it implies that the EU liability is subsidiary to Member States' liability. This is particularly problematic from the fundamental rights perspective. Since most of the EU's activities require some form of participation by the Member States, it may be significantly challenging to hold the EU liable for its contribution to fundamental rights violations that have been directly committed by the Member States.

However, the limited CJEU's competences to deal with joint liability excludes the possibility to overcome these procedural challenges This could only be achieved by a change in the Treaties.

5.5 Interim conclusions

The findings above demonstrate that it is still unclear how exactly EU liability law deals with situations where more than one actor is involved in fundamental rights violations. The allocation of joint liability between the EU and its Member States still possess several challenges.

First, several substantive challenges were identified. The Court's understanding of "public sphere" was found to be rather restrictive. In this respect, the action for damages would benefit from a broader understanding similar to the one provided by the ECtHR, as to include more conduct that otherwise can remain unchallenged.

---

[142] For a detailed analysis on *Kočner v EUROPOL* and its implications for the EU's liability regime see Joyce De Coninck and Sarah Tas, 'Investigating five dimensions of the EU's liability regime: Marián Kočner' (2025) 62(1) Common Market Law Review 195.

[143] Joined Cases 5, 7, 13-24/66 *Kampffmeyer* (n 20); the same approach was adopted in more recent cases, see Case T-138/03 *É.R. and Others v Council and Commission* [2006] ECLI:EU:T:2006:390, para 42; Case T-317/12 *Holcim (Romania) v Commission* [2014] ECLI:EU:T:2014:782, para 86.

[144] Oliver, 'Joint Liability of the Community and the Member States' (n 92) 288; Christopher Harding, 'The Choice of Court Problem in Cases of Non-Contractual Liability under E.E.C. Law' (1979) 16 Common Market Law Review 403-405; Fink, Rauchegger and De Coninck, 'The Action for Damages as a Fundamental Rights Remedy' (n 39) 59-60; Case C-55/90 *Cato v Commission* [1992] ECLI:EU:C:1992:52, Opinion of AG Darmon.

Moreover, the Court's general rule under which primary liability is allocated to the authority that enjoys legal decision-making power, is applied strictly. This "normative control" threshold was deemed to be an obstacle to hold Frontex accountable under the action for damages. The Court should consider the ECtHR's "factual control" threshold, which allows Frontex to be held directly liable for its non-legally binding influence over the Member State's conduct.

Moreover, it was found that Frontex's associated obligations usually confer rights on individuals and their breach is most likely to be considered sufficiently serious. However, the Court's strict approach to the causal link remains an obstacle to hold Frontex liable for associated conduct. While the Court's case-law does not provide a consistent answer as to whether it requires an "exclusive" causation for liability or whether it allows several determining causes for liability to arise, the recent case of *WS and Others* seems to suggest that the Court follows the former rather than the later, thus failing to recognise Frontex's associated obligations and excluding the possibility of joint liability.

Therefore, it was found that where cases are not excluded at the admissibility stage through the application of an uncertain attribution threshold, a strict causation test will often prevent joint liability at the merits stage of the proceeding.

In addition, significant institutional obstacles in the procedural implementation of joint liability were also identified.

6 Conclusion

This thesis set out to answer the question: *What is the potential and what are the limitations of the action for damages under Article 340 (2) TFEU to hold Frontex accountable for fundamental rights violations?*

The analysis conducted demonstrated that the action for damages holds significant potential as a fundamental rights remedy, due to the distinguished characteristics it possesses. Unlike the preliminary ruling, it offers direct access to individuals and does not dependent on the discretion of national courts. Moreover, it is not limited by the strict standing requirements and admissibility criteria of both the action for failure to act and the action for annulment. Most importantly, the action for damages may be the only judicial mechanism available for individuals to challenge Frontex's "factual conduct" and to address the accountability gap that arises from the virtual absence of other remedies to redress that type of conduct. Thus, the action for damages is necessary for the EU to comply with its obligations under the right to an effective remedy enshrined in Article 47 CFR.

In addition, the action for damages is the only remedy available under the Treaties capable of compensating individuals for harmed cause as a result of fundamental rights violations. It also allows individuals to ensure the Union's compliance with its fundamental rights obligations and may serve to deter future misconduct.

