Frontex and human rights : responsibility in 'multi-actor situations' under the ECHR and EU public liability law

Fink, M.

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PROEFSCHRIFT

ter verkrijging van
de graad van Doctor aan de Universiteit Leiden,
op gezag van Rector Magnificus prof.mr. C.J.J.M. Stolker,
volgens besluit van het College voor Promoties
te verdedigen op woensdag 13 december 2017
klokke 10.00 uur.

door

Melanie Fink

geboren te Dornbirn, Oostenrijk

in 1985

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This thesis was written in the framework of a 'cotutelle de thèse' between Leiden University (Europa Institute) and the University of Vienna (Department for European, International and Comparative Law).

The research leading to this thesis received funding through:
- a DOC Fellowship of the Austrian Academy of Sciences;
- a Marietta Blau-Grant of the OeAD-GmbH (Austrian agency for international mobility and cooperation in education, science and research), financed by the Austrian Federal Ministry of Science, Research and Economy.

Lay-out: AlphaZet prepress, Waddinxveen
Printwerk: Ipskamp Printing

Acknowledgments

Writing this thesis was a challenging and rewarding experience. I was privileged to count on the intellectual and emotional support of many outstanding colleagues and friends, who encouraged me to start, motivated me to persevere, and pushed me to finish. I owe a debt of gratitude to all of them, but will limit myself to name a few for the extraordinary support they provided.

First of all, I would like to express my respect and gratitude to my supervisors Rick Lawson, Manfred Nowak, Jorrit Rijpma, and Stephan Wittich. I have benefited enormously from their generosity with time, insightful comments, and guidance. I thank them wholeheartedly for their unwavering support and availability. Jorrit, my supervisor, colleague, and friend, made sure that I remained on track from beginning to end. His encyclopedic knowledge of EU law, his mad skills to never stop asking questions, and his availability any day of the week and time of the day truly gave me confidence throughout the years of writing, and eventually the courage to call this manuscript finished.

I would also like to thank the members of the Reading Committee, Christina Binder, Niels Blokker, Elspeth Guild, Steve Peers, August Reinisch, and Christa Tobler. I am honoured they invested their time and mind to review this manuscript and I am grateful for their insightful comments.

This research would not have been possible without the generous funding of the Austrian Academy of Sciences and the Austrian agency for international mobility and cooperation in education, science and research. Their support allowed me not only to devote full-time to my research, but also provided the geographical mobility essential to carry it out.

My PhD journey started at the Department of European, International and Comparative Law of the University of Vienna and then took me to the the Europa Institute of Leiden University and the Lauterpacht Centre for International Law of the University of Cambridge. I would like to thank all my colleagues for a most inspiring research environment and, most of all, for their humour, kindness, and friendship. I am particularly indebted to Stefaan Van den Bogaert, the Director of the Europa Institute, for welcoming me over and over again when I came back after every good bye and finally refused to leave.

While researching and writing this thesis I was lucky enough to be in the company of a number of extraordinarily kind, supportive, and funny friends from Vienna, Amsterdam, and all over the world. To my friends in Vienna, thank you for making me feel home whenever I am with you, whether that is on your beautiful Viennese rooftop terraces, or in the streets, parks, restaurants, and bars of Vienna. I sincerely appreciate your encouragement, humour, and friendship. To my friends in Amsterdam, thank you for not letting work stop me explore the city's treasures and distractions with you, and for being my family away from home. My dear Amsterdam butterflies, thank you for all those joyful moments spent in the air.

Reserving the most important for last, I wish to thank my whole family, but especially my parents Elke and Werner, their partners Andrea and Artur, my sister Anja with her lovely family, my brother Julian, and my grandparents Ilse and Ludwig. I thank you for all those moments full of laughter, food, and wine. But most of all I thank you for your unconditional support and love. You mean the world to me. Finally, I would like to express my gratitude, admiration, and love to my partner, João Pedro, for his tremendous support throughout this journey.

Melanie Fink

Leiden, 19 September 2017

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List of Abbreviations

AFSJ	Area of Freedom, Security and Justice
ARIO	Articles on the Responsibility of International Organizations
ASR	Articles on Responsibility of States for Internationally Wrongful Acts
CFI	Court of First Instance
CFR	Charter of Fundamental Rights of the European Union
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union (comprising *inter alia* the ECJ and the General Court)
CSDP	Common Security and Defence Policy
EBCG	European Border and Coast Guard
EBCGT	European Border and Coast Guard Teams
EBGT	European Border Guard Teams
ECHR (also 'Convention')	European Convention on Human Rights
ECJ	(European) Court of Justice (one of the courts of the CJEU)
ECtHR	European Court of Human Rights
EEAS	European External Action Service
ERIT	European Return Intervention Teams
EU (also 'Union')	European Union
ICC	International Coordination Centre
ICJ	International Court of Justice
ILC	International Law Commission
JCB	Joint Coordination Board
JO	Joint Operation
OLAF	European Anti-Fraud Office
OPCOM	Operational Command
OPCON	Operational Control
OPlan	Operational Plan
RABIT	Rapid Border Intervention Team
SCIFA	Strategic Committee on Immigration Frontiers and Asylum
SNE	Seconded National Expert
TACOM	Tactical Command
TACON	Tactical Control
TEP	Technical Equipment Pool
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

UN	United Nations
UNSC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties

Note: The research for this thesis was completed in April 2017. Subsequent developments are therefore not reflected in this study. This dissertation is written in UK English and was submitted to language review.

1 Introduction

1.1 Setting the scene: Frontex, joint operations, and legal responsibility

In 2016, the United Nations High Commissioner for Refugees (UNHCR) reported 65 million forcibly displaced persons on the move, the highest number since World War II. Since 2011, this figure had been rising sharply, reaching new record-highs annually. Overwhelmingly, those that leave their countries of origin are hosted by neighbouring states.[1] Some, however, fleeing persecution, conflict, or poverty, intend to seek refuge in Europe. Estimates of the actual number vary significantly, but peaked in 2015 when over one million persons were reported to have arrived irregularly in Europe by land and sea, compared with 280,000 in 2014 and 390,000 in 2016.[2]

For the purposes of entering its territory, a large part of Europe is designed as 'one single area'. Almost all European Union (EU, also 'Union') member states and four non-EU states have abolished checks at the borders between them, thereby creating the 'Schengen area'. They have also set up common rules to control their external borders and agreed on a regime according to which refugees can lodge an asylum application in only one state.[3] Whilst entering the Schengen area without possessing the necessary documents had never been easy, crossing these borders, but also moving around within, became gradually more difficult from 2015 onwards. Irregular migrants increasingly encountered newly erected fences, border barriers, or temporarily reintroduced internal border controls, and found themselves stranded on Greek islands or along the way to central and northern European countries.[4]

Many persons, however, never arrive at the physical borders of the EU.

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1 UNHCR, 'Global Trends: Forced Displacement in 2015' (June 2016).

2 This data was retrieved from http://migration.iom.int/europe [last accessed April 2017].

3 See in particular Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), [2016] OJ L77/1; Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, [2013] OJ L180/31 [the 'Dublin III Regulation'].

4 The Guardian, '"Prisoners of Europe"' (6 September 2016), https://www.theguardian.com/world/2016/sep/06/prisoners-of-europe-the-everyday-humiliation-of-refugees-stuck-in-greece-migration; BBC News, 'Migrant crisis: Hungary's closed border leaves many stranded' (15 September 2015), http://www.bbc.com/news/world-europe-34260071; Austria, Germany, Denmark, Sweden and Norway temporarily reintroduced internal border controls as a result of the 'refugee crisis', see also 1.1.1 below.

Over the last two decades, the death toll of migrants attempting to reach European territory has increased consistently. Causes for loss of lives are diverse and include deaths from suffocation in trucks, containers or cargo holds, from excessive use of force, dehydration, hypothermia, or from lack of medical treatment. Most fatalities, however, occur in the Mediterranean in efforts to cross Europe's southern maritime border, often on unseaworthy or overloaded boats.[5] In October 2013, two devastating incidents, in which over 360 migrants drowned off the shores of the Italian island Lampedusa, sparked public outrage and increased awareness of migrant deaths in the Mediterranean. However, since then the death toll has continued to rise significantly. 2014 and 2015 were both considered the 'deadliest years' at the time, with an estimated 3,280 and 3,770 fatalities respectively. Yet, in 2016, this number rose to an all-time high of 5,098, despite a decrease in the overall number of irregular migrants making the crossing.[6]

1.1.1 'Reinforcing' Frontex: the European Border and Coast Guard Agency

This migration or refugee 'crisis', as it has been labelled since spring 2015, was perceived as a major threat to the functioning of the Schengen area.[7] On the one hand, states at the external borders affected, such as Greece or Italy, were accused of not complying with the common European rules requiring effective control of their stretches of the external border and registration of arriving irregular migrants. This prompted Austria, Denmark, Germany, Norway, and Sweden to temporarily reintroduce border controls at their Schengen-internal borders.[8] On the other hand, states in Northern and West-

5 In May 2015, a team of researchers at VU Amsterdam released the 'Death at the Borders Database', based on official death records of migrants who died along the southern European borders between 1990 and 2013 (recorded total 3188), see http://www.borderdeaths.org/; also, the NGO 'United' keeps a register of lives lost under circumstances (at times loosely) related to the crossing of borders in Europe; between 1993 and June 2015, it registered 22,394 deaths, http://unitedagainstrefugeedeaths.eu/wp-content/uploads/2015/06/Listofdeaths22394June15.pdf; similarly, 'Fortress Europe' reports 27,382 deaths between 1988 and February 2016, see http://fortresseurope.blogspot.nl/p/la-strage.html; on the factual and methodological difficulties in counting and recording migrant deaths, see Tamara Last and Thomas Spijkerboer, 'Tracking Deaths in the Mediterranean' in Tara Brian and Frank Laczko (eds), *Fatal Journeys: Tracking Lives Lost during Migration* (International Organization for Migration 2014).

6 These are the numbers recorded by the 'Missing Migrants Project', launched by the International Organization for Migration in the aftermath of the 'Lampedusa shipwrecks', see http://missingmigrants.iom.int/ [last accessed April 2017].

7 In the Rome Declaration of 25 March 2017, adopted at a meeting on the occasion of the 60th anniversary of the Treaty of Rome, the leaders of 27 EU member states indeed highlighted 'migratory pressures' among the 'unprecedented challenges' the EU is currently facing, see http://www.consilium.europa.eu/press-releases-pdf/2017/3/47244656633_en.pdf.

8 See also Council of the European Union, 'Implementing Decision setting out a Recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk', Brussels, 12 May 2016.

ern Europe without immediately affected external Schengen borders were accused of not sharing the responsibility of protecting individuals entitled to international protection.

Two response strategies were pursued in order to meet both concerns.[9] The first was reinforcing internal solidarity and responsibility through relocating persons in need of international protection from Italy, Greece, and Hungary to less affected EU member states.[10] This promise proved difficult to deliver. Even though a compromise was finally reached in September 2015, its implementation remained slow.[11]

The second response strategy enjoyed greater popularity among member states. Broadly speaking, it consisted of a wide range of measures aimed at joining efforts to prevent irregular migration.[12] The first to be implemented was the launch on 22 June 2015 of a Common Security and Defence Policy (CSDP) naval operation to identify, capture and dispose of vessels and assets used or suspected of being used by human smugglers or traffickers (EUNAVFOR MED, later named 'Operation Sophia' after the baby girl born on board one of the vessels during a rescue mission).[13] Moreover, in March 2016 a controversial agreement was reached between the EU and Turkey,

9 For a more detailed overview and appraisal of the legal responses to the migration 'crisis' see Cathryn Costello and Minos Mouzourakis, 'The Common European Asylum System: Where did it all go wrong?' in Diego Acosta Arcarazo and Cian C Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart Publishing 2014); Manfred Nowak and Antonia E Walter, 'The Crisis of the European Refugee Policy' in Wolfgang Benedek and others (eds), *European Yearbook on Human Rights: Yearbook 2016* (Intersentia; Neuer Wissenschaftlicher Verlag 2016).

10 See in particular, European Council, 'Special meeting 23 April 2015 - statement' (2015); European Commission, 'Communication: A European Agenda on Migration' (COM(2015) 240 final, 13 May 2015).

11 The Commission publishes regular report on the progress made, for the latest report see European Commission, 'Eleventh report on relocation and resettlement' (COM(2017) 212 final, 12 April 2017).

12 See in particular references in n 10.

13 Council of the European Union, Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED), 18 May 2015, OJ L122/31; in June 2016, the Council extended the mandate for another year and added two supporting tasks, namely (1) training of the Libyan coastguard and navy and (2) contributing to the implementation of the UN arms embargo on the high seas off the coast of Libya, Council of the European Union, Decision (CFSP) 2016/993 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA), 20 June 2016, OJ L162/18.

according to which irregular migrants newly arriving in Greece from Turkey are sent back to Turkey if they do not apply for asylum or do not qualify as refugees.[14]

Among the most important measures were those relating to reinforcing the effectiveness and solidarity of external border control. This was predominantly achieved through channelling more money to, and eventually considerably strengthening, Frontex.[15] Frontex is an EU agency that supports Schengen states in the management of their external borders *inter alia* by training border guards, conducting risk analyses, and organising joint return and border control operations. It was originally founded in 2005 as the 'European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union', but is better known by its acronym 'Frontex', from the French frontières extérieures' (engl. 'external borders').[16]

On 15 December 2015, the European Commission tabled a proposal to overhaul Frontex.[17] Within less than a year, the new European Border and Coast Guard Regulation ('EBCG Regulation') entered into force, replacing Frontex' legal basis. The 'reinforced' Frontex, officially renamed 'European Border and Coast Guard Agency' but still referred to by its 'old' name, was launched on 6 October 2016 at a border checkpoint at the Bulgarian external border with Turkey.[18] The new founding Regulation explicitly defines border management in Europe as a 'shared responsibility' between Frontex

14 EU-Turkey Statement of 18 March 2016, http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/; It should be noted, however, that in the view of the CJEU, the statement was not entered into between the EU and Turkey, but rather between the EU member states and Turkey. In February 2017, the CJEU declared that it lacked jurisdiction to hear actions for annulment of the EU-Turkey statement brought by three asylum seeker because the statement did not constitute a measure attributable to an EU institution or body. Even if the statement qualified as an international agreement, the CJEU held, it would be one concluded by the Heads of State or Government of the Member States of the European Union and the Turkish Prime Minister, rather than by the EU. See CJEU, Case T-192/16 *NF v European Council*, 28 February 2017, ECLI:EU:T:2017:128.

15 For more detail on the expanding role of Frontex since its establishment see Jorrit J Rijpma, 'Frontex and the European system of border guards: The future of European border management' in Maria Fletcher, Ester Herlin-Karnell and Claudio Matera (eds), *The European Union as an Area of Freedom, Security and Justice* (Routledge 2016) 218–228.

16 Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, [2004] OJ L349/1.

17 European Commission, Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, 15 December 2015, COM(2015) 671 final.

18 Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard, [2016] OJ L251/1.

and the respective national authorities.[19] It significantly increased Frontex' response capacity through additional tasks, better access to human and technical resources, and significantly more financial means. The agency now for example avails itself of a 'rapid reaction pool' encompassing at least 1,500 officers that may assist member states on short notice in crisis situations.[20] Frontex' budget increased from EUR 143 million in 2015 to EUR 254 million in 2016, an amount that is envisaged to rise to EUR 281 million in 2017.[21] Whereas in 2015, Frontex availed itself of 309 staff members, this number is envisaged to gradually increase to an estimated 1000 persons by 2020.[22]

The EBCG Regulation, however, did not transform Frontex into a truly supranationalised European border authority. The character and role of the agency did not change in nature, only in scale.[23] Thus, despite the EBCG Regulation's emphasis on border management as a 'shared responsibility', the member states retain the primary duty to manage their respective segments of the external borders, in their own interest, but also the common interest of all member states. The agency, in turn, supports the member states by 'reinforcing, assessing and coordinating' their actions.[24]

1.1.2 Joint operations and allocation of responsibility in multi-actor situations

One of Frontex' main tasks is the organisation and implementation of joint operations. Joint operations are launched in order to support one or more member states in external border management. Assistance may be rendered for purposes of border control (joint border control operations) or the return of third country nationals that have no right to stay (joint return operations). Both types of operation are characterised by the deployment of additional human and technical resources that are made available primarily by other

19 Ibid art 5.

20 Ibid in particular art 20(5); for more detail see 2.3.2.1.2.

21 Frontex, 'Budget 2016' (24 December 2015); the data for 2017 was retrieved from Frontex' homepage, http://frontex.europa.eu/pressroom/faq/european-border-and-coast-guard/.

22 Frontex, 'General Report 2015' (Warsaw 2016), 64; the data for 2020 was retrieved from Frontex' homepage, http://frontex.europa.eu/pressroom/faq/european-border-and-coast-guard/.

23 See also Jorrit J Rijpma, 'The Proposal for a European Border and Coast Guard: evolution or revolution in external border management?' (Study for the LIBE Committee of the European Parliament, 2016), 32; Anna Mrozek, 'Same same but different?: The European Border and Coast Guard and the "new" Perspective of Joint Border Surveillance at the External Borders of the European Union' (2016) Sonderband Zeitschrift für Europarechtliche Studien 143, 154–155; Sergio Carrera and Leonhard den Hertog, 'A European Border and Coast Guard: What's in a name?' (CEPS Paper in Liberty and Security in Europe No. 88, March 2016), 16.

24 EBCG Regulation (n 18) art 5.

member states and operate under a specific 'command regime'. Practically speaking, border guards and other experts as well as equipment, ranging from simple night vision devices to vessels or aircraft, from different states are deployed by the agency to another state in need of support in order to conduct border management tasks.

This set-up poses a fundamental question. If the responsibility for or implementation of border management is shared, is the responsibility for unlawful conduct associated with it too? More specifically, if unlawful activities are performed during joint operations, how is the responsibility for these distributed among the member states and the agency? It may be evident that the state whose stretch of the external border is concerned is responsible. However, it is unclear to what extent the organisational, financial, technical, or personal assistance makes other states and Frontex responsible too.[25]

Imagine the following scenario: During a border control operation at sea, as vessel forces a boat carrying migrants back to its place of origin. This is potentially in violation of the prohibition of collective expulsions, but probably also the prohibition of *refoulement*.[26] The operation is hosted by State A, coordinated and financed by Frontex, but the vessel in question and its crew are from State B. The incident is supervised by a nearby vessel of State C and a helicopter of State D. The crew on State B's vessel did not decide alone to send the migrant boat back. In fact, representatives of A, B, C, D, and Frontex sat together and discussed possible courses of conduct, reaching the conclusion this was the way to proceed. Whilst each one of them may have contributed to the unlawful activity, their contributions vary in nature and degree. But which one leads to legal responsibility? In other words, who has to bear the consequences for and remedy the unlawful conduct (see also the illustration in Figure 1)?

25 The lack of clarity in the allocation of responsibility has in particular been pointed out by PACE, Committee on Migration, Refugees and Displaced Persons, 'Frontex: human rights responsibilities' (Report, Doc. 13161, 8 April 2013), paras 39-49; see also Niels Blokker, 'The Macro Level: The Structural Impact of General International Law on EU Law: International Legal Personality of the European Communities and the European Union: Inspirations from Public International Law' (2016) 35 Yearbook of European Law 471, 481–482; Rijpma, 'Frontex and the European system of border guards' (n 15) 229; Rijpma, 'The Proposal for a European Border and Coast Guard' (n 23) 29; Efthymios Papastavridis, 'The EU and the obligation of *non-refoulement* at sea' in Francesca Ippolito and Seline Trevisanut (eds), *Migration in the Mediterranean: Mechanisms of International Cooperation* (Cambridge University Press 2016) 238; Roland Pierik, 'Shared Responsibility in International Law: A Normative-Philosophical Analysis' in André Nollkaemper, Dov Jacobs and Jessica N M Schechinger (eds), *Distribution of Responsibilities in International Law* (Cambridge University Press 2015) 37, 54-58.

26 See below, text to n 33-36.

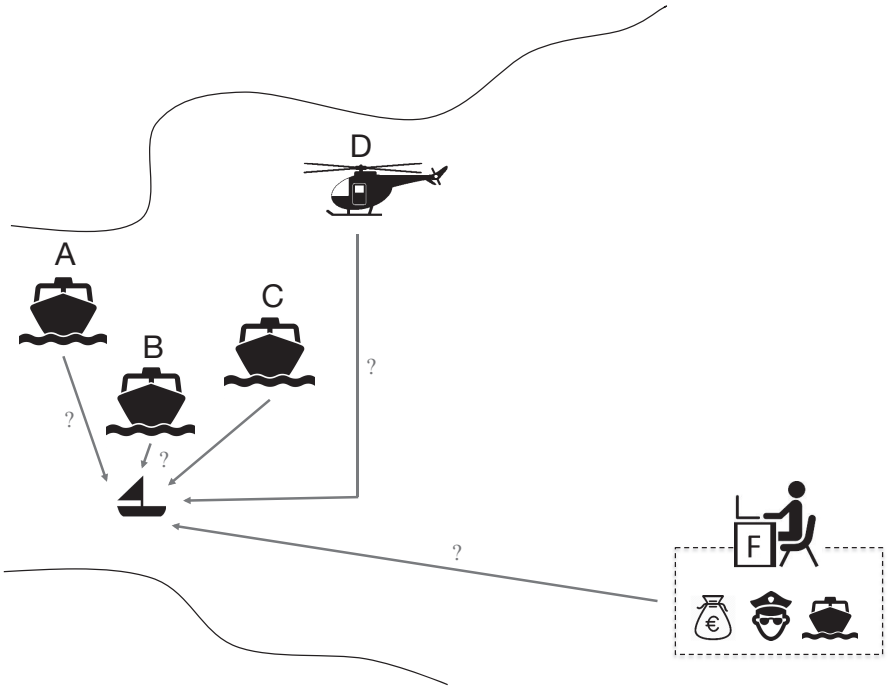

Figure 1: The challenge of allocating responsibility during Frontex operations

Difficulties in allocating responsibility are not unique to Frontex, but exist more generally when multiple actors contribute to a harmful, and perhaps unlawful, outcome ('*multi-actor situations*').[27] It is not always clear what exactly each actor contributed and what types of contribution to an unlawful outcome are capable of leading to legal responsibility. Moreover, what if none of the contributions is sufficient to trigger legal responsibility, but the outcome as a whole is, had it been the result of the conduct of only one actor? What if they can do more harm together than each one of them alone?

27 See in particular André Nollkaemper, 'Introduction' in André Nollkaemper, Ilias Plakokefalos and Jessica N M Schechinger (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press 2014) 4–6; André Nollkaemper, 'The Problem of Many Hands in International Law' (SHARES Research Paper 72, 2015, ACIL 2015-15); for a conceptualisation of the variety of what is here referred to as 'multi-actors situations', see André Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Concept Paper' (ACIL Research Paper No 2011-07, SHARES Series, 2011); André Nollkaemper and Dov Jacobs, 'Introduction: Mapping the Normative Framework for the Distribution of Shared Responsibility' in André Nollkaemper, Dov Jacobs and Jessica N M Schechinger (eds), *Distribution of Responsibilities in International Law* (Cambridge University Press 2015).

The lack of clarity in the distribution of responsibility has a number of drawbacks. On the one hand, it may negatively affect the performance of obligations.[28] Legal responsibility not only reinstates the balance between the perpetrator and the victim of a wrong, e.g. through compensation, it also seeks to discourage unlawful behaviour in the first place.[29] The latter aim of legal responsibility is particularly important when harm cannot, by its very nature, be fully made good by financial means, as is regularly the case with respect to infringements of a person's dignity or physical integrity. Importantly, if it is uncertain whether they will ever be called to account for unlawful behaviour, or if it is possible to perpetually shift the blame to others, this may weaken the incentives for public actors to ensure their own compliance with legally binding rules.[30]

On the other hand, lack of clarity in the distribution of responsibility weakens the position of the victim of a breach. The reason is that bringing legal action requires knowledge of the role each actor played with respect to a specific injury, and the extent to which this is relevant to responsibility.[31] This is even more so where cooperation among the potential wrongdoers spans multiple and overlapping legal regimes. In those cases, the specific obligations and the possibilities for a person to invoke violations thereof often differ depending on the actor in question, e.g. whether it is a state or an international organisation, and what commitments they have entered into respectively. As a consequence, invoking responsibility often presupposes knowing who is responsible, because it defines what obligations apply and where a complaint may be lodged.

In the case of Frontex, clarifying the allocation of legal responsibility among the actors involved in joint operations is particularly crucial because border control and return operations inherently touch upon a broad range of human rights. This is so regardless of whether states conduct these operations alone, jointly, or with the assistance of international or supranational

28 André Nollkaemper, 'Shared Responsibility for Human Rights Violations: A relational account' in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation* (Routledge 2017) 30.

29 Lewis A Kornhauser, 'Incentives, Compensation, and Irreparable Harm' in André Nollkaemper, Dov Jacobs and Jessica N M Schechinger (eds), *Distribution of Responsibilities in International Law* (Cambridge University Press 2015) 121; Anne van Aaken, 'Shared Responsibility in International Law: A Political Economy Analysis' in André Nollkaemper, Dov Jacobs and Jessica N M Schechinger (eds), *Distribution of Responsibilities in International Law* (Cambridge University Press 2015) 160, noting that the additional third objective of securing international cooperation is often neglected in legal literature.

30 Similarly see also Kornhauser (n 29) in particular 121-123.

31 Nollkaemper, 'Shared Responsibility for Human Rights Violations' (n 28) 30; in this vein see also Matthias Lehnert, *Frontex und operative Maßnahmen an den europäischen Außengrenzen: Verwaltungskooperation - materielle Rechtsgrundlagen - institutionelle Kontrolle* (Nomos 2014) 408–410.

organisations. Therefore, when implementing joint operations, the member states and Frontex inevitably engage in human rights sensitive activities.[32]

By design, border control operations monitor entry and exit to state territory which includes the detection and prevention of unauthorised border crossings. Return operations enforce decisions by national authorities that a specific person is not entitled to stay on their territory and has to be (forcibly) removed. Even though states are generally free to deny persons entry to their territory or send them away if they have no right to stay, at the same time it touches upon some of the most fundamental rights of individuals. Some persons, for example, have a right to remain on a state's territory once they have entered, despite having done so without the required documents. This obviously concerns refugees, who have a right not to be expelled to territories where they would face persecution.[33] Beyond that however, all individuals have a right not to be sent back to a state where they would face especially serious maltreatment, such as torture or other inhuman or degrading treatment or punishment (the prohibition of *refoulement*).[34] In addition, regardless of whether they enjoy a right to stay in a particular case, individuals have a right for their specific situation to be assessed before they are returned. This safeguard, known as the prohibition of collective expulsions, more specifically requires that individuals get the chance to submit arguments against their removal.[35] Importantly, this has been interpreted as not only prohibiting expulsion *sensu stricto* from the territory of a state, but also expulsions during border control operations, where the persons have technically not crossed the border yet.[36] Finally, as law enforcement activities, border control and return by their nature often have to be enforced

32 Rijpma, ‚Frontex and the European system of border guards' (n 15) 228; Rijpma, 'The Proposal for a European Border and Coast Guard' (n 23) 29.

33 See in particular the Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 137 and Protocol relating to the Status of Refugees, 31 January 1967, 606 UNTS 267, art 33(1).

34 See in particular Charter of Fundamental Rights of the European Union, [2007] OJ C303/1, art 19(2); in the context of the ECHR the protection from *refoulement* was developed by the ECtHR in particular under Article 3 ECHR, see ECtHR, *Soering v The United Kingdom*, 7 July 1989, application no 14038/88, para 91; in later cases, it was confirmed that this also covers expulsion of refugees, see ECtHR, *Cruz Varas v Sweden*, 20 March 1991, application no 15576/89; ECtHR, *Vilvarajah and Others v The United Kingdom*, 30 October 1991, application nos 13163/87, 13164/87, 13165/87, 13447/87, 13448/8.

35 See in particular Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, art 4 of prot no 4; CFR (n 34) art 19(1); Notably, the ECtHR found Italy in breach of this provision twice, see ECtHR, *Hirsi Jamaa and Others v Italy*, 23 February 2012, application no 27765/09; ECtHR, *Sharifi and Others v Italy and Greece*, 21 October 2014, application no 16643/09. In a more recent case, *Khlaifia*, the Court clarified that the provision does not necessarily require a state to conduct individual interviews, as long as persons have possibilities to submit arguments against their removal, e.g. during identification procedures. See ECtHR, *Khlaifia and Others v Italy*, 15 December 2016, application no 16483/12, paras 247-251.

36 ECtHR, *Hirsi* (n 35) paras 176-178.

against the will of the persons concerned and may include coercion or the use of physical force. Such measures are particularly sensitive to a person's human dignity and physical integrity.

Against this background, it is imperative to clarify the allocation of legal responsibility among the actors involved in joint operations in order to ensure individual victims of human rights violations can make use of their right to an effective remedy. This is even more so in light of the reinforcement of Frontex which may aggravate the existing challenges by broadening the scope of the agency's powers and competences.[37]

1.2 Research question and scope

1.2.1 Main research question

This study examines the legal responsibility of public actors involved in Frontex operations for human rights violations that may occur in the context of joint operations (see Figure 2). It centres on the allocation (also: distribution) of responsibility among them, determining to what extent each of their contributions may trigger responsibility.

In this light, it answers the following research question:

> *How is legal responsibility for human rights violations that may occur in the context of Frontex-coordinated joint operations allocated among the actors involved?*

This study neither claims nor assumes that human rights violations occur in all joint operations. However, in light of the human rights sensitivity of the activities involved in border control and return operations, human rights violations *may* occur. Thus, for the purposes of examining legal responsibility, this study assumes the occurrence of a human rights violation. It goes without saying that this assumption does not remove the necessity, nor diminish the importance or difficulty, of ascertaining in each specific case *whether* an infringement occurred in the first place. However, it is outside the scope of this study to discuss the human rights compatibility of EU external border management generally, or of specific practices particularly.

37 See also Rijpma, 'The Proposal for a European Border and Coast Guard' (n 23) 29; the need to complement the reinforcement of the agency with strengthened fundamental rights protection seems to be acknowledged in the EBCG Regulation (n 18) recitals (14) and (48).

Figure 2: Definition of legal responsibility

1.2.2 Scope of the research

1.2.2.1 The operations and actors

The subject matter studied comprises joint operations that are coordinated by Frontex (see Figure 3). This includes border control operations that take place at land, sea, and air borders of the 'Schengen area' and return operations.[38] They are referred to as 'Frontex operations', 'Frontex-coordinated operations', or 'joint operations' interchangeably.

A broad range of parties may be involved in joint operations. There are public actors, ranging from Frontex, EU member states, and non-EU Schengen states to third states, but also private actors that provide specific contracted services. This study is exclusively concerned with the relationship among the principal public actors, i.e. Frontex and Schengen states, when they participate in or host a joint operation.

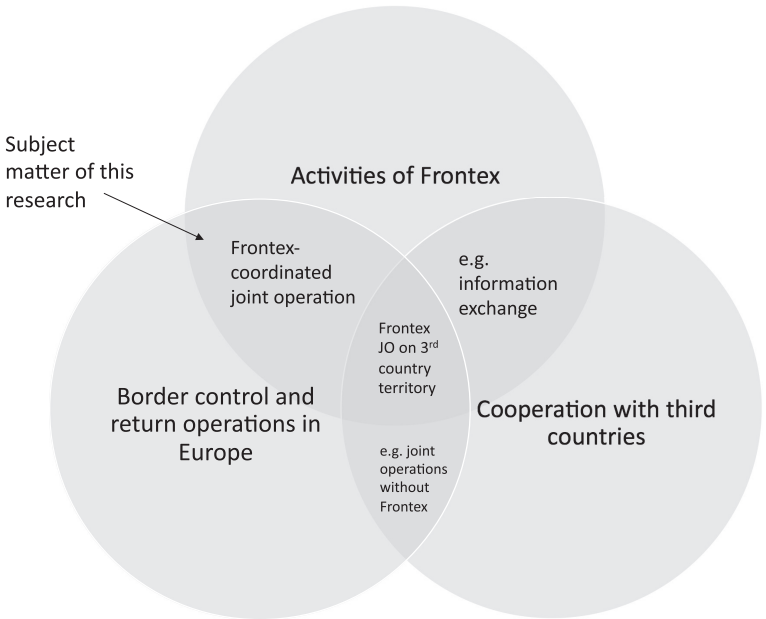

Figure 3: Operations within the scope of this research

38 For more detail on the 'Schengen area' see 2.1.1.1.

1.2.2.2 The legal framework

There are numerous forms of legal responsibility that potentially arise as a result of a breach of human rights during Frontex operations. These include responsibility under general international law or specific international human rights regimes, under EU law, and under national legal systems of the states involved. This study cannot meaningfully address them all. The choice of forms of legal responsibility to be analysed is guided by two principal criteria.

First, the study is limited to forms of legal responsibility that can be established before courts following an action by an individual. Individual complaints mechanisms are a powerful tool to compel public authorities to comply with their legal obligations, especially when there is a lack of political will to ensure the protection of these rights. Beyond their relevance for ensuring protection in the specific case at hand, successful claims may also trigger broader policy changes.

Second, responsibility regimes that are in principle capable of addressing questions of allocation of responsibility are chosen over others that are not. The fundamental question examined in this study is not so much the *existence* of responsibility, but its *allocation*. Not all responsibility regimes are equally susceptible of addressing this question. National law, for example, may contain rules on and mechanisms to establish the legal responsibility of a specific state that was involved in a Frontex operation, but it cannot usually comprehensively determine how this responsibility relates to the potential responsibility of other actors involved.

Two responsibility regimes have been identified that fulfil both criteria and are, *prima facie*, applicable in the context of Frontex operations. The first is legal responsibility under the European Convention on Human Rights (ECHR, also 'Convention'). All principal actors participating in joint operations except Frontex (or the EU) are bound by the ECHR and incur responsibility according to the same rules for breaches thereof.[39] This responsibility may be invoked before the European Court of Human Rights (ECtHR) by anyone who is a victim of a violation, provided all available local remedies have been exhausted.[40]

The second regime is liability under EU law for breaches of fundamental rights guaranteed under EU law, in particular the Charter of Fundamental Rights of the European Union (CFR).[41] This requires more detailed explana-

39 See also below 2.4.1.3.

40 ECHR (n 35) art 34.

41 It should be noted that for the purposes of this study 'human rights' and 'fundamental rights' are used as synonyms. However, the expression 'human rights' will be preferred over 'fundamental rights', unless reference is made specifically and exclusively to the rights protected within the EU legal order.

tion. The CFR applies without restriction to the conduct of EU bodies and to member states when they implement EU law.[42] However, in EU law, no fundamental rights specific complaints mechanism exists, which means that victims of fundamental rights violations must have recourse to the general remedies available against breaches of Union law by public authorities. In light of the analysis in this study, Chapter 5 indeed identifies a need to adapt EU public liability law in accordance with the requirements of fundamental rights law, and alternatively recommends to set up a fundamental rights complaints procedure under EU law.[43]

There are two principal direct remedies available to individuals against acts of Union bodies, including Frontex: legality review and action for damages. Whereas the former, if successful, results in annulment of the contested act, the latter aims at compensation for the damage suffered by the violation. Legality review is governed by Article 263 Treaty on the Functioning of the European Union (TFEU).[44] However, it is limited to acts of the Union 'intended to produce legal effects vis-à-vis third parties'. Moreover, as 'non-privileged' applicants, individuals' standing is reduced to situations where they can be shown to be the addressees of, or directly (and individually) concerned by an act. In parallel to the legality review, EU law allows individuals to challenge inaction by EU bodies under similar conditions (Article 265 TFEU). Even though the Court has taken a flexible approach in the past as to what constitutes a 'legal act' for the purpose of the action for annulment, it offers very limited prospects of success for individuals whose rights may have been breached during Frontex operations.[45] Importantly, the execution of border control or return operations, and more specifically the activities of Frontex in that respect, predominantly consist of 'purely factual conduct' rather than legally binding acts and is thus commonly not open to challenge under Articles 263 and 265 TFEU.[46]

However, factual conduct can be challenged in the context of an action for damages, providing individuals with the possibility to recover loss they have suffered as a result of conduct of EU bodies (Article 340 TFEU). Under

42 See also below 2.4.1.3.

43 See below 5.4.2.1.

44 Consolidated version of the Treaty on the Functioning of the European Union, [2012] OJ C326/47.

45 Discussing the meaning of an 'act' within the context of annulment actions see for example CJEU, Case 60/81 *IBM v Commission*, 11 November 1981, ECLI:EU:C:1981:264, para 9.

46 Jorrit J Rijpma, 'Hybrid agencification in the Area of Freedom, Security and Justice and its inherent tensions: the case of Frontex' in Madalina Busuioc, Martijn Groenleer and Jarle Trondal (eds), *The agency phenomenon in the European Union* (Manchester University Press 2012) 96; Rijpma, 'Frontex and the European system of border guards' (n 15) 239; discussing the limits of these actions in the context of Frontex operations see also Izabella Majcher, 'Human Rights Violations During EU Border Surveillance and Return Operations: Frontex's Shared Responsibility or Complicity?' (2015) 7 Silesian Journal of Legal Studies 45, 70–72; Papastavridis, 'The EU and the obligation of non-refoulement at sea' (n 25) 260–261.

circumstances such as Frontex operations, the action for damages is in practice the most important, or indeed the only, substantive remedy under EU law to invoke rights that may have been violated by an EU body.[47] The right to compensation for damages is indeed recognised as a fundamental right itself in Article 41(3) CFR.[48]

Whilst the action for damages therefore provides the only individual complaints mechanism where Frontex violates fundamental rights during joint operations, it is not *per se* susceptible of addressing questions of allocation of liability. That is until the Court of Justice of the European Union (CJEU), starting with the case of *Francovich* in 1991, set out that as a matter of Union law, member states are liable for any breaches thereof.[49] In the following years, it gradually aligned the conditions governing liability of member states and Union bodies.[50] The thereby created 'EU public liability law' is in principle capable of addressing questions of allocation of liability, in particular because its rules apply to states and Union bodies alike and may be interpreted by a common court, the CJEU, in a binding manner.

The choice of these two legal frameworks imposes limitations on this study. Most obviously, a state may be responsible for breaches of national human rights law under responsibility mechanisms provided and governed by national law. However, given that EU law forms part of the legal systems of the member states, national responsibility mechanisms and accompanying remedies they provide for individual victims can also be used to invoke violations *of EU law*. National mechanisms may in particular, with respect to breaches of national or EU human rights law, set out different, less onerous conditions for responsibility. This is indeed not unlikely, given that, as will be explained in more detail in the course of this study, EU liability law imposes a high threshold for liability to arise. Thus, it is important to note that even if a state is found in this study not to incur legal responsibility for certain breaches, this does not exclude the possibility that the same state may be otherwise held responsible in the context of national responsibility mechanisms that will not be studied here.

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47 In this vein see also Pekka Aalto and others, 'Article 47 - Right to an Effective Remedy and to a Fair Trial' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1219; similarly also AG Geelhoed, Opinion in CJEU, Case C-234/02 P *Mediator v Lamberts*, 23 March 2004, ECLI:EU:C:2004:174, para 107, who argued that due to the lack of appeal possibilities, 'the compensation procedure under Article [268 TFEU] is particularly important' and 'the only way in which a citizen affected by the conduct of the Ombudsman can assert his right to proper legal protection'.

48 It is important to note that Article 41(3) is not limited to damages for violations of fundamental rights. It can hence not be considered a fundamental rights specific remedy.

49 CJEU, Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy*, 19 November 1991, ECLI:EU:C:1991:428.

50 For more detail see below 4.1.4.1.

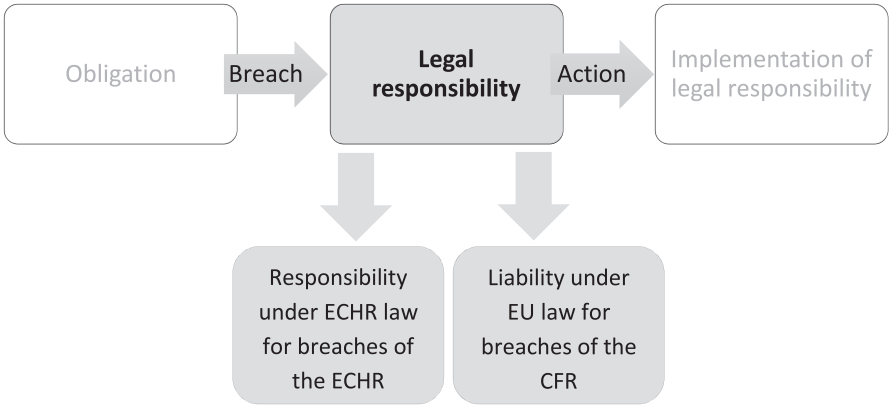

Figure 4: Forms of legal responsibility studied

1.2.3 The research question in detail

In light of the previous sections, the main research question can be divided into two sub-questions.

> *(1) How is responsibility for violations of the ECHR that may occur during Frontex-coordinated joint operations allocated among the states involved according to ECHR law?*
>
> *(2) How is liability for violations of the CFR that may occur during Frontex-coordinated joint operations allocated among Frontex and the EU member states involved according to EU public liability law?*

For the purpose of this study, the term 'responsibility' is used when referring to legal responsibility under international law, including the ECHR, whereas the term 'liability' is used when speaking of EU public liability law.

1.3 Research design

1.3.1 General approach

The aim of this study is to clarify the allocation of responsibility among actors involved in Frontex operations. It seeks to achieve this aim by addressing the two main factors causing ambiguity.

The **first factor** concerns the question of the precise powers of Frontex and the states involved respectively.[51] The extent and nature of each actor's contribution and the authority they exercise over the resources deployed, are all relevant in determining the existence and degree of their legal responsibility. In this light, this study first examines the detailed roles and powers of Frontex and the states involved during joint operations, focussing on the decision-making processes and chains of command.

These questions are only marginally addressed in the EBCG Regulation. Thus, this part of the analysis also relies on information and documents requested from the agency.[52] The requests for access to documents included all Handbooks to Operational Plans, and the Operational Plans as well as their Annexes for a total of 16 joint sea, land, air, and return operations. The operations were chosen based on *inter alia* their duration, their budget, and the level of state participation. With respect to all 16 joint operations, further information was requested regarding the fundamental rights related incidents that occurred during the operations, the number of irregular migrants deterred from continuing their journey to or entering the EU, and the number of asylum applications lodged with the competent member state authority during the operations. With few exceptions, the requests were successful. Most of them, however, only partially. The most frequent grounds for refusal of access were that disclosure would undermine public security or the protection of personal data.[53] On the basis of the analysis in this study, it is recommended in Chapter 5 to make the crucial documents fully and unconditionally publicly available.[54]

In addition to the EBCG Regulation and documents requested from the agency, the analysis of the involved actors' powers also relies on qualitative empirical research. On the one hand, four semi-structured interviews were conducted at Frontex' headquarters in Warsaw. These interviews included a total of six officials from four different organisational units within the

51 The fact that the tasks and responsibilities of Frontex and the member states respectively are not entirely clear was pointed out for instance by Anneliese Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial immigration control: Legal challenges* (Martinus Nijhoff Publishers 2010) 232–236; Violeta Moreno-Lax, 'Searching Responsibilities and Rescuing Rights: Frontex, the Draft Guidelines for Joint Maritime Operations and Asylum Seeking in the Mediterranean' (Reflexive Governance in the Public Interest Working paper series, REFGOV-FR-28, 2010), 4; Steve Peers, Elspeth Guild and Jonathan Tomkin, *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition: Volume 1: Visas and Border Controls* (Martinus Nijhoff Publishers 2012) 119.

52 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, [2001] OJ L145/43; applicable to Frontex by virtue of EBCG Regulation (n 18) art 74(1).

53 These grounds for refusal are recognised in Regulation (EC) No 1049/2001 (n 52) art 4(1).

54 See below 5.4.1.1.

agency.[55] On the other hand, the qualitative empirical research consisted of a field visit to the Military Airbase Pratica di Mare where the International Coordination Centre for Joint Operation Triton is located.[56]

The **second factor** causing ambiguity concerns the more general difficulties in allocating responsibility in multi-actor situations.[57] This study determines the general rules that govern responsibility in a multi-actor context under ECHR and EU law respectively, with a view to applying them to the context of Frontex operations. In this respect, it relies on doctrinal legal analysis.

In the context of the ECHR, the analysis is based on the law of international responsibility as applied by the ECtHR. For the purposes of this study, the law of international responsibility is understood as encompassing the rules reproduced in the Articles on the Responsibility of States for Internationally Wrongful Acts (ASR) and the Articles on the Responsibility of International Organizations (ARIO) formulated by the International Law Commission in 2001 and 2011 respectively.[58] The analysis is predominantly concerned with determining the relevant rules, their content, and their application to Frontex operations.

In the context of EU public liability law, the analysis is based on the Treaties as well as the CJEU's case law as regards the liability of Union bodies and member states. It develops general rules on allocation of liability from that case law and applies them to Frontex operations.

The findings are summarised in a table at the end of each relevant section (see Table 1; for the distinction between primary and associated responsibility referred to in this table see 1.3.3 below).

55 The interviews at Frontex' headquarters were conducted on 3 and 4 September 2015. Interview Reports are on file with the author.

56 The field visit took place from 23 to 24 November 2015. A Field Visit Report is on file with the author.

57 The lack of clarity in allocating responsibility in multi-actor situations in the law of international responsibility and its implementation have been pointed out, for example, by John E Noyes and Brian D Smith, 'State Responsibility and the Principle of Joint and Several Liability' (1988) 13 Yale Journal of International Law 225; and more recently by Nollkaemper, 'Introduction' (n 27) 12–16.

58 ILC, 'Report of the Fifty-Third Session: Articles on Responsibility of States for Internationally Wrongful Acts' (UN Doc A/56/10, 2001), hereinafter 'ASR'; ILC, 'Report of the Sixty-Third Session: Articles on the Responsibility of International Organizations' (UN Doc A/66/10, 2011), hereinafter 'ARIO'.

Table 1: Summary of findings (preview)

	ECHR			CFR	
	Primary responsibility	**Associated responsibility (obligations to protect)**	**Associated responsibility ('complicity')**	**Primary liability**	**Associated liability**
Frontex/EU	*Chapter 3.3*	*Chapter 3.4*	*Chapter 3.4*	*Chapter 4.3*	*Chapter 4.4*
Host state					
Participating state (minor technical equipment)					
Participating state (standard team member)					
Participating state (large assets, e.g. vessels, aircraft)					

As indicated earlier, the purpose of this study is not to enquire whether and to what extent human rights violations occur during Frontex operations. Rather, the aim is to determine the allocation of legal responsibility if they do occur. This exercise is necessarily theoretical. In particular, in the case of an actual human rights violation, the responsibility of all parties involved will have to be assessed with due regard to their role and contribution in the specific circumstances of the situation.

Having said this, it is nonetheless useful to illustrate the theoretical findings by explaining how they would apply to a specific situation. Four hypothetical scenarios are used to focus the reader's attention on the potential practical implications of the results of this study. These are briefly set out in the following and will be referred to throughout the study.

Whilst the scenarios are hypothetical, they are based on situations that have in the past given rise to human rights concerns. Detail is omitted in favour of simplicity. The examples are chosen with a view to illustrating diverse sets of circumstances. However, the choice should not be understood to suggest that the practices mentioned occur on a regular basis or that these violations have been alleged more frequently than others. In the interest of clarity, in all four of the examples, State A refers to the host state of an operation. States B, C, and D refer to states participating to varying degrees therein: State B refers to states contributing large assets (e.g. vessels, aeroplanes), State C refers to the 'standard' participating state who, for example, contributes border guards or other experts to a border control operation or participates in a return operation, and State D refers to states contributing minor technical equipment (e.g. night vision devices).

EXAMPLE 1: EXCESSIVE USE OF FORCE

A Frontex operation, hosted by State A, is ongoing at A's land border. A team of border surveillance officers, including officers of A, but also of State C, spot a large group that has just crossed the border. Upon request, the persons detected are unable to show the necessary documents. When the border guards try to apprehend them, the situation gets out of hand and they have to use force in order to transfer them to a local reception facility. During an ensuing screening interview, one of the migrants plausibly claims that he had been subjected to excessive force by C's officer in violation of the prohibition of inhuman or degrading treatment (Article 3 ECHR, Article 4 CFR).

EXAMPLE 2: REFOULEMENT AT SEA

A Frontex operation, hosted by State A, is ongoing at A's sea border. A vessel contributed to the operation by State B (variation: by State A itself) is patrolling the operational area, when it observes a suspicious boat. Once the boat is within sight, it can be confirmed that the boat carries a large number of migrants accompanied by smugglers. The vessel attempts to intercept the boat by the repeated use of light and sound signals but the boat refuses to comply. After warning shots into the air, a crew member fires shots at the engine of the boat, immobilising it. The boat is towed to the territorial waters of a third state and handed over to its authorities in violation of the prohibition of *refoulement* and the prohibition of collective expulsions (Article 3 ECHR, Article 4 Protocol No. 4 ECHR, Article 19 CFR).

EXAMPLE 3: INHUMAN CONDITIONS IN RECEPTION FACILITIES

A Frontex operation, hosted by State A, is ongoing at A's external borders. As part of this operation, a team of border surveillance officers including officers of A, but also of State C, apprehends a group of persons that had previously been dropped off by a smugglers' boat. The group is transferred to a local reception facility. On site, screening and debriefing experts deployed by Frontex conduct interviews with migrants in order to identify their country of origin and collect intelligence regarding the routes and practices of human smugglers. Frontex has an 'office' in the area, from where a Frontex representative coordinates local activities. The conditions in the reception facility had been deteriorating for a while. The most pressing problem is that A's authorities have run out of money to buy sufficient food for everyone. Even though forcing persons to stay there violates the prohibition against treating them in an inhuman or degrading manner, the team, including officers of A and C, transfer the apprehended migrants to that facility (Article 3 ECHR, Article 4 CFR).

Note: Setting up and maintaining migrant reception facilities is outside the mandate of Frontex operations. The responsibility of states for human rights violations directly resulting from the conditions in reception facilities is thus outside the scope of this study. However, migrants may be in a reception facility because they were brought there in the context of a Frontex operation. This raises the question whether the actors involved in joint operations may also be responsible.

EXAMPLE 4: REFOULEMENT AND RETURN OPERATIONS

State A organises a return operation. The destination is State Z (who is not a Schengen state). Persons that have been identified as nationals of Z and have received individual return orders qualify as 'returnees'. 10 returnees are already in State A. Participating states escort returnees to A, bringing the total number to 30. A Frontex project manager travels with them. Before take-off, it becomes apparent that three returnees escorted from participating State C had been presented with a return order immediately after their arrival. They convincingly argue that they would be at risk of being subjected to torture if returned (Article 3 ECHR, Article 19 CFR).

Note: The adoption of return decisions is outside the mandate of Frontex operations. The responsibility arising directly from the adoption of a return decision is thus outside the scope of this study. However, joint return operations involve the execution by a host state of return decisions issued by a participating state. This raises the question whether actors involved in Frontex return operations may be responsible for returning a person in violation of the prohibition of refoulement in the implementation of another state's return decision.

Establishing clarity in the allocation of responsibility for human rights violations that may occur during Frontex operations in itself strengthens the position of individual victims. Knowing the roles of each actor involved, their powers and authority, the command structures they follow, and the rules on allocation of responsibility applicable in that context, individuals are better placed to take legal action if their rights have been violated. To some extent, the same is true for ensuring compliance with human rights obligations on the part of the actors involved. The more clarity there is, the smaller the scope for 'blame-shifting' from one to another, which may function as an incentive for compliance with the obligations in the first place. Thus, the main part of this study is concerned with establishing clarity in the allocation of responsibility in the context of Frontex operations.

However, whilst clarity itself has a positive impact, it is also true that some solutions will be more beneficial to both the position of the individual and the performance of the obligations than others. For example, allocating responsibility only to the host state of a joint operation may not significantly encourage the other states and Frontex, to ensure they comply with their obligations. In contrast, if responsibility is distributed among all of them according to the degree of their involvement, this may incentivise performance of their obligations to a larger extent, and additionally equips individual victims with a broader range of possibilities for taking legal action. In addition, the latter solution may indeed correspond better to reality. If a human rights violation originates in cooperative action, the most useful approach appears to be to compel all of those involved to halt and remedy the unlawful conduct. Without discussing this aspect in more detail, this study proceeds from the assumption that when multiple actors cooperate in

what leads to a human rights violation, all of them should bear responsibility, at least to a degree proportional to their contributions.[59]

1.3.2 Attribution and causation

Each legal system defines the conditions under which responsibility arises for breaches of its rules. Hence, different forms of legal responsibility arise under different conditions. However, a number of components are common to many of them. It is regularly required that a *breach* of a binding obligation occurs. Sometimes, victims need to show that they have suffered *damage*. An actor commonly incurs legal responsibility if it can be established, first, that the conduct at the origin of the breach in question is *attributable* to it and, second, that it was that breach that *caused* the damage.

For the purposes of this study, 'attribution' is understood as the link between the actor and the allegedly unlawful conduct (see Figure 5). This link is particularly important when the responsibility of a legal entity like a state or an international organisation is at stake. Every breach ultimately originates in the behaviour of individuals. Also in the context of Frontex operations, alleged breaches of human rights obligations are realised by one or more persons deployed during operations. The rules on attribution of conduct define the circumstances under which a person's conduct (legally) qualifies as the entity's conduct.

'Causation' is understood as the link between the allegedly unlawful conduct and the damage suffered (see Figure 5). Rules on causation establish whether the unlawful conduct in question was actually the (main) source of the undesired outcome.

Attribution and causation are often key to determining the allocation of responsibility in the context of multi-actor situations. If a breach occurs but many actors were involved, the rules on attribution of conduct define 'in whose name', from a legal perspective, the breach in question was committed. If several actors commit breaches, the rules on causation establish whose breach may be considered a sufficiently direct source of the undesired outcome. However, the relevance of the concepts of attribution and causation for the allocation of legal responsibility varies among legal systems. Because damage is not required for responsibility to arise under international law, for example, neither is causation.[60] In contrast, damage, and

59 On the advantages of 'shared responsibility', see Nollkaemper, 'Shared Responsibility for Human Rights Violations' (n 28) 37–38; for a more detailed discussion from *inter alia* normative, political, and economic perspectives see in particular the contributions in André Nollkaemper, Dov Jacobs and Jessica N M Schechinger (eds), *Distribution of Responsibilities in International Law* (Cambridge University Press 2015).

60 For more detail see 3.1.1.1.

thus also causation, play a more substantial role in EU liability law where they both form indispensable conditions for liability.[61]

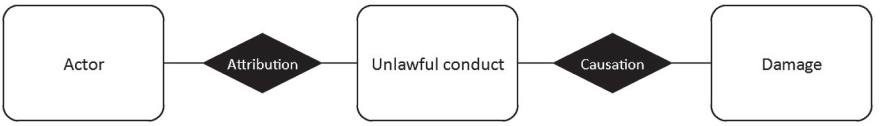

Figure 5: Actor, unlawful conduct, damage, and their relationship

1.3.3 Bases for responsibility: primary and associated responsibility

Responsibility under ECHR and EU law is studied in the framework of two different conceptual bases. The first is the responsibility that arises directly from a human rights violation committed during an operation. For instance, in Example 1, this is the responsibility for having used excessive force. Similarly, in Example 2, it concerns the responsibility for having handed over the migrants concerned to third state authorities. This will be referred to as 'primary responsibility' or 'direct responsibility' interchangeably. It arises for what will be called a 'primary' breach, violation, or infringement. In the examination of the allocation of direct responsibility, questions of attribution of conduct commonly dominate the analysis (see Figure 6).

In both Examples 3 and 4, the respective primary violations occur outside the mandate of Frontex operations and are hence outside the scope of this study when it comes to the analysis of primary responsibility.

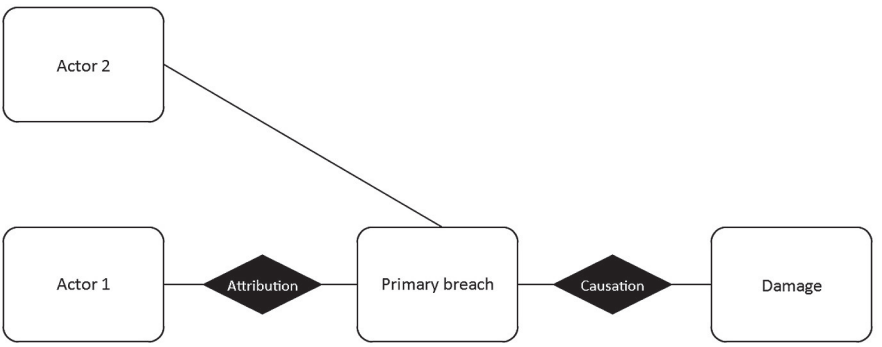

Figure 6: Allocation of responsibility: primary responsibility

61 For more detail see 4.1.2.3, 4.1.3.3.

The second conceptual basis in the framework in which responsibility is studied concerns responsibility that arises for *conduct associated with the primary violation*. This will be referred to as 'associated responsibility' or 'indirect responsibility' interchangeably. Associated conduct may be assistance rendered by one actor to another in breach of human rights. It can also be a failure to protect an individual from suffering interference with their rights, in particular due to insufficient or outright lack of supervision, or refraining from preventing another actor from breaching human rights. For the current purpose, the actor contributing to or failing to prevent the primary breach is referred to as the *facilitating actor*.

Questions of indirect responsibility that arise in the context of Frontex operations may be grouped into two different categories. One is where a human rights violation occurs *during* a joint operation, but not all actors involved incur primary responsibility for it. Consider, for instance, Example 1 above. If State A was considered responsible for the primary breach, the question arises whether State C and Frontex additionally incur responsibility for not having protected the victims from being maltreated. Similar questions arise in relation to Example 2.

The other is where a human rights violation occurs *outside the mandate* of a Frontex operation, but the implementation of the joint operation has an impact on it. In Example 3, for instance, the responsibility arising directly from the conditions in the reception facilities is outside the scope of this study. However, migrants may be in a reception facility because they were brought there in the context of a Frontex operation. This raises the question whether the actors involved in joint operations may incur responsibility for having failed to protect individuals from being placed in a reception facility where the conditions do not meet minimum human rights standards. Similarly, in Example 4, the responsibility for the adoption of a return decision is outside the scope of this study. However, joint return operations involve the execution of return decisions. This raises the question whether actors involved in Frontex operations may be responsible for implementing a return decision that violates the prohibition of *refoulement*.

Commonly, associated responsibility only arises if there is an obligation prohibiting the contribution to, or requiring the prevention of a breach by another actor (see Figure 7). In that event, the primary actor and the facilitating actor both incur responsibility for realising a single undesired outcome by breaching different obligations. Whilst the primary obligation on the one hand, and the obligation to prevent or not to contribute to the primary violation on the other, are two separate obligations, they *can* (but do not have to) arise from a single provision. Obligations to protect, for example, in particular as part of positive obligations arising under human rights law, are often implicit in the same provision breached by the primary actor.

In Example 1, for instance, if State C incurs responsibility for not having protected the victim from being maltreated, its responsibility arises on the basis of the same provision as State A's responsibility, i.e. Articles 3 ECHR and 4 CFR.

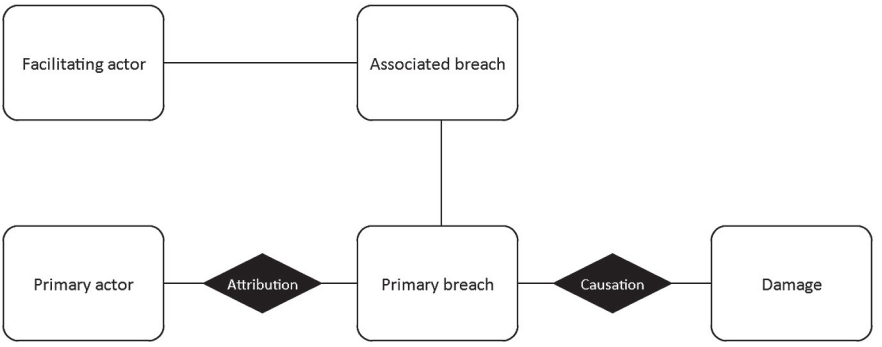

Figure 7: Allocation of responsibility: associated responsibility

Under public international law, an additional basis for responsibility exists, which is studied in Chapter 3 in the context of the ECHR. Often referred to as 'complicity', responsibility may under certain circumstances arise, even in the absence of a more specific obligation, if a state or an international organisation renders aid or assistance in the commission of the primary breach (see Figure 8).

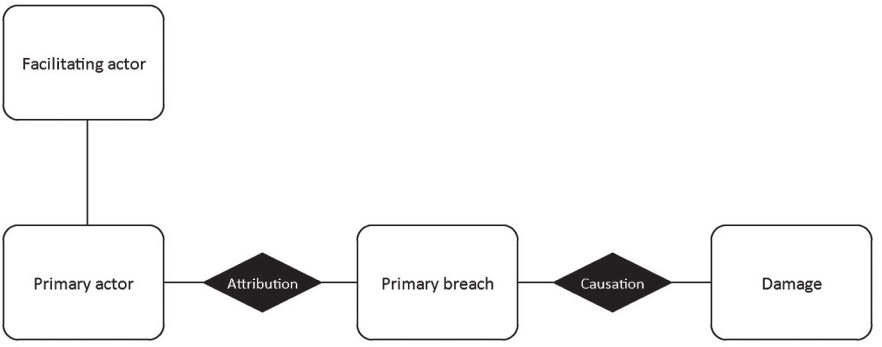

Figure 8: Allocation of responsibility: aid or assistance

1.4 Scientific relevance

As a whole, this study brings clarity to the allocation of responsibility during Frontex operations. In doing so, it provides a tool for, on the one hand, individuals to find the correct respondent and forum to file a complaint and, on the other hand, those who decide on such allegations.

The scientific contribution of this study is twofold. First, it provides a detailed examination of the powers and legal responsibility of each actor involved in Frontex operations. Frontex itself has been the subject of extensive research. Research has been conducted in particular on the nature of the agency, its mandate and tasks, and its accountability, but also on aspects of legal responsibility for the agency's potential unlawful conduct.[62] This study builds on this research in two ways. On the one hand, it narrows the lens to zoom in on the question of legal responsibility, allowing a more detailed analysis of this particular aspect. On the other hand, within the question of legal responsibility, it broadens the scope of previous research by examining it from the perspective of legal frameworks beyond general public international law, addressing in particular the question of liability under EU law.

Second, many of the challenges discussed in this study are inherent in multi-actor situations. In this vein, the scientific contribution of this study goes beyond the specific case of Frontex operations and provides a legal framework for addressing allocation of legal responsibility in multi-actor situations generally. Despite the ever-increasing cooperation between international actors, the principles governing the allocation and sharing of responsibility among multiple actors who contribute to an undesired outcome in fact remain relatively undeveloped. This is true for both ECHR and EU law, albeit to different extents.

In the area of international responsibility questions arising from the involvement of multiple potential wrongdoers have received considerable attention.[63] Research interest has focussed on questions of attribution of conduct relating to the cooperation between states and international organisations,

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62 See for example the following comprehensive studies: Jorrit J Rijpma, 'Building Borders: The Regulatory Framework for the Management of the External Borders of the European Union' (PhD thesis, European University Institute 2009); Lehnert (n 31); Roberta Mungianu, *Frontex and Non-Refoulement: The International Responsibility of the EU* (Cambridge University Press 2016).

63 See in particular the SHARES Project, a research project at the University of Amsterdam, http://www.sharesproject.nl/; in that context three edited volumes, discussing a broad range of questions regarding 'shared responsibility' were published, André Nollkaemper, Ilias Plakokefalos and Jessica N M Schechinger (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press 2014); Nollkaemper, Jacobs and Schechinger (eds) (n 59); André Nollkaemper, Ilias Plakokefalos and Jessica N M Schechinger (eds), *The Practice of Shared Responsibility in International Law* (Cambridge University Press 2017).

predominantly in the context of multinational contingents participating in operations organised by international organisations.[64] Also the notion of 'complicity', i.e. responsibility for rendering aid or assistance in the commission of an internationally wrongful act, has recently received particular attention.[65] This study adds to the existing research by providing an in-depth discussion (based on Article 6 of the Articles on the Responsibility of States for Internationally Wrongful Acts) of the attribution of conduct among states when they jointly conduct law enforcement operations. In addition, it discusses the potential application of the concept of 'complicity' in the context of the ECHR.

In the area of EU law, public liability law in general has been extensively studied.[66] However, two aspects have rarely been addressed. The first is the question of liability for fundamental rights violations. Even though fundamental rights have continuously gained significance within the EU legal order, the potential of liability for breaches thereof has not been subject to in-depth treatment.[67] The second is the issue of allocation of liability in multi-actor situations. Literature addressing the topic is scarce and largely focusses on joint or concurrent liability of the Union and its member states, and the procedural (im)possibility of implementing it.[68] This study aims to fill this gap by extensively discussing, on the one hand, the liability under EU law of the EU and its member states for fundamental rights violations and, on the other, the allocation of liability among them.

64 For recent comprehensive works see Francesco Messineo, 'The attribution of conduct in breach of human rights obligations during peace support operations under UN auspices' (PhD thesis, University of Cambridge 2012); Bérénice Boutin, 'The Role of Control in Allocating International Responsibility in Collaborative Military Operations' (PhD thesis, Universiteit van Amsterdam 2015); Moritz P Moelle, *The International Responsibility of International Organisations: Cooperation in Peacekeeping Operations* (Cambridge University Press 2017).

65 Among many, see Helmut P Aust, *Complicity and the Law of State Responsibility* (Cambridge University Press 2011); Miles Jackson, *Complicity in International Law* (Oxford University Press 2015).

66 For a recent comprehensive treatment see Pekka Aalto, *Public liability in EU law: Brasserie, Bergaderm and beyond* (Hart Publishing 2011).

67 It has been discussed by Angela Ward, 'Damages under the EU Charter of Fundamental Rights' (2012) 12 ERA Forum 589; and by 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).

68 For a more extensive treatment of the topic of allocation of liability in other languages see Uwe Säuberlich, *Die außervertragliche Haftung im Gemeinschaftsrecht: Eine Untersuchung der Mehrpersonenverhältnisse* (Springer 2005); see also Léontin-Jean Constantinesco, *Les problèmes résultant de la responsabilité extra-contractuelle concomitante de la Communauté et d'un État membre* (Office des publications officielles des Communautés européennes 1980).

1.5 Outline

The study consists of five chapters:
- Chapter 1: Introduction
- Chapter 2: Frontex-coordinated joint operations
- Chapter 3: Responsibility under the ECHR
- Chapter 4: Liability under EU law
- Chapter 5: Conclusion

Chapter 2 centres on the distribution of roles and authority among the host state, the participating states and Frontex in the context of joint operations. It elaborates on the pooling of operational resources prior to launching operations, the process of deployment, the coordination bodies and instruments established for joint operation, the respective authority exercised by the actors involved over the deployed operational resources, and the procedures in place for dealing with fundamental rights-related incidents. Chapter 2 therefore provides the basis for the application of the general rules on allocation of legal responsibility to Frontex operations in the subsequent chapters.

Chapter 3 examines the allocation of responsibility under ECHR law among states involved in Frontex operations for breaches of the ECHR that may occur during operations. It is divided into four main sections. The first sets out the 'basics' of the law of international responsibility, its relationship with the ECHR, and its application to the EU member states when they act within EU law. The subsequent section elaborates on the conditions for responsibility. Given that responsibility is analysed on the basis that violations do indeed occur, the focus is on the question of attribution of conduct, the only other precondition for responsibility to arise. The third and fourth sections of Chapter 3 analyse primary and associated responsibility respectively. The former is dominated by a discussion of attribution rules and their application to the relationship between the actors involved in joint operations. Finally, the analysis of associated responsibility discusses responsibility for breaches of obligations to protect under the ECHR on the one hand, and responsibility for rendering aid or assistance in the absence of such obligations on the other.

Chapter 4 examines the allocation of liability under EU law among Frontex and EU member states involved in Frontex operations for breaches of the CFR that may occur during operations. It follows the same structure as Chapter 3. In this vein, it opens by setting out the 'basics' of EU public liability law. Subsequently, it elaborates on the conditions for liability and their application to the context of fundamental rights violations. The third and fourth sections address primary and associated liability respectively, both first identifying general rules from the case law of the CJEU and then applying them to the context of Frontex operations.

Chapter 5 summarises the main findings and their practical implications. Moreover, it sets out the obstacles to determining, incurring, and implementing responsibility identified in this study, and puts forward recommendations on how to address them. In essence, this study revealed that only the host state is comprehensively responsible for human rights violations that may occur during Frontex operations. Whilst Frontex and highly involved participating states are partly responsible too, some contributions to human rights violations during joint operations remain below the threshold required for responsibility to arise under both the ECHR and EU public liability law. The reason for this is essentially that neither of these responsibility mechanisms systematically appreciates the fact that several public actors can do more together than each of them alone. Assuming that international cooperation continues to intensify, it is ever more urgent to address this shortcoming by developing clear and comprehensive rules on allocation of responsibility that take into account the effects of cooperative action.

2 Frontex-coordinated joint operations

The aim of this chapter is to examine the role and powers of Frontex, the host state, and participating states during joint operations. The extent to which each of them is involved in decision-making processes and exercises authority over the resources deployed during joint operations determines the existence and degree of their legal responsibility. For this reason, this chapter focusses on decision-making and chains of command during Frontex-coordinated joint operations. As such, it not only forms the basis for the subsequent chapters, but also provides an important clarification of the tasks, responsibilities, and precise powers of Frontex and the states involved in joint operations.[69]

Section 2.1 opens with a closer look at the agency. It introduces the origins, evolution, and tasks of Frontex (Section 2.1.1). In both EU law and international law, only 'subjects' thereof can be held responsible for breaches of their obligations. Section 2.1.2 thus discusses Frontex' legal personality within EU law and international law respectively, in order to clarify its capacity to bear legal responsibility under each of these legal systems. Section 2.1.3 provides an overview of the internal organisation of Frontex, highlighting the bodies set up with a mandate to monitor fundamental rights compliance of the activities of the agency.

The remaining part of the chapter elaborates on the organisation and coordination of joint operations. The analysis relies on the EBCG Regulation, Frontex' revised legal basis that entered into force on 6 October 2016. However, the EBCG Regulation leaves open numerous questions that are of interest here, especially the practical decision-making processes and detailed chains of command. Thus, the analysis also relies on an examination of documents requested from the agency under the right to public access to documents and qualitative empirical research. The latter consists of semi-structured interviews conducted at Frontex' headquarters in Warsaw and a field visit to the Military Airbase Pratica di Mare where the International Coordination Centre for Joint Operation Triton is located.[70] It should be noted that these documents, interviews, and visits relate to Frontex' legal basis in force prior to 6 October 2016. However, the legal framework for joint operations did not undergo substantial modifications.[71] It may thus be assumed that the conclusions drawn on that basis still remain valid in light of the EBCG

69 See in particular the references cited in n 51.

70 For more detail see above 1.3.1.

71 Compare in particular EBCG Regulation (n 18) arts 15-42 with Council Regulation (EC) No 2007/2004 (n 16) [as amended] arts 3-3c, 7-10c.

Regulation. Where this is otherwise, it will be specifically pointed out in the course of this chapter.

Section 2.2 introduces joint operations. It discusses the typical activities during, and different types of, border control and return operations.

Section 2.3 focusses on the operational resources used to conduct joint operations. These include financial, human, and technical resources. Section 2.3.1 provides an overview of Frontex' financial resources. Section 2.3.2 discusses the different 'pools' of human and technical resources the agency has established in order to plan activities more efficiently and make swift reaction possible. Finally, Section 2.3.3 elaborates on the deployment of human and technical resources, focussing on the tasks and powers conferred on deployed officers and experts in the context of joint operations.

Section 2.4 zooms in on the implementation of joint operations. Section 2.4.1 sets out the applicable rules during joint operations, focussing on the Operational Plan that forms the basis according to which operations are implemented. Section 2.4.2 outlines the various instruments in place to ensure the coordination of the operations. Section 2.4.3 provides a detailed discussion of the authority the actors involved exercise over the deployed resources. It analyses the command and control arrangements according to the EBCG Regulation and the Operational Plans as well as the rules regarding criminal jurisdiction and civil liability. Finally, Section 2.4.4 looks into the structures in place to deal with fundamental rights-related incidents that may occur during joint operations and the possibilities for withdrawing financial support, or suspending or terminating operations on that basis.

Section 2.5 concludes that the state hosting a joint operation assumes the leading role, whereas the participating states act in support of the host state. Frontex, in turn, supports, reinforces, coordinates, and monitors the actions of member states before, during, and after joint operations.

2.1 Frontex: an overview

2.1.1 Origin, establishment, and tasks

2.1.1.1 The 'Schengen area': common rules governing external border control

A state's power to regulate and control entry to and presence on its territory has often been associated with the core of state sovereignty.[72] Yet, the development of the free movement of persons within the EU and the abolition of

72 Gerassimos Fourlanos, *Sovereignty and the Ingress of Aliens* (Almqvist and Wiksell International 1986) 55–58; for detail see Malcom Anderson and others, *Policing the European Union* (Clarendon Press 1995) 121–155.

internal border controls, in particular, have triggered a gradual transfer of limited powers in the area of external border management to the EU.[73]

Cooperation in the area of external border management was initiated intergovernmentally, both inside and outside the EU context. Most notably, in 1985, five states (Belgium, France, Germany, Luxembourg, and the Netherlands) concluded the Schengen Agreement, aimed at abolishing checks at internal borders.[74] The Schengen Convention, signed in 1990 in order to implement the Schengen Agreement, further specified that common rules would govern controls at the external borders.[75]

This 'Schengen system' came into effect in 1995 and was incorporated into the EU legal system in 1999.[76] The competences of the EU in the area of border management are now found in Article 77 TFEU, which sets out in particular that the EU shall adopt measures concerning checks at the external borders and the absence thereof at internal borders. The centre-piece of the EU's Schengen *acquis* is the 'Schengen Borders Code', a Regulation that provides the legal framework for controls at the external borders of the Schengen area.[77]

The Schengen area currently encompasses 26 states. Of the 28 EU member states, two, the United Kingdom and Ireland, are excluded from the application of the Schengen *acquis* with the possibility to opt in at a later stage to all or some Schengen provisions. This is because when the Schengen system was incorporated into the Union legal framework, they were not parties to the Schengen agreements.[78] In addition, Denmark negotiated a separate position, but continued to be part of the Schengen area as a matter of international law.[79] 26 EU member states are therefore in principle members of the Schengen area. However, the lifting of internal borders with four states (Bul-

73 Ferruccio Pastore, 'Visas, Borders, Immigration: Formation, Structure, and Current Evolution of the EU Entry Control System' in Neil Walker (ed), *Europe's Area of Freedom, Security and Justice* (Oxford University Press 2004) 94–98.

74 Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, 14 June 1985; for more detail on the simultaneous developments within the EU, see Jorrit J Rijpma, 'The Third Pillar of the Maastricht Treaty: The Coming Out of Justice and Home Affairs' in Maartje de Visser and Anne P van der Mei (eds), *The Treaty on European Union 1993-2013: Reflections from Maastricht* (Intersentia 2013).

75 Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, 19 June 1990.

76 Treaty of Amsterdam, Protocol integrating the Schengen *acquis* into the framework of the European Union, 2 October 1997.

77 Schengen Borders Code (n 3).

78 Schengen Protocol (n 76) art 4; for a more detailed discussion see Rijpma, 'Building Borders' (n 62) 66–68.

79 Schengen Protocol (n 76) art 3; Treaty of Amsterdam, Protocol on the position of Denmark, 2 October 1997, art 1.

garia, Croatia, Cyprus, and Romania) has been postponed until the Council decides that the conditions for abolishing internal border controls have been met. This brings the number of EU states where no internal border checks are carried out to 22.[80] In addition, the Schengen *acquis* is applicable to four non-EU countries (the 'Schengen Associated Countries', i.e. Iceland, Liechtenstein, Norway, and Switzerland), who concluded Association Agreements with the EU member states covering not only the then existing *acquis* but also all measures that build on it.[81] In this chapter, the terms 'Schengen states' and 'member states' will be used interchangeably.

2.1.1.2 Operational implementation of the common rules

Despite the transfer of important powers in the area of external border management to the EU, the external borders continue to be borders of the member states rather than of the EU. In this light, in principle, it is the task of the respective national border guards to control the external borders.[82]

It soon became clear that this approach brought a number of challenges. The diversity of the national authorities present at the external borders made a homogenous application of the Schengen rules difficult. In addition, the financial burden of external border control is unequally distributed, largely depending on the geographical position of the respective state and the geographical features of their border. Consequently, in 2002, the Commission identified a need to raise awareness among the national authorities that their activities also serve the interests of the other member states, to increase coordination and cooperation between them, and to share the financial burden more equally. On that basis, the Commission proposed *inter alia* the establishment of an external borders practitioners' common unit that would develop from the existing Strategic Committee on Immigration Frontiers and Asylum (SCIFA) and also brought up the possible creation of a 'European corps of border guards'.[83] The idea of an external borders practitioners' common unit was endorsed by the Council and soon after by the Seville European Council.[84]

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80 This is set out in the respective Acts of Accession: OJ 2003 L236/33, art 3 and Council Decision of 6 December 2007, 2007/801/EC, OJ 2007 L323/34 (Cyprus); OJ 2005 L157/203, art 4 (Bulgaria and Romania); OJ 2012 L112/21, art 4 (Croatia).

81 Schengen Protocol (n 76) art 6; OJ 1999, L176/36 (Iceland and Norway); OJ 2008, L53/1 (Switzerland); Council Decision 2011/350/EU of 7 March 2011, OJ 2011 L160/19 (Liechtenstein).

82 Schengen Borders Code (n 3) arts 1, 16; Rijpma, 'Frontex and the European system of border guards' (n 15) 218.

83 European Commission, 'Communication: Towards integrated management of the external borders of the member states of the European Union' (COM(2002) 233 final, 7 May 2002), in particular paras 12-19, 27-32, 47-51.

84 Council of the European Union, 'Plan for the management of the external borders of the Member States of the European Union' (10019/02 FRONT 58 COMIX 398, 14 June 2002); European Council (Seville), 'Presidency Conclusions' (21 and 22 June 2002), paras 31-32.

The new 'External Border Practitioners Common Unit', composed of the heads of the national services in charge of border control, met for the first time in July 2002 as a new formation of SCIFA (SCIFA plus the heads of national border guard services, therefore SCIFA+). Its major task was to manage the operational cooperation of external border management practitioners. This involved the approval of plans for joint operations and pilot projects submitted by the member states, the monitoring of their implementation, and the establishment of *ad hoc* centres.[85] Between July 2002 and March 2003, the Common Unit approved the initiation of a total of 17 projects, operations and *ad hoc* centres and set up a network of national contact points for the management of external borders. Major projects included a 'Common Integrated Risk Analysis Model' aimed at producing risk analyses that could be used by the Practitioners Common Unit and a 'Common Core Curriculum for Border Guard Training'. Joint operations were implemented *inter alia* at the coasts of the northern Mediterranean and the Canary Islands and in the South-eastern Mediterranean.[86]

2.1.1.3 Establishment and development of Frontex

Less than a year after the Common Unit first met, the Commission identified structural limits related to the Common Unit's capability to effectively coordinate operational cooperation, noting that it was better equipped for more strategic tasks. The Commission found there was a 'need of alternative institutional solutions' and called for a 'much more operational body'. This new permanent structure should exercise day-to-day management and coordination tasks and be able to respond in time to emergency situations.[87]

85 Valsamis Mitsilegas, 'Border Security in the European Union: Towards Centralised Controls and Maximum Surveillance' in Anneliese Baldaccini, Elspeth Guild and Helen Toner (eds), *Whose freedom, security and justice? EU immigration and asylum law and policy* (Hart 2007) 363–365; Daphné Gogou, 'Towards a European Approach on Border Management: Aspects Related to the Movement of Persons' in Marina Caparini and Otwin Marenin (eds), *Borders and Security Governance: Managing Borders in a Globalised World* (Transaction Publishers 2006) 112; Peers, Guild and Tomkin (n 51) 121.

86 Greek Presidency, 'Progress Report for the Implementation of the Plan for the management of external borders of the Member States of the European Union and the comprehensive Plan for combating illegal immigration' (17 March 2003); for a detailed analysis of the activities, House of Lords, 'Proposals for a European Border Guard' (Session 2002-03, 29th Report, London 2003), paras 33-39.

87 European Commission, 'Communication: Development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents' (COM(2003) 323 final, 3 June 2003), 7–8; Rijpma, 'Hybrid agencification in the Area of Freedom, Security and Justice and its inherent tensions' (n 46) 87–88.

This issue was taken up shortly after by the Justice and Home Affairs Council, as well as the Thessaloniki and Brussels European Councils.[88]

In November 2003 the Commission tabled a draft Regulation establishing a 'European Agency for the Management of Operational Co-operation at the External Borders' to take over the tasks from the Common Unit.[89] The Regulation was adopted by the Council in October 2004, setting up the new agency as of 1 May 2005 with a mandate to improve the management of the external borders of the Schengen area by coordinating the Schengen states' actions in the application of the Schengen Borders Code.[90] The new agency Frontex started its operational work in the headquarters in Warsaw on 3 October 2005.[91]

Frontex' founding Regulation was subject to two major revisions. In 2007 a Rapid Border Intervention Team ('RABIT') mechanism was set up, designed to provide swift operational assistance for a limited period of time to a member state facing a situation of urgent and exceptional pressure.[92] The RABIT Regulation is particularly notable for having introduced a range of executive powers for officers deployed in support of the requesting state that were later extended to officers participating in 'standard' joint operations. In 2011, a second amendment further strengthened the agency's powers.[93] Unlike the original founding Regulation, this amendment required the

88 Council of the European Union, 'Preparation of the Thessaloniki European Council' (5 June 2003); European Council (Thessaloniki), 'Presidency Conclusions' (19 and 20 June 2003), 13–14; European Council (Brussels), 'Presidency Conclusions' (16 and 17 October 2003).

89 European Commission, Proposal for a Council Regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders, 20 November 2003, COM/2003/0687 final.

90 Council Regulation (EC) No 2007/2004 (n 16); for detail on the origins and specific characteristics of Frontex see also Andrew W Neal, 'Securitization and Risk at the EU Border: The Origins of FRONTEX' 47 Journal of Common Market Studies 333; Rijpma, 'Hybrid agencification in the Area of Freedom, Security and Justice and its inherent tensions' (n 46); Jorrit J Rijpma, 'Institutions and Agencies: Government and Governance after Lisbon' in Diego Acosta Arcarazo and Cian C Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart Publishing 2014).

91 Frontex, 'Annual Report 2006' (Warsaw, 2006), 2; Council of the European Union, Decision designating the seat of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 26 April 2005, 2005/358/EC.

92 Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, [2007] OJ L199/30.

93 Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, [2011] OJ L304/1.

approval of the European Parliament, who included significant improvements regarding fundamental rights protection.[94]

In 2016, in the wake of the migration or refugee 'crisis', a completely revised European Border and Coast Guard Regulation ('EBCG Regulation') was adopted, replacing Frontex' original founding Regulation.[95] The new Regulation significantly increased the agency's powers, human resources, and financial means. It in particular afforded the agency a more comprehensive monitoring role, further improved its access to resources to be used in border control and return operations, increased the powers of deployed human resources, and expanded Frontex' role in relation to the return of persons with no right to stay.[96] Reflecting these changes, the new Regulation officially renamed Frontex the 'European Border and Coast Guard Agency', although it continues to be referred to as 'Frontex', and remains the same legal person with full continuity in all activities.[97] It is no coincidence that the reinforcement of Frontex occurred in the midst of a migration or refugee 'crisis'. Channelling resources to and otherwise strengthening external border control more generally forms the EU's main response strategy in such situations.[98]

2.1.1.4 Tasks of Frontex

Together, Frontex and the national border management authorities form the 'European Border and Coast Guard' (EBCG).[99] Their joint responsibility lies in implementing European integrated border management, including border control, measures relating to the prevention and detection of cross-border crime, search and rescue in the context of border surveillance operations, return of persons with no right to stay, and cooperation with relevant stake-holders.[100]

Frontex and the member states assume different roles within the EBCG. The member states retain the primary responsibility for the management of their respective segments of the external borders.[101] The agency's duty is to ensure coherence in European integrated border management. For that purpose, it supports member states in the implementation of Union measures relating to border management, in particular the Schengen Borders Code, by reinforcing, assessing and coordinating the actions of member

94 For more detail on the development of Frontex' approach to fundamental rights see Rijpma, 'Frontex and the European system of border guards' (n 15) 230–233; see also below 2.1.3.3.
95 EBCG Regulation (n 18); see also above 1.1.
96 For more detail see Rijpma, 'The Proposal for a European Border and Coast Guard' (n 23).
97 EBCG Regulation (n 18) recital (11).
98 See in particular above 1.1.1 and below 2.3.1.
99 EBCG Regulation (n 18) art 3(1).
100 Ibid arts 1, 4, 5(1).
101 Ibid art 5(1), recital (6).

states.[102] This does not prevent member states from continuing to engage in operational cooperation amongst themselves or with the authorities of third states, where this complements the work of Frontex. However, such activities must be notified to the agency and may not jeopardise its functioning or the attainment of its objectives.[103]

Frontex' tasks more specifically include the monitoring of migratory flows and trends or challenges at the external borders. For that purpose, it gathers and analyses data on the threats at and vulnerabilities of Europe's external borders, using a 'Common Integrated Risk Analysis Model' (CIRAM). On that basis, the agency may recognise threats early on and identify appropriate responses, including for example joint border control or return operations.[104]

Frontex also supervises the member state's management of the external borders. It can in particular deploy liaison officers in member states and has to carry out vulnerability assessments. In the context of vulnerability assessments, the agency evaluates the capacity and readiness of member states to face present and future challenges at the external borders and the potential consequences for the member state and the functioning of the whole Schengen area.[105] If necessary, the Executive Director recommends measures to be taken by member states to eliminate vulnerabilities identified and the time limit within which these are to be implemented. Where the member state concerned fails to comply, the Management Board may issue a binding decision in that respect.[106] Eventually, in the event of a continued failure of the member state to comply, the Council may decide on appropriate measures to be taken, including joint border control or return operations.[107]

Frontex also supports member states in the area of capacity building, contributing to developments in research relevant for European integrated border management and to training of border guards.[108] In particular, in relation to personnel that participate in joint operations, it has to provide advanced training relevant to their tasks and powers, conduct regular exercises, and ensure that they are sufficiently trained in relevant Union and international law, including fundamental rights and refugee law.[109]

The largest part of Frontex' budget is spent on supporting member states

102 Ibid arts 5(3), 6(2).
103 Ibid art 8(2).
104 Ibid art 11, see also art 15(3).
105 Ibid arts 12-13; pointing out the potential overlap and need for coordination between the Vulnerability Assessment and the Schengen Evaluation Mechanism, see Rijpma, 'The Proposal for a European Border and Coast Guard' (n 23) 14–15.
106 EBCG Regulation (n 18) art 13(6-8).
107 Ibid arts 13(8), 19; see also below 2.2.1.2.
108 Ibid arts 36-37.
109 Ibid art 36(2, 4)

directly at the external borders or in the area of return cooperation, in particular through the organisation and coordination of joint operations.[110] This forms the focus of this study and is elaborated on in detail in Sections 2.2-2.4.

2.1.2 Legal personality

Frontex was established as an agency under EU law. It is based on Articles 77(2)(b) and (d) and 79(2)(c) TFEU, the legal basis for the EU's common policy on border management.

EU agencies are permanent EU bodies created by secondary legislation in order to perform tasks specified in their constituent acts.[111] The powers afforded to agencies vary significantly, depending on the functional needs and the political nature of the specific agency.[112] Despite their broad variety, EU agencies have two major things in common. First, they enjoy a certain degree of organisational and financial autonomy, which has triggered concerns in particular regarding their democratic accountability.[113] Second,

110 Ibid arts 14, 27, 28, 33.

111 For detail see Merijn Chamon, *EU Agencies: Legal and Political Limits to the Transformation of EU Administration* (Oxford University Press 2016) 5–15; see also European Commission, 'Communication: The operating framework for the European Regulatory Agencies' (COM(2002) 718 final, 11 December 2012), 3; Stefan Griller and Andreas Orator, 'Everything under control?: The "way forward" for European agencies in the footsteps of the Meroni doctrine' (2010) 35 European Law Review 3, 7; R. D Kelemen, 'European Union Agencies' in Erik Jones, Anand Menon and Stephen Weatherill (eds), *The Oxford Handbook of the European Union* (Oxford University Press 2012) 393.

112 There are, however, constitutional limits to the delegation of powers to agencies, see in particular CJEU, Case 9/56 *Meroni v High Authority*, 13 June 1958, ECLI:EU:C:1958:7, limited more recently by CJEU, Case C-270/12 *United Kingdom v Parliament and Council (ESMA)*, 22 January 2014, ECLI:EU:C:2014:18; these limits have been extensively analysed recently by Chamon (n 111) 134–298, he in particular discussed the (ir)relevance of the much relied on *Meroni* case (CJEU, Case 9/56 *Meroni* (n 112)), see 175-248; see also : Renaud Dehousse, 'Delegation of powers in the European union: The need for a multi-principals model' (2008) 31 West European Politics 789; more generally see Giandomenico Majone, 'Delegation of Regulatory Powers in a Mixed Polity' (2002) 8 European Law Journal 319; Griller and Orator (n 111) 15–31.

113 For a detailed discussion of autonomy in the context of EU agencies see Martijn Groenleer, *The Autonomy of European Union Agencies: A Comparative Study of Institutional Development* (Uitgeverij Eburon 2009); Deirdre Curtin, 'Holding (Quasi-)Autonomous EU Administrative Actors to Public Account' (2007) 13 European Law Journal 523; Madalina Busuioc, 'Accountability, Control and Independence: The Case of European Agencies' (2009) 15 European Law Journal 599; Madalina Busuioc, *The Accountability of European Agencies: Legal Provisions and Ongoing Practices* (Eburon 2010); Tobias Bach and Julia Fleischer, 'The parliamentary accountability of European Union and national agencies' in Madalina Busuioc, Martijn Groenleer and Jarle Trondal (eds), *The agency phenomenon in the European Union* (Manchester University Press 2012); broader on the problems of independent agencies see Martin Shapiro, 'The problems of independent agencies in the United States and the European Union' (1997) 4 Journal of European Public Policy 276.

agencies enjoy legal personality, which enables them to fulfil their tasks independently from the EU institutions.[114]

In this vein, Article 56(1) EBCG Regulation states that Frontex 'shall have legal personality'. Thus, Frontex has the legal capacity to bear rights and duties under EU law. Consequently, as discussed in more detail in Chapter 4, it can be held liable under EU law for breaches thereof independently from the EU itself and the member states.[115]

This does not automatically endow Frontex with international legal personality, necessary to enjoy rights, have duties, and bear responsibility on the international plane.[116]

The international legal personality of EU agencies is indeed controversial.[117] Some authors detect certain indications of agencies' international legal personality where member states have concluded headquarters agreements with the agencies residing in their territory, resembling classic headquarters agreements with international organisations. It is argued that member states have treated the agencies like subjects of international law, since they would have invoked Article 218 TFEU and concluded the agreement with the EU, had they not at least acknowledged a restricted international legal personality.[118] Most authors, however, deny international legal personality of agencies.[119]

International legal personality of bodies other than states can be explicitly conferred or implied.[120] The prevailing view is that international legal personality of bodies other than states is implied when the body was intended to and in fact exercises functions and rights on the international plane which can only be explained on the basis of the possession of international legal person-

114 Ronald van Ooik, 'The Growing Importance of Agencies in the EU: Shifting Governance and the Institutional Governance' in Deirdre Curtin and Ramses A Wessel (eds), *Good governance and the European Union* (Intersentia 2005) 132.

115 Similarly see Chamon (n 111) 357; for more detail see below 4.1.2.

116 Provisions such as Article 56(1) EBCG Regulation are commonly understood as only conferring 'domestic' legal personality, see also Gregor Schusterschitz, 'European Agencies as Subjects of International Law' (2004) 1 International Organizations Law Review 163, 163; Andrea Ott, 'EU Regulatory Agencies in EU External Relations: Trapped in a Legal Minefield Between European and International Law' (2008) 13 European Foreign Affairs Review 515, 526–528.

117 Blokker, 'The Macro Level: The Structural Impact of General International Law on EU Law' (n 25) 479–482.

118 Schusterschitz (n 116), he concludes that agencies have acquired restricted international legal personality as far as their headquarters are concerned.

119 Florin Coman-Kund, 'EU agencies as global actors: a legal assessment of Europol's international dimension' (Maastricht Working Papers, 2014-6); Griller and Orator (n 111) 7; distinguishing between different agencies see Ott (n 116).

120 James Crawford, *Brownlie's principles of public international law* (8th edn, Oxford University Press 2012) 167–168.

ality.[121] Simply put, if Frontex is endowed with tasks and powers it can only exercise with international legal personality, it can be assumed that it was, to the extent necessary, implicitly conferred international legal personality.[122]

Frontex' international cooperation mandate is set out in Articles 52-55 EBCG Regulation according to which the agency may, in particular, conclude working arrangements with international organisations competent in the area of border management, and with authorities of third countries in matters 'related to the management of operational cooperation'.[123] At the end of 2016, Frontex had concluded working arrangements with several international organisations, including UNHCR, IOM, Interpol and DCAF, and with the authorities of 18 third states. The most recent agreement was signed in May 2016 with the relevant authorities of Kosovo.[124] The objectives of working arrangements are, *inter alia*, to counter irregular migration and related cross-border crime by means of border control, to strengthen security at the border, to develop good relations and mutual trust among the relevant authorities, and sometimes include capacity building. Most working arrangements foresee cooperation relating to risk analysis, training, research, and technical development. Furthermore, they contain provisions on the coordination of joint operational measures and pilot projects, including cooperation in the field of return operations, and allow for the participation of representatives of the competent authorities of the third state in joint operations as observers.[125] The conclusion of working arrangements is subject to prior approval of the Commission and has to be notified to the European Parliament.[126]

The legal nature of working arrangements is not entirely clear. The decisive criterion under international law distinguishing a non-binding agreement

121 ICJ, *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)*, 11 April 1949, ICJ Reports 1949, 174, 179.

122 With respect to Europol see Coman-Kund (n 119) 19.

123 See in particular EBCG Regulation (n 18) arts 52(2), 54(2); for a more detailed discussion see Melanie Fink, 'Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding "Technical Relationships"' (2012) 28 Utrecht Journal of International and European Law 20.

124 Working arrangements have been signed with the respective authorities of the following states: the Russian Federation, Ukraine, Moldova, Georgia, the former Yugoslav Republic of Macedonia, Serbia, Albania, Bosnia and Herzegovina, the United States, Montenegro, Belarus, Canada, Cape Verde, Nigeria, Armenia, Turkey, Azerbaijan, and Kosovo.

125 The working arrangements concluded so far with authorities of third states are similar in their objectives and content, see for example the working arrangement with the authorities of Armenia, 'Working Arrangement establishing operational cooperation between the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) and the National Security Council of the Republic of Armenia', 22 February 2012.

126 EBCG Regulation (n 18) arts 52(2), 54(2).

from a treaty is the intention of the parties.[127] All working arrangements concluded with the authorities of third states contain a provision establishing that it shall not be considered a treaty under international law and its implementation shall not be regarded as fulfilment of obligations by the EU. This seems to contradict some of the clear and precise language ('the parties shall …', 'the parties will …') used in the agreements. Be that as it may, even if Frontex was to conclude legally binding agreements (with international organisations and/or third states) this would not automatically require that Frontex itself possess international legal personality. Similarly to the working arrangements concluded by the Commission in the framework of its cooperation with international organisations under Article 220 TFEU, Frontex could act under the umbrella of the international legal personality of the EU.

In sum, as the law currently stands, it cannot be assumed that the agency enjoys implicit international legal personality because its international cooperation mandate does not require it.[128] For the purposes of international responsibility, it may thus be assumed that the EU bears international responsibility for internationally wrongful acts resulting from the agency's activities.[129]

2.1.3 Internal organisation

2.1.3.1 Governing bodies

Frontex is managed by an Executive Director, who is assisted by a Deputy Executive Director. The positions are currently held by Fabrice Leggeri (since 16 January 2015) and Berndt Körner (since January 2016) respectively. The Executive Director is independent in the performance of his duties and therefore not subject to the instructions of any government or EU body.[130] His tasks include the proposal, preparation, and implementation of the strategic decisions, programmes, and activities adopted by the agency's governing body, the Management Board, in particular the preparation of the annual work programme, activity report, and budget as well as the appointment of staff.[131] The Executive Director is appointed by the Management Board on

127 Oscar Schachter, 'The Twilight Existence of Nonbinding International Agreements' (1977) 71 The American Journal of International Law 296, 296–297.

128 The same conclusion is reached by Coman-Kund with respect to Europol, Coman-Kund (n 119) 36–37; This is relevant because it has been argued that Europol enjoys particularly wide powers in the area of external relations and that Frontex' external relations powers may be closest to the powers enjoyed by Europol, see Steve Peers, 'Governance and the Third Pillar: The Accountability of Europol' in Deirdre Curtin and Ramses A Wessel (eds), *Good governance and the European Union* (Intersentia 2005) 264.

129 See also 3.1.2.1.1.

130 EBCG Regulation (n 18) art 68(1).

131 Ibid art 68(3).

the basis of proposals by the Commission for a (once renewable) term of five years.[132] He is accountable for his activities to a Management Board.[133]

The Management Board is responsible for taking the strategic decisions of the agency.[134] Its tasks include the adoption of the annual work programme, activity report, and budget, the establishment of the agency's organisational structure and staff policy, the development of multiannual planning and a long term strategy regarding the activities of the agency, decisions on a number of matters concerning the operational tasks of the agency, and the appointment of the Executive Director and exercise of disciplinary authority over him.[135] The Management Board is composed of a representative of each Schengen member state and two representatives of the Commission. The representatives are appointed for a (once renewable) term of four years by the respective member state or the Commission and shall have experience and expertise in the field of operational cooperation on border management.[136] In practice they are often the operational heads of the national services in charge of border control, making the composition of the Management Board similar to that of the Practitioners Common Unit.[137] States that are members of the EU but not signatories of the Schengen *acquis*, i.e. the United Kingdom and Ireland, are invited to participate in the meetings of the Management Board.[138]

2.1.3.2 Staff

Frontex' human resources consist of its own staff and national experts seconded to the agency, the so-called SNEs.[139] Seconded national experts receive their salaries from the state seconding them, which also continues to be responsible for their social security and pension, but are required to carry out their duties 'solely in the interests of Frontex' and may neither seek nor take 'any instructions from any government, authority, organisation or person outside Frontex.'[140] The agency's human resources have been steadily growing since its establishment (see Figure 9). It is envisaged that by 2020 the agency may employ up to 1,000 persons.[141] It is noteworthy that

132 Ibid art 69.
133 Ibid art 68(4).
134 Ibid art 62(1).
135 Ibid art 62.
136 Ibid art 63; states that are associated with the implementation, application and development of the Schengen *acquis* but are not member states of the EU (Iceland, Liechtenstein, Norway, Switzerland) have representatives on the Management Board but limited voting rights, see para 3.
137 Rijpma, 'Building Borders' (n 62) 264; see also above 2.1.1.2.
138 EBCG Regulation (n 18) art 66(4).
139 Ibid art 58(4).
140 Frontex Management Board, Decision No 22/2009 regarding the rules on the secondment of national experts (SNE) to Frontex, 25 June 2009, recital (4), art 1(1), art 7(1)(a).
141 See http://frontex.europa.eu/pressroom/faq/european-border-and-coast-guard/.

the growth has taken place almost entirely in the area of the agency's own staff, whilst the number of seconded national experts remained relatively stable (see Figure 9).This makes the agency less dependent on secondments by member states.

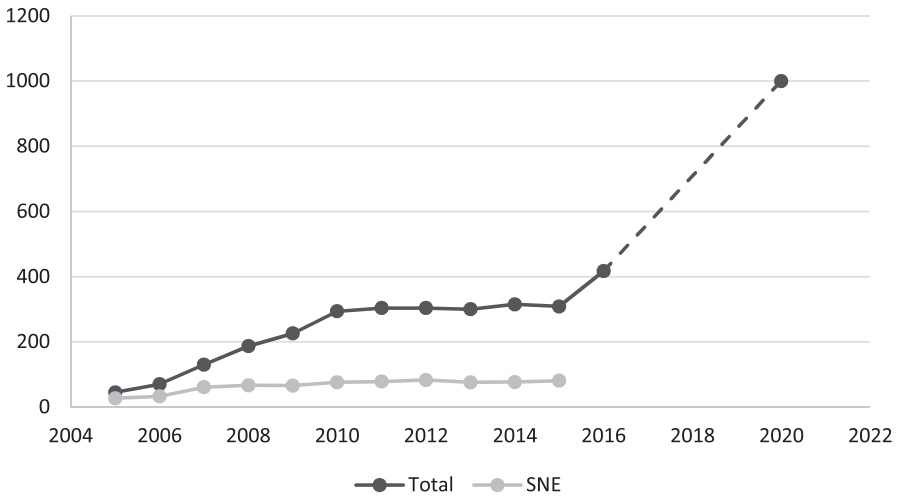

Figure 9: Staff development 2005-2020[142]

The agency's human resources work in three divisions, the Operations Division (further divided into Risk Analysis, Frontex Situation Centre, Joint Operations, and Return Support), the Capacity Building Division (further divided into Training, Research and Development, Pooled Resources, and Third Countries and EU Cooperation) and Corporate Governance (further divided into Financial and Corporate Services, Human Resources and Security, Information and Communication Technology, and Legal Affairs).[143]

2.1.3.3 Fundamental rights bodies

Frontex has made significant progress in relation to human rights awareness throughout its over ten years of existence. In particular, in 2011 two fundamental rights bodies were introduced within Frontex' organisational structure. First, relevant organisations in the field of human rights protection form part of a 'Consultative Forum' which assists the Executive Director and the Management Board in fundamental rights matters. The Consultative Forum advises on the development and implementation of a Frontex Fundamental Rights Strategy, Code of Conduct, and Common Core Curriculum, and on the establishment of a fundamental rights complaints

142 The data for the years 2005-2015 is retrieved from Frontex' Annual General Reports. The data for 2016 and 2020 is from Frontex' homepage, see the link in n 141.

143 See http://frontex.europa.eu/about-frontex/organisation/structure/.

mechanism. It also informs the public through annual reports that are made publicly available.[144] The composition of the Consultative Forum is decided by the Management Board on a proposal of the Executive Director and currently encompasses a total of 15 EU agencies, international organisations, and civil society organisations.[145]

Second, Frontex has a Fundamental Rights Officer who contributes to the agency's Fundamental Rights Strategy, monitors compliance with fundamental rights, and promotes the respect thereof. The position is currently held by Inmaculada Arnaez Fernandez. The Fundamental Rights Officer is independent in the performance of her duties, reports directly to the Management Board, and cooperates with the Consultative Forum.[146] She is consulted *inter alia* on Operational Plans that form the basis of joint operations, on the necessity of early suspension or termination of operations due to fundamental rights violations, and on evaluations after the conclusion of operations.[147] In addition, she is involved in setting up a pool of forced return monitors and receives their reports in relation to return operations they have monitored.[148] Importantly, the Fundamental Rights Officer enjoys a central role in the fundamental rights complaints mechanism open to individuals that was introduced with the EBCG Regulation.[149]

2.2 Joint operations

Joint operations organised and coordinated by Frontex are launched in order to support one or more member states in external border management. Assistance may be rendered for purposes of border control (joint border control operations) or the return of third country nationals that have no right to stay (joint return operations). Both types of operation are characterised by the deployment of additional operational resources that are made available

144 EBCG Regulation (n 18) art 70; Frontex had already cooperated with many of these organisations before the establishment of the Consultative Forum, cooperation existed in particular with UNHCR, who assigned a liaison officer to Frontex in 2007 in order to 'help ensure that border management complies with the international obligations of EU member states', see UNHCR, 'Q&A: Working for refugees on Europe's outer borders', News Stories 18 May 2010, http://www.unhcr.org/4bf29c8b6.html, they concluded a working arrangement with the agency in 2008. The working arrangement includes regular consultations, the exchange of information, expertise, and experiences as well as UNHCR's assistance in human rights training, see Frontex, 'Frontex – UNHCR: Reinforced Cooperation' News Release of 18 June 2010. In addition, Frontex signed a cooperation arrangement with the European Union Agency for Fundamental Rights on 26 May 2010.

145 Frontex Management Board, Decision No 29/2015 on the composition of the Frontex Consultative Forum on Fundamental Rights, 9 September 2015; the mandate of these members lasts until 31 December 2018.

146 EBCG Regulation (n 18) art 71(1-2).

147 Ibid arts 71(3), 25(4), 26, 28(8).

148 Ibid arts 28(6), 29(1).

149 Ibid art 72; for more detail see 2.4.4.2.

primarily by other member states and operate under a specific 'command regime'. The state that receives the support is commonly referred to as the 'host state', those that contribute operational resources as 'participating states'.[150]

It should be noted that Frontex may also deploy operational resources as a contribution to 'Migration Management Support Teams' (MMST). Migration Management Support Teams are teams of experts that assist member states facing 'disproportionate migratory challenges at particular hotspot areas of its external borders characterised by large inward mixed migratory flows'.[151] The experts are contributed by Frontex, the European Asylum Support Office (EASO), Europol, or other relevant EU agencies and allow these agencies to respond rapidly and in an integrated manner to 'crises' at specific points of the external border.[152] However, the deployment of Migration Management Support Teams is not coordinated by Frontex, but by the Commission and therefore falls outside the scope of this study.[153]

2.2.1 Joint border control operations

2.2.1.1 Activities during operations

In the framework of joint border control operations, Frontex supports one or more member states in the control of their segments of the external border. This support consists of deploying additional technical and human resources ('European Border and Coast Guard Teams') primarily made available by other member states, financing the operations, and coordinating the activities of the various actors involved.[154]

The main objective of a joint border control operation is border control, i.e. detecting, preventing, and responding to irregular migration flows.[155] Whilst operations are commonly launched specifically for this purpose, they may also be part of multipurpose operations that can for example involve coast guard functions, or fighting migrant smuggling.[156]

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150 Ibid art 2(5, 7).

151 Ibid arts 14(2d), 18(1).

152 Ibid art 2(9); for more detail see Statewatch, 'Explanatory note on the "Hotspot" approach' (http://www.statewatch.org/news/2015/jul/eu-com-hotsposts.pdf), 2.

153 EBCG Regulation (n 18) art 18(3)

154 For detail on 'European Border and Coast Guard Teams' see below 2.3.2.1.1 and 2.3.3.1.

155 See for example Frontex (Operations Division, Joint Operations Unit, Sea Borders Sector), Operational Plan: Joint Operation EPN Triton 2014, 22 October 2014, on file with the author, 6, Annex 2; Frontex (Operations Division, Joint Operations Unit, Sea Borders Sector), Operational Plan: Joint Operation EPN Hermes 2014, 24 September 2014, on file with the author, 5, Annex 2; Frontex (Operations Division, Joint Operations Unit, Land Borders Sector), Operational Plan: Joint Operation Poseidon Land 2013, Warsaw, 12 March 2013, on file with the author, 8-9, Annex 2; Frontex (Operations Division, Joint Operations Unit, Air Border Sector), Operational Plan: Joint Operation Pegasus 2014, undated, on file with the author, 4, Annex 2.

156 EBCG Regulation (n 18) art 15(5).

Border control consists of border checks and border surveillance.[157] Border checks are 'carried out at border crossing points, to ensure that persons, including their means of transport and the objects in their possession, may be authorised to enter the territory of the Member States or authorised to leave it'.[158] In this context, additional human and technical resources made available for joint border control operations, such as border guards and document checking equipment, are commonly relied upon to increase a member state's capacity and capability for thorough border checks, in particular verification of the conditions governing entry.[159] Use of additional human resources is frequently made for screening and debriefing interviews as well, after first checks have been carried out.[160] Screening interviews are mandatory for any irregular migrant crossing (or attempting to cross) an external border of the EU without possessing the necessary documentation. They are carried out to establish his or her presumed nationality, making them the first step in national processes following the detection of an irregular migrant.[161] As opposed to screening interviews, debriefing interviews are voluntary. They are carried out to collect information and produce intelligence about countries of origin, and reasons for travelling, as well as routes and *modi operandi* of facilitators.[162] When necessary, screening and debriefing teams can be supported by interpreters and/or cultural mediators if agreed between Frontex and the member state supported. This is considered particularly important due to their ability, based on experience, language expertise and cultural background, to evaluate credibility and reliability of the information provided by the irregular migrant interviewed.[163]

157 Schengen Borders Code (n 3) art 2(10).

158 Ibid art 2(11).

159 Frontex (Operations Division, Joint Operations Unit, Land Borders Sector), Handbook to the Operational Plan: Joint Land Borders Operations, undated, on file with the author, 14; Frontex (Operations Division, Joint Operations Unit, Sea Borders Sector), Handbook to the Operational Plan: Joint Maritime Operations, 13 February 2014, on file with the author, 15; Frontex (Operations Division, Joint Operations Unit, Air Border Sector), Handbook to the Operational Plan: Air Border Joint Operations, undated, on file with the author, 14–15.

160 Screening and debriefing experts always enjoy team member status (previously 'guest officer status'), see Handbook OPlan Land Border Operations (n 159) 20, 23; Handbook OPlan Maritime Border Operations (n 159) 21, 24; Frontex (Operations Division, Joint Operations Unit, Return Operations Sector), Handbook to the Operational Plan: Operations - Return Operations Sector, undated, on file with the author, 20, 23; Handbook OPlan Air Border Operations (n 159) 20 (with respect to debriefers).

161 Handbook OPlan Land Border Operations (n 159) 21–23; Handbook OPlan Maritime Border Operations (n 159) 22–24; Handbook OPlan Return Operations (n 160) 21–23.

162 Handbook OPlan Air Border Operations (n 159) 16–20; Handbook OPlan Land Border Operations (n 159) 16–20; Handbook OPlan Maritime Border Operations (n 159) 17–21; Handbook OPlan Return Operations (n 160) 16–20.

163 Handbook OPlan Land Border Operations (n 159) 20, 22-23, 28; Handbook OPlan Maritime Border Operations (n 159) 21, 23-24, 30; Handbook OPlan Return Operations (n 160) 20, 22-23, 28; Handbook OPlan Air Border Operations (n 159) 20.

Deployed resources, such as maritime and terrestrial assets, dog teams, night vision devices or thermal cameras, are also relied upon for border surveillance. Border surveillance refers to 'the surveillance of borders between border crossing points and the surveillance of border crossing points outside the fixed opening hours'.[164] Its purpose is to prevent unauthorised border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally.[165] It includes up to four stages: detection of intended unauthorised border crossings, tracking of the means of transportation, identification, and interception.[166] Whilst 'interception' may refer to any measures taken to interrupt or stop the movement of persons when there are reasonable grounds to suspect that they intend to circumvent border checks, it is frequently used in the context of sea border operations. In that respect, it is understood as stopping, boarding, searching, diverting the course of, or escorting a vessel that is engaged in the smuggling of migrants by sea before it reaches the host state.[167]

Apart from support by providing additional human and technical resources for conducting border control, deployed personnel also facilitate the exchange of experience. In this light, their role is not only to conduct border control, but also to share their knowledge and experience with local staff and in turn learn from their host. In order to ease the exchange of knowledge and experience, the 'guests' are normally integrated into existing that include local staff.[168]

164 Schengen Borders Code (n 3) art 2(12).

165 Ibid art 13(1).

166 Handbook OPlan Maritime Border Operations (n 159) 12–13; see also Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [Sea Borders Regulation], [2014] OJ L189/93, recital (1).

167 For more detail on the precise measures that may be taken in the different maritime zones, see Sea Borders Regulation (n 166) arts 6-8; for a broader definition see UNHCR, 'Interception of Asylum-Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach' (Doc EC/50/SC/CPR.17, 9 June 2000), para 10; see also UNHCR, 'Protection Safeguards in Interception Measures' (Executive Committee Conclusion No 97, 2003); for more detail on interception more generally and in the context of Frontex operations see Efthymios Papastavridis, 'Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law' (2008-2009) 36 Syracuse Journal of International Law and Commerce 145; Efthymios Papastavridis, '"Fortress Europe" and FRONTEX: Within or Without International Law?' (2010) 79 Nordic Journal of International Law 75.

168 See for example Handbook OPlan Air Border Operations (n 159) 24–25; for a specific operation see for example OPlan JO Triton 2014 (n 155) 15.

It should be noted that vessels deployed during sea operations have regularly participated in rescue operations.[169] Since the entry into force of the EBCG Regulation, search and rescue operations for persons in distress at sea that take place in the context of sea border surveillance indeed explicitly form part of 'European integrated border management'.[170] Thus, provisions have been included in the EBCG Regulation according to which Frontex may provide technical and operational assistance to member states and third countries in support of search and rescue operations which may arise during border surveillance operations at sea.[171] However, once involved in a search and rescue operation, vessels come under the coordination of the competent maritime rescue coordination centre (MRCC) for the duration of the rescue operation.[172] Since the coordination structures established for joint operations are thereby inapplicable for that period, search and rescue operations are excluded from this study.

2.2.1.2 Types of operation

Operations can take place at air (white), land (green), or sea (blue) external borders of Schengen states. At all types of border joint operations may take the form of 'standard operations' or 'rapid interventions'. Standard operations may be implemented at any time to address challenges at the external border, such as irregular immigration or cross-border crime.[173] Rapid interventions are designed to provide swift operational assistance to a member state facing a situation of 'specific and disproportionate challenges'. Such a situation could arise in particular where a member state is confronted with the arrival of large numbers of third-country nationals trying to enter its territory without authorisation.[174] Many standard operations have become permanent, running throughout the whole year.[175] In contrast, rapid interventions may only take place for a limited period of time.[176]

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169 For example, according to Frontex' own data, between 1 January 2015 and 24 November 2015, a total of 140,380 irregular migrants were rescued during Joint Operation Triton 2015 (data retrieved from Frontex briefing 24 November 2015, 31, on file with the author). The obligation to rescue persons in distress at sea is specifically reiterated in the Operational Plans for joint sea operations (typically in the Rules of Engagement), see for example OPlan JO Triton 2014 (n 155) Annex 3; OPlan JO Hermes 2014 (n 155) Annex 3; the relevant obligations under international law are set out in particular in the following treaties: United Nations Convention on the Law of the Sea (UNCLOS), 10 December 1982, 1833 UNTS 397; International Convention on Maritime Search and Rescue (SAR), 27 April 1979, 1405 UNTS 119; International Convention for the Safety of Life at Sea (SOLAS), 1 November 1974, 1184 UNTS 1979.

170 EBCG Regulation (n 18) art 4(b).

171 Ibid arts 8(1f), 14(2e).

172 For example, Rules of Engagement for Joint Operation Triton 2014, OPlan JO Triton 2014 (n 155) Annex 3.

173 EBCG Regulation (n 18) art 15(1).

174 Ibid art 15(2).

175 For more detail see below 2.2.1.3.

176 EBCG Regulation (n 18) art 15(2).

Even though regular exercises for rapid interventions took place from 2007 onwards, the mechanism has so far only been activated twice, both times by Greece.[177] The first ever rapid intervention took place between 2 November 2010 and March 2011 at the Greek-Turkish border upon a request by Greece on 24 October 2010. Qualifying the situation as an 'urgent and exceptional situation', approximately 200 national border control experts as well as technical equipment and other logistical and administrative support were deployed to Greece.[178] It was activated for a second time by Greece in December 2015. As a result, the standard operation in that area (JO Poseidon Sea) was replaced by a rapid intervention in order to handle the large number of migrants landing on Greek islands. The focus of the over 700 officers deployed on the ground was on speeding up the registration and identification process.[179]

Both standard and rapid operations are as a rule launched upon the request and with the consent of the host member state, be it on the basis of the host state's own initiative or a recommendation by the Executive Director.[180] Requests are evaluated, approved, and coordinated by the Executive Director. The decision on which joint operations to launch depends on the specific situation at the respective stretches of the external border in question as well as the availability of resources.[181] Due to the urgency of rapid interventions, the Executive Director is required to decide on a request within two working days.[182]

The EBCG Regulation for the first time foresees the possibility that a rapid intervention may be implemented following a legally binding decision by the Council on the basis of a proposal from the Commission.[183] These rapid interventions may be launched where the functioning of the Schengen area is in jeopardy because the member state in question did not comply with a decision of the Management Board setting out the measures to be taken to eliminate vulnerabilities identified. In addition, also where a member state did not request sufficient support from the agency despite facing specific

177 The first RABIT exercise took place between 5 and 9 November 2007 in Porto, Portugal on the basis of a fictional scenario developed by Frontex, see Frontex, 'Rapid Border Intervention Teams first time in action' News Release of 6 November 2011; House of Lords, 'Frontex: The EU External Borders Agency' (Session 2007-08, 9th Report, London 2008), 68; Another exercise took place in April 2008 at the Slovenian-Croatian border, see Frontex, 'Rapid Border Intervention Teams (Rabits) Exercise in Slovenia' News Release of 10 April 2008.

178 Frontex, 'Frontex to Deploy 175 Specialist Border Personnel to Greece' News Release of 29 October 2010.

179 Frontex, 'Frontex accepts Greece's request for rapid border intervention teams' News Release of 10 December 2015; Frontex, 'General Report 2015' (n 22) 28.

180 EBCG Regulation (n 18) art 15(1-2, 4).

181 Ibid art 15(3).

182 Ibid art 17(4).

183 Ibid art 19(1).

and disproportionate challenges, the Council and the Commission may take such action.[184] If the member state in question does not comply with the Council decision and cooperate with Frontex, the Commission may trigger the procedure provided for in the Schengen Borders Code to temporarily reinstate internal border controls.[185]

2.2.1.3 Examples of joint border control operations implemented by Frontex

Notable recent air border operations include Joint Operation (JO) Pegasus, JO VEGA Children, and JO Alexis. JO Pegasus was the longest running operation with 209 operational days in 2015 and 149 operational days in 2014.[186] Its focus was on supporting border checks at the 13 participating airports with specific skills in interviewing irregular migrants, in particular those whose profiles matched specific pre-identified threats.[187] JO Alexis had the most extensive participation. In 2015, it took place at 30 EU international airports with the participation of 24 Schengen states, 8 third countries, and Interpol.[188] During its two phases, 73 deployed officers enhanced the capabilities of the local border guards in relation to different types of document fraud and abuses.[189]

The largest land border operations coordinated by Frontex took place in the Western Balkans and at the South-Eastern land borders. This includes in particular JO Poseidon Land which ran on an almost permanent basis between 2010 and 2014 at the borders of Greece and Bulgaria with Turkey.[190] In 2015, all operational activities implemented at the land borders in the Western Balkans and at the South-Eastern land borders were brought under one joint operation, JO Flexible Operational Activities, hosted by Croatia and Hungary at their border with Serbia, and by Bulgaria and Greece at the Turkish green border. This allowed for a more flexible use of available resources, in particular a more rapid reaction potential when resources needed to be reallocated.[191] JO Flexible Operational Activities ran for 309 days with the participation of 26 Schengen states and 3 third countries and a budget of over EUR 5 million.[192]

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184 See also 2.1.1.4.

185 EBCG Regulation (n 18) art 19(10).

186 Frontex, 'General Report 2015' (n 22) 48; Frontex, 'General Report 2014' (Warsaw 2015), 48.

187 Frontex, 'General Report 2015' (n 22) 26; see also OPlan JO Pegasus 2014 (n 155) 4, Annex 2.

188 Frontex, 'General Report 2015' (n 22) 48; similarly in 2014, see Frontex, 'General Report 2014' (n 186) 48.

189 Frontex, 'General Report 2015' (n 22) 25–26.

190 Frontex, 'General Report 2014' (n 186) 48–49; Frontex, 'General Report 2013' (Warsaw 2014), 58; Frontex, 'General Report 2012' (Warsaw 2013), 47; Frontex, 'General Report 2011' (Warsaw 2012), 42; Frontex, 'General Report 2010' (Warsaw 2011), 35.

191 Frontex, 'General Report 2015' (n 22) 48, 52.

192 See the Archive of Operations on Frontex' homepage, http://frontex.europa.eu/operations/archive-of-operations/.

The largest part of the agency's operational budget is allocated to sea border operations.[193] Joint sea border operations generally take place under the umbrella of the European Patrols Network (EPN), a communication platform for the exchange of information and best practices among the broad range of authorities involved in the area of maritime surveillance.[194] Sea operations take place almost exclusively at the Spanish (Western Mediterranean and North-West Atlantic), Italian (Central Mediterranean), and Greek (Eastern Mediterranean) borders. Joint operations implemented at Spain's sea borders include in particular JO Hera (North-West Atlantic), JO Indalo (Western Mediterranean), and JO Minerva (Western Mediterranean seaports). The first phase of JO Hera was launched in 2006, the very first year Frontex operations took place. It has been running on an almost permanent basis ever since. Having peaked in 2008 with a budget of over EUR 10 million, JO Hera has since then continuously decreased in scale, as the focus of operations increasingly shifted to the Central and Eastern Mediterranean border.[195]

Frontex also implemented sea operations in Greece and Italy early on. In Greece, JO Poseidon Sea has been running on an almost permanent basis since 2007. In most years, its budget ranged from EUR 8 million to EUR 13 million, but rose to almost EUR 20 million in 2015.[196] In that year, the regular joint operation was replaced by a rapid intervention. Large operations implemented at Italy's blue border are, in particular, JO Hermes, JO Aeneas, and since 2014 JO Triton. In 2015, these operations were merged into a single joint operation, JO Triton.[197] As a result of the increased funding for joint maritime operations in response to the migration or refugee 'crisis', JO Triton was equipped with a budget of close to EUR 40 million in 2015.[198] That made it the biggest operation ever implemented by Frontex.

The permanent Focal Points Programme, designed to provide for a more permanent exchange of border guards and information at key points at the external borders, may be implemented at air, land, and sea borders. It allows member states, in cooperation with Frontex, to establish 'Focal Points', i.e. border crossing points or other points along the borders identified as particularly vulnerable. Focal Points can be located for example on road or railway connections or at various points between border crossing points at the external land border. Focal Points at the sea external border are usually

193 Frontex, 'General Report 2015' (n 22) 40; Frontex, 'General Report 2014' (n 186) 39.
194 See the Archive of Operations on Frontex' homepage, http://frontex.europa.eu/operations/archive-of-operations/; see also Lehnert (n 31) 165.
195 See the Archive of Operations on Frontex' homepage, http://frontex.europa.eu/operations/archive-of-operations/.
196 Ibid.
197 Frontex, 'General Report 2015' (n 22) 52.
198 See the Archive of Operations on Frontex' homepage, http://frontex.europa.eu/operations/archive-of-operations/.

sea ports, those at air borders are airports. Joint operations launched within the Focal Points Programme regularly include the participation of third states.[199]

2.2.2 Joint return operations

In the area of return support, Frontex reinforces and coordinates member states' activities relating to the return of persons who have no right to stay.[200] In particular, it organises, coordinates, and finances or co-finances two types of joint return operation. These are return operations in the narrow sense and return interventions.[201]

During return operations in the narrow sense, Frontex in essence assists member states with carrying out returns. For this purpose, member states inform the agency on a monthly basis of the number and destination of their planned returns, so that it can draw up a rolling Operational Plan and provide the states with necessary operational assistance, for example through chartering of aircraft.[202] Frontex may also assist in organising 'collecting return operations', i.e. operations where the third country of return provides the means of transport.[203] Each operation has to be monitored by a so-called forced-return monitor, who observes and reports on the operation as required under Article 8(6) Return Directive.[204]

Return interventions are more comprehensive than return operations in the narrow sense. They may include the organisation of the latter, but additionally also the deployment of European Return Intervention Teams (ERIT).[205] Return interventions can be launched as standard or rapid interventions. Standard interventions may be implemented at any time where a member state faces a burden in implementing its obligation to return third-country nationals in respect of whom a return decision was issued.[206] Rapid interventions, in contrast, require that the host member state faces a situation of 'specific and disproportionate challenges' in meeting this obligation.[207] Like border control operations, return operations are as a rule launched upon request by a member state, but under the circumstances described in Article 19 EBCG Regulation may be launched following a legally binding decision by the Council on the basis of a proposal from the Commission.[208]

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199 Frontex, 'General Report 2014' (n 186) 47; Frontex, 'General Report 2013' (n 190) 19; Frontex, 'Evaluation Report Joint Operation Focal Points 2013 Air' Warsaw 19 May 2014.
200 EBCG Regulation (n 18) art 27.
201 Ibid arts 28, 33.
202 Ibid art 28(1-2).
203 Ibid art 28(3-5).
204 Ibid art 28(6).
205 Compare ibid arts 28-33; for more detail see below 2.3.2.1.3.
206 Ibid art 33(1).
207 Ibid art 33(2).
208 Ibid arts 28(1, 3), 33(1-2), 19; see also 2.2.1.2.

Human resources that may be deployed during return operations include forced-return monitors, who observe and report on the operation, and forced-return escorts, who assist in case coercive measures have to be used in order to carry out the return of a person who resists removal.[209] Other return specialists may also be deployed, who carry out specific tasks required to carry out return-related activities, such as identification of particular groups of third-country nationals, acquisition of travel documents from third countries, and facilitation of consular cooperation.[210] Importantly, the EBCG Regulation clarifies that Frontex may not enter into the merits of the return decisions. However, should the agency have fundamental rights concerns in respect of a return operation, it has to communicate these to the participating states and the Commission.[211]

The possibility of launching return interventions was newly created with the EBCG Regulation. At the time of writing, no return interventions have yet taken place. However, return operations in the narrow sense have been implemented since 2010. In that context, the number of irregular migrants returned has increased consistently over the last few years. In 2015, 3,565 persons were returned in 66 operations, which represented a 64% overall increase as compared to the previous year (in 2014, 2,271 persons were returned in 24 operations).[212] Since the entry into force of the EBCG Regulation, Frontex avails itself of a substantially increased budget in this respect. In 2016, the budget for return support amounted to a total of over EUR 66 million, compared to just over EUR 13 million in 2015.[213] It may be assumed that activities in this area will intensify as a result of the strengthening of Frontex.[214]

2.2.3 Joint operations hosted by third states

All joint operations discussed so far are operations hosted by and launched in (or from) Schengen states. The EBCG Regulation created the possibility of carrying out joint operations on the territory of neighbouring non-Schen-

209 Ibid arts 29(1), 30(1).
210 Ibid art 31(1).
211 Ibid art 28(1, 7).
212 Frontex, 'General Report 2015' (n 22) 50-51, 53; Frontex, 'General Report 2014' (n 186) 51–52.
213 Frontex, 'Budget 2016' (n 21); Frontex, 'Budget 2015 (amended N3)' (6 November 2015); Frontex, 'General Report 2015' (n 22) 40; It should be noted that prior to 2016, return support did not feature as a separate budget chapter. The amount for 2015 is therefore deduced from the Budget 2015 in combination with the General Report 2015.
214 In this vein see also European Commission, 'Report to the European Parliament, the European Council and the Council on the operationalisation of the European Border and Coast Guard' (COM(2017) 42 final, 25 January 2017), 7–9; European Commission, 'Second report to the European Parliament, the European Council and the Council on the operationalisation of the European Border and Coast Guard' (COM(2017) 201 final, 2 March 2017), 8–9.

gen states ('third states').[215] Already before the entry into force of the EBCG Regulation, third states were able to participate in Frontex operations, albeit to a more limited extent, for instance by sending observers.[216] The major novelty introduced by the EBCG Regulation is the possibility to deploy border management equipment and personnel of Schengen states during joint operations *hosted* by and *carried out in* third states.[217] Participation by member states in such joint operations is voluntary.[218]

Third states are of course neither bound by EU law generally, nor by the EBCG Regulation more specifically. Hence, where border management personnel from member states is deployed in third states, the EU (note: not Frontex) concludes a status agreement with that third country, whenever necessary. The conclusion of such an agreement is mandatory in case the deployed personnel are to exercise executive powers in the third state.[219] In accordance with Article 54(5), the Commission has drawn up a model status agreement which shall serve as a blueprint for future agreements.[220] The Commission has further selected two priority third countries (Serbia and Macedonia) with whom it is conducting 'exporatory talks'. In January 2017, it recommended to the Council to authorise the opening of formal negotiations with both countries.[221]

The model agreement sets out the tasks, powers, privileges, and immunities of the personnel to be deployed to third states. It further determines the conditions for termination and suspension of activities, and reiterates the fundamental rights obligations of deployed personnel.[222] With respect to the powers of and authority over the personnel deployed to third states, the model agreement essentially replicates the relevant parts of the EBCG Regulation. This is remarkable. As discussed in detail below, the host state

215 EBCG Regulation (n 18) art 54(3).

216 Council Regulation (EC) No 2007/2004 (n 16) [as amended] art 14(6); for more detail see below 2.3.3.1.2.

217 In principle, this includes not just joint border control operations, but also joint return operations. For example, member state personnel may be given access to databases of third states. However, joint return operations may not be launched from third states. See European Commission, 'Communication: Model status agreement as referred to in Article 54(5) of Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard' (COM(2016) 747 final, 22 November 2016), section 2. For this reason, the following considerations only apply to joint border control operations.

218 EBCG Regulation (n 18) art 54(3).

219 Ibid art 54(4).

220 European Commission, 'Model status agreement as referred to in Article 54(5) of Regulation (EU) 2016/1624' (n 217).

221 European Commission, 'First report on the operationalisation of the European Border and Coast Guard' (n 214) 9–10; European Commission, 'Second report on the operationalisation of the European Border and Coast Guard' (n 214) 10–11.

222 European Commission, 'Model status agreement as referred to in Article 54(5) of Regulation (EU) 2016/1624' (n 217) Annex, arts 4-6, 8.

of an operation typically exercises far reaching authority over deployed personnel. This includes, in particular, the power to issue instructions.[223] Thus, in the case of joint operations led by and carried out in third states, member states (partially) place their border guards and other experts under third state authority on the basis of an agreement concluded between the EU and the third state. This seems unique under EU law. Even though member states may contribute their personnel to be deployed abroad also in the context of CSDP operations, military command in those operations remains with EU-designated commanders, and is not transferred to third state authorities.[224]

The model agreement specifies that joint operations may include any 'action aimed at tackling illegal immigration, present or future threats at the external border [of the third state concerned] or cross-border crime'.[225] Thus, it appears that joint operations may cover not only the external borders of neighbouring third states with the EU, but also their external borders with other third states. However, 'increased technical and operational assistance' can only be provided for the control of those parts of the third state's external borders neighbouring a member state. In other words, member states' border guards and other experts as well as their border management equipment may be deployed to a third state, but only to control their external border with the EU. For instance, they may be active at the border between Serbia and Hungary or the Libyan Mediterranean border, but not the border between Serbia and Montenegro or Libya and Chad.

This raises a fundamental question about the nature of joint operations in third states. The notion of 'border control' has the same meaning in the model agreement as in the Schengen Borders Code. It refers to activities taken in response to a person's intention to cross a border. As such, it may consist of border checks and border surveillance, both aimed at preventing unauthorised *entry* to a territory.[226] However, joint operations at third states' external borders with the EU are unlikely to focus on the control of entry of EU nationals to those third countries. Rather, they will typically be launched to control the *exit* of third country nationals from third country territory so as to avoid having to control their entry to the EU. This presents a number of human rights risks. On the one hand, every person has a right to leave a country, guaranteed for example in Article 2(2) of Protocol 4 to the ECHR or

223 See below 2.4.3.1.

224 See below 3.3.3.3.

225 European Commission, 'Model status agreement as referred to in Article 54(5) of Regulation (EU) 2016/1624' (n 217) Annex, art 2(2).

226 Schengen Borders Code (n 3) art 2(10-12); European Commission, 'Model status agreement as referred to in Article 54(5) of Regulation (EU) 2016/1624' (n 217) Annex, art 2(5), the model agreement, however, contains only a reference to, but no definition of border checks and border surveillance.

in Article 12(2) of the International Covenant on Civil and Political Rights.[227] On the other hand, whilst no right to enter another country exists, the principle of *non-refoulement* guarantees that persons cannot be forced back to a place where they would suffer serious maltreatment or persecution.[228] However, this fundamental protection is only triggered once they have actually left the country where they are in danger. Cooperating with third states to prevent exit from their territory not only risks participating in a breach of the right to leave but, depending on the situation in the third state in question, may also circumvent the protection against *refoulement*.

Joint operations led by and carried out in third states raise similar questions of allocation of responsibility to joint operations hosted by third states. If human rights violations occur during operations, which actor—Frontex, participating member states, the hosting third state—bears responsibility for it? Can the participation of member states or Frontex give rise to responsibility on their part for inhumane reception or detention conditions in the third state? Clarifying questions of responsibility may be particularly crucial in the context of joint operations hosted by third states because, as explained in the previous paragraphs, they give rise to human rights challenges even beyond those posed by joint operations hosted by member states.

As noted, the model agreement envisages that member state personnel enjoy the same powers and are subject to similar authority regimes when deployed to third states or Schengen states. Thus, in principle, the analysis in this study applies to operations in third states just like to those in Schengen states. However, there are some caveats with respect to both responsibility under the ECHR (Chapter 3) and liability under EU law (Chapter 4).

Whilst all Schengen states are parties to the ECHR, this is not the case for all neighbouring third states. North African states, for example, are not signatories to the Convention and cannot be held responsible for breaches thereof. Moreover, third states are not bound by EU law and cannot be held liable for breaches thereof. In this vein, when operations are hosted by third states who are not parties to the ECHR, the analysis in Chapters 3 and 4 does not apply insofar as it relates to host state responsibility. However, to the extent it deals with the responsibility of participating states and Frontex, the analysis in this study applies *mutatis mutandis* to operations hosted by third states. Where this does not seem to be the case, it will be specifically pointed out in the relevant sections.[229]

Other neighbouring third states, Serbia and Macedonia (the two priority states selected by the Commission) for example, are ECHR signatories.

227 International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, 999 UNTS 171 and 1057 UNTS 407.

228 See above text to n 33-36.

229 See in particular below 3.4.2.3.

When operations are hosted by third states that are parties to the Convention, the analysis in Chapter 3 is fully applicable.

2.3 Operational resources for joint operations

To implement joint operations, Frontex needs to have financial, human, and technical resources available. Section 2.3.1 first outlines Frontex' budget and its distribution over the agency's activities. Section 2.3.2 then gives an overview of the pooling of human and technical resources, before Section 2.3.3 discusses the modalities and consequences of their deployment.

2.3.1 Financial resources

Since its establishment, the financial resources of Frontex have been steadily growing (see Figure 10). Two budget increases, namely those in 2011 and 2015/2016, will be mentioned here as particularly remarkable. At the start of 2011 Frontex' budget was just over EUR 86 million, representing a 7% decrease when compared to the previous year. During the year, the Commission provided the agency with an additional EUR 30 million, raising the total budget to EUR 118 million (this amounts to a 27% increase compared with 2010).[230] The additional funding was part of an emergency response package to address the rising numbers of arrivals of irregular migrants during the first half of 2011, due to the uprisings in the North African region known as the 'Arab Spring'.[231]

The second particularly notable growth in the funds of the agency occurred in 2015 and 2016. The budget at the start of 2015 amounted to EUR 114 million, already an increase of over 16% when compared with 2014.[232] In April, the agency received almost EUR 28 million out of emergency funds in response to the rising death toll of individuals trying to cross the Mediterranean, raising the agency's budget to EUR 143 million for 2015.[233] Finally, in

230 Frontex, 'Budget 2011' (undated); Frontex, 'Budget 2012 (amended N3)' (1 January 2012).

231 European Commission, 'The European Commission's response to the migratory flows from North Africa' (MEMO/11/226, 8 April 2011), other measures included the extension of Frontex-coordinated Joint Operation EPN Hermes to assist the Italian authorities and a call for Frontex to speed up negotiations to conclude working arrangements with countries of origin and transit of irregular migration in the Mediterranean region (in particular Egypt, Morocco, and Tunisia); Frontex, 'General Report 2011' (n 190) 23; discussing the EU policy responses to human mobility flows from North Africa in the wake of the 'Arab Spring' in a larger context, see Sergio Carrera, Leonhard den Hertog and Joanna Parkin, 'EU Migration Policy in the wake of the Arab Spring: What prospects for EU-Southern Mediterranean Relations?' (MEDPRO Technical Report No. 15, August 2015); Jan Wouters and Sanderijn Duquet, 'The Arab Uprisings and the European Union: In search of a comprehensive strategy' (Working Paper No. 98, January 2013).

232 Frontex, 'Budget 2015 (amended N3)' (n 213).

233 European Council (n 10); Frontex, 'Budget 2015 (amended N3)' (n 213).

2016, Frontex' budget further increased to EUR 254 million, an amount that is envisaged to rise further to EUR 281 million in 2017.[234]

A large part of the annual budget is allocated to the organisation and implementation of joint operations. It regularly ranges between 50% and 65% of the total annual budget and in 2016 reached an all-time high of 73% (EUR 186 million in total).[235]

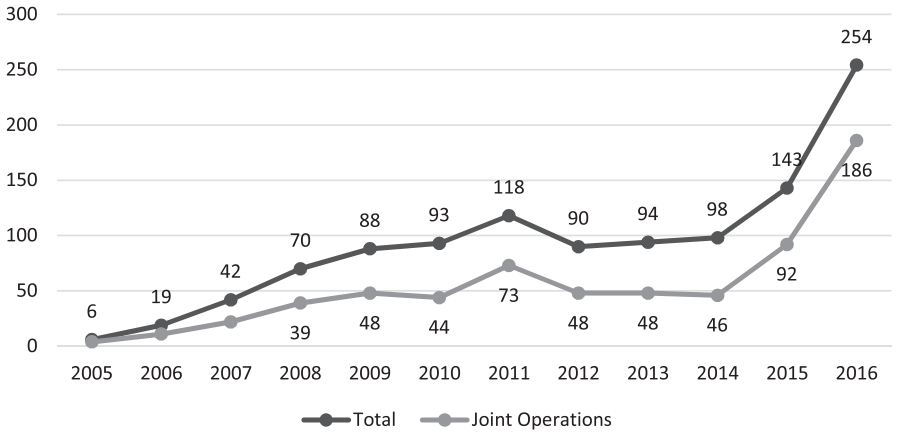

Figure 10: Budget development and distribution 2005-2016 (in Mio EUR)[236]

234 Frontex, 'Budget 2016' (n 21); the data for 2017 was retrieved from Frontex' homepage, http://frontex.europa.eu/pressroom/faq/european-border-and-coast-guard/.

235 See also the explanation on this date in n 236.

236 All data was retrieved from Frontex' annual budget reports. It should be noted that until (and including) 2015, return operations formed part of the general budget chapter 'joint operations'. From 2016 onwards, 'return support' features as a separate budget chapter. For the purposes of illustrating budget distribution in 2016, the budget chapters 'joint operations' and 'return support' have been added together. Since, however, 'return support' is broader than 'return operations', the figure for joint operations in 2016 may in reality be slightly lower than the figure illustrated here.

2.3.2 Pooling of human and technical resources

In order to plan activities more efficiently and make swift reaction possible, Frontex pools personnel and equipment that may later be deployed.

2.3.2.1 Human resources

2.3.2.1.1 The 'standard' pool of European Border and Coast Guard Teams

Frontex sets up a pool of European Border and Coast Guard Teams (EBCGT), a human resources pool where persons that may be deployed during joint operations are registered.[237]

The pool consists of contributions from the member states on the one hand and from the agency on the other.[238] Member states make national border guards and other relevant staff available on the basis of annual bilateral negotiations with Frontex. The ensuing agreements, concluded in the form of a Frontex Letter of Agreement and a Commitment Confirmation by the respective state, are considered a state's commitment to the pool.[239] Frontex' contribution consists of border guards or other relevant staff that are seconded by member states to the agency as national experts on the basis of annual bilateral negotiations and agreements between the agency and the respective state.[240] All members of the EBCGT therefore originate from national border authorities (see also Figure 11).[241]

Human resources registered in the EBCGT pool have to be made available for deployment by member states at the request of the agency, unless the member state is faced with an 'exceptional situation substantially affecting the discharge of national tasks'.[242] Border guards and other staff have to be made available for secondment in accordance with the agreements reached with the agency, 'unless that would seriously affect the discharge of national tasks'.[243]

237 Prior to the entry into force of the EBCG Regulation this was named the 'European Border Guard Teams' (EBGT), on the EBGT see also Roberta Mungianu, 'Frontex: Towards a Common Policy on External Border Control' (2013) 15 European Journal of Migration and Law 359, 379–381.

238 EBCG Regulation (n 18) art 20(2, 11).

239 Ibid art 20(2-3); Frontex, 'Annual Information on the Commitments of Member States to the European Border Guard Teams and the Technical Equipment Pool: Report 2015' (April 2015), 12.

240 EBCG Regulation (n 18) arts 20(11), 58(2, 4).

241 Frontex, 'EBGT and TEP Report 2015' (n 239) 6.

242 EBCG Regulation (n 18) art 20(3).

243 Ibid art 20(11).

The overall number of border guards and other staff to be made available and their profiles are decided by the Management Board on the basis of a proposal by the Executive Director.[244] The EBCGT is currently made of 14 different profiles covering different areas of border control. These include first and second line officers, surveillance officers and specialised profiles such as screening or debriefing experts, document experts, stolen-vehicle detection officers and Frontex Support Officers.[245] The newest addition is the profile of the European Coast Guard Functions Officer.[246]

The required number of EBCGT members was initially set at 1,850, a number that was already slightly exceeded in its first year of existence.[247] The pool has continued to grow, reaching 2,500 at the end of 2013 and a total of 2,900 registered border guards at the end of 2014.[248] The two most common profiles are border surveillance and first-line officers, together amounting to almost 50% of the total EBCGT members (border surveillance officers: 897 corresponding to 31%, first-line officers: 506 corresponding to 17,5%).[249] Occasionally the agency may launch additional calls for contributions in order to respond to unforeseen needs.[250]

Currently all states applying the Schengen *acquis* and two Schengen Associated Countries (Norway and Switzerland) contribute to the pool.[251] The contributions per state mirror their respective specialisations as well as their size and the availability of personnel.[252] The largest contributor is Spain (286 profiles) followed by Romania (254 profiles), Portugal (243 profiles), the Netherlands (200 profiles), Germany (194 profiles), Poland (186 profiles), and Latvia (173 profiles).[253] Frontex itself contributes 66 officers seconded by 19 different states.[254]

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244 Ibid art 20(2); this was done with Frontex Management Board, Decision No 11/2012 establishing the profiles and the overall number of border guards to be made available to the European Border Guard Teams, 23 May 2012.

245 Frontex, 'EBGT and TEP Report 2015' (n 239) 6; for a short description of these profiles see for example Frontex, 'General Report 2012' (n 190) 41; on Frontex Support Officers see below 2.4.2.2.

246 Frontex, 'Frontex takes first step towards creating European Coast Guard' News Release of 30 November 2016.

247 Frontex Management Board, Decision No 11/2012 (n 244); Frontex, 'Annual Information on the Commitments of Member States to the European Border Guard Teams and the Technical Equipment Pool: Report 2013' (Warsaw, 2013), 7.

248 Frontex, 'Annual Information on the Commitments of Member States to the European Border Guard Teams and the Technical Equipment Pool: Report 2014' (Warsaw, 2014), 9; Frontex, 'EBGT and TEP Report 2015' (n 239) 6.

249 Frontex, 'EBGT and TEP Report 2015' (n 239) 7.

250 Ibid 12, 15; an additional call has for example been launched for Joint Operation Triton 2014, as a result of which the additional needs were successfully covered, see ibid 15.

251 Frontex, 'EBGT and TEP Report 2015' (n 239) 6–7.

252 Ibid 5.

253 Ibid Annex 1.

254 Ibid 8.

Frontex has to provide all border guards that are members of the EBCGT with training relevant to their tasks and powers and conduct regular exercises with them. In addition, it has to ensure that all personnel that participate in the EBCGT receive training in relevant Union and international law, including fundamental rights and access to international protection.[255] The contributions to the EBCGT are managed through the web-based Operational Resources Management System (OPERA), where officers nominated by member states for the human resources pool are registered with their relevant personal details, including deployment history, profiles, or participation in Frontex training.[256]

2.3.2.1.2 The rapid reaction pool of European Border and Coast Guard Teams

In order to be able to react on short notice in the context of rapid interventions, the EBCG Regulation requires Frontex to set up, within the 'standard' pool of EBCGT, a rapid reaction pool consisting of at least 1,500 border guards and other relevant staff.[257] The precise numbers to be made available by each state are set out in Annex I of the EBCG Regulation.

As opposed to the standard EBCGT, the rapid reaction pool is a standing corps placed at the immediate disposal of the agency.[258] At the request of the agency, persons in the rapid reaction pool have to be made available within no more than five working days from when the Operational Plan is agreed upon. In this respect, member states cannot invoke the exception that they are faced with a situation affecting the discharge of national tasks, unless this has been confirmed in a risk analysis or a vulnerability assessment.[259]

On 7 December 2016, the agency announced that the rapid reaction pool had been launched and was ready for deployment in emergency situations.[260]

255 EBCG Regulation (n 18) art 36(2).
256 Handbook OPlan Air Border Operations (n 159) 56; Handbook OPlan Land Border Operations (n 159) 64; Handbook OPlan Maritime Border Operations (n 159) 65; Handbook OPlan Return Operations (n 160) 60.
257 EBCG Regulation (n 18) art 8(1g).
258 Ibid art 20(5).
259 Ibid art 20(5, 7).
260 Frontex, 'European Border and Coast Guard Agency launches rapid intervention pool' News Release of 7 December 2016; see also European Commission, 'First report on the operationalisation of the European Border and Coast Guard' (n 214) 5, where the Commission notes that the availability of all 1.500 border guards and other officer was confirmed by the member states.

2.3.2.1.3 Pools for return operations

Frontex is required to set up three human resources pools for deployment during return operations and interventions. A pool of forced-return monitors, a pool of forced-return escorts, and a pool of return specialists.[261] All three pools were established on 7 January 2017.[262]

The process of contributing to these pools functions in a similar way to the pool of EBCGT. In essence, the overall number and profile of persons to be made available is decided by the Management Board.[263] Contributions from each member state are then planned on the basis of annual bilateral negotiations with Frontex. Experts registered in the pools must be made available upon request by the agency within 21 days with respect to standard operations, and 5 days with respect to rapid interventions. In both cases (note: also with respect to rapid interventions), member states are freed from this obligation if they are faced with an 'exceptional situation substantially affecting the discharge of national tasks'.[264]

From these three pools, Frontex assembles ERIT (European Return Intervention Teams) for deployment during return interventions.[265]

2.3.2.2 Technical resources

2.3.2.2.1 Technical Equipment Pool

The 'Technical Equipment Pool' (TEP) is a centralised record of technical equipment to be deployed during Frontex operations.[266] The TEP can include equipment owned and provided by a state on the one hand and equipment owned by the agency or co-owned by the agency and a state on the other (see also Figure 12).[267]

Each year, the Management Board, on the basis of a proposal from the Executive Director, determines the 'Overall Minimum Number of Technical Equipment' (OMNTE) per type of equipment that the agency needs in order

261 EBCG Regulation (n 18) arts 29-31.

262 For detail on the numbers of experts pledged as of 12 January 2017 and 20 February 2017 see European Commission, 'First report on the operationalisation of the European Border and Coast Guard' (n 214) 7–8; European Commission, 'Second report on the operationalisation of the European Border and Coast Guard' (n 214) 8–9.

263 EBCG Regulation (n 18) arts 29(2), 30(2), 31(2).

264 Ibid arts 29(3), 30(3), 31(3).

265 Ibid art 32(1).

266 Ibid art 39(1); TEP is the successor of the 'Centralised Record of Available Technical Equipment' (CRATE) and was created as a result of the changes introduced with Regulation (EU) 1168/2011, see Frontex, 'EBGT and TEP Report 2013' (n 247) 8.

267 EBCG Regulation (n 18) art 39(1).

to carry out its activities for the following year.[268] On that basis Frontex launches a call for contributions by member states inviting them to propose technical equipment.[269] During the ensuing bilateral negotiations, Frontex and the respective state decide on the type, number, and duration of the contribution. The agreement reached is considered the contribution by the state.[270]

To the extent it falls within the agreed minimum number of technical equipment, member states are under an obligation to make the promised equipment available for deployment at the request of the agency, unless they are themselves faced with an exceptional situation substantially affecting the discharge of national tasks.[271] Assets deployed that form part of the 'Overall Minimum Number of Technical Equipment' are always fully financed by Frontex, whereas assets beyond that may be financed partly or fully by the agency.[272]

At the end of 2014 (the latest available data), the TEP was composed of almost 960 pieces of equipment.[273] This includes more than 330 maritime assets, i.e. Offshore Patrol Vessels, Coastal Patrol Vessels, Coastal Patrol Boats, and fast interception boats, almost 100 aerial means, i.e. Fixed Wing Aircrafts and Helicopters, almost 140 terrestrial assets, i.e. Thermo Vision Vehicles and other patrol cars, 40 dog teams, and about 360 pieces of other equipment, such as night vision devices, handheld thermal cameras, document checking equipment, heart-beat detectors, and carbon dioxide detectors as well as mobile offices or laboratories.[274] Most contributions are made by Italy (172 pieces) and Portugal (152 pieces).[275] Like the EBCGT, the TEP is also managed through OPERA.[276]

268 Ibid art 39(5, 9); see Frontex, 'EBGT and TEP Report 2015' (n 239) 5; Frontex Management Board, Decision No 20/2012 establishing the rules related to the Technical Equipment to be deployed for Frontex coordinated operational activities in 2013, 27 September 2012, updated by Frontex Management Board, Decision No 6/2014 adopting rules related to the technical equipment, including Overall Minimum Number of Technical Equipment to be deployed for Frontex coordinated operational activities in 2015, 26 March 2014.

269 Frontex, 'EBGT and TEP Report 2015' (n 239) 5–6.

270 Ibid 12.

271 EBCG Regulation (n 18) art 39(8).

272 Ibid art 39(16).

273 Frontex, 'EBGT and TEP Report 2015' (n 239) 5; in comparison: at the end of 2013 the TEP was composed of 804 pieces of equipment, see Frontex, 'EBGT and TEP Report 2014' (n 248) 6.

274 Frontex, 'EBGT and TEP Report 2015' (n 239) 9.

275 Ibid 2.

276 Handbook OPlan Air Border Operations (n 159) 56; Handbook OPlan Land Border Operations (n 159) 64; Handbook OPlan Maritime Border Operations (n 159) 65; Handbook OPlan Return Operations (n 160) 60.

2.3.2.2.2 Rapid reaction equipment pool

The TEP also includes a rapid reaction equipment pool containing a limited number of items needed for possible rapid border interventions. Equipment in the rapid reaction pool has to be made available as soon as possible, but no later than ten days from when the Operational Plan is agreed upon. Member states cannot invoke the exception that they are faced with a situation affecting the discharge of national tasks.[277]

Like the rapid reaction pool of EBCGT, the rapid reaction equipment pool was also launched on 7 December 2016. However, at the end of January 2017 the Commission reported that considerable gaps still exist for most types of equipment to be pledged for availability in the rapid reaction equipment pool.[278]

2.3.2.3 Availability of pooled resources

According to Frontex reports, the contributions registered in the respective pools almost entirely covered the agency's needs. A particular challenge, however, seems to be actual availability of the assets contributed. Neither the TEP nor the EBCGT are physical pools of resources. Rather, the registered resources correspond to the written commitments made by the states. Contrary to those commitments, registered assets have not always been made available in practice, in particular during peak season. There has therefore sometimes been a gap between the number of registered assets and those actually made available.[279]

Partly, the lack of availability of pooled resources may be addressed through the establishment of the rapid reaction pools.[280] However, another possible way for Frontex to meet this challenge is the acquisition or leasing of its own technical equipment as provided for under Article 38 EBCG Regulation. Such equipment will be registered in a member state, if registration is necessary (e.g. for vessels), but has to be made available to the agency at any time. In relation to co-owned equipment, the agency and the respective member state agree on periods during which the piece of equipment shall be fully available to the agency.[281]

277 EBCG Regulation (n 18) art 39(7).

278 European Commission, 'First report on the operationalisation of the European Border and Coast Guard' (n 214) 5.

279 Frontex, 'EBGT and TEP Report 2015' (n 239) 11, 15; see also European Commission, 'First report on the operationalisation of the European Border and Coast Guard' (n 214) 3–4; European Commission, 'Second report on the operationalisation of the European Border and Coast Guard' (n 214) 2–5

280 See above 2.3.2.1.2 and 2.3.2.2.2.

281 EBCG Regulation (n 18) arts 38, 39(2-3).

Even though, according to the latest available data, the TEP does not yet include Frontex-owned assets, the agency started acquiring smaller pieces of equipment in 2015.[282] In addition, several projects are under way to increase Frontex' own operational capacity. In 2013 Frontex launched a pilot project on the acquisition of Aerial Surveillance Services from a commercial operator. The service was deployed in Bulgaria within the framework of JO Poseidon Land 2014 and included the provision of 120 flight hours, a mobile ground station over 40 days, the deployment of equipment and personnel as well as logistical and administrative arrangements.[283] Due to the success of the project, in 2015 Frontex concluded a framework contract for the acquisition of aerial surveillance services, assets and expert support for Frontex operations.[284] A similar pilot project was launched in 2015 regarding the leasing of mini-buses, passenger cars, and four-wheel-drive vehicles to be used for transporting deployed officers during operations in Hungary, Greece, and Bulgaria.[285] Finally, in June 2015 Frontex organised the emergency rental of twelve mobile field offices deployed in Italy, Spain, Bulgaria, and a number of Greek islands where they were used by Frontex staff, for screening, registration, finger-printing of migrants, and debriefing purposes.[286]

2.3.3 Deployment of human and technical resources

This section sketches the deployment of human and technical resources. It should be noted, however, that the deployed personnel and equipment always operate alongside the host state's own personnel and equipment. Local staff continue to carry out their tasks according to the relevant national law and EU law. When involved in joint operations they have an additional set of tasks and duties. These include cooperation with and support of deployed officers, knowledge of the respective roles, mandates and tasks, and active contribution towards the full integration of deployed officers within the local work environment.[287]

2.3.3.1 Deployment of human resources

There are two main categories of deployed officer: members of EBCGT or ERIT ('team members', prior to the entry into force of the EBCG Regulation called 'guest officers') and 'other deployed officers' (see also Figure 11). The distinction is crucial since, as discussed in more detail in the following sec-

282 Frontex, 'EBGT and TEP Report 2015' (n 239) 9; Frontex, 'General Report 2015' (n 22) 24.
283 Frontex, 'EBGT and TEP Report 2015' (n 239) 14.
284 Ibid 15; Frontex, 'General Report 2015' (n 22) 24.
285 Frontex, 'General Report 2015' (n 22) 25.
286 Ibid 24.
287 Handbook OPlan Air Border Operations (n 159) 23; Handbook OPlan Land Border Operations (n 159) 31; Handbook OPlan Maritime Border Operations (n 159) 32; Handbook OPlan Return Operations (n 160) 29.

tion, team member status brings with it a range of powers under EU law that other deployed officers do not enjoy.

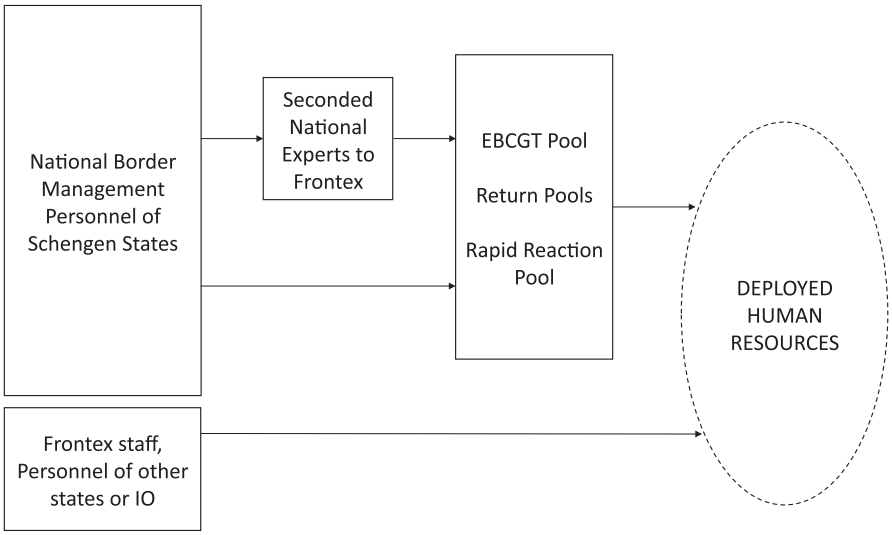

Figure 11: Pooling and deployment of human resources

2.3.3.1.1 Team members (former 'guest officers')

Team members are persons deployed to a joint border control or return operation from one of the human resources pools in support of the local staff.[288] Most persons deployed for border control operations are officers of border guard services of member states, but they do not necessarily have to be.[289] Those deployed during return interventions are return escorts or monitors, or other return specialists.

Team members wear their own uniform when participating in a joint operation, but use a blue armband with the insignia of the EU and Frontex. In addition, they carry with them at all times during their deployment an accreditation document issued by the agency in cooperation with the host state.[290]

In order to carry out their tasks, team members are conferred a range of powers by virtue of EU law. These are defined in Article 40 EBCG Regulation, according to which they have the capacity to perform all tasks and

288 See in particular EBCG Regulation (n 18) art 2(8); on the human resources pools see above 2.3.2.1.

289 Notably, before the entry into force of the EBCG Regulation, 'guest officers' had to belong to border guard services of member states, see Council Regulation (EC) No 2007/2004 (n 16) [as amended] art 1a(6).

290 EBCG Regulation (n 18) arts 40(4), 41.

exercise all powers necessary for border control and return, as well as those necessary for the realisation of the objectives of the Schengen Borders Code and the Return Directive.[291] The only explicit limitation is that, as a rule, decisions to refuse entry in accordance with the Schengen Borders Code shall be taken by a local border guard. However, since the entry into force of the EBCG Regulation, the host member state may authorise team members to take such decisions on its behalf.[292] Currently, team members can only be deployed to other Schengen states. However, the EBCG Regulation created the possibility of deploying team members with executive powers to third states. Their powers will be based on a status agreement, the model for which is to be drawn up by the Commission.[293]

Team members may carry weapons, ammunition, and equipment in accordance with the national law of their home member state, unless this includes weapons, ammunition and equipment the use of which the host member state has specifically prohibited.[294] They can resort to the use of force in order to exercise their right to self-defence, and in other situations if the home and host states have agreed to that. As a rule, the use of force requires the presence of border guards of the host state, but the host state may, with the consent of the home state, authorise members of the teams to use force in the absence of their border guards.[295]

2.3.3.1.2 Other deployed officers

Human resources deployed during joint operations may also include officers that do not qualify as team members. For the purposes of this study, these will be referred to as 'other deployed officers'.

As opposed to team members, other deployed officers do not generally have executive powers to carry out border management tasks and are not allowed to take coercive measures against any person. In this light, the distinction between team members and other deployed officers is crucial, due to the implications for the extent of powers they can exercise.

Other deployed officers may include (1) Frontex staff, (2) observers, and (3) advisers.

Frontex staff are personnel that the agency deploys from its own staff members who are not qualified to perform border control functions (as opposed

291 Ibid art 40(1); Handbook OPlan Air Border Operations (n 159) 25; Handbook OPlan Land Border Operations (n 159) 28; Handbook OPlan Maritime Border Operations (n 159) 30; analysing the powers of guest officers Mungianu, 'Frontex: Towards a Common Policy on External Border Control' (n 237) 381–384.
292 EBCG Regulation (n 18) art 40(9).
293 Ibid art 54(4-5).
294 Ibid art 40(5).
295 Ibid art 40(6-7).

to personnel seconded to the agency by a member state, and contributed by the agency to the EBCGT or ERIT). Importantly, they may only perform coordination and similar tasks.[296] The Frontex Coordinating Officer to be designated for every operation, in order to foster cooperation and coordination between the actors involved, is required to be a Frontex staff member.[297]

Observers are personnel from Union agencies and bodies, international organisations, or third countries participating in joint operations. Their involvement in any given operation is subject to the agreement of the member states concerned. Participation and tasks of third country observers are based on working arrangements or memoranda of understanding between Frontex and the competent authorities of the third country concerned. In addition, the Operational Plan has to provide detailed rules on their participation.[298]

Special advisers are officers of border guard services of the United Kingdom and Ireland participating in joint operations.[299] Depending on operational needs, other types of special adviser may also be involved in an operation. Other special advisers may for example include EU advisers, i.e. officers of border guard services of member states deployed in third countries during Frontex-coordinated activities, or special debriefing advisers, i.e. an officer deployed in support of the local authorities and debriefing teams.[300] The participation of EU advisers (in third countries) is similar to the participation of third country observers, and is based on working arrangements or memoranda of understanding between Frontex and the competent authorities of the third country concerned.

The role of observers and advisers is limited to assisting and advising the local authorities and exchanging or obtaining experience. They are in particular relied upon to serve as intermediaries between the host state and their 'home' authority, provide expertise in the examination of travel documents,

296 Ibid art 20(11).

297 Ibid art 58(2); for more detail see 2.4.2.2.

298 Ibid arts 52(5), 54(7); Participation of third country observers is for example foreseen in the working arrangement with the authorities of Armenia of 22 February 2012, para 3(vi) 'Subject to the consent of the hosting EU Member State, Frontex may invite representatives of the competent authorities of Armenia to participate in certain Frontex coordinated joint operations as observers on a case-by-case basis decided by the Executive Director of Frontex.'

299 Ibid art 51; more specifically see Handbook OPlan Air Border Operations (n 159) 13; see also Frontex, 'EBGT and TEP Report 2015' (n 239) 6–7.

300 With respect to EU advisers see for example Handbook OPlan Air Border Operations (n 159) 13; with respect to special advisers for debriefing activities for example Handbook OPlan Land Border Operations (n 159) 34; Handbook OPlan Maritime Border Operations (n 159) 35; Handbook OPlan Return Operations (n 160) 32.

and assist with language and other professional skills or the exchange of intelligence.[301]

2.3.3.2 Deployment of technical resources

In addition to personnel, host states are commonly also supported with technical equipment ('assets') made available to them. Similarly to deployed personnel, technical equipment can be contributed by a participating state or by Frontex itself (see also Figure 12).

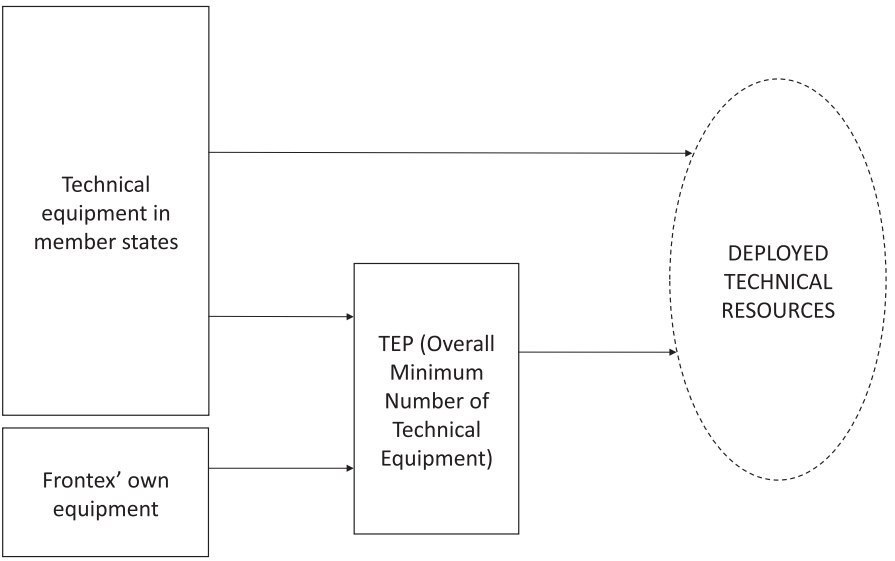

Figure 12: Pooling and deployment of technical resources

Technical equipment relied upon during joint operations includes aerial assets, like aeroplanes or helicopters, terrestrial assets, including Thermo Vision Vehicles, Patrol Cars and Dog Teams, or maritime assets, in particular different types and sizes of vessels.[302] However, the possible types of asset that can be contributed are not exhaustively listed in the EBCG Regulation. Depending on the needs of a specific operation, any type of technical equipment that may prove useful can therefore potentially be contributed and deployed.

301 EBCG Regulation (n 18) art 40 *a contrario*; see also Handbook OPlan Air Border Operations (n 159) 25–26; Handbook OPlan Land Border Operations (n 159) 34; Handbook OPlan Maritime Border Operations (n 159) 35; Handbook OPlan Return Operations (n 60) 32; for a specific operation see for example OPlan JO Triton 2014 (n 155) Annex 7.

302 Handbook OPlan Land Border Operations (n 159) 13; Handbook OPlan Maritime Border Operations (n 159) 14; for specific operations see for example OPlan JO Triton 2014 (n 155) Annex 5; OPlan JO Hermes 2014 (n 155) Annex 5; for more detail on technical equipment that may be used for joint operations see above 2.3.2.2.

Technical equipment frequently requires expert knowledge for its safe operation, most obviously in the case of large assets, such as aeroplanes, helicopters, or vessels. Depending on the complexity and size of the asset, it may require only a captain/pilot or a whole crew. This has created a particular challenge. Prior to the entry into force of the EBCG Regulation only officers of border guard services of member states could be contributed as team members. Hence, the status of other members of the asset crew, for example the technical staff or a chef on board a large vessel, remained unclear.[303] Especially in light of the consequences of the status of personnel as regards their powers and liability, the question was under what circumstances they would qualify as team members (then 'guest officers'). This dilemma was solved with the entry into force of the EBCG Regulation, which allows not only officers of border guard services to be deployed as team members, but also any other 'relevant staff'.[304] In this light, it is likely that in future operations, all asset staff relevant to or actually fulfilling border control functions will be deployed as team members. Even if that should not be the case, it may be assumed that they are subject to the same rules and limitations as team members, in order to avoid a gap in the provisions on criminal and civil liability with respect to their acts, the guarantee of disciplinary authority over them, and other rules designed as safeguards in return for the powers they exercise.[305]

Up to (and including) 2016, larger technical equipment, such as vessels or aircraft, has always been contributed exclusively with personnel of the respective home member state. Since the handling of certain assets can vary between states, this ensures deployment of a fully and independently functioning asset. At the same time, it allows contributing states to maintain command arrangements on the asset itself untouched, even where certain powers are conferred to other authorities during joint operations.[306] However, with the entry into force of the EBCG Regulation, the new profile of the 'European Coast Guard Functions Officer' was created.[307] It is envisaged that officers registered under this profile will be deployed on vessels contributed to sea border operations. In December 2016, Frontex announced that in 2017 it will deploy three off-shore patrol vessels from Finland, Romania, and France, which will for the first time have multi-national European

303 See in particular Council Regulation (EC) No 2007/2004 (n 16) [as amended] art 1a(6); see also n 289; for a more detailed overview of technical equipment see also above 2.3.2.2.

304 EBCG Regulation (n 18) in particular art 20.

305 Indeed, the definition of 'guest officers' has not always been applied as strictly in practice as envisaged in the Frontex Regulation. See for example OPlan JO Hermes 2014 (n 155) Annex 5, where debriefing experts contributed by the United Kingdom are explicitly listed as guest officers, instead of special advisers.

306 For more detail see below 2.4.3.1.

307 Frontex, 'Frontex takes first step towards creating European Coast Guard' News Release of 30 November 2016.

crews on board.[308] In April 2017, the first of these was deployed to a joint operation. Contributed by Finland, the crew of the vessel includes officers provided by seven other member states.[309]

If the home or host state requests it, the host state appoints a Liaison Officer skilled in the know-how of the relevant operational matters for aerial and maritime assets. That officer acts as an interface between the asset personnel and the national authorities of the host state.[310]

2.3.3.3 Operational Resources Management System (OPERA)

The Operational Resources Management System (OPERA) is not only used to manage pooling of operational resources through creating human resources and technical equipment databases, but also to manage deployment of operational resources.

Managing deployment includes the possibility for Frontex to generate requests for resources to member states, to register deployment of resources, to monitor deployment and the expenses associated with it, and to issue accreditation documents as well as reports. For this purpose, all relevant operational details, comprising duration, location, type of operation, and additional operational needs, are stored. With respect to human resources, important additional details include information regarding arrival and departure dates, means of transportation, and accommodation, but also whether the officer in question travels to the operational area carrying weapons, in which case the weapon itself and the amount of ammunition is to be registered.[311]

2.3.3.4 Overview: personnel deployed during operations

The previous sections showed that it is crucial to distinguish different categories and types of personnel involved in joint operations. Their powers, command and control arrangements, and concomitant liabilities all depend on their status.[312] Thus, the status of personnel potentially also affects responsibility resulting from their actions.

Table 2 gives an overview of the different types of human resource that may be involved in joint operations. In the interest of simplicity, the remainder of this study will refer to the border control personnel on vessels, helicop-

308 Ibid.
309 Frontex, 'First ship with multinational crew joins Frontex operation' News Release of 20 April 2017.
310 Handbook OPlan Maritime Border Operations (n 159) 32.
311 Handbook OPlan Air Border Operations (n 159) 56–59; Handbook OPlan Land Border Operations (n 159) 64–68; Handbook OPlan Maritime Border Operations (n 159) 65–69; Handbook OPlan Return Operations (n 160) 60–64.
312 For more detail see below 2.4.3.

ters, aeroplanes, or other large assets as '**team members on large assets**'. In contrast, team members contributed independently from large assets, e.g. as part of teams of border patrol, screening, or debriefing officers, as '**standard team members**'. This distinction will be essential throughout the study because, as explained in more detail below, participating states retain a significant degree of authority over their large (often military) assets.[313]

Table 2: Personnel during joint operations

Category	Type	Definition	Tasks	Exec. powers
Local staff	---	Personnel of the host state participating in joint operations	All	Yes (full)
Team members	Team members contributed by member states ('standard team members')	Border guards, return specialists, or other relevant staff contributed by member states for participation in joint operations	All activities relevant to border control or return	Yes (limited)
	Team members contributed by Frontex ('standard team members')	Border guards, return specialists, or other relevant staff seconded by a member state to Frontex and contributed by Frontex for participation in joint operations	All activities relevant to border control or return	Yes (limited)
	Team members on large assets	Personnel that are deployed on large assets, e.g. vessels, helicopters, or aeroplanes, and exercise border management tasks	All activities relevant to border control or return	Yes (limited)
Other deployed officers	Frontex staff	Frontex staff members not qualified to perform border control functions participating in joint operations	Coordination and similar tasks	No
	Observers	Personnel of Union agencies and bodies, international organisations or third countries participating in joint operations	Experience exchange	No
	Advisers	Officers of border guard services of the United Kingdom and Ireland participating in joint operations or other types of special adviser	Experience exchange	No

313 See below 2.4.3.1.3.

2.4 Implementing joint operations

The following sections discuss the implementation of joint operations, focussing in particular on the roles of the participating actors and their authority over the deployed resources in practical terms. Whilst operations may be subject to specific arrangements agreed upon among the parties involved where necessary, joint operations are commonly implemented according to a standard model. The following analysis is thus based on a 'typical' joint border control operation, such as JO Triton, a joint sea border operation in the Central Mediterranean hosted by Italy.

No further distinction will be made between standard and rapid operations, since virtually no differences exist between them in the implementation phase, in particular as regards the roles of the parties involved. Similarly, no general distinction will be made between border control and return operations. At the time of writing, no return operations that include the deployment of fully-fledged ERIT (European Return Intervention Teams) have yet been completed. However, since the entry into force of the EBCG Regulation, the organisation of return operations is closely modelled on border control operations. It may therefore be assumed that, in the relevant aspects, their practical implementation resembles the model outlined in the following sections.