Moreover, the action for damages is exceptionally flexible. Article 340 (2) TFEU merely states that the EU is to make good any damage it causes "in accordance with the general principles common to the laws of the Member States", without imposing precise conditions.

However, since the action for damages has not been conceived as an instrument of fundamental rights protection, it has a number of shortcomings and limitations. First, it has been strictly interpreted by the CJEU. While, public liability law is flexible enough to implement a more lenient approach where fundamental rights violations are concerned, the Court has been reluctant to lower the conditions for liability.

Several examples within this limitation were found: the unnecessary "sufficiently serious breach" test, the unattainable evidentiary standards imposed, the narrow understanding of "public sphere", the unclear division between attribution and causation, the stringent "normative control" threshold, and the strict approach to the causal link, where the Court often requires an "exclusive" causation for liability to arise, ultimately excluding the possibility of joint liability.

While these limitations hamper the effectiveness of the action for damages, they can be overcome if the Court uses its interpretative leeway and flexibility to adapt the action for damages to the fundamental rights context, for instance, by adopting an approach in line with the ECtHR and by developing a clear framework. In light of the lack of alternative remedies available, this is particularly crucial to ensure compliance with the right to an effective remedy and to achieve the "complete system of remedies" that the CJEU prides itself to have established[145].

However, there are also limitations inherent to the action of damages that may require a change in primary law to unlock the full potential of this legal remedy. For

[145] Case C-294/83 Les Verts v European Parliament (n 41).

instance, while the Court may adopt a more lenient approach to establish joint liability, the limited CJEU's competence to deal with joint liability excludes the possibility of a common forum to overcome the procedural challenges highlighted. This could only be achieved by a change in the Treaties.

In conclusion, while the action for damages holds significant potential as a flexible tool to address fundamental rights violations committed by Frontex, its current application is marked by legal uncertainty, high procedural thresholds and an undeveloped framework to address liability in multi-actor situations. Nevertheless, this legal remedy is not to be undermined. If the Court would adapt the framework to the specificities of fundamental rights and align its case-law with the ECtHR, this mechanism would be able redress Frontex's fundamental rights violations.

List of References

Legal Sources

Legal acts

European Convention on Human Rights [ECHR], Rome, 4 November 1950

Explanations Relating to the Charter of Fundamental Rights [2007] OJ 303/17

Charter of Fundamental Rights of the European Union [2012] OJ C 326/391

Consolidated version of the Treaty on European Union [2012] OJ C 326/13

Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C 202/1

Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC [2016] OJ L 251/1

Regulation (EU) of the European Parliament and of the Council 2019/1896 of Nov. 13, 2019, on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L 295/1

Case Law

Court of Justice of the European Union

Joined Cases 9 and 12/60 *Vloeberghs v High Authority* [1961] ECLI:EU:C:1961:18

Case C-25/62 *Plaumann v Commission* [1963] ECLI:EU:C:1963:17

Joined Cases 5, 7, 13-24/66 *Kampffmeyer and Others v Commission* [1967] ECLI:EU:C:1967:31

Case C-9/69 *Sayag and Others v Leduc and Others* [1969] ECLI:EU:C:1969:37

Case C-4/69 *Alfons Lütticke GmbH v Commission of the European Communities* [1971] ECLI:EU:C:1971:40

Case C-5/71 *Zuckerfabrik Schöppenstedt v Council* [1971] ECLI:EU:C:1971:116

Case C-14/78 *Denkavit Commerciale v Commission* [1978] ECLI:EU:C:1978:221

Joined Cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79 *Dumortier v Council* [1979] ECLI:EU:C:1979:223

Case C-51/81 *De Franceschi v Council and Commission* [1982] ECLI:EU:C:1982:20

Joined Cases 256/80, 257/80, 265/80, 267/80 and 5/81 *Birra Wührer v Council and Commission* [1982] ECLI:EU:C:1982:18

Case C-217/81 *Interagra v Commission* [1982] ECLI:EU:C:1982:222

Case C-175/84 *Krohn v Commission* [1986] ECLI:EU:C:1986:85

Case C-294/83 *Les Verts v European Parliament* [1986] ECLI:EU:C:1986:166

Case C-109/88 *Handels og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss* [1989] ECLI:EU:C:1989:383

Case C-55/90 *Cato v Commission* [1992] ECLI:EU:C:1992:168

Joined Cases C-104/89 and C-37/90 *Mulder and Others v Council and Commission* [1992] ECLI:EU:C:1992:217

Case C-370/89 *SGEEM and Etroy v EIB* [1992] ECLI:EU:C:1992:482

Case C-127/92 *Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health* [1993] EU:C:1993:859

Case C-146/91 *Koinopraxia Enóséon Georgikon Synetairismon Diacheiríséos Enchorion Proïonton Syn. PE (KYDEP) v Council of the European Union and Commission of the European Communities* [1994] ECLI:EU:C:1994:329

Case C-392/93 *The Queen v H.M. Treasury, ex parte British Telecommunications* [1996] ECLI:EU:C:1996:131

Joined Cases C-178/94 to C-190/94 *Dillenkofer and Others v Bundesrepublik Deutschland* [1996] ECLI:EU:C:1996:375

Case C-319/96 *Brinkmann Tabakfabriken v Skatteministeriet* [1998] ECLI:EU:C:1998:429

Case C-352/98 P *Bergaderm and Goupil v Commission* [2000] ECLI:EU:C:2000:361

Case T-30/99 *Bocchi Food Trade International v Commission* [2001] ECLI:EU:T:2001:96

Case C-381/99 *Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG.* [2001] ECLI:EU:C:2001:358

Case T-209/00 *Lamberts v Mediator* [2002] ECLI:EU:T:2002:94

Case C-222/02 *Peter Paul and Others v Bundesrepublik Deutschland* [2004] ECLI:EU:C:2004:606

Case C-295/03 P *Alessandrini and Others v Commission* [2005] ECLI:EU:C:2005:413

Case T-415/03 *Cofradía de pescadores "San Pedro" de Bermeo and Others v Council* [2005] ECLI:EU:T:2005:365

Case C-293/04 *Beemsterboer Coldstore Services* [2006] EU:C:2006:162

Case C-243/05 P *Agraz and Others v Commission* [2006] ECLI:EU:C:2006:708

Case T-138/03 *É.R. and Others v Council and Commission* [2006] ECLI:EU:T:2006:39

Case C-470/03 A.*G.M.-COS.MET Srl v Suomen altio and Tarmo Lehtinen* [2007] ECLI:EU:C:2007:213

Case C-282/05 P *Holcim (Deutschland) v Commission* [2007] ECLI:EU:C:2007:226

Case C-331/05 P *Internationaler Hilfsfonds v Commission* [2007] ECLI:EU:C:2007:390

Case T-351/03 *Schneider Electric SA v Commission of the European Communities* [2007] ECLI:EU:T:2007:212

Case T-48/05 *Franchet and Byk v Commission* [2008] ECLI:EU:T:2008:257

Joined Cases C-120/06 P and C-121/06 P *FIAMM and Others v Council and Commission* [2008] ECLI:EU:C:2008:476

Case T-412/05 *M v European Ombudsman* [2008] ECLI:EU:T:2008:397

Case C-440/07 P *Commission v Schneider Electric* [2009] ECLI:EU:C:2009:459

Case C-118/08 *Transportes Urbanos y Servicios Generale* [2010] ECLI:EU:C:2010:39

Case T-16/04 *Arcelor v Parliament and Council* [2010] ECLI:EU:T:2010:54

Case C-419/08 P *Trubowest Handel and Makarov v Council and Commission* [2010] ECLI:EU:C:2010:147

Case F-50/09 *Missir Mamachi di Lusignano v Commission* [2011] ECLI:EU:F:2011:55.