2.4.1 Applicable rules during joint operations

2.4.1.1 Generally applicable rules

All activities during joint operations are subject to the relevant Union law, international law and the national law of the host state.[314] Apart from the EBCG Regulation itself, the most important pieces of Union legislation are the Schengen Borders Code with respect to border control operations and the Return Directive with respect to return operations. The Schengen Borders Code provides for the absence of border control of persons crossing the internal borders between the member states and establishes rules governing border control of persons crossing the Union's external borders. It in particular lays down the modalities for crossing external borders, the entry conditions for third-country nationals, and the general framework for carrying out border checks and surveillance.[315] The Return Directive sets out the obligation to return irregular migrants and contains rules as regards the expulsion procedure. These concern *inter alia* the treatment of the returnees, the possibilities for detaining them, and the procedural safeguards that

314 EBCG Regulation (n 18) arts 14(2), 27(1), 40(2).
315 Schengen Borders Code (n 3).

states have to make available.[316] It also requires that every forced-return operation has to be monitored, a function that may be fulfilled by deployed forced-return monitors in the context of Frontex operations.[317]

With respect to border surveillance at sea, the Schengen Borders Code is amended and supplemented by specific rules laid down in the Sea Borders Regulation.[318] The latter emphasises the need to ensure the safety of all persons involved, including the persons intercepted or rescued, and reiterates the respect of the protection against *refoulement* and other fundamental rights guarantees, in particular when planning and implementing the disembarkation of intercepted or rescued persons.[319] The core part of the Sea Borders Regulation sets out the modalities for detection, interception in the territorial sea, on the high seas, and in the contiguous zone respectively, and search and rescue situations including disembarkation.[320] Frontex is required to report annually to the European Parliament, the Council and the Commission on the practical application of the Sea Borders Regulation.[321] In its first report, submitted in July 2015, the agency provided information on the amendments made to the Operational Plans as a result of the Sea Borders Regulation and the practical implementation of the Regulation, as well as the need for developing further measures. New rules integrated into Operational Plans include assessments of the general situation in relevant third parties, details of shore-based medical staff and national authorities responsible for follow-up measures in terms of international protection or other persons in particularly vulnerable situations, and an identification of states for disembarkation.[322]

2.4.1.2 Operation-specific rules: the Operational Plan

Each joint operation is implemented according to an Operational Plan ('OPlan'), drawn up beforehand under the responsibility of the Executive Director and covering all aspects considered necessary for carrying out the operation.[323] In practice, the Operational Plan is prepared by an Operational Manager in cooperation with the host state and then approved by the Exec-

316 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, [2008] OJ L348/98.
317 Ibid art 8(6); EBCG Regulation (n 18) art 28(6).
318 Sea Borders Regulation (n 166).
319 Ibid arts 3, 4.
320 Ibid arts 5–10.
321 Ibid art 13.
322 Frontex, 'Annual Report on the implementation on the EU Regulation 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders' (9 July 2015).
323 EBCG Regulation (n 18) arts 16(2-3), 33(3).

utive Director.[324] It is subject to final agreement by the host member state and participating member states are consulted.[325] The only exception are Operational Plans for joint operations carried out under the lead and within the territory of neighbouring third states. In addition to the agreement of the third state (i.e. the host state), the Operational Plan requires the agreement of the member state(s) bordering the operational area.[326] In relation to rapid interventions, the time limit for finalising the Operational Plan is five working days, starting with the request.[327]

Each Operational Plan consists of a Main Part, Annexes, and the Handbook to the Operational Plan. Whilst the Main Part and the Annexes are drafted specifically for every single operation, the Handbooks each cover one of the four types of operation (Air, Land, Sea, and Return).[328] The Handbooks accordingly deal with those aspects that are applicable to all operations of one type and contain the Code of Conduct for all participating persons, the operational concept, including a description of the main activities that can be conducted during joint operations, general guidelines for debriefing and screening activities, the coordination structure, including the tasks and responsibilities of all participating actors, and arrangements for command and control as well as communication and reporting.[329] The Main Part and the Annexes in turn contain the more specific information with respect to each operation, i.e. the assessment of the situation, the aims and objectives of the specific operation, the precise operational area and period of implementation, the plan of deployed resources, specific tasks and instructions to participants (rules of engagement), a command and control scheme including names as well as contact details of relevant personnel, and certain organisational arrangements and logistics.[330] All Operational Plans for operations at the external sea borders have to be established in accordance with the Sea

324 Handbook OPlan Air Border Operations (n 159) 26; Handbook OPlan Land Border Operations (n 159) 31; Handbook OPlan Maritime Border Operations (n 159) 33; Handbook OPlan Return Operations (n 160) 30; for a specific operation see for example OPlan JO Triton 2014 (n 155) 1; on the Operational Manager see 2.4.2.2.

325 EBCG Regulation (n 18) art 16(2); art 33(3) suggests that with respect to return interventions, participating member states have to agree to the Operational Plan.

326 Ibid art 54(3); for more detail on joint operations led by and carried out in third states see above 2.2.3.

327 Ibid arts 17(4, 6), 33(4).

328 Handbook OPlan Air Border Operations (n 159) 7; Handbook OPlan Land Border Operations (n 159) 7; Handbook OPlan Maritime Border Operations (n 159) 7; Handbook OPlan Return Operations (n 160) 8.

329 See Handbook OPlan Air Border Operations (n 159); Handbook OPlan Land Border Operations (n 159) ; Handbook OPlan Maritime Border Operations (n 159); Handbook OPlan Return Operations (n 160).

330 See for example OPlan JO Pegasus 2014 (n 155); Operational Plan: Joint Operation Poseidon Land 2013 (n 155); OPlan JO Triton 2014 (n 155); It should be noted that the Handbooks were only drawn up in 2014. Operational Plans for joint operations implemented before that date only comprise a Main Part and Annexes that contain the information specific to the operation as well as the more general aspects.

Borders Regulation, which contains a number of additional guarantees with respect to fundamental rights as well as the modalities of interception at sea and disembarkation (see previous section).[331]

According to the EBCG Regulation, all parts of the Operational Plan are legally binding on the agency, the host state, and participating states.[332] Neither the Main Parts, nor the Annexes and Handbooks are publicly available. Partial access is typically granted by the agency upon request.

2.4.1.3 Fundamental rights

All joint operations have to be implemented in compliance with human rights. This includes, in particular, the human rights obligations contained in the ECHR and the CFR. Both guarantee a broad range of rights relevant to persons that may be affected by Frontex operations, such as the right to life (Article 2 ECHR, Article 2 CFR), the prohibition of torture or inhuman or degrading treatment or punishment (Article 3 ECHR, Article 4 CFR), the prohibition of *refoulement* (in particular Article 3 ECHR, Article 19(2) CFR), the prohibition of collective expulsions (Article 4 Protocol No. 4 ECHR, Article 19(1) CFR), the right to private and family life (Article 8 ECHR, Article 7 CFR), and the right to liberty (Article 5 ECHR, Article 6 CFR).

The ECHR is applicable to all contracting parties. This includes all Schengen states that may be involved in Frontex operations. The EU itself is not currently a party to the Convention, making the ECHR arguably not directly applicable to Frontex' conduct.[333] It should be noted that there are limitations to the applicability of the ECHR when parties act extraterritorially. This may affect in particular border control operations at sea. Importantly, however, the ECtHR has clarified that when a state vessel carries out interceptions during border control operations at sea, the affected individuals fall within the jurisdiction of that state, making the Convention applicable.[334]

The CFR applies to the conduct of EU bodies and to member states when they implement EU law and therefore also when they act within the framework of the Schengen Borders Code and the EBCG Regulation.[335] However, it is arbuably not directly applicable to non-EU Schengen states, i.e. to Iceland, Liechtenstein, Norway, and Switzerland.

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331 EBCG Regulation (n 18) art 16(3j); Sea Borders Regulation (n 166).

332 EBCG Regulation (n 18) art 16(3); Handbook OPlan Air Border Operations (n 159) 7; Handbook OPlan Land Border Operations (n 159) 7; Handbook OPlan Maritime Border Operations (n 159) 7; Handbook OPlan Return Operations (n 160) 8.

333 For more detail see below 3.1.2.1.1.

334 See in particular ECtHR, *Hirsi* (n 35) paras 70-82; on the definition of 'interception' see above 2.2.1.1; certain conduct of participating states may, however, be excluded from the Convention's applicability, for detail see below 3.4.1.3.2.

335 CFR (n 34) art 51(1).

Thus, together, the ECHR and the CFR impose obligations on all the principal actors involved in Frontex operations to guarantee the above-mentioned rights (see Figure 13).

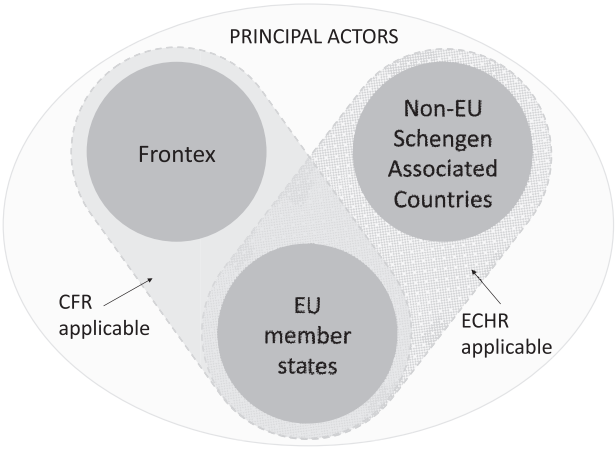

Figure 13: Principal actors and applicability of European human rights law

Human rights obligations are reiterated in the EBCG Regulation, the Schengen Borders Code, the Return Directive, and in the Operational Plans for each operation.[336] In addition, Codes of Conduct drawn up by the agency set out behavioural standards for all persons participating in Frontex activities, including during joint operations. These contain fundamental rights and international protection obligations, prohibit abuse of authority, discrimination, harassment, corruption, as well as the use of drugs and alcohol, and set out rules on ethical and professional behaviour.[337] Whilst the Codes of Conduct as such are not legally binding, they are included in the relevant Handbooks to the Operational Plans that in turn are legally binding.[338]

336 EBCG Regulation (n 18) in particular art 34(1); Schengen Borders Code (n 3) in particular art 4; Return Directive (n 316) in particular art 1; Handbook OPlan Air Border Operations (n 159) 6–7; Handbook OPlan Land Border Operations (n 159) 6–7; Handbook OPlan Maritime Border Operations (n 159) 6–7; Handbook OPlan Return Operations (n 160) 7–8.

337 Frontex, Code of Conduct for all persons participating in Frontex activities, undated, http://frontex.europa.eu/assets/Publications/General/Frontex_Code_of_Conduct.pdf; Frontex, Code of Conduct for joint return operations coordinated by Frontex, 7 October 2013, http://frontex.europa.eu/assets/Publications/General/Code_of_Conduct_for_Joint_Return_Operations.pdf; drawn up according to EBCG Regulation (n 18) art 35.

338 Handbook OPlan Air Border Operations (n 159) 8–12; Handbook OPlan Land Border Operations (n 159) 8–11; Handbook OPlan Maritime Border Operations (n 159) 8–11; Handbook OPlan Return Operations (n 160) 10–13; before the Handbooks were drawn up in 2014, it was common practice to annex the Code of Conduct to the Operational Plans, see for example: Frontex (Operations Division, Joint Operations Unit, Sea Borders Sector), Operational Plan: Joint Operation EPN Hermes 2013, undated, on file with the author, Annex 7; Operational Plan: Joint Operation Poseidon Land 2013 (n 155) Annex 5.

2.4.2 Coordination structures during joint operations

Due to the variety of actors involved, a number of coordination instruments are in place to implement joint operations.

2.4.2.1 Coordination structures located in the host state

The centre-piece of the coordination structure established for joint operations is the **International Coordination Centre (ICC)**. The ICC is established by the host state in cooperation with Frontex and located in the premises ensuring the most efficient coordination of the joint operation, normally in the premises of the respective authority of the host state. An exception is joint operations at air borders, where the ICC is located in Warsaw and local centres are established at participating airports.[339] The ICC serves as a focal point for leading and coordinating the implementation of all operational activities as well as for communicating with and coordinating all assets and experts deployed. Its staff consists of an **ICC Coordinator** and duty officers. The ICC Coordinator is an officer assigned by the respective authority of the host state and is responsible for leading and coordinating the daily operational activities and ensuring the fulfilment of the ICC's tasks throughout the joint operation in the whole operational area.[340] For coordination at the regional or local level, a **Regional/Local Coordination Centre (R/LCC)** led by an R/LCC Coordinator may be established. Regional or Local Coordination Centres operate under the coordination of the ICC.[341] Different authorities of host or participating states may appoint and deploy **Liaison Officers (LO)** to the ICC or Regional or Local Coordination Centre to facilitate cooperation between the actors involved and ensure effective implementation of the operational activities.[342]

Within the ICC, a **Joint Coordination Board (JCB)** is established in charge of running the joint operation.[343] The JCB is composed of at least the ICC Coordinator, who is at the same time the JCB's chairman, the Frontex Operational Coordinator (see the following section), the Intelligence Officer, and so-called National Officials. The **Intelligence Officer (IO)** is nominated by the host state authority and acts as the daily interface between the host state authorities and the ICC in gathering and sharing relevant operational and intelligence information. **National Officials (NO)** are nominated to the ICC by every participating state who deploys major aerial, terrestrial, or maritime

339 Handbook OPlan Air Border Operations (n 159) 30.
340 Handbook OPlan Land Border Operations (n 159) 26–27; Handbook OPlan Maritime Border Operations (n 159) 27–28; Handbook OPlan Return Operations (n 160) 26–27.
341 Handbook OPlan Land Border Operations (n 159) 26, 28-29; Handbook OPlan Maritime Border Operations (n 159) 27, 30-31; Handbook OPlan Return Operations (n 160) 26, 28-29.
342 Handbook OPlan Land Border Operations (n 159) 30; Handbook OPlan Maritime Border Operations (n 159) 32.
343 For more detail on the JCB's role see below 2.4.3.1.3.

assets (e.g. vessels or aircraft) to the operation for the whole period of deployment of the assets. Their function is to coordinate the actions of their respective national asset(s) according to national legislation. Often large vessels or aeroplanes contributed are military equipment. In this vein, the presence of the National Official is considered necessary in order to safeguard the interests and prerogatives of their sending state. In addition, the National Official adjusts orders according to the technical requirements of the specific assets under their sphere of influence and translates them into the language of their respective crews. The Frontex Operational Coordinator, the Intelligence Officer, and all National Officials have access to the ICC on a 24/7 basis.[344]

At land or sea borders the host state may in addition set up so-called **Focal Points (FP)** in cooperation with Frontex in order to coordinate activities with respect to specific border crossing points or border surveillance areas.[345] Focal Points can be established either to cover areas that are not covered by regular joint operations or to complement pre-existing joint operations. In the latter case, they act under the coordination of the ICC.[346]

2.4.2.2 Coordination instruments provided by Frontex

There are a number of instruments aimed at enabling Frontex to fulfil its coordinating role in the implementation of joint operations. These have mostly been developed in practice and have only to a very limited extent found their way into the EBCG Regulation.

The **Operational Manager (OM)** assigned to every joint operation assumes a central role on the part of Frontex. He is responsible for the joint operation from the very beginning until its evaluation. The Operational Manager drafts the proposal for the Operational Plan in cooperation with the host state, follows the relevant developments during all stages of the implementation, keeps the superiors informed, and if necessary adapts the operational needs or updates and amends the Operational Plan. He also gathers, stores, and analyses information received from different sources and supports cooperation with other actors involved in the joint operation. He additionally performs tasks of a more administrative nature when ensuring professional preparation, maintenance, and archiving of all related documentation and managing the operational funds, including Frontex' financial contribu-

344 Handbook OPlan Land Border Operations (n 159) 26–31; Handbook OPlan Maritime Border Operations (n 159) 27–30; Handbook OPlan Return Operations (n 160) 26–28.

345 See also above 2.2.1.3.

346 Handbook OPlan Land Border Operations (n 159) 29; Handbook OPlan Maritime Border Operations (n 159) 31.

tion. The Operational Manager is supported by a team made up of specialised staff from different Frontex units (the Operational Team, 'OT').[347]

Whereas the Operational Manager is responsible for the overall administration of joint operations, a **Frontex Coordinating Officer (FCO)** is nominated for every operation in order to foster cooperation and coordination between the actors involved. This already well-established practice was codified during the 2011 revision of the Frontex Regulation and is now found in Article 22 EBCG Regulation.[348] The Frontex Coordinating Officer acts on behalf of the agency in all aspects of the deployment of the teams. He provides an interface between host and participating states, between the agency and the host state and between the agency and the members of the teams. In addition, he monitors the correct implementation of the Operational Plan, including in relation to the protection of fundamental rights, and reports back to the agency on all aspects of the deployment of the teams, in particular when instructions to the EBCGT or the ERIT by the host member state are not in compliance with the Operational Plan. If disagreements arise regarding the execution of the Operational Plan or the deployment of teams, the Executive Director may authorise the Frontex Coordinating Officer to assist in resolving the conflict.[349] The Frontex Coordinating Officer must be a staff member of the agency.[350]

Neither the Operational Manager, who operates from the Frontex Headquarters, nor the Frontex Coordinating Officer, who is only required to ensure 'constructive presence during the joint operation when the operational need occurs', are present in the host state for the entire duration of the operation.[351] However, the Frontex Regulation explicitly requires the agency to ensure that a staff member of Frontex is always present.[352] Therefore, and in order to support the Operational Manager and the Frontex Coordinating Officer, a **Frontex Operational Coordinator (FOC)** is permanently deployed throughout the joint operation in the ICC or at the location from where the

347 Handbook OPlan Air Border Operations (n 159) 26–27; Handbook OPlan Land Border Operations (n 159) 31–32; Handbook OPlan Maritime Border Operations (n 159) 33; Handbook OPlan Return Operations (n 160) 30.

348 For the practice of appointing Frontex Coordinating Officers pre-dating the 2011 amendment see for example Frontex (Operations Division, Joint Operations Unit, Sea Borders Sector), Operational Plan: Joint Operation EPN Hermes 2010, undated, on file with the author, 11; Frontex (Operations Division, Joint Operations Unit, Sea Borders Sector), Operational Plan: Joint Operation EPN Hermes 2009, Warsaw, 3 April 2009, on file with the author, 9.

349 EBCG Regulation (n 18) art 22; Handbook OPlan Air Border Operations (n 159) 28; Handbook OPlan Land Border Operations (n 159) 32; Handbook OPlan Maritime Border Operations (n 159) 33–34; Handbook OPlan Return Operations (n 160) 30–31.

350 EBCG Regulation (n 18) art 58(2); see also above 2.3.3.1.2.

351 Handbook OPlan Air Border Operations (n 159) 28; Handbook OPlan Land Border Operations (n 159) 32; Handbook OPlan Maritime Border Operations (n 159) 33; Handbook OPlan Return Operations (n 160) 30.

352 EBCG Regulation (n 18) art 22(1).

most efficient coordination can be accomplished. The Frontex Operational Coordinator monitors and facilitates the correct implementation of the operational activities. He is present during JCB meetings, may give advice in particular to the ICC Coordinator and the National Officials, and provides the Frontex headquarters with daily situation reports, highlighting cases that need immediate attention.[353] Additional support for the Frontex Coordinating Officer and/or the Frontex Operational Coordinator can be provided by a **Frontex Support Officer (FSO)**, normally deployed at the local level, for example in an LCC.[354]

The central point of contact with respect to all operational information that may have a direct impact on the joint operation is the **Frontex Situation Centre (FSC)**, located in the Operational Division at Frontex' headquarters in Warsaw. Its main role is to generally keep Frontex and the member states updated on the operational situation. It thus maintains situational awareness, monitors media, and provides a constantly updated, almost real-time picture of the situation at the external borders. In addition, the Frontex Situation Centre collects and disseminates information relating to issues needing specific attention, in particular 'Serious Incident Reports', and gives first responses to emergency situations and crises that might occur.[355] For that purpose, it provides 24/7 on-call availability.[356] The Frontex Situation Centre uses a web-based portal, **Frontex One-Stop-Shop (FOSS)**, for sharing operational-related information with participating states and other partners.[357]

Frontex can also appoint an **Operational Analyst (OA)** to each joint operation, whose task is to collect and process all relevant information, including the daily reports and incident reports. He produces regular analytical assessments, enabling a wider view of the risks, threats, and overall situation in and around the operational area. The Operational Analyst additionally provides the analytical input for the preparation and evaluation of the operation.[358]

353 Handbook OPlan Land Border Operations (n 159) 32; Handbook OPlan Maritime Border Operations (n 159) 34; Handbook OPlan Return Operations (n 160) 31.

354 Handbook OPlan Land Border Operations (n 159) 33; Handbook OPlan Maritime Border Operations (n 159) 34; Handbook OPlan Return Operations (n 160) 31.

355 For more detail on 'Serious Incident Reports' see below 2.4.4.1.

356 Handbook OPlan Air Border Operations (n 159) 28–30; Handbook OPlan Land Border Operations (n 159) 34–35; Handbook OPlan Maritime Border Operations (n 159) 35–37; Handbook OPlan Return Operations (n 160) 32–34.

357 Handbook OPlan Air Border Operations (n 159) 38–40; Handbook OPlan Land Border Operations (n 159) 42–45; Handbook OPlan Maritime Border Operations (n 159) 43–46; Handbook OPlan Return Operations (n 160) 39–41.

358 Handbook OPlan Land Border Operations (n 159) 33; Handbook OPlan Maritime Border Operations (n 159) 34; Handbook OPlan Return Operations (n 160) 31.

2.4.3 Authority over deployed resources

2.4.3.1 Command and control arrangements

During joint operations, the operational resources (i.e. in particular team members, but not the Frontex staff with coordinating functions) are subject to a specific command regime detailed in the EBCG Regulation and the respective Operational Plans.[359] Essentially, this regime provides for multiple levels of authority over operational resources that are exercised by different participating actors. In other words, none of the actors involved has full authority over the operational resources because it is shared between the parties.

This is not uncommon for multinational contingents participating in joint operations. As explained in more detail in Chapter 3, UN peace operations, the classic example of a multinational force, and NATO and EU CSDP operations also work on the basis of a 'multilayered authority structure'.[360] Multilayered authority structures ensure that the operational aims can be achieved by placing all resources involved under a (more or less) unified command structure whilst the contributing states at the same time retain some core elements of authority over their personnel and/or other assets. These core elements of authority commonly relate to discipline and criminal jurisdiction over their personnel as well as contingent-internal command structures.[361]

Transfers of authority raise a broad range of questions. But they are particularly relevant for determining legal responsibility for possible unlawful conduct because it is important in that context to understand where legal powers lie, where orders originate and/or who could have prevented the infringements (for detail see Chapters 3 and 4).

The following section first highlights some terminological challenges, then analyses the command and control arrangements as set out in the EBCG Regulation and in more detail in the Operational Plans, and finally sum-

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359 With respect to team members see Handbook OPlan Air Border Operations (n 159) 25, 'Guest officers and seconded guest officers are not within the chain of command of the hosting Member State but they perform their duties according to the command structure of the joint operation.' It is important to note that this regime is only applicable to operational resources. In contrast, personnel deployed to serve in one of the coordination structures of the operation, *inter alia* the Frontex Coordinating Officer, the Frontex Operational Coordinator, the ICC Coordinator, the Intelligence Officer, and the National Officials, remain under the full authority of the entity that contributed them. With respect to the Frontex Coordinating Officer this is explicitly stipulated in the EBCG Regulation (n 18) 8; with respect to National Officials see for many others OPlan JO Hermes 2014 (n 155) 10; OPlan JO Triton 2014 (n 155) 10–11.

360 See below 3.3.3.1.

361 Terry D Gill, 'Legal Aspects of the Transfer of Authority in UN Peace Operations' (2011) 42 Netherlands Yearbook of International Law 37, 39.

marises the command and control regime that results from the arrangements discussed.

2.4.3.1.1 Terminology

As opposed to other multinational operations, particularly EU CSDP operations, there is no comprehensive description of the types of authority each participating party exercises over the resources deployed in Frontex operations.[362]

The EBCG Regulation speaks of and allocates the authority 'to issue instructions', without distinguishing between different types or levels of 'instructions'.

The Operational Plans are more nuanced in that respect, introducing several layers of authority over deployed resources. They retain the authority 'to issue instructions', but also speak of various forms of command and control, in particular 'operational command and control', 'tactical command and control', and variations thereof.[363] The Operational Plans, however, do not clarify how these forms of authority relate to each other.

'Command and control' is language commonly used with respect to military operations. The most relevant levels of military command and control (C2) distinguish between full command, operational command (OPCOM) and control (OPCON), and tactical command (TACOM) and control (TACON). The exact definitions may vary depending on the specific context but are roughly understood as follows: Full command describes the military authority of a commander to issue orders to subordinates covering any aspect of military operations and administration. It may only be exercised at the national level and is for that reason retained by the state contributing troops even when other elements of command authority are delegated to a multinational force commander.[364] OPCOM allows for the deployment of units within an area of operation and the designation of missions to reach the strategic objective of the operation as a whole.[365] OPCON involves the authority over subordinate commanders or other persons and is normally an attribute

362 European Union Military Committee, EU Concept for Military Command and Control, 22 December 2014, Document EEAS 02021/7/14 REV 7.

363 See for example OPlan JO Triton 2014 (n 155) 11, 'SGO perform their tasks under the instructions from the border guards of the host MS, while their command and control is exercised by Frontex.' It is unclear here how 'instructions' and 'command and control' relate to each other. The same formulation is used in other Operational Plans and in Handbook OPlan Air Border Operations (n 159) 35.

364 EU Concept for Military Command and Control (n 362) Annex A, para 3; Gill (n 361) 46.

365 Gill (n 361) 46–47.

of OPCOM.[366] TACOM relates to the authority on the field over (sub)units of a force and the possibility to assign tasks to persons within that unit in order to achieve missions assigned by a higher authority. TACON involves the detailed direction and control over specific movements and manoeuvres on the ground.[367] In the context of multinational forces, normally only OPCON and/or OPCOM or parts of it are delegated by the contributing states to a multinational commander of another state or an international organisation.[368] TACOM and TACON usually remain with the sending state.

It is unclear whether 'operational command and control' and 'tactical command and control' when used in the Operational Plans are equivalent in meaning to other multinational operations, such as EU CSDP operations. This is particularly so because the Operational Plans do not always use this terminology consistently. Moreover, operational and tactical command and control sometimes seem to be used in the opposite way to the definitions outlined above.[369]

Given the absence of uniform terminology in relation to Frontex operations and the lack of certainty whether the terms used correspond to the meaning they are commonly ascribed in relation to other multinational operations, the following terms will be used here in order to avoid confusion: 'authority to issue instructions on deployment' will refer to the authority vested in an individual or a body to decide on the course of action to be taken by operational resources. In contrast 'authority to issue instructions on implementation' will refer to the authority vested in an individual or a body to direct the operational unit on the field in order to achieve the course of action as defined by the individual or body vested with the authority to issue instructions on deployment.

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366 Ibid 46–47; Kirsten Schmalenbach, *Die Haftung Internationaler Organisationen im Rahmen von Militäreinsätzen und Territorialverwaltungen* (Peter Lang 2004) 109; Blaise Cathcart, '15. Command and Control in Military Operations' in Terry D Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press 2010) 237–238; EU Concept for Military Command and Control (n 362) Annex A, para 3.

367 Gill (n 361) 49–50; Schmalenbach (n 366) 111; Cathcart (n 366) 238; EU Concept for Military Command and Control (n 362) Annex A, para 3

368 Gill (n 361) 47; Cathcart (n 366) 235.

369 See for example Operational Plan: Joint Operation EPN Hermes 2009 (n 348) 17, 'The Command and Control of aerial and maritime means participating in the operation remain under the authority of National Commands, whereas the tactical command are under the authority of the specific Commander of the means'; compare this formulation to the following: Handbook OPlan Maritime Border Operations (n 159) 41, 'Operational command of aerial, maritime and terrestrial assets of the participating MS remains with the respective MS, while the tactical command of the assets is in the hands of the ICC after consultation with the National Officials (NO).' Similar formulations are used in Operational Plans for specific operations, for example OPlan JO Hermes 2014 (n 155) 10; OPlan JO Triton 2014 (n 155) 10–11; Frontex (Operations Division, Joint Operations Unit, Sea Borders Sector), Operational Plan: Joint Operation EPN Indalo 2013, undated, on file with the author, 30.

2.4.3.1.2 Authority regime according to the EBCG Regulation

By virtue of Article 21(1) EBCG Regulation, the power to issue instructions to team members deployed during joint operations is allocated to the host state. Article 40(3) establishes the concomitant obligation of team members to abide by instructions given by the host state and foresees that, as a general rule, they may perform their tasks and exercise their powers only in the presence of border guards of the host state. The host member state may, however, authorise team members to act on its behalf. There are only two limits to the host state's authority to issue instructions. First, the instructions have to comply with the Operational Plan.[370] Second, Frontex, via its Coordinating Officer, may communicate its views on instructions to the host state, who shall 'take those views into consideration and follow them to the extent possible'.[371]

2.4.3.1.3 Authority regime according to the Operational Plans

Whilst in principle following the EBCG Regulation, the Operational Plans set out a more elaborate authority regime over operational resources.[372] Generally, all activities of deployed personnel and assets are coordinated by the ICC directly or through Regional or Local Coordination Centres if established.[373] Decisions on deployment of the operational resources and their specific tasks are taken in the JCB which holds daily meetings for that purpose where the past and ensuing 24 hours are discussed. In order to enable decision-making by the JCB, all communication in relation to operational activities in the operational area is channelled via the ICC.[374]

However, the authority transferred to the JCB is 'without prejudice to the privileges of the national operational chain of command and control specific to each participating' state.[375] As outlined above, states commonly do not transfer full authority over their military resources to other states or international organisations, but retain certain core aspects of it. This is important in the context of Frontex operations, because large assets contributed to joint

370 EBCG Regulation (n 18) art 21(1).
371 Ibid art 21(2).
372 Replicating the above mentioned provisions of the EBCG Regulation see Handbook OPlan Air Border Operations (n 159) 23; Handbook OPlan Land Border Operations (n 159) 28; Handbook OPlan Maritime Border Operations (n 159) 30; Handbook OPlan Return Operations (n 160) 28.
373 Handbook OPlan Air Border Operations (n 159) 13; Handbook OPlan Land Border Operations (n 159) 26, 12; Handbook OPlan Return Operations (n 160) 26; Handbook OPlan Maritime Border Operations (n 159) 27, 12.
374 Handbook OPlan Land Border Operations (n 159) 39; Handbook OPlan Maritime Border Operations (n 159) 41; Handbook OPlan Return Operations (n 160) 37.
375 Handbook OPlan Air Border Operations (n 159) 13; Handbook OPlan Land Border Operations (n 159) 12; Handbook OPlan Maritime Border Operations (n 159) 12.

operations, in particular vessels or aeroplanes, are often military equipment. In this light, a distinction has to be made between

- team members deployed independently from large assets, e.g. screening and debriefing teams, or teams of border patrol officers ('standard team members'), and
- large assets, e.g. vessels or aeroplanes, including the team members deployed on these.

With respect to standard team members, the JCB takes decisions under the lead of its chair, the ICC Coordinator. Whilst all members of the JCB are present and may be consulted, none of them can formally 'block' a decision. The JCB directs its instructions to the respective team leaders. The team leaders, who are officers of the host state, pass these on to the members of their teams.[376]

With respect to large aerial, maritime and terrestrial assets, participating states retain authority through two mechanisms. First, when the JCB takes decisions that affect an asset of a participating state, the National Official of that particular state has to be consulted.[377] Even though the National Official does not explicitly have the right to block a decision, in practice decisions are not taken until consensus is reached.[378] Second, with each asset the contributing state deploys a 'Commanding Officer' (CO) responsible for commanding the asset's staff.[379] Commanding Officers receive their orders directly from the respective National Official, who translates or adapts the decisions taken in the JCB to the specific needs of the asset.[380] For that purpose the National Official must be vested with the necessary powers to give instructions to the Commanding Officers of the national assets.[381] The implementation of the JCB's decisions with respect to particular assets can be supported by a host state Liaison Officer assigned to the specific technical equipment.[382] The remainder of this study will refer to the assets to which this regime applies simply as '**large assets**'.

It should be noted that it is unclear how this regime will be affected where multinational crews are deployed on vessels contributed to sea border operations.[383] Given the authority that states commonly retain over military equipment, it seems likely that personnel contributed by one participating state to be deployed on a vessel contributed by another participating state

376 See for example OPlan JO Triton 2014 (n 155) 15.
377 Handbook OPlan Maritime Border Operations (n 159) 41.
378 This follows from interviews with Frontex officials.
379 Handbook OPlan Maritime Border Operations (n 159) 30; see also for example OPlan JO Hermes 2014 (n 155) 10; OPlan JO Triton 2014 (n 155) 10–11; OPlan JO Indalo 2013 (n 369) 30.
380 Handbook OPlan Maritime Border Operations (n 159) 30, 27.
381 Ibid 28; Handbook OPlan Return Operations (n 160) 27.
382 Handbook OPlan Maritime Border Operations (n 159) 32.
383 See also above 2.3.3.2.

will be under the latter's authority to the same extent as all other personnel on that vessel. This would mean that the authority regime sketched out in this section equally applies to the foreign personnel within the multinational crew of a vessel. Proceeding on this assumption, this study will not further distinguish between crews that are of the nationality of the state contributing the vessel and multinational crews.

2.4.3.1.4 Conclusion

In light of the above, the JCB is in principle vested with the authority to issue instructions on deployment, i.e. the JCB decides on the course of action to be taken by operational resources. However, decisions within the JCB are taken in different 'configurations' depending on the operational resources concerned. Whilst decisions with respect to standard team members are taken under the lead of the host state, decisions that affect large assets require consultation with the respective National Official.

The authority to issue instructions on implementation in relation to standard team members rests with the team leaders, thereby the host state.[384] In contrast, the authority to issue instructions on implementation in relation to large assets remains with the respective contributing state.[385]

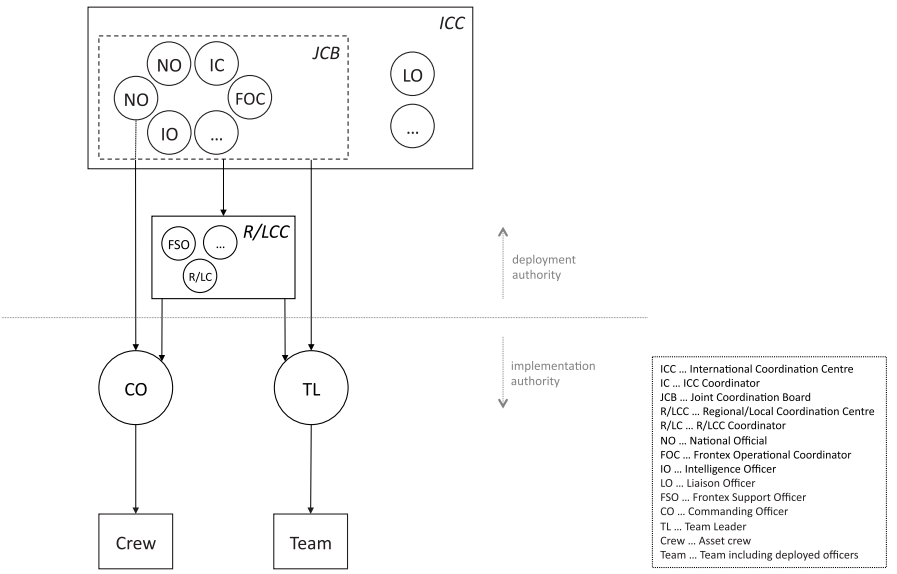

Figure 14: Command and control arrangements during joint operations

384 See also Handbook OPlan Maritime Border Operations (n 159) 41; OPlan JO Hermes 2014 (n 155) 10; OPlan JO Triton 2014 (n 155) 10–11.

385 Handbook OPlan Maritime Border Operations (n 159) 41.

2.4.3.2 Disciplinary authority, criminal jurisdiction, and civil liability

Despite the partial transfer of the authority to issue instructions to the host state, all team members remain subject to the disciplinary authority of their home member state. In particular, the home member state has to provide for appropriate disciplinary and other measures for violations of fundamental rights or international protection obligations in the course of joint operations.[386]

Articles 42 and 43 EBCG Regulation in addition lay down rules regarding civil liability for and criminal jurisdiction over acts committed by team members.

Article 43 (criminal liability) provides that team members 'shall be treated in the same way as officials of the host Member State with regard to any criminal offences that might be committed against them or by them'. It thus seems to accord the host state jurisdiction over criminal offences committed by or against team members.[387]

Article 42 (civil liability) sets out that where members of the teams operate in a host member state, 'that Member State shall be liable in accordance with its national law for any damage caused by them during their operations'. Even though the drafting history of Articles 42 and 43 (or more precisely their identically formulated predecessors) suggests that the prime concern of both provisions was the liability of the team members themselves, Article 42 thus addresses the liability of the states involved for conduct of team members.[388]

However, the relevance of Article 42 EBCG Regulation for the purposes of allocating responsibility is limited. On the one hand, it is silent on the liability of the other participating actors, leaving open whether and under what circumstances they may incur liability *in addition* to the host state. On the other hand, it seems to be inapplicable in the context of the legal frameworks studied here. The reason is that Article 42 EBCG Regulation explicitly refers to liability 'in accordance with [the host state's] national law', thereby suggesting that the rule therein is not supposed to determine the allocation

386 EBCG Regulation (n 18) art 21(5).

387 For detail on this question see Joop Voetelink, *Status of Forces: Criminal Jurisdiction over Military Personnel Abroad* (T.M.C. Asser Press 2015) 101.

388 Their predecessors were Articles 10b and 10c as introduced with RABIT Regulation (n 92); European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism, 19 July 2006, COM(2006) 401 final, 8–9, explaining that the 'criminal and civil liability *of guest officers and members of the Rapid Border Intervention Teams* while on duty in another Member State than their own' is regulated [emphasis added]; both Articles are taken almost *verbatim* from Articles 2 and 3 of Council of the European Union, Council Framework Decision 2002/465/JHA on joint investigation teams, 13 June 2002, OJ L162/1.

of responsibility under international or EU law. Chapter 3 discusses in more detail whether Article 42 EBCG may function as a *lex specialis* to the general rules on attribution of conduct under international law.[389]

2.4.4 Responding to fundamental rights-related incidents

2.4.4.1 General rules on incident reporting

All border-related incidents that occur within the operational area during a joint operation are collected and reported on a daily basis via specific software, the 'Joint Operations Reporting Application' (JORA). Within JORA, incidents can be created, sent, managed, and analysed. Using templates, an authorised host state or deployed officer (the 'incident reporter') creates a report for every incident. The incident report is subsequently verified at several levels, involving first a member of the Local Coordination Centre, second a member of the ICC, and third the Frontex Situation Centre which gives final approval.[390]

A special system is in place for what are defined as 'serious incidents'. These are incidents that need urgent attention due to their potential effect on or relevance to the mission itself, Frontex' image (*sic*), ensuing obligations, safety and security of participants, or any combination thereof. In order to simplify the identification of a serious incident, the agency drew up a 'Frontex Serious Incident Catalogue', containing a non-exhaustive list of possible serious incidents. These include situations of alleged violations of fundamental rights, of EU or international law, in particular international protection obligations, and of the Frontex Code of Conduct. If in doubt as to whether a situation amounts to a serious incident, every 'incident reporter' can contact the Frontex Situation Centre on a 24/7 basis.[391]

Every participant involved in joint operations is under an obligation to immediately report any serious incidents he is involved in or otherwise gains knowledge of to the Frontex Situation Centre and the host state authorities. 'Immediately' under normal circumstances means within two hours from detection.[392] The idea is that the Frontex senior management, member states, the Management Board, and other relevant actors are informed immediately about the occurrence of a serious incident in order

389 See below 3.2.2.2.

390 Handbook OPlan Air Border Operations (n 159) 35-37, 41-48; Handbook OPlan Land Border Operations (n 159) 39-41, 49-56; Handbook OPlan Maritime Border Operations (n 159) 41-42, 50-57; Handbook OPlan Return Operations (n 160) 37-38, 45-52.

391 Handbook OPlan Air Border Operations (n 159) 37, 49-55; Handbook OPlan Land Border Operations (n 159) 40, 57-63; Handbook OPlan Return Operations (n 160) 38, 53-59; Handbook OPlan Maritime Border Operations (n 159) 42, 58-64.

392 Handbook OPlan Air Border Operations (n 159) 37; Handbook OPlan Land Border Operations (n 159) 40; Handbook OPlan Maritime Border Operations (n 159) 42; Handbook OPlan Return Operations (n 160) 38.

to improve situational awareness, increase their reaction capabilities, and facilitate possible follow-up measures and official statements. If a participant is concerned that reporting alleged fundamental rights violations via this procedure may have consequences for his integrity, future deployment, or reputation, he or she can exceptionally make use of any other available channels, including personal reporting.[393]

2.4.4.2 Dealing with fundamental rights-related incidents

With a view to establishing an internal procedure to allow the Executive Director to adequately react to violations of fundamental rights detected in the course of Frontex operations, Frontex adopted a 'Standard Operating Procedure to ensure respect of Fundamental Rights in Frontex joint operations and pilot projects'.[394]

This procedure envisages five steps. The first step is internal preparations, predominantly concerned with identifying potential fundamental rights risks before launching a specific operation. The Fundamental Rights Officer assesses proposed projects with a view to their fundamental rights compliance and impact, including on situations outside the mandate of the agency, such as detention conditions in a member state. On that basis, Frontex decides on how to best mitigate fundamental rights risks or avoid potential fundamental rights violations.

The second step consists of ensuring that fundamental rights-related aspects are included in the Operational Plan, i.e. reporting obligations, monitoring tasks, and reference to fundamental rights-relevant national rules. The third and fourth steps reiterate the incident reporting obligation of all participants during joint operations and set out detailed procedures for dealing with these incident reports in the Frontex Situation Centre. The fifth and final step of the standard operating procedure envisages a decision by the Executive Director on the existence and gravity of a fundamental rights violation by an individual participant or a national authority. That decision is reported to the European Commission.

393 Handbook OPlan Air Border Operations (n 159) 49-55; Handbook OPlan Land Border Operations (n 159) 57-63; Handbook OPlan Maritime Border Operations (n 159) 58-64; Handbook OPlan Return Operations (n 160) 53-59.

394 Frontex Executive Director, Decision No 2012/87 on the Standard Operating Procedure to ensure respect of Fundamental Rights in Frontex joint operations and pilot projects, 19 July 2012 [on file with the author]; the document is not publicly available but is made partially available by the agency upon request.

In 2012, the European Ombudsman opened an own-initiative inquiry into Frontex' mechanisms to promote and monitor compliance with its fundamental rights obligations.[395] In the course of the enquiry, the Ombudsman recommended the establishment of a complaints procedure available to individuals who consider themselves to be victims of fundamental rights violations that occurred during Frontex operations.[396] In its reply, Frontex pointed out that it had no executive powers and merely coordinated the cooperation between member states. It deduced from the nature of its tasks that only member state authorities performed activities capable of affecting individuals' rights. In this vein, it considered the incident reporting system and the standard operating procedure sufficient, on the part of the agency itself, to address possible fundamental rights infringements during Frontex operations and saw no necessity for an individual complaints mechanism.[397] The Ombudsman disagreed with Frontex' position, finding that without an individual complaints mechanism, fundamental rights compliance could not be effectively guaranteed.[398] Given that Frontex had not satisfactorily addressed this specific recommendation, the Ombudsman prepared a 'special report' to the European Parliament, reiterating the need for an individual complaints mechanism.[399]

The EBCG Regulation introduced an obligation for Frontex to set up a fundamental rights complaints mechanism 'to monitor and ensure the respect for fundamental rights in all the activities of the Agency'.[400] Thus, a complaints mechanism was finally established as of 6 October 2016 when the Executive Director adopted 'The Agency's Rules on the Complaints

395 European Ombudsman, Letter from the European Ombudsman opening own-initiative inquiry concerning implementation by Frontex of its fundamental rights obligations, 6 March 2012, OI/5/2012/BEH-MHZ.

396 Ibid in particular at 1(iv), 3(ii), 5(ii); European Ombudsman, Draft recommendation of the European Ombudsman in his own-initiative inquiry concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), 9 April 2013, OI/5/2012/BEH-MHZ, Draft Recommendation M.

397 Frontex, 'Opinion on the European Ombudsman's own-initiative inquiry into the implementation by Frontex of its fundamental rights obligations' (17 May 2012); Frontex, 'Answer on draft recommendations of the European Ombudsman in his own-initiative inquiry OI/5/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex)' (25 June 2013); both letters are available on the European Ombudsman's homepage.

398 European Ombudsman, Decision closing own-initiative inquiry concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), 12 November 2013, OI/5/2012/BEH-MHZ, in particular para 79.

399 European Ombudsman, Special Report of the European Ombudsman to the European Parliament in own-initiative inquiry concerning Frontex, 12 November 2013, OI/5/2012/BEH-MHZ.

400 EBCG Regulation (n 18) art 72(1).

Mechanism'.[401] Anyone who considers themselves to have been the direct victim of a human rights violation committed by personnel deployed during a Frontex operation may submit a complaint to the agency.[402] The procedure is handled by the Frontex Fundamental Rights Officer, who decides on the admissibility of the complaint.[403] Importantly, substantive decisions relating to complaints are not made by the Fundamental Rights Officer, but by the Executive Director when the agency's staff are concerned, and the relevant member state authority when their personnel are concerned. In this vein, once a complaint is admissible, the Fundamental Rights Officer has to forward it to the Executive Director or a member state and ensure they follow up on the complaint.[404]

As of 2 March 2017, three complaints were submitted under this procedure, only one of which was declared admissible.[405] It remains to be seen how the mechanism will be handled by the agency. However, two things are noteworthy. The first is that the complaints mechanism appears to predominantly deal with ensuring the responsibility of the accused border guard, as opposed to the institutional responsibility of the agency and the member states.[406] At least, in both the EBCG Regulation and the Rules on the Complaints Mechanism, disciplinary measures against the responsible officer are the only example given for a possible 'appropriate follow-up'.[407] In any case, however, the view seems to prevail that members of European Border Guard or Return Intervention Teams may not engage any responsibility on the agency's part. Whilst this is already suggested in the EBCG Regulation itself, it is made particularly clear in the Rules on the Complaints Mechanism. The latter explicitly excludes seconded national experts that do not work in the agency's headquarters from the meaning of 'agency staff'.[408] Importantly, however, as noted above, officers contributed by Frontex to European Border Guard or Return Intervenion Teams *have to be* officers seconded by member states to the agency.[409] Thus, under the complaints mechanism, it is clearly upon the member states, not Frontex, to deal with complaints against conduct of officers contributed by Frontex to European Border Guard or Return Intervenion Teams. As shown in the course of this

401 Frontex Executive Director, Decision No R-ED-2016-106 on the Complaints Mechanism, Annex 1 'The Agency's Rules on the Complaints Mechanism', 6 October 2016.
402 EBCG Regulation (n 18) art 72(2); Rules on the Complaints Mechanism (n 401) art 3.
403 EBCG Regulation (n 18) art 72(4); the admissibility criteria are set out in the Rules on the Complaints Mechanism (n 401) art 8.
404 EBCG Regulation (n 18) art 72(6-7); Rules on the Complaints Mechanism (n 401) arts 10-11.
405 European Commission, 'First report on the operationalisation of the European Border and Coast Guard' (n 214) 9; European Commission, 'Second report on the operationalisation of the European Border and Coast Guard' (n 214) 10.
406 See also Rijpma, 'The Proposal for a European Border and Coast Guard' (n 23) 30.
407 EBCG Regulation (n 18) art 72(6-7); Rules on the Complaints Mechanism (n 401) art 10(5).
408 Rules on the Complaints Mechanism (n 401) arts 4(8), 10(1).
409 See in particular above 2.3.2.1.1 and Figure 11.

study, the view that only the agency's own staff may engage its responsibility fails to take into account, in particular, the extensive monitoring obligations Frontex incurs under its founding Regulation, and its positive obligations under fundamental rights law.[410]

2.4.4.3 Suspension, termination, or withdrawal of financial support

As a rule, joint operations terminate when the designated period for the operation ends. Whilst early termination was not originally envisaged, this possibility was introduced into the Frontex Regulation in 2011. Apart from the situation where member states participating in a joint operation simply request that the agency terminates that joint operation, Article 25 EBCG Regulation provides for three more possibilities for early termination, suspension, and/or withdrawal of financial support. All of these require the agency to inform the member state concerned beforehand.[411]

First, the agency shall terminate joint operations if the conditions for conducting those joint operations are no longer fulfilled.[412] Whilst it is not entirely clear what these 'conditions' are, this should comprise compliance with the relevant applicable legal obligations, in particular the Operational Plan and the Codes of Conduct, but also more generally international and Union law, including fundamental rights.

Second, the Executive Director may (note: not 'shall') withdraw the agency's financing or suspend or terminate an operation, if the Operational Plan is not respected by the host member state.[413] The Operational Plan reiterates the obligation for all participants to respect fundamental rights and contains the Codes of Conduct.[414] Thus, if the host state fails to comply with fundamental rights, the Executive Director may decide to withdraw its financial support, or suspend or terminate the operation entirely.

Third, after consulting the Fundamental Rights Officer, the Executive Director shall withdraw the financing of a joint operation, or suspend or terminate it in whole or in part if he considers that there are 'violations of fundamental rights […] that are of a serious nature or are likely to persist'.[415] This obligation was introduced by the European Parliament during the

410 See in particular below 4.4.
411 EBCG Regulation (n 18) art 25.
412 Ibid art 25(1).
413 Ibid art 25(3).
414 For more detail see above see 2.4.1.
415 EBCG Regulation (n 18) art 25(4).

process of adoption of the 2011 amendments to the Frontex Regulation.[416] The threshold for a 'serious violation' or one that is 'likely to persist' is not further defined but it may be assumed that the former refers to the gravity of an incident whereas the latter covers continuing violations or situations where no remedies are in place.

In this light, when fundamental rights violations occur, Frontex clearly has to withdraw its financial support or suspend or terminate joint operations, where they are serious or likely to persist. However, even where this threshold is not met, it seems that the agency would have to take one of these measures because the 'conditions' for conducting the operation are no longer met or because the Operational Plan was not respected.

It should be noted that the rules may differ with respect to joint operations led by and carried out in neighbouring third states. The model agreement that serves as a blueprint for the status agreements that are to be concluded with third states envisages similar early termination possibilities than the EBCG Regulation but conceives them as options rather than obligations upon the Executive Director of the agency.[417] Given the additional fundamental rights concerns such operations raise, this is unfortunate.[418]

The logic behind the introduction of possibilities for early termination is that the prospect of a withdrawal of the financial, technical, and personal resources encourages states to comply with the conditions for the conduct of joint operations, including the respect of fundamental rights. Whilst they are hence designed to serve (*inter alia*) the protection of fundamental rights, their impact on fundamental rights compliance may be more complex in reality. Operations coordinated by Frontex generally receive more public attention than unilateral operations. Assuming that upon withdrawal of Frontex-coordinated assets the host state does not cease its activities, termination of a joint operation may not halt fundamental rights violations but

416 Compare: European Commission, Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 24 February 2010, COM(2010) 61 final, art 3(1), '[…] The Agency may also terminate joint operations and pilot projects if the conditions to conduct these initiatives are no longer fulfilled.' and: European Parliament, Legislative Resolution on the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 13 September 2011, 2013/C 51 E/29, which introduced new art 3(1a).

417 European Commission, 'Model status agreement as referred to in Article 54(5) of Regulation (EU) 2016/1624' (n 217) Annex, art 5. It should be noted, however, that the model agreement explicitly allows the Executive Director to suspend or terminate activities in case of fundamental rights violations, regardless of whether these are serious or likely to persist, see art 5(3).

418 For more detail on joint operations led by and carried out in third states see above 2.2.3.

rather remove them from the 'public eye'. Thus, before making use of early termination in accordance with Article 25 EBCG Regulation, careful consideration has to be given to the origin of fundamental rights violations, the impact of termination of the joint operation, and the availability of means to address them.

To date, no joint operation has ever been terminated before its envisaged end date. The agency, however, reports that it has made use of the early termination possibilities as a tool to pressure member states into complying with fundamental rights.[419]

2.5 Conclusion

Frontex is an EU agency established in order to support member states in the implementation of Union measures relating to border management, in particular the Schengen Borders Code. One of its tasks is the organisation, implementation, and financing of joint border control and return operations. The aim of such operations is to assist one or more member states in controlling their segments of the Schengen external border or in returning third country nationals that have no right to stay. This is predominantly achieved by deploying border guards, other experts, and technical equipment made available in particular by other member states.

Each member state is primarily responsible for the management of its respective segment of the external border. This general rule remains unaltered when joint operations are launched to support a member state. In this vein, **the host state** has the overall lead in joint operations at its external borders. This means for example that it has to agree on the operation-specific rules that apply (i.e. the Operational Plan) and enjoys the authority to issue instructions to the deployed resources. It also takes the lead within the bodies established to coordinate the daily running of an operation, in particular by deploying an ICC Coordinator who oversees and coordinates decision-making by the Joint Coordination Board during the implementation of the operation. Its oversight on the ground is typically ensured by combining foreign and local officers in teams, the leaders of which are host state officers.

The **participating states** have a supportive role during joint operations. Their support mainly consists of making technical and human resources available and transferring the authority to issue instructions to the host state. However, that transfer is limited with respect to large assets that are often of a military nature. Practically, this especially concerns vessels

419 This has been pointed out by several Frontex officials independently from each other during interviews.

deployed during sea border operations. The national command structures on these remain intact even during deployment, which means in particular that the Commanding Officer is a national of the respective participating state. In addition, they participate in decision-making during operations by having a so-called National Official present within the Joint Coordination Board who is consulted when decisions affect large technical equipment they have contributed. In practice, decisions are not taken, if the respective National Official has not agreed to them.

Frontex supports, reinforces, coordinates, and monitors the actions of member states before, during, and after joint operations. It takes the lead in the planning phase of an operation, drawing up in particular the Operational Plan on the basis of which the operations are carried out. The agency's role during operations goes well beyond the supporting role of participating states. It not only provides technical or human resources, but also finances or at least co-finances joint operations. In addition, it acts as a coordinator with regard to all aspects of the operations. It does so by setting up an elaborate framework of coordination structures that ensure the presence of Frontex officers at all relevant levels, especially on the ground and within the bodies running the operation (in particular the Joint Coordination Board). Whilst not able to directly issue instructions to deployed officers, it can express its views on such instructions to the host state, who has to follow these to the extent possible. Its presence on the ground and the incident reporting system it sets up safeguard that the agency stays informed on all relevant occurrences during an operation. Importantly, Frontex also assumes a monitoring role, including in particular the monitoring of compliance with the legal requirements at all stages during the operation. As a last resort, it may terminate an operation if the activities during joint operations fail to respect legally binding rules, including fundamental rights.

3 Responsibility under the ECHR

The purpose of this chapter is to examine the allocation of responsibility among states involved in Frontex operations for breaches of the ECHR committed in the course of the operations. Responsibility is analysed within the context of the law of international responsibility as applied by the ECtHR.

Section 3.1 provides an introduction, addressing two main issues. Section 3.1.1 sets out the legal framework for the analysis in this chapter. After providing an overview of the law of international responsibility and its sources, it discusses its applicability in the context of the ECHR. Section 3.1.2 then focusses on the extent of the scrutiny exercised by the ECtHR when conduct of the contracting parties is governed by EU law. It more specifically addresses the '*Bosphorus* doctrine', according to which the ECtHR may waive detailed scrutiny of conduct that is taken in strict compliance with obligations flowing from EU law, and examines the potential use of this doctrine in the context of Frontex operations.

Section 3.2 then concentrates on attribution of conduct, the only condition, other than the breach itself, for responsibility to arise. It first outlines the generally applicable rules on attribution of conduct in relation to states and international organisations respectively (Section 3.2.1). It then addresses the question of whether Frontex operations may be subject to specific attribution rules that are either applicable to the relationship between the EU and its member states more generally, or the relationship between Frontex and member states more specifically (Section 3.2.2).

Sections 3.3 and 3.4 focus on the central topic of this chapter, the allocation of responsibility as between the actors participating in joint operations. They maintain the distinction set out in more detail in Chapter 1, discussing, first, responsibility for the primary breach (Section 3.3) and, second, responsibility for associated conduct (Section 3.4).[420]

In this vein, **Section 3.3** analyses the responsibility of the host and participating states that arises directly from a human rights violation committed during an operation. All states involved are responsible insofar as they can be considered the 'authors' of the breach, i.e. insofar as the conduct in violation of the Convention is attributable to them. Hence, this section elaborates on the application of the rules on attribution of conduct to Frontex operations. More specifically, it discusses whether the authority the host state and Frontex exercise over personnel deployed during Frontex operations renders their

420 For more detail on this distinction see above 1.3.3.

conduct attributable to the host state and/or Frontex. The analysis is based on Articles 6 ASR and 7 ARIO, dealing with the attribution of conduct of organs lent by states to other states or international organisations respectively.

Section 3.4 examines the circumstances under which states that are not responsible for the primary breach in a specific case are responsible for conduct associated with the primary breach. The central question is whether contributing to, or not preventing, a violation of the ECHR, may render the facilitating actor responsible. This question is primarily discussed in light of obligations to protect that arise under the ECHR, in particular under the doctrine of positive obligations as developed by the ECtHR (Section 3.4.1). However, the analysis reveals that the Convention is limited in its applicability to participating states. Against this background, Section 3.4.2 examines a second form of associated responsibility, namely the rules on aid or assistance under general international law.

Section 3.5 summarises the findings of this chapter and illustrates their practical implications using the example scenarios introduced in Chapter 1.[421] In essence, the analysis shows that the host state is directly responsible for breaches of the ECHR committed during Frontex operations that result from conduct of local staff or standard team members. Participating states are directly responsible for breaches resulting from the conduct of personnel on large assets, vessels for example, they contributed. All other participating states incur no primary responsibility. Host states and states contributing large assets are also responsible for breaches of obligations to prevent, if they know or ought to know of an imminent violation but do not act upon that knowledge. In contrast, the Convention is not applicable to states that only contribute standard team members or minor technical equipment. Hence, they incur no associated responsibility under the Convention. However, the analysis shows that they may be responsible under the rules on aid or assistance, which may therefore complement the Convention in this respect.

3.1 Responsibility of EU member states for breaches of the ECHR

3.1.1 Responsibility for breaches of the ECHR

3.1.1.1 Conditions for responsibility under the law of international responsibility

Like any system of law, public international law has to address the responsibility of its subjects for breaches of their obligations. The law of international responsibility sets out the preconditions for responsibility of states and international organisations to arise and the consequences it triggers.

421 See above 1.3.1.

It is a set of so-called secondary rules applicable across the board no matter the origin or nature of the obligation breached.[422]

Responsibility arises for conduct qualified as an internationally wrongful act, i.e. conduct consisting of an action or omission that is attributable to a state or international organisation and constitutes a breach of an international obligation.[423] Thus, states and international organisations incur responsibility when two conditions are met:

1. Conduct is attributable to the state or international organisation.
2. That conduct is in breach of their obligations under international law.

'Attributable' means that the conduct of a physical person is characterised, from the point of view of international law, as an act of a specific state or international organisation.[424] This is crucial because states and international organisations are only responsible for their own conduct in violation of international law but, just like any other corporate entity, they can only act through natural persons. For that reason, there is a need to define the circumstances under which a person's conduct (legally) qualifies as the entity's conduct.[425] This is, essentially, the purpose the rules on attribution of conduct fulfil.[426]

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422 For a discussion of the categorisation of international responsibility as a system of secondary norms, see Eric David, 'Primary and Secondary Rules' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010); Ulf Linderfalk, 'State Responsibility and the Primary-Secondary Rules Terminology: The Role of Language for an Understanding of the International Legal System' (2009) 78 Nordic Journal of International Law 53.

423 ILC, 'ASR' (n 58) art 2; calling these the *subjective* and *objective* elements of an internationally wrongful act, see Special Rapporteur Ago, 'Second Report on State Responsibility' (UN Doc A/CN.4/233, Twenty-Second Session 1970), 187–195; for more detail see Brigitte Stern, 'The Elements of an Internationally Wrongful Act' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010); C. F Amerasinghe, 'The Essence of the Structure of International Responsibility' in Maurizio Ragazzi (ed), *International responsibility today: Essays in memory of Oscar Schachter* (Martinus Nijhoff 2005).

424 Luigi Condorelli and Claus Kress, 'The Rules of Attribution: General Considerations' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 221; see also above 1.3.2.

425 Christian Tomuschat, 'Attribution of International Responsibility: Direction and Control' in Malcolm D Evans and Panos Koutrakos (eds), *The international responsibility of the European Union: European and international perspectives* (Hart Publishing 2013) 7; James Crawford and Jeremy Watkins, 'International Responsibility' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 287; on the importance of the rules on attribution of conduct see Luigi Condorelli, 'L'Imputation à l'Etat d'un fait internationalement illicite: solutions classiques et nouvelles tendances' (1984/VI) 189 Recueil des Cours de l'Académie de Droit International 1.

426 Jörn Griebel and Milan Plücken, 'New Developments Regarding the Rules of Attribution?: The International Court of Justice's Decision in *Bosnia* v. *Serbia*' (2008) 21 Leiden Journal of International Law 601, 602–603; James Crawford, *State Responsibility: The General Part* (Oxford University Press 2013) 45.

A breach capable of triggering international responsibility can be any conduct, whether action or omission, that is not in conformity with an obligation incumbent on the state or the international organisation. The significance of a provision and the gravity of a breach thereof are irrelevant in assessing *whether* responsibility arises, but may inform the form and amount of reparation due. In addition, serious breaches of obligations arising under peremptory norms may trigger a set of additional consequences.[427]

The two preconditions, attribution and breach, are sufficient for responsibility to arise. This means that international responsibility is 'objective' in that there is no requirement of fault.[428] Furthermore, responsibility arises regardless of another party's damage as a result of the breach. This in addition removes the need for proving causation, since the causality relationship constitutes a 'mere bridge' between the wrongful act and the injury.[429] Exceptionally, a primary obligation may itself include a requirement that fault or injury has to be proven. In those cases, the question of fault and/or damage forms part of the analysis of whether there was a breach of that provision.

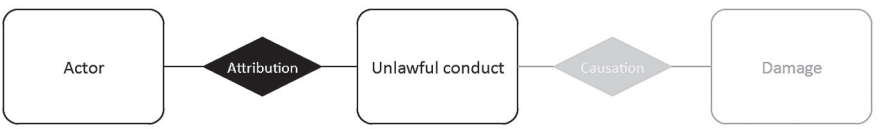

Figure 15: Conditions for responsibility to arise

3.1.1.2 Sources of the law of international responsibility

The law of international responsibility is reproduced in the outcome of the work of the International Law Commission (ILC) on the topic. From 1949, the ILC started to deal with state responsibility and in 2001 adopted the 'Articles on Responsibility of States for Internationally Wrongful Acts' (also 'Articles on State Responsibility', short 'ASR').[430] Due to the growing influence of international organisations, it was considered necessary to develop a framework regarding their international responsibility. This resulted in the adoption of the 'Articles on the Responsibility of International Organizations' (ARIO).[431] The responsibility of international organisations for internationally wrongful acts is essentially based on the law of state responsibility and largely governed by the same general rules. Only where the

427 ILC, 'ASR' (n 58) art 12 including the commentaries thereto; for the special set of consequences triggered by a violation of an obligation with *ius cogens*-character see arts 40, 41.
428 Crawford, *State Responsibility* (n 426) 61.
429 See also above 1.3.2; Julio Barboza, 'Legal Injury: The Tip of the Iceberg in the Law of State Responsibility?' in Maurizio Ragazzi (ed), *International responsibility today: Essays in memory of Oscar Schachter* (Martinus Nijhoff 2005) 7.
430 ASR (n 58).
431 ILC, 'ARIO' (n 58).

characteristics of international organisations so required, were specific rules adopted. These specific rules include in particular the issue of attribution of conduct, the responsibility of a member state of the organisation in question for internationally wrongful acts committed by the organisation, and the remedies available to assure the responsibility of the international organisation.[432]

Both sets of articles were drafted in the form of treaties. Their form notwithstanding, they are not formally binding and represent evidence of law rather than sources of law within the meaning of Article 38(1) of the Statute of the International Court of Justice. As such, the rules contained in the ILC Articles are only binding if and to the extent that they are found in customary international law. It is important to note that the ILC's task goes beyond codification and encompasses the promotion of the progressive development of international law. The final documents produced by the ILC typically combine both, codification of customary international law and proposals for the progressive development of existing rules, being rarely explicit about where codification stops and progressive development starts. Whilst the ASR are considered either fully or at least in large parts a codification of the customary international law on state responsibility, the status as customary international law of the ARIO is disputed.[433] It would go beyond the scope of this study to establish the customary nature of every article dealt with. It is therefore based on the assumption that the ASR and the ARIO, in particular the rules on attribution of conduct, reflect customary international law.

The choice to draft the ASR and the ARIO in the form of treaties may encourage the application of rules of interpretation inspired by the Vienna Convention on the Law of Treaties (VCLT). However, given the ASR and the ARIO are not actually treaties, these rules may not always be the most suitable.[434]

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432 Ige Dekker, 'Making sense of accountability in international institutional law' (2005) 36 Netherlands Yearbook of International Law 83, 85.

433 Crawford, *State Responsibility* (n 426) 43; for a discussion of the status of the ARIO as customary international law see Gerhard Hafner, 'Is the Topic of Responsibility of International Organizations Ripe for Codification?: Some Critical Remarks' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford University Press 2011); for the criticism of lack of practice see for example José E Alvarez, 'Revisiting the ILC's Draft Rules on International Organization Responsibility' (2011) 105 American Society of International Law Proceedings 344, 345–346; Kristen E Boon, 'New Directions in Responsibility: Assessing the International Law Commission's Draft Articles on the Responsibility of International Organizations' (2011) 37 The Yale Journal of International Law Online 1, 8.

434 I would like to thank Professor Gregor Noll, who encouraged me to reflect more thoroughly on the question of interpretation of the ASR and ARIO; this question has indeed so far only received limited attention in literature, see Giorgio Gaja, 'Interpreting Articles Adopted by the International Law Commission' (2015) 85 The British Yearbook of International Law 10, 11.

The focus of the VCLT on the ordinary meaning of the terms used rests on the basis that the language of a treaty reflects a final compromise reached by the contracting parties. This lends particular authority to the wording. In contrast, the ILC Articles represent the dominant view within the ILC, as an expert body, meaning that minority views may not be reflected in the text. Since the wording of the Articles does not have the same authority as the language of a treaty, the commentaries to and the development of the Articles bear more weight than they do in relation to treaties, where preparatory works only serve as supplementary means of interpretation.[435] It has thus been pointed out that 'the bare article must be read in the light of the accompanying commentary, and preferably alongside the preparatory work of the ILC such that the history of each provision may be traced with precision'.[436] Against this background, this chapter traces the meaning of the relevant Articles of the ASR and the ARIO taking into account not only their wording and the ordinary meaning of the terms, but also the commentaries to and the development of the provisions.

3.1.1.3 The law of international responsibility and the ECHR

To a large extent, the law of international responsibility is characterised by a 'one-size-fits-all' approach.[437] Unlike national law, it does not provide for distinct frameworks applicable to civil and criminal liability respectively, and for contractual and tort liability within the former. It by design applies to any breach of international law irrespective of the origin or nature of the obligation. As a result, responsibility can arise from a breach of a customary norm, general principles of law, or a treaty provision, no matter what the purpose of the treaty is and whether it is of a bilateral or multilateral nature.[438]

As a treaty entered into between subjects of international law, the ECHR constitutes part of the international legal order.[439] Thus, the law of international responsibility in principle also applies to a failure to comply with obligations arising from the ECHR.

435 For more detail see David D Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority' (2002) 96 The American Journal of International Law 857, 868–870; see also Gaja (n 434) 18–20.

436 Crawford, *State Responsibility* (n 426) 87.

437 Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 European Journal of International Law 483, 486.

438 Crawford, *State Responsibility* (n 426) 51–54.

439 For a detailed account of the use of international law by the ECtHR see Magdalena Forowicz, *The Reception of International Law in the European Court of Human Rights* (Oxford University Press 2010); Frédéric Vanneste, *General international law before human rights courts: Assessing the specialty claims of international human rights law* (Intersentia 2010).

However, the law of international responsibility is residual in character. This means that it applies by default, but only when and to the extent that a specialised subsystem of international law does not itself (explicitly or implicitly) spell out *leges speciales* that govern breaches thereof.[440] Specialised subsystems may in particular develop their own rules when the general ones are unsuitable.

In relation to questions of implementation of responsibility, the ECHR indeed provides for specific provisions that displace and complement the general rules. These are in particular Articles 33 and 34 ECHR which unequivocally grant all parties to the Convention, but also all individual victims the right to invoke any alleged breach of the Convention before the ECtHR and thereby displace and complement the general rules on implementation of responsibility.

The ECHR, however, remains silent on other aspects of the law of international responsibility. This is not uncommon. Indeed, rarely does a specialised subsystem deal extensively with responsibility arising from its breach and provide for an entire set of rules.[441] For the matters that remain unregulated, the general rules continue to be applicable, to the extent that they serve the purposes of the special regime.[442] This has been illustrated with the notion of a 'sliding scale of speciality'. At one end of the scale, a *lex specialis* may be designed only to replace a single provision of the general rules while leaving the application of the others untouched. On the other end of the scale, a *lex specialis* could exclude the application of the general regime of international responsibility altogether.[443]

The ECHR in particular contains no specific rules on attribution of conduct. In its case law, the ECtHR has filled this gap by referring to and applying the general rules on attribution of conduct.[444] In this light, the remaining part of

440 ILC, 'ASR' (n 58) art 55; ILC, 'ARIO' (n 58) art 64.

441 Subsystems of international law 'embracing, in principle, a full (exhaustive and definite) set of secondary rules', would be called a 'self-contained regime', see Bruno Simma, 'Self-Contained Regimes' (1985) 26 Netherlands Yearbook of International Law 111, 117; the term 'self-contained regime' is, however, frequently used more broadly, relating merely to 'branches of international law'. Human rights would, in those terms, be qualified as a self-contained regime. See for example Study Group of the ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (finalized by Martti Koskenniemi)' (UN Doc A/61/10, Fifty-Eighth Session, 2006), para 152(1).

442 Bruno Simma and Dirk Pulkowski, 'Leges Speciales and Self-Contained Regimes' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 148; Crawford, *State Responsibility* (n 426) 105.

443 Simma and Pulkowski, 'Of Planets and the Universe' (n 437) 490.

444 See for example ECtHR, *Jaloud v the Netherlands*, 20 November 2014, application no 47708/08, para 98; for more examples see in particular below 3.3.2.2 and 3.3.3.2.

this chapter starts from the assumption that the general rules on attribution of conduct are applicable by default to the ECHR, as long as the ECtHR does not develop a *lex specialis* in the context of specific attribution rules.[445]

3.1.2 Responsibility for conduct relating to EU law

This section explores the limits to responsibility (or its determination) under the ECHR when conduct is governed by EU law. It analyses these limits, first, in relation to conduct of the EU itself (Section 3.1.2.1), and, second, in relation to conduct of EU member states (Section 3.1.2.2). Finally, Section 3.1.2.3 examines the consequences this has for human rights responsibility in the context of Frontex operations.

3.1.2.1 Responsibility for conduct of the EU

3.1.2.1.1 Responsibility of the EU

The capacity of having rights and obligations under international law, i.e. international legal personality, is a precondition for incurring international responsibility.[446] As discussed in more detail in Chapter 2, Frontex itself does not possess international legal personality. However, since it is a Union body, its unlawful conduct may give rise to EU responsibility.

The EU is generally bound by international law and incurs responsibility for breaches thereof.[447] In the human rights context, this means that the EU has to abide by those human rights that qualify as general rules of inter-

445 See also Rick Lawson, 'Out of Control. State Responsibility and Human Rights: Will the ILC's Definition of the "Act of State" Meet the Challenges of the 21st Century?' in Monique Castermans-Holleman, Fried van Hoof and Jacqueline Smith (eds), *The Role of the Nation-State in the 21st Century: Human Rights, International Organisations and Foreign Policy. Essays in Honour of Peter Baehr* (Kluwer Law International 1998) 99; Malcolm D Evans, 'State Responsibility and the European Convention on Human Rights: Role and Realm' in Malgosia Fitzmaurice and Dan Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (Hart Publishing 2004) 157.

446 Alain Pellet, 'The Definition of Responsibility in International Law' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 6.

447 On the international responsibility of the EU see Blokker, 'The Macro Level: The Structural Impact of General International Law on EU Law' (n 25); for more detail on the EU's international responsibility see Andrés Delgado Casteleiro, 'The International Responsibility of the European Union: From Competence to Normative Control' (PhD thesis, European University Institute 2011); Malcolm D Evans and Panos Koutrakos (eds), *The international responsibility of the European Union: European and international perspectives* (Hart Publishing 2013), in particular the contribution by Ramses A Wessel and Leonhard den Hertog, 'EU Foreign, Security and Defence Policy: A Competence-Responsibility Gap?'.

national law, being either custom or general principles.[448] Nonetheless, the major challenge is that international organisations are not usually signatories to the broad range of human rights treaties that have been enacted at the international level. More specifically, because the EU is not a party to the ECHR, the Convention obligations are not binding on the Union as a matter of international law. The ECtHR has accordingly on numerous occasions confirmed that the EU cannot be held responsible under the ECHR, quite simply because it is not a signatory to it.[449]

Closing this gap has been on the agenda for decades.[450] After numerous setbacks, the Lisbon Treaty on the EU side, containing an obligation for the EU to accede to the ECHR, and Protocol 14 on the ECHR side, creating the necessary preconditions within the ECHR framework, have finally paved the way for accession of the EU to the ECHR. The major change that accession would trigger is the ECHR becoming binding on the EU as a matter of international law. Consequently, individuals would be able to bring claims directed against the EU before the ECtHR, including for breaches that may be committed by Frontex. Starting in July 2010, the Steering Committee for Human Rights and the European Commission, representing the Council of Europe and the EU respectively, negotiated the instruments on EU accession to the ECHR, the draft outcome of which was presented in June 2013.[451]

448 For a discussion of human rights as general rules of international law see Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1988-1989) 12 Australian Year Book of International Law 82; for more detail on the application of international law to international organisations, see Henry Schermers and Niels Blokker, *International Institutional Law* (5th edn, Martinus Nijhoff Publishers 2011) paras 1572-1581.

449 See for example ECtHR, *Matthews v the United Kingdom*, 18 February 1999, application no 24833/94, para 32; ECtHR, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland*, 30 June 2005, application no 45036/98, para 152.

450 For detail see Rick Lawson, 'A Twenty-First-Century Procession of Echternach: The Accession of the EU to the European Convention on Human Rights' in Filip Dorssement, Klaus Lörcher and Isabelle Schönmann (eds), *The European Convention on Human Rights and the Employment Relation* (Hart Publishing 2013).

451 CDDH ad hoc negotiation group and European Commission, 'Final Report to the CDDH, 10 June 2013, 47+1(2013)008rev2, Appendix I, Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms' (Fifth negotiation meeting on the accession of the European Union to the European Convention on Human Rights); for a discussion of the Draft Accession Agreement see Melanie Fink, 'Draft Agreement on Accession of the EU to the ECHR' in Niels Blokker and others (eds), *Vijftig: juridische opstellen voor een Leidse nachtwacht* (Boom Juridische uitgevers 2014); for more detail Paul Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Hart Publishing 2013).

However, this draft agreement was held incompatible with EU law by the CJEU in Opinion 2/13, which sent the drafters back to the drawing board and postponed accession to the more distant future.[452] Against this background, the analysis of this chapter is based on the presumption that the EU will not be a signatory to the ECHR in the foreseeable future. The concluding chapter, however, recommends to pursue accession in order to close some of the responsibility gaps identified in this study.[453]

3.1.2.1.2 Responsibility of EU member states

States are free to create and join international organisations and transfer competences to them. However, a transfer of powers to international organisations may also create an 'accountability gap'. The major reason is that individuals generally have fewer possibilities to invoke the responsibility of international organisations than that of states.[454] The conduct of all EU member states, for example, can be challenged before the ECtHR, whereas the EU's conduct cannot. The need to close this gap has triggered discussions of whether states can be held responsible for conduct of international organisations they are members of, despite their separate legal personalities.[455]

So far, the ECtHR has consistently dismissed actions directed against the conduct of international organisations as inadmissible, regardless of whether they were formally brought against the member states of those organisations. It has done so most frequently in cases against the United Nations, but has similarly declined its competence to hear claims against member states of other international organisations when conduct of the organisation itself was concerned.[456]

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452 CJEU, *Opinion 2/13 (Opinion Pursuant to Article 218(11) TFEU)*, 18 December 2014, ECLI:EU:C:2014:2454.

453 See below 5.4.2.1.

454 For an outline of the difficulties in holding international organisations to account see PACE, Committee on Legal Affairs and Human Rights, 'Accountability of international organisations for human rights violations' (Doc. 13370, 17 December 2013).

455 For a discussion of the downsides of such responsibility see in particular Niels Blokker, 'Member State Responsibility for Wrongdoings of International Organizations: Beacon of Hope or Delusion?' (2015) 12 International Organizations Law Review 319; discussing the extent to which national courts may fill this gap see August Reinisch, 'To What Extent Can and Should National Courts "Fill the Accountability Gap"?' (2013-2014) 10 International Organizations Law Review 572.

456 ECtHR, *Behrami and Behrami v France and Saramati v France, Germany and Norway*, 2 May 2007, application nos 71412/01, 78166/01, para 149; see also ECtHR, *Berić and others v Bosnia and Herzegovina*, 16 October 2007, application nos 36357/04 and others, para 29; ECtHR, *Galić v the Netherlands*, 9 June 2009, application no 22617/07, para 37; ECtHR, *Blagojević v the Netherlands*, 9 June 2009, application no 49032/07, para 37; ECtHR, *Boivin v 34 Member States of the Council of Europe*, 9 September 2008, application no 73250/01; ECtHR, *Rambus Inc. v Germany*, 16 June 2009, application no 40382/04; ECtHR, *Beygo v 46 Member States of the Council of Europe*, 16 June 2009, application no 36099/06; ECtHR, *Klausecker v Germany*, 6 January 2015, application no 415/07.

In the case of *Connolly*, the same rationale was applied to the EU.[457] The case concerned a complaint by a former employee of the European Commission who alleged a violation of his rights of fair trial on the basis that he had not been permitted to submit written observations to the opinion of the Advocate General regarding his labour dispute with the European Communities. Aware that the EU was not a contracting party to the ECHR, he filed the application against 15 member states of the EU. The ECtHR declared the complaint inadmissible *ratione personae*, noting that only acts attributable to states were reviewable before the Court.[458]

Hence, member states of the EU have so far not been held responsible for acts of the EU by virtue of their membership alone.[459] In this vein, this study assumes that member states are only responsible for conduct attributable to them. However, two things should be noted.

First, member state conduct can consist of acts implementing EU law, but it can also be much broader and encompass various other forms of involvement. In *Kokkelvisserij*, for example, the applicant alleged a violation of his right to fair trial on the ground that he lacked opportunity to respond to the Advocate General's opinion rendered during a preliminary ruling procedure.[460] Notably, the Court was prepared to attribute the alleged shortcomings to the respondent state on the ground that the preliminary ruling had been sought by the Dutch courts and was thus inextricably linked to the national proceedings.[461] Moreover, in *Gasparini*, the Court found that even absent member state conduct, it would be able to hear complaints directed against a structural lacuna in the internal protection mechanism of the organisation concerned.[462] Unlike specific decisions of an international

457 ECtHR, *Connolly v 15 Member States of the European Union*, 9 December 2008, application no 73274/01; some authors, however, point out that the ECtHR shows more deference to the UN than other international organisations, in particular the EU, see Cedric Ryngaert, 'The European Court of Human Rights' Approach to the Responsibility of Member States in Connection with Acts of International Organizations' (2011) 60 International and Comparative Law Quarterly 997, 1008–1009; suggesting that this would in any case be the preferred approach Tobias Lock, 'Beyond *Bosphorus*: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights' (2010) 10 Human Rights Law Review 529.

458 ECtHR, *Connolly* (n 457).

459 See also Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford University Press 2011) 42–43; Maarten den Heijer, 'Issues of Shared Responsibility before the European Court of Human Rights' (ACIL Research Paper No 2012-04, SHARES Series, 2012), 32–33.

460 ECtHR, *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v the Netherlands*, 20 January 2009, application no 13645/05.

461 Ibid.

462 ECtHR, *Gasparini v Italy and Belgium*, 12 May 2009, application no 10750/03; the case, however, did not concern the EU.

organisation, these are 'created' by the member states when they set up the mechanism in question.[463]

Second, even though it has not done so yet, the possibility that the ECtHR may in future hold member states responsible for conduct attributable to the EU is by no means excluded. In *Senator Lines*, the applicant company complained of a violation of its Convention rights by the EU institutions in their application of EU competition law.[464] Senator Lines argued that the member states 'were individually and collectively responsible for the acts of Community institutions' and brought the case against all member states. The case was ultimately held inadmissible. However, it is remarkable that the Court did so on other grounds, not because the case concerned conduct attributable to the EU.

3.1.2.2 Responsibility for conduct of EU member states

The fact that member states remain responsible for their own conduct, even when they implement EU law, may result in a dilemma for the member state concerned. For example, in compliance with its obligations as a member of the EU, a state may be required to engage in conduct that is incompatible with the ECHR. The fundamental question is how to reconcile such competing commitments stemming from different legal systems.

In a complex line of case-law, the Court developed a tool for regulating the relationship between state obligations arising from the ECHR on the one hand and their membership of international organisations on the other. The following sections focus on those cases concerning state conduct in the context of their EU membership specifically.

3.1.2.2.1 Bosphorus: a 'conditional scrutiny waiver'

The leading case, *Bosphorus Airways v Ireland*, concerned the impoundment by Irish authorities of an aircraft that the applicant, a Turkish airline, had leased from the national airline of the former Yugoslavia.[465] The applicant company alleged that this violated its right to property under Article 1 of Protocol No 1 ECHR. Ireland was, however, under an obligation to impound the aircraft as a matter of EU law, which in turn implemented a series of UN Security Council sanctions against the Federal Republic of Yugoslavia (Serbia and Montenegro) in the context of the then ongoing armed conflict.

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463 For more detail see den Heijer, 'Issues of Shared Responsibility before the European Court of Human Rights' (n 459) 33; Lock, 'Beyond Bosphorus' (n 457).

464 ECtHR, *Senator Lines GmbH v Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom*, 10 March 2004, application no 56672/00.

465 ECtHR, *Bosphorus* (n 449); for a detailed appraisal of *Bosphorus* see Cathryn Costello, 'The *Bosphorus* Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe' (2006) 6 Human Rights Law Review 87.

The major distinction between *Bosphorus* and the cases mentioned in the previous section (e.g. *Connolly*) is that in *Bosphorus* it was undisputed that a member state measure itself was under review, not a member state's responsibility for an act of the EU.[466]

The ECtHR held that the Convention did not pose a bar to states transferring competences to international organisations. Even so, it also famously pronounced that states continue to be responsible under the Convention for the acts of their organs 'regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations.'[467] Absolving states completely from their Convention responsibility in areas covered by a transfer of competences to an international organisation, the Court held, would be incompatible with the purpose and object of the Convention.[468]

However, acknowledging the legitimate aim of compliance with obligations flowing from membership of international organisations, the ECtHR considered that interference with Convention rights resulting from implementing such obligations would be justified, if the international organisation itself protects human rights 'in a manner which can be considered at least equivalent to that for which the Convention provides'.[469] The Court steps back from full scrutiny when a member state has done 'no more than implement legal obligations flowing from its membership of the organisation'. In those cases, the member state is presumed to have complied with its Convention obligations.[470] Conversely, when the organisation in question does not grant equivalent protection or the member state's acts go beyond what is strictly required by its international obligation, member states do not benefit from the presumption of compliance and are fully open to scrutiny. As an ultimate safeguard for the protection of human rights, the Court exercises full scrutiny 'if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient'.[471]

Against this background, state measures are in principle fully open to scrutiny regardless of whether they are taken in the implementation of obligations arising from their membership in the EU. However, in the interest of international cooperation, the ECtHR reduces the intensity of its scrutiny

466 ECtHR, *Bosphorus* (n 449) paras 137, 153; this distinction is also expressly pointed out by Christina Eckes, 'Does the European Court of Human Rights Provide Protection from the European Community? - The Case of *Bosphorus Airways*' (2007) 13 European Public Law 47, 53–54.

467 ECtHR, *Bosphorus* (n 449) paras 152-153.

468 Ibid para 154.

469 Ibid para 155.

470 Ibid para 156.

471 Ibid para 156.

when states are faced with conflicting obligations.[472] It presumes human rights compliance and therefore waives more detailed scrutiny when two conditions are fulfilled. First, the impugned interference was a result of strict compliance with an obligation flowing from EU membership. Second, the EU itself must grant equivalent human rights protection.[473] This presumption may be rebutted if human rights protection is manifestly deficient in the specific case.

The following sections discuss when the ECtHR considers member states to have acted in strict compliance with their obligations under EU law, whether the EU's human rights protection may be considered as 'equivalent' to the Convention, and what the ECtHR would consider as protection that is 'manifestly deficient'.

3.1.2.2.2 Discretion

The first condition for the Court to waive detailed scrutiny is that the impugned interference was the result of strict compliance with an obligation flowing from EU membership. This is the case when the state in question did not enjoy sufficient discretion under EU law to choose an implementing measure that would respect both EU and ECHR law, in other words, when it was faced with conflicting obligations.

This condition was found to be fulfilled in a number of cases. In *Bosphorus*, for example, the Court noted that the provision in question was found in a regulation that was directly applicable, became part of the Irish legal order, and unequivocally obliged Ireland to impound the aircraft in question. This was all the more clear after the CJEU had rendered a preliminary ruling, which determined the Irish proceedings in a legally binding manner and left the Irish court with no discretion.[474] The impugned interference was thus not the result of an exercise of discretion by the Irish authorities.

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472 This rationale was particularly explicit for example in ECtHR, *Michaud v France*, 6 December 2012, application no 12323/11, para 104.

473 See also Steve Peers, 'Bosphorus - European Court of Human Rights' (2006) 2 European Constitutional Law Review 443, 452.

474 ECtHR, *Bosphorus* (n 449) paras 143-148; In this respect *Bosphorus* was in keeping with earlier decisions, in particular European Commission of Human Rights, *M. & Co. v Germany*, 9 February 1990, application no 13258/87, which concerned Germany's execution of a judgment of the CJEU. In that case, the European Commission of Human Rights found it could not subject Germany to scrutiny since it was faced with conflicting obligations under the ECHR and the EC (as opposed to *Bosphorus*, however, the complaint was held inadmissible altogether). See also Sionaidh Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*' (2006) 43 Common Market Law Review 629, 643; Esa Paasivirta and Pieter J Kuijper, 'Does One Size Fit All?: The European Community and the Responsibility of International Organizations' (2005) 35 Netherlands Yearbook of International Law 169, 192–196.