Case T-341/07 *Sison v Council* [2011] ECLI:EU:T:2011:687

Case C-T-107/08 *Transnational Company "Kazchrome" and ENRC Marketing v Council and Commission* [2011] ECLI:EU:T:2011:704

Case T-437/10 *Gap granen & producten v Commission* [2013] ECLI:EU:T:2013:248

Case C-176/12 *Association de médiation sociale* [2014] ECLI:EU:C:2014:2

Joined Cases C-501/12 to C-506/12, C-540/12 and C-541/12 *Specht and Others* [2014] ECLI:EU:C:2014:2005

Case T-317/12 *Holcim (Romania) v Commission* [2014] ECLI:EU:T:2014:782

Case C-611/12 P *Giordano v Commission* [2014] ECLI:EU:C:2014:2282

Case T-384/11 *Safa Nicu Sepahan v Council* [2014] ECLI:EU:T:2014:986

Case T-217/11 *Staelen v European Ombudsman* [2015] ECLI:EU:T:2015:238

Case T-138/14 *Chart v EEAS* [2015] ECLI:EU:T:2015:981

Case T-309/10 RENV *Klein v Commission* [2016] ECLI:EU:T:2016:570

Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising v Commission and ECB* [2016] ECLI:EU:C:2016:701

Joined Cases T-533/15 and T-264/16 *Kim and Others v Council and Commission* [2018] ECLI:EU:T:2018:138

Case T-786/14, *Bourdouvali and Others v Council and Others* [2018] ECLI:EU:T:2018:487

Case T-461/16 *Kaddour v Council* [2018] ECLI:EU:T:2018:316

Case T-558/15 *Iran Insurance v Council* [2018] ECLI:EU:T:2018:945

Case T-528/20 *Kočner v Europol* [2021] ECLI:EU:T:2021:631

Case T-249/20 *Abdelkader Sabra v Council of the European Union* [2022] ECLI:EU:T:2022:140

Case T-282/21 *SS and ST v. Frontex* [2022] ECLI:EU:T:2022:235

Case C-175/21 *Harman International Industries* [2022] ECLI:EU:C:2022:895

Case T-600/21 *WS and Others v Frontex* [2023] ECLI:EU:T:2023:492

Case T-600/22 *ST v Frontex* [2023] ECLI:EU:T:2023:776

Case T-136/22 *Alaa Hamoudi v Frontex* [2023] ECLI:EU:T:2023:821

Case C-755/21 P *Kočner v Europol* [2024] ECLI:EU:C:2024:202

Case C-679/23 P *WS and Others v Frontex* [pending]

Case C-136/24 P *Alaa Hamoudi v Frontex* [pending]

Opinions of Advocates General

Joined Cases 9 and 12/60 *Vloeberghs v High Authority* [1961], Opinion of AG Roemer, ECLI:EU:C:1961:6

Joined Cases 5, 7, 13-24/66 *Kampffmeyer and Others v Commission* [1967], Opinion of AG Gand, ECLI:EU:C:1967:8

Case 4/69 *Alfons Lütticke GmbH v Commission of the European Communities* [1971], Opinion of AG Dutheillet de Lamothe, ECLI:EU:C:1971:17

Case 14/78 *Denkavit Commerciale v Commission* [1978], Opinion of AG Mayras, ECLI:EU:C:1978:196

Case C-55/90 *Cato v Commission* [1992], Opinion of AG Darmon, ECLI:EU:C:1992:52

Case C-176/12 *Association de médiation sociale* [2013], Opinion of AG Cruz Villalón, ECLI:EU:C:2013:49

Case C-755/21 P *Kočner v Europol* [2023], Opinion of AG Rantos, ECLI:EU:C:2023:481

Case C-136/24 P *Hamoudi v Frontex* [2025], Opinion of AG Norkus, ECLI:EU:C:2025:257

Case C-679/23 P *WS and Others v Frontex* [2025], Opinion of AG Ćapeta, ECLI:EU:C:2025:427

European Court of Human Rights

Soering v The United Kingdom App no 14038/88 (ECtHR, 7 July 1989)

Osman v. The United Kingdom App no 23452/94 (ECtHR, 28 October 1998)

Behrami and Behrami v France and Saramati v. France, Germany and Norway App no 71412/01 and 78166/01 (ECtHR, 2 May 2007)

Opuz v Turkey App no 33401/02 (ECtHR, 9 June 2009)

M.S.S. v Belgium and Greece App no 30696/09 (ECtHR, 21 January 2011)

Al-Jedda v. the United Kingdom App no 27021/08 (ECtHR, 7 July 2011)

Hirsi Jamaa and Others v Italy App no 27765/09 (ECtHR, 23 February 2012)

Tarakhel v Switzerland App no 29217/12 (ECtHR, 4 November 2014)

Jaloud v. the Netherlands App no 47708/08 (ECtHR, 20 November 2014)

J.K. and Others v Sweden App no 59166/12 (ECtHR, 23 August 2016)

N.T. v Spain App no 8675/15 and 8697/15 (ECtHR, 13 February 2020)

M.H. and Others v Croatia App nos 15670/18 and 43115/18 (ECtHR, 18 November 2021)

G.R.J. v Greece App no 15067/21 (ECtHR, 3 December 2024)

A.R.E. v Greece App no 15783/2 (ECtHR, 7 January 2025)

Other legal documents

International Law Commission, 'Report of the International Law Commission Sixty-third session', UN Doc A/66/10 (26 April-3 June and 4 July-12 August 2011) https://legal.un.org/ilc/documentation/english/reports/a_66_10.pdf [accessed 25 August 2025]

European Ombudsman, 'Decision closing own-initiative inquiry OI/9/2014/MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex)' OI/9/2014/MHZ (4 May 2015) https://link.europa.eu/tx77dv [accessed 25 August 2025]

European Union Agency for Fundamental Rights, 'Fundamental Rights Report 2016' (27 May 2016) https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-fundamental-rights-report-2016-2_en.pdf [accessed 25 August 2025]

European Union Agency for Fundamental Rights, 'Asylum and migration into the EU in 2015' (29 May 2016) https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-fundamental-rights-report-2016-focus-0_en.pdf [accessed 25 August 2025]

European Parliament, 'Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations' (14 July 2021) https://www.europarl.europa.eu/cmsdata/238156/14072021%20Final%20Report%20FSWG_en.pdf [accessed 25 August 2025]

European Anti-Fraud Office, 'Final Report' CASE No OC/2021/0451/A1 (October 2022)

Academic Sources

Aalto P, *Public liability in EU law: Brasserie, Bergaderm and beyond* (Hart Publishing 2011)

Coman-Kund F, 'Legal Protection against Fundamental Rights Breached through Factual Conduct by the European Union' in in Melanie Fink (ed.), *Redressing Fundamental Rights Violations by the EU: The Promise of the 'Complete System of Remedies'* (Cambridge University Press 2024)

Craig P, *EU Administrative Law* (2nd edn, Oxford University Press 2012

De Coninck and Sarah Tas, 'Investigating five dimensions of the EU's liability regime: Marián Kočner' (2025) 62 Common Market Law Review 195

De Coninck J, 'Catch-22 in the Law of Responsibility of International Organizations: Systemic Deficiencies in the EU Responsibility Paradigm for Unlawful Human Rights Conduct in Integrated Border Management' (PhD Thesis, Ghent University 2020)

___ *The EU's Human Rights Responsibility Gap: Deconstructing Human Rights Impunity of International Organisations*, (Hart Publishing 2024)

___ 'Shielding Frontex: On the EU General Court's WS and others v Frontex', (Verfassungsblog, 9 September 2023) <https://verfassungsblog.de/shielding-frontex/> accessed 25 August 2025

___ 'Shielding Frontex 2.0: The One with the Impossible Proof', (Verfassungsblog, 30 January 2024) < https://verfassungsblog.de/shielding-frontex-2-0/> accessed 25 August 2025

Fink M, *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford University Press 2018)

___ 'EU liability for contributions to member states' breaches of EU Law' (2019) 56 *Common Market Law Review* 1227

___ 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable'(2020) 21 *German Law Journal* 532

___ 'Expert opinion: case T-600/21 WS and others v Frontex', 2023

Fink M and Rijpma J, 'Responsibility in Joint Returns after WS and Others v Frontex: Letting the Active By-Stander Off the Hook' (EU Law Analysis, 22 September 2023) <https://eulawanalysis.blogspot.com/2023/09/responsibility-in-joint-returns-after.html> accessed 25 August 2025

Fink M, Rauchegger C and De Coninck J, 'The Action for Damages as a Fundamental Rights Remedy', in Melanie Fink (ed.), *Redressing Fundamental Rights Violations by the EU: The Promise of the 'Complete System of Remedies'* (Cambridge University Press 2024)

Gil-Bazo M, 'The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's law' (2008) 27 Refugee Survey Quarterly 33