The Court followed a similar line of reasoning in *Povse*.[475] The case concerned Austria's enforcement of an order to return Ms Povse to Italy to reside with her father, rendered by an Italian court. She and her mother alleged that Austria's enforcement of the order violated their right to private and family life. However, the Court found that the relevant provision of the regulation in question did not leave Austria any discretion and the national courts had additionally sought a preliminary ruling.[476] Consequently, the Court rejected the application as manifestly ill-founded.

A more recent example is the case of *Avotiņš*.[477] It concerned a Latvian national, who borrowed money from a company under an arrangement governed by Cypriot law, but failed to pay it back. In his absence, a Cypriot district court ordered him to fulfil his obligations. A Latvian court subsequently ordered the recognition and enforcement of the Cypriot court's decision, also without his presence. When Mr Avotiņš learned about the decisions issued against him, he appealed the Latvian (not the Cypriot) decision, but lost that case. Before the ECtHR, he argued that Latvia had infringed his right to a fair hearing under Article 6 ECHR by recognising and enforcing the Cypriot decision which itself violated his rights of defence. However, when Latvia ordered the enforcement of the Cypriot decision, it did so through the application of EU law, namely the Brussels I Regulation.[478] Thus, the main question revolved around whether Latvia, applying *Bosphorus*, could be presumed to have complied with the Convention. As regards the discretion enjoyed by the Latvian authorities, the Court noted that the provision applied by the Latvian court was contained in a regulation. Moreover, the provision itself clearly set out the instances under which a member state court could refuse to recognise and enforce a foreign judgment. As the CJEU had found in 'a fairly extensive body of case-law', this provision 'did not confer any discretion on the court from which the declaration of enforceability was sought.' The ECtHR thus did not consider the Latvian court to enjoy any margin of manoeuvre in the specific case.[479]

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475 ECtHR, *Povse v Austria*, 18 June 2013, application no 3890/11.

476 Ibid paras 79-82.

477 ECtHR, *Avotiņš v Latvia*, 23 May 2016, application no 17502/07.

478 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2001] OJ L12/1; subsequently replaced by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), [2012] OJ L351/1.

479 ECtHR, *Avotiņš* (n 477) para 106; for more detail see also Lize R Glas and Jasper Krommendijk, 'From *Opinion 2/13* to *Avotiņš*: Recent Developments in the Relationship between the Luxembourg and Strasbourg Court' (2017) 17 Human Rights Law Review 1, 14–17.

In a number of other cases, the Court has subjected member states to full scrutiny because the impugned conduct could not be considered the result of strict compliance with an obligation flowing from EU membership. These cases in some instances concern obligations that stem from primary EU law. In *Matthews*, for example, a resident of Gibraltar was refused registration as a voter for the European Parliament on the basis of the EC Act on Direct Elections of 1976.[480] She challenged the act alleging a breach of her right to vote. Instead of considering the act in question an obligation of the respondent state stemming from an act of the then European Community, the Court held that all the relevant instruments 'constituted international instruments which were *freely entered into* by the United Kingdom'.[481] The United Kingdom was therefore considered to be fully responsible for the consequences of those instruments.

More frequently, the cases where member states are subjected to full scrutiny concern the implementation of directives. In *Michaud*, for example, a French lawyer challenged the human rights compatibility of rules that, in implementation of a directive under EU law, obliged lawyers to disclose information on money laundering and terrorist financing.[482] The ECtHR specifically pointed out that, as opposed to regulations, directives are only binding on member states as regards the result to be achieved, but leave it to them to choose the means and manner of achieving it. As a consequence, it subjected France's conduct to full scrutiny.[483] Similarly, in *Cantoni* the Court held France responsible for its implementation of a directive, which would have granted it enough leeway for implementation in conformity with human rights.[484]

Whilst the ECtHR considers directives to by nature leave member states a margin of manoeuvre, a regulation may also afford sufficient discretion to EU member states for a member state to be subjected to full scrutiny. This was the case for example in *M.S.S. v Belgium and Greece*.[485] *M.S.S.* concerned the transfer of an asylum seeker from Belgium to Greece according to the 'Dublin Regulation', an EU Regulation that determines the EU member state

480 ECtHR, *Matthews* (n 449); the case was, however, rendered before *Bosphorus*.
481 Ibid para 33 [emphasis added].
482 ECtHR, *Michaud* (n 472).
483 Ibid para 113, no violation was, however, found.
484 ECtHR, *Cantoni v France*, 15 November 1996, application no 17862/91; see also Tobias Lock, 'The ECJ and the ECtHR: The Future Relationship between the Two European Courts' (2009) 8 The Law and Practice of International Courts and Tribunals 375, 379; discussing *Cantoni v France* see also Enzo Cannizzaro, 'Beyond the Either/Or: Dual Attribution to the European Union and to the Member State for Breach of the ECHR' in Malcolm D Evans and Panos Koutrakos (eds), *The international responsibility of the European Union: European and international perspectives* (Hart Publishing 2013) 301–302.
485 ECtHR, *M.S.S. v Belgium and Greece*, 21 January 2011, application no 30696/09.

responsible for examining an asylum application.[486] The applicants argued *inter alia* that the transfer infringed the prohibition of *refoulement*. The Court noted that the Regulation provided that each member state could decide to examine an asylum application regardless of whether such examination was its responsibility under the criteria laid down in the Regulation.[487] Belgium was thus not strictly obliged to transfer the applicant, but could have refrained from doing so. Even though the case concerned the implementation of a regulation, Belgium therefore enjoyed a margin of manoeuvre. As a result, the *Bosphorus* presumption did not apply and Belgium was subjected to full scrutiny.[488]

In sum, the assessment of whether or not a member state enjoys sufficient discretion to comply with the Convention is strict. There is only one situation where member states clearly enjoy no discretion, namely where a preliminary ruling requested by a member state sets out a particular course of conduct (e.g. *Bosphorus*; *Povse*).[489] With respect to obligations laid down in directives, member states will normally be considered to enjoy discretion within the meaning of the *Bosphorus* test (e.g. *Michaud*; *Cantoni*). In relation to regulations it depends on the specific provisions at stake (e.g. *Avotiņš*, as opposed to *M.S.S.*).

3.1.2.2.3 Equivalent protection

The second condition for the Court to waive detailed scrutiny is that human rights protection granted under EU law is equivalent to the protection afforded by the Convention. That requires sufficient substantive guarantees on the one hand, and effective mechanisms to monitor the observance of these guarantees on the other.[490]

Substantively, the ECtHR expressed the view in *Bosphorus* that the EU's human rights guarantees were equivalent to those of the Convention. This was so in particular because the respect for fundamental rights was a condition of legality of all Community acts. In that respect, the Court pointed out the 'special significance' of the Convention within the EU legal system and the CJEU's extensive reference to Convention provisions and ECtHR case law when carrying out fundamental rights review.[491] As the Court

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486 Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, [2003] OJ L50/1; in the meantime replaced by Dublin III Regulation (n 3).

487 ECtHR, *M.S.S.* (n 485) para 339.

488 Ibid para 340; Even though Switzerland is not an EU member state, the Court reached the same conclusion in a case against Switzerland similar to *M.S.S.*, see ECtHR, *Tarakhel v Switzerland*, 4 November 2014, application no 29217/12, paras 88-91.

489 ECtHR, *Bosphorus* (n 449); ECtHR, *Povse* (n 475).

490 ECtHR, *Michaud* (n 472) para 103; reiterated in ECtHR, *Avotiņš* (n 477) para 101.

491 ECtHR, *Bosphorus* (n 449) para 159.

later pointed out, this finding of substantive equivalence of the Union's fundamental rights protection applied all the more after the CFR attained the same legal value as the EU treaties.[492] The ECtHR also held that procedurally the EU legal order offers protection equivalent to the Convention. In that respect, it took account of the competences of the CJEU to control compliance with fundamental rights. It pointed out that individuals have considerably more limited access to the CJEU than to the ECtHR, but noted in particular the possibility of lodging actions for damages against Union bodies and the role national courts play in the protection of fundamental rights at the EU level.[493]

After the CJEU rejected the draft agreement on accession of the EU to the ECHR, there was some speculation as to whether the ECtHR would retain its 'friendly' approach towards the EU.[494] However, in the case of *Avotiņš*, the Court confirmed and reiterated that it considers human rights protection granted at EU level to be substantively and procedurally equivalent to the Convention.[495]

In some instances, protection under EU law may only be equivalent if the mechanisms in EU law to monitor the observance of fundamental rights have actually been used in a specific case. In *Michaud*, the relevant French court had indeed refused to request a preliminary ruling from the CJEU and had thus 'ruled without the full potential of the relevant international machinery for supervising fundamental rights'. As a consequence, the Court considered the protection afforded by EU law in the specific case not to be equivalent to the Convention.[496] This question was raised again in *Avotiņš*, where the Latvian court had not requested a preliminary ruling either. However, the ECtHR noted that it was necessary in this respect to take into account the specific features of the supervisory mechanism in question and the circumstances of each case.[497] In that light, it concluded that the applicant had not advanced any specific arguments as regards the interpretation of the Brussels I Regulation that would have required the Latvian courts to request a preliminary ruling from the CJEU. The failure to do so therefore did not call the finding of equivalent protection into question.[498]

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492 ECtHR, *Michaud* (n 472) para 106.
493 ECtHR, *Bosphorus* (n 449) paras 160-165; ECtHR, *Michaud* (n 472) paras 108-111; ECtHR, *Avotiņš* (n 477) para 104.
494 See for example Glas and Krommendijk (n 479) 9; Piet Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?' (2015) 38 Fordham International Law Journal 955, 991; Federico Fabbrini and Joris Larik, 'The Past, Present and Future of the Relation between the European Court of Justice and the European Court of Human Rights' (2016) 35 Yearbook of European Law 145, 173–174.
495 ECtHR, *Avotiņš* (n 477) paras 102-104.
496 ECtHR, *Michaud* (n 472) paras 114-115.
497 ECtHR, *Avotiņš* (n 477) paras 109-111.
498 Ibid para 111.

3.1.2.2.4 Manifest deficiency

The presumption of human rights compliance is rebutted if human rights protection is shown to be manifestly deficient in a specific case. In those situations, the interest of international cooperation is outweighed by the Convention's role as a 'constitutional instrument of European public order' in the field of human rights and the state in question is subjected to full human rights scrutiny.[499]

In this respect, the question arose whether the human rights protection under EU law could be considered manifestly deficient where the principle of mutual trust applies. Under that principle, applicable in particular in the Area of Freedom, Security and Justice (AFSJ), states are allowed, sometimes required, to assume that other EU member states comply with human rights, without verifying it in a specific case.[500] In *Avotiņš*, the Court stated that, in general, the creation of an AFSJ in Europe on the basis of mutual trust is 'wholly legitimate' from the standpoint of the Convention.[501] However, where member states are required to presume that fundamental rights have been observed by other member states, this could run counter to the ECHR. In particular, the Convention requires at least a review commensurate with the gravity of serious allegations of fundamental rights violations, in order to ensure that the protection of those rights is not manifestly deficient.[502] In that light, the Court noted that it was necessary under the Convention that the mutual recognition mechanisms are not applied automatically and mechanically so as to render the protection of the human rights manifestly deficient.[503] In *Avotiņš*, it concluded that it was the applicant himself who had failed to resort to the available remedies. The protection afforded under EU law was therefore not manifestly deficient in the specific case.[504]

3.1.2.3 Responsibility for conduct during Frontex operations

It follows from the above that member states are responsible for their conduct during Frontex operations that is in breach of the Convention. However, the ECtHR may limit this scrutiny if states act without discretion when they participate in Frontex operations, provided human rights protection granted by EU law is equivalent to the Convention and not manifestly deficient. Even though this has to be assessed for each situation specifically, some general observations can be made.

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499 ECtHR, *Bosphorus* (n 449) para 156; ECtHR, *Michaud* (n 472) para 103; ECtHR, *Avotiņš* (n 477) para 112.

500 For more detail see also below 4.4.1.2 and 4.4.4.3.

501 ECtHR, *Avotiņš* (n 477) para 113.

502 Ibid para 114.

503 Ibid para 116.

504 Ibid paras 117-125.

The most relevant obligations implemented during Frontex operations stem from the EBCG Regulation, the Schengen Borders Code, the Return Directive, and more specifically the Operational Plans drawn up for each operation. All of these are not only themselves subject to EU fundamental rights law, but they additionally reiterate the most important fundamental rights obligations.[505] This means that, as a matter of EU law, they have to be read and interpreted, where possible, so as to leave member states sufficient discretion to implement their obligations in conformity with human rights obligations. As a consequence, it is unlikely that the relevant EU law instruments compel a member state to infringe the ECHR. Since states will, therefore, as a rule not face conflicting obligations in the first place, they typically will not benefit from the conditional scrutiny waiver. Of course, this does not exclude the possibility that the aforementioned instruments could in a specific case compel a member state to adopt a course of conduct that would infringe the ECHR. Where this seems likely, it will be specifically pointed out in this chapter.[506]

However, obligations of participating states' officers may stem not only from the legal instruments mentioned above, but also more practically from binding instructions given by the officers of the host member state.[507] There are no indications in the EBCG Regulation or Operational Plans that team members are free to disregard such instructions when they conflict with human rights obligations. This raises the question of whether a participating member state whose personnel did nothing but follow such an instruction may benefit from the presumption of human rights compliance.

In the context of its *Bosphorus* doctrine, the Court has to date only considered obligations stemming from legislative or quasi-legislative instruments under EU law. It is thus uncertain whether obligations stemming from instructions such as those of a host state during Frontex operations could in principle trigger the application of the conditional scrutiny waiver. Whilst there does not seem to be any discretion in those cases, the key question may be whether human rights protection under EU law can be considered equivalent in that respect.

It should be borne in mind that human rights protection afforded under EU law is considered by the ECtHR as generally equivalent to the Convention. However, the substantive and procedural safeguards that have led the Court to this conclusion seem to apply predominantly to legislative or quasi-legislative acts. As opposed to instructions, they are, in particular, subject to a broad range of mechanisms to ensure their human rights compliance before they are adopted, and to monitor the observance of these guarantees

505 For more detail see above 2.4.1.3.
506 See in particular below 3.4.1.3.2.
507 See above 2.4.3.1.

once they are in force. As *Michaud* showed, the lack of theoretically existing human rights protection mechanisms in a specific situation may indeed call the general finding of equivalence of protection into question. In this light, it is doubtful whether conduct that implements a host state instruction would be presumed by the Court to comply with the Convention. Against this background, whilst conceivable, it is unlikely that participating states benefit from a scrutiny waiver even where their personnel strictly implement host state instructions.

In sum, state conduct during Frontex operations will generally be subjected to full scrutiny before the ECtHR.

3.2 Attribution of conduct: identifying the relevant rules

As explained in more detail in the previous section, states are responsible when (1) conduct that is attributable to them (2) is in breach of the ECHR. This section focusses on the rules on attribution of conduct, i.e. the rules that determine what qualifies as an act of a state in the eyes of international law.

The aim of this section is to outline the rules on attribution of conduct and identify those applicable to Frontex operations. For that purpose, Section 3.2.1 first sets out the basic framework regarding attribution of conduct to states and international organisations respectively and examines the possibilities for attribution to multiple entities. Section 3.2.2 then discusses the existence of a *lex specialis* as between the EU and its member states more generally and in the context of Frontex operations more specifically.

3.2.1 The rules on attribution of conduct

3.2.1.1 Attribution of conduct to states

The rules on attribution envisage that conduct of persons in a public function is state conduct, whereas conduct of private citizens is not.[508] Hence, states are not responsible for the acts of everyone within their territory or jurisdiction.[509] This rule of non-attributability of private conduct was explic-

508 Crawford and Watkins (n 425) 287.

509 See C. F Amerasinghe, 'Imputability in the Law of State Responsibility for Injuries to Aliens' (1966) 22 Revue égyptienne de droit international 91, 129; see also David D Caron, 'The Basis of Responsibility: Attribution and Other Trans-Substantive Rules' in Richard B Lillich and Daniel B Magraw (eds), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Transnational Publishers 1998) 126–127; Griebel and Plücken (n 426) 603; Olivier de Frouville, 'Attribution of Conduct to the State: Private Individuals' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 261, pointing out that 'it cannot be required of a State that it is in control of all the events which take place on its territory, short of obliging it to become a totalitarian State.'

itly included in the draft of the ASR at first reading. Article 11 of that draft stipulated that 'The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.'[510] Since this was, however, considered inherent in the rules on attribution as a whole, Article 11 does not feature in the final set of Articles.[511] In this light, one of the core functions of attribution rules is to delimit the public realm, for which the state bears responsibility, from the private realm.[512]

If only public conduct gives rise to state responsibility, the most important question is, what qualifies as 'public'. As a general rule, this covers anyone who is empowered to exercise public authority.[513] These are normally state organs, which is why Article 4 ASR provides as a starting point that the conduct of state organs is considered an act of the state in the eyes of international law.[514] State organs within the meaning of Article 4 ASR are those the state has designated as such under its national law.[515] Beyond that, the International Court of Justice (ICJ) has extended the rule of Article 4 ASR to persons that act in 'complete dependence' on the state, albeit emphasising that equating persons with state organs when they do not have that status under national law 'must be exceptional'.[516] The attribution rule in Article 4 ASR covers all state organs, thus all persons making up the organisation of the state whether exercising legislative, executive, or judicial functions for the central government or any of its territorial units, and irrespective of the

510 ILC, 'Report of the Twenty-Seventh Session: ASR, (former) Articles 10-15 as adopted at first reading' (UN Doc A/10010/Rev.1, 1975), 70.

511 For more detail see Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Hart Publishing 2006) 44–45; de Frouville (n 509) 262–263; Condorelli and Kress (n 424) 232.

512 Caron, 'The Basis of Responsibility: Attribution and Other Trans-Substantive Rules' (n 09) 110; Special Rapporteur Crawford, 'First Report on State Responsibility' (UN Doc A/CN.4/490, Fiftieth Session 1998), 33-34, para 154; Gordon A Christenson, 'The Doctrine of Attribution in State Responsibility' in Richard B Lillich (ed), *International Law of State Responsibility for Injuries to Aliens* (University Press of Virginia 1983) 326.

513 Crawford, *State Responsibility* (n 426) 115; see also Condorelli and Kress (n 424) 229, calling this 'the "normal" basis for attribution'.

514 ILC, 'ASR' (n 58) art 4.

515 Djamchid Momtaz, 'Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 239; Condorelli and Kress (n 424) 229; on the limits of the relevance of internal law in this context see Pierre-Marie Dupuy, 'Relations between the International Law of Responsibility and Responsibility in Municipal Law' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 180–181.

516 ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegowina v Serbia and Montenegro)*, 26 February 2007, ICJ Reports 2007, 43, 392–393.

hierarchical position of the organ.[517] Notably, responsibility arises for *any* 'public conduct', i.e. attribution is not limited to the conduct of the leaders of the state or those who control its functioning.[518]

Also, persons not formally designated as state organs may be empowered to exercise public authority. The ASR envisage two such situations and establish the attribution of the conduct of those persons to the state. First, Article 5 ASR deals with private parties empowered by the law of a state 'to exercise elements of the governmental authority'. The decisive element is that they are endowed with functions akin to those normally exercised by organs of the state, regardless of whether this is permanent or temporary, or for very specific purposes.[519] Due to their similarity to persons formally appointed as state organs, they are sometimes referred to as *de facto* organs.[520] Second, Article 6 ASR deals with organs of a foreign state that are empowered to exercise governmental authority of another state. These 'transferred organs' are, under the strict conditions of Article 6 ASR, considered 'at the disposal' of the receiving state, rendering their conduct attributable to the latter.

Articles 4 to 6 ASR have in common that they concern persons that are empowered by law to exercise public authority for a state. The basis for attribution is the *de jure* relationship between the acting persons and the state in question.[521] The control that this relationship entails on the part of the state justifies it bearing responsibility for the conduct of these persons. In the case of Article 4 ASR, attribution is based on a notion of 'institutional control' the state has over the set-up of the state apparatus.[522] In the case of Articles 5 and 6 ASR, it is based on the 'normative control' the state exercises over the conduct of the persons. The *de jure* link to the state is sufficient to trigger attribution, meaning there is no need to (additionally) establish *de facto* control by the state over every one of their acts.[523] In this vein, Article 7 ASR clarifies that *ultra vires* conduct by state organs and persons empowered to exercise elements of governmental authority is also attributable. Only when they act in a private capacity is their conduct not attributable to the state.

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517 ILC, 'ASR' (n 58) art 4; for more detail see Momtaz (n 515) 239–243.

518 Crawford and Watkins (n 425) 288.

519 Momtaz (n 515) 245.

520 Christiane Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility' (2011) 8 International Organizations Law Review 397, 453.

521 It should be pointed out that for the sake of clarity this statement is slightly simplistic, since in the case of Article 4 ASR – as discussed above – in the absence of a *de jure* link complete *de facto* control may also lead to attribution.

522 Tzanakopoulos (n 459) 38.

523 This is explicitly pointed out in the ILC's commentaries to Article 5 ASR, see ILC, 'ASR' (n 58) art 5, comm (7). As a matter of clarification, it is important to point out that the designation as *de facto* organs of persons attributable under Article 5 ASR should not disguise that attribution does not depend on factual control. The term '*de facto* organ' is only used to illustrate the similarity and draw a parallel to persons formally designated as state organs.

Aside from some more specific cases of attribution of conduct, the rule of non-attributability of private conduct has one major exception.[524] Under the limited circumstances set out in Article 8 ASR, 'factual control' over private conduct also leads to attribution to the 'controlling' state. Attribution according to Article 8 ASR requires that the 'person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'. Since this case concerns attribution of *prima facie* private conduct, it has been restrictively interpreted by the ICJ. In the case *Military and Paramilitary Activities in and against Nicaragua*, it held that for the purpose of attributing acts of private parties to a state, 'it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed', and hence coined the threshold of 'effective control'.[525]

In sum, attribution of conduct to states is based on a sufficiently close relationship between the state and the acting persons or their conduct.[526] This may vary in kind and degree. Responsibility arises on the one hand based on a *de jure* relationship, consisting of formal institutional ties between the state and the individual (Article 4 ASR) or the exercise of otherwise 'normative control' by the state (Articles 5 and 6 ASR). On the other hand, it may result from a *de facto* relationship between the state and the individual through the state's exercise of effective control over the impugned conduct (Article 8 ASR).[527]

524 These exceptions are conduct of agents of necessity (Article 9 ASR), conduct of insurrectional movements (Article 10 ASR), and conduct acknowledged and adopted by the state as its own (Article 11 ASR), for more detail see Becker (n 511) 66–77.

525 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits*, 27 June 1986, ICJ Reports 1986, 14, para 115; this was explicitly confirmed in 2007, ICJ, *Genocide Convention* (n 516) paras 403-407, where the ICJ dismissed the 'overall control-test' of the Appeals Chamber of the International Tribunal for the Former Yugoslavia, see ICTY (Appeals Chamber), Case IT-94-1-A *Prosecutor v Duško Tadić*, 15 July 1999, 38 ILM 1518, para 145; for a discussion see Antonio Cassese, 'On the Use of Criminal Law Notions in Determining State Responsibility for Genocide' [2007] Journal of International Criminal Justice 1; Antonio Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 The European Journal of International Law 649; Griebel and Plücken (n 426); Marko Milanović, 'State Responsibility for Acts of Non-state Actors: A Comment on Griebel and Plücken' (2009) 22 Leiden Journal of International Law 307.

526 Momtaz (n 515) 246; Christiane Ahlborn, 'To Share or Not to Share?: The Allocation of Responsibility between International Organizations and their Member States' (SHARES Research Paper 28, 2013, ACIL 2013-26), 6–7; discussing the prevalence of the control-test in this area see Kristen E Boon, 'Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines' (2014) 15 Melbourne Journal of International Law 1.

527 Also distinguishing on the basis of *de jure* and *de facto* control, see for example Caron, 'The Basis of Responsibility: Attribution and Other Trans-Substantive Rules' (n 509) 128; Condorelli and Kress (n 424) 229.

3.2.1.2 Attribution of conduct to international organisations

Considering there was no compelling reason to choose a fundamentally different approach to responsibility of international organisations, the ILC used the ASR as a 'source of inspiration' for the ARIO.[528] What has been said with respect to states therefore in principle also applies to international organisations. If an international organisation is to incur responsibility, it is necessary to establish a *de jure* or *de facto* relationship between the acting person on the one hand and the organisation on the other.

What is split into three different Articles in the ASR, is found in one single rule in the ARIO. This crucial Article 6 ARIO stipulates that conduct of an 'organ or agent of an international organization […] shall be considered an act of that organization under international law'. Similarly to Article 4 ASR, organs are those with a formal 'organic link' to the organisation. As is the case with states, organs are attributable regardless of their place and role within the organisation. This means that Article 6 ARIO extends beyond principal organs of an organisation to any other organ created by secondary law.[529] In addition, organs fully seconded to an international organisation by its member states are also attributable to it according to Article 6 ARIO.[530]

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528 ILC, 'Report of the Fifty-Fourth Session' (UN Doc A/57/10, 2002), 232, para 475, noting that the ASR 'should be regarded as a source of inspiration, whether or not analogous solutions are justified with regard to international organizations.'; as Special Rapporteur Gaja points out in his survey of the comments made by states and international organisations on the articles which were adopted by the ILC at first reading, this has been a recurrent theme of criticism, Special Rapporteur Gaja, 'Eighth Report on Responsibility of International Organizations' (UN Doc A/CN.4/640, Sixty-Third Session, 2011), 5, para 5; see, however, Moshe Hirsch, *The responsibility of international organizations toward third parties: some basic principles* (Martinus Nijhoff Publishers 1995) 11, who argues 'It is widely accepted that the principles of state responsibility are applicable, with some variation, by analogy, to the responsibility of international organizations.' (with further references); Clyde Eagleton, 'International organization and the law of responsibility' (1950) 76 Recueil des Cours de l'Académie de Droit International, 325; with respect to the ARIO see Christiane Ahlborn, 'The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations: An Appraisal of the "Copy-Paste Approach"' (2012) 9 International Organizations Law Review 53; Niels Blokker, 'Preparing articles on responsibility of international organizations: Does the International Law Commission take international organizations seriously?' in Jan Klabbers and A. Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar Publishing 2011); Alain Pellet, 'International Organizations are Definitely not States: Cursory Remarks on the ILC Articles on the Responsibility of International Organizations' in Maurizio Ragazzi (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (2013); Arnold N Pronto, 'Reflections on the Scope of Application of the Articles on the Responsibility of International Organizations' in Maurizio Ragazzi (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (2013) 147–150.

529 Pierre Klein, 'The Attribution of Acts to International Organizations' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 298.

530 ILC, 'ARIO' (n 58) art 7, comm (1).

Unlike Article 4 ASR, Article 6 ARIO in addition establishes the attribution of acts of 'agents' to the international organisation. The term 'agent' has been defined by the ICJ 'in the most liberal sense' and refers to 'any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions – in short, any person through whom it acts.'[531] This definition of 'agent' is reiterated in Article 2(d) ARIO.[532] As is made clear in the ILC's commentaries on Article 6 ARIO, an 'agent', whose conduct is attributable to the organisation, can be *de jure* linked to the organisation, equivalent to Article 5 ASR, or *de facto* linked, like Article 8 ASR.[533]

Whilst Article 6 ARIO provides for the attribution of, on the one hand, persons with formal organic ties to the international organisation and, on the other, private persons normatively or factually linked to the organisation, it does not cover attribution of foreign organs, i.e. organs transferred by a state or another international organisation. This equivalent to Article 6 ASR is found in Article 7 ARIO, which explicitly deals with the attribution of conduct of persons with organic ties to a state or another international organisation. Article 7 ARIO provides that conduct of foreign organs over which an international organisation exercises 'effective control' (note: not 'normative control') is attributable to the latter. As will be discussed in more detail below, this means that Article 7 ARIO requires a *de facto* relationship to the international organisation, instead of a *de jure* relationship, which the parallel rule in Article 6 ASR requires.[534]

It is important to note in this context that international organisations are instruments of cooperation between states.[535] States closely interact with international organisations, take part in their decision-making and fulfil an important function in the implementation of those decisions.[536] In particular, as opposed to states, international organisations commonly do not possess the necessary administrative structures to implement their legislation and consequently often rely on organs of their member states for that purpose. Thus, attribution of conduct more generally, but the circumstances under which member state organs are attributable to an international organisation in particular, raise complex questions.[537]

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531 ICJ, *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* (n 121) 177.

532 ILC, 'ARIO' (n 58) art 2(d).

533 Ibid art 6, comm (10-11).

534 See below 3.3.3.1.

535 Condorelli and Kress (n 424) 222.

536 See for example Tomuschat (n 425) 9–10; Jan Klabbers, 'Self-Control: International Organisations and the Quest for Accountability' in Malcolm D Evans and Panos Koutrakos (eds), *The international responsibility of the European Union: European and international perspectives* (Hart Publishing 2013) 77.

537 Tomuschat for example states that 'the problem of attribution plays for them [international organisations] an infinitely more important role than for states.', Tomuschat (n 425) 10.

In the case of the EU, for example, are member state organs 'entrusted with parts of the organization's functions' (see Article 6 ARIO) when they implement EU legislation? Exercising public authority of the EU could make them *de facto* EU organs or agents and render their acts attributable to the EU under Article 6 ARIO.[538] However, such situations have been excluded from the application of Article 6 ARIO. In his Seventh Report, Special Rapporteur Gaja expressed that Article 6 ARIO was not to be understood as making conduct of a member state organ in implementation of a strictly binding obligation attributable to the organisation in question, because this would 'conflict with the rule that conduct taken by any one of the State organs is attributed to the State, as set out in article 4 [ASR]'.[539] In this vein, the ILC explicitly points out that Article 6 ARIO does not apply to persons who still act 'to a certain extent as organ of the seconding State or as organ or agent of the seconding organization'. For those situations, the more specific rule of Article 7 ARIO was designed.[540] Conduct of national authorities thus remains such, even when it has its foundation in or is determined by the law of an international organisation.[541]

In light of the above, a combination of two factors prevents the conduct of member state organs being attributable to an international organisation when they implement the latter's decisions. First, Article 6 ARIO is not applicable to those situations because Article 7 ARIO covers it. Second, Article 7 ARIO defines effective (factual, not normative) control as a trigger for attribution. This approach has not been without criticism. It has, for example, been proposed that Article 6 ARIO be accorded a broader meaning, attributing conduct of member state organs to international organisations where the latter exercise a particularly high degree of normative control.[542]

538 This is argued by Pieter J Kuijper and Esa Paasivirta, 'Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organizations' (2004) 1 International Organizations Law Review 111, 126–127; see also Stefan Talmon, 'Responsibility of International Organizations: Does the European Community Require Special Treatment?' in Maurizio Ragazzi (ed), *International responsibility today: Essays in memory of Oscar Schachter* (Martinus Nijhoff 2005) 412–414; Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility' (n 520) 452–455.

539 Special Rapporteur Gaja, 'Seventh Report on Responsibility of International Organizations' (A/CN.4/610, Sixty-First Session, 2009), para 33.

540 ILC, 'ARIO' (n 58) art 7, comm (1).

541 Tomuschat (n 425) 23; for detail see Tzanakopoulos (n 459) 34–37.

542 This argument is – in the context of EU Military Operations – made by Aurel Sari and Ramses A Wessel, 'International Responsibility for EU Military Operations: Finding the EU's Place in the Global Accountability Regime' in Bart van Vooren, Steven Blockmans and Jan Wouters (eds), *The EU's Role in Global Governance: The Legal Dimension* (Oxford University Press 2013).

Still, in its case law, the ECtHR follows the ILC's approach and conduct of member state organs remains attributable to the respective state even where they implement decisions of an international organisation.[543] As discussed in more detail above, the exercise of normative control by an international organisation may lead to a scrutiny waiver, but does not make the conduct attributable to the organisation in question.[544]

If the acts of member state organs are to be attributable to the EU when they implement EU law, this would require there to be a special rule governing the relationship between the EU and its member states.[545] This will be discussed in more detail below.[546]

3.2.1.3 Illustration

Table 3: Rules on attribution of conduct (overview)

	ASR (ATTRIBUTION TO STATES)		ARIO (ATTRIBUTION TO INT. ORG.)	
	ARTICLE	**CONTROL REQUIRED**	**ARTICLE**	**CONTROL REQUIRED**
ORGANS	4 ASR	Institutional control	6 ARIO	Institutional control
DE FACTO ORGANS	5 ASR	Normative control	6 ARIO	Normative control
LENT ORGANS	6 ASR	Normative control	7 ARIO	De facto control
PRIVATE CONDUCT	8 ASR	De facto control	6 ARIO	De facto control

3.2.1.4 Possibilities of attribution to multiple entities

In principle, nothing prevents a violation of international law from being attributed to more than one legal entity at the same time. As noted by the ILC, 'the situation can arise where a single course of conduct is at the same time attributable to several States and is internationally wrongful for each

543 The ECtHR's case ECtHR, *Bosphorus* (n 449) is explicitly cited by Special Rapporteur Gaja in support of the view that normative control by an international organisation is insufficient to trigger attribution to the latter, see Special Rapporteur Gaja, 'Seventh Report on Responsibility of International Organizations' (n 539) para 33.

544 See above 3.1.2.2.

545 See also Talmon, who suggests that the then draft of Article 6 ARIO should be amended so as to provide for the possibility to attribute conduct of state organs to an international organisation when they perform the function of 'agents' of the international organisation, see Talmon, 'Responsibility of International Organizations: Does the European Community Require Special Treatment?' (n 538) 413–414.

546 See below 3.2.2.

of them.'[547] If that is the case, all of them are internationally responsible as 'co-authors'.[548]

The clearest illustration of attribution of conduct to a plurality of actors is situations where two or more distinct persons, acting on behalf of two or more different entities, collaborate as co-perpetrators of a single wrongful act. In other words, multiple organs attributable to different actors may violate an international obligation through joint conduct. For example, two or more states may join their troops and attack a third country in violation of the prohibition of the use of force. Such joint wrongful conduct engages the responsibility of each of them.

Another conceivable alternative to attribution of one wrong to several actors is the parallel application of two or more attribution rules with respect to one organ.[549] One person may simply act on behalf of two or more entities at the same time. When states or international organisations avail themselves of a common organ (also 'joint organ') its conduct 'cannot be considered otherwise than as an act of each of the States [or international organisations] whose common organ it is.'[550] A common organ can be formally established. However, even without a formal act, one person may simply act in the name of two or more entities simultaneously, due to the parallel application of two or more attribution rules with respect to a single course of conduct.[551] An example of a joint organ is the *Nauru* case, where the International Court of Justice addressed an alleged failure to rehabilitate land from which phosphate was extracted in Nauru while this was placed under UN Trusteeship. The trusteeship was exercised by 'the Administering Authority', which did not have international legal personality distinct from those of its constituent states, and consisted of New Zealand, the United Kingdom, and Australia.

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547 ILC, 'ASR' (n 58) art 47, comm (3).

548 The following categorisation is based on: Christian Dominicé, 'Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 282–283; for detail see also Francesco Messineo, 'Attribution of Conduct' in André Nollkaemper, Ilias Plakokefalos and Jessica N M Schechinger (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press 2014) 67–80.

549 For more detail see Messineo (n 548) 67–78; on common organs and examples in this respect see also Stefan Talmon, 'A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq' in Phil Shiner and Andrew Williams (eds), *The Iraq War and International Law* (Hart Publishing 2008) 198–204.

550 ILC, 'Report of the Twenty-Sixth Session' (UN Doc A/9610/Rev.1, 1974), 277-278, para 2; also pointing out the possibility of a common organ simultaneously attributable to several entities see Special Rapporteur Gaja, 'Second Report on Responsibility of International Organizations' (UN Doc A/CN.4/541, Fifty-Sixth Session, 2004), 4, para 6.

551 See also Messineo, 'The attribution of conduct in breach of human rights obligations during peace support operations under UN auspices' (n 64) 193.

The Administering Authority was treated, by the Court, as a common organ of those three states and – though in the case at hand only Australia was sued – its conduct being potentially attributable to all of them.[552]

In line with the principle of independent responsibility, each state is separately responsible for the breach, even where it is committed by a joint organ.[553]

3.2.2 A special rule for Frontex operations?

3.2.2.1 A special rule for the European Union?

Throughout the drafting process of the ARIO, the European Commission made the case for a special rule of attribution of conduct governing the relationship between the EU and its member states. By reason of its specific characteristics, in the view of the Commission, the framework applicable to 'normal' international organisations must be adapted to the EU, or so-called 'regional economic integration organisations' more generally.[554] The main argument expressed was that the EU should be responsible for the conduct of member state organs in their implementation of EU law. Also, in literature, the idea that, whilst implementing EU law, member state organs 'act in the exercise of the authority of the Community' has 'from a standpoint of pure Community law' been argued to be 'certainly the right one.'[555] Several avenues were proposed to achieve this goal. The option favoured by the Commission was the inclusion of special attribution rules, making certain acts of member state organs attributable to the EU, or other rules for responsibility, rendering the EU responsible for acts of member state organs without changing attribution to the member states.[556]

552 ICJ, *Case Concerning Certain Phosphate Lands in Nauru (Nauru v Australia), Preliminary Objections*, 26 June 1992, ICJ Reports 1992, 240; see also André Nollkaemper, 'Issues of Shared Responsibility before the International Court of Justice' (ACIL Research Paper No 2011-01, SHARES Series, 2011).

553 ILC, 'ASR' (n 58) art 47, comm (3); ILC, 'Report of the Twenty-Sixth Session' (n 550) 277-278, para 2; for more detail see Nollkaemper and Jacobs, 'Shared Responsibility in International Law' (n 27).

554 Expressing this view at the very start of the ILC's work on the topic, see the statement of the representative of the European Commission to the Sixth Committee of the General Assembly on 27 October 2003, UN Doc A/C.6/58/SR.14, paras 13-14; see also the comments and observations submitted to the ILC, UN Doc A/CN.4/545, 25 June 2004, 22, para 5; this view was maintained until the last comments and observations were submitted, see UN Doc A/CN.4/637, 14 February 2011, 7-8.

555 Paasivirta and Kuijper (n 474) 192.

556 See for example the following statements of the European Commission: UN Doc A/CN.4/556, 32; UN Doc A/C.6/59/SR.21, para 18.

These proposals have not been followed by the ILC who considers its framework applicable to all international organisations, no matter their function, nature or size, just like the ASR are applicable to all states, no matter their size or place within the international community as a whole.[557] However, the ARIO start from the premise that they may be displaced by more specific rules and are hence residual in character.[558] Article 64 ARIO provides that where a special rule of international law governs the question of responsibility of an international organisation, it displaces the default regime. Article 64, as opposed to its parallel provision in the ASR, specifically mentions the possibility of the rules of an organisation working as *leges speciales*.[559] Such *leges speciales* may, broadly speaking, concern two distinct questions. The first is whether the rules of general international law are applicable to a breach of the law of the international organisation. Put simply, is the law of international responsibility applicable to breaches of EU law? The second, and the one of importance here, is whether with respect to a specific international organisation, special rules are applicable in the case of a breach of general international law. As such, the emergence of *leges speciales* may function as a tool to take account of the special characteristics of international organisations.[560] The question therefore arises whether and to what extent a special rule of attribution has emerged in relation to the EU whereby member state organs are attributable to the EU when they implement EU law.[561]

At the heart of the argument for a special rule with respect to the EU are the far-reaching competences accorded to it. Proposals for attribution rules brought forward in the context of the drafting process of the ARIO hence focussed on competence as a determinative for attribution.[562] In order to

557 ILC, 'ARIO' (n 58) art 1 in connection with art 2a; discussing this question see Jan Wouters and Jed Odermatt, 'Are All International Organizations Created Equal?' (2012) 9 International Organizations Law Review 7.

558 Pronto (n 528) 151; Kristen E Boon, 'The Role of *Lex Specialis* in the Articles on the Responsibility of International Organizations' in Maurizio Ragazzi (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (2013); Blokker, 'Preparing articles on responsibility of international organizations: Does the International Law Commission take international organizations seriously?' (n 528) 334–336; see also above 3.1.1.3.

559 This seems to have been at least partly in order to accommodate the claims of the EU for special rules, see Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility' (n 520) 451.

560 ILC, 'ARIO' (n 58) general comm (7); for a discussion see Pellet, 'International Organizations are Definitely not States' (n 528) 46–49.

561 The possibility of such a rule is explicitly mentioned by the ILC in its commentaries, ARIO (n 58) art 64, comm (2).

562 See for example the special attribution rule proposed by Paasivirta and Kuijper (n 474) 216, 'Without prejudice to Article 4, in the case of a REIO [regional economic integration organisations] the conduct of its member states and their authorities shall be considered as an act of the REIO under international law to the extent that such conduct falls within the competencies of the REIO as determined by the rules of that REIO.'

take into account the varying extent of normative control by different international organisations over their member states, it has been suggested that attribution of state organs' conduct be limied to areas of exclusive competence.[563] In areas of exclusive competence it is for EU law to regulate conduct of member states. From an EU law perspective, it seems that this should be mirrored in international law in that breaches resulting from such action would engage the EU's responsibility.[564] Along these lines, arguments in favour of a special rule have predominantly been made with reference to the WTO framework.[565] WTO dispute settlement bodies have indeed attributed conduct of member state organs to the EU, where they were considered to functionally act as EU organs.[566]

However, letting competence determine attribution creates some difficulties. For example, the focus on exclusive competence may be unjustified, since it does not seem necessary for the purposes of attribution to distinguish between shared and exclusive competences, given that shared competences also become exclusive once exercised. More importantly, however, competence entails a right to act. Attribution, in contrast, is not related to a legal entitlement of a state or an international organisation to engage in

563 Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility' (n 520) 452; Sari and Wessel (n 542) 130.

564 Sari and Wessel (n 542) 129; arguing along these lines see Paasivirta and Kuijper (n 474) 213; Andrés Delgado Casteleiro, 'The International Responsibility of the European Union - The EU Perspective: Between Pragmatism and Proceduralisation' (2012-2013) 15 Cambridge yearbook of European legal studies 563, 586, arguing 'Given that someone must have committed a wrongful act for the responsibility to arise and that the EU can only act if it has powers conferred upon it, any issue of responsibility for actions committed by EU Member States when implementing EU law must logically entail the responsibility of the EU.'

565 This example has also been invoked by the European Commission when arguing for a special attribution rule. See reference by representatives of the EU to WTO practice in statements on the ILC's work on responsibility of international organisations for example UN Doc A/CN.4/545, 29, at paras 5-7.

566 For a discussion of the WTO, investment law, law of the sea, and ECHR practice on attribution of conduct between the EU and its member states see Frank Hoffmeister, 'Litigating against the European Union and Its Member States: Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?' (2010) 21 The European Journal of International Law 723, 731–734; see also José Manuel Cortés Martín, 'European Exceptionalism in International Law?: The European Union and the System of International Responsibility' in Maurizio Ragazzi (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (2013) 198, who seems to argue for an application of a *lex specialis* in relation to the EU beyond the WTO context; discussing in detail the international responsibility of the EU in the WTO context see Andrés Delgado Casteleiro and Joris Larik, 'The "Odd Couple": The Responsibility of the EU at the WTO' in Malcolm D Evans and Panos Koutrakos (eds), *The international responsibility of the European Union: European and international perspectives* (Hart Publishing 2013).

the impugned conduct but rests on control exercised over it.[567] If the division of competences is to have implications for international responsibility, it seems that this would be in the context of establishing whether a breach has occurred.[568] It may be argued that the obligations entered into only extend to the areas of competence. Where the EU is not competent, its conduct would accordingly not qualify as a breach since the relevant provisions are not applicable in the first place. Having said this, it seems that in any case, as will be discussed in more detail in the following section, the lack of competence could only have an impact on international responsibility if it was sufficiently obvious to the third party.[569] Beyond that, it constitutes an unreasonable burden on third parties to acquire detailed knowledge on the internal division of competences between an international organisation and its member states, which is not binding on them.[570]

Regardless of the suitability of competence as a criterion for attribution, as pointed out above, the argument of attribution of member state conduct to the EU has been put forward predominantly with respect to areas of exclusive competence. Its applicability to areas of shared competence is far from established, which makes the existence of a *lex specialis* in areas of EU com-

567 This is also illustrated with the rule in the law of international responsibility that acts of organs are attributable 'automatically' where they act *ultra vires*, see Talmon, 'Responsibility of International Organizations: Does the European Community Require Special Treatment?' (n 538) 409; for detail on the unsuitability of competence as an attribution rule see Joni Helioskoski, 'EU Declarations of Competence and International Responsibility' in Malcolm D Evans and Panos Koutrakos (eds), *The international responsibility of the European Union: European and international perspectives* (Hart Publishing 2013).

568 Helioskoski (n 567) 191-196, in particular 193; the question of competence is indeed commonly discussed within the context of establishing a breach of an obligation, see for example Stephan Wittich, 'International Investment Law' in André Nollkaemper, Ilias Plakokefalos and Jessica N M Schechinger (eds), *The Practice of Shared Responsibility in International Law* (Cambridge University Press 2017) 837–838; Hirsch (n 528) 20–24.

569 This may be the case when declarations of competence have been made beforehand, in detail on the potential effects of such declarations see Helioskoski (n 567).

570 Hirsch (n 528) 14–15, who argues 'The powers of an international organization (express and implied), in accordance with its constituent treaty, do not restrict its international responsibility toward third parties. To concede the opposite conclusion would unreasonably undermine the security of legal relations between international organizations and third parties; the latter should not have to worry about the organization's powers under its internal law, which is *res inter alios acta* for them.'; see also Maurits J Dolmans, *Problems of Mixed Agreements: Division of Powers within the EEC and the Rights of Third States* (Asser Instituut 1985) 75–79.

petence outside the WTO context unlikely at best.[571] Either way, such a rule would not apply to the ECHR context. As is clear from *Bosphorus* and subsequent case law, the ECtHR does not consider acts in implementation of EU law as attributable to the EU. It rather attributes them to the member states according to the general rules of attribution of conduct, taking account of the 'normative control' exercised by an international organisation over state conduct by limiting its scrutiny when certain conditions are fulfilled.[572] It should be noted that it seems that the drafters of the Draft Agreement on Accession of the EU to the ECHR were also of the view that member state conduct in implementation of EU law would not be attributable to the EU. Article 1(4) of that agreement envisaged the attribution of acts, measures, or omissions of organs of an EU member state to that state, irrespective of whether a member state enjoys any discretion in implementing EU law. Conversely, acts, measures and omissions of the EU institutions, bodies, offices, or agencies, or of persons acting on their behalf, were considered to be attributable to the EU.[573]

3.2.2.2 Responsibility allocation arrangements in the EBCG Regulation

Article 42 EBCG Regulation lays down rules regarding civil liability for acts committed by members of teams deployed during Frontex operations. Essentially, Article 42 sets out that where members of the teams are operating in a host member state, 'that Member State shall be liable in accordance with its national law for any damage caused by them during their operations'.

Rules similar to Article 42 are commonly found in contribution agreements or arrangements that regulate the relationship among different entities that deploy their forces in the context of a multinational operation. Contribution agreements in particular deal with modalities of contribution, requirements that personnel or equipment are expected to meet, and liability for damage

571 Jean D'Aspremont, 'A European Law of International Responsibility?: The Articles on the Responsibility of International Organizations and the European Union' (SHARES Research Paper 22, 2013, ACIL 2013-04), 8, 12, who argues that the relevance of special rules would be confined to the WTO context but that no general *lex specialis* exists; see also the argument brought forward by Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility' (n 520) 452, who points out that internal rules cannot establish *leges speciales*; following this view see Cortés Martín (n 566) 197; see also Sari and Wessel (n 542), who conclude that no *lex specialis* exists with respect to EU Military Operations; also Ramses A Wessel and Leonhard den Hertog, 'EU Foreign, Security and Defence Policy: A Competence-Responsibility Gap?' in Malcolm D Evans and Panos Koutrakos (eds), *The international responsibility of the European Union: European and international perspectives* (Hart Publishing 2013) 343, apply the general rules on responsibility of international organisations to the EU, but seem to be of the view that conduct of member state organs implementing Union law could be attributable to the Union by virtue of Article 6 ARIO (on page 349).

572 See above 3.1.2.2.

573 Draft Agreement on the Accession of the EU to the ECHR (n 451); Cannizzaro (n 484) 359–360.

caused by members of the multinational force.[574] An example is the model contribution agreement regarding military contingents placed at the disposal of the UN for peacekeeping operations.[575]

One question such rules trigger is whether they are intended as attribution rules for the purposes of international responsibility. Two considerations speak against assuming such an intention with respect to Article 42. First, the explicit reference to liability 'in accordance with [the host state's] national law' suggests that the arrangement was not supposed to determine the legal situation under international law. Second, in particular from the second paragraph onwards, Article 42 indicates that the predominant concern was to allocate responsibility as between the participating states and not necessarily attributing conduct to either of them. This was also pointed out by the ILC with respect to the similarly worded model contribution agreement regarding military contingents placed at the disposal of the UN for peacekeeping operations.[576]

The second question is to what extent they are actually capable of qualifying as attribution rules. Article 64 ARIO specifies that *leges speciales* 'may be contained in the rules of the organization applicable to the relations between an international organization and its members.'[577] On this account, the key question is whether Article 42 is a rule of an international organisation for the purposes of Article 64 ARIO. Article 2(b) ARIO contains a non-exhaustive list of what qualifies as 'rules of the organization', including the constituent instruments and rules adopted in accordance with those instruments, such as decisions, resolutions and other acts of the international organisation, as well as established practice of the organisation.[578] This shows that rules of international organisations cover a broad range of rules neither purely international nor entirely comparable to internal law of states.[579]

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574 See for example United Nations, 'Model Contribution Agreement between the United Nations and the Participating States contributing Resources to a United Nations Peace-Keeping Operation' (UN Doc A/50/995, 9 July 1996).

575 See also ILC, 'ARIO' (n 58) art 7, comm (3); see ILC, 'Report of the Fifty-Sixth Session' (UN Doc A/59/10, 2004), 111, para 3, 110, para 2; ILC, 'Report of the Sixty-First Session' (UN Doc A/64/10, 2009), 62-63, para 2; United Nations (n 574).

576 ILC, 'ARIO' (n 58) art 7, comm (3), pointing out that '[t]he agreement appears to deal only with distribution of responsibility and not with attribution of conduct'; see ILC, 'Report of the Fifty-Sixth Session' (n 575) 111, para 3; ILC, 'Report of the Sixty-First Session' (n 575) 62-63, para 2.

577 It should be noted that Article 42 EBCG Regulation, if accepted, would displace rules contained in the ARIO but also in the ASR. The latter, however, does not contain an equivalent reference in the relevant Article 55 ASR. For the present purposes, it is assumed that rules of an organisation are capable of displacing the ASR to the same extent that they can do so in the context of the ARIO.

578 For a detailed account regarding the origin of the definition see Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility' (n 520) 403–405.

579 For more detail see ibid 407–418, with further references; Pronto (n 528) 155–156.

It has been suggested that, whilst those of internal character are relevant in determining whether a person is considered an organ of an organisation, only rules that are international in character can qualify as *leges speciales* within the meaning of Article 64 ARIO.[580] In the context of the EU it has been argued in particular that the rules on allocation of competence were 'internal' in character and could accordingly not function as attribution rules.[581] The same rationale would apply to rules contained in secondary law.

In any event, even if rules contained in secondary law qualify as *leges speciales* for the purposes of Article 64 ARIO, their applicability would seem to be confined to the relationship between the international organisation and its member states (or between the member states themselves). From the perspective of third parties they constitute *res inter alios acta* and can for that reason not govern the relationship between an international organisation and/or its member states on the one side and a third party on the other.[582] This was also pointed out by the ILC with respect to the model contribution agreement regarding military contingents placed at the disposal of the UN for peacekeeping operations. It found that 'this type of agreement is not conclusive because it governs only the relations between the contributing State or organization and the receiving organization and could thus not have the effect of depriving a third party of any right that that party may have towards the State or organization which is responsible under the general rules.'[583] In this light, as long as they are not replicated in an instru-

580 Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility' (n 520) 401; also of this view D'Aspremont (n 571) 9; Cortés Martín (n 566) 197; as Ahlborn mentions, however, the qualification of certain rules of international organisations as internal is not universally accepted, see Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility' (n 520) 419–420 and references therein.

581 D'Aspremont (n 571) 9; Wittich (n 568) 840–841.

582 Marten Zwanenburg, 'Toward a more mature ESDP: Responsibility for violations of international humanitarian law by EU crisis management operations' in Steven Blockmans (ed), *The European Union and Crisis Management: Policy and Legal Aspects* (T.M.C. Asser Institute 2008) 406, who points out that 'it could be argued that provisions on claims in an agreement between the EU and a troop-contributing state are *res inter alios acta* for third parties'; see also see also Wittich (n 568) 840–841; Boon, 'The Role of Lex Specialis in the Articles on the Responsibility of International Organizations' (n 558); Pronto (n 528) 156.

583 ILC, 'ARIO' (n 58) art 7, comm (3); see ILC, 'Report of the Fifty-Sixth Session' (n 575) 111, para 3, 110, para 2; ILC, 'Report of the Sixty-First Session' (n 575) 62-63, para 2; Special Rapporteur Gaja, 'Second Report on Responsibility of International Organizations' (n 550) 13, para 43; the drafting Committee pointed out that these considerations would even apply to a case where a third party knew of the arrangement, ILC, Summary record of the 2810th meeting (UN Doc A/CN.4/SR.2810, 2004) 137-138, para 17; see also the clarification by Ago in ILC, Summary record of the 1263rd meeting (UN Doc A/CN.4/SR.1263, 1974), 60, para 14, 'If two States had concluded a special agreement governing their respective international responsibilities, that agreement was not binding on third States, which were not obliged to apply to one of those States rather than to the other.'

ment applicable to third parties, Article 42 EBCG Regulation is not capable of regulating attribution of conduct with effect for third parties.[584]

In conclusion, irrespective of whether Article 42 EBCG Regulation was intended as an attribution rule and is capable of qualifying as such, it cannot have effect as between the actors participating in a Frontex operation on the one hand and an individual lodging a complaint before the ECtHR on the other. For that reason, it does not displace the general regime of attribution of conduct in that respect. Of course, Article 42 EBCG Regulation remains relevant as a rule for the allocation of responsibility, e.g. for the purposes of reimbursement as between the entities participating in Frontex operations after one actor has been held responsible under the ECHR.

3.3 Responsibility for the primary breach

This section analyses the allocation of responsibility among the host and participating states for human rights violations that may occur during Frontex operations. It is concerned with the responsibility for the primary breach, i.e. the responsibility that arises directly from a human rights violation committed during an operation.[585]

For example, when a multinational team of border guards uses excessive force against an individual during Frontex operations, which state is responsible for that violation under the ECHR? Similarly, when migrants are expelled in violation of the prohibition of *refoulement* during a Frontex operation, is the host state or are participating states, alone or together, responsible for these Convention violations?

Where such breaches occur, the states involved are responsible insofar as the course of conduct at the origin of the breach is attributable to them. In other words, those that can be considered the authors of a violation, bear responsibility for it. This section discussion how the rules on attribution of conduct apply to Frontex operations, i.e. under what circumstances the host and participating states can be considered the authors of a Convention violation that occurs during a Frontex operation. As set out in the previous section, attribution of conduct during Frontex operations is determined according to the general attribution rules as expressed in the ASR and ARIO. These therefore form the basis of the analysis in this section.

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584 The same conclusion is reached by Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012) 255, who argues that '[t]hese rules are only binding as between Member States and do not prejudice claims brought by a national of a third state.' He also argues that the rules in any case do not touch upon human rights claims.

585 For the distinction between primary and associated responsibility see above 1.3.3.

Section 3.3.1 sets out the starting point and explains the approach and structure chosen for the purposes of the remainder of this section. Sections 3.3.2 and 3.3.3 form the core analysis regarding attribution of conduct during Frontex operations, dealing with attribution of conduct to the host state and attribution of conduct to the EU respectively. Finally, Section 3.3.4 summarises the conclusions reached.

3.3.1 Attribution of conduct during Frontex operations: the starting point

The main body of personnel deployed during Frontex operations includes:[586]

- host state officers ('local staff'),
- persons deployed as standard team members by participating states,
- persons deployed as standard team members by Frontex,
- persons deployed as team members on large euqipment, and
- Frontex staff deployed to exercise coordinating and similar tasks.

Local staff and team members contributed by participating states are, generally speaking, state organs and attributable to their 'home' states on the basis of Article 4 ASR. Exceptionally, they may not formally be incorporated into the state administration, but otherwise authorised by law to conduct border management tasks. Since such powers qualify as 'governmental authority' for the purposes of Article 5 ASR, conduct of those persons is attributable to the respective state by virtue of Article 5 ASR.[587] Thus, the conduct of local staff or team members of participating states is, as a starting point, attributable to the respective state.

Personnel contributed by Frontex may include personnel with coordinating tasks or personnel deployed as team members. The former are largely regular Frontex staff members.[588] The latter are always seconded national experts (SNEs).[589] Under Article 6 ARIO both types of personnel are attributable to the EU. Regular Frontex staff simply because Article 6 ARIO does not only cover staff within the main institutions of an international organisation, but also extends to personnel within subordinate bodies, such as Frontex.[590]

586 For a more detailed overview of personnel deployed during Frontex operations see Table 2.

587 ILC, 'ASR' (n 58) art 5, comm (2).

588 The 'Coordinating officer' that is deployed for each joint operation indeed *has to* be a Frontex staff member, see EBCG Regulation (n 18) arts 22, 32(2), 58(2).

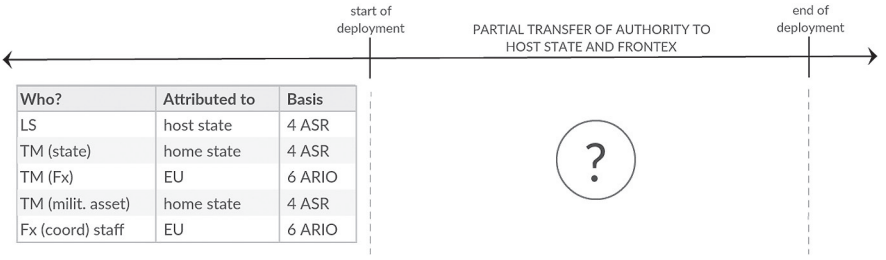
589 Ibid arts 20(11), 58(4).

590 See above text to n 529; see also Wessel and den Hertog (n 571) 348, who argue that 'In view of the Union rules on "internal" responsibility, there are good reasons to interpret the term "organs and agents" as "institutions, bodies, offices and agencies and their servants" as used is in the TFEU.'; similarly Ramses A Wessel, 'Division of International Responsibility between the EU and its Member States in the Area of Foreign, Security and Defence Policy' (2011) 3 Amsterdam Law Forum 34, 36.

SNEs are attributable to the EU because Article 6 ARIO also covers member state officials' conduct when they are fully seconded to the organisation.[591]

In this light, the starting point must be that the conduct of personnel deployed during Frontex operations is attributable to their respective contributing entity, commonly according to Articles 4 ASR, or 6 ARIO.

However, for the duration of their deployment, they are subject to a specific command regime detailed in the EBCG Regulation and the respective Operational Plans.[592] In essence, authority over them is not only exercised by their respective 'home' entities, but partly also by the host state of an operation as well as by Frontex. This transfer of authority concerns in particular all personnel deployed as 'team members' who at least partially receive their orders from the host state. The crucial question this raises, is how the transfer of authority affects attribution of their conduct. In the eyes of international law, do they act in the name of the host state or Frontex, instead of, or in addition to their home entity?



Who?	Attributed to	Basis
LS	host state	4 ASR
TM (state)	home state	4 ASR
TM (Fx)	EU	6 ARIO
TM (milit. asset)	home state	4 ASR
Fx (coord) staff	EU	6 ARIO

LS...'Local staff', TM...'Team member', Fx...'Frontex'

Figure 16: Attribution of conduct of human resources used for Frontex operations (starting point)

The law of international responsibility sets out the conditions under which organs of one state or international organisation can be considered 'transferred' to another and become attributable to the receiving state or international organisation. The relevant rules are found in Articles 6 ASR and 7 ARIO respectively. These provisions therefore form the focus of the following sections (see Table 4).

591 ARIO (n 58) 86; similarly see the position of INTERPOL during the drafting process of the ARIO, in ILC, comments and observations received from governments and international organisations, 12 May 2005, UN doc A/CN.4/556, 40, para 24.

592 For more detail see 2.4.3.1.

Table 4: Rules on attribution of conduct (provisions relevant for Frontex operations)

	ASR (ATTRIBUTION TO STATES)		ARIO (ATTRIBUTION TO INT. ORG.)	
	ARTICLE	CONTROL REQUIRED	ARTICLE	CONTROL REQUIRED
ORGANS	4 ASR	Institutional control	6 ARIO	Institutional control
DE FACTO ORGANS	5 ASR	Normative control	6 ARIO	Normative control
LENT ORGANS	**6 ASR**	**Normative control**	**7 ARIO**	**De facto control**
PRIVATE CONDUCT	8 ASR	De facto control	6 ARIO	De facto control

Section 3.3.2 discusses whether, according to Article 6 ASR, conduct of deployed 'team members' is attributable to the host state. After elaborating on the general requirements for attribution under Article 6 ASR (Section 3.3.2.1), it analyses how Article 6 ASR has been interpreted by the ECtHR (Section 3.3.2.2) and applies those rules to the context of Frontex operations (Section 3.3.2.3).

Section 3.3.3 focusses on Article 7 ARIO, discussing whether conduct of personnel involved in Frontex operations is attributable to the EU. Like the preceding section, it first sets out the threshold of Article 7 ARIO (Section 3.3.3.1), analyses its reception by the ECtHR (Section 3.3.3.2), and applies it to Frontex operations (Section 3.3.3.3). Even though the EU cannot be held responsible under the ECHR, it is necessary to determine whether conduct during Frontex operations is attributable to it. If that is the case, states are presumed here to bear no direct responsibility for it under the ECHR and it falls outside the ECtHR's jurisdiction.[593]

3.3.2 Attribution of conduct to the host state

3.3.2.1 Article 6 ASR

3.3.2.1.1 The threshold of Article 6 ASR

Article 6 ASR deals with the situation where an organ of one state is placed at the disposal of another. It sets out the circumstances under which conduct of the 'lent' or 'transferred' organ is attributable to the receiving state:

> The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

593 See above 3.1.2.1.

Attribution under Article 6 ASR rests on three conditions: First, the person placed at the disposal of another state must be an organ of the sending state.[594] Other than persons having the status of an organ according to Article 4 ASR, this includes so-called *de facto* organs that, in accordance with Article 5 ASR, are empowered by the law of the sending state to exercise elements of its governmental authority.[595]

Second, transferred organs are attributable to the receiving state if they exercise 'functions embodying genuine elements of [its] governmental authority'.[596] This requires that they perform functions of a public character, excluding the secondment of technicians, advisors, or experts who act in a personal capacity.[597] The precise meaning of 'governmental authority' has predominantly been addressed with respect to Article 5 ASR, where the content of the powers, the way they are conferred on the person, the purposes for which they are to be exercised, and the extent to which the person is accountable to government for their exercise were pointed out as relevant factors.[598] Examples of governmental authority in this context include powers of detention or immigration control.[599] In the context of Article 6 ASR, more emphasis has been placed on the question for which state, the receiving or the sending state, the powers are exercised, instead of focussing on a definition of governmental authority. In that light, conduct is not attributable to the receiving state when a transferred organ continues exercising governmental authority for the sending state.[600] This aspect is, however, mainly addressed through the third requirement.

The third condition for attribution is that the organ is 'placed at the disposal' of the receiving state.[601] The formulation 'placed at the disposal' is accorded a specific meaning in the context of Article 6 ASR and implies that the transferred organ acts 'with the consent, under the authority of and for the purposes of the receiving State.'[602] It thus encompasses three elements: First, the transferred organ exercises functions of the receiving state and in that sense 'performs duties which normally fall to the organs of the beneficiary

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594 ILC, 'ASR' (n 58) art 6, comm (5).
595 ILC, 'Report of the Twenty-Sixth Session' (n 550) 290, para 18.
596 Ibid 288.
597 Ibid 288.
598 ILC, 'ASR' (n 58) art 5, comm (6); see further Dupuy (n 515) 182–183; Crawford, *State Responsibility* (n 426) 129–132; Antenor Hallo de Wolf, *Reconciling Privatization with Human Rights* (Intersentia 2012) 210–221.
599 ILC, 'ASR' (n 58) art 6, comm (2).
600 ILC, 'Report of the Twenty-Sixth Session' (n 550) 288-289, paras 11-12; 290, para 18.
601 ILC, 'ASR' (n 58) art 6, comm (2).
602 Ibid art 6, comm (2); Special Rapporteur Crawford, 'First Report on State Responsibility' (n 512) 44, para 220.

State.'[603] This excludes not only state organs that continue to act for the purposes of the sending state, but even those who act for shared purposes.[604] Second, the transferred organ acts with the consent of the receiving state, excluding the application of the attribution rule to situations of territorial occupation.[605]

The decisive element is the third, which requires that the transferred organ is 'genuinely and exclusively under the authority' of the receiving state.[606] This entails the organ acting 'in conjunction with the machinery' of the receiving state, in other words under the control of the receiving state by way of being subject to its laws and instructions.[607] The idea that the transferred organ had to act 'in accordance with the instructions' of the receiving state even featured as an explicit condition for attribution in Special Rapporteur Ago's first proposal of then Article 9 ASR.[608] Importantly, this does not mean that the harmful conduct has to be specifically controlled or commanded by the receiving state, but describes the requirement that the organ is subject to the receiving state's authority in that it would have to obey orders if given by the latter.[609] In this light, what is crucial in the context of Article 6 ASR is the establishment of a functional, or institutional, link between the organ in question and the structure or authority of the receiving state.[610] In this vein conduct in excess of authority or contravention of instructions is also attributable.[611]

Notably, in the drafting process of what became Article 6 ASR, the focus shifted from the power of the receiving state to issue instructions to the absence of such power for the sending state. In 1974, the ILC accordingly noted that 'the organ shall act in conjunction with the machinery of [the

603 ILC, 'Report of the Twenty-Sixth Session' (n 550) 288, paras 7-8; see also Special Rapporteur Ago, 'Third Report on State Responsibility' (UN Doc A/CN.4/246, Twenty-Third Session 1971), 269, para 203; ILC, 'Report of the Fiftieth Session' (UN Doc A/53/10, 1998), 84, para 412; ILC, 'ASR' (n 58) art 6, comm (1-2).

604 ASR (n 58) art 6, comm (4).

605 Ibid art 6, comm (4).

606 Special Rapporteur Ago, 'Third Report on State Responsibility' (n 603) 268-269, para 202; pointing out that interest and consent are not enough but that 'authority' is decisive, see ILC, 'Report of the Twenty-Sixth Session' (n 550) 288, para 7.

607 ILC, 'Report of the Twenty-Sixth Session' (n 550) 287, para 5; 288, paras 7-8; ILC, 'Report of the Fiftieth Session' (n 603) 84, para 412, referring to control 'at least at the level of policy if not of detail'; ILC, 'ASR' (n 58) art 6, comm (2).

608 See the several mentions of 'in accordance with the instructions' of the receiving state in Ago's third report, Special Rapporteur Ago, 'Third Report on State Responsibility' (n 603) 269, para 202; 270, para 206; 272, para 209; see his first proposal at 274, para 214.

609 ILC, 'Summary record of the 1262nd meeting' (UN Doc A/CN.4/SR/1262, Twenty-Sixth Session 1974), 55, para 15.

610 ILC, 'ASR' (n 58) art 6, comm (4); for more detail see Messineo, 'The attribution of conduct in breach of human rights obligations during peace support operations under UN auspices' (n 64) 199-200, 204; Messineo, 'Attribution of Conduct' (n 548) 89–91.

611 ILC, 'ASR' (n 58) art 7, which is also applicable to Article 6 ASR situations.

receiving] State and under its exclusive direction and control, not on instructions from the sending State.'[612] This formulation was retained in the ILC's commentaries to the final draft of Article 6 ASR.[613] Thus, it is important that the receiving state's authority is exclusive, ruling out in particular the possibility for the sending state to issue instructions to the transferred organ.[614] It is worth mentioning that, as Ago pointed out, 'exclusivity' of authority in this context does not exclude the possibility that persons, independently of their function within the receiving state, continue to act as organs of their home state.[615] If the authority of the receiving state is exclusive with respect to the functions in the context of which the breach was committed, the conduct in question is attributable to the receiving state and triggers its responsibility.

Against this background, persons sent to another state to perform diplomatic or consular functions are clearly not 'put at the disposal' of the receiving state.[616] A point that has been particularly emphasised is that organs sent in order to assist another state in military operations, for example in order to fight off an armed attack by a third state, are also not attributable to the receiving state since they remain under the authority of their home state for which reason they cannot be considered genuinely 'placed at the disposal' of the receiving state.[617] Also 'ordinary situations of inter-State cooperation or collaboration' that do not entail a transfer of authority are not covered by Article 6 ASR.[618]

The threshold of Article 6 ASR for the conduct of a 'lent' organ to be attributed to the receiving state may be summarised as follows (see also Figure 17): The person is (1) an organ of the sending state, (2) exercises governmental authority of the receiving state, and (3) is placed at the receiving state's disposal. The organ is considered to be placed at the receiving state's disposal if it acts (a) for the purposes, (b) with the consent, and (c) under the exclusive authority, i.e. subject to the laws and instructions, of the receiving state.

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612 ILC, 'Report of the Twenty-Sixth Session' (n 550) 287, para 5.

613 ILC, 'ASR' (n 58) art 6, comm (2).

614 This was clarified by Special Rapporteur Ago, see ILC, 'Summary record of the 1262nd meeting' (n 609) 55, para 15.

615 Special Rapporteur Ago, 'Third Report on State Responsibility' (n 603) 268, para 201; this situation has to be distinguished from person acting as 'joint organs', discussed above in 3.2.1.4.

616 ILC Report, *Twenty-Sixth Session* (UN Doc A/9610/Rev.1, 1974) 287, para 4; ILC, 'ASR' (n 58) 44.

617 Special Rapporteur Ago, *Third Report on State Responsibility* (UN Doc A/CN.4/246, 1971) 269, para 202; ILC Report, *Twenty-Sixth Session* (UN Doc A/9610/Rev.1, 1974) 287, para 4.

618 ILC, 'ASR' (n 58) 44.

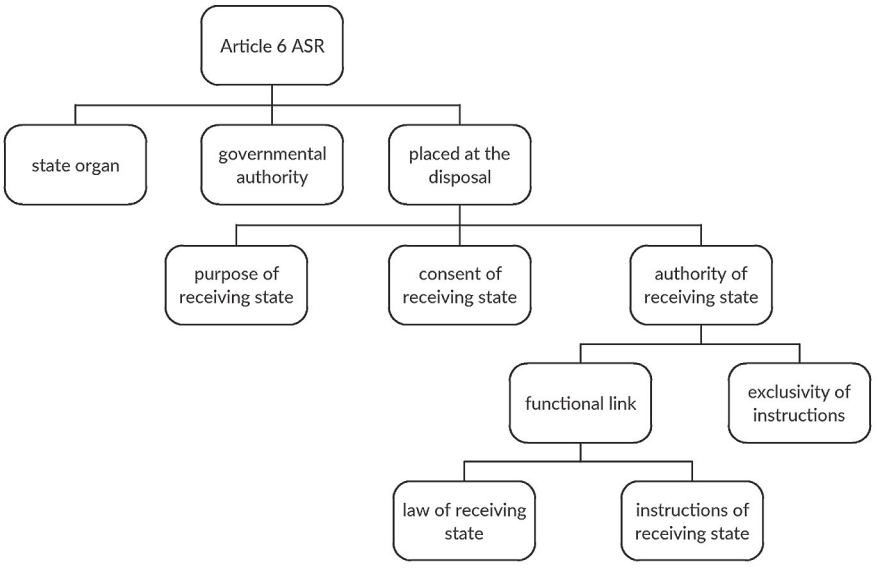

Figure 17: Article 6 ASR: overview of requirements for attribution

3.3.2.1.2 Article 6 ASR and attribution to the home entity

If the threshold of Article 6 ASR is met, how does this 'transfer' affect the relationship between the organ and its original 'home' entity? Two possibilities are conceivable. The first is that the organ's conduct is simultaneously attributable to the receiving state (on the basis of Article 6 ASR) and the sending ('home') state (in particular on the basis of Article 4 ASR). That would make them joint organs of the receiving and the sending state, in which case their wrongful conduct engages the responsibility of both.[619] The second is that the application of Article 6 ASR 'breaks' the link between the transferred organ and its former home entity. In that case, as organs of the receiving state only, the organ's conduct may only engage the receiving state's responsibility.

Article 6 ASR does not generally bar the possibility of a person being an organ of the sending and the receiving state at the same time. It is indeed not at all unlikely that an organ is transferred only with respect to specific purposes, but continues to act for its home state independently of its function within the receiving state.[620] This means that a person may act as an organ for the receiving state on one occasion and for the sending state on another.

619 For more detail on 'joint organs' see above 0.

620 See also Special Rapporteur Ago, 'Third Report on State Responsibility' (n 603) 268, para 201.

However, when acting for the purposes of the receiving state, the transferred organ does so under the *exclusive* authority of that state. That conduct is therefore regarded under international law as an act of the receiving, but not of the sending state.[621] Thus, with respect to *a single course of conduct*, the organ will only be acting for one of the two states. In this light, Special Rapporteur Ago pointed out that the case of a transferred organ should not be 'confused with that of a "joint" organ [whose actions] are acts of each of the two States at the same time and may consequently involve the international responsibility of both of them.'[622]

Also, the overall function of Article 6 ASR confirms that its application breaks the link between the transferred organ and its former home entity. Whereas most attribution rules, e.g. Articles 4, 5, 8 ASR and 6 ARIO, delimit the public from the private sphere for the purpose of responsibility, Articles 6 ASR and 7 ARIO delimit 'two public spheres' from each other. They hence serve to allocate responsibility among several public actors, which speaks against a simultaneous application of Article 4 ASR and Article 6 ASR.

The rule of exclusive attribution to the receiving state is confirmed in case law. In the *Genocide Convention* case, the ICJ noted that 'the act of an organ placed by a State at the disposal of another public authority shall not be considered an act of that State if the organ was acting on behalf of the public authority at whose disposal it had been placed.'[623] It is also the dominant view expressed in literature, where the treatment of acts of organs of a state that are put at the disposal of another state has indeed been considered as illustrative of attribution as an 'exclusive operation'.[624]

621 ILC, 'ASR' (n 58) art 6, comm (2).

622 Special Rapporteur Ago, 'Third Report on State Responsibility' (n 603) 268, n 401.

623 ICJ, *Genocide Convention* (n 516) 204, para 389.

624 Nollkaemper and Jacobs, 'Shared Responsibility in International Law' (n 27) 10; see also Crawford, *State Responsibility* (n 426) 132; den Heijer, *Europe and Extraterritorial Asylum* (n 584) 82; den Heijer, 'Issues of Shared Responsibility before the European Court of Human Rights' (n 459) 20–22; Messineo, 'Attribution of Conduct' (n 548) 83–84; Francesco Salerno, 'International Responsibility for the Conduct of "Blue Helmets": Exploring the Organic Link' in Maurizio Ragazzi (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (2013) 420, who argues that 'The purpose of the rule is clear: when State organs placed at the disposal of another State exercise their public functions under the exclusive governmental authority of the receiving State, their conduct must be attributed exclusively to the latter, because the receiving State's chain of command is the only one international law takes into account.'; Talmon, 'A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq' (n 549) 198, argues that attribution of conduct of the Coalition Provisional Authority in Iraq to the UK on the basis of Article 6 ASR would exclude attribution to other actors involved.

3.3.2.2 *Article 6 ASR in the case law of the ECtHR*

Owing to the stringent requirements of Article 6 ASR, it only applies to exceptional situations.[625] The Strasbourg organs, the European Commission of Human Rights and the ECtHR, followed this strict approach.[626]

In 1977 the European Commission of Human Rights dealt with measures taken by the Swiss police in Liechtenstein. The case of *X and Y v Switzerland* concerned a German national who was banned from entering Liechtenstein territory by the Federal Aliens' Police of Switzerland.[627] The question arose whether the measure complained of was attributable to Switzerland or Liechtenstein. At the time, Liechtenstein was not a contracting party to the Convention. Thus, in case of attribution to Liechtenstein, the Convention would be inapplicable. Conversely, the responsibility of Switzerland could only be engaged if the measures were attributable to it.[628]

The entry ban was based on a Swiss law, applicable in Liechtenstein by virtue of a treaty in force between the two states, which covered Swiss laws and decrees concerning the entry, exit, residence, and establishment of foreigners more generally. The same treaty rendered the Swiss authorities competent in matters of the aliens' police, and excluded Liechtenstein's authorities from overruling entry bans such as the one issued in the case at hand.[629] Switzerland argued that the acts were attributable to Liechtenstein since it had only 'delegated certain functions of the aliens' police to the Swiss authorities' but had thereby 'not generally renounced its sovereignty' in those matters. The Swiss authorities, in their view, only performed an ancillary function based on the treaty between the two states.[630] The European Commission of Human Rights disagreed. It observed that the entry ban was exclusively in conformity with Swiss law and that Switzerland exercised its own jurisdiction in Liechtenstein.[631] Consent alone, and the fact that Swiss authorities acted in the interest of Liechtenstein as well, did not make the measures complained of attributable to Liechtenstein. Since the Swiss Federal Aliens' Police exercised Swiss public authority, it had not been genuinely and exclusively placed at the disposal of Liechtenstein.[632]

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625 Crawford calls the situation of Article 6 ASR 'extremely narrow' yet in practice not uncommon, see Crawford, *State Responsibility* (n 426) 132; also the ILC in its commentaries points out that Article 6 deals with a 'limited and precise situation', ILC, 'ASR' (n 58) art 6, comm (1).

626 Den Heijer, 'Issues of Shared Responsibility before the European Court of Human Rights' (n 459) 22.

627 European Commission of Human Rights, *X and Y v Switzerland*, 14 July 1977, application nos 7289/75 and 7349/76.

628 Ibid 71.

629 Ibid 72; this was clarified by the respondent state, see 67-68.

630 Ibid 62.

631 Ibid 73.

632 See also Special Rapporteur Crawford, 'First Report on State Responsibility' (n 512) 45, para 224; ILC, 'ASR' (n 58) art 6, comm (7).

In *Drozd and Janousek v France and Spain*, the ECtHR accepted a transfer of organs.[633] In that case, the two applicants had been convicted for an armed robbery by an Andorran court. At the time of their application to the ECtHR, they were serving their fourteen years' imprisonment in France. The Andorran court that had convicted the applicants was composed of French and Spanish judges seconded by France and Spain respectively.[634] Because Andorra was not a contracting party to the Convention, only if and to the extent that the complaints related to acts attributable to Spain and/or France, would the Convention be applicable.

The ECtHR distinguished between the judicial process and the detention resulting from the conviction.[635] With regard to the former it denied its competence to hear the claim since the acts in question were not attributable to either of the respondent states. It observed:

> Whilst it is true that judges from France and Spain sit as members of Andorran courts, they do not do so in their capacity as French or Spanish judges. Those courts, in particular the Tribunal de Corts, exercise their functions in an autonomous manner; their judgments are not subject to supervision by the authorities of France or Spain.[636]

Whilst the Court was not asked to pronounce on the question of attribution to Andorra, it seems that the measures complained of were not attributable to France or Spain precisely because of the rule underlying Article 6 ASR. It may on these grounds be assumed that the conduct relating to the judicial process was attributable to Andorra.[637] With respect to the subsequent detention in France, the Court found itself competent to hear the claim but denied France's responsibility.[638]

In *Drozd and Janousek*, attribution of the Andorran court's acts to Andorra excluded simultaneous attribution of the same acts to France or Spain. A minority found it 'difficult to accept that there is a watertight partition between the entity of Andorra and the States to which the two Co-Princes belong, when in so many respects […] those States participate in

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633 ECtHR, *Drozd and Janousek v France and Spain*, 26 June 1992, application no 12747/87.

634 They were directly or indirectly appointed by the two co-princes of Andorra, the President of France and the Bishop of Urgel in Spain and for the purpose of serving in the Andorran courts acquired Andorran nationality, see Special Rapporteur Crawford, 'First Report on State Responsibility' (n 512) 45, para 226.

635 This is also explicitly pointed out by ibid 45, para 226.

636 ECtHR, *Drozd and Janousek* (n 633) para 96.

637 Den Heijer, *Europe and Extraterritorial Asylum* (n 584) 84.

638 ECtHR, *Drozd and Janousek* (n 633) para 110; The Court found that France could not be required 'to impose its standards on third States or territories'. France was consequently not obliged to verify whether the proceedings which led to the conviction were compatible with all the requirements of Article 6 ECHR, unless the conviction was the result 'of a flagrant denial of justice'.

its administration.'[639] They were not convinced by the majority's distinction between the acts of the Spanish and French authorities in their capacity as Andorran organs on the one side and their acts as Spanish and French organs on the other.[640] They rather considered that 'the Co-Princes should even now use their authority and influence in order to give effect in Andorra to the fundamental principles of the European Convention on Human Rights […].'[641] However, this seemed to be based on the historically unique position of Andorra and its specific relationship with the two respondent states rather than on a more general rejection of the exclusivity of attribution under Article 6 ASR.[642]

More recently, the Court discussed the question of a transfer of organs in *Jaloud v the Netherlands*.[643] At a checkpoint in Iraq, a patrol of six Dutch soldiers shot Mr Jaloud, a passenger in an approaching car that had refused to stop. In his application to the ECtHR, Jaloud's father argued that the investigation carried out was insufficient to meet the Netherlands' procedural obligations under Article 2 ECHR, guaranteeing the right to life. The Court eventually agreed with the applicant and found the Netherlands responsible for failures in investigating the incident.[644] However, at the heart of the case was the preliminary question of whether the Convention was applicable at all.

The Dutch soldiers were present as part of the 'Stabilization Force in Iraq' under a UN Security Council mandate. They belonged to a unit that was under UK command. In light of this, the Dutch government argued that the events that led to the death of Mr Jaloud did not fall within its jurisdiction according to Article 1 ECHR, and that the Convention was therefore inapplicable.[645] For the Convention to be applicable with respect to the Netherlands, the Court had to satisfy itself that the Netherlands exercised either effective control over the area in question, or, more relevant in this case, authority and control over the victim, Mr Jaloud.[646] That was only possible,

639 Ibid Joint Dissenting Opinion of Judges Pettiti, Valticos and Lopes Rocha, approved by Judges Walsh and Spielmann.
640 Special Rapporteur Crawford, 'First Report on State Responsibility' (n 512) 45, para 226.
641 ECtHR, *Drozd and Janousek* (n 633) Joint Dissenting Opinion of Judges Pettiti, Valticos and Lopes Rocha, approved by Judges Walsh and Spielmann; for more detail see den Heijer, 'Issues of Shared Responsibility before the European Court of Human Rights' (n 459) 22.
642 The case was decided before a treaty in 1993 settled Andorra's status as a state, see Messineo, 'Attribution of Conduct' (n 548) 85–86.
643 ECtHR, *Jaloud* (n 444).
644 Ibid paras 183-228.
645 For detail see ibid paras 112-120.
646 These general rules are reiterated in ibid para 139.

however, if the Dutch soldiers were attributable to the Netherlands in the first place, not to the UK in particular.[647]

The Court observed that the Dutch soldiers were at the relevant time under the operational command of the UK and took their day-to-day orders from a UK officer. However, it pointed out that the Netherlands continued to have authority regarding 'the formulation of essential policy', it 'assumed responsibility for providing security in [the] area, to the exclusion of other participating States', and 'retained full command over its contingent there'.[648] That being so, the Court, explicitly invoking Article 6 ASR, found that the Dutch troops were not 'placed "at the disposal" of any foreign power, whether it be Iraq or the United Kingdom or any other power, or that they were "under the exclusive direction or control" of any other State'.[649] Since the powers the Dutch soldiers exercised (in the name of the Netherlands) were sufficient for the establishment of jurisdiction within the meaning of Article 1 ECHR, the Convention was applicable to the Netherlands.[650]

It thus seems that the operational command exercised by the UK over the Dutch soldiers was not sufficient on its own for the purposes of attributing their conduct to the UK, in particular because the UK's authority over the Dutch soldiers was not exclusive. In this light, the Court in *Jaloud* appears to have continued to adopt a particularly strict approach towards attribution of conduct of lent organs.[651]

3.3.2.3 Article 6 ASR in the context of Frontex operations

As explained above, the starting point is that personnel deployed during Frontex operations act in the name of the entity that has contributed them.[652] However, the authority transferred to the host state over person-

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647 The Court itself was, however, not entirely clear on the relationship between its analysis of the attribution of conduct and the establishment of jurisdiction for the purposes of Article 1 ECHR. For a discussion see Aurel Sari, 'Untangling Extra-territorial Jurisdiction from International Responsibility in *Jaloud v. Netherlands*: Old Problem, New Solutions?' (2014) 53 Military Law and the Law of War Review 287; Jane M Rooney, 'The Relationship between Jurisdiction and Attribution after *Jaloud v. Netherlands*' (2015) 62 Netherlands International Law Review 407; Friederycke Haijer and Cedric Ryngaert, 'Reflections on *Jaloud v. the Netherlands*' (2015) 19 Journal of International Peacekeeping 174.

648 ECtHR, *Jaloud* (n 444) paras 146-149.

649 Ibid para 151, even though the Court in this respect explicitly invoked Article 6 ASR, it implicitly also relied on Article 8 ASR by referring to para 406 of ICJ, *Genocide Convention* (n 516).

650 ECtHR, *Jaloud* (n 444) para 152.

651 See also Sari, 'Untangling Extra-territorial Jurisdiction from International Responsibility in Jaloud v. Netherlands' (n 647) 307–310, who argues that the Court thereby construed Article 6 ASR too narrowly and inconsistently with its earlier case law. It would, in his view, 'impose a regime of strict liability on contributing States', which 'finds little support in practice'.

652 See above 3.3.1.

nel deployed as 'team members' raises the question whether Article 6 ASR renders their conduct attributable to the host state whilst they exercise their tasks and powers during joint operations. This section analyses whether 'team members' may be considered 'transferred' to the host state according to Article 6 ASR. If that is the case, their conduct in violation of human rights triggers the host state's responsibility.

As described in the previous sections, an organ can be considered 'lent' to another state for the purposes of Article 6 ASR when the person is (1) an organ of the sending state, (2) exercises governmental authority of the receiving state, and (3) is placed at the receiving state's disposal (see also Figure 17). Border management is undeniably a task that involves the exercise of governmental authority.[653] Two key questions thus remain to be analysed in the following sections. First, are team members organs of another state? Second, can they be considered 'placed at the disposal' of the host state? Beyond consent – team members clearly do not operate against the will of the host state – the latter question rests on two conditions: acting for the purposes and under the exclusive authority of the host state.

3.3.2.3.1 Are team members state organs?

Whereas it is clear that team members contributed by participating states are organs of other states and as such fulfil the first requirement for the application of Article 6 ASR, this is more complex with respect to team members contributed by Frontex.[654] They are not organs of another state, but of another international organisation. Since Article 6 ASR is limited to interstate cooperation, the question is whether it can be applied, by analogy, to organs of international organisations lent to states.

In 1971 Special Rapporteur Ago considered that assistance in the form of lent organs may obviously also be 'provided not by another State but by an international organization or institution'.[655] In this vein, Article 6 ASR (then Article 9 ASR), as adopted on first reading, explicitly covered organs lent to states by international organisations.[656] It read:

> The conduct of an organ which has been placed at the disposal of a State by another State or by an international organization shall be considered as an act of the former State under international law, if that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it has been placed.

653 As discussed above, powers relating to immigration control are considered an exercise of governmental authority, see in the context of Article 5 ASR, ILC, 'ASR' (n 58) art 5, comm (2).

654 As discussed above, the term 'organ' in Article 6 ASR also covers persons attributable by virtue of Article 5 ASR, see ILC, 'Report of the Twenty-Sixth Session' (n 550) 290, para 18.

655 Special Rapporteur Ago, 'Third Report on State Responsibility' (n 603) 267, para 200.

656 See also, ILC, 'Report of the Twenty-Sixth Session' (n 550) 286, para 1, 'An analogous situation may arise where an organ is "lent" to a particular State, not by another State, but by an international organization.'

Upon reconsideration of the Articles, Special Rapporteur Crawford suggested omitting the reference to international organisations. Accepting that such situations were conceivable in theory, he found that there were few or no convincing examples of that in practice. Moreover, he considered that this would raise a range of complex questions, including with respect to the responsibility of the member states of the organisation. In his view, those difficulties outweighed the 'very limited clarification' that the inclusion of organs lent by international organisations would have offered.[657] Also pointing out that such situations were extremely rare, this suggestion was taken up by the ILC and the reference to international organisations deleted.[658]

The situation was not meant to be left unregulated altogether. A saving clause was introduced to allow discussion of the matter at a later stage.[659] Article 57 ASR for that purpose sets out that the ASR are 'without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.' The idea was to deal with those matters in a separate set of Articles. Yet, when the ARIO were adopted, the question of attribution of organs lent by international organisations to states remained open. Article 7 ARIO, which deals with the transfer of organs in the context of international organisations, is limited to organs lent to international organisations by states and other international organisations. However, no rule is provided for the transfer of organs from an international organisation to a state.

Importantly, in the drafting process the view was never expressed that the transfer of organs by international organisations to states required a different approach to the transfer of organs from one state to another. The decision to leave the former question open was based on the rare occurrence and complexity of the situation, rather than a rejection of the rule underlying Article 6 ASR. For the same reasons, closing that gap did not seem a priority during the drafting process of the ARIO. It may thus be assumed that Article 6

657 Special Rapporteur Crawford, 'First Report on State Responsibility' (n 512) 46, paras 228-229, 231.

658 It was noted during the discussion: 'There had been no objection to the elimination of the case of international organizations in article 9. It was evident that the situation contemplated in that article was extremely rare.', ILC, 'Summary record of the 2558th meeting' (UN Doc A/CN.4/SR/2558, Fiftieth Session 1998), 268, para 50; see also ILC, 'ASR' (n 58) art 6, comm (9), noting that the situation of international organisations lending organs to states 'is even more exceptional than the inter-State cases to which article 6 is limited.'

659 ILC, 'Report of the Fiftieth Session' (n 603) 85, para 424; see also ILC, 'ASR' (n 58) art 6, comm (9).

ASR applies by analogy to the transfer of organs by international organisations to states.[660]

3.3.2.3.2 Do team members act for the purposes of the host state?

According to Article 5(2) EBCG Regulation, 'Member States shall ensure the management of their external borders, *in their own interests and in the common interest of all Member States*'.[661] In this vein, when fulfilling border management tasks during Frontex operations, member states do not do so *exclusively* for the purposes of the host state.

However, they do act *predominantly* for the purposes of the host state. It is important to recall in this respect that the external borders continue to be borders of each member state, who are primarily responsible for the management of their respective sections.[662] In this light, it may be assumed that team members deployed during Frontex operations serve the purposes of the host member states within the meaning of Article 6 ASR.

3.3.2.3.3 Do team members act under the exclusive authority of the host state?

An organ acts under the exclusive authority of the receiving state when it is subject to the laws and instructions of the receiving state, not the instructions of the sending state.

The EBCG Regulation provides that, while performing their tasks and exercising their powers, team members 'shall comply with Union and international law and shall observe fundamental rights and the *national law of the host Member State*'.[663] In addition, it allocates the power to issue instructions to team members deployed during joint operations to the host state and establishes the concomitant obligation of team members to abide by those instructions.[664] Only two limits to this power are envisaged in the EBCG Regulation. First, the host state has to follow Frontex' views on these instructions, but only 'to the extent possible'.[665] Second, the instructions have to comply with the Operational Plan, which, however, the host state

660 See also Messineo, 'The attribution of conduct in breach of human rights obligations during peace support operations under UN auspices' (n 64) 200–201, noting, however, that 'a more specific provision in this respect would have been welcome.'; Messineo, 'Attribution of Conduct' (n 548) 88, arguing 'It should be added that the same rule in Article 6 of the ARSIWA also applies by analogy to the rare situation of an organ or agent of an international organisation transferred to a state for the exercise of governmental authority thereof.'

661 EBCG Regulation (n 18) art 5(2) [emphasis added].

662 Schengen Borders Code (n 3) art 1; EBCG Regulation (n 18) art 5(1), recital (6); see also above 2.1.1.2 and 2.1.1.4.

663 EBCG Regulation (n 18) art 40(2) [emphasis added].

664 Ibid arts 21(1), 40(3).

665 Ibid art 21(2).

itself has to agree to beforehand.[666] Home states, in contrast, essentially retain no more than the possibility of prohibiting certain uses of force before deployment and the authority to take disciplinary measures.[667] In sum, the EBCG Regulation subjects team members to the exclusive authority of the host state.

However, as explained in detail in Chapter 2, the Operational Plans set out a more detailed, more elaborate, and far more complex regime of authority over deployed resources.[668] In essence, there are multiple layers of authority that are exercised by different participating actors. As a result, the power of the host state to issue instructions to team members is less comprehensive in reality than it is by design.

During Frontex operations, instructions may essentially be issued at two levels. One is the 'operational level', i.e. the Joint Coordination Board (JCB), where the course of action to be taken by operational resources is decided and instructions regarding their deployment and tasks are determined. The other is the 'implementation level', i.e. the team leaders and commanding officers, who direct the units on the ground in order to achieve the course of action as defined by the Joint Coordination Board. It is important to note that in this light, only the instructions given by the Joint Coordination Board are based on real decision-making regarding the course of conduct to be taken. Thus, these are the instructions most relevant for the purposes of Article 6 ASR.

This raises the question of who can be considered the author of the instructions coming from the Joint Coordination Board. It is useful to recall in this context that the Joint Coordination Board meets within the International Coordination Centre (ICC), which is established by the host state in cooperation with Frontex and commonly located in the premises of the respective authority of the host state. It is led by a host state officer (the ICC Coordinator), who chairs the meetings, and ensures the daily running of the operation. However, decisions within the Joint Coordination Board are taken in different 'configurations' depending on the operational resources concerned.

Decisions that concern standard team members but no large assets contributed by a participating state are taken under the lead of the chair of the Joint Coordination Board, a host state officer. Even though all members of the Joint Coordination Board may be present and consulted, none of them can formally 'block' the decision. The instructions are passed on to the team members through team leaders, also host state officers. Against this background, standard team members can be considered to act exclusively under the instructions of the host state.

666 Ibid art 21(1-2).
667 Ibid arts 21(5), 40(6).
668 See above 2.4.3.1.3.

Decisions that concern team members deployed on large (often military) assets, e.g. vessels or aeroplanes, *require* that the National Official of the respective participating state is consulted. Whilst formally they have no explicit right to block decisions, in practice decisions are not taken until consensus is reached.[669] The Joint Coordination Board's instructions are passed on to the asset concerned by the National Official via the Commanding Officer, who is of the nationality of the respective asset. In this light, the authority to issue instructions to team members deployed on large assets is *shared* between the host state and the relevant participating state.

3.3.2.3.4 Conclusion

All team members contributed to Frontex operations by participating states or Frontex are 'state organs' for the purposes of Article 6 ASR. For the duration of their deployment, they exercise the host state's governmental authority. They act with the consent of and for the purposes of the host state.

Standard team members are also subject to the exclusive authority of the host state. They are therefore 'placed at the disposal' of the host state within the meaning of Article 6 ASR. As a consequence, if their conduct during Frontex operations violates human rights, the host state is responsible.[670] As described in more detail above, the application of Article 6 ASR breaks the original link with the home entity.[671] Since there is thus no simultaneous application of Article 6 ASR on the one hand, and Articles 4 ASR and 6 ARIO on the other, standard team members are organs *only* of the host state, not joint organs of the home and the host state. In this vein, their conduct is attributable *only* to the host state.

In contrast, team members deployed on large assets are under the shared authority of the host state and their home state. Hence, whilst they are *also* under the authority of the host state, this authority is not exclusive. If the requirement of exclusivity is understood strictly, the threshold of Article 6 ASR is therefore not met. Both the drafting history and commentaries to Article 6 ASR and the stringent approach adopted by the ECtHR, suggest that the lack of exclusivity indeed bars the 'transfer' of an organ within the meaning of Article 6 ASR. As a result, the conduct of team members deployed on large assets remains attributable to their respective home entities under Article 4 ASR. If they commit a human rights violation during Frontex operations, their home states are responsible.

669 For detail see above 2.4.3.1.

670 Reaching the same conclusion see also Mungianu, *Frontex and Non-Refoulement* (n 62) 70–73; den Heijer, *Europe and Extraterritorial Asylum* (n 584) 255–256.

671 See above 3.3.2.1.2.

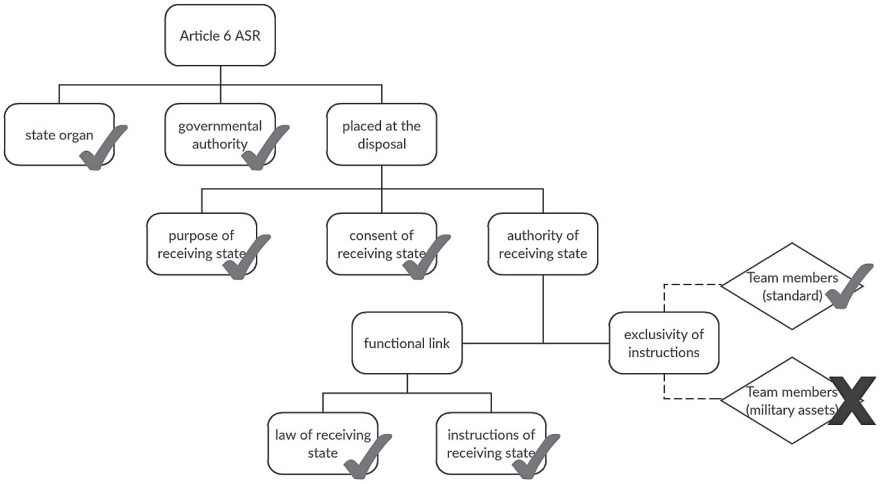

Figure 18: Article 6 ASR: application to Frontex operations

3.3.3 Attribution of conduct to the EU

3.3.3.1 Article 7 ARIO

3.3.3.1.1 The threshold of Article 7 ARIO

Article 7 ARIO deals with the situation where a state or an international organisation lends its organs to another international organisation. It is not applicable to organs fully seconded to international organisations, who are attributable to the international organisation as organs or agents according to Article 6 ARIO.[672] Article 7 ARIO instead concerns instances where states retain certain powers over their organs, such as disciplinary powers and criminal jurisdiction.[673] A transferred organ's conduct is attributable to the receiving international organisation under the following conditions:

> The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.

672 Critical on the distinction between organs fully seconded to an international organisation and otherwise put at its disposal see Aurel Sari, 'UN Peacekeeping Operations and Article 7 ARIO: The Missing Link' (2012) 9 International Organizations Law Review 77; Sari and Wessel (n 542) 132.

673 ARIO (n 58) art 7, comm (1); see also Special Rapporteur Gaja, 'Seventh Report on Responsibility of International Organizations' (n 539) 9, para 24.

When comparing Article 7 ARIO to its twin provision, Article 6 ASR, two differences are evident. First, Article 7 ARIO makes no reference to the exercise of governmental authority by the transferred organ. This was deliberately omitted since it seemed unsuitable for international organisations.[674] Instead, Special Rapporteur Gaja had proposed replacing it with a reference to the exercise of an organisation's functions, but this was not retained in the final text.[675] As opposed to Article 6 ASR, attribution under Article 7 ARIO is accordingly not limited to a specific type of act. Any act of a transferred organ can in principle be attributed to the receiving international organisation.[676] Second, even though the threshold of 'being placed at the disposal' of the receiving international organisation also features in Article 7 ARIO, it was considered necessary to further clarify what this entails. For this reason, the text of Article 7 ARIO explicitly requires the exercise of 'effective control' by the organisation over the impugned conduct.[677]

'Effective control' as a threshold for attribution of conduct of organs transferred by states to international organisations is generally accepted. However, its precise meaning, in particular the nature and extent of control required, has given rise to some controversy.[678] The ILC's commentaries

674 Special Rapporteur Gaja, 'Second Report on Responsibility of International Organizations' (n 550) 13, para 47; ILC, 'Report of the Fifty-Sixth Session' (n 575) 111, para 3; ARIO (n 58) art 7, comm (4).

675 The Special Rapporteur proposed the following wording for then Article 5: 'The conduct of an organ of a State or an international organization that is placed at the disposal of another international organization *for the exercise of one of that organization's functions* shall be considered under international law an act of the latter organization to the extent that the organization exercises effective control over the conduct of the organ.', see Special Rapporteur Gaja, 'Second Report on Responsibility of International Organizations' (n 550) 14, para 50 [emphasis added].

676 Blanca Montejo, 'The Notion of "Effective Control" under the Articles on the Responsibility of International Organizations' in Maurizio Ragazzi (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (2013) 392–393.

677 Special Rapporteur Gaja, 'Second Report on Responsibility of International Organizations' (n 550) 14, para 48.

678 Crawford, *State Responsibility* (n 426) 203, argues: 'It is generally accepted that the standard of effective control as identified in DARIO Article 7 is the preferred method for the determination of responsibility as between a state and an international organization.'; see also Hirsch (n 528) 64; Tom Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers' (2010) 51 Harvard International Law Journal 113, 140–141; Bérénice Boutin, 'Responsibility of the Netherlands for the Acts of Dutchbat in *Nuhanović* and *Mustafić*: The Continuous Quest for a Tangible Meaning for "Effective Control" in the Context of Peacekeeping' (2012) 25 Leiden Journal of International Law 521, 526–527; Messineo, 'The attribution of conduct in breach of human rights obligations during peace support operations under UN auspices' (n 64) 202; within the ILC, see ILC, 'Summary record of the 2800th meeting' (UN Doc A/CN.4/SR.2800, Fifty-Sixth Session 2004), 69, para 15; see however Brownlie in ILC, 'Summary record of the 2803th meeting' (UN Doc A/CN.4/SR.2803, Fifty-Sixth Session 2004), 90, para 36, who argued for more convergence with the ASR and thus a broader test of 'authority'.

define it as factual control that is exercised over the specific impugned conduct, assessed taking full account of the factual circumstances of a situation.[679] As such, effective control can be distinguished from both institutional control and normative control, both of which are neither required nor decisive under Article 7 ARIO.[680]

Even though the notion of effective control is not a concept of military command and control, it was primarily developed in the context of military operations, in particular UN peace operations.[681] Since the UN does not have its own military forces, it has to rely on contributions by states in order to conduct peace operations. This normally involves the transfer by states of a certain degree of authority over the deployed personnel to the UN, whilst retaining other powers, in particular in relation to discipline and criminal jurisdiction over troop members. Even though there may be divergence between peace operations as well as between different national contingents, UN-led operations commonly involve a transfer of operational control and/or command to the UN, exercised through a UN representative.[682] However,

679 ARIO (n 58) art 7, comm (4), see ILC, 'Summary record of the 2803th meeting' (n 678) 111, para 3; the fact that it entailed control over the specific conduct by the organ, not its general conduct was emphasised in the discussions, see ILC, 'Summary record of the 2810th meeting' (UN Doc A/CN.4/SR.2810, Fifty-Sixth Session 2004), 137, para 15; see also Hirsch (n 528) 64–65.

680 Tzanakopoulos (n 459) 40, who, however, makes the case for – under certain circumstances – considering normative control as effective control (40-45); on this proposition see also Tomuschat (n 425) 30.

681 Special Rapporteur Gaja, ‚Seventh Report on Responsibility of International Organizations' (n 539) 9, para 25; Hirsch (n 528) 66, points out: 'The most frequent utilization of the instrument of disposal of state organs is made by the various U.N. peace-keeping forces (though other international organizations also use this means).'

682 It is important to note that there is a major distinction in this context between UN-led and UN-mandated operations. With respect to the latter the command and control structure remains with the states. Hilaire McCoubrey and Nigel D White, *The Blue Helmets: Legal Regulation of United Nations Military Operations* (Dartmouth 1996) 142–144; Gill (n 361) 48–49; Dannenbaum (n 678) 144; Cathcart (n 366) 235; Patrick C Cammaert and Klappe Ben, '6.5 Authority, Command, and Control in United Nations-led Peace Operations' in Terry D Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press 2010) 160–161; Michael Bothe, 'Peacekeeping' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd edn, Oxford University Press 2012) 1191; Borhan Amrallah, 'The International Responsibility of the United Nations for Activities Carried out by U.N. Peace-Keeping Forces' (1976) 32 Revue égyptienne de droit international 57, 64; Robert C Siekmann, *National Contingents in United Nations Peace-Keeping Forces* (Martinus Nijhoff Publishers 1991) 111–119; Hirsch (n 528) 66; for detail see Finn Seyersted, 'United Nations Forces: Some Legal Problems' (1961) 37 British Yearbook of International Law 351, 356–404; the UN Principles and Guidelines on Peacekeeping Operations ('Capstone Doctrine') point out that only operational control, not however operational command is delegated to the UN, United Nations, Department of Peacekeeping Operations, 'United Nations Peacekeeping Operations: Principles and Guidelines' (2008), 68; Christopher Leck, 'International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct' (2009) 10 Melbourne Journal of International Law 1, 7.

the internal command structure within the national contingents is typically not replaced and tactical command and control is exercised by the National Officers over their own national contingents.[683]

It has been noted that the command and control arrangements during UN peace operations 'are significantly less neat and tidy' in practice than their legal set-up.[684] Thus, because contributing states retain a considerable degree of authority over their contingents in practice, it has been argued that national contingents 'find themselves serving two masters', the UN and their respective home state.[685] Nevertheless, operational command and/or control has commonly been considered decisive with respect to Article 7 ARIO, and conduct during UN-led peace operations has been argued to be attributed to the UN or to both, the relevant state and the UN, on that basis.[686] It should be borne in mind though that the 'effective control' test is applied with respect to the specific impugned conduct rather than the general command and control relationship between the entity and the individual, which is why attribution always depends on the circumstances of each case.

In simplified terms, this means that attribution, and as a consequence responsibility, lies with the entity that gives orders at the operational level.[687] Beyond this, there is very little clarity as to what else may amount to effective control.

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683 Gill (n 361) 49–50; Siekmann (n 682) 111–113; on the limits posed by the authority exercised at the national level see Dannenbaum (n 678) 144–148; for a definition of operational command/control and tactical command/control see above 2.4.3.1.1.

684 McCoubrey and White (n 682) 145, who explain the practical difficulties on 144-147; on the relationship with respect to command and control between the UN and the troop-contributing states in practice Leck (n 682) 7–12; Dannenbaum (n 678) 148–151; more generally see Siekmann (n 682) 98–119.

685 Dannenbaum (n 678) 148.

686 Pointing out that operational command and/or control is decisive: see reference in the commentaries to the UN Secretary-General's statement, ARIO (n 58) art 7, comm (9); see also the reference to operational control when the ILC distances itself from the 'ultimate control' standard, ibid art 7, comm (10) and ILC, 'Report of the Sixty-First Session' (n 575) 67, para 9; see also Marko Milanović and Tatjana Papić, 'As bad as it gets: The European Court of Human Rights's *Behrami and Saramati* Decision and General International Law' (2009) 58 International and Comparative Law Quarterly 267, 287; Montejo (n 676) 393–394; arguing for attribution to the UN, or both the UN and the contributing state, on that basis: Amrallah (n 682) 65-68, 74; Bothe (n 682) 1185; Hirsch (n 528) 67, Dannenbaum (n 678); Leck (n 682); Gill (n 361) 55–56, emphasises, however, that it depends on a case-by-case analysis; also Messineo argues for attribution to both the UN and the contributing state. He does so, however, on the basis of a parallel application of Article 4 ASR and Article 6 ARIO, Messineo, 'The attribution of conduct in breach of human rights obligations during peace support operations under UN auspices' (n 64) 223–230; for a more detailed analysis, including practice, see Marten Zwanenburg, *Accountability of Peace Support Operations* (Martinus Nijhoff Publishers 2005) 51–129; Seyersted (n 682) 404–435, in particular 428-429.

687 Milanović and Papić (n 686) 282.

The notion of effective control is also commonly discussed within the framework of Article 8 ASR. Article 8 deals with the attribution of conduct of private persons or groups of persons to states. It specifies that conduct of private persons is attributed to a state when they are 'in fact acting on the instructions of, or under the direction or control of' that state. In the *Nicaragua* case, the ICJ coined the threshold of 'effective control', understood as requiring specific directions on the part of the state.[688]

Article 8 ASR fulfils what has been identified above as a key role for rules on attribution, namely 'distinguishing the "State sector" from the "non-State sector" for the purposes of responsibility'.[689] If a state exercises effective control, conduct that would otherwise be considered 'private' gives rise to international responsibility. On these grounds, the ICJ emphasised the importance of a strict approach to Article 8 ASR.[690] Article 7 ARIO, in contrast, serves to allocate responsibility between two subjects of international law, in other words between 'two public sectors'.[691] The same concerns that mandate a strict approach to Article 8 ASR hence do not apply to Article 7 ARIO. Against this background, despite the similarity between the thresholds of the two Articles, nothing in principle speaks against applying a more lenient approach to Article 7 ARIO. However, the relationship between Article 6 ASR, Article 7 ARIO and Article 8 ASR remains particularly complex and Article 7 ARIO assumes somewhat of a middle position between Article 6 ASR and Article 8 ASR.[692]

In this manner, it has been argued that beyond 'giving orders', the possibility for the entities involved to prevent the unlawful outcome may also impact attribution of conduct. More specifically, Dannenbaum, for example, argues that the following question should determine attribution of conduct in this context:

> [G]iven the command and control authority and responsibility with which each entity was endowed, and given the de facto actions that each took, which entity was positioned to have acted differently in a way that would have prevented the impugned conduct?[693]

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688 See references in n 525.

689 Special Rapporteur Crawford, 'First Report on State Responsibility' (n 512) 33-34, para 154.

690 ICJ, *Genocide Convention* (n 516) 406.

691 These different purposes between Article 8 ASR and Article 7 ARIO are emphasised by the ILC, see ILC, 'Report of the Fifty-Sixth Session' (n 575) 111, para 4; ILC, 'Report of the Sixty-First Session' (n 575) 63-64, para 4; see also in the final commentaries, ARIO (n 58) art 7, comm (5); this is confirmed in literature Boon, 'Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines' (n 526) 25; Dannenbaum (n 678) 154–155; Kjetil M Larsen, 'Attribution of Conduct in Peace Operations: The "Ultimate Authority and Control" Test' (2008) 19 European Journal of International Law 509, 515; Messineo, 'Attribution of Conduct' (n 548) 91–96, who discusses the notion of 'effective control' in Article 7 ARIO in more detail.

692 Crawford, *State Responsibility* (n 426) 203; Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility' (n 520) 456–457; Montejo (n 676) 390–392.

693 Dannenbaum (n 678) 154, 157.

This relevance of the ability to prevent has also been advanced by other authors and gained support from the Dutch Court of Appeal in *Nuhanović v the Netherlands* and *Mustafić v the Netherlands*, later confirmed by the Dutch Supreme Court.[694] Crawford notes that 'it is too early to determine whether [this] liberal conception of control […] can be considered a legitimate addition to the law of state responsibility.'[695] It seems nonetheless that the power to prevent may at least be indicative of who exercises effective control in situations where no orders have been given.[696]

3.3.3.1.2 Article 7 ARIO and attribution to the home entity

If the threshold of Article 7 ARIO is met, like Article 6 ASR, it raises the question of how this 'transfer' affects the relationship between the organ and its original 'home' entity. Is the transferred organ a 'joint organ' between the sending state and the receiving international organisation, or is its conduct exclusively attributable to the international organisation?

Since Article 6 ASR and Article 7 ARIO have similar purposes, it would seem that Article 7 ARIO would also 'break' the link between the transferred organ and its original 'home' state.[697]

However, as opposed to Article 6 ASR, Article 7 ARIO does not require exclusivity of control over the conduct in question. What matters is the extent of effective control, which is a question of degree.[698] This, as Special Rappor-

694 See for example Boutin, 'Responsibility of the Netherlands for the Acts of Dutchbat in Nuhanović and Mustafić' (n 678) 528, 531-532, who argues that the effective control goes beyond direct orders (528) and that in the absence of such, it is relevant who could have prevented the relevant conduct (531-532); Sigmar Stadlmeier and Elisabeth Lischka, 'Attribution of Human Rights Violations committed during Multinational Military Operations' in Gerhard Hafner, Franz Matscher and Kirsten Schmalenbach (eds), *Völkerrecht und die Dynamik der Menschenrechte: Liber Amicorum Wolfram Karl* (Facultas 2012) 396; Hoffmeister (n 566) 745; The Hague Court of Appeal, *Nuhanović v the Netherlands*, judgment of 5 July 2011, ILDC 1742 (NL 2011); on the same day it rendered its judgment in *Mustafić v the Netherlands*; for a discussion see Boutin, 'Responsibility of the Netherlands for the Acts of Dutchbat in Nuhanović and Mustafić' (n 678); André Nollkaemper, 'Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica' (ACIL Research Paper No 2011-11, SHARES Series, 2011); confirmed in Supreme Court of the Netherlands, *the Netherlands v Nuhanović* (case no 12/03324), judgment of 6 September 2013.

695 Crawford, *State Responsibility* (n 426) 209.

696 Boutin, 'Responsibility of the Netherlands for the Acts of Dutchbat in Nuhanović and Mustafić' (n 678) 531–532; Nollkaemper, 'Dual Attribution' (n 694).

697 On Article 6 ASR see above 3.3.2.1.2; see also Talmon, 'Responsibility of International Organizations: Does the European Community Require Special Treatment?' (n 538).

698 This was emphasised in distinguishing it from Article 6 ASR, see ARIO (n 58) art 7, comm (4); ILC, 'Report of the Sixty-First Session' (n 575) 63, para 3; ILC, 'Report of the Fifty-Sixth Session' (n 575) 111, para 3; more clearly pointing out the difference in the requirement of exclusivity see Special Rapporteur Gaja, 'Second Report on Responsibility of International Organizations' (n 550) 14, para 48; ILC, 'Summary record of the 2800th meeting' (n 678) 68, para 9.

teur Gaja noted, may 'also leave the way open for dual attribution of certain conducts.'[699] It is indeed conceivable that two entities simultaneously exercise effective control over the impugned conduct. In this vein, if the sending state and the receiving international organisation both exercise effective control, the conduct in question is attributable to both of them and triggers the responsibility of both.[700]

3.3.3.2 Article 7 ARIO in the case law of the ECtHR[701]

The application of Article 7 ARIO by the ECtHR has given rise to substantial controversy. In particular, the ECtHR seems to have applied diverging approaches in two cases concerning UN-authorised military operations, namely *Behrami* on the one hand and *Al-Jedda* on the other.

At the centre of *Behrami* were the international civil and security presences in Kosovo (UNMIK and KFOR respectively) that had been established under UN auspices after the NATO air strikes on Kosovo in 1999. In *Behrami and Behrami* v *France* and *Saramati* v *France, Germany and Norway* the ECtHR had to examine whether it was competent to scrutinise the respondent states' participation therein.[702]

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699 Special Rapporteur Gaja, 'Second Report on Responsibility of International Organizations' (n 550) 14, para 48; he later noted that this may be particularly true outside the military context, see Special Rapporteur Gaja, 'Seventh Report on Responsibility of International Organizations' (n 539) 9, para 25.

700 This view is also expressed by, Ömer F Direk, 'Responsibility in Peace Support Operations: Revisiting the Proper Test for Attribution Conduct and the Meaning of the «Effective Control» Standard' (2014) 61 Netherlands International Law Review 1, 10–14; Crawford, *State Responsibility* (n 426) 204; Boris Kondoch, '30. The Responsibility of Peacekeepers, Their Sending States, and International Organizations' in Terry D Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press 2010) 523; Bothe (n 682) 1193; Salerno (n 624) 417; Ahlborn, 'To Share or Not to Share?' (n 526) 10, who considers that 'multiple attribution of conduct seems to be compelling in cases of peacekeeping'; Leck (n 682) 17; Dannenbaum (n 678); Alexander Orakhelashvili, 'Division of Reparation between Responsible Entities' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 653–654; of a different view, however Hoffmeister (n 566) 727, who considers that rules on attribution always distribute responsibility either to the state or the organisation; Messineo, 'The attribution of conduct in breach of human rights obligations during peace support operations under UN auspices' (n 64) 208–209, he argues that 'the difference between Article 7 ARIO and Article 6 ASR seems to have occurred more by accident than by design.' He therefore suggests interpreting effective control as a criterion of exclusivity, in order to achieve best possible convergence with Article 6 ASR.

701 This section is partially based on two earlier publications, Melanie Fink, 'Allocating Responsibility through Attribution' in Matthias C Kettemann (ed), *Grenzen im Völkerrecht* (Jan Sramek 2013); Melanie Fink, 'The European Court of Human Rights and State Responsibility' in Christina Binder and Konrad Lachmayer (eds), *The European Court of Human Rights and Public International Law* (Facultas 2014).

702 ECtHR, *Behrami* (n 456).

The first application, *Behrami and Behrami*, concerned a group of boys playing in the municipality of Mitrovica in March 2000. They encountered undetonated NATO bombs, one of which exploded killing Gadaf Behrami and seriously injuring Bekim Behrami. Their father complained that France, who led the Multinational Brigade in charge of Mitrovica, had not respected the provisions of Security Council Resolution 1244 on mine clearance. In the second application, Ruzhdi Saramati complained about being under arrest between July 2001 and January 2002. He brought the case against Norway, France, and Germany as he was arrested and detained initially on the orders of a Norwegian commander, then on the order of a French commander. As the alleged involvement of German officers could not be verified, Saramati later withdrew his complaint against Germany. In both cases, the respondent states disputed the Court's jurisdiction *ratione loci* and *ratione personae*. The arguments revolved around the issue of whether the applicants fell under the respondent states' jurisdiction according to Article 1 ECHR.

According to the ECtHR, it was undisputed that it was the international presences (instead of the Federal Republic of Yugoslavia) who controlled Kosovo within the meaning of Article 1 ECHR.[703] This being the case, it decided to examine the compatibility *ratione personae* of the applicants' complaints with the Convention and discussed the attribution of the impugned conduct in that context.[704]

The Court first observed that the arrest and detention of Saramati came within the security mandate of KFOR whereas the supervision of demining activities fell within the mandate of UNMIK.[705] It then attributed the acts at stake in both cases to the UN. Regarding UNMIK, the Court held that, as a subsidiary organ of the UN, it was 'institutionally directly and fully answerable to the UNSC [United Nations Security Council]' and therefore attributable to the UN.[706] Attribution of the acts of KFOR proved to be more complex. The Court held that for the acts to be attributable to the UN, 'the key question is whether the UNSC retained *ultimate authority and control* so that operational command only was delegated.'[707] The 'ultimate authority and control' test in the Court's view served to establish whether the UNSC retained sufficient control over the acts such that the delegation of powers complied with the requirements under the UN Charter.[708] Factors it considered included the fact that Resolution 1244 imposed sufficiently defined limits on the exercise of the delegated powers and that the Resolution required

703 Ibid paras 69-70.
704 Ibid para 72.
705 Ibid para 127.
706 Ibid paras 142-143.
707 Ibid para 133 [emphasis added].
708 The Court – for this test – relies on language used by Sarooshi, see Dan Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (Oxford University Press 1999).

the leadership of KFOR to report to the Security Council.[709] Having outlined the chain of command in relation to KFOR, the Court held that 'KFOR was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action was, in principle, "attributable" to the UN'.[710] Since all the acts complained of were therefore attributable to the UN, the Court denied its competence *ratione personae*.[711]

Many commentators took issue with the Court's application of the rules on attribution of conduct in *Behrami*, in particular in relation to the conduct of KFOR.[712] Apart from the question of whether the Court's assumption of a 'delegation' of Chapter VII powers is accepted or not, the most criticised move was the Court's decision to link the notion of delegation to the assessment of attribution of conduct. What the Court assessed was whether the Security Council retained as much control as was necessary to lawfully delegate powers, a question of internal institutional law of the UN. However, the crucial question in relation to international responsibility is whether it retained sufficient control to attribute conduct to the UN. The distinction is crucial because different thresholds of control apply to the legality of delegation and attribution of conduct. Whilst the institutional relationship between the international presences and the UN – in the form of a retention of ultimate authority and control by the UN – is relevant for internal institutional purposes, it is the factual relationship – effective control over the impugned conduct – that is decisive for the purpose of attribution. Linking these two questions, the Court attributed conduct of KFOR to the UN by analysing the legality of the Security Council's delegation of powers under Chapter VII.[713]

Not only scholars disagreed with the ECtHR's application of the attribution rules – the ILC also distanced itself from such an interpretation of Article 7 ARIO. It noted that 'when applying the criterion of effective control, "opera-

709 ECtHR, *Behrami* (n 456) para 134.

710 Ibid para 141.

711 Ibid para 149.

712 Francesco Messineo, 'The House of Lords in *Al-Jedda* and Public International Law: Attribution of Conduct to Un-Authorized Forces and the Power of the Security Council to Displace Human Rights' (2009) 56 Netherlands International Law Review 35, 41–43; Larsen, 'Attribution of Conduct in Peace Operations' (n 691) 512–525; Alexander Breitegger, 'Sacrificing the Effectiveness of the European Convention on Human Rights on the Altar of the Effective Functioning of Peace Support Operations: A Critique of *Behrami & Saramati* and *Al Jedda*' (2009) 11 International Community Law Review 155, 165–172; Dannenbaum (n 678) 151–156; Vanneste (n 439) paras 170-171; Damien van der Toorn, 'Attribution of Conduct by State Armed Forces Participating in UN-authorised Operations: The Impact of *Behrami* and *Al-Jedda*' (2008) 15 Australian International Law Journal 9, 18–23; Milanović and Papić (n 686) 281–289, who also argued that the Court was also not correct in assessing whose mandate it was, as this was irrelevant for the purpose of attribution, see 274.

713 Milanović and Papić (n 686) 281; see also van der Toorn (n 712) 18; Breitegger (n 712) 167–168.

tional" control would seem more significant than "ultimate" control, since the latter hardly implies a role in the act in question.'[714] It is important to note that the ECtHR did not seem, at least not explicitly, to intend to depart from the rules on attribution under general international law. The Court referred extensively to the ASR and the ARIO in the section on 'Relevant Law and Practice' and explicitly pointed out the 'effective control' test in Article 7 (then Article 5) ARIO.[715]

The ECtHR confirmed its decision in *Behrami* in subsequent cases.[716] The case of *Al-Jedda*, however, marked a new development.[717] The case concerned Mr Al-Jedda, who was born an Iraqi national and later acquired British citizenship, which he lost again as a consequence of the events that were the subject matter of the judgment of the ECtHR. Between October 2004 and December 2007, when travelling to Iraq, he was arrested and detained in a detention centre in Basra, Iraq, run by British forces, on account of being suspected of involvement in terrorist activities. However, no criminal charge was ever brought against him. Having unsuccessfully challenged the legality of his detention in the United Kingdom, Al-Jedda brought the case before the ECtHR and argued a violation of Article 5 ECHR.

Relying on the Court's decision in *Behrami*, the United Kingdom *inter alia* argued that at the relevant time its forces were part of a multi-national force authorised by the UN Security Council and operating under the 'ultimate authority' of the UN. Hence, in the UK's view, Al Jedda's detention was attributable to the UN and outside the UK's jurisdiction.[718] Against the backdrop of the criticism of the Court's decision in *Behrami*, *Al-Jedda* was considered an opportunity for the Court to re-evaluate its ultimate authority and control test.[719]

Examining whether the applicant's detention was attributable to the UK or the UN, the Court took into account the particular facts of the case including 'the terms of the United Nations Security Council Resolutions which formed the framework for the security regime in Iraq during the period in question'.[720] Three resolutions were of relevance in this context. At the time of the invasion of Iraq by US and UK forces on 20 March 2003, there was indeed no UN Security Council resolution authorising the invasion itself or the setting up of a security regime after the displacement of the Iraqi

714 ARIO (n 58) art 7, comm (10).
715 ECtHR, *Behrami* (n 456) paras 28-34.
716 ECtHR, *Berić* (n 456), here the Court used the threshold of 'effective overall control' (not 'ultimate authority and control'), see para 27; ECtHR, *Gajic v Germany*, 28 August 2007, application no 31446/02; ECtHR, *Kasumaj v Greece*, 5 July 2007, application no 6974/05.
717 ECtHR, *Al-Jedda v the United Kingdom*, 7 July 2011, application no 27021/08.
718 Ibid paras 64-68.
719 See also the judgments of the Court of Appeal of The Hague, Netherlands, 5 July 2011, Nuhanovic and Mustafic v The Netherlands, LJN:BR5388; ILDC 1742 (NL 2011).
720 ECtHR, *Al-Jedda* (n 717) para 76.

government. The first relevant resolution was Resolution 1483 of 22 May 2003, adopted shortly after major combat operations had been completed, in which the Security Council recognised the US and the UK, forming the 'Coalition Provisional Authority'), as 'Occupying Powers' in Iraq.[721] More significant, and central to the Court's analysis, was UNSC Resolution 1511, adopted on 16 October 2003. That resolution contained a Security Council authorisation to maintain security in Iraq and called for UN member states to contribute *inter alia* military assistance, under the UN mandate, to the multinational force in Iraq.[722]

Importantly, the Court found that the acts of the soldiers of the multinational force did not, as a result of the authorisation contained in Resolution 1511, become attributable to the UN, nor cease to be attributable to the troop-contributing nations. In essence, the resolution in question did not change the command structure over the force. It was still exercised by the troop contributing states, rather than the UN itself. The Court specifically noted that the periodic reports to the Security Council regarding the activities of the multi-national force did not confer on the UN 'any degree of control over either the force or any other of the executive functions of the Coalition Provisional Authority.'[723] This situation, according to the Court, did not change with the adoption of Resolution 1546 of 8 June 2004 as it merely 'reaffirmed the authorisation for the Multi-National Force established under Resolution 1511' and did not indicate 'that the Security Council intended to assume any greater degree of control or command over the Multi-National Force than it had exercised previously'.[724]

The Court then, unconvincingly as many authors noted, distinguished the case from *Behrami*, pointing out the UN's different role in Kosovo where it had authorised the deployment of the international presence from the start.[725] Having distinguished the two cases, the Court noted that it appeared to be common ground between the parties that the test to be applied in order to establish attribution was that set out by the ILC in Article 7 ARIO (then Article 5) and the commentaries thereto, i.e. that the conduct of an organ 'lent' by a state to an international organisation should be attributable to the latter if the organisation exercises effective control over that

721 Ibid para 78.
722 Ibid para 79.
723 Ibid para 80.
724 Ibid para 81.
725 Ibid para 83; putting forward the view that the situations in *Behrami* and *Al-Jedda* were, for the purposes of attribution of conduct, not distinguishable see Kjetil M Larsen, '"Neither Effective Control nor Ultimate Authority and Control": Attribution of Conduct in *Al-Jedda*' (2011) 50 Military Law and the Law of War Review 347, 357–358; Francesco Messineo, 'Things Could Only Get Better: *Al-Jedda* beyond *Behrami*' (2011) 50 Military Law and the Law of War Review 321, 333–336; Messineo, 'The House of Lords in Al-Jedda and Public International Law' (n 712) 43–47; Marko Milanović, '*Al-Skeini* and *Al-Jedda* in Strasbourg' (2012) 23 The European Journal of International Law 121, 136.

conduct. In light of its analysis of the resolutions in question, the Court concluded that the UN Security Council 'had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force and that the applicant's detention was not, therefore, attributable to the United Nations.'[726]

Two conclusions may be drawn from the Court's reasoning in *Al-Jedda*. The first is that, regrettably, it is not at all clear whether the ultimate authority and control test, the effective control test, or a combination of the two determines attribution of conduct of organs 'lent' by states to international organisations.[727] The second is that, by explicitly considering the effective control test, the Court in *Al-Jedda* nonetheless brings the threshold for attribution significantly closer to the one set out in Article 7 ARIO.[728] *Al-Jedda* may indeed be the closest the Court could have been expected to come to overruling *Behrami*. It has been argued, in this vein, that 'the practical result of *Al-Jedda* is that *Behrami* should no longer be considered "good law" when it comes to the attribution of conduct during UN-authorized peace support operations.'[729]

Against this background, the following sections work on the assumption that the effective control primarily test determines attribution. Yet, in light of the ambiguities left by the ECtHR, the potential consequences of the ultimate authority and control test will also be identified.

3.3.3.3 Article 7 ARIO in the context of Frontex operations

During Frontex operations, not only the host state, but also Frontex, exercise a certain degree of authority over the personnel involved. This raises the question whether Article 7 ARIO renders their conduct attributable to the EU whilst they exercise their tasks and powers during joint operations. In this vein, the following paragraphs analyse whether personnel deployed during Frontex operations may be considered 'transferred' to the EU according to Article 7 ARIO. If that is the case, their conduct in violation of human rights does not necessarily trigger the (primary) responsibilityof the states involved under the ECHR.[730]

726 ECtHR, *Al-Jedda* (n 717) para 84.

727 See also Larsen, '"Neither Effective Control nor Ultimate Authority and Control"' (n 725) 356; Frederik Naert, 'The European Court of Human Rights' *Al-Jedda* and *Al-Skeini* Judgments: An Introduction and Some Reflections' (2011) 50 Military Law and the Law of War Review 315, 317.

728 Naert, 'The European Court of Human Rights' Al-Jedda and Al-Skeini Judgments' (n 727) 317; den Heijer, 'Issues of Shared Responsibility before the European Court of Human Rights' (n 459) 37.

729 Messineo, 'Things Could Only Get Better' (n 725) 323, see also 337-340.

730 For more detail see above 3.1.2.1.

Article 7 ARIO has mainly been discussed with respect to operations under UN auspices, but may also apply to EU-led operations.[731] In the context of the EU, Article 7 ARIO has predominantly sparked debates on attribution of conduct during military crisis management operations in the framework of the CSDP. The CSDP is part of the Common Foreign and Security Policy (CFSP) and allows the Union to engage in missions outside its territory for peacekeeping, conflict prevention, and strengthening international security.[732] Because it thereby draws on the capabilities provided by states, including their personnel, questions regarding attribution of conduct similar to those in relation to UN peace operations arise.[733] Responsibility for the conduct of CSDP operations lies with the Council.[734] Under its authority, the Political and Security Committee exercises political and strategic control over operations.[735] A single military chain of command is established running through EU-designated commanders at the strategic, operational and tactical levels.[736] On this basis, the EU has commonly been considered to exercise effective control over conduct during CSDP operations, making such conduct attributable to it by virtue of the rule underlying Article 7 ARIO.[737]

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731 Pieter J Kuijper and Esa Paasivirta, 'EU International Responsibility and its Attribution: From the Inside Looking Out' in Malcolm D Evans and Panos Koutrakos (eds), *The international responsibility of the European Union: European and international perspectives* (Hart Publishing 2013) 54.

732 Consolidated version of the Treaty on European Union, [2012] OJ C326/13, art 42(1).

733 For more detail see Gloria Fernández Arribas, 'International Responsibility of the European Union for the Activities of its Military Operations: The issue of effective control' (2013-2014) 18 The Spanish Yearbook of International Law 33, 46–48.

734 TEU (n 732) art 43(2).

735 EU Concept for Military Command and Control (n 362) para 8.

736 Ibid para 9; see also Sari and Wessel (n 542) 137–138; Frederik Naert, 'The International Responsibility of the Union in the Context of its CSDP Operations' in Malcolm D Evans and Panos Koutrakos (eds), *The international responsibility of the European Union: European and international perspectives* (Hart Publishing 2013) 319–321.

737 Frederik Naert, *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights* (Intersentia 2010) 515–516; Naert, 'The International Responsibility of the Union in the Context of its CSDP Operations' (n 736) 335; Frederik Naert, 'Accountability for Violations of Human Rights Law by EU Forces' in Steven Blockmans (ed), *The European Union and Crisis Management: Policy and Legal Aspects* (T.M.C. Asser Institute 2008) 379–381; also, Sari and Wessel argue that 'the EU acquires a "particularly great degree of control" over national contingents participating in its missions, albeit be it on a temporary basis, and […] the contingents are completely dependent in their action upon the EU during their assignment.' On that basis they, however, do not attribute conduct to the EU according to the rule underlying Article 7 ARIO, but rather consider EU military missions *de facto* organs of the EU under Article 6 ARIO, Sari and Wessel (n 542) 140; similarly Wessel and den Hertog (n 571); see also Fernández Arribas (n 733) 56–57, who, however, points out that it depends on the facts of a specific case; also Tsagourias seems to lean towards attribution to the EU, even though not excluding attribution to the member states, Nicholas Tsagourias, 'EU Peacekeeping Operations: Legal and Theoretical Issues' in Martin Trybus and Nigel D White (eds), *European Security Law* (Oxford University Press 2007) 121–123; for more detail see also Zwanenburg, 'Toward a more mature ESDP: Responsibility for violations of international humanitarian law by EU crisis management operations' (n 582) 403–412.

Frontex assumes a crucially different role in the context of joint operations form that of EU bodies in relation to CSDP operations. As discussed in detail in Chapter 2, Frontex finances operations, sets out the framework within which all activities have to take place (in particular by drafting the Operational Plans), guides the host state in implementing it (e.g. through its views on instructions issued by the host state), and supervises the states involved in all their activities during joint operations. Importantly, however, within the chain of command, Frontex itself may at no point directly issue (operational) instructions to the deployed personnel.

Against this background, Frontex may be considered to exercise ultimate authority and control. However, effective control would require a more direct role by the agency in determining conduct during joint operations, in particular by issuing instructions to deployed personnel. Whilst Frontex does not currently have this possibility, it is better equipped with the means to prevent a wrongful outcome. For example, as explained in more detail in Chapter 2, the Executive Director can, in some instances even must, withdraw financial support of, suspend, or terminate joint operations when human rights violations occur.[738] This may be relevant because such a possibility can exceptionally, especially when no orders were given in a specific case, qualify as 'effective control'.[739] However, it is unclear, first, what weight the ECtHR would give to a possibility to prevent for the purposes of attributing conduct, and, second, how the host state's (greater) possibilities to prevent would affect the assessment.

In this light, it is safe to conclude, for current purposes, that Frontex cannot usually be considered to effectively control the conduct of personnel deployed during joint operations.[740] The threshold of Article 7 ARIO is thus not met and deployed personnel cannot be considered transferred to the EU.

It should be noted that this conclusion is reached on the basis of the current role Frontex assumes with respect to operations it coordinates. However, in light of Article 7 ARIO, it seems that only a shift of command and control to the EU level, and thus a truly 'supranationalised' system of European

738 See above 2.4.4.3.

739 Nollkaemper, 'Dual Attribution' (n 694) 6–7, he argues (page 17): 'Given the unique facts, and given the fact that attribution was based on the active involvement of the Netherlands in the evacuation process (a mere possibility to intervene would not have been enough) and that the case rests largely on the fact that the mission de facto had been completed, one should be very cautious in using the judgment as a possible basis for other claims in regard to liability of troop contributing countries.'

740 Reaching the same conclusion see also Mungianu, *Frontex and Non-Refoulement* (n 62) 68–70; Papastavridis, 'The EU and the obligation of non-refoulement at sea' (n 25) 256–257; see, however, Majcher (n 46) 58–64, who argues that in some cases conduct in violation of human rights during joint operations may be attributable to both the host state and Frontex.

border guards, would meet the requirements of Article 7 ARIO.[741] Provided member states were to continue to exercise control alongside the EU, conduct during such operations would in that case be attributable to both.[742]

3.3.4 Interim conclusion

This section has analysed the responsibility of home and participating states that arises directly from a human rights violation committed during an operation. The key question addressed was under what circumstances the host and participating states can be considered the authors of a Convention violation that occurs during a Frontex operation.

It results from the analysis that conduct of local staff and standard team members contributed by states or Frontex is attributable to the host state. The host state consequently bears responsibility if their conduct during Frontex operations breaches the Convention. The local staff are attributable to the host state under Article 4 ASR, i.e. simply because they have been designated as state organs by the host state itself. Team members are exclusively attributable to the host state under Article 6 ASR. Under that provision, the conduct of an organ of a state that is 'lent' to another state is attributable to the receiving state to the extent that the organ acts under the receiving state's genuine and exclusive authority. With respect to team members, this threshold is met essentially because they are subject to the laws and instructions of the host state whilst they are deployed.

Moreover, their conduct is not attributable to the EU by virtue of Article 7 ARIO because the transfer of authority to Frontex is not sufficient for that rule to apply. In particular, the mere fact that an international organisation finances certain activities or renders other forms of assistance does not make these activities attributable to it. Article 7 ARIO would require a transfer of certain command or similar powers that allow the organisation to directly determine the conduct in question. Since Frontex is not currently vested with such powers, conduct during Frontex operations is not attributable to the EU.

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741 See also Unisys, 'Study on the feasibility of the creation of a European System of Border Guards to control the external borders of the Union: Final Report Version 3.00' (16 June 2014), 25, where it is indicated that its proposal may involve 'an important change both in terms of responsibility and liability when centralising the competence for such specific operations exclusively at EU level'. Coming to the same conclusion see Rijpma, 'Frontex and the European system of border guards' (n 15) 239, who argues that 'a genuine transfer of executive power to an EU body would, in case of violations of fundamental rights, place the responsibility for such violations squarely with the EU and from that point of view would bring clarity to the legal twilight within which Frontex currently operates.'

742 On the possibility of multiple attribution in such situations see also above 3.3.3.1.2.

It also results from the analysis that, in contrast to the conduct of standard team members, the conduct of all other personnel deployed during Frontex operations remains attributable to their home entities. Hence, Frontex coordinating staff remain attributable to the EU under Article 6 ARIO. Most importantly, however, team members deployed on large assets, such as vessels or aeroplanes, also remain attributable to their original home state under Article 4 ASR.

The reason for the continued attribution of their conduct to their original home entities is that none of these persons can be considered 'placed at the disposal' of the host state or the EU. Article 6 ASR, which would make their conduct attributable to the host state, does not apply with respect to their conduct. Frontex coordinating staff are simply not subject to the instructions of the host state. Team members deployed on large assets are. Yet, the authority the host state exercises over them is not sufficiently exclusive because of the continued powers the respective contributing states retain within the chain of command. Article 7 ARIO, which would make their conduct attributable to the EU, is not applicable for the same reasons already pointed out with respect to standard team members, i.e. Frontex is not vested with sufficient powers to determine their conduct.

The result of the analysis is therefore as follows (see also the illustration in Figure 19):

- Host state officers ('local staff') remain attributable to the host state under Article 4 ASR, making the host state responsible for their conduct.
- Persons deployed as standard team members by participating states and persons deployed as standard team members by Frontex are attributable to the host state under Article 6 ASR, making the host state responsible for their conduct.
- Persons deployed as team members on large assets remain attributable to the contributing state under Article 4 ASR, making that state responsible for their conduct.
- Frontex staff deployed to exercise coordinating roles remain attributable to the EU under Article 6 ARIO, making no state directly responsible for their conduct under the ECHR.

Who?	Attributed to	Basis
LS	host state	4 ASR
TM (state)	home state	4 ASR
TM (Fx)	EU	6 ARIO
TM (milit. asset)	home state	4 ASR
Fx (coord) staff	EU	6 ARIO

Who?	Attributed to	Basis
LS	host state	4 ASR
TM (state)	host state	6 ASR
TM (Fx)	host state	6 ASR
TM (milit. asset)	home state	4 ASR
Fx (coord) staff	EU	6 ARIO

LS...'Local staff', TM...'Team member', Fx...'Frontex'

Figure 19: Attribution of conduct of human resources used for Frontex operations (result)

It should be borne in mind that local staff as well as persons deployed as team members are more likely to directly commit a human rights violation than Frontex staff. This is simply because, as explained in more detail in Chapter 2, they fulfil the core border management tasks and are availed of executive powers.[743] In this vein, it can be concluded that overall the host state is responsible for human rights violations that occur during Frontex operations. The most important exception is violations committed by team members on large large assets, such as vessels, which engage the responsibility of the respective contributing state.

As set out in more detail above, one violation may also be attributable to more than one entity at the same time.[744] Hence, in the context of Frontex operations, if two or more persons attributable to different entities realise a human rights violation through joint conduct, that violation engages the responsibility of both or all of them.

In practice, this means that when a team member, for example, uses excessive force, the human rights infringement is exclusively attributable to the host state (State A in Example 1). In this vein, the host state is exclusively responsible under the ECHR. However, the situation is more complex when large assets deployed by a participating state is involved in a human rights violation. For instance, in Example 2, a vessel deployed by State B to a sea border operation hosted by State A, hands over migrants on an intercepted boat to the authorities of a third state and thereby infringes the prohibition of *refoulement*. Because of the powers State B retains over its vessel, the impugned conduct is attributable to State B, not to State A. Thus, State B is responsible under the ECHR for the infringement of the prohibition of *refoulement* in Example 2. In contrast, if the vessel in question is contributed to the operation by State A itself, it is State A who is responsible.

The findings of this section are summarised in Table 5.

743 See above 2.3.3.1.
744 See above 0.

Table 5: Summary of findings (1)

	ECHR			CFR	
	Primary responsibility	**Associated responsibility (obligations to protect)**	**Associated responsibility ('complicity')**	**Primary liability**	**Associated liability**
Frontex/EU	No responsibility	*Chapter 3.4*	*Chapter 3.4*	*Chapter 4.3*	*Chapter 4.4*
Host state	Responsibility for breaches by local staff and standard team members				
Participating state (minor technical equipment)	No responsibility				
Participating state (standard team member)	No responsibility				
Participating state (large assets, e.g. vessels, aircraft)	Responsibility for breaches by team members on large assets they contributed				

3.4 Responsibility for associated conduct

As the previous section revealed, when ECHR violations occur during Frontex operations, only the state who exercised the most far-reaching authority over the acting individual bears responsibility as the 'author' of the breach.

In this manner, the host state turns out to be responsible for most human rights infringements no matter whether they originate in the conduct of its own local officers, or officers deployed as border guards, return specialists, or other experts. For instance, in Example 1, it is an officer that State C contributed who uses excessive force, but State A who bears responsibility for it. In contrast, where infringements originate in the conduct of personnel on a vessel or aeroplane contributed by a participating state, the respective state is responsible for them. In this vein, in Example 2, State B is responsible for the violation of the prohibition of *refoulement* that was committed by the vessel it contributed to the joint operation. However, State A, the host state, not only led the operation, but was also involved in the decision-making that led to the breach. The question thus is, does it bear responsibility for facilitating, or not preventing, the breach committed by State B?

But infringements that occur outside the mandate of a specific operation also raise similar questions. For example, whilst it is clear that the host state is responsible for setting up and maintaining migrant reception facilities that meet minimum human rights standards, the question arises whether a participating state may be responsible for knowingly bringing a migrant to a facility that does not meet these requirements (see Example 3). Similarly, whilst it is clear that a host state of a return operation is not directly responsible for return decisions adopted by participating states, the question arises whether the host state may be responsible for executing such decisions (Example 4).

Against this background, this section analyses the circumstances under which states that are not responsible for the primary breach in a specific case, are nonetheless responsible for conduct associated with the primary breach. The central question is whether contributing to, or not preventing, a violation of the ECHR may render the facilitating actor responsible. More specifically, in light of the findings of the previous section, the questions that form the focus of this section are the following:

- Is the host state responsible *in addition to the respective participating state* for breaches committed by them (e.g. in Examples 2 and 4)?
- Are participating states responsible *in addition to the primarily responsible state* for breaches attributable to the host or other participating states (e.g. in Examples 1 and 3)?

These questions are analysed in light of the obligations to protect individuals from human rights interference by others as developed by the ECtHR (Section 3.4.1). However, as the analysis will reveal, these obligations are not fully applicable to all relevant situations during Frontex operations. Section 3.4.2 thus offers an analysis of a second form of associated responsibility, namely the rules on aid or assistance under general international law, examining whether these may fill the 'gap' left by the doctrine of positive obligations.

3.4.1 Responsibility for violations of obligations to protect

In order to protect an individual from human rights interference by others, it may sometimes be sufficient to *abstain* from adopting a certain course of conduct. An example is the prohibition of *refoulement*, dicussed in more detail below, which prohibits states from exposing individuals to certain known risks to their rights by expelling them. However, in many situations, that will not be sufficient. The effective protection of an individual often requires a state to actively interfere with the course of conduct of the direct perpetrator. Thus, before looking in more detail at the obligations states have under the Convention to protect individuals from human rights interference by others, the following gives a brief overview of positive obligations under the ECHR more generally.

3.4.1.1 Positive obligations under the ECHR: an overview

Human rights are generally understood to encompass state obligations of a negative and positive nature. An obligation is 'negative' when it requires a state to abstain from action that would unduly interfere with the exercise of a right. Positive obligations, in contrast, are commonly considered to require member states to take action.[745]

Some Convention provisions explicitly contain aspects of positive obligations. Under Article 6 ECHR, for example, a state has to set up courts where fair and public hearings can be held, inform a person promptly of the accusations against him, and provide legal assistance and interpreters to those in need.[746] More importantly, however, the ECtHR has long held that Convention rights also contain implied positive obligations. The overarching rationale the Court relied on was that the protection of Convention rights needs to be 'practical and effective', not 'theoretical or illusory'.[747]

The foundations for the development of the doctrine of positive obligations was laid in *Marckx* and *Airey*, both decided in 1979. *Marckx v Belgium* concerned Ms Marckx and her daughter, who complained that Belgian law established no automatic family bond between unmarried mothers and their children.[748] Discussing whether Belgium had thereby breached their right to private and family life (Article 8 ECHR), the Court noted that the objective of that provision was essentially that of protecting the individual against arbitrary interference by public authorities, thus compelling the state to *abstain* from such conduct. However, it found that 'in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective "respect" for family life'.[749] Four months later, the Court decided the case of *Airey v Ireland*, brought by Ms Airey who sought to separate from her abusive husband.[750] This possibility was available by law, but practically too expensive for Ms Airey. The Court found in particular that Ireland had breached its positive Convention obligation to make separation 'effectively accessible, when appropriate, to anyone who may wish to have recourse thereto'.[751]

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745 Dinah Shelton and Ariel Gould, 'Positive and Negative Obligations' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 562–563; for more detail on the definition of positive obligations and the (difficult) distinction between negative and positive obligations, see Malu Beijer, *The Limits of Fundamental Rights Protection by the EU: The Scope for the Development of Positive Obligations* (Intersentia 2017) 41–46.

746 Another example is Article 3 of Protocol No 1 to the ECHR, which requires states to hold free elections at reasonable intervals.

747 Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart 2004) 221.

748 ECtHR, *Marckx v Belgium*, 13 June 1979, application no 6833/74.

749 Ibid para 31.

750 ECtHR, *Airey v Ireland*, 9 October 1979, application no 6289/73.

751 Ibid para 33.

Whilst *Marckx* and *Airey* left no doubt that states, beyond abstaining from arbitrarily interfering with Convention rights, may be required 'to take action', it is the extent of these positive obligations that raises the most complex questions. It is beyond the scope of this study to provide a detailed analysis of the Court's case law in this area.[752] However, the following paragraphs outline some of the most important duties states may incur under the doctrine of positive obligations.

In essence, positive obligations may require substantive or procedural action. Substantively, state parties may have to enact the laws or otherwise put in place the administrative framework necessary for the enjoyment of a specific right. This was the case, for example, in *Marckx*, but also in *Goodwin v the UK*, where the Court found that states were required to establish legal recognition of post-operative transsexuals.[753] Moreover, states may have to take other, more practical, steps to safeguard the rights of individuals. For example, a state may have to inform individuals of certain risks its authorities are aware of. This was held in *L.C.B. v the United Kingdom*, where an applicant who had been diagnosed with leukaemia argued that the authorities should have identified the extent of her father's exposure to radiation during the UK's nuclear tests on Christmas Island and warned her father to monitor her health accordingly. However, in that specific case, the Court found that the United Kingdom could not reasonably be considered to have failed to take action, in particular because of the insufficient information available to the authorities at the time.[754] Another example is *Öneryıldız v Turkey*, a case concerning an explosion at a public refuse tip operated by local authorities that claimed the lives of several persons living in the area.[755] The Court noted that the Turkish authorities knew or ought to have known that the refuse tip presented a real and immediate risk to persons living in the area. They therefore had a positive obligation under Article 2 ECHR to take such 'preventive operational measures as were necessary and sufficient to protect those individuals'.[756] Since appropriate steps had not been taken, the Court found Turkey to have violated the Convention.

752 For a detailed analysis of positive obligations in the context of the ECHR see in particular Mowbray (n 747); Dimitris Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (Routledge 2012); Laurens Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Intersentia 2016).

753 See above text to n 748-749; ECtHR, *Christine Goodwin v the United Kingdom*, 11 July 2002, application no 28957/95.

754 ECtHR, *L.C.B. v the United Kingdom*, 9 June 1998, application no 23413/94, paras 36-41.

755 ECtHR, *Öneryıldız v Turkey*, 30 November 2004, application no 48939/99.

756 Ibid para 101.

Procedurally, states are obliged to set up a domestic system to adequately respond to interference with the rights of individuals and provide remedies for them. In *McCann v the United Kingdom*, for example, the Court noted that the prohibition of arbitrary killing by state agents would be practically ineffective, if no procedure existed for reviewing the lawfulness of the use of lethal force by state authorities. Thus, the protection of the right to life also requires 'that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State'.[757] Also, in *Jaloud v the Netherlands*, discussed in more detail above, the Court found the respondent state to have breached its positive procedural obligations under Article 2 ECHR.[758] Similarly, *Assenov and Others v Bulgaria* concerned a positive duty under Article 3 ECHR to investigate the alleged beating of Mr Assenov whilst in police custody.[759] The Court held that where an individual raises an arguable claim that he has been seriously ill-treated by state authorities, Article 3 ECHR requires that there should be an effective official investigation capable of leading to the identification and punishment of those responsible.[760] Since the investigation carried out by the authorities in the case of Mr Assenov was insufficient, the respondent state was found to have violated its positive obligations under the Convention.[761]

3.4.1.2 Protecting individuals from interference by third parties

This section elaborates on the circumstances under which a state is required under the Convention to protect individuals from interference by others, whose acts are not attributable to it.[762] Generally speaking, apart from negative duties which will be discussed here, all positive duties described in the previous section also apply to situations where the risk or interference does not emanate from the respondent state's authorities, but from someone else. This includes, as will be explained, duties to adopt legislative or other rules, or to set up a domestic system to adequately respond to and sanction interference with the rights of individuals. However, the obligation most relevant to Frontex operations is the duty to take practical or operational measures to prevent interference from third parties. This will therefore form the focus of this section.

757 ECtHR, *McCann and Others v the United Kingdom*, 27 September 1995, application no 18984/91, para 161.

758 For more detail see above 3.3.2.2, in particular n 644.

759 ECtHR, *Assenov and Others v Bulgaria*, 28 October 1998, application no 24760/94.

760 Ibid para 102.

761 Ibid paras 103-106.

762 For a detailed study of state's obligations to prevent gross human rights violations committed by third parties see Nienke van der Have, 'The Prevention of Gross Human Rights Violations Under International Human Rights Law' (PhD thesis, University of Amsterdam 2017).

In principle, obligations to protect individuals may arise when interference stems from private parties, or from other public actors, i.e. states or international organisations. As will be shown in more detail in this section, the Court does not draw a general conceptual distinction between these two situations. Both will therefore be addressed in the following.

3.4.1.2.1 Interference by private parties

It is useful to recall at this point that conduct by private parties can as such only be the subject of a complaint before the ECtHR if it is attributable to a state and as such qualifies as 'state conduct'. Positive obligations, however, may require states to protect individuals from harm inflicted by private parties. Thus, whilst not making states directly responsible for human rights interference by private parties, a violation of positive obligations triggers responsibility of states for *their own failure* in not preventing it.[763]

Also in this context, positive obligations may be of a substantive or a procedural nature. Procedurally, states are required to set up efficient and independent judicial systems, in the context of which, for example, the cause of a murder can be established and the guilty parties punished.[764]

Substantively, states may be required to adopt specific legislative or other measures, including criminal law provisions, so as to afford individuals sufficient protection from interference by private parties. This was the case in *X and Y v the Netherlands*.[765] In *X and Y*, the Court noted that Convention obligations 'may involve the adoption of measures designed to secure respect for private life *even in the sphere of the relations of individuals between themselves*'.[766] It found the Netherlands to have indeed violated Article 8 ECHR because its criminal law did not provide for the possibility of instituting proceedings against the perpetrator of a sexual assault committed against X.[767] In *A v the United Kingdom*, the Court reached a similar conclusion on the basis of Article 3 ECHR.[768] The Court stated that Article 3 requires states to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals.[769] Since

763 Pointing out the parallel functions of attribution rules and positive obligations in this area see Monica Hakimi, 'State Bystander Responsibility' (2010) 21 The European Journal of International Law 341, 347–349.

764 See for example ECtHR, *Opuz v Turkey*, 9 June 2009, application no 33401/02, para 150.

765 ECtHR, *X and Y v the Netherlands*, 26 March 1985, application no 8978/80.

766 Ibid para 23 [emphasis added].

767 Ibid paras 24-30; see also *M.C. v Bulgaria*, where the Court held Bulgaria responsible under Articles 3 and 8 ECHR because its criminal law, combined with the application and investigation in the case at hand, did not provide sufficient protection against rape, ECtHR, *M.C. v Bulgaria*, 4 December 2003, application no 39272/98, paras 148-187.

768 ECtHR, *A v the United Kingdom*, 23 September 1998, application no 25599/94.

769 Ibid para 22.

English law allowed as a defence to a charge of assault on a child that the treatment in question amounted to 'reasonable chastisement', the respondent state's law could not be considered to offer adequate protection to the applicant against treatment or punishment contrary to Article 3 ECHR.[770]

Importantly, substantive positive obligations of states in relation to interference by private parties not only involve the adoption of appropriate rules, but may also require states to otherwise intervene preventatively, if the protection of an individual so requires. In *Osman v the United Kingdom*, for example, the Court confirmed this in relation to Article 2 ECHR.[771] The case concerned a father who was shot by his son's teacher. The Court analysed whether the respondent state had violated the right to life by failing 'to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual'.[772] Taking into account the difficulties in policing modern societies, the unpredictability of human conduct, and the limited availability of resources, the Court noted that positive obligations to prevent offences against individuals arise only to the extent that they do not impose an impossible or disproportionate burden on the authorities.[773] Against this background, it found that it was necessary that

> the authorities knew or ought to have known […] of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[774]

After a detailed examination, the Court found that on the facts of the case it could not be said that the authorities knew or ought to have known that the lives of the Osman family were at real and immediate risk. Consequently, it concluded that there had not been a Convention violation.[775]

In other situations, however, the Court has held the respondent states responsible for failing to step in to protect individuals from interference by other private parties. This was the case for example in *Opuz v Turkey* in relation to *inter alia* Articles 2 and 3 of the Convention.[776] The case concerned victims of domestic violence, which eventually resulted in the death of the applicant's mother. The Court essentially reiterated the principles set out in *Osman*.[777] In light of the facts of the case, the Court found that the lethal attack on the applicant's mother was indeed foreseeable for the state, who would incur responsibility if it failed 'to take reasonable measures which

770 Ibid paras 23-24.
771 ECtHR, *Osman v the United Kingdom*, 28 October 1998, application no 23452/94.
772 Ibid para 115.
773 Ibid para 116.
774 Ibid para 116.
775 Ibid paras 117-122.
776 ECtHR, *Opuz* (n 764); another examples is ECtHR, *Kılıç v Turkey*, 28 March 2000, application no 22492/93, paras 62, 76.
777 ECtHR, *Opuz* (n 764) paras 128-130.

could have had a real prospect of altering the outcome or mitigating the harm'.[778] Since Turkey had failed to display the diligence required for the protection of the rights of the applicants, e.g. placing the perpetrator in detention, ordering protective measures, or issuing injunctions, it was responsible under the Convention.[779]

Another example is *Z and Others v the United Kingdom*, a case concerning children that had been neglected and abused by their parents.[780] The Court reiterated that Article 3 ECHR required states to take reasonable steps to prevent ill-treatment by private individuals of which the authorities had or ought to have had knowledge.[781] In light of the seriousness of the abuse and the length of time that passed until the children were removed from their parents' care, the Court found that the United Kingdom had failed to live up to its protective duties under Article 3 ECHR.[782] Similarly, positive obligations of state parties to intervene in protection of individuals against other private parties have also been found to arise *inter alia* in the context of Article 8 ECHR (*López Ostra v Spain*), Article 9 ECHR (*Gldani v Georgia)*, and Article 11 ECHR (*Plattform Ärzte für das Leben v Austria*).[783]

3.4.1.2.2 Interference by other states or international organisations

The obligations to protect individuals from interference by others are not limited to acts of private parties. They also require states to offer protection against human rights violations by other states or international organisations.[784] Thus, responsibility may arise where a state fails to prevent a violation that is attributable to another state or international organisation.

The obligation to protect individuals from abuses by other states is particularly well developed in the area of the prohibition of *refoulement*.[785] The prohibition of *refoulement* essentially forbids the expulsion of an individual to another state where especially serious maltreatment would be inflicted upon the person. Whilst it is thus strictly speaking an obligation to *abstain* from taking action, i.e. a negative obligation, it is in many ways similar to

778 Ibid paras 133-136.
779 Ibid paras 137-149, 158-176.
780 ECtHR, *Z and Others v the United Kingdom*, 10 May 2001, application no 29392/95; other examples include ECtHR, *E. and Others v the United Kingdom*, 26 November 2002, application no 33218/96, paras 88-101; ECtHR, *Đorđević v Croatia*, 24 July 2012, application no 41526/10.
781 ECtHR, *Z and Others* (n 780) para 73.
782 Ibid paras 74-75.
783 ECtHR, *López Ostra v Spain*, 9 December 1994, application no 16798/90; ECtHR, *Gldani Congregation of Jehova's Witnesses and Others v Georgia*, 3 May 2007, application no 71156/01; ECtHR, *Plattform "Ärzte für das Leben" v Austria*, 21 June 1988, application no 10126/82.
784 Hakimi (n 763) 342.
785 Den Heijer, ‚Issues of Shared Responsibility before the European Court of Human Rights' (n 459) 27.

positive obligations. In particular, responsibility of the expelling state in these cases does not arise for the abuse inflicted on an individual by another state but for a failure to protect by expelling an individual despite the risk of such maltreatment.[786]

The prohibition of *refoulement* has been developed from, and is usually associated with Article 3 ECHR, the prohibition of torture or cruel, inhuman, or degrading treatment or punishment. Starting with *Soering v the United Kingdom*, the Court relied on the overriding importance and absolute character of Article 3 ECHR when it held that a state party may incur responsibility, 'where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country'.[787] In the recent case of *Ilias and Ahmed v Hungary*, for example, the Court found that Hungary had *inter alia* breached Article 3 ECHR, when it expelled two Bangladeshi asylum-seekers from Hungary to Serbia under a procedure that was not appropriate to provide the necessary protection against a real risk of inhuman and degrading treatment.[788]

In addition to Article 3 ECHR, other Convention provisions may engage an expelling state's responsibility for exposing an individual to certain risks in a receiving state. Where a risk to the right to life is at stake, this may raise an issue under Article 2. Execution of the death penalty might additionally engage responsibility under Article 1 of Protocol 6 or Article 1 of Protocol 13 (the abolition of the death penalty). In *Bader and Kanbor v Sweden*, holding that the applicant's deportation would expose him to a real risk of being executed and therefore to treatment contrary to Articles 2 and 3, the Court for the first time found a violation other than under Article 3 in the context of *refoulement*.[789] In exceptional cases, where the individual 'has suffered or risks suffering a flagrant denial of a fair trial in the requesting country', Article 6 can also pose a bar to expulsion.[790] Similarly, Article 8 may under certain

786 Hakimi (n 763) 343.

787 ECtHR, *Soering v The United Kingdom* (n 34) para 91; for a more detailed discussion of the ECtHR's application of Article 3 ECHR in *refoulement* cases see Cornelis W Wouters, *International Legal Standards for the Protection from Refoulement* (Intersentia 2009) 238–246; in later cases the Court confirmed that the protection from *refoulement* also applies to refugees, see ECtHR, *Cruz Varas v Sweden* (n 34); ECtHR, *Vilvarajah and Others v The United Kingdom* (n 34); the source of ill-treatment in the receiving state is thereby irrelevant, see ECtHR, *H.L.R. v France*, 29 April 1997, application no 24573/93, para 40.

788 ECtHR, *Ilias and Ahmed v Hungary*, 14 March 2017, application no 47287/15, paras 112-125.

789 ECtHR, *Bader and Kanbor v Sweden*, 8 November 2005, application no 13284/04; with further references see Maarten den Heijer, 'Whose Rights and Which Rights?: The Continuing Story of Non-Refoulement under the European Convention on Human Rights' (2008) 10 European Journal of Migration and Law 277, 280–281.

790 ECtHR, *Soering v The United Kingdom* (n 34) para 113.

circumstances prohibit expulsion where there are sufficiently adverse effects on the expelled individual.[791]

Among Schengen states, the prohibition of *refoulement* has been particularly relevant in the context of the Common European Asylum System. More specifically, several applications were brought against transferrals from one state to another under the 'Dublin system', according to which refugees can lodge an asylum application in only one state. Most notably, the case of *M.S.S. v Belgium and Greece* concerned an Afghan asylum seeker who entered the EU irregularly through Greece and travelled to Belgium, where he lodged his asylum application.[792] In accordance with EU law, Belgium transferred the applicant back to Greece. In doing so, the Court found that Belgium had failed to sufficiently protect the applicant and had thus violated Article 3 ECHR. First, the transfer of the applicant to Greece put him at risk of 'indirect' or 'chain' *refoulement*.[793] Due to the inherent deficiencies in the Greek asylum procedure, there was no guarantee that the asylum application would be seriously examined by the Greek authorities. Hence, the applicant was at risk that he would be expelled by Greece back to a country where he would face treatment contrary to Article 3 ECHR. Crucially, this situation was not only well known to the Belgian authorities, but they would also have had the possibility of refusing transfer to Greece.[794] Second, Belgium furthermore violated Article 3 ECHR by knowingly exposing the applicant to detention and living conditions in Greece that amounted to degrading treatment.[795]

The case of *Tarakhel v Switzerland* concerned similar challenges.[796] The applicants, an Afghan family, had requested an interim measure before the ECtHR, in order to suspend the enforcement of their planned transfer from Switzerland to Italy under the 'Dublin system'. In view of the situation as regards the reception system in Italy and the 'special protection' that asylum seekers require, the Court found that a transfer to Italy by the respondent state without having first obtained individual guarantees from the Italian authorities specific to the applicants' situation would violate Article 3 ECHR.[797]

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791 For more detail see den Heijer, 'Whose Rights and Which Rights?' (n 789); Hélène Lambert, 'The European Convention on Human Rights and the Protection of Refugees: Limits and Opportunities' (2005) 24 Refugee Survey Quarterly 39.

792 ECtHR, *M.S.S.* (n 485); see also above text to n 485-488.

793 On 'indirect' or 'chain' *refoulement* see also ECtHR, *T.I. v The United Kingdom*, 7 March 2000, application no 43844/98.

794 ECtHR, *M.S.S.* (n 485) paras 344-361.

795 Ibid paras 365-368.

796 ECtHR, *Tarakhel* (n 488).

797 Ibid paras 106-122.

It is noteworthy that the principle of mutual trust applicable under EU law does not release states from their obligations under the ECHR. This applies, as discussed above in the context of *Avotiņš*, when states are called upon to implement a decision of another EU member state.[798] It applies equally, however, in situations where states are required to protect individuals from risks they would be exposed to if returned to another EU member state. In *Tarakhel*, the Court pointed out that the presumption that other states participating in the 'Dublin system' complied with human rights was rebutted in the event that there were 'substantial grounds' for believing that the returnee faces a 'real risk' of being subjected to treatment contrary to Article 3 ECHR in the receiving state. The Court highlighted that the fact that another 'Dublin state' was the source of the risk to an individual, could not alter the level of protection guaranteed by the Convention or the Convention obligations of the state ordering the person's removal. In particular, it did not exempt states 'from carrying out a thorough and individualised examination of the situation of the person concerned and from suspending enforcement of the removal order should the risk of inhuman or degrading treatment be established'.[799]

Whilst the case law with respect to the obligation to protect individuals from interference by other states is most developed in the area of the prohibition of *refoulement*, state parties to the ECHR are also required to otherwise intervene for the protection of an individual's rights against another state or international organisation.

An example is *Ilaşcu v Moldova and Russia*.[800] The applicants in *Ilaşcu* were arrested and later convicted by a Court they claimed had no jurisdiction. What is important here is that this occurred in Transdniestria, a region that is *de jure* within Moldovan state territory, but *de facto* ruled by the authorities of the 'Moldavian Republic of Transdniestria'. They brought the case against both Russia and Moldova. In relation to Russia, it suffices to note that the applicants came within Russia's jurisdiction, essentially because Transdniestria was under its effective authority, and the Court found Russia's responsibility to be engaged.[801] More importantly here, is that Moldova was also found responsible. Whilst the Court acknowledged that Moldova did not exercise control over Transdniestria, it still had a positive obligation to take measures available to it to secure for the applicants the rights guaranteed by the Convention. The Court indeed found Moldova's responsibility to be

798 ECtHR, *Avotiņš* (n 477), in more detail on the question of mutual trust in that case see above 3.1.2.2.4.

799 ECtHR, *Tarakhel* (n 488) paras 103-104.

800 ECtHR, *Ila□cu and Others v Moldova and Russia*, 8 July 2004, application no 48787/99.

801 For the Court's findings on Russia's jurisdiction see ibid paras 392-394.

engaged for having failed to do so in relation to the breaches emanating directly from the authorities of the 'Moldavian Republic of Transdniestria' and/or Russia.[802]

The question of state obligations in relation to human rights infringements directly committed by other states notably also arose in cases dealing with extraordinary rendition.[803] This includes in particular *El-Masri v Macedonia*, the first decided by the ECtHR, but also *Al Nashiri v Poland*, *Husayn (Abu Zubaydah) v Poland*, and *Nasr and Ghali v Italy*.[804] The case of *El-Masri* concerned the extraordinary rendition of Mr El-Masri from Macedonia to Afghanistan by the CIA. In the process, the applicant was detained incommunicado over a period of over 20 days in a hotel in Skopje, subsequently handed over to CIA agents at Skopje airport, where he was subjected to torture, and then flown to Afghanistan and detained in a CIA-run facility, where he suffered ill-treatment for another four months.

Macedonia was held responsible for having breached Articles 3, 5, 8, and 13 ECHR. Most importantly for the current purposes, Macedonia was *inter alia* held responsible under Article 3 ECHR for the torture the applicant suffered at Skopje airport at the hands of CIA agents before his expulsion. In that respect, the Court emphasised that the acts complained of were carried out within the jurisdiction of the respondent state and in the presence of its officials. In this vein, the Court confirmed that Macedonia was 'responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities'.[805] Having established that the acts of these foreign officials amounted to torture, the Court held Macedonia responsible for the violation of the applicant's rights at Skopje airport since it had not only failed to take any measures to prevent the human rights infringements from occurring, but had also actively facilitated them.[806]

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802 Ibid in particular paras 322-352; this was essentially reiterated in ECtHR, *Catan and Others v Moldova and Russia*, 19 October 2012, application nos 43370/04, 8252/05 and 18454/06, in particular para 110. In that case, however, Moldova was found to have complied with its positive obligations (see in particular paras 147-148).

803 On this practice see in particular Manfred Nowak, '"Extraordinary Renditions", Diplomatic Assurances and the Principle of Non-Refoulement' in Walter Kälin and others (eds), *International law, conflict and development: The emergence of a holistic approach in international affairs* (Martinus Nijhoff Publishers 2010).

804 ECtHR, *El-Masri v Macedonia*, 13 December 2012, application no 39630/09; ECtHR, *Al Nashiri v Poland*, 24 July 2014, application no 28761/11; ECtHR, *Husayn (Abu Zubaydah) v Poland*, 24 July 2014, application no 7511/13; ECtHR, *Nasr and Ghali v Italy*, 23 February 2016, application no 44883/09.

805 ECtHR, *El-Masri* (n 804) paras 206, 211; in this vein see also ECtHR, *Al Nashiri* (n 804) paras 452, 517; ECtHR, *Husayn (Abu Zubaydah)* (n 804) paras 449, 512; ECtHR, *Nasr and Ghali* (n 804) paras 241 ,289.

806 ECtHR, *El-Masri* (n 804) paras 207-211, in particular para 211.

Throughout the judgment, the Court does not always exhaustively clarify the precise conceptual basis for Macedonia's responsibility.[807] However, it can be assumed that its responsibility for the torture Mr El-Masri suffered at Skopje airport arises on the basis of its failure to protect the applicant against interference by the CIA agents that it had knowledge of and the means to prevent.[808]

3.4.1.2.3 Conclusion

It is beyond dispute that states, under the Convention, have to protect individuals from human rights violations committed by others, which includes a duty to intervene where the protection so requires. The ECtHR's case law in this area is characterised by a case-by-case approach. However, for the present purposes, two important conclusions may be drawn from the overview above.

The first relates to the conditions under which states incur responsibility for a failure to protect individuals from interference by other public actors. On the one hand, under the prohibition of *refoulement*, they have to abstain from exposing an individual to risks of serious maltreatment that would be inflicted abroad if expelled. More importantly for the current purposes, they also have to take active steps to protect an individual, where this is necessary. It seems that the Court in this respect does not draw a conceptual distinction between interference by private parties on the one hand, and other states or international organisations on the other.[809] When it comes to the duty to take practical or operational measures to protect an individual, responsibility regularly arises under two conditions: The authorities (1) knew or ought to have known of a risk of ill-treatment contrary to the Convention, (2) but did not take reasonable steps to prevent it. Measures are 'reasonable' when they are available, have a real prospect of altering the outcome or mitigating the harm, and do not place a disproportionate burden on the state. In other words, states are under a due diligence obligation to take measures if they can realistically be expected to do so.[810]

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807 In this respect see in particular André Nollkaemper, 'The ECtHR Finds Macedonia Responsible in Connection with Torture by the CIA, but on What Basis?' (EJIL: *Talk!* 24 December 2012) <http://www.ejiltalk.org/the-ecthr-finds-macedonia-responsible-in-connection-with-torture-by-the-cia-but-on-what-basis/>.

808 The Court in this respect in particular reiterates states' positive obligations under Article 3 ECHR, see ECtHR, *El-Masri* (n 804) para 198, and when holding Macedonia responsible specifically refers to ECtHR, *Z and Others* (n 780), ECtHR, *M.C.* (n 767), and ECtHR, *Gldani v Georgia* (n 783), a line of case law discussed in more detail above 3.4.1.2.1.

809 In ECtHR, *El-Masri* (n 804) in particular para 211, for example, the Court relies on its case-law in the area of positive obligations that arise in relation to interference by private parties, when holding Macedonia responsible; see also den Heijer, 'Issues of Shared Responsibility before the European Court of Human Rights' (n 459) 27.

810 See in particular ECtHR, *Osman* (n 771) para 116; see also ECtHR, *El-Masri* (n 804) para 206, where the Court emphasised the presence of state officials and the acquiescence or connivance of the state; see also Beijer (n 745) 63–69; Shelton and Gould (n 745) 577.

Second, in line with the Court's case law, in particular *Avotiņš* and *Tarakhel*, the principle of mutual trust does not release states from this obligation.

3.4.1.3 Responsibility for failures to protect during Frontex operations

The following analyses the circumstances under which states that are involved in Frontex operations but are not directly responsible in a specific case, may nevertheless be responsible for failing to meet their obligations under the Convention to protect individuals from human rights interference by others.

3.4.1.3.1 Responsibility of the host state

Questions of associated responsibility of the host state arise in particular in two situations. The first is human rights violations that occur during joint operations for which a participating state is responsible, but the host state is not. This is the case where infringements originate in the conduct of personnel on large assets, such as vessels or aeroplanes, contributed by participating states (such as in Example 2).[811] Hence, the crucial question is whether the host state may be responsible for these under the doctrine of positive obligations.