Grozdanovski L, 'Evidence as Enabler – or Filter – of Actions Brought by Private Parties Directly before the EU Courts', in Melanie Fink (ed.), *Redressing Fundamental Rights Violations by the EU: The Promise of the 'Complete System of Remedies'* (Cambridge University Press 2024)

Harding C, 'The Choice of Court Problem in Cases of Non-Contractual Liability under E.E.C. Law' (1979) 16 Common Market Law Review 389

Hofmann H, Roweand G, Türk A, *Administrative Law and Policy of the European Union* (Oxford University Press 2011

Kunst A, 'Hamoudi v Frontex, an EU Courts pushback case: Shifting the burden of proof and a duty to assist the Court (a duty of candour?)'(EU Law Analysis, 28 February 2025) <https://eulawanalysis.blogspot.com/2025/02/hamoudi-v-frontex-eu-courts-pushback.html> accessed 25 August 2025

___ 'Hamoudi v Frontex: Advocate General Norkus' Opinion - Reversing the Burden of Proof and the Presumption of Frontex's Privileged Access to Evidence' (EU Law Analysis, 19 April 2025) <https://eulawanalysis.blogspot.com/2025/04/hamoudi-v-frontex-advocate-general.html> accessed 25 August 2025

Lammasniemi L, *Law Dissertations A Step-by-Step Guide* (2nd edn, Routledge 2021).

McDonald D, 'Credibility Assessment in Refugee Status Determination Credibility Assessment in Refugee Status Determination' (2014) 26 National Law School of India Review 115

Noll G, 'Credibility, Reliability, and Evidential Assessment' in Cathryn Costello, Michelle Foster and Jane McAdam (eds.), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021)

Oliver P, 'Joint Liability of the Community and the Member States' in Ton Heukels and Alison McDonnell (eds), *The Action for Damages in Community Law* (Kluwer Law International 1997)

Partipilo F, 'The EU General Court's judgment in the case of WS and Others v Frontex: human rights violations at EU external borders going unpunished'(EU Law

Analysis, 22 September 2023) <https://eulawanalysis.blogspot.com/2023/09/the-eu-general-courts-judgment-in-case.html> accessed 25 August 2025

Nicolosi S, 'Going Unnoticed? Diagnosing the Right to Asylum in the Charter of Fundamental Rights of the European Union' (2017) 23 European Law Journal 94

Peers S and Others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014)

Pirello A, 'Tilting the Scales The Burden of Proof When Power Wears an EU Uniform' (Verfassungsblog, 15 May 2025) <https://verfassungsblog.de/tilting-the-scales/> accessed 25 August 2025

Półtorak N, 'Action for Damages in the Case of Infringement of Fundamental Rights by the European Union' in E. Baginska (ed), *Damages for Violations of Human Rights: A Comparative Study of Domestic Legal Systems* (Springer 2016)

Prechal S, 'Protection of Rights: How Far?' in Sacha Prechal and Bert van Roermund (eds), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford University Press 2008)

Rademacher T, 'Factual Administrative Conduct and Judicial Review in EU Law' (2017) 29 European Review of Public Law 399

Rauchegger C, 'Article 47: Damages for Breach of the Charter as a Remedy under the First Paragraph of Article 47' in Steve Peers and Others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2021)

Smith-Khan L, 'Why refugee visa credibility assessments lack credibility: a critical discourse analysis' (2019) 28 (4) Griffith Law Review 406

Tas S, 'Op-Ed: "Frontex above the law – a missed opportunity for a landmark judgment on Frontex's responsibility with regards fundamental rights violations: WS and Others v Frontex (T-600/21)' (EU Law Live, 20 September 2023) <https://eulawlive.com/op-ed-frontex-above-the-law-a-missed-opportunity-for-a-landmark-judgment-on-frontexs-responsibility-with-regards-fundamental-rights-violations-ws-and-others-v-frontex-t-600-21/> accessed 25 August 2025

Toth AG, 'The Concepts of Damage and Causality as Elements of Non-contractual Liability' in Ton Heukels and Alison McDonnell (eds), *The Action for Damages in Community Law* (Kluwer Law International 1997)

Ward A, 'Damages under the EU Charter of Fundamental Rights' (2012) 12 ERA Forum 589

Wils W, 'Concurrent Liability of the Community and a Member State' (1992) 17 European Law Review 191