In light of the above, such responsibility arises under two conditions, namely that the host state knew or ought to have known of an immediate and real risk of interference with an individual's Convention rights, but did not take measures available to it to prevent them.[812] As discussed in more detail in Chapter 2, the host state assumes the overall lead during Frontex operations. More specifically, it enjoys a central role within the International Coordination Centre and the Joint Coordination Board, the focal points for leading and coordinating the implementation of all operational activities as well as for communicating with and coordinating all assets and experts deployed.[813] In addition, any serious incidents, such as human rights violations, have to be reported immediately to the Frontex Situation Centre and the host state authorities.[814] Hence, it can safely be assumed that the host state at all times has, or should have, knowledge of potential human rights violations.

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811 See above 3.3.

812 See also *El-Masri*, where the Court more specifically found that a state is responsible for the acts of foreign officials carried out within its jurisdiction and with the acquiescence or connivance of its authorities, if it fails to take any measures that might have been necessary in the circumstances of the case to prevent it from occurring, see ECtHR, *El-Masri* (n 804) in particular paras 206, 211; see also above text to n 804-808.

813 See above 2.4.2.1.

814 See above 2.4.4.1.

The host state's leading role during Frontex operations at the same time equips it with the possibility to prevent human rights violations being committed by deployed assets. It in particular shares the authority over large assets with the respective contributing state. Whilst this is not sufficient to meet the threshold for attribution of of asset personnel's activities to the host state, it provides the host state with a range of measures to shape their conduct so as to prevent human rights violations.[815] For example, within the Joint Coordination Board, it may simply refrain from consenting to decisions that would lead to human rights violations.

Against this background, if human rights violations are committed by personnel on foreign vessels or aeroplanes, the host state incurs responsibility under the ECHR *alongside* the respective contributing state for having failed to prevent the occurrence of that breach.

The second relevant scenario where the associated responsibility of the host state may arise, concerns the situation where the implementation of a return decision issued by a participating state infringes the prohibition of *refoulement*. This begs the question whether the host state is itself also responsible for a violation of the prohibition of *refoulement* for executing the return decision in the framework of the Frontex operation (see in particular Example 4).

Whilst the principle of mutual trust allows the host state to presume that the participating state's return decision complies with human rights requirements, this presumption does not release the host state from its obligations under the Convention.[816] Thus, where the suspicion arises that the return of an individual would violate that person's rights, the host state has to assess whether there are substantial grounds to believe that the expulsion places the returnee at risk of being subjected to torture or to inhuman or degrading treatment or punishment. When that is the case, the host state is prohibited under the Convention from carrying out the return, and is responsible for a violation of the prohibition of *refoulement* if it does.

3.4.1.3.2 Responsibility of participating states

It was found above that participating states are responsible for human rights violations committed with the involvement of their own large assets, e.g. when their own vessels carry out interceptions during a border control operation at sea and violate human rights whilst doing so.[817] The question here is whether they may incur responsibility for human rights violations committed by other states, in particular the host state, for a failure to prevent them.

815 On attribution of conduct of persons deployed on large assets see above 3.3.2.3.4.
816 For more detail see above 3.1.2.2.4 and 3.4.1.2.2.
817 See above 3.3.

In principle, it is conceivable that responsibility arises from either of two aspects of the participating states' involvement.

First, responsibility may arise for contributing human and technical resources to a human rights violation of the host state. When discussing the predecessor to Article 6 ASR, the ILC indeed noted that 'the very act of placing some of a State's organs at the disposal of another State' could in itself constitute a breach of an international obligation of the sending or the receiving state. As an example, it pointed out that a state may be internationally bound not to furnish aid of any kind, and therefore also not to 'lend' any of its organs, to another state.[818]

At the outset, if the ECHR requires states to prevent infringements by others, it must *a fortiori* also prohibit active contributions. It may be assumed that this would at least require that the state knows or ought to know of the violation when rendering assistance. Such knowledge can be expected to exist, if the deficiencies in the host state are either structural, or inherent in the design of the specific operation. For example, if a host state's human rights record exposes systemic failures that would inevitably materialise during a Frontex operation, participating states must be assumed to know that their contributions would be used for human rights violations. This may be the case, for instance, where the conditions under which asylum seekers are detained are so inappropriate that they qualify as inhuman and degrading treatment (see also Example 3). Similarly, if the Operational Plan itself sets out a course of conduct that would be in violation of the ECHR, it has to be obvious to a participating state that it would be assisting in a human rights violation.

Second, participating states may be responsible for a failure to intervene at the moment a human rights violation occurs. Again, this would at least require that they know or ought to know of the infringement, but also that they have the means to prevent it. Depending on the extent of involvement of a participating state, the likelihood of gaining knowledge about the risk of a violation and the possibility to prevent it vary. Broadly speaking, there are three types of involvement that have different consequences in this respect.

1) States who contribute large assets are the most likely to gain knowledge of circumstances that may lead to a human rights violation. This is in particular because they have a National Official present on the Joint Coordination Board, which holds daily meetings where the past and ensuing 24 hours are discussed. Thus, they can be assumed to know when there is a risk that human rights violations may occur. Moreover, being present on the Joint Coordination Board and consulted with respect to activities during joint operations also makes it possible for them to change, or attempt to change, the course of conduct in order to prevent or mitigate foreseeable risks.

818 ILC, 'Report of the Twenty-Sixth Session' (n 550) 290, para 16.

2) States who contribute standard team members neither have National Officials present in the Joint Coordination Board, nor can they otherwise influence the decision-making process during the Joint Coordination Board's daily meetings. However, their team members may gain knowledge of risks of human rights violations in their respective areas of deployment and report these to their respective home state. Since a participating state cannot issue instructions to the team members it contributed, the only relevant option in those circumstances seems to be for that state to withdraw its assistance altogether. A specific challenge that additionally arises in this respect is that under the EBCG Regulation states are under an obligation to make personnel registered in a human resources pool available for joint operations. The EBCG foresees only one explicit exception to this obligation, namely where they are themselves faced with an exceptional situation substantially affecting the discharge of national tasks.[819] When rapid border control interventions are concerned, as a rule, no exception applies at all.[820] Unless the CJEU would find there to be an additional implicit exception where human rights law requires, states may indeed find themselves to be obliged, under the EBCG Regulation, to follow a course of conduct that contradicts their Convention obligations. This could indeed trigger the '*Bosphorus* presumption', meaning the ECtHR could decide to step back from detailed scrutiny of a participating state's conduct in a specific case, unless it finds the human rights protection granted by EU law in these circumstances to be manifestly deficient.[821]

3) States who contribute minor technical equipment, as a rule, do not seem to be in a position to either gain sufficient knowledge of imminent human rights risks during operations, or substantially alter the course of conduct.

In any case, with respect to both possibilities—responsibility for the contribution as such on the one hand and responsibility for a failure to intervene on the other—the main challenge does not lie in the lack of knowledge, possibilities to intervene, or the application of the '*Bosphorus*-presumption'. Rather, from the perspective of the participating state, human rights violations that may occur during Frontex operations are not only committed by another state, but more importantly, they also take place within another state. Whilst states more generally have to protect the rights of individuals within their territory, the Convention's applicability is more limited extraterritorially. Thus, the crucial question is whether the Convention prohibits states from contributing to, and requires states to intervene in human rights violations committed by other states within the latter's own territory.[822]

819 EBCG Regulation (n 18) arts 20(3), 29(3), 30(3), 31(3); for more detail see above 2.3.2.1.1 and 2.3.2.1.3.

820 Ibid art 20(5, 7); for more detail see above 2.3.2.1.2.

821 For more detail see above 3.1.2.2 and 3.1.2.3.

822 For a detailed analysis of state's obligations to prevent within their own territory and extraterritorially see van der Have (n 762).

Whilst this will not be discussed in detail here, some tentative observations may help to shed light on the challenges that arise in this respect.

According to Article 1 ECHR, the High Contracting Parties owe their Convention obligations to those individuals who come within their 'jurisdiction'. Whilst all individuals on a state's territory are generally within that state's jurisdiction, under some circumstances individuals that are outside a state's territory may also come within its jurisdiction.

One possibility is that a decision taken inside a state's territory adversely affects the rights of individuals abroad. For example, it is conceivable that the decision itself to participate in or to continue participating in a Frontex operation despite the foreseeability of specific human rights violations engages a state's responsibility. Some support for this argument can be found in *Soering*. As explained in more detail above, in that case the Court found that the *decision* by a state to extradite a person may engage its responsibility, where the person can be expected to face a real risk of torture if extradited.[823] Citing this passage, the Court observed in *Ilaşcu*, 'A State's responsibility may also be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction.'[824]

However, there is an important difference between *Soering* and situations such as Frontex operations. In *Soering*, the individual's rights were at risk outside the state's territory. But at the time of the decision to expose the individual to those risks, the individual was within the state's territory (and thus unquestionably within its jurisdiction). In contrast, in the context of Frontex operations, the decision to (continue to) contribute to an operation despite foreseeable human rights violations has consequences for individuals that are abroad, both at the time of the decision and at the time the risk materialises. Whilst the Court has not specifically addressed this question, it is doubtful that, as the law currently stands, states incur positive obligations under these circumstances.

The other possibility is that the individuals whose rights may be infringed during Frontex operations are within the participating states' jurisdiction even though they are abroad. Whilst complex in detail, it suffices to note here that state parties generally incur Convention obligations extraterritori-

823 ECtHR, *Soering v The United Kingdom* (n 34) para 91 [emphasis added].
824 ECtHR, *Ilaşcu* (n 800) para 317.

ally in the following two situations.[825] The first is where a state exercises 'effective (overall) control' over an area outside their own territory, which brings the individuals in that territory within the 'controlling' states' jurisdiction.[826] Clearly, this is not applicable in the present context. States participating in Frontex operations do not, by virtue of their participation, exercise effective control over the host state's territory. The second situation in which a contracting state incurs Convention obligations in relation to individuals abroad is where the state exercises 'authority and control' over them.[827] Authority and control over individuals may consist of either of two possibilities. On the one hand, a state may exercise physical power and control over individuals, like apprehending or detaining them, and thereby bring them under its jurisdiction.[828] On the other hand, a state may exercise all or some of the public powers abroad that are normally exercised by the government of the territory in question, with the consent, invitation, or acquiescence of that government. That brings the individuals affected by those public powers within the jurisdiction of the state who exercises them.[829]

It is indeed conceivable that in the context of a joint operation, participating states exercise authority and control over individuals, bringing them within their jurisdiction. Simply speaking, when they contribute a border guard to a joint operation, that border guard exercises border management functions in the territory and with the consent of the host state. They may thus be considered to participate in the exercise of public powers normally exercised by the host state alone. Whether this kind of *participation* in the exercise of public powers is really sufficient for the purposes of Article 1 ECHR is not entirely clear. But for the current purposes it is noteworthy that it may be.

825 The general rules were summarised in particular by the Court in ECtHR, *Al-Skeini and Others v the United Kingdom*, 7 July 2011, application no 55721/07, paras 130-142; reiterated more recently in ECtHR, *Jaloud* (n 444) para 139; for a detailed discussion of the Court's case-law on the Convention's extraterritorial application see for example Marko Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011); Maarten den Heijer and Rick Lawson, 'Extraterritorial Human Rights and the Concept of 'Jurisdiction'' in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2013); Rick Lawson, 'Life after *Bankovic*: On the Extraterritorial Application of the European Convention on Human Rights' in Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004).

826 See in particular ECtHR, *Loizidou v Turkey (Preliminary Objections)*, 23 March 1995, application no 15318/89, para 62; ECtHR, *Loizidou v Turkey (Merits)*, 18 December 1996, application no 15318/89, paras 52, 56; ECtHR, *Cyprus v Turkey*, 10 May 2001, application no 25781/94, paras 76-77.

827 See for example ECtHR, *Issa and Others v Turkey*, 16 November 2004, application no 31821/96, para 71; see also ECtHR, *Isaak v Turkey*, 24 June 2008, application no 44587/98.

828 See for example ECtHR, *Öcalan v Turkey*, 12 May 2005, application no 46221/99, para 91; ECtHR, *Medvedyev v France*, 29 March 2010, application no 3394/03, para 67.

829 See for example ECtHR, *Al-Skeini* (n 825) para 135.

Importantly, however, as a general rule, only participating states that contribute large assets, such as vessels or aeroplanes, may be considered to participate in the exercise of public powers in the host state. In contrast, states who deploy standard team members do not exercise such powers. The reason is that the conduct of their team members is exclusively attributable to the host state.[830] In the eyes of international law, during joint operations team members act solely in the name of the host state. As a consequence, whilst they exercise public powers, they do so in the name of the host state, not their home state. Thus, it appears that they do not bring the affected individuals within the jurisdiction of their home state. Notably, thus, the lack of control over them by their 'home' states that impedes attribution of conduct, also precludes extraterritorial application of the Convention.

In practice this means that individuals affected by border management activities conducted during joint operations may be within the jurisdiction *not only* of the directly responsible state, but also of participating states that contribute large assets. For example, if a host state vessel forces a boat carrying migrants back to its place of origin the individuals on that boat are arguably within the host state's jurisdiction.[831] This section shows, however, that in addition, the persons on that boat may be within the jurisdiction of those participating states that contribute large assets and thereby participate in the exercise of the host state's public powers. As a consequence, these participating states incur positive obligations under the ECHR and, under the circumstances described above, may consequently be responsible if they contribute to or fail to prevent a human rights violation committed by the host state in sending the boat back to its place of departure.

This conclusion, it should be noted, is tentative. The Court consistently requires the exercise of jurisdiction if the Convention is to apply extraterritorially. However, the details of what exactly amounts to jurisdiction and what does not remain disputed and cannot be exhaustively dealt with here.[832] Having set out a particularly strict understanding of the jurisdiction requirement in its decision in *Banković* in 2001, the Court has since then certainly shown willingness to loosen the criteria where the consequences would have seemed arbitrary or otherwise unjustified.[833] Yet, as a rule, the power or possibility to positively affect the situation of an individual who is abroad does not amount to an exercise of jurisdiction, if not accompanied by

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830 See above 3.3.2.3.4.

831 See above 2.4.1.3, in particular n 334.

832 For more detail see in particular Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (n 825); Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004).

833 ECtHR, *Banković and Others v Belgium and Others*, 12 December 2001, application no 52207/99; for a critique of *Banković* see Lawson, 'Life after Bankovic' (n 825); for the developments after *Banković* see in particular above n 827-829; for more detail see in particular den Heijer, *Europe and Extraterritorial Asylum* (n 584) 45–48; den Heijer and Lawson (n 825) 187–190.

some form of control over the territory in question or the affected individual.[834] In this vein, the mere possibility to prevent a human rights violation committed by another state abroad does not mean states incur an *obligation* under the Convention to do so. The case of states participating in Frontex operations illustrates in particular two things in this context: First, the line between sufficient and insufficient control for positive obligations to arise extraterritorially is unclear. It was tentatively drawn here between participating states that contribute large assets and those that do not. Ultimately, however, more specific case law and research on this question is needed to reach a more definite conclusion. Second, if participations in human rights violations that do not entail the control currently required for the exercise of jurisdiction are to be governed by ECHR law, a change in the present state of the law seems necessary. In this respect, there are in particular two possibilities. The first is to adopt a more lenient approach to the extraterritorial applicability of the ECHR.[835] The second is to hold states responsible under the rules on aid or assitance provided for under general international law. It is the latter possibility that is explored in more detail in the following section.

3.4.2 Responsibility for rendering aid or assistance[836]

As the analysis in the previous section revealed, positive obligations to protect are not fully applicable to all relevant situations during Frontex operations. Against this background, this section offers an analysis of a second

834 It should be noted, however, that in *Manoilescu and Dobrescu v Romania and Russia*, a case eventually declared inadmissible, the Court held that 'even in the absence of effective control of a territory outside its border' the state may still incur positive obligations under the Convention, see ECtHR, *Manoilescu and Dobrescu v Romania and Russia*, 3 March 2005, application no 60861/00, para 101; this was repeated in ECtHR, *Treska v Albania and Italy*, 29 June 2006, application no 26937/04. Importantly, however, this statement was explicitly based on *Ilaşcu*, where the Court found Moldova did incur positive obligations with respect to Transdniestria, an area *within its own territory* over which it had lost full effective control, see ECtHR, *Ilaşcu* (n 800), discussed in more detail above 3.4.1.2.2. Moreover, the idea that states incur positive obligations outside their own territory without exercising jurisdiction does not seem to have gained support in later case law. See also Kjetil M Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (Cambridge University Press 2012) 220–224.

835 See also below 5.4.2.2; arguing for a wider understanding of 'jurisdiction' see also Fabiane Baxewanos, *Defending Refugee Rights: International Law and Europe's Offshored Immigration Control* (Neuer Wissenschaftlicher Verlag 2015) in particular 99-105; Fabiane Baxewanos, 'Relinking Power and Responsibility in Extraterritorial Immigration Control: The case of immigration liaison officers' in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation* (Routledge 2017).

836 This section is partially based on an earlier publication, Melanie Fink, 'A "blind spot" in the framework of international responsibility?: Third-party responsibility for human rights violations: the case of Frontex' in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation* (Routledge 2017).

form of associated responsibility, namely the rules on aid or assistance under general international law.

It should be noted that the ECtHR does not currently rely on the rules on aid or assistance beyond situations that would already be covered by obligations to protect arising under ECHR law. As will be discussed in more detail in this section, obligations to protect under ECHR law generally require more from a state than the rules on aid or assistance do. Hence, the only relevant scenario where the latter may usefully complement the former seems to be where obligations to protect do not apply, i.e. in situations outside an assisting state's jurisdiction. This section thus focusses on the question of whether the rules on aid or assistance may fill the 'gap' in the context of the ECHR where obligations to protect are not applicable to a specific situation.

3.4.2.1 Derivative responsibility under international law

International law provides for a set of rules dealing with responsibility of states for their involvement in an internationally wrongful act of other states or international organisations.[837] This type of responsibility is conditional upon a breach of international law by another state or international organisation, it is thus 'derivative'.[838] The underlying idea is that a contribution to a wrong ought to trigger legal consequences, even though the actor has not necessarily engaged in conduct prohibited by a primary obligation under international law.

Questions of derivative responsibility can only arise as a result of the participation of a state or international organisation in the acts of another international legal person. Where a state's involvement in the acts of individuals or groups of individuals is at stake, this may raise questions of attribution of those acts to the state, but no issue of derived responsibility arises.[839]

In his first, more detailed, discussion of derivative responsibility, Special Rapporteur Ago distinguished two conceptual categories of the '[i]mplication of a State in the internationally wrongful act of another state'.[840] The overall proposition was to treat situations where a state *participates* in the act of another differently from those where a state *constrains* another state in its freedom to decide whether or not to commit an international wrong.[841] In this vein, the ASR and the ARIO cover three different scenarios of derivative

837 ILC, 'ASR' (n 58) chapter IV; for the more specific obligations of states triggered by serious breaches of peremptory norms see Annie Bird, 'Third State Responsibility for Human Rights Violations' (2011) 21 European Journal of International Law 883.

838 See also ILC, 'ASR' (n 58) chapter IV, comm (8).

839 See for example Bernhard Graefrath, 'Complicity in the Law of International Responsibility' (1996) 29 Revue Belge de Droit International 370, 370.

840 Special Rapporteur Ago, 'Seventh Report on State Responsibility' (A/CN.4/307, Thirtieth Session, 1978), para 52.

841 Ibid paras 52-53.

responsibility. First, Article 16 ASR, Article 14 ARIO, and Article 58 ARIO provide that aid or assistance rendered in the commission of a wrongful act triggers responsibility of the assisting state or international organisation. Second, Article 17 ASR, Article 15 ARIO, and Article 59 ARIO concern direction and control exercised over the commission of an internationally wrongful act. Third, Article 18 ASR, Article 16 ARIO, and Article 60 ARIO deal with coercion of another state or international organisation to commit an internationally wrongful act. The provisions on aid or assistance cause the participating actor to incur responsibility 'for its own act in deliberately assisting another State [or international organisation] to breach an international obligation'.[842] In contrast, direction and control or coercion exercised over the commission of an internationally wrongful act trigger responsibility for the principal wrongful act itself.[843]

The most common forms of involvement of one state or international organisation in the wrong of another international entity fall under the provisions dealing with 'aid or assistance'. This is also the case for Frontex operations. The question that arises is whether, even in the absence of a specific obligation to protect (or inapplicability thereof), states involved in Frontex operations are responsible for assisting one another in what turns out to be a wrongful act.

The following section more closely examines the conditions under which responsibility for rendering aid or assistance arises. It traces the meaning of Article 16 ASR, taking into account not only its wording and the ordinary meaning of the terms, but also the commentaries to and the development of the provision.[844] Since a thorough analysis of state practice and *opinio iuris* in relation to Article 16 ASR would go well beyond the scope of this section, the discussion proceeds on the assumption that Article 16 ASR reflects customary international law. It should be noted, however, that as opposed to the attribution rules laid down in the ILC Articles, which are to a large

842 ILC, 'ASR' (n 58) art 16, comm (10); see also Graefrath (n 839) 371.

843 ILC, 'ASR' (n 58) art 17, comm (1), art 18, comm (1); Andreas Felder, *Die Beihilfe im Recht der völkerrechtlichen Staatenverantwortlichkeit* (Schulthess 2007) 89–95.

844 It should be noted here that even though the choice to draft the Articles in treaty form may induce the application of rules of interpretation inspired by the Vienna Convention on the Law of Treaties, these are unsuitable to give meaning to the ASR and the ARIO. The focus of the Vienna Convention on the ordinary meaning of the terms used rests on the basis that the language of a treaty reflects a final compromise reached by the contracting parties. This lends particular authority to the wording. In contrast, the ILC Articles represent the dominant view within the ILC, an expert body, meaning that minority views may not be reflected in the text. Since the wording of the Articles therefore does not have the same authority as the language of a treaty, the commentaries to and the development of the Articles bear more weight than they do in relation to treaties, where preparatory works only serve as supplementary means of interpretation. For more detail see David D Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority' (2002) 96 The American Journal of International Law 857, 868–870.

extent considered to reflect customary international law, the status of the prohibition of rendering aid or assistance remains disputed. Whereas the Special Rapporteurs initially leaned towards considering Article 16 ASR progressive development, the final commentaries to the Articles suggest a basis in customary international law.[845] Scholarly writings are divided on the issue, even though a majority of authors argue for a customary law basis for the provision.[846] In one of the rare cases where the prohibition of rendering aid or assistance in the commission of an internationally wrongful act has been addressed in international case law, the International Court of Justice confirmed the customary nature of the principle underlying Article 16 ASR in the *Genocide Convention* case.[847]

3.4.2.2 Responsibility for rendering aid or assistance

Article 16 ASR sets out the conditions under which responsibility for rendering aid or assistance, also referred to as 'complicity', arises.[848] It provides:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
> (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
> (b) the act would be internationally wrongful if committed by that State.

Article 16 rests upon three conditions. First, Article 16(b) confirms that the assisting state only incurs responsibility where it is itself bound by the primary obligation breached. This is understood as a safeguard in order to prevent the rules on derivative responsibility from undermining the principle that obligations between two states create neither rights nor obligations for third parties.[849]

The second requirement is concerned with distinguishing conduct that is suitable for triggering derivative responsibility from conduct that falls outside its scope. Assistance is required to reach a certain threshold and show effects on the wrongful conduct it facilitates.[850] This requirement is not explicitly addressed in the text of Article 16 but Special Rapporteur Craw-

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845 Aust (n 65) 97–98.

846 With extensive references to scholarly writings see ibid 98–99, who – on the basis of a thorough analysis of state practice and *opinio iuris* – confirms that Article 16 ASR represents customary international law, see page 191.

847 ICJ, *Genocide Convention* (n 516) para 420.

848 For a discussion of the various meanings of 'complicity' in international law see John Cerone, 'Re-examining International Responsibility: "Complicity" in the Context of Human Rights Violations' (2008) 14 ILSA Journal of International and Comparative Law 525.

849 For a critique of this requirement see Vladyslav Lanovoy, 'Complicity in an Internationally Wrongful Act' in André Nollkaemper, Ilias Plakokefalos and Jessica N M Schechinger (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press 2014) 156–161.

850 See also Crawford, *State Responsibility* (n 426) 405.

ford considered the use of the terms 'aid or assistance', accompanied by the commentaries, sufficient to make clear that a nexus between the wrongful act and the assistance rendered is to be established.[851] The commentaries to Article 16 explain in very general terms that 'the aid or assistance must be given with a view to facilitating the commission of the wrongful act, *and must actually do so*.'[852] Upon adoption of then Article 27 on first reading, the ILC suggested that the assistance rendered 'must have the effect of making it *materially* easier for the State receiving the aid or assistance in question to commit an internationally wrongful act'.[853] Yet, there is no requirement 'that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act'.[854] The decisive element in distinguishing conduct suitable for triggering derivative responsibility from other activities thus seems to be the impact rather than the type of assistance rendered.[855]

The third and most controversial requirement is found in Article 16(a), namely that the assisting state ought to have 'knowledge of the circumstances of the internationally wrongful act'. This suggests that responsibility arises if the assisting state is aware that its assistance is used for the commission of a wrongful act. In its commentaries, however, the ILC seems to adopt a somewhat narrower approach. It points out that assistance must be given 'with a view to facilitating the commission of an internationally wrongful act'.[856] More explicitly, the ILC clarifies that a 'State is not responsible for aid or assistance under article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct'.[857]

The nature of this requirement has given rise to divergent views. In particular, one position is to either regard intention as an additional limitation on derivative responsibility not contained in the wording of Article 16, or to narrow the meaning of 'knowledge' in Article 16(a) to 'intention' on the basis of the commentary or state practice.[858] Others, however, have questioned the usefulness of intent as a decisive criterion for complicity or

851 James Crawford, Second Report on State Responsibility, Addendum, A/CN.4/498/Add.1, para 180.
852 ILC, 'ASR' (n 58) art 16, comm (3) [emphasis added].
853 International Law Commission, Report on its Thirtieth Session, YILC 1978, vol II(2), 104.
854 ILC, 'ASR' (n 58) art 16, comm (5); see also Crawford, *State Responsibility* (n 426) 403 who argues that 'the required standard would […] appear to be one of substantial involvement on the part of the complicit state.'
855 For more detail on the scope of the 'material element' of 'complicity', see Lanovoy (n 849) 141–150.
856 ILC, 'ASR' (n 58) art 16, comm (3, 5); see also den Heijer, *Europe and Extraterritorial Asylum* (n 584) 96.
857 ASR (n 58) art 16, comm (5).
858 For the former see Crawford, *State Responsibility* (n 426) 406; for the latter see Aust (n 65) 235–241.

pointed to the inherent difficulty in determining the state of mind of a state or an international organisation.[859] Apart from the fact that a state will usually not officially declare the purposes of its aid, it often acts through several officials who might not share the same state of mind.[860] In addition, the difficulties in proving that aid is given specifically for the illegal purpose have been advanced in opposition to an intention requirement.[861]

The knowledge requirement contained in the text of Article 16 indeed seems to have developed in response to the wish to incorporate some form of intention as a 'subjective element'. Upon introducing the knowledge requirement into Article 16 which until then required that assistance 'is rendered for the commission of an internationally wrongful act', Special Rapporteur Crawford noted that, 'The proposal in the text retains the element of intent, which can be demonstrated by proof of rendering aid or assistance with knowledge of the circumstances.'[862] This is in line with how Special Rapporteur Ago seems to have understood the requirement of intention: 'The very idea of "complicity" in the internationally wrongful act of another necessarily presupposes an intent to collaborate in the commission of an act of this kind, and hence, in the cases considered, knowledge of the specific purpose for which the State receiving certain supplies intends to use them.'[863] Thus, it seems that the knowledge requirement may be considered a manifestation of intention, without additionally requiring a volitional element.

In this vein, intention may be established by demonstrating the participating actor had knowledge of the specific circumstances. This means the assisting state needs to be aware, first, of the commission of a wrongful act (as opposed to a general habit of another state of breaching international law) and, second, of the fact that the assistance given is used for that purpose.[864] Assisting another actor whilst being aware that the assistance is used for an international wrong implies that the participating actor accepted the anticipated consequences.[865]

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859 For example Graefrath (n 839); John Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility' (1986) 57 British Yearbook of International Law 77; Kate Nahapetian, 'Confronting State Complicity in International Law' (2002) 7 UCLA Journal of International Law and Foreign Affairs 99.

860 Quigley (n 859) 111.

861 Graefrath (n 839) 375.

862 At that time it was Article 27, see Special Rapporteur Crawford, 'Second Report on State Responsibility' (UN Doc A/CN.4/498, Fifty-First Session 1999), para 188, n 362.

863 Special Rapporteur Ago, 'Seventh Report on State Responsibility' (n 840) para 72.

864 See also Georg Nolte and Helmut P Aust, 'Equivocal Helpers - Complicit States, Mixed Messages and International Law' (2009) 58 International and Comparative Law Quarterly 1, 14–15; setting out a number of criteria that may be relevant in determining knowledge for the purposes of Article 16 ASR, see Lanovoy (n 849) 150–156.

865 See also den Heijer, *Europe and Extraterritorial Asylum* (n 584) 75, citing the 'Grotian theory of *culpa*' in connection with state responsibility for acts of individuals. For *culpa* knowledge is sufficient because 'knowledge implies a concurrence of will'.

3.4.2.3 Aid or assistance in the context of Frontex operations

The previous section showed that responsibility for 'complicity' arises under four conditions.

1. A state commits an internationally wrongful act (the 'receiving state'). For the current purposes, this would be a breach of the ECHR.
2. Another state (the 'assisting state') renders aid or assistance that makes it materially easier for that internationally wrongful act to occur.
3. The assisting state does so in the knowledge that the assistance is used for that internationally wrongful act.
4. The act would be internationally wrongful if committed by the assisting state, i.e. the assisting state is itself bound by the primary obligation breached by the receiving state.

These four conditions are necessary, but also sufficient. Most importantly, whilst it is required that the original internationally wrongful act would still be unlawful if committed by the assisting state, there is no need, in addition, for an obligation that prohibits a state from rendering assistance. For example, if the host state breaches the prohibition of *refoulement* during a Frontex operation, participating states may incur responsibility for rendering aid or assistance regardless of whether they additionally are under an obligation to prevent, or not to assist in, that violation. This at the same time renders the question of applicability of the Convention with respect to the assisting states futile. In other words, a participating state may incur responsibility for being complicit in a human rights violation by the host state, regardless of whether the victim of the violation is within its jurisdiction according to Article 1 ECHR.

Consequently, states involved in Frontex operations are responsible for having rendered aid or assistance if the four conditions set out above are met. Neither the first nor the fourth condition pose particular challenges in this context. A breach of human rights attributable to another state is simply presumed to exist for the current purposes. In addition, all states involved are contracting parties to the ECHR. A breach of the Convention by one of them would thus also be internationally wrongful if committed by any other.

The second and the third requirements are similar, but not identical to those that trigger responsibility for breaches of positive obligations to protect under the ECHR.[866] In essence, the provisions on 'aid or assistance' set a higher threshold for responsibility to arise than positive obligations.

866 See above 3.4.1.

On the one hand, 'complicity' requires knowledge. In contrast, it is sufficient to show that a state 'ought to have had knowledge' for responsibility under the doctrine of positive obligations to arise. Whilst the former can be more difficult for applicants to prove, it appears that at least the host state, participating states that are represented in the International Coordination Centre through their National Officials, and participating states with team members on the ground who report back to them, can commonly be assumed to have actual knowledge.

On the other hand, responsibility for 'complicity' seems to require active conduct, whereas responsibility for violation of positive obligations by definition arises from failures to act. In this vein, the concepts of 'aid or assistance' and positive obligations have sometimes been distinguished along the lines of positive action and omissions. In the *Genocide Convention* case, the International Court of Justice held that

> complicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators of the genocide, while a violation of the obligation to prevent results from mere failure to adopt and implement suitable measures to prevent genocide from being committed. In other words, while complicity results from commission, violation of the obligation to prevent results from omission.[867]

This does not pose a significant obstacle to the derivative responsibility of the host state for violations attributable to participating states. Providing all structures to actually run the operation and being required to consent to decisions taken during joint operations, mean that its aid or assistance plainly qualifies as active contribution, making it 'complicit' in participating states' breaches.

Similarly, participating states actively aid or assist when they contribute human and technical resources to an operation. That in itself may render them complicit in breaches committed by the host state or other participating states. However, as noted above in the context of obligations to protect, at the time of rendering assistance, the participating state cannot as a general rule be considered to have knowledge of the fact that violations may be committed using their contributions, unless the deficiencies in question are structural or inherent in the design of an operation.[868]

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867 ICJ, *Genocide Convention* (n 516) para 432; also arguing against the possibility of derivative responsibility being triggered by omissions see for example Felder (n 843) 254–255; see also Crawford, *State Responsibility* (n 426) 405, who considers that 'the contribution must be in the form of a positive act: neither active incitement nor a mere omission will suffice to ground responsibility.'

868 For more detail see above 3.4.1.3.2.

The most common scenario in relation to participating states is that they gain knowledge about an imminent human rights violation in the course of the implementation of an operation.[869] Against this background, the crucial question is whether there are circumstances in which derivative responsibility may arise for a failure to prevent a human rights violation, i.e. an omission.

The major difference between the concepts of 'aid or assistance' and positive obligations lies in the role played by the third party in question. The former is an exception to the general rule that states are free to take either side in a conflict insofar as it places limits *on the possibility to support* a perpetrator in the commission of a wrongful act. Yet, there is generally no requirement to actively protect the victim and it is normally legitimate for a state not to get involved at all. In contrast, the obligation to prevent human rights violations is aimed at protecting potential victims from unlawful interference. This prohibits states from remaining inactive and requires their involvement on the side of the victim. Thus, whereas the concept of derivative responsibility does not apply to a stranger to a dispute, states incur a duty to take preventive measures under the concept of positive obligations even without prior involvement.[870]

As a general rule, it can hence be said that 'doing nothing' is fine when assessed through the lens of derivative responsibility. Accordingly, omissions usually do not trigger such responsibility. However, this does not apply when a state is already involved, i.e. when the state cannot be considered a stranger to the situation or dispute. In those cases, they are under an obligation to react to a wrongful act, failing which they incur derivative responsibility.[871] With due regard to the institutional set-up, the planning, and the implementation of joint operations, all participating states are indeed already 'involved' prior to any human rights breach. In this light, they are, under the rules on aid or assistance, under a duty to prevent, so far as possible, human rights violations when they gain knowledge thereof. Failing to do so may trigger their derivative responsibility.

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869 On the likelihood of gaining knowledge according to different types of contributions see above 3.4.1.3.2.

870 For this conceptual approach see also Lea Brilmayer and Isaias Y Tesfalidet, 'Third State Obligations and the Enforcement of International Law' (2011) 44 NYU Journal Of International Law And Politics 1, 37–42.

871 More generally arguing that omissions may also qualify as 'aid or assistance', see Lanovoy (n 849) in particular 145-147; see also the examples given by Quigley (n 859) 124–125, and by Aust (n 65) 229–230; the approach proposed here is, however, less far-reaching than Quigley (n 859) 124–125, who argues: 'If a donor State supplies, for example, electrical apparatus and stipulates that it should not be used to administer torture, it should be liable for complicity if it learns that the apparatus is being used for torture yet takes no action to prevent continued wrongful use, when such action is available to it.'

In sum, obligations to protect under ECHR law are generally more far-reaching than the rules on aid or assistance under general international law. However, in the specific context of Frontex operations, states involved incur responsibility for having been complicit in a human rights violation committed by another state under circumstances similar to those in relation to the doctrine of positive obligations. Importantly, under the rules on aid or assistance, there is no need to establish that the victim of a breach comes within the jurisdiction of the assisting state. It is sufficient that a breach of the ECHR was committed by a contracting party and another contracting party rendered aid or assistance in the commission of that breach. The concept of aid or assistance may thus fulfil an important function in complementing the doctrine of positive obligations where human rights violations take place under the jurisdiction of a contracting party to the ECHR but outside the territory of an assisting state.[872]

It is noteworthy that the rules on aid or assistance cannot fulfil the same function in relation to operations hosted by third states who are no contracting parties to the ECHR.[873] In these cases the first condition is not met, i.e. there is no breach of the ECHR by the 'receiving state'. For this reason, states participating in joint operations hosted by third states cannot be held responsible under the ECHR for their assistance rendered, even if the ECtHR was to apply the rules on aid or assistance. Of course, this does not exclude their responsibility under general public international law.

3.4.3 Interim conclusion

This section analysed the circumstances under which states that are not directly responsible in a specific case are nonetheless responsible for conduct associated with the primary breach. The central question addressed was whether contributing to, or not preventing, a violation of the ECHR, may render the facilitating actor responsible.

In light of the findings of Section 3.3, two broad situations were identified, in which questions of associated responsibility are most relevant. The first concerns breaches by anyone but the host state. These are, in particular, breaches committed during a joint operation with the involvement of large asset, a vessel for example, deployed by participating states. The question this raises is whether the host state is responsible *in addition to the respective participating state*.

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872 Arguing that the concept of aid or assistance may be better suited than the doctrine of positive obligations to determine a state's responsibility for its involvement in conduct of a primary actor contrary to the ECHR outside its territory see den Heijer, *Europe and Extraterritorial Asylum* (n 584) 57-103, see in particular 100, 103; pointing out the Court's predominant reliance on 'independent responsibility', see den Heijer, 'Issues of Shared Responsibility before the European Court of Human Rights' (n 459) 46–47.

873 See above 2.2.3.

With due regard to its dominant position in leading joint operations, it can be expected that the host state knows or ought to know of any immediate and real risks to individuals' Convention rights during operations. Under those circumstances, state parties to the Convention incur a positive obligation to take all reasonable steps to prevent such violations. In this vein, the host state may for example have to use its position within the Joint Coordination Board to block the taking of decisions that would lead to a breach of human rights, or instruct its own local personnel to take measures to prevent breaches. If the host state fails to do so, it incurs responsibility under the ECHR. Thus, if breaches are committed during joint operations that are attributable to others, e.g. breaches by large assets of contributing states, the host state is *additionally* responsible for not preventing them.

In addition, if, during a return operation, a reasonable suspicion arises that the implementation of the return decision of a participating state would violate the prohibition of *refoulement*, the host state incurs responsibility alongside the participating state if it carries out the return nonetheless.

In practice, this means that in both Examples 2 and 4, where the participating states are responsible for the primary infringement, the host state will additionally incur responsibility for conduct associated with those breaches. In Example 2, the human rights violations committed during the operation originate in the conduct of personnel on a vessel contributed by participating State C. State A, the host state, is responsible under the doctrine of positive obligations because leading the operation means that it has (or ought to have) knowledge of risks of human rights violations that may be committed, but also that it is actually capable of preventing them. In Example 4, the prohibition of *refoulement* requires it to verify, if a reasonable suspicion arises, whether an individual that received a return order from a participating state faces a real risk of torture if returned, and refrain from carrying out the return if that is the case.

The second situation analysed concerns the associated responsibility of contributing states. The question is whether contributing states are responsible *in addition to the primarily responsible actor* for breaches attributable to the host or another contributing state.

In this context, it is crucial to note that human rights violations during Frontex operations occur extraterritorially from the viewpoint of participating states. The analysis revealed that only states contributing large assets exercise public powers that may bring the affected individuals within their jurisdiction according to Article 1 ECHR. They can also commonly be assumed to have knowledge of imminent risks to human rights during operations. This is specifically due to the presence of a state representative as a National Official on the Joint Coordination Board. As a consequence, they incur positive obligations under the ECHR to use any reasonable possibility, in particular within the Joint Coordination Board, to prevent human rights breaches

committed by others. Thus, if breaches are committed that are attributable to others, e.g. breaches by team members or large assets of another state, or breaches by local staff, states contributing large assets *additionally* incur responsibility under the ECHR if they fail to prevent those breaches.

With respect to the conduct of all other participating states during Frontex operations, the Convention does not apply, as a general rule, and they accordingly do not incur any positive obligations to protect. Even if they have team members on the ground, these exercise public powers exclusively in the name of the host state and thus cannot bring the affected individuals within the jurisdiction of their home state according to Article 1 ECHR.

Practically speaking, this means that when a team member, for example, uses excessive force, as in Example 1, participating State C does not incur responsibility in addition to State A, to whom the impugned conduct is attributed. Similarly, State C is also not responsible in Example 3, where individuals are transferred to a reception facility that does not meet minimum human rights standards. The reason in both cases is that the violations occur in State A and the individuals affected are not under State C's jurisdiction at the moment of the decision to participate in the operation, nor at the moment it later learns of a risk of human rights infringements. Thus, as the law currently stands, State C seems to neither incur responsibility for the decision to participate in and contribute to the operation in the first place, nor for its failure to intervene in protection of the affected individuals at a later stage.

In contrast, State B may incur responsibility for failing to prevent a human rights violation in the variation to Example 2, i.e. if a vessel of State A, the host state, hands over a migrant boat to third state authorities in violation of the prohibition of *refoulement*. As opposed to participating State C in the previous examples, State B, through the vessel it contributed, exercises public powers within State A. This brings the individuals affected by the operation within its jurisdiction. Since State B's position within the Joint Coordination Board also allows it to gain knowledge of and prevent human rights violations, it is responsible under the doctrine of positive obligations if it fails to take reasonable measures in order to protect the individuals at risk.

However, the rules on aid or assistance may complement the obligations to protect under the ECHR, since they do not require the establishment of jurisdiction within the meaning of Article 1 ECHR with respect to assisting states. Responsibility under the rules on aid or assistance arises when a state knowingly aids another in committing a breach of international law. Whilst responsibility ultimately depends on the specific possibilities available to a state, and the circumstances of the case, three general remarks can be made. First, participating states incur derivative responsibility under the rules on aid or assistance if they decide to participate in and contribute to a joint operation despite knowing that the assistance will be used in the

commission of a human rights violation. Such knowledge must be assumed to exist in particular when the human rights deficiencies in the host states are structural or when violations are inherent in the design of an operation (e.g. in the Operational Plan). Second, states that contribute team members may gain knowledge of human rights violations in the area of deployment, in particular when the team member reports back to its home state. If, in those cases, they have possibilities to alter the course of conduct in order to prevent a violation but do not make use of them, they incur responsibility under the rules on aid or assistance. Third, in contrast, states that contribute only minor equipment have, as a rule, more limited oppotunities to gain knowledge of human rights and prevent them. In this light, they will generally not incur associated responsibility.

In practice, this would mean that in Examples 1 and 3 it is irrelevant that the operation does not take place under State C's jurisdiction. The responsibility of State C in both cases then depends on the knowledge they have that their assistance to the operation is used in the context of a human rights violation. Whilst the excessive use of force in Example 1 may not be foreseeable, it is more likely that it is in Example 3. In particular, if the reception facilities in State A are known to not meet basic human rights requirements, State C may incur responsibility for nonetheless having participated in and substantially contributed to the operation.

These findings are summarised in Table 6.

Table 6: Summary of findings (2)

	ECHR			CFR	
	Primary responsibility	**Associated responsibility (obligations to protect)**	**Associated responsibility ('complicity')**	**Primary liability**	**Associated liability**
Frontex/EU	No responsibility	No responsibility	No responsibility	*Chapter 4.3*	*Chapter 4.4*
Host state	Responsibility for breaches by local staff and standard team members	Responsibility for not preventing breaches of others, e.g. breaches by team members on large assets contributed by participating states	Responsible for assisting in breaches of others, e.g. breaches by team members on large assets contributed by participating states		
Participating state (minor technical equipment)	No responsibility	No responsibility (no jurisdiction)	As a rule no responsibility (impact of assistance low, lack of knowledge and possibilities)		
Participating state (standard team member)	No responsibility	No responsibility (no jurisdiction)	Responsibility for assisting in breaches they have knowledge of		
Participating state (large assets, e.g. vessels, aircraft)	Responsibility for breaches by team members on large assets they contributed	Responsibility for not preventing breaches by the host state or other participating states if they had the means to prevent	Responsibility for assisting in breaches of the host state or other participating states		

3.5 Conclusion

This chapter has examined the circumstances under which the actors participating in Frontex operations are responsible if breaches of the ECHR are committed in the course of the operations. It is concerned with the responsibility of host and participating states only, since neither Frontex itself nor the EU can be held responsible under the ECHR. The analysis was based on the law of international responsibility as reproduced in the ASR and the ARIO and applied by the ECtHR.

The ECtHR developed a line of case law under which states may be subject to limited scrutiny for conduct in strict implementation of their obligations under EU law. The so-called *Bosphorus* doctrine, however, does not apply to the conduct of states in the context of Frontex operations, in particular because states, as a rule, enjoy sufficient discretion to implement their obligations under EU law in conformity with the ECHR. Consequently, host and participating states are subject to full scrutiny before the ECtHR for their conduct during joint operations.

Responsibility under the ECHR arises for every violation of a Convention right that is attributable to a state party. That means, simply speaking, for a state to incur responsibility, the breach must have been committed by one of their organs. Whether or not a person may be considered an organ of a specific state or international organisation is defined by rules on attribution of conduct. In this light, if a Convention violation occurs during a Frontex operation, each state is responsible insofar as that violation can be attributed to it. Thus, the allocation of **primary responsibility** during Frontex operations depends on the attribution of the conduct that was in breach of the Convention. For the current purposes, the conduct of local staff and persons deployed by participating states or Frontex as team members is the most relevant The reason is that these persons are the most likely to be involved in human rights violations because they fulfil the core border management tasks and have executive powers.

The analysis was based on the premise that the general attribution rules are applicable to conduct during Frontex operations. The most basic of these rules is that the conduct of a person that a state or an international organisation has designated by law as their organ, is attributable to that state or international organisation (Article 4 ASR and Article 6 ARIO). In the context of Frontex operations, this means that at the outset, the conduct of personnel is generally attributable to the entity that contributed them. In particular, local staff are attributable to the host state under Article 4 ASR, and team members are attributable to a participating state (Article 4 ASR) or Frontex (Article 6 ARIO).

However, for the duration of their deployment, personnel are subject to a specific command regime during Frontex operations under which authority over them is partly exercised by the host state and Frontex. The crucial question this raises is how the transfer of authority affects attribution of their conduct.

The relevant rules are found in Articles 6 ASR and 7 ARIO. Article 6 ASR deals with the situation that an organ of one state is placed at the disposal of another and sets out the circumstances under which conduct of the 'lent' or 'transferred' organ is attributable to the receiving state. A transfer of attribution from a sending to a receiving state within the meaning of Article 6 ASR requires that an organ of another state exercises governmental functions of

the receiving state at whose disposal it is placed. 'Placed at the disposal' in this context entails that the transferred organ acts for the purposes, with the consent, and under the exclusive authority, i.e. subject to the laws and instructions, of the receiving state.

The parallel provision in the ARIO is Article 7. Article 7 ARIO deals with the situation where an organ of a state or an international organisation is placed at the disposal of another international organisation. It provides that conduct of the lent organ is attributable to the receiving organisation, if and to the extent that the latter exercises effective control. Effective control in this context is understood as *de facto* control over the specific course of conduct in question. Simply speaking, conduct is attributable to the entity that gives operational orders. In the absence of orders, the power to prevent may indicate which entity effectively controls the impugned conduct.

Thus, whilst Article 6 ASR essentially requires full and exclusive normative control for a 'transfer' of an organ from one state to another, under Article 7 ARIO factual control (that need not necessarily be exclusive) is decisive. This also makes Article 7 ARIO more susceptible to multiple attribution, i.e. attribution of one course of conduct to more than one entity at the same time. Once Article 6 ASR is applicable, this 'breaks' the attribution link between the lent organ and its original 'home' entity. In other words, the lent organ's conduct is exclusively attributable to the receiving state. In contrast, under Article 7 ARIO, there may be situations in which conduct is attributable to the sending and the receiving entity at the same time.

It is evident from the analysis of the application of these articles to Frontex operations that conduct of local staff and standard team members contributed by states or Frontex is attributable to the host state. Conversely, team members deployed on large assets (vessels, aeroplanes) remain attributable to their original home state. This conclusion was reached on the basis of a number of considerations.

First, standard team members are attributable to the host state under Article 6 ASR. They act for the purposes and with the consent of the host state, and are subject to its laws and exclusive instructions. In particular, operational decisions concerning these team members are taken under the lead of the Joint Coordination Board's chair, a host state officer, without any other entity having the authority to 'block' or 'overrule' them, and are passed on to the team members through other host state officers. Hence, in line with Article 6 ASR, standard team members are considered exclusively organs of the host state.

Second, team members on large assets are not attributable to the host state under Article 6 ASR. Whilst they are partly under the authority of the host state, it is not sufficiently exclusive. Their home states retain powers within the chain of command. In particular, decisions taken in the Joint Coordina-

tion Board concerning large assets are in practice not taken without the consent of the representative of the respective participating state within the Joint Coordination Board (the National Official). In addition, the Joint Coordination Board's instructions are passed on to the asset concerned by the National Official via the Commanding Officer, who is of the same nationality as the asset. Due to the fact that authority over them is shared by the host state and the relevant participating state, Article 6 ASR is inapplicable and their conduct remains attributable to the original home state under Article 4 ASR.

Third, their conduct is not attributable to the EU by virtue of Article 7 ARIO because the transfer of authority to Frontex is not sufficient for that rule to apply. In particular, the mere fact that an international organisation finances certain activities or renders other forms of assistance does not makes these activities attributable to it. Article 7 ARIO requires a transfer of powers that allows the organisation to more directly determine the conduct in question. Since Frontex is not currently vested with such powers, conduct during Frontex operations is not attributable to the EU.

In sum, the primary responsibility for breaches of the ECHR committed during Frontex operations lies with the host state if they result from conduct of local staff or standard team members. It lies with the respective contributing state if they result from conduct of team members deployed on large assets. Breaches resulting from the joint conduct of two or more persons attributable to different entities engage the responsibility of both or all of them.

These findings raise the question of whether states that are not directly responsible for a specific breach may still be responsible for contributing to, or not preventing it. More specifically, is the host state responsible, for instance, *in addition to the contributing state* for breaches committed by large assets? Similarly, are contributing states responsible *in addition to the primarily responsible state* for breaches attributable to the host or another contributing state?

These questions of **associated responsibility** were analysed, first, in light of the obligations to protect as developed by the ECtHR. In particular, under the doctrine of positive obligations, state parties incur a broad range of duties. The most important for the current purposes is the obligation to intervene preventatively in order to protect individuals from interference with their Convention rights by others, including other states or international organisations. In essence, where authorities know or ought to know of a risk of ill-treatment, they have to take reasonable steps to prevent it, i.e. they have to take all measures available to them that have a real prospect of altering the outcome or mitigating the harm. Hence, states involved in Frontex operations may incur responsibility if they fail to prevent each other's human rights violations. Importantly, the principle of mutual trust does not release them from their positive obligations.

The analysis showed that with due regard to the host state's dominant position in leading joint operations, it can be expected that the host state knows or ought to know of any immediate and real risks to individuals' Convention rights during operations. In this vein, the host state has to take all reasonable steps to prevent breaches that may be committed by large assets of contributing states, e.g. by blocking decisions of the Joint Coordination Board that would lead to a breach of human rights or instructing its own local personnel to take suitable measures. If it fails to do so, it incurs responsibility under the ECHR in addition to the respective contributing state. Further, if a reasonable suspicion arises during a return operation that the implementation of a return decision of a participating state would violate the prohibition of *refoulement*, the host state incurs responsibility (probably alongside the participating state) if it nonetheless executes the decision.

The situation is more complex with respect to participating states. States that contribute large assets can commonly be assumed to have knowledge of imminent risks to human rights during operations, in particular due to their presence on the Joint Coordination Board. Even though human rights violations during Frontex operations occur extraterritorially from their viewpoint, the Convention is applicable to them because through their large assets they exercise public powers, thereby bringing the affected individuals within their jurisdiction according to Article 1 ECHR. As a consequence, they incur positive obligations under the ECHR and are responsible if they do not use all possible means, in particular within the Joint Coordination Board, to prevent human rights violations. Hence, if breaches are committed that are attributable to others, e.g. breaches by team members or large assets of another state, or breaches by local staff, they incur responsibility as well under the ECHR if they fail to take reasonable measures to prevent them.

In contrast, all other contributing states are unlikely to incur responsibility under the doctrine of positive obligations. Even if they are in a position to gain knowledge of and react to Convention violations by others, they do not incur positive obligations because the affected individuals are not within their jurisdiction, making the Convention inapplicable to them.

In this light, this chapter also analysed a second basis for associated responsibility, namely the rules on aid or assistance under public international law. The relevant rule, as reproduced in Article 16 ASR, provides that responsibility for 'complicity' arises whenever a state renders aid or assistance that makes it materially easier for the receiving state to commit an internationally wrongful act, provided the assisting state does so with knowledge of the internationally wrongful act and is itself bound by the primary obligation breached by the receiving state.

Importantly, this responsibility is 'derivative' and arises regardless of whether the assisting state is under a primary obligation that prohibits it from rendering assistance. Thus, the applicability of the Convention does not have to be

ascertained with respect to the assisting state. As a result, as opposed to obligations to protect under the ECHR, a state may incur responsibility for being complicit in a human rights violation of another state, regardless of whether the affected individual is within its jurisdiction according to Article 1 ECHR.

This means in particular that beyond the host state and states contributing large assets, other participating states may also incur responsibility for being complicit in a breach, provided all the conditions are met. For the current purposes, participating states incur responsibility for aiding or assisting in a breach under conditions that are similar to those that trigger responsibility for breaches of positive obligations under the ECHR. Thus, in particular, states that contribute team members may be responsible in addition to another state for having assisted in a human rights violation. In contrast, it is unlikely that states who have only contributed minor technical equipment incur responsibility.

In sum, the host state and states contributing large assets are responsible in addition to the primarily responsible state, if they know or ought to know of an imminent violation but do nothing to prevent it. If the ECtHR was to apply the rules on aid or assistance as provided under general international law, states contributing team members may be responsible under similar circumstances.

In conclusion, responsibility for breaches of the ECHR during Frontex operations is allocated among the states involved as follows:

- Host states
  - incur primary responsibility for breaches committed by local staff, and by persons deployed as standard team members by participating states or Frontex,
  - incur associated responsibility if they fail to protect individuals from breaches attributable to others, e.g. breaches involving large assets of participating states.
- Participating states that contribute large assets
  - incur primary responsibility for breaches committed by team members on large assets they contributed,
  - incur associated responsibility if they fail to protect individuals from breaches attributable to the host state or other contributing states, e.g. breaches by local staff, by team members, or by large assets of another state.
- Participating states that contribute standard team members
  - incur no primary responsibility,
  - incur no associated responsibility under the ECHR,
  - may incur associated responsibility under the rules on aid or assistance for breaches committed by the host state or other contributing states, provided they know about them and have means to react.

- Participating states that contribute minor technical equipment
  - incur no primary responsibility,
  - incur no associated responsibility under the ECHR,
  - incur no associated responsibility under the rules on aid or assistance.

The **practical implications** of these findings are illustrated in the following.

EXAMPLE 1: EXCESSIVE USE OF FORCE

A Frontex operation, hosted by State A, is ongoing at A's land border. A team of border surveillance officers, including officers of A, but also of State C, spot a large group that has just crossed the border. Upon request, the persons detected are unable to show the necessary documents. When the border guards try to apprehend them, the situation gets out of hand and they have to use force in order to transfer them to a local reception facility. During an ensuing screening interview, one of the migrants plausibly claims that he had been subjected to excessive force by C's officer in violation of the prohibition of inhuman or degrading treatment (Article 3 ECHR, Article 4 CFR).

The human rights infringements committed by State C's officer are exclusively attributable to State A because C's officer exercises governmental authority for the purposes and under the exclusive authority of A. Hence, State A is responsible under the ECHR for the violation of Article 3 ECHR committed by C's officer, whereas State C is not.

State C is also not responsible for failing to prevent the human rights breaches in question. The reason is that the conduct occurs extraterritorially from State C's perspective and C does not exercise sufficient authority over the victim to bring it within its 'jurisdiction' for the purposes of Article 1 ECHR. Essentially, even though its officer may exercise 'public powers', thereby exercising authority over the affected individuals, the officer does so in the name of State A. Hence, State C incurs no obligations to protect under the ECHR in relation to human rights interference that occurs during joint operations.

Hence, as the law currently stands, only State A is responsible in Example 1. If the ECtHR were to hold contracting states responsible under the rules on aid or assistance as provided for under general international law ('complicity'), it is irrelevant that the operation does not take place under State C's jurisdiction. The responsibility of State C then depends on the knowledge it has about the fact that its assistance to the operation is used in the context of a human rights violation. Under the specific circumstances of the example scenario, however, the excessive use of force may not be sufficiently foreseeable so as to engage State C's responsibility under the rules on complicity.

EXAMPLE 2: REFOULEMENT AT SEA

A Frontex operation, hosted by State A, is ongoing at A's sea border. A vessel contributed to the operation by State B (variation: by State A itself) is patrolling the operational area, when it observes a suspicious boat. Once the boat is within sight, it can be confirmed that the boat carries a large number of migrants accompanied by smugglers. The vessel attempts to intercept the boat by the repeated use of light and sound signals but the boat refuses to comply. After warning shots into the air, a crew member fires shots at the engine of the boat, immobilising it. The boat is towed to the territorial waters of a third state and handed over to its authorities in violation of the prohibition of *refoulement* and the prohibition of collective expulsions (Article 3 ECHR, Article 4 Protocol No. 4 ECHR, Article 19 CFR).

The conduct of the personnel on State B's vessel is attributable to State B for the simple reason that they are State B's organs. Hence, State B is responsible for the infringement of the ECHR. Notably, the relevant conduct is not attributable to State A. State A exercises some degree of authority over the course of conduct of State B's vessel. In particular, it has a central position within the Joint Coordination Board, the body running the operation. However, it shares the authority over State B's vessel with B. B has a national representative on the Joint Coordination Board who has to be consulted whenever decisions affect B's vessel. In addition, the vessel's Commanding Officer only receives the instructions that result from the Joint Coordination Board's decisions from the national representative. The crucial point is that under Article 6 ASR, the conduct of B's vessel is attributable to State A instead of State B only if A exercises exclusive authority over their conduct. Consequently, State A's partial authority over B's vessel is insufficient and A is not responsible for B's vessel's activities.

However, State A is responsible for its own failure to prevent the breach committed by B's vessel. As a host state, it could have easily prevented the infringement, simply by not agreeing to the course of conduct that led to the violation. By not doing so, State A is responsible for a breach of its positive obligations to protect under the ECHR. Hence, both State A and State B are responsible in Example 2.

If the same infringement occurs but is committed by State A's vessel, this has a number of implications for the responsibility of both States A and B. Quite obviously, State A is responsible for the conduct of its vessel in breach of the Convention. More interesting, however, is the question whether in those circumstances State B additionally incurs responsibility for failing to prevent the infringement by State A's vessel during the operation hosted by State A. It indeed may. The activities during joint operations are extraterritorial from B's viewpoint. Simply speaking, this means that State B only incurs obligations under the ECHR if the individuals affected are under B's authority and control. In this context, it is crucial that State B's vessel exercises border

management tasks with the consent of State A. These are 'public powers' that are normally exercised by A. In light of the case law of the ECtHR, this may suffice to bring the individuals affected by the tasks under B's authority for the purpose of the ECHR. If that is the case, State B is obliged to use all reasonable measures to prevent A's foreseeable breaches.

In this context, it is important to remember that State B is represented on the Joint Coordination Board at all times and is therefore likely to gain knowledge of any circumstances or decisions that may lead to a human rights violation. B can use its position to attempt to change the course of conduct to prevent or mitigate A's human rights violation. Failing to use all reasonable means to do so renders State B responsible in addition to State A.

EXAMPLE 3: INHUMAN CONDITIONS IN RECEPTION FACILITIES

A Frontex operation, hosted by State A, is ongoing at A's external borders. As part of this operation, a team of border surveillance officers including officers of A, but also of State C, apprehends a group of persons that had previously been dropped off by a smugglers' boat. The group is transferred to a local reception facility. On site, screening and debriefing experts deployed by Frontex conduct interviews with migrants in order to identify their country of origin and collect intelligence regarding the routes and practices of human smugglers. Frontex has an 'office' in the area, from where a Frontex representative coordinates local activities. The conditions in the reception facility had been deteriorating for a while. The most pressing problem is that A's authorities have run out of money to buy sufficient food for everyone. Even though forcing persons to stay there violates the prohibition against treating them in an inhuman or degrading manner, the team, including officers of A and C, transfer the apprehended migrants to that facility (Article 3 ECHR, Article 4 CFR).

Note: Setting up and maintaining migrant reception facilities is outside the mandate of Frontex operations. The responsibility of states for human rights violations directly resulting from the conditions in reception facilities is thus outside the scope of this study. However, migrants may be in a reception facility because they were brought there in the context of a Frontex operation. This raises the question whether the actors involved in joint operations may be responsible for having brought a migrant to a reception facility where the conditions do not live up to minimum human rights standards.

The question Example 3 poses is whether State C is responsible for having failed to prevent the human rights infringements suffered by the migrants that were brought to State A's reception facilities after having been picked up in the context of a Frontex operation. State C's officer has indeed helped realise the human rights violation, by handing over apprehended migrants to the facility in question. The officer thus clearly failed to protect the victim from a human rights violation (that may have been foreseeable), which normally engages a state's responsibility under the ECHR.

However, a combination of factors prevents State C from being responsible, or indeed from incurring an obligation to protect the individual migrants in the first place. As pointed out already in relation to Example 1, the conduct occurs extraterritorially from State C's perspective and the persons in the reception facility are not within C's jurisdiction. For that reason, State C is not obliged under the ECHR to protect the individuals there from human rights violations they may suffer. Therefore, as the law currently stands, State C is not responsible under the ECHR.

However, as discussed in the context of Example 1, if the ECtHR were to hold contracting parties responsible under the rules on aid or assistance ('complicity'), it is irrelevant that the operation does not take place under State C's jurisdiction. Like in Example 1, the responsibility of State C then depends on the knowledge it has that its assistance to the operation is used in the context of a human rights violation. Hence, in particular if the reception facilities in State A are known to not meet basic human rights requirements, State C may incur responsibility for nonetheless having participated in and substantially contributed to the operation. In this vein, Example 3 illustrates particularly well the difference between obligations to protect under the ECHR and the rules on aid or assistance, and the potential of the latter to complement the former.

EXAMPLE 4: REFOULEMENT AND RETURN OPERATIONS

State A organises a return operation. The destination is State Z (who is not a Schengen state). Persons that have been identified as nationals of Z and have received individual return orders qualify as 'returnees'. 10 returnees are already in State A. Participating states escort returnees to A, bringing the total number to 30. A Frontex project manager travels with them. Before take-off, it becomes apparent that three returnees escorted from participating State C had been presented with a return order immediately after their arrival. They convincingly argue that they would be at risk of being subjected to torture if returned (Article 3 ECHR, Article 19 CFR).

Note: The adoption of return decisions is outside the mandate of Frontex operations. The responsibility arising directly from the adoption of a return decision is thus outside the scope of this study. However, joint return operations involve the execution by a host state of return decisions issued by a participating state. This raises the question whether actors involved in Frontex return operations may be responsible for returning a person in violation of the prohibition of refoulement in the implementation of another state's return decision.

Once brought to State A, the returnees are clearly under State A's jurisdiction. The prohibition of *refoulement* requires the host state to verify whether an individual that has received a return order from a participating state faces a real risk of torture if returned, provided that a reasonable suspicion arises in the context of the implementation of a return operation. If State A carries out the return despite such a risk, it is responsible under the ECHR for doing so.

4 Liability under EU Law

The purpose of this chapter is to examine the allocation of liability under EU law among the actors participating in Frontex operations for breaches of fundamental rights committed in the course of the operations. The fundamental rights referred to in this chapter are those guaranteed *under EU law*, i.e. in the CFR (Charter of Fundamental Rights of the European Union) or as general principles of EU law. Since EU public liability law is only applicable to Frontex and EU member states, Schengen states that are not EU member states are excluded from the analysis in this chapter.

Section 4.1 starts by providing an introduction to EU public liability law. The objective is to outline the 'basics' of Union liability (Section 4.1.2) and member state liability (Section 4.1.3) respectively and to set the scene for the remaining chapter (Section 4.1.4).

Section 4.2 elaborates on the conditions for public liability to arise, focussing on how they apply to breaches of fundamental rights. Most importantly, not every breach of Union law necessarily triggers liability. Only qualified unlawfulness does, meaning breaches have to concern rules that confer rights on individuals and have to be 'sufficiently serious'. The analysis in Section 4.2 revolves around the circumstances under which breaches of fundamental rights can be considered to reach the threshold of 'qualified unlawfulness' required for liability to arise. Case law regarding liability for fundamental rights violations is scarce. For that reason, Section 4.2 relies on the Court's case law on public liability more generally, identifying the generally applicable requirements first, before applying them to situations of fundamental rights violations.

Having established the circumstances under which liability for fundamental rights violations arises, Sections 4.3 and 4.4 focus on the central question of this chapter, the allocation of liability as between Frontex and member states participating in joint operations. They maintain the distinction set out in more detail in Chapter 1, discussing, first, primary liability (Section 4.3) and, second, associated liability (Section 4.4).[874]

In this vein, **Section 4.3** analyses how liability that arises directly from a fundamental rights violation committed during an operation is distributed among the actors involved. For that purpose, it explores various possibilities for interaction between Union bodies and member states that potentially raise questions of allocation of liability (Section 4.3.2). Sections 4.3.3 and

874 For the distinction between primary and associated liability see above 1.3.3.

4.3.4 then proceed to examine how the CJEU has allocated liability in those situations. The aim is to establish the key principles governing the Court's case law in this area (Section 4.3.6), in order to apply them to Frontex operations (Section 4.3.7).

Section 4.4 examines the circumstances under which actors that are not directly liable in a specific case are liable for conduct associated with the primary breach. The central question is whether contributing to, or not preventing, a fundamental rights violation may render the facilitating actor responsible. Section 4.4.1 starts by outlining the obligations that Union bodies and member states have when involved in a breach of Union law committed by another authority. The following sections discuss, first, the circumstances under which breaches of these obligations may give rise to liability (Section 4.4.2) and, second, the specific obstacles joint or concurrent liability may raise (Section 4.4.3). Finally, Section 4.4.4 applies the findings to Frontex operations.

It should be noted that neither the distinction between primary and associated liability, nor the approaches adopted with respect to each of these bases for liability are necessarily common in EU public liability law.[875] However, no widely accepted conceptual framework has yet been developed to address questions of allocation of liability under EU law. The Court, on the one hand, is not normally explicit about the general rules on the basis of which it allocates liability to one actor or another, nor their theoretical foundation. It rather allocates liability *ad hoc* in a case-by-case fashion (for more detail see Section 4.3.1.2). On the other hand, literature addressing the topic is scarce and largely focusses on joint or concurrent liability of the Union and its member states, and the procedural (im)possibility of implementing it.[876]

875 A similar approach has, however, been adopted by Säuberlich in his extensive study on multi-actor situations in EU public liability law, see Säuberlich (n 68).

876 For an extensive treatment of the topic of allocation of liability see ibid; see also T. C Hartley, 'Concurrent Liability in EEC Law: A Critical Review of the Cases' (1977) 2 European Law Review 249; Constantinesco (n 68); Andrew Lewis, 'Joint and Several Liability of the European Communities and National Authorities' (1980) 33 Current Legal Problems 99; 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); Constantin Stefanou and Helen Xanthaki, *A legal and political interpretation of Article 215(2) [new Article 288(2)] of the Treaty of Rome: The individual strikes back* (Ashgate/Dartmouth 2000) 120–164; Maartje de Visser, 'The Concept of Concurrent Liability and its Relationship with the Principle of Effectiveness: A One-way Ticket into Oblivion?' (2004) 11 Maastricht Journal of European and Comparative Law 47.

The objective of Sections 4.3 and 4.4 is to discover the relationship between Frontex and participating member states under public liability law. However, in light of the above, they also aim to provide a conceptualisation of questions of allocation of liability in EU law more generally.

Section 4.5 summarises the main findings of this chapter and illustrates their practical implications using the example scenarios introduced in Chapter 1.[877] In essence, the analysis shows that the primary liability for breaches of the CFR committed during Frontex operations lies with the host state if they result from conduct of local staff or any deployed team members. In the case of large assets, the host state shares that primary liability with the respective contributing state. All other participating states and Frontex do not, or only exceptionally, incur primary liability. Frontex, participating states that contribute large assets, and the host state may also be liable in addition to the primarily liable actor for having breached their obligations to protect or supervise. Such associated liability arises if they fail to take appropriate measures to prevent a fundamental rights breach they had, or should have had, knowledge of. In contrast, all other participating states are unlikely to incur associated liability, in essence because infringements of their obligations to protect will qualify as sufficiently serious only in exceptional circumstances. They hence incur neither primary nor associated liability under EU law for fundamental rights violations that may occur during joint operations.

4.1 Introduction to EU public liability law

4.1.1 What is public liability?

'Public liability' denotes the non-contractual liability of public authorities within the EU, i.e. the Union, Union bodies, and member states, arising for breaches of EU law.[878] A breach for the purposes of public liability may concern any binding provision of EU law, no matter whether contained in the Treaties, the CFR, secondary law, or general principles of EU law.

Public liability law encompasses two sub-systems: the rules governing liability of the Union and Union bodies on the one hand and those governing member state liability on the other.[879] It defines the circumstances under which liability arises, in other words, the conditions for liability.[880]

877 See above 1.3.1.

878 This terminology is also used by Aalto (n 66), see in particular 12-14, where he explains the reasons for this choice of terminology.

879 Each discussed in detail below in 4.1.2 and 4.1.3 respectively.

880 See below 4.1.2.3 (with respect to Union liability) and 4.1.3.3 (with respect to member state liability).

Liability entails an obligation on the part of the liable party to make good the consequences arising as a result of the breach and a concomitant right to compensation of the victim of the breach. The latter has been qualified as a fundamental principle of Union law and the 'necessary extension of the principle of effective judicial protection and access to the courts'.[881] The procedure that serves to establish liability and award compensation to the victim is referred to as the 'action for damages'.[882]

Any conduct is capable of giving rise to liability, be it acts or omissions, be it of a legislative, administrative, or judicial nature. Most importantly, as opposed to actions for legality review under Article 263 TFEU, conduct that does not consist of any formal legal act is also capable of triggering liability if in breach of an obligation.[883] 'Factual conduct' may for example consist of driving a car (*Sayag v Leduc*), issuing public statements with wrong or harmful information (*Richez-Parise*; *Compagnie Continentale*; *Briantex*; *A.G.M.-COS. MET*), providing a third party with information concerning the applicant (*Hamill*), not protecting an informant's identity (*Adams*), or failing to ensure safety (*Berti*; *Grifoni*).[884] This means that conduct during Frontex operations that is of a factual nature, e.g. patrolling external borders, intercepting a migrants vessel, conducting screening or debriefing interviews, or returning an individual to the state of departure, is therefore capable of giving rise to liability.

4.1.2 Liability of the European Union and Union bodies

4.1.2.1 Legal basis

The non-contractual liability of the European Union for damage caused by its institutions is based on Article 340(2) TFEU, the content of which has survived all Treaty amendments practically unchanged. Appearing as Article

881 AG Geelhoed, Opinion in CJEU, Case C-234/02 P *Lamberts* (n 47) paras 82–83.

882 See below 4.1.2.2 (with respect to Union liability) and 4.1.3.2 (with respect to member state liability).

883 See also above 1.2.2.2; Alexander Türk, *Judicial review in EU law* (Edward Elgar 2009) 241; Marc H van der Woude, 'Liability for Administrative Acts under Article 215(2) EC' in Ton Heukels and Alison McDonnell (eds), *The Action for Damages in Community Law* (Kluwer Law International 1997) 119–121.

884 CJEU, Case 9/69 *Sayag and Others v Leduc and Others*, 10 July 1969, ECLI:EU:C:1969:37; CJEU, Joined Cases 19, 20, 25 and 30/69 *Richez-Parise and Others v Commission*, 28 May 1970, ECLI:EU:C:1970:47, paras 31-42; CJEU, Case 169/73 *Compagnie Continentale France v Council*, 4 February 1975, ECLI:EU:C:1975:13; CJEU, Case 353/88 *Briantex and Di Domenico v EEC and Commission*, 9 November 1989, ECLI:EU:C:1989:415; CJEU, Case C-470/03 *A.G.M.-COS.MET Srl v Suomen altio and Tarmo Lehtinen*, 17 April 2007, ECLI:EU:C:2007:213; CJEU, Case 180/87 *Hamill v Commission*, 8 October 1988, ECLI:EU:C:1988:474; CJEU, Case 145/83 *Adams v Commission*, 7 November 1985, ECLI:EU:C:1985:448; CJEU, Case 131/81 *Berti v Commission*, 7 October 1982, ECLI:EU:C:1982:341; CJEU, Case C-308/87 *Grifoni v EAEC*, 27 March 1990, ECLI:EU:C:1990:134; note, however, that not in all of these cases was liability actually found.

215(2) in the 1957 Treaty establishing the European Economic Communities, it was renumbered Article 288(2) by the Treaty establishing the European Community in the version resulting from the Amsterdam revision, and became Article 340(2) with the entry into force of the Lisbon Treaty in 2009. According to Article 340(2),

> […] 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.

It is clear from the wording of Article 340(2) TFEU that *the Union* shall make good the victim's damage, rather than the institutions themselves.[885] However, in the 'interests of a good administration of justice', the Union is generally represented before the Court by the institution whose conduct is alleged to have caused the damage.[886]

EU agencies, who have separate legal personality under Union law, are commonly themselves liable according to provisions in their founding instruments modelled on Article 340(2) TFEU.[887] In this vein, Article 60(3) of the EBCG Regulation states:

> In the case of non-contractual liability, the Agency shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its departments or by its staff in the performance of their duties.[888]

Frontex' conduct in breach of Union law is hence capable of giving rise to the liability of the agency itself. Liability of Frontex arises under the same conditions as the Union's liability. Due to the lack of specific case law on Frontex' liability, the following analysis relies on the principles developed by the Court with respect to the Union's liability. The expression 'Union liability' will be used as shorthand for the system of liability governing the Union and Union bodies.

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885 See, however, the exception with respect to the European Central Bank in Article 340(3) TFEU.

886 CJEU, Joined Cases 63-69/72 *Werhahn Hansamuehle and Others v Council*, 13 November 1973, ECLI:EU:C:1973:121, para 7; CJEU, Case 353/88 *Briantex* (n 884) para 7; CJEU, Case T-292/09 *Mugraby v Council and Commission*, 6 September 2011, ECLI:EU:T:2011:418, para 24.

887 See for example, OHIM, Council Regulation (EC) No 207/2009 of 26 February 2009, OJ L 78/1, art 118; EMEA, Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency, OJ L 136/1 (as amended), art 72; EEA, Regulation (EC) No 401/2009 of the European Parliament and of the Council of 23 April 2009 on the European Environment Agency and the European Environment Information and Observation Network, OJ L 126/13, art 18.

888 EBCG Regulation (n 18) art 60(3).

4.1.2.2 Judicial competence and admissibility

According to Article 268 TFEU, the competence to rule on the liability of the Union lies with the CJEU. With respect to Frontex, it is conferred on the CJEU by virtue of Article 60(4) of the EBCG Regulation. This competence is exclusive.[889] Actions for damages against the Union or Frontex may accordingly not be brought before courts of the member states.

Within the CJEU, Article 256(1) TFEU allocates the competence to hear actions for damages at first instance to the General Court (prior to the entry into force of the Lisbon Treaty named the 'Court of First Instance', short 'CFI').[890] Since the establishment of the General Court in 1989, the Court of Justice (in the following referred to as 'ECJ') therefore only hears actions for damages in appeals on points of law.[891]

Applications must be brought within five years from the occurrence of the event giving rise to the damage and must be sufficiently detailed.[892]

Although early case law suggested a necessity to seek annulment, when possible, before claiming compensation for damages arising from the same act, the Court has since emphasised that the action for damages is designed as an autonomous legal remedy.[893] It has consistently held that the action for damages is an independent form of action with a particular purpose to fulfil within the system of actions. To declare an action for damages inadmissible on the sole ground that it may lead to a result similar to that of an action for annulment (or an action for failure to act) would, in the Court's view, 'be contrary to the independent nature of this action as well as to the efficacy of the general system of forms of action created by the Treaty'.[894] Even though the question seems to resurface occasionally, the relationship between the

889 This may be inferred from art 274 TFEU, which reads 'Save where jurisdiction is conferred on the Court of Justice of the European Union by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States.'

890 This excludes disputes between the Union and its servants, which fall under the jurisdiction of the Civil Service Tribunal, see Statute of the Court of Justice of the European Union, Protocol (No 3) to the Treaties, [2012] OJ C326/201, annex, art 1.

891 Ibid arts 56-58.

892 Ibid arts 21, 46; Rules of Procedure of the General Court, [2015] OJ L105/1 (as amended), art 76.

893 For early case law suggesting that it may be necessary to seek annulment before compensation see CJEU, Case 25/62 *Plaumann v Commission*, 15 July 1963, ECLI:EU:C:1963:17; see, however, the previous case CJEU, Joined Cases 9 and 12/60 *Vloeberghs v High Authority*, 14 July 1961, ECLI:EU:C:1961:18, which emphasises the different nature of the actions for annulment and damages and hence the need for different admissibility requirements.

894 CJEU, Case 4/69 *Lütticke v Commission*, 28 April 1971, ECLI:EU:C:1971:40, para 6; this was confirmed *inter alia* in CJEU, Case 5/71 *Zuckerfabrik Schöppenstedt v Council*, 2 December 1971, ECLI:EU:C:1971:116, para 3.

actions for annulment and damages can be considered to have been clarified, at least to the extent that as a general rule the latter cannot depend on the former.[895]

4.1.2.3 Conditions for liability of the European Union

Even though EU law provides an explicit basis for the Union's liability, it does not comprehensively define the conditions for it to occur. Article 340(2) TFEU leaves the elaboration of a system of liability to the Court, which for that purpose shall be guided by the 'general principles common to the laws of the Member States'. The latter formulation allows the Court to draw inspiration from national legal systems, whilst taking into account the specific characteristics of the Union in order to adopt a solution appropriate to its legal system.[896]

On that basis, the Court has consistently held that liability is subject to three cumulative conditions:

1. the unlawfulness of the conduct complained of,
2. the occurrence of damage on the part of the victim, and
3. a causal relationship between the unlawful conduct and the victim's damage.[897]

However, the condition of unlawfulness is qualified. A mere breach may not always trigger liability. The precise requirements that a breach must fulfil in order to give rise to liability have changed considerably over time. The cases of *Zuckerfabrik Schöppenstedt* and *Bergaderm* form the milestones with respect to the development of the condition of unlawfulness.

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895 It resurfaced for example in *Krohn*, where the Court noted that '[Plaumann] relates solely to the exceptional case where an application for compensation is brought for the payment of an amount precisely equal to the duty which the applicant was required to pay under an individual decision, so that the application seeks in fact the withdrawal of that individual decision.', CJEU, Case 175/84 *Krohn v Commission*, 26 February 1986, ECLI:EU:C:1986:85, para 33; in the same case, Advocate General Mancini calls *Plaumann* in this regard an 'isolated statement', para 8; for detail see also Philip J Mead, 'The Relationship between an Action for Damages and an Action for Annulment: The Return of Plaumann' in Ton Heukels and Alison McDonnell (eds), *The Action for Damages in Community Law* (Kluwer Law International 1997).

896 AG Maduro, Opinion in CJEU, Joined Cases C-120/06 P and C-121/06 P *FIAMM and Others v Council and Commission*, 9 September 2008, ECLI:EU:C:2008:476, para 55; AG Roemer, Opinion in CJEU, Case 5/71 *Schöppenstedt* (n 894) 989–990; see also Ton Heukels and Alison McDonnell, 'The Action for Damages in a Community Law Perspective: Introduction' in Ton Heukels and Alison McDonnell (eds), *The Action for Damages in Community Law* (Kluwer Law International 1997) 3–4.

897 The first clear statement of the Court on the conditions required for the occurrence of liability can be found in CJEU, Case 4/69 *Lütticke* (n 894) para 10.

4.1.2.3.1 The 'Schöppenstedt-test'

In the Court's early case law a crucial distinction evolved between legislative and administrative conduct. Whereas in the case of the latter simple unlawfulness was sufficient, liability for legislative conduct arose under considerably stricter conditions. For these purposes, any measure of general applicability was considered 'legislative', whereas those of individual applicability qualified as 'administrative'.[898] The rule was laid down in *Zuckerfabrik Schöppenstedt*:

> Where legislative action involving measures of economic policy is concerned, the Community does not incur non-contractual liability for damage suffered by individuals as a consequence of that action […] unless a *sufficiently flagrant violation of a superior rule of law for the protection of the individual* has occurred.[899]

The rationale for the so-called *Schöppenstedt*-test was that the policy choices involved in legislative activity should not be hindered by the prospect of applications for damages whenever the public interest requires the adoption of measures that adversely affect the interests of individuals.[900] On this basis a further distinction crystallised in later case law, differentiating between legislative measures that involved the exercise of wide discretion and those that did not. The former were subject to the fully-fledged *Schöppenstedt*-test. With respect to the latter, a mere breach of a superior rule of law seemed to be sufficient.[901]

A sufficiently flagrant violation under the *Schöppenstedt*-test occurred when 'the institution concerned [had] manifestly and gravely disregarded the limits on the exercise of its powers'.[902] This was by and large interpreted restrictively.[903] A notable example where the test was met was the series

898 Fines points out, however, that the formula which defines the field of application of the stricter liability test varied considerably over time, see Francette Fines, 'A General Analytical Perspective on Community Liability' in Ton Heukels and Alison McDonnell (eds), *The Action for Damages in Community Law* (Kluwer Law International 1997) 28.

899 CJEU, Case 5/71 *Schöppenstedt* (n 894) para 11 [emphasis added].

900 CJEU, Joined Cases 83 and 94/76, 4, 15 and 40/77 *Bayerische HNL v Council and Commission*, 25 May 1978, ECLI:EU:C:1978:113, para 5.

901 Chris Hilson, 'The Role of Discretion in EC Law on Non-Contractual Liability' (2005) 42 Common Market Law Review 677, 677–681.

902 See for example CJEU, Joined Cases 83 and 94/76, 4, 15 and 40/77 *Bayerische HNL* (n 900) para 6.

903 For detail see Anthony Arnull, 'Liability for Legislative Acts under Article 215(2) EC' in Ton Heukels and Alison McDonnell (eds), *The Action for Damages in Community Law* (Kluwer Law International 1997) 136–149; Walter Van Gerven, 'Non-contractual Liability of Member States, Community Institutions and Individuals for Breaches of Community Law with a View to a Common Law for Europe' (1994) 1 Maastricht Journal of European and Comparative Law 6, 25–29.

of cases known as the *Quellmehl and Maize Gritz* cases.[904] In declaring the applications successful, the Court emphasised that, first, the rule breached occupied a particularly important place among the rules of Community law intended to protect the interests of the individual, second, the breach 'affected a limited and clearly defined group of commercial operators', third, the damage suffered went 'beyond the bounds of the economic risks inherent in the activities in the sector concerned' and, fourth, there was no sufficient justification for the breach.[905] Similar infringements, in particular 'failing completely to take account of the position of [the applicant], without invoking any overriding public interest', rendered the Community liable in other successful cases, such as *Sofrimport* or (partly) *Mulder*.[906] In contrast, in *HNL* and *Grands Moulins* the Court held that where the measure 'affected very wide categories of traders' and the effects of the breach 'did not ultimately exceed the bounds of the economic risks inherent in the activities' in the sector concerned, liability of the Community did not arise.[907] At times, the *Schöppenstedt*-test was applied more strictly. For example, in the case of *Amylum*, the Court explained that the threshold had not been met, since, even though vitiated by errors, 'these were not errors of such gravity that it may be said that the conduct of the defendant institutions in this respect was *verging on the arbitrary* and was thus of such a kind as to involve the Community in non-contractual liability.'[908]

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904 CJEU, Joined Cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79 *Dumortier v Council*, 4 October 1979, ECLI:EU:C:1979:223; CJEU, Case 238/78 *Ireks-Arkady v Council and Commission*, 4 October 1979, ECLI:EU:C:1979:226; CJEU, Joined Cases 261 and 262/78 *Interquell Stärke and Diamalt v Council and Commission*, 4 October 1979, ECLI:EU:C:1979:228; CJEU, Joined Cases 241, 242, 245 to 250/78 *DGV v Council and Commission*, 4 October 1979, ECLI:EU:C:1979:227; for more detail see text to n 1220-1222.

905 For example CJEU, Joined Cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79 *Dumortier* (n 904) para 11; it should be pointed out that the second and third of these four elements do not strictly speaking qualify the breach, see Van Gerven, 'Non-contractual Liability of Member States, Community Institutions and Individuals for Breaches of Community Law with a View to a Common Law for Europe' (n 903) 28; see also A. G 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) 183, who more convincingly considers this part of the damage condition.

906 CJEU, Case C-152/88 *Sofrimport v Commission*, 26 June 1990, ECLI:EU:C:1990:259, paras 26–28; similarly CJEU, Joined Cases C-104/89 and C-37/90 *Mulder and Others v Council and Commission*, 19 May 1992, ECLI:EU:C:1992:217, paras 15–21; CJEU, Case 74/74 *CNTA v Commission*, 14 May 1975, ECLI:EU:C:1975:59, paras 42–44; the *Mulder* case is discussed in more detail below, text to n 1228-1231.

907 CJEU, Joined Cases 83 and 94/76, 4, 15 and 40/77 *Bayerische HNL* (n 900) para 7; see also CJEU, Case 50/86 *Grands Moulins de Paris v EEC*, 8 December 1987, ECLI:EU:C:1987:527, para 21.

908 CJEU, Joined Cases 116 and 124/77 *Amylum v Council and Commission*, 5 December 1979, ECLI:EU:C:1979:273, para 19 [emphasis added]; later the Court indicated that 'conduct verging on the arbitrary' may not always be a necessary condition for liability, CJEU, Case C-220/91 P *Commission v Stahlwerke Peine-Salzgitter*, 18 May 1993, ECLI:EU:C:1993:192, para 51; for detail see Arnull (n 903) 139–149.

Framed as an exception applicable only to 'legislative' action, in the Court's case law, the *Schöppenstedt*-test became the rule. The Community was to a large extent concerned with legislation, leaving implementation in most areas to the member states. As a consequence, a large proportion of actions for damages were subject to the restrictively interpreted *Schöppenstedt*-test.[909] Challenging the institutions' conduct under these strict conditions turned out to be extremely difficult. As Advocate General Tesauro pointed out, until 1996 only eight damages actions brought against the Community had been successful.[910]

4.1.2.3.2 The 'Bergaderm-test'

The Court's strict approach met with criticism. It was argued that the relevance of the distinction between legislative and administrative measures was questionable and that the *Schöppenstedt*-test was too restrictive, protecting the institutions more than individuals.[911] Moreover, since the 1990s, the law of member state liability had emerged and seemed subject to less restrictive conditions.[912] Whilst the *Schöppenstedt*-test was subject to numerous adjustments and alterations over the course of its roughly 25 years of application, in 2000, the case of *Bergaderm* brought particularly far-reaching changes that shaped the conditions for liability as they apply today.[913]

The case concerned Bergaderm's production of sun oil containing furocoumarines, the precise effects of which were subject to scientific controversy but potentially harmful. In 1995 the permissible quantity of furocoumarines in sun oil was limited in a directive adopted by the Commission. Bergaderm, whose sun oil did not fulfil that requirement, was put into liquidation by the end of 1995 and sought compensation from the Commission based on the unlawfulness of the directive. Both the CFI and Advocate General Fennelly started their analysis by classifying the contested Directive as legislative in nature.[914]

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909 See in particular van der Woude (n 883) 110–112; Andrea Biondi and Martin Farley, *The right to damages in European law* (Kluwer Law International 2009) 101–103.

910 AG Tesauro, Opinion in CJEU, Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur v Bundesrepublik Deutschland and The Queen/ Secretary of State for Transport, ex parte Factortame and Others*, 5 March 1996, ECLI:EU:C:1996:79, para 63, n 65.

911 Paul Craig, 'Once more unto the breach: the Community, the State and damages liability' (1997) 113 Law Quarterly Review 67, 67; Fines (n 898) 21 and 23 respectively; see also Angela Ward, *Judicial review and the rights of private parties in EU law* (2nd edn, Oxford University Press 2007) 367; for an overview of the critical views see Aalto (n 66) 86–87; Hilson (n 901) 682–683.

912 For detail see below 4.1.3.3.

913 On the changes to the *Schöppenstedt*-test before *Bergaderm* see Aalto (n 66) 90; CJEU, Case C-352/98 P *Bergaderm and Goupil v Commission*, 4 July 2000, ECLI:EU:C:2000:361; analysing in detail the pressures leading to that change see Ward, *Judicial review and the rights of private parties in EU law* (n 911) 393–399.

914 CJEU, Case T-199/96 *Laboratoires pharmaceutiques Bergaderm and Goupil v Commission*, 16 July 1998, ECLI:EU:T:1998:176, paras 50–51; AG Fennelly, Opinion in CJEU, Case C-352/98 P *Bergaderm* (n 913) paras 26–33.

On appeal, however, the Court did not follow that approach. Citing in particular its case law on state liability, the Court held that the condition of unlawfulness was qualified in two ways.

a. The rule infringed must be intended to confer rights on individuals and
b. the breach itself must be sufficiently serious.[915]

In this light, with *Bergaderm*, at least three important aspects of the *Schöppenstedt*-test changed. First, the Court abandoned the requirement that the infringement concern a 'superior rule'. The sufficiently serious breach of any provision conferring rights on individuals would be sufficient to trigger liability. This is evident from the wording in *Bergaderm* and was explicitly pointed out by the CFI later in 2005, when it held that 'contrary to the Council's submissions, it is unimportant whether or not the rule of law infringed constitutes a higher-ranking rule of law'.[916] Second, the Court abandoned the dichotomy between legislative and administrative measures.[917] The requirement of a sufficiently serious breach was determined to be applicable to all situations. Third, the Court 'formalised' the criteria that govern the sufficient seriousness of a breach, by providing a list of exemplary factors that it would take into account in assessing the seriousness of a breach.[918]

Even though the *Bergadem*-test has been subject to some alterations since its establishment, it in essence still applies today. The Court's interpretation of its two main elements, i.e. the rule intended to confer rights on individuals and the sufficiently serious breach, are discussed in detail in Sections 4.2.1 and 4.2.2 respectively.

4.1.3 Liability of EU Member States

4.1.3.1 Legal basis

The Treaties do not contain a parallel provision to Article 340(2) TFEU, providing for the liability of member states for breaches of Union law. Even though the possibility of state liability had been explored in literature, it was generally assumed that this was a matter to be governed by national law.[919]

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915 CJEU, Case C-352/98 P *Bergaderm* (n 913) para 42.
916 CJEU, Case T-415/03 *Cofradía de pescadores "San Pedro" de Bermeo and Others v Council*, 19 October 2005, ECLI:EU:T:2005:365, para 85.
917 Aalto (n 66) 91.
918 Hilson (n 901) 681–683.
919 For a detailed discussion see Angela Ward, 'Effective Sanctions in EC Law: A Moving Boundary in the Division of Competence' (1995) 1 European Law Journal 205; exploring possibilities for state liability under Community law pre-*Francovich*, see Deirdre Curtin, 'Directives: The effectiveness of judicial protection of individual rights' (1990) 27 Common Market Law Review 709.

However, in a remarkable development that started with the case of *Francovich*, the Court confirmed that, as a matter of Union law, member states are liable for any breaches thereof.[920] It recalled that the Community legal order conferred rights on individuals which must be protected by national courts and held that it would hamper both the effectiveness of Community law and the protection of rights it guarantees, if individuals were unable to obtain redress when a member state infringes their rights under Community law.[921] Accordingly 'a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible'.[922] The Court inferred the principle of state liability from two bases. First, fostering effectiveness of Union law and the protection of rights it guarantees, it is inherent in the system of the Treaties. Second, it is required by what is now Article 4(3) TEU, according to which member states shall take all appropriate measures to ensure fulfilment of their obligations arising out of the Treaties.[923] At a later stage it added the principle of Union liability enshrined in Article 340(2) TFEU as a third basis for state liability.[924]

Francovich had a resounding impact and sparked much debate as to its implications, potential, and dangers.[925] It laid down the foundation for the principle of state liability which is now a firmly established principle of Union law.

4.1.3.2 Judicial competence and admissibility

The competence to hear actions for damages against member states lies exclusively with their respective national courts. The CJEU is only involved in proceedings relating to the non-contractual liability of member states

920 CJEU, Joined Cases C-6/90 and C-9/90 *Francovich* (n 49).
921 Ibid paras 31–33.
922 Ibid para 35.
923 Ibid paras 35–36.
924 CJEU, Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* (n 910) paras 28–29.
925 Early discussions of the implications of *Francovich*, see Karol P E Lasok, 'State liability for breach of Community law' (1992) 3 International Company and Commercial Law Review 186; Kenneth Parker, 'State liability in damages for breach of Community law' (1992) 108 Law Quarterly Review 181; Roberto Caranta, 'Governmental Liability after Francovich' (1993) 52 Cambridge Law Journal 272; Paul Craig, 'Francovich, remedies and the scope of damages liability' (1993) 109 Law Quarterly Review 595; Malcolm Ross, 'Beyond Francovich' (1993) 56 The Modern Law Review 55; Josephine Steiner, 'From direct effects to Francovich: shifting means of enforcement of Community law' (1993) 18 European Law Review 3; Van Gerven, 'Non-contractual Liability of Member States, Community Institutions and Individuals for Breaches of Community Law with a View to a Common Law for Europe' (n 903) 6–12, who, however, argues that in light of the Court's previous case law it is 'nothing more than a logical development'; Roberto Caranta, 'Judicial Protection against Member States: A new *jus commune* takes shape' (1995) 32 Common Market Law Review 703; Carol Harlow, 'Francovich and the Problem of the Disobedient State' (1996) 2 European Law Journal 199.

indirectly, when a member state court asks for a preliminary ruling according to Article 267 TFEU. The designation of the competent national courts and the procedural rules are a matter of national law.[926] These conditions cannot be less favourable than those relating to similar domestic claims and must not make it impossible or excessively difficult to obtain reparation.[927]

4.1.3.3 Conditions for liability of EU member states

Beyond setting out the general principle of state liability in Union law, *Francovich* left plenty of questions open. In light of the outright breach at stake, the Court only engaged in a rudimentary treatment of the conditions for state liability. It held that 'the conditions under which that liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss and damage.'[928] It considered that in the case of non-transposition of directives, three conditions are required and sufficient to give rise to a right on the part of the individual to obtain reparation. First, the result prescribed by the directive entails the grant of rights to individuals, second, the content of those rights is identifiable, and third, there is a causal link between the breach of the state's obligation and the loss and damage suffered by the injured parties.[929]

The conditions for state liability were clarified in *Brasserie du Pêcheur*.[930] The case originated in two requests for preliminary rulings by German (*Brasserie du Pêcheur*) and British (*Factortame and others*) courts. Both proceedings involved violations of Treaty provisions, namely Articles 30 and 52 TEEC (now Articles 34 and 49 TFEU), that had been condemned by the Court in previous judgments.[931] In *Brasserie du Pêcheur*, the Court confirmed what Advocate General Mischo had already clearly set out in his Opinion in *Francovich*, namely that the principle of state liability holds good for any breach of Union law by member states.[932] It held that EU law confers a right to compensation where a member state infringes a rule of law intended to confer rights on individuals in a sufficiently serious manner, and there is a direct causal link between the breach and the damage sustained by the injured

926 CJEU, Joined Cases C-6/90 and C-9/90 *Francovich* (n 49) para 42.
927 Ibid para 43.
928 Ibid para 38.
929 Ibid paras 39–41.
930 CJEU, Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* (n 910).
931 CJEU, Case 178/84 *Commission v Germany*, 12 March 1987, ECLI:EU:C:1987:126; CJEU, Case C-221/89 *The Queen v Secretary of State for Transport, ex parte Factortame*, 25 July 1991, ECLI:EU:C:1991:320; CJEU, Case C-246/89 *Commission v United Kingdom*, 4 October 1991, ECLI:EU:C:1991:375.
932 CJEU, Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* (n 910) para 32; AG Mischo, Opinion in CJEU, Joined Cases C-6/90 and C-9/90 *Francovich* (n 49) para 85.

party.[933] Thus, even though in the area of state liability the conditions for liability are commonly 'grouped' slightly differently (the qualifications of unlawfulness are traditionally listed as two separate criteria; damage and causation appear as one single condition), member state liability is essentially subject to three cumulative conditions:

1. the unlawfulness of the conduct complained of, which is qualified in that
   a. first, the rule of law infringed must be intended to confer rights on individuals and,
   b. second, the breach must be sufficiently serious,
2. the occurrence of damage on the part of the victim, and
3. a causal relationship between the unlawful conduct and the victim's damage.

The conditions for member state liability hence correspond in substance to the conditions for Union liability. Their precise relationship shall be discussed in the following section.

4.1.4 Analysing public liability law

4.1.4.1 Union and member state liability as a single system of public liability

For decades, the law on liability of the Union developed while the very existence of state liability had not yet been confirmed by the Court. The case of *Francovich* marked a turning point in the law on public liability. As noted by Caranta shortly after it had been rendered, its relevance went well beyond the field of governmental liability. In his view, it marked 'the birth of a "jus commune", of a law common to all the Member States and to the Community itself, in the field of the judicial protection of individuals against public powers.'[934]

The idea that breaches of Union law should be governed by the same set of rules irrespective of the public authority that committed them is compelling. This is even more so when considering how intertwined the conduct of the Union and its member states often is, for example when member states implement Union law. In particular, should the conditions for liability really

933 CJEU, Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* (n 910) para 51; these conditions have been consistently confirmed by the Court, recently in CJEU, Case C-98/14 *Berlington Hungary and Others*, 11 June 2015, ECLI:EU:C:2015:386, para 104; in *Dillenkofer* the Court confirmed that these conditions were the same as those already outlined in *Francovich*, where the 'sufficiently serious breach, although not expressly mentioned […], was nevertheless evident from the circumstances of that case', CJEU, Joined Cases C-178/94 to C-190/94 *Dillenkofer and Others v Bundesrepublik Deutschland*, 8 October 1996, ECLI:EU:C:1996:375, para 23.

934 Caranta, 'Governmental Liability after Francovich' (n 925) 296–297.

be different, depending on whether the unlawfulness originates in Union legislation or the implementation thereof?[935]

Indeed, in the case of *Brasserie du Pêcheur*, the Court held that as a general rule the conditions governing member state and Union liability do not differ from each other, and therefore relied on the conditions for Union liability when clarifying those applicable to member state liability.[936] Four years later, in the case of *Bergaderm*, the Court explicitly endorsed the parallelism between the conditions governing Union and state liability from the perspective of Union liability.[937] The Court essentially reiterated its finding in *Brasserie du Pêcheur* and held that

> the conditions under which the State may incur liability for damage caused to individuals by a breach of Community law cannot, in the absence of particular justification, differ from those governing the liability of the Community in like circumstances. The protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage […].[938]

Against this background, it is safe to conclude that generally the same 'test' applies to actions for damages against Union bodies and member states.[939]

The parallelism between Union and state liability has significant consequences for the study of public liability law. Most importantly, both are part of a single system of liability, meaning that case law in the area of Union liability is in principle relevant for member state liability and vice versa.[940]

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935 Van Gerven, 'Non-contractual Liability of Member States, Community Institutions and Individuals for Breaches of Community Law with a View to a Common Law for Europe' (n 903) 35–36; Caranta, 'Governmental Liability after Francovich' (n 925) 297; for a different view see for example AG Léger, Opinion in CJEU, Case C-5/94 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland)*, 23 May 1996, ECLI:EU:C:1996:205, 138–146, in particular 145, since the interpretation by the Court of the conditions governing Union liability was widely criticised as overly restrictive and as a result granting insufficient protection for the right to effective judicial remedy, he found the idea to align state liability with Union liability 'somewhat paradoxical' since Union liability would thereby 'contaminate' its younger sibling.

936 CJEU, Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* (n 910) para 42; see also Harlow (n 925) 203; Heukels and McDonnell (n 896) 6; David Edward and William Robinson, 'Is there a Place for Private Law Principles in Community Law?' in Ton Heukels and Alison McDonnell (eds), *The Action for Damages in Community Law* (Kluwer Law International 1997) 342–343.

937 CJEU, Case C-352/98 P *Bergaderm* (n 913) paras 39–44.

938 Ibid para 41.

939 The convergence between the conditions governing Union and state liability is studied in detail by Aalto (n 66); see also Ward, *Judicial review and the rights of private parties in EU law* (n 911) 402–404; Biondi and Farley disagree, in their view, it is possible to speak of a unitary test for damages liability only in theory, '[i]n practice, however, there remain numerous, important differences between the two forms of actions, and separate treatment is still necessary.', see Biondi and Farley (n 909) xxxvi.

940 Walter Van Gerven, 'Of Rights, Remedies and Procedures' (2000) 37 Common Market Law Review 501, 510–511; see also Ward, *Judicial review and the rights of private parties in EU law* (n 911) 205–206.

For this reason, the analysis in this chapter does not treat Union and member state liability separately. Rather, it discusses each of the conditions for liability in turn, taking into account the case law on both Union as well as state liability.

Treating Union and member state liability as a single system of liability proves particularly advantageous when some aspects of the conditions for liability have been clarified with respect to only one of the two sub-systems. If the assumption is that the same principles apply, either of these sub-systems can help to fill the gaps in the other. As will be seen below, this is especially useful in the context of liability for fundamental rights violations, since there is some case law in the area of Union liability, but none at all in the area of state liability.[941]

4.1.4.2 Case law in the area of public liability

As is evident from the previous sections, the task of applying EU public liability law is shared between courts belonging to different legal systems.[942] Whilst the General Court is primarily competent to hear actions against the Union and Union bodies, the courts of the respective member states are exclusively competent to give final rulings on state liability. The Court of Justice is involved in Union liability cases when appeals are lodged against the decisions of the General Court and in state liability cases through the preliminary ruling procedure.

The analysis in this chapter is concerned with the minimum conditions for incurring liability under EU law. For that reason it exclusively takes into account case law of the CJEU. However, it is important to keep in mind that member states are free to apply less stringent conditions for liability and may be called upon to develop the details of some of said conditions, especially when the facts of a case do not allow the CJEU itself to do so.[943]

In the area of state liability, all cases decided by the CJEU so far are in principle relevant to this study. In total, 41 CJEU cases discuss at least one aspect of state liability in some detail (up to, and including 2016, see Table 7).[944]

In the area of Union liability, not all the case law is relevant to this study. Most importantly, the qualifications of unlawfulness in the law of Union liability have been subject to substantial changes over time, culminating

941 See 4.2.1.3 and 4.2.2.5.

942 See in particular above 4.1.2.2 and 4.1.3.2.

943 Paul Craig, *EU Administrative Law* (2nd edn, Oxford University Press 2012) 737–738; pointing out the role of national courts in the assessment of causation in particular, see Biondi and Farley (n 909) 55–60.

944 See also the list of cases drawn up by Tobias Lock, 'End of an Epic?: The Draft Agreement on the EU's Accession to the ECHR' (2012) 31 Yearbook of European Law 162, in n 19.

in *Bergaderm*, which aligned the conditions for Union and state liability.[945] Whilst 'pre-*Bergadem*' case law in principle remains 'good law' in relation to the conditions of damage and causal link, its continued relevance is more limited with respect to the qualifications of unlawfulness.

It is useful to recall at this point that according to the *Schöppenstedt*-test, only breaches of a 'superior rule of law for the protection of the individual' were capable of giving rise to liability. With *Bergaderm*, the Court dropped the 'superiority' requirement and found that it would be sufficient that the rule infringed 'be intended to confer rights on individuals'. It has since been clarified that the expressions, 'rule of law for the protection of the individual' and 'rule of law intended to confer rights on individuals' are mere variations on a single legal concept.[946] It can therefore be assumed that any provision that was considered 'a superior rule of law for the protection of the individual' under the *Schöppenstedt*-test, would also qualify as a 'rule of law intended to confer rights on individuals' under the current *Bergaderm*-test. It follows that 'pre-*Bergaderm*' case law continues to be relevant in relation to the requirement that the rule of law infringed confers rights on individuals. However, it has to be used cautiously, taking into account in particular that if liability was dismissed under the *Schöppenstedt*-test for lack of 'superiority' of the provision in question, it cannot be assumed that liability would also have to be denied under the *Bergaderm*-test.[947]

The requirement of a sufficiently serious breach underwent even more substantial changes as a result of *Bergaderm*. As opposed to the *Schöppenstedt*-test, its application was extended to all situations, as opposed to legislative acts only, and the criteria determining seriousness were 'formalised'. It cannot therefore be assumed that 'pre-*Bergaderm*' case law generally continues to be of relevance with respect to the sufficiently serious breach requirement.

Thus, in principle, 'post-*Bergadem*' case law is relevant to this study, and 'pre- *Bergaderm*' case law is to a more limited extent. This leaves a body of case law that is too large to be considered in its entirety here. The study is, however, based on a significant sample of cases, focussing on decisions by the ECJ, but also using General Court decisions. As a point of departure, the study relies on those cases that have been identified in academic literature as key developments regarding one or more areas of public liability law. In respect to more specific questions relevant here, i.e. liability for fundamental rights violations and allocation of liability, the study additionally relies on

945 For detail see above 4.1.2.3.

946 CJEU, Case T-341/07 *Sison v Council*, 23 November 2011, ECLI:EU:T:2011:687, para 33.

947 See also Aalto (n 66) 112; however, see 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) 159, who considers the *Bergaderm*-test in this respect more stringent than the *Schöppenstedt*-test.

cases that may not generally mark key developments but otherwise provide useful clarification. This includes in particular those cases that the Court itself frequently refers to. In total, this study relies on approximately 200 cases, all identified in the references in each section and the list of references at the end of this study.

Table 7: List of cases on state liability

	Case number	Name (short)	Date	ECLI
1	C-6/90, C-9/90	Francovich	19/11/1991	ECLI:EU:C:1991:428
2	C-46/93, C-48/93	Brasserie du pêcheur	05/03/1996	ECLI:EU:C:1996:79
3	C-392/93	British Telecommunications	26/03/1996	ECLI:EU:C:1996:131
4	C-5/94	Hedley Lomas	23/05/1996	ECLI:EU:C:1996:205
5	C-178/94 to C-190/94	Dillenkofer	08/10/1996	ECLI:EU:C:1996:375
6	C-283/94, C-291/94, C-292/94	Denkavit Internationaal	17/10/1996	ECLI:EU:C:1996:387
7	C-94/95, C-95/95	Bonifaci and Berto	10/07/1997	ECLI:EU:C:1997:348
8	C-373/95	Maso and Others	10/07/1997	ECLI:EU:C:1997:353
9	Case C-261/95	Palmisani	10/07/1997	ECLI:EU:C:1997:351
10	Case C-127/95	Norbrook Laboratories	02/04/1998	ECLI:EU:C:1998:151
11	Case C-319/96	Brinkmann	24/09/1998	ECLI:EU:C:1998:429
12	C-140/97	Rechberger	15/06/1999	ECLI:EU:C:1999:306
13	C-302/97	Konle	01/06/1999	ECLI:EU:C:1999:271
14	C-424/97	Haim	04/07/2000	ECLI:EU:C:2000:357
15	C-397/98, C-410/98	Metallgesellschaft and Höchst	08/03/2001	ECLI:EU:C:2001:134
16	C-150/99	Lindöpark	18/01/2001	ECLI:EU:C:2001:34
17	C-118/00	Larsy	28/06/2001	ECLI:EU:C:2001:368
18	C-63/01	Evans	04/12/2003	ECLI:EU:C:2003:650
19	C-224/01	Köbler	30/09/2003	ECLI:EU:C:2003:513
20	C-222/02	Peter Paul	12/10/2004	ECLI:EU:C:2004:606
21	C-173/03	Traghetti del Mediterraneo	13/06/2006	ECLI:EU:C:2006:391
22	C-470/03	A.G.M.-COS.MET	17/04/2007	ECLI:EU:C:2007:213
23	C-511/03	Ten Kate	20/10/2005	ECLI:EU:C:2005:625
24	C-446/04	Test Claimants I	12/12/2006	ECLI:EU:C:2006:774
25	C-524/04	Test Claimants II	13/03/2007	ECLI:EU:C:2007:161
26	C-278/05	Robins	25/01/2007	ECLI:EU:C:2007:56
27	C-445/06	Danske Slagterier	24/03/2009	ECLI:EU:C:2009:178
28	C-452/06	Synthon	16/10/2008	ECLI:EU:C:2008:565
29	C-118/08	Transportes Urbanos	26/01/2010	ECLI:EU:C:2010:39
30	C-568/08	Combinatie Spijker Infrabouw	09/12/2010	ECLI:EU:C:2010:751
31	C-429/09	Fuß	25/11/2010	ECLI:EU:C:2010:717
32	C-279/09	DEB	22/12/2010	ECLI:EU:C:2010:811

Table 7: List of cases on state liability

	Case number	Name (short)	Date	ECLI
33	C-94/10	Danfoss	20/10/2011	ECLI:EU:C:2011:674
34	C-420/11	Leth	14/03/2013	ECLI:EU:C:2013:166
35	C-501/12 to C-506/12, C-540/12, C-541/12	Specht	19/06/2014	ECLI:EU:C:2014:2005
36	C-244/13	Ogieriakhi	10/07/2014	ECLI:EU:C:2014:2068
37	C-318/13	Proceedings brought by X	03/09/2014	ECLI:EU:C:2014:2133
38	C-98/14	Berlington	11/06/2015	ECLI:EU:C:2015:386
39	C-160/14	Ferreira da Silva e Brito	09/09/2015	ECLI:EU:C:2015:565
40	C-168/15	Tomášová	28/07/2016	ECLI:EU:C:2016:602
41	C-268/15	Fernand Ullens de Schooten	15/11/2016	ECLI:EU:C:2016:874

4.2 Liability for fundamental rights violations

Liability may arise for breaches of *any* provision that is binding under EU law. For the current purposes, this means in particular that breaches of fundamental rights obligations, guaranteed in the CFR or as general principles of EU law, can also give rise to the liability of the Union or its member states if all the conditions are fulfilled.[948]

This section elaborates on each of the conditions for public liability, with a view to applying them to breaches of fundamental rights. Case law specifically addressing liability for fundamental rights violations is scarce. Member state liability more commonly concerns Treaty provisions or specific rights arising from secondary legislation. Liability of EU bodies is frequently invoked in respect of principles, such as the protection of legitimate expectations, non-discrimination, or the principle of proportionality.[949]

Even where fundamental rights are explicitly relied upon, it often concerns rights of an economic nature or rights that find expression in specific secondary Union legislation, such as rights of defence, or protection of personal data. In contrast, cases concerning core fundamental rights also at stake in the context of Frontex operations, such as the right to life, the freedom from torture or inhuman or degrading treatment or punishment, or the right to protection of private and family life, do not arise as frequently, or indeed not at all. This may be partly explained by the economic nature of the activities with which Union law has traditionally been concerned and, as a consequence, the type of claimants that tend to use the direct actions available

948 Walter Van Gerven, 'Remedies for Infringements of Fundamental Rights' (2004) 10 European Public Law 261, 268.

949 See also Aalto (n 66) 40.

under Union law. It has been pointed out that the vast majority of actions for damages against the Union have been brought by corporations and involved economic interests.[950]

In light of the lack of fundamental rights-specific cases, this section relies on the Court's case on public liability more generally, identifying the generally applicable requirements first, before applying them to situations of fundamental rights violations.

Whilst all conditions are discussed to some extent, the focus is on the qualifications of unlawfulness, the most complex and volatile of these.

Section 4.2.1 analyses the circumstances under which a rule is considered to confer rights on individuals and discusses to what extent fundamental rights may form the sources of 'individual rights' in the context of liability law. Section 4.2.2 focusses on carving out the threshold that is required for a breach to qualify as 'sufficiently serious'. This provides a basic understanding of the circumstances that could render fundamental rights breaches that may occur during Frontex operations 'sufficiently serious' so as to trigger liability. Section 4.2.3 sketches out the remaining two conditions, namely the requirement for damage and the causal link between the breach and the damage.

4.2.1 Unlawfulness: the character of the rule infringed

Breaches of EU law give rise to liability only if the rule infringed *is intended to confer rights on individuals*.[951] The idea that EU law is capable of conferring rights directly on individuals is neither new nor unique to public liability law. As early as 1963, in the case of *Van Gend en Loos*, the Court famously declared that 'the Community constitutes a new legal order of international law […] the subjects of which comprise not only Member States but also their nationals'. In that vein, it held that Community law may impose obligations on individuals and confer upon them rights which become part of their legal heritage.[952] Broadly speaking, a right (also 'individual right' or 'subjective right') may be described as a legal entitlement to demand

950 Harlow (n 925) 204–205; Ward, 'Damages under the EU Charter of Fundamental Rights' (n 67) 603, who notes that 'almost all of the cases concerning damages for breach of EU law, whether by the EU institutions or the Member States, have arisen in the context of commercial or economic law.'

951 Recently see for example CJEU, Case C-611/12 P *Giordano v Commission*, 14 October 2014, ECLI:EU:C:2014:2282, paras 35, 44; CJEU, Case C-98/14 *Berlington* (n 933) para 104.

952 CJEU, Case 26/62 *Van Gend en Loos v Administratie der Belastingen*, 5 February 1963, ECLI:EU:C:1963:1, 12.

something from someone else.[953] However, the precise characteristics of the concept of 'EU rights' and their meaning across the different areas of EU law, *inter alia* in the areas of public liability, direct effect, and the Court's jurisprudence on remedies and procedural rules in national courts, remain unclear.[954] This concerns in particular the relationship between the meaning of rights in the context of direct effect on the one hand and public liability, in particular state liability, on the other.[955]

The following section sets out the requirements a provision has to meet in order to be considered a 'rule intended to confer rights on individuals' for the purposes of public liability. Without attempting to solve the complex question of the meaning of the concept of rights in the different areas of EU law, it first briefly examines the implications that a finding of direct effect of a provision has in this context, in particular the question of whether every directly effective provision can be considered as conferring rights for the purposes of liability.

4.2.1.1 Individual rights, direct effect, and public liability

Direct effect essentially describes the capacity of an EU law provision to be invoked by private parties in proceedings in front of a national court.[956] When establishing the principle of state liability in *Francovich*, the Court left some room for speculation that liability may be meant to close the gap in protection that arises when provisions are not directly effective. The idea was tempting since the Court pointed out that the possibility of redress was particularly indispensable where the full effectiveness of a rule is subject

953 Saša Beljin, 'Rights in EU Law' in Sacha Prechal and Bert van Roermund (eds), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford University Press 2008) 93; Thomas Eilmansberger, 'The relationship between rights and remedies in EC law: In search of the missing link' (2004) 41 Common Market Law Review 1199, 1238; Van Gerven, 'Of Rights, Remedies and Procedures' (n 940) 502.

954 Prechal, 'Protection of Rights' (n 947) 157–163; Christopher Hilson and Antony T Downes, 'Making sense of rights: Community rights in E.C. law' [1999] European Law Review 121; Angela Ward, 'More than an "Infant Disease": Individual Rights, EC Directives, and the Case for Uniform Remedies' in Jolande M Prinssen and Annette Schrauwen (eds), *Direct Effect: Rethinking a Classic of EC Legal Doctrine* (Europa Law Publishing 2002); Beljin (n 953).

955 Sacha Prechal, 'Member State Liability and Direct Effect: What's the Difference After All?' (2006) 17 European Business Law Review 299, 303; However, this question has also given rise to some controversy in the area of the Union's liability for breaches of international law, for more detail see Anne Thies, *International trade disputes and EU liability* (Cambridge University Press 2013) 69–70.

956 Bruno de Witte, 'Direct effect, primacy, and the nature of the legal order' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (2nd edn, Oxford University Press 2011) 323; see also Sacha Prechal, *Directives in EC law* (2nd edn, Oxford University Press 2005) 240–241, who discusses the uncertainties related to this definition and offers an alternative; for earlier discussions of direct effect see J. A Winter, 'Direct applicability and direct effect: Two distinct and different concepts in Community law' (1972) 9 Common Market Law Review 425; Pierre Pescatore, 'The doctrine of direct effect: An infant disease of Community law' (1983) 8 European Law Review 155.

to prior action on the part of the state, in the absence of which individuals cannot enforce their rights before national courts.[957] However, in *Brasserie du Pêcheur*, the Court explicitly dismissed the idea that liability would depend on the absence of direct effect. The latter, it held, is only a minimum guarantee which cannot in every case avoid individuals suffering damage as a result of a member state's breach of Community law.[958] In the Court's view, the individual's right to reparation is indeed 'the necessary corollary of the direct effect of the Community provision whose breach caused the damage sustained.'[959] Hence, neither direct effect nor the absence thereof are conditions for state liability to arise.

Yet, the uncertainty remained as to whether the two concepts were otherwise linked, especially through the notion of individual rights.[960] A provision is generally directly effective when it is clear, precise, and unconditional. Akin to the test under international law that defines whether a provision is 'self-executing', the conditions for direct effect thus focus on the 'justiciability' of the provision in question.[961] This broad view on direct effect, also referred to as 'objective' direct effect, recognises the need to distinguish between the existence and invocability of a right and sees the purpose of the doctrine of direct effect as defining the latter.[962] However, the Court has from the start established a close connection between the capability of a provision to have direct effect and to create individual rights. As a result, a narrow view on direct effect, also referred to as 'subjective' direct effect, essentially equates direct effect with the creation of rights.[963] It is in this light that the notion of individual rights constitutes the most important interface between direct effect and public liability.[964]

It is beyond the scope of this study to explore in detail the merits of the diverging views on the concept of direct effect and its relationship with state liability. It suffices to point out that for the present purpose much seems to depend on the understanding of 'rights' in the context of direct effect. If understood as a mere entitlement to rely on the directly effective provision,

957 CJEU, Joined Cases C-6/90 and C-9/90 *Francovich* (n 49) para 34; AG Mischo in turn had made it clear in his Opinion that the principle of state liability 'is applicable to all infringements of Community law […] whether these are infringements of provisions of the Treaty, of regulations or of directives with or without direct effect', para 85.

958 CJEU, Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* (n 910) para 20.

959 Ibid para 22.

960 The 'secret link' between liability and direct effect is analysed in detail by Prechal, 'Member State Liability and Direct Effect' (n 955).

961 Eilmansberger (n 953) 1203; de Witte (n 956) 331.

962 This point was in particular made by Prechal, see Prechal, *Directives in EC law* (n 956) 99; Prechal, 'Member State Liability and Direct Effect' (n 955) 303–306; Prechal, 'Protection of Rights' (n 947) 163; see also Beljin (n 953) 111–113.

963 On this discussion see Prechal, *Directives in EC law* (n 956) 99–106; Eilmansberger (n 953) 1203.

964 Prechal, 'Member State Liability and Direct Effect' (n 955) 303.

the creation of a 'right' to that extent does seem an inevitable consequence of direct effect. However, not every directly effective provision necessarily contains a right that goes beyond the mere invocability of the provision. In other words, a provision may be sufficiently clear, precise, and unconditional to be used as a 'shield' against the application of conflicting national norms, but not entail further individual rights that could be used as a 'sword' and eventually give rise to liability.[965] It has indeed been pointed out that there may be direct effect without creating rights (in the latter sense) in the same way that there may be rights that are not directly effective.[966]

The conclusion to be drawn here is that direct effect may be an indication of the existence of a right for the purposes of public liability. Indeed, the Court at times inferred the conferral of a right for the purposes of public liability from its capacity to have direct effect.[967] However, the notions of direct effect and individual rights for the purposes of public liability are not synonymous. There may be rights that are not directly effective and provisions that have direct effect but do not confer rights. It follows that the existence of a right has to be established independently from the capacity of the provision in question to produce direct effect.[968]

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965 De Witte (n 956); Van Gerven, 'Of Rights, Remedies and Procedures' (n 940), who distinguishes between 'general' and 'specific' rights; Eilmansberger (n 953); Prechal, *Directives in EC law* (n 956) 100–102; most authors refer to the famous statement of the Court in CJEU, Case 8/81 *Becker v Finanzamt Münster-Innenstadt*, 19 January 1982, ECLI:EU:C:1982:7, para 25, '[…] wherever the provisions of a directive appear […] to be unconditional and sufficiently precise, those provisions may […] be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the State.'; the Court repeated this statement on various occasions, e.g. in CJEU, Case C-430/04 *Feuerbestattungsverein Halle*, 8 June 2006, ECLI:EU:C:2006:374, para 28; see however Koen Lenaerts and Tim Corthaut, 'Of birds and hedges: The role of primacy in invoking norms of EU law' (2006) 31 European Law Review 287, who argue that the concept of direct effect should be reduced 'to its true proportions', i.e. allowing individuals to enforce rights conferred by EU law.

966 Prechal, *Directives in EC law* (n 956) 105–106 (with examples); Prechal, 'Member State Liability and Direct Effect' (n 955) 305; Beljin (n 953) 111–113; de Witte (n 956) 330–331.

967 See for example in CJEU, Case C-445/06 *Danske Slagterier v Bundesrepublik Deutschland*, 24 March 2009, ECLI:EU:C:2009:178, para 22, where the Court held: 'It should be recalled that it is undisputed that Article 28 EC has direct effect in the sense that it confers on individuals rights upon which they are entitled to rely directly before the national courts and that breach of that provision may give rise to reparation […].'; CJEU, Case C-420/11 *Leth v Republik Österreich and Land Niederösterreich*, 14 March 2013, ECLI:EU:C:2013:166, para 32; see also CJEU, Case T-415/03 *San Pedro* (n 916) para 86.

968 See also AG Stix-Hackl, Opinion in CJEU, Case C-222/02 *Peter Paul and Others v Bundesrepublik Deutschland*, 12 October 2004, ECLI:EU:C:2004:606, 58, pointing out that 'conferring rights' is not synonymous for 'direct effect'; It has been argued that direct effect in fact should not be sufficient, since the consequences of a right in the context of public liability go well beyond those in the context of direct effect. Hence, a higher threshold should apply to the former. See Eilmansberger (n 953).

4.2.1.2 *Individual rights in public liability law*

There is little guidance from the Court as to the precise characteristics of a rule that would qualify it as one 'intended to confer rights on individuals' for the purposes of public liability law. Often, the court limits itself to stating that a rule confers a right or does not, without analysing in detail why it reached that conclusion.[969]

If a provision is to contain rights for individuals, the content and beneficiaries of those rights must be sufficiently ascertainable.[970] This requirement has largely been applied in the area of state liability, but more recently also found its way into the case law on Union liability.[971] The level of precision required is unclear, but where the relevant provision does not 'in any way define the substantive scope of the legal rule on the basis of which the national court must decide the case before it', it 'creates neither rights nor obligations for individuals'.[972] Whilst this threshold does not appear to be particularly high, the precision and clarity of a rule is taken into account in the assessment of the seriousness of the breach.[973]

The most important requirement for a provision to confer rights on individuals is that it serves the protection of individuals, rather than the general public at large.[974] An obligation on a state or an EU body is therefore not sufficient in itself, rather it depends to whom that obligation is owed.[975] This has commonly been considered an expression of the *Schutznormtheorie* ('protective rule theory'), an instrument for the identification of individual rights applied for example in German law.[976] In determining the protective scope

969 See for example CJEU, Case C-5/94 *Hedley Lomas* (n 935) para 27; CJEU, Case C-152/88 *Sofrimport* (n 906) para 26; CJEU, Joined Cases C-104/89 and C-37/90 *Mulder* (n 906) para 15.

970 Prechal, 'Protection of Rights' (n 947) 163–164; Prechal, *Directives in EC law* (n 956) 124–129.

971 For example in CJEU, Joined Cases C-6/90 and C-9/90 *Francovich* (n 49) para 40; CJEU, Joined Cases C-178/94 to C-190/94 *Dillenkofer* (n 933) paras 22, 27, 44; CJEU, Case C-127/95 *Norbrook Laboratories v Ministry of Agriculture, Fisheries and Food*, 2 April 1998, ECLI:EU:C:1998:151, para 108; in the area of Union liability, CJEU, Case T-415/03 *San Pedro* (n 916) para 86; CJEU, Case T-217/11 *Staelen v European Ombudsman*, 29 April 2015, ECLI:EU:T:2015:238, para 73.

972 CJEU, Case C-98/14 *Berlington* (n 933) para 108.

973 See below 4.2.2.2.

974 For example CJEU, Case T-415/03 *San Pedro* (n 916) para 86; see also Beljin (n 953) 114–115; Aalto (n 66) 129; Prechal, 'Protection of Rights' (n 947) 163–164.

975 For example CJEU, Case C-222/02 *Peter Paul* (n 968) para 40.

976 It is, however, commonly considered less restrictive than the theory applied in the German legal order, Arnull (n 903) 136–137; Prechal, 'Protection of Rights' (n 947) 165; Van Gerven, 'Non-contractual Liability of Member States, Community Institutions and Individuals for Breaches of Community Law with a View to a Common Law for Europe' (n 903) 27; see, however, Eilmansberger (n 953) 1241–1243, who is of the view that the Court applies the *Schutznormtheorie* only with respect to the liability of EU bodies, but not in the area of state liability, to which he argues it should be extended.

of a provision, the CJEU takes into account its wording, purpose, and legislative context. In some instances, the Court has relied on the objectives set out in the preamble of the directive or regulation containing the provision at stake, but the mere mention in the preamble of the protection of individuals as one of the aims pursued is insufficient on its own, if it is not mirrored in one or more specific provisions.[977]

The inclusion of individuals within a provision's protective scope is often a matter of degree. In this light, the central question is *to what extent* individuals have to be covered by the protective scope of a provision, in particular where it fulfils more than one purpose.[978] The Court has consistently held that individuals are conferred rights, even if their protection is not the sole purpose of the rule in question. This was first clarified in *Kampffmeyer*, where 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'.[979] Similarly, in *Dillenkofer* the Court found that 'the fact that the [relevant] directive is intended to assure other objectives cannot preclude its provisions from also having the aim of protecting consumers.'[980] This wide interpretation has since been confirmed on numerous occasions. In more recent cases, the Court has explicitly pointed out that the requirement that provisions are intended to confer rights on individuals is met 'if the rule of law breached, while in the main concerning interests of a general nature, also protects the individual interests of the persons concerned'.[981]

However, in order to qualify as a rule conferring rights on individuals, the protection of individuals may have to be dominant among several purposes. This seems to have motivated the Court in *Peter Paul* to deny the existence of individual rights.[982] The case revolved around the question of whether the obligation to subject banks to 'prudential supervision' conferred a right on depositors to have the competent authorities take supervisory measures in their interest. In essence, the CJEU found that deficient supervision over credit institutions could not give rise to member state liability, because individual rights protection only appeared as a minor purpose among many

977 Most prominently in CJEU, Joined Cases C-178/94 to C-190/94 *Dillenkofer* (n 933) 37; CJEU, Joined Cases 5, 7, 13-24/66 *Kampffmeyer and Others v Commission*, 14 July 1967, ECLI:EU:C:1967:31, 263; for the limitation thereof see CJEU, Case C-222/02 *Peter Paul* (n 968) paras 38–40.

978 Prechal, 'Protection of Rights' (n 947) 165.

979 CJEU, Joined Cases 5, 7, 13-24/66 *Kampffmeyer* (n 977) 262–263.

980 CJEU, Joined Cases C-178/94 to C-190/94 *Dillenkofer* (n 933) para 39.

981 CJEU, Case T-341/07 *Sison III* (n 946) para 47; also in CJEU, Case T-437/10 *Gap granen & producten v Commission*, 16 May 2013, ECLI:EU:T:2013:248, para 22.

982 CJEU, Case C-222/02 *Peter Paul* (n 968); for more detail and a critical discussion of the case see Michel Tison, 'Do not attack the watchdog!: Banking supervisor's liability after *Peter Paul*' (2005) 42 Common Market Law Review 639.

and did not necessarily foster the overall aim of the rules at stake.[983] Whilst *Peter Paul* seems to have narrowed the broad interpretation of the individual rights condition, it has been argued that the approach adopted may have been motivated by policy considerations and the financial implications resulting from liability for failures in banking supervision. Thus, it is open to doubt whether generally applicable criteria for the identification of individual rights can be deduced from *Peter Paul*.[984]

Against this background, it is safe to conclude that the Court has interpreted the individual rights condition generously.[985] Beyond those mentioned above, examples of provisions, rules, or principles that confer rights on individuals include the fundamental freedoms (*Brasserie du Pêcheur*; *Hedley Lomas*; *Test Claimants*; *Danske Slagterier*; *Berlington*),[986] the protection of legitimate expectations or legal certainty (*CNTA I*; *Sofrimport*; *Mulder*; *Emesa Sugar*),[987] the principle of proportionality (*Zuckerfabrik Bedburg*; *Emesa Sugar*; *M v Ombudsman*),[988] the principle of equality, the prohibition of discrimination, as enshrined in the Treaties (*Bayerische HNL*; *Dumortier*; *Grands Moulins*), in secondary legislation (*Specht*), or in the general principles of EU law (*Dole Fresh Fruit*),[989] the right to have an Environmental Impact Assessment carried out (*Leth*),[990] or specific rights contained in directives (*Francovich*; *Dillenkofer*; *Fuß*).[991]

983 CJEU, Case C-222/02 *Peter Paul* (n 968) paras 40-46.

984 Tison (n 982) 668–670; Prechal, 'Protection of Rights' (n 947) 167.

985 Beljin (n 953) 116; Prechal, 'Protection of Rights' (n 947) 178; providing a particularly detailed analysis of the Court's case law in this area, see Aalto (n 66) 111-132, 158-176.

986 CJEU, Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* (n 910) para 23, 54; CJEU, Case C-5/94 *Hedley Lomas* (n 935) para 27; CJEU, Case C-446/04 *Test Claimants in the FII Group Litigation*, 12 December 2006, ECLI:EU:C:2006:774, para 211; CJEU, Case C-445/06 *Danske Slagterier* (n 967) para 22–26; CJEU, Case C-98/14 *Berlington* (n 933) para 105.

987 CJEU, Case 74/74 *CNTA I* (n 906) paras 42–44; CJEU, Case C-152/88 *Sofrimport* (n 906) para 26; CJEU, Joined Cases C-104/89 and C-37/90 *Mulder* (n 906) para 15; CJEU, Case T-43/98 *Emesa Sugar v Council*, 6 December 2001, ECLI:EU:T:2001:279, para 64.

988 CJEU, Case 281/84 *Zuckerfabrik Bedburg v Council and Commission*, 14 January 1987, ECLI:EU:C:1987:3, paras 35–39; CJEU, Case T-43/98 *Emesa Sugar* (n 987) para 64; CJEU, Case T-412/05 *M v European Ombudsman*, 24 September 2008, ECLI:EU:T:2008:397, para 125; implicitly also CJEU, Case T-16/04 *Arcelor v Parliament and Council*, 2 March 2010, ECLI:EU:T:2010:54, para 159.

989 CJEU, Joined Cases 83 and 94/76, 4, 15 and 40/77 *Bayerische HNL* (n 900) para 5; CJEU, Joined Cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79 *Dumortier* (n 904) para 11; CJEU, Case 50/86 *Grands Moulins* (n 907) para 10; CJEU, Joined Cases C-501/12 to C-506/12, C-540/12 and C-541/12 *Specht and Others*, 19 June 2014, ECLI:EU:C:2014:2005, para 101; CJEU, Case T-56/00 *Dole Fresh Fruit International v Commission and Council*, 6 March 2003, ECLI:EU:T:2003:58, para 73.

990 CJEU, Case C-420/11 *Leth* (n 967) paras 31-36, 44, pointing out that it may be required that the purpose of the provision breached encompasses the type of damage actually sustained by the applicant.

991 CJEU, Joined Cases C-6/90 and C-9/90 *Francovich* (n 49) para 44; CJEU, Joined Cases C-178/94 to C-190/94 *Dillenkofer* (n 933) paras 33–42; CJEU, Case C-429/09 *Fuß v Stadt Halle*, 25 November 2010, ECLI:EU:C:2010:717, para 50.

In contrast, a provision that 'concerns only relations between Member States […] cannot confer individual rights upon private parties'.[992] Similarly, the rules on allocation of competences between the institutions do not confer rights on individuals either. As the Court held in *Vreugdenhil*, 'it is sufficient to state that the aim of the system of the division of powers between the various Community institutions is to ensure that the balance between the institutions provided for in the Treaty is maintained, and not to protect individuals.'[993] The failure to observe that balance by the Commission in *Vreugdenhil* was hence not sufficient to render the Community liable towards an individual applicant.[994] This reasoning was confirmed in *Artegodan* regarding provisions on the division of competences between the Union and its member states.[995] However, as the Court emphasised in both *Vreugdenhil* and *Artegodan*, liability can arise if the substantive rules adopted in violation of a competence rule infringe individual rights.[996]

In sum, the key rule is that a provision is considered to confer rights on individuals when it includes the protection of individuals as one of its (predominant) objectives, as long as the right ensuing from that provision is sufficiently identifiable.

4.2.1.3 Fundamental rights as sources of 'individual rights'

It is indisputable that fundamental rights generally serve the protection of individuals. However, for the purposes of public liability, in principle this has to be ascertained for each right specifically.[997] A number of fundamental rights have already been confirmed by the Court as qualifying as 'rights' for the purposes of public liability. This is the case for example for the right to good administration, breaches of which are the most frequent fundamental rights infringements to have triggered public liability (e.g. *Agraz*;

992 CJEU, Case T-415/03 *San Pedro* (n 916) para 88; CJEU, Case T-196/99 *Area Cova and Others v Commission and Council*, 6 December 2001, ECLI:EU:T:2001:281, para 152.

993 CJEU, Case C-282/90 *Vreugdenhil v Commission*, 13 March 1992, ECLI:EU:C:1992:124, para 20.

994 Ibid para 21; this ruling was widely criticised, see for example Fines (n 898) 23–24; also AG Bot, Opinion in CJEU, Case C-221/10 P *Artegodan v Commission*, 19 April 2012, ECLI:EU:C:2012:216, para 42.

995 CJEU, Case C-221/10 P *Artegodan* (n 994) para 81; see also Opinion of AG Bot in the same case, paras 41-45; more clearly see the reasoning of the General Court, CJEU, Case T-429/05 *Artegodan v Commission*, 3 March 2010, ECLI:EU:T:2010:60, paras 73–75.

996 CJEU, Case C-282/90 *Vreugdenhil v Commission* (n 993) para 22; CJEU, Case C-221/10 P *Artegodan* (n 994) para 81.

997 Ward, 'Damages under the EU Charter of Fundamental Rights' (n 67) 598.

AFCon; *SEMEA*; *Chart*; *Staelen*).[998] In the view of the Court, the right to good administration, including the principle of due diligence flowing from it, must be regarded as a rule of law whose purpose is to confer rights on individuals 'where it constitutes the expression of a specific right such as the right to have one's affairs handled impartially, fairly and within a reasonable time'.[999] Other fundamental rights that were considered by the Court to confer individual rights include the right to property (*FIAMM*; *Sison III*; *Ledra Advertising*),[1000] the freedom to pursue a trade, an economic activity, or a profession (*FIAMM*),[1001] the presumption of innocence (*Franchet and Byk*; *Tillack*),[1002] the right to respect for private life (*M v Ombudsman*; *Sison III*),[1003] the right to the protection of personal data (*Nikolaou*; *CN v Parliament*),[1004]

998 CJEU, Case T-285/03 *Agraz and Others v Commission*, 17 March 2005, ECLI:EU:T:2005:109, paras 49–54, this judgment was set aside by the ECJ on different grounds, but damages were eventually awarded by the CFI on 26 November 2008 (ECLI:EU:T:2008:526); CJEU, Case T-160/03 *AFCon Management Consultants and Others v Commission*, 17 March 2005, ECLI:EU:T:2005:107; CJEU, Case C-531/12 P *Commune de Millau and SEMEA v Commission*, 19 June 2014, ECLI:EU:C:2014:2008, paras 97–109; CJEU, Case T-138/14 *Chart v EEAS*, 16 December 2015, ECLI:EU:T:2015:981, paras 113–114; CJEU, Case T-217/11 *Staelen* (n 971) paras 88, 269; see, however, AG Wahl, Opinion in CJEU, Case C-338/15 P *Staelen v European Ombudsman*, 20 July 2016, ECLI:EU:C:2016:599, paras 44-47, who considers it 'overly categorical' that the General Court found the right to good administration to generally confer rights on individuals.

999 CJEU, Case T-138/14 *Chart* (n 998) para 113; in contrast, where the principle of sound administration does not constitute the expression of a specific right, it does not confer rights on individuals, see CJEU, Case T-193/04 *Tillack v Commission*, 4 October 2006, ECLI:EU:T:2006:292, para 127; CJEU, Case T-196/99 *Area Cova* (n 992) para 43.

1000 CJEU, Joined Cases C-120/06 P and C-121/06 P *FIAMM* (n 896) para 184; CJEU, Case T-341/07 *Sison III* (n 946) paras 41, 75; CJEU, Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising v Commission and ECB*, 20 September 2016, ECLI:EU:C:2016:701, para 66; implicitly also CJEU, Case T-16/04 *Arcelor* (n 988) paras 153, 158; no liability was, however, found in any of the mentioned cases; in *Systran* the General Court found that a sufficiently serious breach of the applicant's copyright and know-how was capable of giving rise to the non-contractual liability on the part of the Community, see CJEU, Case T-19/07 *Systran and Systran Luxembourg v Commission*, 16 December 2010, ECLI:EU:T:2010:526, para 261; the judgment was, however, annulled by the ECJ because the Court considered that the dispute was of contractual, not non-contractual nature, CJEU, Case C-103/11 P *Commission v Systran and Systran Luxembourg*, 18 April 2013, ECLI:EU:C:2013:245.

1001 CJEU, Joined Cases C-120/06 P and C-121/06 P *FIAMM* (n 896) para 184; implicitly also CJEU, Case T-16/04 *Arcelor* (n 988) paras 153, 158; implicitly also CJEU, Case C-611/12 P *Giordano* (n 951) paras 47-50; but no violation was found in any of the aforementioned cases.

1002 CJEU, Case T-48/05 *Franchet and Byk v Commission*, 8 July 2008, ECLI:EU:T:2008:257, para 209; also mentioned in CJEU, Case T-193/04 *Tillack* (n 999) para 121.

1003 CJEU, Case T-412/05 *M v Ombudsman* (n 988) paras 125-126; the fact that the right to respect for private life constitutes a rule of law intended to confer rights on individuals was confirmed in CJEU, Case T-341/07 *Sison III* (n 946) paras 41, 75, where, however, no liability was found; mentioning the right to family life, see CJEU, Case T-193/04 *Tillack* (n 999) para 121.

1004 CJEU, Case T-259/03 *Nikolaou v Commission*, 12 September 2007, ECLI:EU:T:2007:254, paras 210-211; CJEU, Case T-343/13 *CN v Parliament*, 3 December 2015, ECLI:EU:T:2015:926, para 47; no breach was, however, found in the latter case.

rights of defence (*Schneider*; *Sison I*),[1005] the freedom of the press (*Tillack*),[1006] and the right to an effective remedy (*Gascogne*).[1007]

These cases also show that for the purposes of giving rise to liability, it is irrelevant whether the fundamental right at stake is enshrined in the CFR, guaranteed as a general principle of Union law, or developed in secondary legislation, as long as it constitutes binding EU law. Most commonly, fundamental rights that have been considered capable of giving rise to public liability stem from the general principles of Union law, the Charter, or both.[1008] For example, in *Arcelor* and *FIAMM* (the right to property and the freedom to pursue a business), as well as in *M v Ombudsman* (the right to respect for private life), the rights at stake were found in the general principles of Union law.[1009] Since the entry into force of the Charter in 2009, explicit reference by the Court to the rights guaranteed therein is more frequent. In *SEMEA*, *Chart*, and *Staelen*, for example, the Court relied on Article 41 CFR when it found the Union liable for breaches of the right to good administration.[1010] Similarly, the Court found Article 48(1) CFR (*Franchet and Byk*), which enshrines the presumption of innocence, and Article 8 CFR (*CN*), which guarantees the protection of personal data, capable of giving rise to liability.[1011] More recently, the Court held the Union liable for the excessive length of proceedings before the General Court, relying on Article 47 CFR (*Gascogne*).[1012] When fundamental rights are detailed in secondary legislation, the latter may also form the basis of a liability claim. This was the case in *CN* and *Nikolaou*, as well as in *Schneider*, where the Court found that the

1005 CJEU, Case T-351/03 *Schneider Electric SA v Commission of the European Communities*, 11 July 2007, ECLI:EU:T:2007:212, paras 145-151; this was confirmed by the ECJ in CJEU, Case C-440/07 P *Commission v Schneider Electric*, 16 July 2009, ECLI:EU:C:2009:459, para 162; CJEU, Case T-47/03 *Sison v Council*, 11 July 2007, ECLI:EU:T:2007:207, para 239; more broadly referring to the right to a fair trial, see CJEU, Case T-193/04 *Tillack* (n 999) para 121.

1006 CJEU, Case T-193/04 *Tillack* (n 999) para 121.

1007 CJEU, Case T-577/14 *Gascogne Sack Deutschland and Gascogne v Union*, 10 January 2017, ECLI:EU:T:2017:1.

1008 The Court does not even always specify the source of the fundamental rights at stake, see for example in CJEU, Case T-341/07 *Sison III* (n 946) paras 41, 75.

1009 CJEU, Case T-16/04 *Arcelor* (n 988) para 153; CJEU, Joined Cases C-120/06 P and C-121/06 P *FIAMM* (n 896) para 183; also the right to protection of copyright and know how was considered to stem from the general principles of EU law, see CJEU, Case T-19/07 *Systran* (n 1000) para 261; CJEU, Case T-412/05 *M v Ombudsman* (n 988) para 126, in this case, the Court additionally relied on Article 7 CFR, which was then note yet legally binding.

1010 CJEU, Case C-531/12 P *SEMEA* (n 998) para 97; CJEU, Case T-138/14 *Chart* (n 998) para 113; CJEU, Case T-217/11 *Staelen* (n 971) paras 81-88; see also CJEU, Case T-193/04 *Tillack* (n 999) para 127.

1011 CJEU, Case T-48/05 *Franchet and Byk* (n 1002) para 209; CJEU, Case T-343/13 *CN* (n 1004) para 47.

1012 CJEU, Case T-577/14 *Gascogne* (n 1007).

right to protection of personal data and rights of defence respectively, were developed by secondary legislation, which was hence also intended to confer rights on individuals.[1013]

In some instances, the Court has also referred to the ECHR when addressing liability arising from breaches of fundamental rights. In *Franchet and Byk*, for example, it held that the presumption of innocence, 'which constitutes a fundamental right set forth in Article 6(2) of the ECHR and Article 48(1) of the Charter, confers rights on individuals'.[1014] Also in *M v Ombudsman*, the Court referred to Article 7 CFR and Article 8 ECHR, which both guarantee the right to respect for private life.[1015] In *CN*, the applicants invoked *inter alia* the right to private life under Article 8 ECHR and the Convention on the Rights of Persons with Disabilities, the latter of which is binding on the Union as a matter of public international law.[1016] The Court left it open whether, 'having regard to their nature and general scheme', they were capable of conferring rights on individuals for the purposes of EU public liability law, since the applicant had simply claimed an infringement 'without offering any specific arguments in support of that claim'.[1017] In this light, whilst the ECHR itself cannot form the basis of a claim for compensation, it remains relevant for public liability under Union law to the extent the rights therein are also protected under EU law.

As this overview shows, only a small number of fundamental rights originating in various sources of Union law have provided the basis of liability claims. Nonetheless, they are commonly more generally considered, or assumed, to confer rights on individuals.[1018] This is certainly the case with respect to 'rights', as opposed to 'principles'. The Charter introduces this distinction in Articles 51(1) and 52 CFR. As opposed to 'rights', 'principles' require 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.'[1019] In essence, according to Advocate General Cruz Villalón in *AMS*, principles are obligations that may be transformed into (judicially cognisable) 'rights' through legislation, whilst rights *per se* already protect

1013 CJEU, Case T-343/13 *CN* (n 1004) para 47; CJEU, Case T-259/03 *Nikolaou* (n 1004) paras 210-211; CJEU, Case T-351/03 *Schneider I* (n 1005) paras 145-151.
1014 CJEU, Case T-48/05 *Franchet and Byk* (n 1002) para 209.
1015 CJEU, Case T-412/05 *M v Ombudsman* (n 988) paras 125-126.
1016 The EU is a contracting party to the Convention on the Rights of Persons with Disabilities, 13 December 2006, 2515 UNTS 3 (signature: 30 March 2007; formal confirmation: 23 December 2010).
1017 CJEU, Case T-343/13 *CN* (n 1004) para 103.
1018 Thies (n 955) 56; Beljin (n 953) 113; see, however, the conclusions drawn by Aalto (n 66) 201, who argues that they have been invoked, but 'do not necessarily lend themselves well to traditional damages claims'.
1019 CFR (n 34) art 52(5).

'directly defined individual legal situations'.[1020] Where 'principles' have not been given specific expression through legislation, 'the possibility of directly relying on a 'principle' so as to exercise an individual right based upon that principle' is excluded.[1021] On their own, they thus predominantly serve the objective of guiding legislative and executive action and are insufficient to confer rights on individuals for the purposes of public liability.[1022] Conversely, 'rights' *per se* confer subjective rights on individuals that they may rely on, including in order to seek compensation for damage suffered as a result of a breach thereof.[1023]

The Charter does not assign the rights protected therein to the categories of 'rights' or 'principles'. The Explanations to the Charter list some examples of 'principles', namely Articles 25 (rights of the elderly), 26 (integration of persons with disabilities), and 37 (environmental protection). In addition, the Explanations clarify that one provision may contain both elements of a 'right' and of a 'principle', e.g. Articles 23 (equality between women and men), 33 (family and professional life) and 34 (social security and social assistance).[1024] In addition, Advocate General Cruz Villalón in his Opinion in *AMS* qualified Article 27 CFR (workers' right to information and consultation within the undertaking) as a 'principle'.[1025] The Court itself in that case also held that Article 27 CFR 'must be given more specific expression in European Union or national law' in order to be fully effective. However, it deduced this merely from the wording of Article 27 CFR, rather than its qualification as a 'principle' as opposed to a 'right'.[1026] It distinguished Article 27 CFR in that respect from the principle of non-discrimination on grounds of age laid down in Article 21(1) CFR, which was 'sufficient in itself to confer on individuals an individual right which they may invoke as such'.[1027]

1020 AG Cruz Villalón, Opinion in CJEU, Case C-176/12 *Association de médiation sociale [AMS]*, 15 January 2014, ECLI:EU:C:2014:2, paras 50-51, 60-66; even though it should be noted that in the past the CJEU has not maintained a consistent distinction between 'rights' and 'principles' along these lines, see for example CJEU, Case C-415/93 *Union royale belge des sociétés de football association and Others v Bosman and Others*, 15 December 1995, ECLI:EU:C:1995:463, para 79, where it referred to the 'principle of freedom of association'.

1021 ibid para 68.

1022 Ward, 'Damages under the EU Charter of Fundamental Rights' (n 67) 598; Paul Craig, *The Lisbon Treaty: Law, politics, and treaty reform* (Oxford University Press 2010) 242; Półtorak (n 67) 435; this may be different when 'principles' have been given specific legislative expression, see AG Cruz Villalón, Opinion in CJEU, Case C-176/12 *AMS* (n 1020) paras 65-72.

1023 The Explanations specifically refer to 'subjective rights', see Explanations relating to the Charter of Fundamental Rights, [2007] OJ C303/17, art 52(5).

1024 Ibid art 52(5); others pointed out by Ward to be 'aspirational' rather than 'substantive' may include Article 35 (health care), Article 38 (consumer protection), see Ward, 'Damages under the EU Charter of Fundamental Rights' (n 67) 598.

1025 AG Cruz Villalón, Opinion in CJEU, Case C-176/12 *AMS* (n 1020) paras 52-56.

1026 Case C-176/12 *AMS* (n 1020) para 45.

1027 Ibid para 47.

The classification of rights guaranteed in the Charter as 'rights' or 'principles' and the consequences thereof are far from clear. Nonetheless, it is safe to assume that those rights commonly at stake during Frontex operations, in particular the freedom from torture, the right to life, the prohibition of *refoulement*, the right to asylum, and the right to private and family life, are '(subjective) rights' that individuals may rely on in order to seek compensation for damage suffered as a result of a breach thereof.[1028]

4.2.2 Unlawfulness: the nature of the breach

A breach of Union law does not lead to liability, 'however regrettable that unlawfulness may be', unless it qualifies as 'sufficiently serious'.[1029] The decisive criterion in that respect is whether the Union or member state authority concerned 'manifestly and gravely disregard the limits on their discretion'.[1030] Two components are hence of particular importance. The first is the extent of discretion the authority in question enjoys. The second is the obviousness ('manifestly') and reprehensibility ('gravely') of the breach.

The following sections discuss each in turn (Sections 4.2.2.1 and 4.2.2.2 respectively) and analyse the relationship between them (Section 4.2.2.3). Subsequently, the general principles deduced from the Court's case law (Section 4.2.2.4) are applied to breaches of fundamental rights obligations (Section 4.2.2.5).

4.2.2.1 Discretion and its limits

A public authority enjoys wide discretion when the law allows for considerable room to make policy choices. Consequently, as a general rule, the more discretion the EU or its member states enjoy, the wider the range of possible legal conduct they can freely choose from. Simply speaking, liability only arises for conduct that is outside that range (see Figure 20).

The extent of discretion depends on the limits to the room for manoeuvre in choosing a course of conduct in a specific situation. In a multi-level system, these may stem from different legal sources, e.g. public international law, EU

1028 In this vein see also Ward, 'Damages under the EU Charter of Fundamental Rights' (n 67) 599, mentioning the prohibition of slavery (art 5 CFR), the right to life (art 2 CFR), prohibition of torture or inhuman or degrading treatment or punishment (art 4 CFR), the prohibition of retroactive criminal offences (art 49 CFR).

1029 See for example CJEU, Case T-384/11 *Safa Nicu Sepahan v Council*, 25 November 2014, ECLI:EU:T:2014:986, para 50; CJEU, Case C-440/07 P *Schneider* (n 1005) para 160; CJEU, Joined Cases C-501/12 to C-506/12, C-540/12 and C-541/12 *Specht* (n 989) para 99; CJEU, Case C-118/08 *Transportes Urbanos y Servicios Generales*, 26 January 2010, ECLI:EU:C:2010:39, para 30.

1030 See for example CJEU, Case C-440/07 P *Schneider* (n 1005) para 160; CJEU, Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* (n 910) para 55; CJEU, Joined Cases C-501/12 to C-506/12, C-540/12 and C-541/12 *Specht* (n 989) para 102.

law, or national law. For the purposes of public liability, only the limits that are binding under EU law are relevant.[1031] Consequently, a member state authority may have no discretion to make policy choices in a specific situation, but will still be considered to have wide discretion if the constraints do not stem from Union law.

The limits to discretion are defined, first of all, in the legal framework determining the relevant policy area, in particular the specific provision(s) in the context of which the impugned conduct was taken.[1032] In addition, the EU and its member states are bound to respect the whole body of applicable Union law, including general principles of Union law and fundamental rights, which may therefore also limit their freedom to make policy choices.[1033] Consequently, having wide discretion in a specific policy area does not mean that the EU and its member states have wide discretion in all situations occurring in that context. Rather, the determination of the extent of discretion for the purposes of liability is dependent on the precise limits that apply to a specific situation.

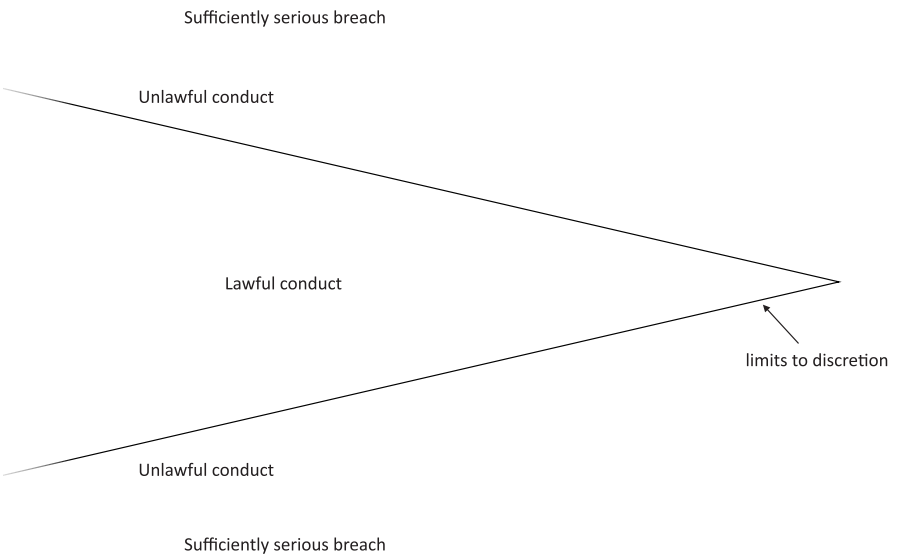

Figure 20: Discretion and its limits in public liability law

1031 CJEU, Case C-424/97 *Haim v Kassenzahnärztliche Vereinigung Nordrhein*, 4 July 2000, ECLI:EU:C:2000:357, para 40.

1032 This was emphasised by AG Stix-Hackl, Opinion in CJEU, Case C-472/00 P *Commission v Fresh Marine*, 10 July 2003, ECLI:EU:C:2003:399, paras 78-80.

1033 Thies (n 955) 54.

4.2.2.2 The obviousness and reprehensibility of the breach

The seriousness of a breach increases with its obviousness and/or reprehensibility. A breach is obvious when the authority in question blatantly infringes its legal obligations, i.e. when the violation is manifest, 'clear-cut', or flagrant. This requirement is more explicit in other language versions, e.g. the French, which requires a 'violation suffisamment caractérisée'.[1034] A breach is reprehensible when an authority exercising ordinary care and diligence would not have committed it, i.e. when the violation is 'inexcusable'. Whilst the Court has consistently rejected the idea that non-contractual liability is subject to a requirement of fault, this allows for the inclusion of 'fault-like' criteria in the determination of the seriousness of a breach.[1035] The question of reprehensibility of a breach is inextricably linked to its obviousness, given that the clearer it is to the relevant authority how to act lawfully, the more inexcusable any deviation from the law is.[1036]

In its case law, the Court predominantly determines the obviousness and reprehensibility of a breach by analysing, *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 or state of the Court's case-law on the matter. Additionally, it takes into account, for example, whether the infringement was intentional or involuntary, and whether a position taken by a Union institution may have contributed towards a member state's infringement.[1037]

1034 Similarly in Portuguese ('violação suficientemente caracterizada') and Spanish ('violación suficientemente caracterizada'); this is highlighted by AG Jacobs, Opinion in CJEU, Case C-150/99 *Stockholm Lindöpark v Svenska staten*, 18 January 2001, ECLI:EU:C:2001:34, para 59; see also Biondi and Farley (n 909) 41; Edward and Robinson (n 936) 344.

1035 CJEU, Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* (n 910) para 79; CJEU, Case C-424/97 *Haim* (n 1031) para 39; CJEU, Case C-429/09 *Fuß* (n 991) para 67.

1036 This is clear, for example, in AG Léger, Opinion in CJEU, Case C-224/01 *Köbler v Republik Österreich*, 30 September 2003, ECLI:EU:C:2003:513, para 139, who points out that the 'decisive factor is whether the error of law at issue is excusable or inexcusable' and argues that this 'characterisation can depend either on the clarity and precision of the legal rule infringed, or on the existence or the state of the Court's case-law on the matter.'; see also AG Geelhoed, Opinion in CJEU, Case C-234/02 P *Lamberts* (n 47) paras 88-89, who, however, points out that he would prefer to speak of 'reprehensibility rather than (in)excusability'.

1037 CJEU, Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* (n 910) paras 43, 56, 57; CJEU, Case C-352/98 P *Bergaderm* (n 913) para 40; whilst the Court has traditionally listed the excusability and intention as factors determining the seriousness of a breach in its case law in the area of state liability, this only more recently also appears in the area of Union liability, see for example CJEU, Case T-384/11 *Safa Nicu Sepahan* (n 1029) para 55; in the area of Union liability the Court, however, often refers to the 'authority exercising ordinary care and diligence', see for example CJEU, Case T-178/98 *Fresh Marine v Commission*, 24 October 2000, ECLI:EU:T:2000:240, paras 61, 62, 82, 91.

In this light, the seriousness of a breach depends on how clear the line demarcating lawful from unlawful conduct is and how reprehensible overstepping it was in a specific case. The main factors determining how clear that line is include (1) the existence of previous case law, (2) the clarity of the provision and the complexity of the situation, and (3) other factors, such as the aim of the impugned measure.

4.2.2.2.1 The existence of previous case law

Distinguishing lawful from unlawful conduct is particularly straightforward when there is case law from the CJEU dealing with similar situations or even the very situation giving rise to the claim for compensation. The Court has therefore consistently held that

> [o]n any view, a breach […] will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case-law of the Court on the matter from which it is clear that the conduct in question constituted an infringement.[1038]

This rule only applies to situations where the Court had clarified the relevant provisions of EU law in cases predating the facts giving rise to the action for damages. Of course, the interpretation that the Court gives to a rule of EU law clarifies the meaning of that rule as it must be understood from the time of its entry into force. However, if the nature and extent of the obligations could not be considered to be clear and precise until the date of the judgment, an infringement before that date would not be sufficiently serious.[1039] Where the Court has not clarified the specific provision at hand but similar ones have been held to be in violation of EU law, this may also be a factor in determining that the breach at stake was sufficiently serious.[1040]

One of the clearest cases where the law applicable to a case had been previously clarified by the Court is *Fuß*.[1041] Mr Fuß was employed as a vehicle driver by the City of Halle (Germany) in the operational service of its fire prevention and protection section. He was rostered to work an average of 54 hours per week, exceeding the maximum average limit of 48 hours per week set by EU law. After he requested that his employer comply with EU law, he was transferred against his will to the fire service control room. Mr Fuß *inter alia* brought a claim for reparation on the ground of the excessive duration of working time completed while in service as a fireman. In case law predat-

1038 CJEU, Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* (n 910) para 57; CJEU, Case C-446/04 *Test Claimants I* (n 986) para 214; CJEU, Case T-341/07 *Sison III* (n 946) para 40.

1039 CJEU, Joined Cases C-501/12 to C-506/12, C-540/12 and C-541/12 *Specht* (n 989) para 105.

1040 This was indicated in CJEU, Case C-318/13 *Proceedings brought by X*, 3 September 2014, ECLI:EU:C:2014:2133, paras 46-49, the Court, however, left it up to the national Court to decide which factor weighed heaviest.

1041 CJEU, Case C-429/09 *Fuß* (n 991).

ing the facts that gave rise to Mr Fuß' claim, the Court had already clarified the concept of 'working time' within the meaning of the relevant EU law.[1042] It had elaborated further on this during the period at issue in the main proceedings, including in a case similar to *Fuß*.[1043] The member state's failure to comply with EU law therefore 'occurred in obvious disregard of the Court's case-law' and consequently amounted to a sufficiently serious breach.[1044] Similarly, in *Larsy*, the Court held that, among other things, 'the competent institution failed to draw all the consequences from a judgment of the Court providing […] a clear answer to the issues before that institution' and therefore committed a sufficiently serious breach of Union law.[1045]

The same applies in the area of Union liability. *Safa Nicu Sepahan*, for example, concerned restrictive measures introduced in order to apply pressure on the Islamic Republic of Iran to end certain nuclear activities.[1046] In that context, between 2011 and 2014 the Council listed the applicant as an entity involved in nuclear proliferation. Safa Nicu Sepahan asked the General Court to annul the relevant Council decision and award it compensation for the material and non-material damage it had suffered due to the restrictive measures taken against it. The Court found the contested act to indeed be unlawful inasmuch as the Council did not adduce enough evidence to prove that the applicant fulfilled at least one of the conditions required for the adoption of restrictive measures.[1047] What led the Court to find that the breach was sufficiently serious was *inter alia* that the rules in question had been clarified in case law predating the adoption of the contested acts. It was clear from those cases that the Council was under an obligation to produce, in the event of a challenge, the evidence and information on which it had based the decision to impose restrictive measures, in order for them to be reviewed by the EU judicature.[1048]

In contrast to situations such as *Fuß*, *Larsy*, and *Safa Nicu Sepahan*, the lack of preceding case law may support the finding that it was not obvious to the authority that its conduct was unlawful. In *British Telecom*, for example, one of the factors leading the Court to deny that the breach was sufficiently serious was that 'no guidance was available to the United Kingdom from case-law of the Court as to the interpretation of the provision at issue'.[1049]

1042 Ibid paras 54-55.
1043 Ibid paras 56-57.
1044 Ibid para 58.
1045 CJEU, Case C-118/00 *Larsy v INASTI*, 28 June 2001, ECLI:EU:C:2001:368, paras 45, 49.
1046 CJEU, Case T-384/11 *Safa Nicu Sepahan* (n 1029).
1047 Ibid paras 26-40.
1048 Ibid paras 63-67.
1049 CJEU, Case C-392/93 *The Queen v H.M. Treasury, ex parte British Telecommunications*, 26 March 1996, ECLI:EU:C:1996:131, para 44.

Similarly, in *Medici Grimm*, before concluding that the Council had not committed a sufficiently serious breach, the Court pointed out *inter alia* that the legal situation was only clarified in the judgment relating to the very facts that also gave rise to the action for damages and no similar precedent was available.[1050]

4.2.2.2.2 Clarity of the provision and complexity of the situation

While the existence of case law may be the clearest, the most frequently applied set of factors in determining the obviousness and reprehensibility of a breach is the complexity of the case and the uncertainty as to the interpretation of the provisions at stake. Where the provisions are clearly applicable, their interpretation is not particularly ambiguous, and the situation is not markedly complex, it is easier for the authority in question to distinguish between lawful and unlawful conduct, more readily rendering infringements sufficiently serious.

This was, for example, the case in *Schneider*, which concerned an action for damages lodged by the company Schneider, after the Commission had declared the proposed concentration between the applicant and a French undertaking to be incompatible with the internal market.[1051] In a previous judgment, the CFI had annulled the Commission's incompatibility decision on two grounds, both of which formed the basis for Schneider's action for damages. First, the Commission had made errors in the economic analysis when assessing the impact of the merger on the national sectoral markets outside France.[1052] Since these, however, were not capable of having influenced the incompatibility decision, the CFI did not analyse their seriousness.[1053] Second, the Commission had breached Schneider's rights of defence. Due to a lack of clarity in the Commission's statement of objections, Schneider was not in a position to assess the full extent of the competition problems to which the Commission claimed the concentration would give rise, and could therefore not properly challenge the assessment.[1054] This error, according to the CFI, was 'neither justified nor accounted for by the particular constraints to which Commission staff are objectively subject.'[1055] The difficulty inherent in undertaking a complex market analysis was irrelevant in this regard, since the unlawfulness at issue did not concern the market analysis as such but rather the Commission's failure to clearly set out its objections to the merger 'which did not involve any particular techni-

1050 CJEU, Case T-364/03 *Medici Grimm v Council*, 26 January 2006, ECLI:EU:T:2006:28, paras 89-90.
1051 CJEU, Case T-351/03 *Schneider I* (n 1005); appeal: CJEU, Case C-440/07 P *Schneider* (n 1005).
1052 CJEU, Case T-351/03 *Schneider I* (n 1005) see summary in para 56.
1053 Ibid paras 131-138.
1054 Ibid see summary in para 57.
1055 Ibid para 154.

cal difficulty or call for any additional specific examination that could not be carried out for reasons of time'.[1056] Consequently, the CFI considered the breach at stake to be sufficiently serious.[1057]

Similarly, in *Safa Nicu Sepahan*, the Court noted that in addition to having been clarified in previous case law, the obligations at stake did not leave the Council with any discretion, did not relate 'to a particularly complex situation', were 'clear and precise', and accordingly did not give rise to 'any difficulties as regards its application or interpretation'.[1058] In that light, it concluded that an authority exercising 'ordinary care and diligence' would not have committed the failures forming the basis of the claim and the breach therefore qualified as sufficiently serious.[1059]

In contrast, where the application and interpretation of the provisions in question is ambiguous and the situation particularly complex, an authority may breach Union law despite having exercised ordinary care and diligence. Those breaches generally do not qualify as sufficiently serious.

This was the case in *Holcim (Deutschland)*.[1060] The case concerned a decision by the Commission to impose a fine on the applicant's predecessor company, due to infringements of competition rules, which was later annulled by the Court. However, the company had already incurred bank guarantee charges in relation to that fine and sought compensation from the Union for these. The CFI pointed out that the case at the origin of the unlawful decision was particularly complex and involved a large number of associations and undertakings inside and outside the Union, as well as a wide range of probative documents whose interpretation was unclear.[1061] This was evidenced by the fact that the respective interpretations by the Commission on the one hand, and the CFI in annulling the decision on the other, diverged only marginally.[1062] In addition, the CFI took account of the difficulties in applying EU law in matters relating to cartels, which were all the greater given the complexity of the case.[1063] On these grounds, the CFI held that the breach in question was not sufficiently serious.[1064]

1056 Ibid para 155.

1057 Ibid para 156; this analysis was confirmed by the ECJ, who additionally pointed out the fact that the margin of discretion of the Community was reduced, or even non-existent, CJEU, Case C-440/07 P *Schneider* (n 1005) para 166.

1058 CJEU, Case T-384/11 *Safa Nicu Sepahan* (n 1029) paras 59-62, in particular para 62; see also text to n 1046-1048 above.

1059 Ibid paras 68-69.

1060 CJEU, Case T-28/03 *Holcim (Deutschland) v Commission*, 21 April 2005, ECLI:EU:T:2005:139; appeal: CJEU, Case C-282/05 P *Holcim (Deutschland) v Commission*, 19 April 2007, ECLI:EU:C:2007:226.

1061 CJEU, Case T-28/03 *Holcim (Deutschland)* (n 1060) paras 102-112.

1062 Ibid para 113.

1063 Ibid para 115.

1064 Ibid para 116.

Likewise, in *Sison III*, the Court considered the infringement in question not serious enough, *inter alia* due to the difficulties in applying or interpreting the relevant provisions.[1065] The case concerned so-called smart sanctions against Mr Sison, mainly consisting of freezing the assets of individuals associated with terrorism. Mr Sison sought compensation alleging several breaches by the Council, some of which had already been established by the Court when it annulled the sanctions. When discussing the seriousness of the breaches, the Court emphasised the 'confused' wording of the provisions regarding the conditions for the adoption of a fund-freezing measure and the difficulties with respect to their interpretation, which was further illustrated by the fact that they had given rise to 'copious case-law' in front of the General Court.[1066] The Court concluded that, even though the breach had been clearly established, it could 'be accounted for by the particular constraints and responsibilities borne by [the Council]' and hence constituted 'an irregularity that an administrative authority exercising ordinary care and diligence could have committed if placed in similar circumstances.'[1067]

The same applies in the area of state liability. In *British Telecom*, for example, the applicant challenged the United Kingdom's implementation of a specific Article of a directive and sought compensation for damage allegedly suffered as a result. In a preliminary ruling, the Court found that the relevant Article was 'imprecisely worded' and 'reasonably capable of bearing also the interpretation given to it by the UK'. Not only had the United Kingdom interpreted the provision 'in good faith', but the interpretation was also based on 'arguments which are not entirely devoid of substance', shared by other member states, and 'not manifestly contrary to the wording of the directive or to the objective pursued by it'.[1068] Since the member states in addition enjoy wide discretion in transposing directives to national law, and no case law had yet clarified the article in question, the Court concluded that the breach by the United Kingdom could not be regarded as sufficiently serious.[1069] The Court reached a similar conclusion in the case of *Denkavit*, holding that the interpretation by Germany had been 'adopted by almost all the other Member States' that were in a similar situation and the Court itself had not provided Germany 'with any indication as to how the provision at issue was to be interpreted.'[1070]

1065 CJEU, Case T-341/07 *Sison III* (n 946).
1066 Ibid paras 62-72.
1067 Ibid para 73.
1068 CJEU, Case C-392/93 *British Telecommunications* (n 1049) para 43.
1069 Ibid paras 44-45; see also above text to n 1049.
1070 CJEU, Joined Cases C-283/94, C-291/94 and C-292/94 *Denkavit Internationaal and Others v Bundesamt für Finanzen*, 17 October 1996, ECLI:EU:C:1996:387, paras 51-52.

The case of *Brinkmann* similarly illustrates how the ambiguity of an EU law provision can lead the Court to deny the seriousness of a breach thereof.[1071] The dispute concerned the levying of taxes for a particular product manufactured by Brinkmann. The product, sold under the designation 'Westpoint', was industrially-produced rolls of tobacco enveloped in porous cellulose that had to be wrapped in cigarette paper before they could be smoked. The dispute revolved around the question of whether 'Westpoint' should be taxed as a cigarette or as smoking tobacco, the latter of which would result in a lower taxation rate. Whereas in Germany 'Westpoint' was considered smoking tobacco, the Danish authorities applied the tax regime for cigarettes. Brinkmann challenged the Danish classification before the Danish courts, who referred questions to the CJEU regarding the regime applicable to 'Westpoint' and state liability ensuing from a potentially erroneous application by the Danish authorities. The CJEU found that the Danish interpretation was incorrect. However, Westpoint did not correspond exactly to either the definition of cigarettes nor of smoking tobacco. In those circumstances, the interpretation by the Danish authorities 'was not manifestly contrary to the wording of the [relevant directive] or in particular to the aim pursued by it', all the more so as other governments and the Commission had also argued in favour of that interpretation.[1072] In that light, the breach could not be considered sufficiently serious and EU law did not require the state to be liable for the damage sustained by Brinkmann.

Likewise, in *Robins*, the CJEU indicated that the breach at stake may not have been sufficiently serious so as to trigger liability *inter alia* because the provision at stake did not seem very clear, having regard especially to the fact that neither the parties in the main proceedings, nor the member states and Commission, had been able to suggest with precision what in their view was required by the directive. The CJEU, however, left the final determination to the national courts.[1073]

4.2.2.2.3 Other factors

Other aspects may also play a role in the assessment of the obviousness and reprehensibility of the breach. In *British Telecom* and *Robins*, positions taken by the Commission were considered relevant factors in finding that the breach at stake may not have been sufficiently serious. In *British Telecom*, the Court pointed out that the Commission had not taken any action against the United Kingdom when it adopted the measures in breach of Union law.[1074] Similarly, in *Robins*, the position taken by the Commission in a related report was of relevance, since it could have reinforced the (incorrect) view of the

1071 CJEU, Case C-319/96 *Brinkmann Tabakfabriken v Skatteministeriet*, 24 September 1998, ECLI:EU:C:1998:429.
1072 Ibid para 31.
1073 CJEU, Case C-278/05 *Robins and Others*, 25 January 2007, ECLI:EU:C:2007:56, paras 79-82.
1074 CJEU, Case C-392/93 *British Telecommunications* (n 1049) para 44.

member state concerned when transposing the relevant provision into national law.[1075]

In *Sison III*, the Court also accorded particular importance to the fundamental objectives of general interest pursued by the impugned measures. It noted that the aim of the restrictive measures in question was to give effect to the framework established by the United Nations Security Council to combat terrorism.[1076] Holding that 'the fight […] against the threats to international peace and security posed by acts of terrorism, constitutes a fundamental objective of general interest for the international community', it explicitly took the importance of these objectives pursued in the general interest into account in ascertaining whether the irregularity committed by the Council was sufficiently serious.[1077] The details of how and when objectives of general interest may be relevant in this context remain to be elaborated by the Court. However, it is noteworthy that the 'fight against irregular migration' has increasingly dominated the EU political agenda.[1078] Hence, it is conceivable that the Court takes this into account as an 'objective of general interest' when it determines the seriousness of breaches of EU law in this context.[1079]

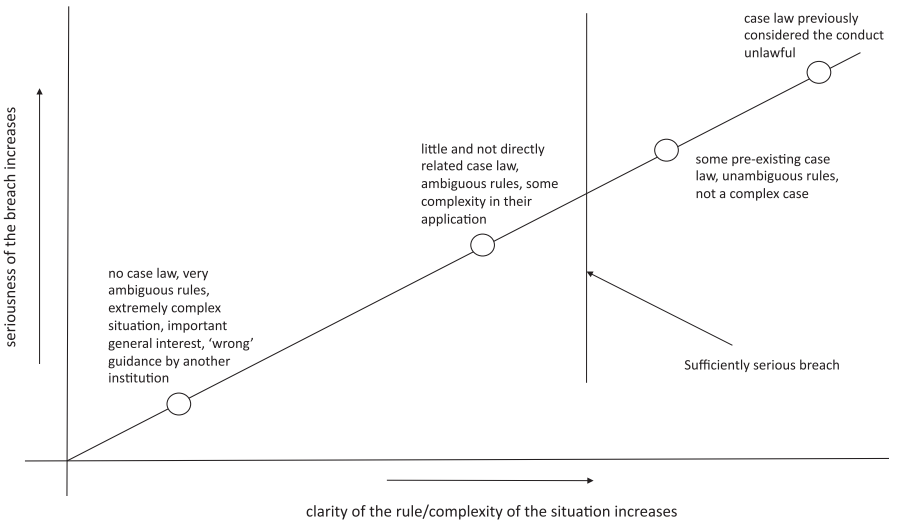

Figure 21: Clarity of the rule/complexity of the situation and seriousness of the breach

1075 CJEU, Case C-278/05 *Robins* (n 1073) para 81.
1076 CJEU, Case T-341/07 *Sison III* (n 946) para 59.
1077 Ibid paras 60-61.
1078 See for example European Commission, 'A European Agenda on Migration' (n 10).
1079 See also below 4.2.2.5.3.

4.2.2.3 The interplay between the factors determining seriousness

It is clear from the analysis above that both the extent of discretion and the obviousness and reprehensibility of the breach are relevant factors in determining the seriousness of unlawful conduct. The crucial question is, however, how they relate to and influence each other. The answer is largely dependent on the role that discretion plays in the assessment of the seriousness of a breach, which has substantially changed over time. The changes have occurred gradually and not always simultaneously in the areas of state and Union liability. Nonetheless, the developments may roughly be distinguished into three phases that will be outlined below.[1080] The objective is to identify a general 'trend' in each of these phases regarding the relationship between the factors determining the seriousness of a breach. It is important to keep in mind, however, that in each of the three phases, there may be occasional judgments that express a different view, often because they still adhere to the approach of the previous phase, or anticipate that of the subsequent phase.

4.2.2.3.1 Phase one

The first phase relates to the 'pre-*Bergaderm*' period and is therefore not discussed in detail. It suffices to note here that discretion only played a marginal role. Whilst the extent of discretion was irrelevant with respect to administrative acts, it gradually gained significance with respect to legislative measures. In theory, it seemed that only those legislative measures that involved discretion would trigger the 'fully fledged' *Schöppenstedt*-test, whilst those that did not required only a 'simple' breach of a superior rule for the protection of individuals.[1081] Either way, the practical relevance of discretion under the *Schöppenstedt*-test remained limited, since there was not a single case in which the Court qualified a measure as legislative, yet non-discretionary.[1082]

4.2.2.3.2 Phase two

The second phase relates to the period where the Court started to carve out the conditions for member state liability and aligned the systems of member state and Union liability. In the second phase, discretion took the centre stage amongst the factors determining the seriousness of a breach. As Advocate General Tesauro observed in his Opinion in *Brasserie du Pêcheur*,

1080 Discussing this development see in particular Hilson (n 901).
1081 Ibid 677; similarly van der Woude (n 883) 114–115.
1082 Hilson (n 901) 683.

> in order to identify the limits of the possibilities for translating unlawfulness into liability, the discretion factor can and must be the decisive element irrespective of the rank of the provision infringed […] and of the measure […] which infringes it.[1083]

In this vein, the Court in *Brasserie du Pêcheur* found that discretion enjoyed a central place among the criteria for determining the seriousness of a breach.[1084] The same approach was adopted in the area of Union liability, where the Court had, since *Bergaderm*, consistently stressed that 'the determining factor in deciding whether there has been [a sufficiently serious] infringement is […] the discretion available to the institution concerned'.[1085]

This meant in particular that courts were required to consider the extent of the authority's discretion when analysing the seriousness of a breach. This point is well illustrated in two judgments of the ECJ from that period, i.e. *Camar and Tico* and *CEVA*. In both cases, the ECJ found that the CFI had erred in law precisely because it had failed to take into account the Commission's discretion for the purposes of establishing its liability.[1086]

Importantly, the need to analyse the extent of discretion stemmed from the fact that it fulfilled the function of a 'gateway'.[1087] Only if the discretion available to the authority in question was considered to be wide did the Court proceed to analyse the obviousness and reprehensibility of the breach in question. In contrast, where discretion was considerably reduced, or even non-existent, a mere infringement of Community law was enough to establish the existence of a sufficiently serious breach (this is illustrated in Figure 22).[1088] In other words, a dichotomy emerged between discretionary and non-discretionary measures.

In this vein, in *Camar and Tico*, *CEVA*, *British Telecom*, and *Denkavit*, for example, the relevant institutions were considered to enjoy wide discretion and

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1083 AG Tesauro, Opinion in CJEU, Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* (n 910) para 78.

1084 Ibid paras 43-47.

1085 CJEU, Case C-198/03 P *Commission v CEVA and Pfizer*, 12 July 2005, ECLI:EU:C:2005:445, para 66; CJEU, Case C-472/00 P *Fresh Marine* (n 1032) para 27; CJEU, Case C-312/00 P *Commission v Camar and Tico*, 10 December 2002, ECLI:EU:C:2002:736, para 55; both *CEVA* and *Fresh Marine* citing CJEU, Case C-352/98 P *Bergaderm* (n 913) para 46 in support.

1086 *Camar and Tico* see: CJEU, Case T-260/97 *Camar v Council and Commission*, 8 June 2000, ECLI:EU:T:2005:283, para 206, CJEU, Case C-312/00 P *Camar and Tico* (n 1085) para 56 (however, also the ECJ eventually found that the Commission's conduct gave rise to liability, see paras 57-62); *CEVA* see: CJEU, Joined Cases T-344/00 and T-345/00 *CEVA and Pharmacia entreprises v Commission*, 26 February 2003, ECLI:EU:T:2003:40, para 103, CJEU, Case C-198/03 P *CEVA* (n 1085) paras 67-71.

1087 This term was used in particular by Hilson (n 901).

1088 CJEU, Case C-352/98 P *Bergaderm* (n 913) para 44; CJEU, Case C-312/00 P *Camar and Tico* (n 1085) para 54; CJEU, Case C-472/00 P *Fresh Marine* (n 1032) para 26; CJEU, Case C-198/03 P *CEVA* (n 1085) para 65; CJEU, Case C-5/94 *Hedley Lomas* (n 935) para 28; CJEU, Joined Cases C-178/94 to C-190/94 *Dillenkofer* (n 933) para 25; CJEU, Case C-127/95 *Norbrook Laboratories* (n 971) para 109.

the Court consequently analysed the obviousness and reprehensibility of the breach in question.[1089] This was particularly evident in *British Telecom*, where the Court argued that the restrictive approach to state liability (i.e. requiring an obvious and reprehensible breach) was justified precisely because the member state enjoyed wide discretion in transposing directives to national law.[1090]

In contrast, in a number of cases, the lack of discretion of the relevant authority in a specific situation was sufficient in itself to qualify a breach as sufficiently serious, without an additional analysis of the obviousness and reprehensibility of the breach. This 'automatism' between the lack of discretion and the establishment of a sufficiently serious breach was more evident in case law relating to member state liability than Union liability. This is particularly so because member states regularly enjoy less discretion under Union law than Union bodies, who also enact Union legislation.[1091]

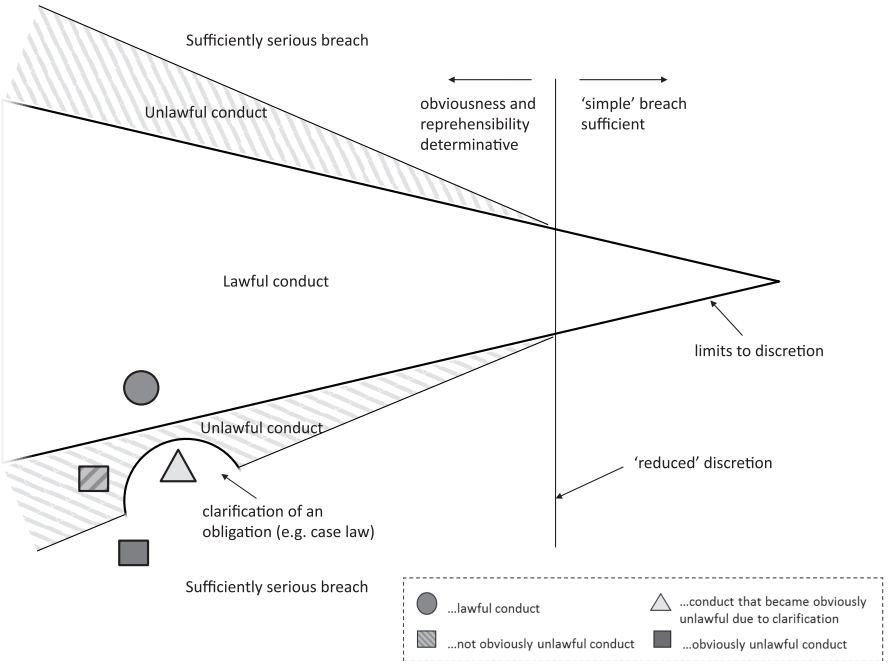

Figure 22: Relationship between factors determining seriousness (phase two)

1089 CJEU, Case C-312/00 P *Camar and Tico* (n 1085) paras 57-62; CJEU, Case C-198/03 P *CEVA* (n 1085) paras 74-93; CJEU, Case C-392/93 *British Telecommunications* (n 1049) paras 43-45 (for more detail see text to n 1049, 1068-1069); CJEU, Joined Cases C-283/94, C-291/94 and C-292/94 *Denkavit* (n 1070) paras 50-53 (see also text to n 1070).

1090 CJEU, Case C-392/93 *British Telecommunications* (n 1049) para 40.

1091 For more detail reflecting on the question of member state discretion in Union law see Hilson (n 901) 692.

Especially in cases involving failure to transpose directives (for example in *Dillenkofer*) or failure to comply with the temporal effects of directives (for example in *Rechberger*), member states were regularly considered to have no or only limited discretion, rendering a mere breach automatically sufficiently serious.[1092]

4.2.2.3.3 Phase three

The phase two approach presented one major contradiction. To some degree the extent of discretion depends on the clarity of a rule.[1093] In *Lindöpark*, for example, the Court held that in light of the clear wording of the provision at stake, the member state concerned […] had only considerably reduced, or even no, discretion.[1094] This was made more explicit in *Robins*, where the Court confirmed that 'discretion is broadly dependent on the degree of clarity and precision of the rule infringed.'[1095] As Hilson argued, there is hence 'a strange circularity' to the phase two approach. If the extent of discretion is to determine whether the clarity of a rule is relevant to the assessment of the seriousness of a breach, it is odd that it depends on the clarity of the rule itself.[1096]

This was resolved in phase three. Whilst the extent of discretion remains an important factor in the determination of the seriousness of a breach, its relationship with the other relevant factors changed. In the third phase, discretion lost its function as a 'gateway' and became a factor in the assessment of the seriousness alongside the obviousness and reprehensibility of the breach (this is illustrated in Figure 23). Even more so than the other phases identified above, this development only took shape very gradually, starting from around 2000 onwards.

1092 See also AG Léger, Opinion in CJEU, Case C-224/01 *Köbler* (n 1036) para 132.

1093 This was already pointed out by Advocate General Tesauro in *Brasserie du Pêcheur*, 'The greater or lesser degree of discretion available to the State coincides, moreover, — at least in most cases — with the greater or lesser degree of clarity and precision of the obligation to which it is subject. In fact, it is quite possible to conceive of obligations which are not at all clear — or better, which are imprecisely demarcated—, even in cases where the States' discretion is small or unimportant. The upshot is that in such cases the limits set to the action of the States are not clearly defined for that very reason, with the result that the situation is not very different substantively from that in which the States have a significant margin of discretion.', AG Tesauro, Opinion in CJEU, Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* (n 910) para 78; see also Hilson (n 901) 692.

1094 CJEU, Case C-150/99 *Lindöpark* (n 1034) paras 40, 42.

1095 CJEU, Case C-278/05 *Robins* (n 1073) para 73; this was confirmed in CJEU, Case C-452/06 *Synthon*, 16 October 2008, ECLI:EU:C:2008:565, para 39; similarly in CJEU, Case T-56/00 *Dole Fresh Fruit* (n 989) para 75, the Court deduced the 'broad discretion which the institutions enjoyed' *inter alia* from the 'complex economic assessments involved'.

1096 Hilson (n 901) 692–693; similarly see Michael Dougan, *National remedies before the Court of Justice: Issues of harmonisation and differentiation* (Hart Publishing 2004) 244–246.

The Court has consistently held that where discretion was considerably reduced, or even non-existent, a mere infringement of Community law *may be* [note: not 'is'] enough to establish the existence of a sufficiently serious breach.[1097] Whilst the use of 'may' instead of 'is' seemed to be without any practical relevance, *Haim*, in 2000, signalled a change.[1098] Mr Haim, a dental practitioner, applied to practise under a social security scheme in Germany. This request was only granted after lengthy proceedings including a preliminary reference to the CJEU that established the incompatibility with Community law of the refusal to enrol Mr Haim. Mr Haim then brought an action against the relevant public law body in Germany for compensation for the loss of earnings which he claimed to have suffered as a result of the breach of Community law. In a preliminary ruling, the CJEU pointed out that 'it is clear from the case-law […] that a mere infringement of Community law by a Member State may, but does not necessarily, constitute a sufficiently serious breach'.[1099] Rather, 'a national court hearing a claim for reparation must take account of all the factors which characterise the situation put before it.'[1100] These, the Court continued, are in essence those that determine the obviousness and reprehensibility of a breach, i.e. in particular the clarity and precision of the rule infringed and the excusability of the breach.[1101]

In subsequent case law, the extent of discretion sometimes played the key role in assessing an infringement's seriousness (e.g. *A.G.M.-COS.MET*; *Synthon*), while on other occasions it was just one of the factors taken into account (e.g. *Larsy*; *Robins*; *Specht*), or did not play a substantial role at all (e.g. *Test Claimants*; *Fuß*; *Proceedings brought by X*).[1102] By 2008, Advocate General Bot had noted that the distinction between reduced and broad discretion, 'is no longer relevant in the light of the manner in which the case-law has developed. In fact, the Court now uses the same criteria to assess whether there has been a sufficiently serious breach in either situation.'[1103]

1097 See references in n 1088.
1098 CJEU, Case C-424/97 *Haim* (n 1031).
1099 Ibid para 41.
1100 Ibid para 42.
1101 Ibid para 43.
1102 CJEU, Case C-470/03 *A.G.M.-COS.MET* (n 884) para 82; CJEU, Case C-452/06 *Synthon* (n 1095) paras 41-43; CJEU, Case C-118/00 *Larsy* (n 1045) paras 41-49; CJEU, Case C-278/05 *Robins* (n 1073) paras 74-81; CJEU, Joined Cases C-501/12 to C-506/12, C-540/12 and C-541/12 *Specht* (n 989) paras 103-105; CJEU, Case C-446/04 *Test Claimants I* (n 986) paras 213-217; CJEU, Case C-429/09 *Fuß* (n 991) paras 54-58; CJEU, Case C-318/13 *Proceedings brought by X* (n 1040) paras 46-49.
1103 AG Bot, Opinion in CJEU, Case C-452/06 *Synthon* (n 1095) para 121.

As the cited cases indicate, this development started taking place in the area of member state liability.[1104] In the meantime, discretion continued to play the role of a 'gateway' in the area of Union liability.[1105] Several authors argued for change in this respect.[1106]

Such a shift hasd indeed gradually been occurring since 2006. In *Medici Grimm*, having established, first, that the Council did not have any discretion in relation to the case at hand, the CFI noted that 'the Council's lack of discretion […] is not sufficient to justify the conclusion that in the present case there was a sufficiently serious breach' of the relevant article. It was also necessary, as a second step, to take account of the obviousness and reprehensibility of the breach.[1107] The CFI took the same approach in *Holcim (Deutschland)*.[1108] Despite the finding that 'the Commission's discretion was reduced', the complexity of the case and the uncertain interpretation of the rules in question led the Court to deny that the violation in question was sufficiently serious to trigger the Union's liability.[1109] The applicant appealed, arguing *inter alia* that a mere infringement was sufficient where discretion was reduced and the Court was therefore wrong to take into account the complexity of the situation and the difficulties in applying the law.[1110] The ECJ, however, upheld the CFI's judgment in that respect. It explicitly pointed out that the CFI was correct in that case to take into account the obviousness and reprehensibility of the breach in addition to the discretion enjoyed by the authority.[1111]

In subsequent case law, the Court has sometimes still considered the extent of discretion to be *the* crucial factor in determining the seriousness of a breach (e.g. *Chart*; *Staelen*), and on other occasions emphasised that there was no 'automatic link' between reduced discretion and the sufficient seriousness of a breach, and that the extent of the discretion 'although determinative, is not the only yardstick' or 'not an exclusive criterion' (e.g. *Artegodan*; *Sison III*; *Safa Nicu Sepahan*).[1112]

1104 Noting this change see also Dougan (n 1096) 244–246.

1105 In 2005, the failure of the CFI to take into account the extent of discretion led the ECJ to set aside the judgment under appeal, see CJEU, Case C-198/03 P *CEVA* (n 1085).

1106 In particular Hilson (n 901) 695; David Bailey, 'Damages Actions under the EC Merger Regulation' (2007) 44 Common Market Law Review 101, 112.

1107 CJEU, Case T-364/03 *Medici Grimm* (n 1050) paras 82-87, in particular para 87.

1108 CJEU, Case T-28/03 *Holcim (Deutschland)* (n 1060).

1109 Ibid paras 102-116; see also above text to n 1060-1064.

1110 CJEU, Case C-282/05 P *Holcim (Deutschland)* (n 1060) para 41.

1111 Ibid paras 50-51.

1112 CJEU, Case T-217/11 *Staelen* (n 971) paras 71-72; CJEU, Case T-138/14 *Chart* (n 998) para 114; CJEU, Case T-429/05 *Artegodan* (n 995) paras 59-62; CJEU, Case T-341/07 *Sison III* (n 946) paras 57-58; CJEU, Case T-384/11 *Safa Nicu Sepahan* (n 1029) para 53; see also CJEU, Case T-328/14 *Jannatian v Council*, 18 February 2016, ECLI:EU:T:2016:86, para 44.

4.2.2.4 Interim conclusion: the 'reasonable unlawful interpretation'

In sum, in assessing the seriousness of a breach, the extent of discretion as well as the obviousness and reprehensibility of the infringement are of relevance. The various factors to be taken into consideration are neither cumulative, nor exhaustive. Depending on the circumstances of the particular case, any one of them may be sufficient, alone or together with other factors, to establish liability.[1113]

The key rule is that breaches based on a 'reasonable unlawful interpretation' of the provision in question are not sufficiently serious, whereas those based on an 'unreasonable unlawful interpretation' are. The factors determining the obviousness and reprehensibility of a breach, in particular the clarity of a rule and its application, determine the width of the area of 'reasonable unlawful interpretations' (illustrated by the shaded area in Figure 23 below). The clearer a rule, the narrower that range. Some interpretations are always flagrantly outside what a diligent authority could reasonably consider lawful (illustrated by the red square in Figure 23 below). Other interpretations are 'reasonable', despite turning out to be unlawful (illustrated by the green-shaded square in Figure 23 below). The more ambiguous the rule, the greater the potential number of these. Some interpretations may be reasonable at one point in time, but are no longer so after the law has been clarified, for example by a judgment of the Court (illustrated by the yellow triangle in Figure 23 below).

Often, the clarity of a rule increases as discretion decreases. The extent of discretion therefore remains a forceful indicator for the scope of possible 'reasonable unlawful interpretations'. In areas of reduced or even no discretion, the distinction between lawful and unlawful conduct may often be straightforward. Hence, the general rule that in those areas a mere breach may be sufficient to trigger liability in practice holds true for many instances. Nonetheless, even in those areas, where the law is ambiguous, there may be room for 'reasonable unlawful interpretations', not qualifying as sufficiently serious breaches.[1114]

This guarantees that authorities retain the possibility to adopt measures that are, in their view, compatible with the law. If they are diligent enough, they will not incur liability, even if it turns out they were wrong. At the same time, it ensures that individuals do not have to tolerate obvious and reprehensible infringements of their rights. In that sense, this approach is consistent with the objective behind the requirement of a sufficiently serious

1113 AG Jacobs, Opinion in CJEU, Case C-150/99 *Lindöpark* (n 1034) para 58; Biondi and Farley (n 909) 48.

1114 See also Kathleen Gutman, 'The Evolution of the Action for Damages against the European Union and its Place in the System of Judicial Protection' (2011) 48 Common Market Law Review 695, 723–724.

breach, namely to secure the 'room for manoeuvre and freedom of assessment' that public authorities need in order to fulfil their functions in the general interest whilst ensuring that third parties do not 'bear the consequences of flagrant and inexcusable misconduct'.[1115]

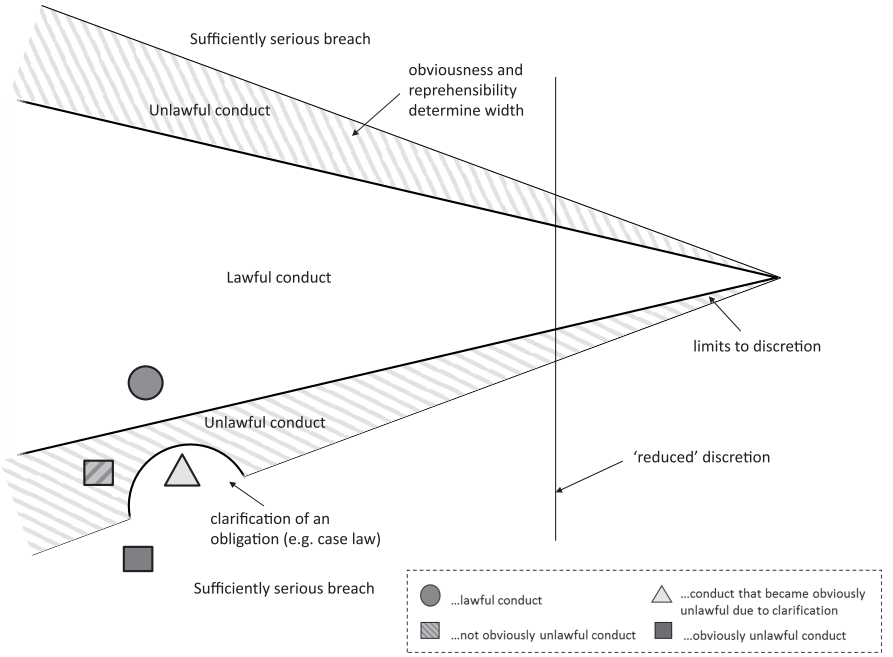

Figure 23: Relationship between factors determining seriousness (phase three)

4.2.2.5 The seriousness of fundamental rights violations

When determining whether a specific fundamental rights violation may give rise to liability, two aspects are of particular relevance. The first is the extent of discretion the Union and its member states enjoy in the context of fundamental rights. The second concerns the question of whether fundamental rights breaches can *per se* be considered as sufficiently serious.

4.2.2.5.1 The extent of discretion in the context of fundamental rights

The key question is how much discretion an authority enjoys to interfere with a specific right, rather than the fundamental rights regime more gener-

1115 CJEU, Case T-351/03 *Schneider I* (n 1005) para 125; CJEU, Case T-341/07 *Sison III* (n 946) para 34; CJEU, Case T-384/11 *Safa Nicu Sepahan* (n 1029) para 51; similarly CJEU, Case C-392/93 *British Telecommunications* (n 1049) para 40; CJEU, Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* (n 910) para 45; these are adaptations of the reasons given by the Court for the strict '*Schöppenstedt*-test', see CJEU, Joined Cases 83 and 94/76, 4, 15 and 40/77 *Bayerische HNL* (n 900) paras 5-6.

ally or the policy area within which the relevant action is taken. Absolute rights by definition prohibit interference, excluding any margin of discretion on the part of public authorities. With respect to other rights, the authorities have some room for manoeuvre to make public policy choices even if they are to the detriment of protected individual interests. However, fundamental rights law predetermines the aims such interfering measures can legitimately pursue and requires interference to be necessary and proportionate to the aim pursued. This is laid down in Article 52(1) CFR:

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

These restrictions on permissible fundamental rights interference limit the margin of discretion of public authorities. The Court has indeed on numerous occasions held that in the context of fundamental rights, discretion is considerably reduced, or even non-existent. In *Schneider*, for example, the Commission was found in breach of the applicant's rights of defence.[1116] The Court considered the relevant obligation to stem 'from the mere application of the relevant procedural rules and, in relation to Schneider's right to be heard, the margin of discretion was therefore considerably reduced, or even non-existent'.[1117] Also in *Safa Nicu Sepahan*, the Court found the Council to have breached obligations arising from the requirement to observe fundamental rights, in particular the right to effective judicial protection, and accordingly found that the Council did 'not enjoy any discretion' in that regard.[1118]

It is important to note that having wide discretion does not mean that the authority in question is free to choose to breach the law. Conversely, a lack of discretion does not stem from the impermissibility of breaching fundamental rights. If that was the case, no authority would ever have any discretion,

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1116 CJEU, Case T-351/03 *Schneider I* (n 1005) see summary in para 57; this was confirmed by the ECJ on appeal, CJEU, Case C-440/07 P *Schneider* (n 1005) para 162; for more detail see above text to n 1051-1057.

1117 CJEU, Case C-440/07 P *Schneider* (n 1005) para 166.

1118 CJEU, Case T-384/11 *Safa Nicu Sepahan* (n 1029) paras 32-36, 60; for more detail see above text to n 1046-1048, 1058-1059; AG Mengozzi points out in his Opinion on the appeal lodged against the case, that the General Court was not entirely clear on exactly what rights were at stake. He, however, also expresses the view that due to the importance of fundamental rights within the EU, there could not be any discretion with respect to the obligations at issue in the case, AG Mengozzi, Opinion in CJEU, Case C-45/15 P *Safa Nicu Sepahan v Council*, [pending], paras 30-32, 41; see also CJEU, Case T-328/14 *Jannatian* (n 1112) para 52, where the Court pointed out that the obligation at stake 'arises from the requirement to observe the fundamental rights of the person or entity concerned, and in particular their right to effective judicial protection, which means that the Council does not enjoy any discretion in that regard.'

since the requirement to observe the law is certainly nothing specific to fundamental rights. Hence, the margin of discretion is wide when the authority in question has considerable room for manoeuvre *to interfere with* (not: 'to violate, infringe, or breach') a fundamental right. However, the Court in a number of cases, including *Chart*, *Franchet and Byk*, *Staelen*, and *M v Ombudsman*, seemed to suggest that the lack of discretion is a consequence of the prohibition against *breaching* fundamental rights.[1119] It remains unclear whether the Court intended to point out the obvious fact that fundamental rights may not be breached, or whether it intended to express, albeit in an incorrect manner, that discretion to interfere with fundamental rights is limited.

In any event, it is safe to conclude that, first, absolute rights do not confer any discretion on public authorities, and, second, although other rights may, that discretion typically has to be considered limited for the purposes of public liability. Hence, when conduct during Frontex operations touches upon fundamental rights, the authorities involved will regularly have to be considered to act with little to no discretion.

4.2.2.5.2 'Reasonable unlawful interpretations' of fundamental rights obligations

The central issue is whether a mere breach of fundamental rights automatically qualifies as sufficiently serious or whether it also has to be obvious and reprehensible to trigger liability. The Court's case law provides support for both.

As explained in more detail above, narrow discretion is a forceful indicator for the lack of room for 'reasonable unlawful interpretations'.[1120] In this vein, in a number of cases, a mere breach of fundamental rights was considered sufficient to trigger liability (e.g. *Franchet and Byk*; *Chart*; *Staelen*; *M v Ombudsman*).[1121]

1119 In CJEU, Case T-138/14 *Chart* (n 998) para 114, for example, the Court pointed out that public authorities 'enjoy no margin of discretion in so far as concerns the observance […] of the principle of sound administration'; similarly, in CJEU, Case T-48/05 *Franchet and Byk* (n 1002) para 219, it held that the relevant authority 'has no margin of discretion with respect to compliance with [the presumption of innocence]'; in CJEU, Case T-217/11 *Staelen* (n 971) para 86, the Court noted that the authority 'does not […] have discretion concerning respect for the principle of diligence'; see also CJEU, Case T-412/05 *M v Ombudsman* (n 988) para 143; a similar point was made by AG Wahl, Opinion in CJEU, Case C-338/15 P *Staelen v European Ombudsman* (n 998) para 38.

1120 See above 4.2.2.4.

1121 See for example CJEU, Case T-48/05 *Franchet and Byk* (n 1002) para 219; CJEU, Case T-138/14 *Chart* (n 998) para 114; CJEU, Case T-217/11 *Staelen* (n 971) para 86; similarly see CJEU, Case T-412/05 *M v Ombudsman* (n 988) para 143, with respect to the principle of confidentiality; see, however, AG Wahl, Opinion in CJEU, Case C-338/15 P *Staelen v European Ombudsman* (n 998) para 35, who disagreed and argued that not every breach of the right to good administration could be considered sufficiently serious.

Beyond these cases, some support for the argument that fundamental rights violations may automatically qualify as sufficiently serious can be found in the cases dealing with public liability for violations of the right to property and/or the freedom to conduct a business (e.g. *Ledra Advertising*; *Giordano*; *Arcelor*; *FIAMM*; *Alessandrini*; *Bocchi*). In these cases, the Court noted that because no absolute rights were concerned, restrictions that correspond to 'objectives of general interest' and do not constitute 'disproportionate and intolerable' interference that impairs 'the very substance' of the rights guaranteed, are permissible. Restrictions going beyond that 'could give rise to non-contractual liability on the part of the Community'.[1122] In essence, this corresponds to the 'test' for permissible limitations of fundamental rights set out in Article 52(1) CFR that is explicitly referred to in newer case law.[1123]

Whilst the Court left open the question of whether any interference not living up to this 'test' would lead to liability (note: '*could* give rise to liability'), two aspects are noteworthy. First, the Court did not seem to assume that an interference with fundamental rights going beyond what is permissible under Article 52(1) CFR would have to fulfil additional criteria to be considered sufficiently serious. To the contrary, in *Arcelor*, having held that the contested provisions cannot infringe the applicant company's right to property and its freedom to pursue a professional activity, the Court concluded that the applicant had failed to establish 'a sufficiently serious breach or disproportionate restriction of those rights by the contested provisions'.[1124] This suggests that a disproportionate restriction would have been sufficient to establish liability. Second, the Court regularly assesses whether the interference at stake was 'disproportionate and intolerable' (or 'disproportionate and unacceptable').[1125] If the 'and' is confirmatory, rather than additional, it suggests that any disproportionate interference (i.e. a breach) is intolerable or unacceptable, hence reprehensible enough to make the breach at stake sufficiently serious.[1126]

1122 Most explicitly CJEU, Joined Cases C-120/06 P and C-121/06 P *FIAMM* (n 896) paras 183-184; see also CJEU, Case T-16/04 *Arcelor* (n 988) para 153; CJEU, Case C-295/03 P *Alessandrini and Others v Commission*, 30 June 2005, ECLI:EU:C:2005:413, para 86; CJEU, Case T-30/99 *Bocchi Food Trade International v Commission*, 20 March 2001, ECLI:EU:T:2001:96, para 80, speaking of 'disproportionate and unacceptable' interference.

1123 CJEU, Case C-611/12 P *Giordano* (n 951) para 49; CJEU, Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising* (n 1000) paras 69-70.

1124 CJEU, Case T-16/04 *Arcelor* (n 988) para 158.

1125 See references in n 1122.

1126 Whilst it cannot be inferred from the mere wording whether one is more likely than the other, if read as being additional, it would allow for more extensive interference than Article 52(1) CFR currently does. Since only the confirmatory reading seems to be in full compliance with fundamental rights law, this reading is preferred here over the other.

However, in other cases, the Court has also suggested that fundamental rights violations only give rise to liability if they are obvious and reprehensible.[1127] An example is *Sison III*.[1128] In that case, the Court established that sanctions imposed on the applicant were incompatible with EU law, but the breach did not qualify as sufficiently serious, especially because the provisions at stake were unclear.[1129] Yet Sison additionally argued that this was at the same time a violation of his fundamental rights, in particular his rights to property and respect for private life. The Court left open whether this was the case, but pointed out that the alleged breach of fundamental rights was 'inseparable' from the illegality already established. For that reason, it concluded that even if a breach of fundamental rights was found to exist, 'that breach is also not sufficiently serious, in the particular circumstances of the case, to incur the non-contractual liability of the Community'.[1130] Thus, a 'simple' breach of the fundamental rights at stake would not have been considered sufficiently serious to trigger liability. Along the same lines, in *Schneider* and *Safa Nicu Sepahan* the Court analysed the clarity of the rules in question and the complexity of their application, to support its finding of a sufficiently serious breach.[1131] The fact that the Court examined the obviousness and reprehensibility of the fundamental rights breaches at stake suggests that the relevant authorities would otherwise not have incurred liability, even though this is ultimately unclear.

Against this background, there are some indications that disproportionate interference with fundamental rights within the meaning of Article 52(1) CFR (i.e. 'simple' breaches of fundamental rights) is unacceptable, and thus *per se* sufficiently serious. Nonetheless, the Court's case law does not permit the assumption that this is always the case. In other words, not all fundamental rights violations may automatically qualify as sufficiently serious.

4.2.2.5.3 Concluding remarks

It is clear from the previous sections that the CJEU has not developed an approach specific to fundamental rights, but follows its general public liability law when addressing breaches of fundamental rights. This is not problematic, provided core fundamental rights violations are, as a general rule, considered sufficiently serious *per se*. At least in circumstances where the

1127 See also Jill Wakefield, *Judicial protection through the use of article 288(2) EC* (European monographs vol 36, Kluwer Law International 2002) 112–113.

1128 CJEU, Case T-341/07 *Sison III* (n 946).

1129 For more detail see above text to n 1065-1067.

1130 CJEU, Case T-341/07 *Sison III* (n 946) paras 75-80, in particular para 80.

1131 In CJEU, Case T-351/03 *Schneider I* (n 1005) paras 154-156, the CFI had emphasised that this failure could not be accounted for by a particular complexity of the situation, thereby suggesting that if it had been otherwise, the breach may not have qualified as sufficiently serious; this was not objected to by the ECJ upon appeal, see in particular CJEU, Case C-440/07 P *Schneider* (n 1005) para 173; see also CJEU, Case T-384/11 *Safa Nicu Sepahan* (n 1029) in particular paras 32–36, 60-67.

action for damages is the practically most important (or indeed the only) substantive remedy under EU law to invoke core fundamental rights that may have been violated by a public authority, this approach seems to be mandated by the right to an effective remedy as guaranteed in Article 47 CFR.[1132]

General public liability law is sufficiently flexible to argue that fundamental rights violations are automatically sufficiently serious. The Court could, for example, take into account the importance of fundamental rights for a democratic society in ascertaining whether a breach thereof is sufficiently serious. It could also rely on the little to no discretion public authorities are availed of in the context of fundamental rights obligations, making a strict approach to liability unnecessary.[1133] In *British Telecom*, for example, the Court had particularly clearly set out that a restrictive approach was justified precisely because the member state enjoyed wide discretion in that case.[1134] Whilst this approach is admittedly most developed in (the older) phase two cases, the Court has also relied on the absence of (or limited) discretion in finding a breach sufficiently serious in (newer) phase three cases (e.g. *A.G.M.-COS.MET*; *Synthon*; *Chart*; *Staelen*).[1135] Moreover, the fact that a fundamental rights analysis already in itself includes a balancing exercise, seems to render it unnecessary to repeat that balancing in the framework of the sufficiently serious breach requirement. This may be inferred for example from *Ledra Advertising*, *Giordano*, *Arcelor*, *FIAMM*, *Alessandrini*, and *Bocchi*.[1136]

Thus, in the application of its general case law on public liability to fundamental rights breaches, the Court certainly *could* consider every fundamental rights violation to be sufficiently serious *per se*. However, it is unclear *whether* this is the case, and if so *on what basis*. Whilst some cases suggest that a mere breach of a fundamental right is sufficiently serious, one is left guessing whether this results from the lack of discretion, the nature of fundamental rights, or the fact that the balancing exercise need not be con-

1132 Explaining why the action for damages is often the practically most important remedy, see above 1.2.2.2; on the right to an effective remedy as guaranteed in Article 47 CFR see Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) in particular 1200–1201; Whilst the compatibility of the Court's approach in public liability law with the right to an effective remedy will not be explored further here, it should be noted that the Court itself pointed out in CJEU, Case T-341/07 *Sison III* (n 946) para 81, that neither the CFR nor the ECHR 'preclude that the Community's non-contractual liability be made subject, in circumstances such as those of this case, to the finding of a sufficiently serious breach of the fundamental rights invoked by the applicant.' Notably, it reached this conclusion without any discussion of the right to an effective remedy. Moreover, and contrary to what the Court suggests, support for this finding can certainly not be found in the ECtHR's *Bosphorus* case.

1133 On the amount of discretion in the context of fundamental rights see above 4.2.2.5.1.

1134 See also text to n 1090.

1135 See also text to n 1102 and 1112.

1136 See also text to n 1122-1126.

ducted twice, or whether it all depends on the specific right at stake. Other cases indeed suggest that fundamental rights violations are only sufficiently serious, if they are obvious and reprehensible. The Court has so far failed to give consistent explanations as to the basis on which it has reached one conclusion or another. This also renders the Court's case law on liability for fundamental rights violations highly unpredictable.

For the current purposes this means that the Court's case law does not make it possible to draw more general conclusions as to whether, or under what circumstances, it would consider fundamental rights violations that occur during Frontex operations sufficiently serious. One may speculate that much depends on the type of right involved and that violations of rights such as the right to life, the prohibition of torture and inhuman or degrading treatment or punishment, and the prohibition of *refoulement* will be considered sufficiently serious *per se*, simply because of the nature of the rights at stake.[1137] In addition, it should be borne in mind that with respect to these rights, discretion regularly has to be considered limited or non-existent, especially where absolute rights (e.g. the prohibition of torture and the prohibition of *refoulement*) are concerned.[1138] Finally, if the Court indeed requires fundamental rights violations to be obvious and reprehensible in order to be considered sufficiently serious, it should be noted that many fundamental rights obligations that apply during border control operations have already been clarified. On the one hand, obligations such as the prohibition of *refoulement* at sea have been clarified in cases before the ECtHR.[1139] On the other hand, the Fundamental Rights Agency regularly provides detailed reports on good practice in the area of external border control and related fundamental rights risks.[1140] It is irrelevant that neither of these are legally binding under EU law, as long as they serve as clarification of the fundamental rights obligations of public authorities within the EU, breaches thereof are more likely to be considered obvious and reprehensible.

In sum, even though the Court's case law in this respect is unclear and inconsistent, it seems that if fundamental rights violations occur in the context of Frontex operations, these are likely to qualify as sufficiently serious. It is, however, unclear whether the Court would consider border management to pursue an 'objective of general interest', i.e. the 'fight against irregular migration', and how this would affect the assessment.[1141]

1137 Similarly see Ward, 'Damages under the EU Charter of Fundamental Rights' (n 67) 601.

1138 See above 4.2.2.5.1.

1139 See for example ECtHR, *Hirsi* (n 35).

1140 See for example, FRA, 'Fundamental Rights Report 2016: Focus, Asylum and migration into the EU in 2015' (2016), available at http://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-fundamental-rights-report-2016-2_en.pdf.

1141 See above text to n 1076-1077.

4.2.3 Damage and causal link

In addition to the unlawfulness of the conduct complained of, liability requires there to be damage on the part of the victim and a causal relationship between the unlawful conduct and the victim's damage. Both damage and causality have to be proven by the applicant.[1142]

4.2.3.1 Damage

Damage has to be actual and certain, meaning hypothetical or future damage is not compensated, unless it is established that it will occur.[1143] It is sufficient that *the existence* of damage is certain, even if *its amount* is not.[1144] If the case allows it, the Court may reserve the final decision on the extent of damage and the amount of compensation to be awarded for a later stage.[1145]

Damage may be material, i.e. a reduction of the person's assets or a loss of profits, and compensation ideally restores the monetary situation to how it would have been in the absence of the unlawful conduct.[1146] But non-material damage, i.e. damage which does not consist of monetary loss, can also give rise to liability. Non-material damage may consist of physical or mental suffering, but also injury to reputation. The extent of damage is assessed *ex aequo et bono*, in other words, what the Court considers 'just and fair'.[1147] Compensation for non-material damage is commonly a monetary lump sum. For example, in *Grifoni* the Court awarded 100 million Italian Lira (approximately EUR 50,000) as compensation for the injuries suffered by the applicant as a consequence of an accident for which the European Atomic Energy Community was to be held partially liable.[1148] In *Vainker*, the suffering of an applicant resulting from the Parliament's mishandling of his claim for compensation due to an occupational disease resulted in the

1142 CJEU, Case 26/74 *Société Roquette Frères v Commission*, 21 May 1976, ECLI:EU:C:1976:69, 22–23; CJEU, Case C-362/95 P *Blackspur and Others v Council and Commission*, 16 September 1997, ECLI:EU:C:1997:401, 31; CJEU, Case C-243/05 P *Agraz and Others v Commission*, 9 November 2006, ECLI:EU:C:2006:708, 27.

1143 CJEU, Case C-611/12 P *Giordano* (n 951) para 36; CJEU, Case C-243/05 P *Agraz III* (n 1142) para 27; referring to 'actual damage', CJEU, Case 51/81 *De Franceschi v Council and Commission*, 27 January 1982, ECLI:EU:C:1982:20, para 9; CJEU, Joined Cases 256/80, 257/80, 265/80, 267/80 and 5/81 *Birra Wührer v Council and Commission*, 27 January 1982, ECLI:EU:C:1982:18, para 9; referring to 'real and certain damage', CJEU, Case T-384/11 *Safa Nicu Sepahan* (n 1029) para 70; on the question of the extent to which the damage must additionally be 'specific, i.e. affecting the applicant's interests and assets in a special and individual way', see Toth (n 905) 181–184, with further references.

1144 CJEU, Case C-243/05 P *Agraz III* (n 1142) para 36; CJEU, Case C-611/12 P *Giordano* (n 951) para 40.

1145 Toth (n 905) 185–186; see for example in CJEU, Case 74/74 *CNTA I* (n 906).

1146 For detail see Toth (n 905) 185–190.

1147 CJEU, Case T-384/11 *Safa Nicu Sepahan* (n 1029) para 92; Toth (n 905) 190.

1148 CJEU, Case C-308/87 *Grifoni v EAEC*, 3 February 1994, ECLI:EU:C:1994:38, para 37–38.

award of EUR 60,000, account being taken *inter alia* of the seriousness of the defendant's conduct.[1149]

Fundamental rights violations may cause either material or non-material damage. An example of an award of compensation for material damage suffered due to a fundamental rights violation is *SEMEA*.[1150] In that case, the Commission had delayed for more than twelve years in requesting repayment of a disputed debt. The Court found that it had therefore, in breach of Article 41 CFR, failed to conduct the recovery procedure with due diligence and had not ensured 'that each procedural step is taken within a reasonable time following the previous step'. As a consequence, SEMEA was awarded compensation for the default interest that accrued over the period of inactivity of the Commission.[1151]

More commonly, however, fundamental rights violations lead to awards of monetary compensation for the non-material damage suffered. In *Nikolaou*, the Court ordered the Commission to pay EUR 3,000 in compensation for violations of the right to personal data resulting from the European Anti-Fraud Office ('OLAF') leaking data about its investigation.[1152] In *M v Ombudsman* the applicant was awarded EUR 10,000 in compensation for the European Ombudsman's violation of *inter alia* the right to private life when conducting an investigation.[1153] In *Staelen*, the Court awarded a total of EUR 7,000 for a breach of Article 41 CFR (right to good administration).[1154]

Higher amounts were awarded when the defendant's infringements were considered particularly serious. *Franchet and Byk*, for example, concerned unlawful conduct by OLAF and the Commission, violating *inter alia* the principle of the presumption of innocence, the obligation to maintain confidentiality, and the principle of sound administration, for which the Court awarded EUR 56,000 in compensation for the non-material damage suffered. The Court emphasised that the applicants 'experienced feelings of injustice and frustration' and 'sustained a slur on their honour and their professional reputation on account of the unlawful conduct of OLAF and of the Commission' that was particularly serious.[1155] *Chart* concerned a former employee of the European External Action Service ('EEAS') in Cairo, Egypt who was subject to the Egyptian social security regime. The EEAS failed to issue an 'end of service-certificate', which is required under Egyptian law, over the course of several years following the termination of her contract

1149 CJEU, Case T-48/01 *Vainker v Parliament*, 3 March 2004, ECLI:EU:T:2004:61, paras 178–180; also in CJEU, Case C-308/87 *Grifoni II* (n 1148) para 38, the Court awarded the applicant a lump sum without further explanation as to the basis for the calculation.

1150 CJEU, Case C-531/12 P *SEMEA* (n 998).

1151 Ibid paras 97-104, 107-109.

1152 CJEU, Case T-259/03 *Nikolaou* (n 1004) para 333.

1153 CJEU, Case T-412/05 *M v Ombudsman* (n 988) para 158.

1154 CJEU, Case T-217/11 *Staelen* (n 971).

1155 CJEU, Case T-48/05 *Franchet and Byk* (n 1002) para 411.

and despite numerous requests by the applicant. The Court found that the EEAS had displayed 'a complete lack of consideration for the applicant' when it failed to prepare the requisite certificate and, despite the applicant's requests, remained inactive and maintained silence or gave purely evasive answers. It pointed out that '[w]hen asked about this at the hearing, the EEAS was unable to provide the slightest explanation for the delegation's failure to respond to the quite legitimate requests made by the applicant.'[1156] That breach of the principle of sound administration and the principle that decisions must be taken within a reasonable time, in the view of the Court warranted an award of EUR 25,000 in compensation for the non-material damages suffered.[1157]

However, compensation for non-material damage does not have to be of a monetary nature. The recognition of illegality, such as by annulment of the unlawful measure, may for example be capable of constituting a form of reparation for the harm suffered by that illegality.[1158] Where the non-material damage suffered cannot be wholly offset by the annulment of the unlawful measure, additional monetary compensation may be required to achieve full reparation.[1159] In the case of injury to the applicant's reputation by the unlawful adoption and maintenance of restrictive measures in *Safa Nicu Sepahan*, the Court awarded EUR 50,000 of compensation in addition to the annulment of the measures in question.[1160] In assessing the amount of compensation it placed emphasis on the seriousness of the allegations against the applicant, the fact that the adoption of the measures attracted considerably more attention than their annulment, the amount of time (three years) that the applicant was subjected to the restrictive measures, and the lack of indication that the Council had verified whether that allegation was well founded in order to limit the harmful consequences which it would entail for the applicant.[1161] Similarly, in *François*, the Court awarded EUR 8,000 in addition to annulment in the context of several infringements of the Staff Regulations and breaches of the principles governing disciplin-

1156 CJEU, Case T-138/14 *Chart* (n 998) para 116.

1157 Ibid para 125, 149-155.

1158 CJEU, Case C-239/12 P *Abdulrahim v Council and Commission*, 28 May 2013, ECLI:EU:C:2013:331, para 72; see also CJEU, Case T-328/14 *Jannatian* (n 1112) para 66, where the Court held 'In the light of the foregoing, it must be concluded that the condition relating to actual damage is not satisfied in the present case and that, in any event, the non-material damage suffered by the applicant is adequately compensated for by the finding that the restrictive measures taken against him were unlawful.'; or in CJEU, Case T-47/03 *Sison I* (n 1005) para 241, where the Court held 'Nevertheless, the fundamental principle that the rights of the defence must be observed being essentially a procedural guarantee […], the Court considers that, in the circumstances, annulment of the contested act will constitute adequate compensation for the damage caused by that breach […].

1159 CJEU, Case T-384/11 *Safa Nicu Sepahan* (n 1029) paras 86–92.

1160 Ibid para 92. This was the first case in which the Court awarded damages in a case concerning restrictive measures.

1161 Ibid paras 88–91.

ary proceedings committed by the Commission, which led to injuries to the applicant's reputation, disruption to his private life, and a state of prolonged uncertainty.[1162]

4.2.3.2 Causation

A right to compensation only arises when the damage suffered was caused by the unlawful conduct in question.[1163] In principle this applies to fundamental rights violations just like any other breach of Union law. However, in many instances, the fundamental rights breach itself is the very source of the immaterial damage. For example, if an individual is tortured, the immaterial damage consisting of the physical and mental suffering is inherent in the breach. Where the breach and the damage are so inseparable, a determination of the causal link will generally be unnecessary. In this vein, in the case of fundamental rights violations, causation typically only plays a relevant role where compensation for material damage is (additionally) requested. Thus, a cursory overview of the causation requirement is sufficient in the present context. Having said this, it should be noted that causation may play a more important role where more than one actor is involved in a fundamental rights violation. This question will, however, be addressed in more detail in Sections 4.4.2.3 and 4.4.4 below.

In principle, there is a causal link when the infringement of Union law was a necessary condition for the damage to occur. In other words, there is no causality if the same result would have been achieved in the absence of the unlawful Union or member state conduct (also referred to as causation in fact, the *conditio sine qua non* requirement, or the 'but-for' condition).[1164] In *Brinkmann*, for example, the Court held that the member state concerned was not liable for not having properly transposed specific provisions of a directive. Whilst this, it clarified, would in principle constitute a sufficiently serious breach of Community law, the damage would have occurred regardless, since the state authorities had given immediate effect to the relevant provisions of the directive instead.[1165] In *Compagnia Italiana Alcool*, the Court rejected a causal link between a failure of the Commission to state its reason and the applicant's damage arising from the contested decision, since the damage allegedly suffered by the applicant would have been the same,

1162 CJEU, Case T-307/01 *François v Commission*, 10 June 2004, ECLI:EU:T:2004:180, paras 110–111.

1163 The question of causation is rarely addressed in detail by the Court and will only be outlined briefly in this section, for more detail see Biondi and Farley (n 909) 55–60; Toth (n 905) 191–198.

1164 Toth (n 905) 192.

1165 CJEU, Case C-319/96 *Brinkmann* (n 1071) paras 27–33, in turn, their unlawful interpretation, which caused the damage, was not sufficiently serious (for more detail see above text to n 1071-1072).

even if that deficiency had not existed.[1166] In *Leth* the Court also denied the existence of a causal link. It found that the rule breached prescribed an environmental impact assessment, but neither laid down the substantive rules in relation to the balancing of the environmental effects with other factors, nor prohibited the completion of projects that would have a negative effect on the environment. For that reason, a breach of the obligation to carry out an environmental impact assessment could not by itself constitute the reason for damage that arises from carrying out the project.[1167]

Whilst the 'but-for condition' is necessary, it is not sufficient in itself for liability to arise. The causal link between the unlawful conduct and the damage sustained also has to be 'sufficiently direct' in order to trigger liability.[1168] A breach is too remote or indirect if an intervening event 'breaks' the chain of causation. This may be the occurrence of exceptional or unforeseeable events, or imprudent conduct by the applicant or other public authorities, if either of these prove to be the determinant cause of the damage.[1169] In this vein, in *Dumortier* the Court denied the existence of a 'sufficiently direct' causal link between the Council's abolition of refunds and the insolvency of the applicants, since the former only exacerbated existing difficulties.[1170] Similarly, in *Trubowest* it denied the direct causal link between the imposition of anti-dumping duties and losses incurred by the applicant since the determinant cause was either the national authority or the applicants themselves, but in any case not the Community.[1171] The extent to which unforeseeable events or imprudent conduct by others may break the chain of causation also depends on the purpose of the specific obligation breached. *Rechberger*, for example, concerned the obligation on member states to ensure that guarantees exist for package travellers in the event of the travel organiser's bankruptcy. The Court found that this obligation is specifically aimed at arming consumers against the consequences of the bankruptcy, *whatever the causes of it may be*. Liability of the member states could therefore not be precluded by imprudent conduct on the part of the travel organiser or by the occurrence of exceptional and unforeseeable events.[1172]

1166 CJEU, Case C-358/90 *Compagnia Italiana Alcool v Commission*, 7 April 1992, ECLI:EU:C:1992:163, para 47; CJEU, Case 26/74 *Société Roquette Frères v Commission* (n 1142) paras 19–20.

1167 CJEU, Case C-420/11 *Leth* (n 967) paras 45–47.

1168 CJEU, Joined Cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79 *Dumortier* (n 904) para 21; CJEU, Case C-419/08 P *Trubowest Handel and Makarov v Council and Commission*, 18 March 2010, ECLI:EU:C:2010:147, para 53; CJEU, Case C-331/05 P *Internationaler Hilfsfonds v Commission*, 28 June 2007, ECLI:EU:C:2007:390, para 23; Toth (n 905) 192–193.

1169 CJEU, Case C-419/08 P *Trubowest* (n 1168) para 59, 60–61; CJEU, Joined Cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79 *Dumortier* (n 904) para 21.

1170 CJEU, Joined Cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79 *Dumortier* (n 904).

1171 CJEU, Case C-419/08 P *Trubowest* (n 1168).

1172 CJEU, Case C-140/97 *Rechberger and Others v Republik Österreich*, 15 June 1999, ECLI:EU:C:1999:306, paras 73–77.

4.3 Liability for the primary breach

Having established that liability may arise if fundamental rights violations are committed during Frontex operations, this section analyses the allocation of that liability between Frontex and the member states involved.

It is concerned with the liability for the primary breach, i.e. the liability that arises directly from a fundamental rights violation committed during an operation.[1173] For example, when a multinational team of border guards uses excessive force against an individual, or migrants are expelled in violation of the prohibition of *refoulement* during a Frontex operation, which of the actors involved (the host state, participating states, and Frontex) are liable for these fundamental rights violations?

The major challenge in allocating liability for fundamental rights violations during joint operations is that they are committed with the contributions and under the shared authority of several actors, including Frontex, the host member state, and/or other participating member states. Because the legal systems of the EU and its member states are closely intertwined, this is not at all uncommon in EU law. Nonetheless, in EU public liability law no conceptual framework exists for addressing questions of allocation of liability. Thus, this section develops a conceptualisation of questions of allocation of liability (between the EU and its member states) in EU law more generally, in order to define the key principles governing the Court's case law in this area, and apply them to the case of Frontex operations.

Section 4.3.1 sets out the approach chosen for the purposes of this study. Section 4.3.2 develops a categorisation of the various possibilities for interaction between Union bodies and member states that potentially raise questions of allocation of liability. Sections 4.3.3 and 4.3.4 then examine how the CJEU has allocated liability in the two most important categories, namely the independent application of Union law by member states on the one hand and the cooperative application of Union law on the other. Section 4.3.5 discusses the competences of the CJEU and the national courts respectively, where conduct of both a Union body and a member state authority may be at the origin of a damage. Finally, Section 4.3.6 provides an overview of the rules on allocation of liability that can be deduced from the case law discussed. These rules are then applied to the context of Frontex operations in Section 4.3.7.

1173 For the distinction between responsibility for the primary breach and associated conduct, see above 1.3.3.

4.3.1 How to approach questions of allocation of liability

4.3.1.1 Attribution, causation, and allocation of liability in EU law

Generally speaking, the Court could allocate liability by assessing (either of) two 'links'. The first is that between the actor and the allegedly unlawful conduct, also referred to as 'attribution'. The second is the link between the allegedly unlawful conduct and the damage suffered, commonly referred to as 'causation'. Both are illustrated in Figure 5 above.

The choice to rely on either attribution or causation for the purposes of allocating liability has a number of implications. The first relates to the procedural stage at which the question of allocation of liability is assessed. The CJEU is only competent to rule on the liability *of the Union and Union bodies*. Hence, before being able to deal with the substantive part of an action, it has to establish that the conduct complained of is attributable to the Union or a Union body and thus capable of giving rise to their liability. If that is not the case, for example because the unlawful conduct at stake is attributable to a member state, the action is inadmissible. In this light, attribution of the allegedly unlawful conduct to the Union or a Union body is a precondition for the competence of the Court to adjudicate on the substance of the case and is determined at the admissibility stage of the proceedings. Conversely, the link between the allegedly unlawful conduct and the damage suffered (causation) is a matter decided at the substantive stage of the proceedings, once the admissibility of the action has been established.[1174]

The second consequence is more fundamental, and concerns the substantive rules that apply. The establishment of a causal link frequently depends on how 'direct' the link is, requiring an assessment of potential intervening events. Conversely, attribution commonly requires some form of control over the unlawful conduct in question (at least, as elaborated in Chapter 3, this is the case in international law).[1175] Whilst the CJEU has developed substantive rules governing causation, this is true to a lesser extent in relation to attribution of conduct.[1176] Indeed, a doctrine regarding attribution of conduct seems largely absent in EU law. This is perhaps unsurprising, given that national legal systems, which serve as the basis for the Court to develop EU liability law, seem particularly ill-equipped to fulfil this function in relation to attribution rules. They simply do not have to deal with multi-actor situations to the same extent than Union law does. In particular, the challenge of multiple public wrongdoers belonging to different legal systems is

1174 Explicitly also CJEU, Case C-55/90 *Cato v Commission*, 8 April 1992, ECLI:EU:C:1992:168, para 17.

1175 For the rules on attribution of conduct in international law see above 3.2.1.

1176 For the rules governing causation developed by the CJEU see above 4.2.3.2; the case law that may be considered to elaborate rules on attribution of conduct under EU law is discussed in more detail below 4.3.2.1.

something that supra- or international legal systems predominantly need to address. In any case, as opposed to causation, the question of attribution appears to have received considerably less attention, or indeed hardly any at all, in EU law.

4.3.1.2 The approach of the CJEU

It should be noted at the outset that the Court's use of 'attribution', 'causation', and related terms is inconsistent. For example, there seems to be no relevant difference between attribution of damage and attribution of conduct.[1177] In a similar manner, the meaning of causation and attribution is often conflated.[1178] Occasionally, the term 'imputation' is used as well, but it does not appear to have a meaning consistently different from attribution and/or causation.[1179]

Whilst the Court therefore does not seem to draw a consistent theoretical distinction between these concepts, it commonly discusses the allocation of liability at the admissibility stage of the proceedings and does not generally apply the substantive rules developed in the case law regarding the establishment of a causal link.[1180] For the current purposes, this means that the establishment of the allocation of liability cannot be approached as a question of causation and the substantive rules on causation are not determinative. Beyond that, however, not much can be said with certainty.

It is worth emphasising that even though it is commonly dealt with at the admissibility stage, the allocation of liability does not appear to be based on attribution rules in the narrow sense (i.e. rules on attribution of conduct),

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1177 Compare for example CJEU, Case 175/84 *Krohn I* (n 895) paras 19, 23; with CJEU, Joined Cases C-104/89 and C-37/90 *Mulder* (n 906) para 9, where the Court cites *Krohn I*.

1178 A particularly good example is CJEU, Case T-54/96 *Oleifici Italiani and Fratelli Rubino Industrie Olearie v Commission*, 15 September 1998, ECLI:EU:T:1998:204, para 67, which seems worth quoting here: 'as regards the existence of a direct causal link between the conduct of the Commission complained of and the alleged damage, it should be pointed out that the failure to reimburse storage costs could not be attributed to the conduct of the Commission's services in their informal cooperation with the Italian authorities but was due to a deliberate and independent choice by those authorities […]. In the circumstances the damage alleged by the applicants can be imputed to the national authorities and thus cannot be considered to have been directly caused by the conduct of the Commission in issue.'; see also CJEU, Case T-279/03 *Galileo International Technology and Others v Commission*, 10 May 2006, ECLI:EU:T:2006:121, in particular the relationship between paras 129-130; CJEU, Joined Cases T-344/00 and T-345/00 *CEVA* (n 1086) para 107.

1179 See for example CJEU, Case T-54/96 *Oleifici Italiani* (n 1178) para 67.

1180 On some occasions, however, the Court seems to discuss the allocation of liability as a question of causation, see for example CJEU, Joined Cases T-344/00 and T-345/00 *CEVA* (n 1086) para 107; this was not discussed by the ECJ upon appeal; the Advocate General, however, did not object to the CFI's approach, see AG Jacobs, Opinion in CJEU, Case C-198/03 P *CEVA* (n 1085) paras 103-104; CJEU, Case T-54/96 *Oleifici Italiani* (n 1178) para 67; see also AG Mayras, Opinion in CJEU, Case 132/77 *Société pour l'Exportation des Sucres v Commission*, 10 May 1978, ECLI:EU:C:1978:99, 1078.

or at least not necessarily. In many cases where an unlawful outcome was preceded by conduct of the EU and a member state, the Court establishes the origin of the unlawfulness and attributes the *damage* (not *conduct*) to that entity. A good example is *Mulder*, where the Court noted that the alleged unlawfulness stemmed 'not from a national body, but from the Community legislature' and consequently found that 'any damage ensuing from the implementation of the Community rules by national bodies is attributable to the Community legislature'.[1181] A notable exception is *Krohn I*, where the CJEU held that due to a legally binding instruction from the Commission to the relevant national authority, 'the unlawful conduct alleged […] is to be attributed not to the [national authority] […] but to the Commission itself.'[1182]

Thus, it is safe to say that the Court is neither explicit nor consistent about the theoretical foundation of the rules on the basis of which it allocates liability. In light of the absence of a conceptually consistent approach to attribution/imputation of conduct, damage, or liability, it is not wise to give too much weight to the Court's use of one of these terms or another. In essence, what is important here is to determine the general rule(s) on the basis of which the Court allocates liability to one or another actor, regardless of their theoretical foundation.

However, the Court is commonly not explicit about the general rule(s) on the basis of which it allocates liability to one actor or another either. It rather allocates liability *ad hoc* in a case-by-case fashion, seeking out the actor that has the strongest link to the damage. Frequently, it fails to consistently refer to its own case law dealing with similar questions, unless the cases concern the same policy areas. The Court's approach has prevented the emergence of a coherent 'line' of case law in this area. This makes it difficult to understand why the Court has allocated liability to one actor or another in a particular case and whether it is based on a more generally applicable rule.

4.3.1.3 The approach adopted for the purposes of this study

In light of the lack of explicit, generally applicable rules governing the allocation of liability, the overall aim of the following sections is to develop them from the case law of the Court, to the extent this is possible. The focus is on the content of those rules, rather than their theoretical foundation. For this purpose, the following approach is adopted (see also Figure 24).

1181 CJEU, Joined Cases C-104/89 and C-37/90 *Mulder* (n 906) para 9; for more detail see below 4.3.3.1.

1182 CJEU, Case 175/84 *Krohn I* (n 895) para 23; for more detail see below 4.3.4.2; similar indications may be found in CJEU, Case 217/81 *Interagra v Commission*, 10 June 1982, ECLI:EU:C:1982:222, para 9, where the Court found that the relevant decisions were to be considered 'as having been adopted by the French [competent authority]'. For more detail see below 4.3.4.1.

Section 4.3.2 identifies and categorises the multi-actor situations that are likely to arise under EU law. Subsequently, Sections 4.3.3 and 4.3.4 examine how the Court has allocated liability in cases arising from these situations. In light of the lack of a consistent theoretical framework underlying the Court's case law in this area, the attention focusses on the result it reached, rather than the conceptual route it took. This means in particular that it is not relevant to the analysis here whether the Court speaks, for example, of 'attribution of conduct', 'attribution of damage', or 'imputation'. Evidently, the same conclusions may often be drawn on the basis of different arguments. The assumption adopted for the purposes of this section is that the Court does not arbitrarily allocate liability to one actor or another. Thus, where possible, the cases are interpreted so as to be consistent with other cases dealing with similar questions. It should be noted that many of the early cases concerned the agricultural sector. However, it is assumed that the general principles on public liability law developed there are equally applicable to other areas of EU law.

Section 4.3.5 elaborates on the distribution of competences between the CJEU and national courts. In particular, it discusses the specific 'exhaustion of local remedies rule' developed by the CJEU and its relationship with the substantive allocation of liability between the Union and member states. Even though these questions of procedure do not form part of the subject matter of this study, it is necessary to examine them in this specific case as such. The reason is that the Court has not at all times been very clear when admitting or dismissing an application, whether this was on substantive or procedural grounds. In order to define generally applicable rules on allocation of liability, Section 4.3.5 thus provides a closer look at the relationship between substance and procedure.

Section 4.3.6 sets out the general rules on allocation of liability that may be deduced from the Court's case law. It is important to highlight that due to the Court's failure to develop a consistent line of case law in this area, this study can inevitably only offer tentative results. Finally, the general rules deduced from the Court's case law are applied to the specific case of Frontex operations in Section 4.3.7.

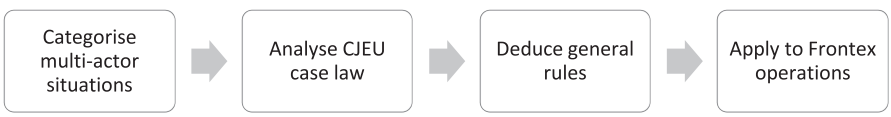

Figure 24: Approaching questions of allocation of liability in EU law

As a final preliminary remark, it should be noted that, given that the Court commonly discusses the allocation of liability at the admissibility stage of the proceedings, the cases analysed are relevant only as regards their admissibility. Importantly, the admissibility is assessed on the basis of the applicant's claims (whether or not these are well-founded is a matter for the

substantive part of the case).[1183] For the applicant, it is necessary to make a 'pre-assessment' of the allocation of liability between the Union and its member states, in order to define the appropriate forum for his action. As will be shown below, this may at times require a thorough knowledge not only of the case law in this area, but also of the sometimes complex relationship between the Union and its member states in the particular area in question.[1184] This can lead to puzzling results. For example, if an applicant substantiates his action for damages against the EU with arguments that only trigger member state liability, the claim is dismissed, even when an accurate legal assessment of the case would indeed have triggered Union liability. In other words, a claim is not only inadmissible when an applicant appears before the wrong court, but also when he appears before the right court, with the wrong argument.[1185] When analysing how the Court allocates liability in its case law, it is thus crucial to assess the results it reaches in light of the applicant's arguments.

4.3.2 Towards a categorisation of multi-actor situations in EU law

4.3.2.1 The starting point

4.3.2.1.1 Conduct that engages member state liability

Member states incur liability for conduct that is attributable to them.[1186] Two basic rules have emerged from the Court's case law regarding the question of when conduct can be qualified as 'state conduct' for the purposes of EU liability law.

1183 See also AG Mayras, Opinion in CJEU, Case 43/72 *Merkur v Commission*, 24 October 1973, ECLI:EU:C:1973:108, 1080–1081.

1184 This is particularly forcefully pointed out by AG Mancini, Opinion in CJEU, Case 175/84 *Krohn v Commission*, 15 January 1987, ECLI:EU:C:1987:8, see below text to n 1275.

1185 This indeed seems to have occurred in CJEU, Joined Cases 12, 18 and 21/77 *Debayser SA v Commission*, 2 March 1978, ECLI:EU:C:1978:42 (discussed in more detail below, see text to n 1254-1255). The action in that case was directed against the unlawful implementation of Union law by a member state and inadmissible before the Court. Ironically, it seemed that the unlawfulness may have originated in the relevant Community regulation, which means the CJEU was in fact the correct forum, had the applicants relied on the right arguments. See in particular paras 20-21, 25, and AG Mayras in his Opinion in the same case at 574.

1186 In CJEU, Joined Cases C-6/90 and C-9/90 *Francovich* (n 49) para 35, the Court noted that liability arises for those losses that are a result of breaches of Union law '*for which the State can be held responsible*' [emphasis added]; this was more clearly spelled out in CJEU, Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* (n 910) operative part para 1, where the Court referred to the 'principle that Member States are obliged to make good damage caused to individuals by breaches of Community law *attributable to the State*' [emphasis added], the change in formulation in *Brasserie du Pêcheur* may have been triggered by the phrasing of the question by one of the referring Courts (the German Bundesgerichtshof), see CJEU, Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* (n 910) para 8; in subsequent case law, the Court used these formulations interchangeably.

First, the acts and omissions of any state organ qualify as 'state conduct' for the purposes of liability.[1187] This is based, in particular, on the consideration that Union law needs to be uniformly applied. Consequently, it cannot depend on domestic rules as to the division of powers between the constitutional authorities. In addition, under international law the state is viewed 'as a single entity', which, in the Court's opinion 'must apply *a fortiori* in the Community legal order since all State authorities […] are bound in performing their tasks to comply with the rules laid down by Community law'.[1188] In that vein, the Court has held that member states cannot plead the internal distribution of powers and responsibilities or the acting body's lack of necessary powers, knowledge, means, or resources to escape liability.[1189] This was explicitly confirmed for the legislature (e.g. *Brasserie du Pêcheur*), the judiciary (e.g. *Köbler*), and territorial subadministrations (e.g. *Konle*).[1190]

In addition, state liability may arise for conduct of public law bodies legally distinct from the state when they exercise certain governmental tasks (e.g. *Haim*).[1191] Beyond the case of *Haim*, it is unclear to what extent member states may incur liability for 'emanations of a state'. Whilst Advocate General Kokott in her Opinion in *A.G.M.-COS.MET* seemed to suggest that conduct that is considered 'state conduct' in other areas of Union law may also be treated as such for the purposes of state liability, this question has not yet been addressed by the Court.[1192]

1187 CJEU, Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* (n 910) para 32; CJEU, Case C-224/01 *Köbler* (n 1036) para 31; CJEU, Case C-302/97 *Konle v Republik Österreich*, 1 June 1999, ECLI:EU:C:1999:271, para 62; CJEU, Case C-424/97 *Haim* (n 1031) para 27.

1188 CJEU, Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* (n 910) para 33–34; CJEU, Case C-224/01 *Köbler* (n 1036) para 32; explicitly drawing wide parallels with the law of international responsibility see AG Léger, Opinion in CJEU, Case C-224/01 *Köbler* (n 1036) paras 44-52.

1189 CJEU, Case C-424/97 *Haim* (n 1031) para 28; see also CJEU, Case C-302/97 *Konle* (n 1187) para 62.

1190 CJEU, Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* (n 910) para 36; see also AG Tesauro in *Brasserie du Pêcheur*, para 42; CJEU, Case C-224/01 *Köbler* (n 1036) para 33; *Köbler* was confirmed in subsequent case law CJEU, Case C-173/03 *Traghetti del Mediterraneo v Repubblica italiana*, 13 June 2006, ECLI:EU:C:2006:391; CJEU, Case C-160/14 *Ferreira da Silva e Brito and Others*, 9 September 2015, ECLI:EU:C:2015:565, para 47; CJEU, Case C-302/97 *Konle* (n 1187) para 62; for a discussion see Dougan (n 1096) 248–255; Craig, 'Once more unto the breach' (n 911) 68–72.

1191 CJEU, Case C-424/97 *Haim* (n 1031) 30–32; see also above text to n 1098-1101.

1192 AG Kokott, Opinion in CJEU, Case C-470/03 *A.G.M.-COS.MET* (n 884) in particular para 78 (including n 18), in combination with para 135; there has been some academic engagement with this question, see for example Dougan (n 1096) 253–255; Roy W Davis, 'Liability in damages for a breach of Community law: some reflections on the question of who to sue and the concept of "the State"' (2006) 31 European Law Review 69; Georgios Anagnostaras, 'The allocation of responsibility in State liability actions for breach of Community law: A Modern Gordian Knot?' (2001) 26 European Law Review 139; Takis Tridimas, 'Liability for Breach of Community Law: Growing Up and Mellowing Down?' (2001) 38 Common Market Law Review 301, 317–321.

Second, member states only incur liability for the conduct of their organs when they act in an official capacity. This was clarified and elaborated on in *A.G.M.-COS.MET*.[1193] AGM was an Italian company which manufactured and sold vehicle lifts. Following a report that indicated certain defects in one of AGM's lifts, the Finnish authorities informed the Finnish importer that the lifts may not meet the safety requirements. In the ensuing two years several investigations were conducted and different views on the safety of AGM's lifts emerged. Whereas the official position of the Finnish authorities was that there was not enough evidence to ban AGM's lifts and no reason to voice the concerns publicly, the official who had been in charge of the case on the part of the Finnish authorities, Mr Lehtinen, held the view that the defects in AGM's lifts were serious enough to prohibit them on safety grounds. Before the Finnish authorities took a final decision on the matter, he voiced those concerns in TV interviews and various other public statements. AGM brought proceedings before the Finnish courts seeking compensation from the Finnish state and Mr Lehtinen for the damage allegedly suffered, in particular a loss of turnover in Finland and elsewhere in Europe. In a preliminary ruling requested by the Finnish court, the CJEU pointed out that the Finnish state would only incur liability, if the national court found Mr Lehtinen's statement attributable to the Finnish state.[1194] It held that attribution to the state depends in particular on how the statements made by the official may have been perceived by the addressees. According to the CJEU, 'The decisive factor for attributing the statements of an official to the State is whether the persons to whom the statements are addressed can reasonably suppose, in the given context, that they are positions taken by the official with the authority of his office.'[1195] Thus, in line with *A.G.M.-COS.MET*, a state organ's *ultra vires* conduct is also attributable to a state, as long as the organ was perceived to be acting in an official capacity.

The attribution rules that emerge from the Court's case law are in substance similar to those under international law, in particular Articles 4, 5, and 7 ASR.[1196] However, the CJEU (primarily) bases them on EU law itself, rather than on international law. As a consequence, where no rules exist, it cannot be assumed that the attribution rules found in international law apply. Having said this, the findings in *A.G.M.-COS.MET* may have at least been inspired by international law, given that Advocate General Kokott's Opinion, which the Court followed, contained extensive references to international law in the relevant parts.[1197]

1193 CJEU, Case C-470/03 *A.G.M.-COS.MET* (n 884).
1194 Ibid 86.
1195 Ibid paras 56–57, for the factors to be taken into account in that regard see para 58.
1196 See above 3.2.1.1.
1197 AG Kokott, Opinion in CJEU, Case C-470/03 *A.G.M.-COS.MET* (n 884) paras 84-85.

4.3.2.1.2 Conduct that engages Union liability

Article 340 TFEU requires the Union to compensate damage that is 'caused *by its institutions or by its servants*' [emphasis added]. Thus, the liability of the Union arises only for conduct attributable (also: 'imputable') to it. Occasionally, this is explicitly listed as the fourth condition for liability, one of the clearest examples being *Holcim (Romania)*.[1198] Whilst the Court commonly attributes conduct to a Union institution, it should in fact be concerned with attribution to the Union itself, since the Union is the entity bearing liability.

In the same vein as Article 340 TFEU, Article 60 EBCG Regulation requires that Frontex has to make good any damage 'caused by *its departments or by its staff*' [emphasis added].

The 'institutions' whose conduct may trigger the Union's liability are the principal institutions listed in Article 13(1) TEU, but also other bodies 'established by the Treaty and authorized to act in its name and on its behalf'.[1199] Consequently, the Court accepted that for example the European Investment Bank and the European Ombudsman could engage the Union's liability.[1200] This reasoning does not seem to extend to agencies, created by secondary law with separate legal personality. Whilst agencies, including Frontex, in any case incur liability themselves for the conduct of their 'departments and staff', it may be argued that the Union incurs at least a subsidiary liability for their conduct.[1201]

In addition, conduct of the Union's servants may give rise to the Union's liability, if they act 'in the performance of their duties'.[1202] In the same vein, the conduct of Frontex' staff gives rise to its liability, if they act 'in the performance of their duties'.[1203] The meaning of this formulation ('in the per-

1198 CJEU, Case T-317/12 *Holcim (Romania) v Commission*, 18 September 2014, ECLI:EU:T:2014:782, para 86 and cited case law; see also CJEU, Case C-234/02 P *Lamberts* (n 47) paras 49, 59, and cited case law; similarly CJEU, Case T-79/13 *Accorinti and Others v ECB*, 7 October 2015, ECLI:EU:T:2015:756, para 61; in CJEU, Case T-250/02 *Autosalone Ispra v EAEC*, 30 November 2005, ECLI:EU:T:2005:432, the lack of attribution to the Community led to the dismissal of the action, see in particular paras 42, 68-98; in literature see in particular Türk (n 883) 241; Fines (n 898) 16–18; Jean-Marc Thouvenin, 'Responsibility in the Context of the European Union Legal Order' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 867.

1199 CJEU, Case C-370/89 *SGEEM and Etroy v EIB*, 2 December 1992, ECLI:EU:C:1992:482, para 15; see also CJEU, Case T-209/00 *Lamberts v Mediator*, 10 April 2002, ECLI:EU:T:2002:94, para 49.

1200 CJEU, Case C-370/89 *SGEEM and Etroy* (n 1199) para 16; CJEU, Case T-209/00 *Lamberts* (n 1199) paras 48–52; confirmed in CJEU, Case C-234/02 P *Lamberts* (n 47) in particular para 52.

1201 Türk (n 883) 243; for more detail see Chamon (n 111) 355–357.

1202 TFEU (n 44) art 340.

1203 EBCG Regulation (n 18) art 60.

formance of their duties') was addressed by the Court in *Sayag v Leduc*.[1204] The case concerned Mr Sayag, an official of the European Atomic Energy Community who caused a road accident in Belgium. He was driving his private car but was in possession of a travel order issued by his employer which provided for the use of his own car during the mission. Mr Leduc and Mr van Hassen, who were passengers in Mr Sayag's car, were injured in this accident. During the proceedings regarding Mr Sayag's prosecution, a Belgian court referred a number of questions to the CJEU, including whether Mr Sayag could be considered to have acted in the performance of his duties at the relevant time. The Court held that 'the Community is only liable for those acts of its servants which, by virtue of an internal and direct relationship, are the necessary extension of the tasks entrusted to the institutions.'[1205] A servant's use of a private car, even in the performance of his duties, does not, according to the Court, satisfy these criteria.[1206] Only in the case of *force majeure* or other 'exceptional circumstances of such overriding importance' that the Community would otherwise not be able to fulfil its tasks, would the use of a private car form part of the servants' performance of his duties within the meaning of non-contractual liability.[1207]

The Court's view on the definition of conduct that qualifies as 'official' for the purposes of the Union's liability has been considered rather restrictive.[1208] In particular, it seems substantially narrower than in the area of member state liability, where the perception by the addressee of an act is determinative. Notably, in *A.G.M.-COS.MET*, discussed in the previous section, the approach seems to have been partially inspired by the rules on attribution of conduct under public international law, whilst *Sayag v Leduc* may have been primarily based on the laws of the member states.[1209] More generally, the rules on attribution of conduct to the Union that emerge from the Court's case law seem considerably narrower than those under international law, in particular Articles 6 and 8 ARIO.[1210]

4.3.2.1.3 Implications for Frontex operations

It follows from the analysis above that the Union and its member states are liable for the conduct of their own staff or organs when they act in an official capacity.

1204 CJEU, Case 9/69 *Sayag v Leduc* (n 884).
1205 Ibid para 7; see also CJEU, Case T-124/04 *Ouariachi v Commission*, 26 October 2005, ECLI:EU:T:2005:378, para 18.
1206 CJEU, Case 9/69 *Sayag v Leduc* (n 884) paras 8–10.
1207 Ibid para 11.
1208 Craig, *EU Administrative Law* (n 943) 695–696; Türk (n 883) 243.
1209 See in particular the opinions of the respective AGs, which the Court followed, AG Gand, Opinion in CJEU, Case 9/69 *Sayag v Leduc* (n 884) 340–343; AG Kokott, Opinion in CJEU, Case C-470/03 *A.G.M.-COS.MET* (n 884) paras 84-85.
1210 See above 3.2.1.2.

As a starting point, this general rule applies as long as the relevant organs do not act under the authority of another entity. For this reason, the rule is only of limited relevance to Frontex operations. More specifically, only Frontex staff continues to act under the sole authority of their 'home entity' Frontex whilst they are deployed to joint operations.[1211] Thus, the agency has to make good damage they cause whilst on duty. It should be noted, however, that Frontex' own staff may only exercise coordinating and similar tasks. Since they therefore do not possess executive or other powers which directly affect individuals, they are unlikely to directly commit fundamental rights violations during joint operations.[1212]

Importantly, most personnel deployed during joint operations, in particular persons deployed as team members, carry out their tasks during deployment under the multi-layered authority regime set up by the EBCG Regulation and the respective Operational Plans.[1213] Hence, the remainder of this section elaborates on the allocation of liability in instances where the impugned conduct has occurred under the partial authority of more than one entity.

4.3.2.2 A tentative categorisation of multi-actor situations in EU law

The general rule that the Union and its member states are each liable for the conduct of their own organs has a number of implications that provide a useful starting point in order to seek out possible multi-actor situations in EU law.

First, damage may originate in unlawful primary law, such as amendments to the Treaties or Acts of Accession. This type of conduct cannot trigger Union liability because primary law is not adopted by Union institutions or servants (e.g. *LAISA*; *Dubois*).[1214] The question of whether and under what circumstances the member states may incur liability under EU law in such situations has not been addressed by the Court yet, but is not of relevance here. This is illustrated in Table 8, row 1.

1211 See above 2.3.3.1.2 and the overview in 2.3.3.4.

1212 Their function is of course highly relevant in the context of incurring associated liability, i.e. Frontex' liability for failing to prevent fundamental rights violations. This is discussed below 4.4.

1213 See above 2.4.3.

1214 See for example CJEU, Joined cases 31 and 35/86 *Levantina Agricola Industrial SA (LAISA) and CPC España SA v Council of the European Communities*, 28 April 1988, ECLI:EU:C:1988:211, paras 19-22; CJEU, Case T-113/96 *Edouard Dubois and Fils v Council and Commission*, 29 January 1998, ECLI:EU:T:1998:11, paras 41-47; confirmed in CJEU, Case C-95/98 P *Edouard Dubois and fils v Council and Commission*, 8 July 1999, ECLI:EU:C:1999:373, paras 18-22; see also Arnull (n 903) 131; Toth (n 905) 191–192, who, however, sees this as a question of causation; Thouvenin (n 1198) 867.

Second, damage may arise from the enactment of unlawful Union legislation. For the current purposes, the term 'Union legislation' is understood broadly, referring to all Union acts of general applicability. Unlawful Union legislation can only trigger Union liability because it is enacted by Union bodies (e.g. *Schöppenstedt*).[1215] This is illustrated in Table 8, row 2.

Third, damage may arise from the unlawful application of Union law. For the current purposes, the term 'application' is understood as any measure that applies Union legislation to a specific situation or transposes it to national law. It includes, on the one hand, activities by Union bodies, such as decisions addressed to individuals, or purely factual conduct. These may only give rise to the Union's liability (e.g. *Adams*).[1216] It, on the other hand, also consists of measures by national authorities, for example applying Union regulations, but also implementing Union directives. These may only give rise to member state liability (e.g. *Fuß*).[1217] This is illustrated in Table 8, row 3.

Table 8: Categorisation of multi-actor situations in EU law: starting point

Actor / Unlawfulness	**Union liability**	**Member state liability**
Primary law	No	?
Union legislation	Yes *	No
Application	Yes, if application by Union body †	Yes, if application by MS authority * †

There are countless potential interactions between Union bodies and member states that may be the source of an unlawful outcome. However, in light of the starting point presented here, the two most important multi-actor situations in practice stem from the fact that the Union often relies on the administrative structures of the member states to execute Union law. The first is the **(independent) application by member states of Union legislation ('situation 1')**. Questions of allocation of liability arise because damage may be the result of law *enacted* by the Union but *applied* by a member state. In Table 8, this is the combinations of the two situations identified with *. The second is the **cooperative application of Union legislation ('situation 2')**. This covers all situations where the application of Union law is shared between a Union body and one or more member states. Questions of allocation of liability arise because damage may be the result of a measure taken by one authority that was thereby supported by another. In Table 8, this is the combination of the two situations identified with †.

1215 CJEU, Case 5/71 *Schöppenstedt* (n 894).
1216 CJEU, Case 145/83 *Adams* (n 884).
1217 CJEU, Case C-429/09 *Fuß* (n 991).

It is important to highlight that Frontex may not develop policies or adopt Union legislation on external border management.[1218] As explained in more detail in Chapter 2, together, Frontex and the national border management authorities form a European Border and Coast Guard, whose joint responsibility lies in *implementing* European integrated border management through *inter alia* conducting joint border control and return operations.[1219] Hence, generally, the implementation of joint operations may be qualified as a form of cooperative application of Union legislation.

Nonetheless, the following sections discuss the allocation of liability in both situation – the independent application by member states of Union legislation, and the cooperative application of Union legislation. One reason why this is preferable is that in order to derive general rules on allocation of liability, the multi-actor situations studied need to represent, if not all, then at least the large majority of possible scenarios. More importantly, however, it is crucial to remember that the categorisation presented here is not based on a distinction the Court itself makes in its case law. It is designed to help identify general lines of reasoning in the Court's case law by adding structure and a conceptual background. However, it would seem unjustified to exclude cases from the analysis on the basis of assigning them to one or another category.

Indeed, because the categorisation presented here is not used by the Court itself, not all cases clearly fall into one category or another. In some instances, the case itself does not contain sufficient information to definitively assign it to either category. In other situations, a single case fits more than one category. In this light, Table 9 shows how the cases used for the purposes of the following sections have been allocated to the categories presented here.

1218 See in particular EBCG Regulation (n 18) recital (8); this is elaborated in more detail in Chapter 2.

1219 See above 2.1.1.4.

Table 9: Cases concerning allocation of liability in EU law

Cases concerning unlawful Union conduct		**Cases concerning unlawful MS conduct**	
Situation 1†	**Situation 2††**	**Situation 1†**	**Situation 2††**
1972 Haegeman*	1986 Krohn	1975 Société des Grands Moulins des Antilles	1978 Société pour l'Exportation des Sucres
1973 Merkur	1994 KYDEP	1978 Debayser	1980 Sucrimex
1974 Holtz & Willemsen		1979 Wagner	1982 Interagra
1975 CNTA			1984 Eurico**
1976 IBC*			1987 L'Étoile commerciale
1976 Lesieur Cotelle*			1991 Sunzest
1976 Société Roquette Frères* (in part)			1992 Borelli
1977 Dietz			1993 Emerald Meats
1979 Ireks-Arkady			1998 Laga
1981 Ludwigshafener Walzmühle			1998 Oleifici Italiani
1984 Unifrex			2006 Lademporiki
1984 Biovilac			2009 Bowland Dairy
1987 De Boer Buizen			
1989 Roquette Frères v Commission			
1992 Vreugdenhil v Commission			
1992 Mulder			
1995 Nölle* (in part)			
1995 Exporteurs in Levende Varkens			
2001 Bocchi			
2001 Cordis			
2002 Biret			
2004 Cantina sociale			
2008 Trubowest*			
2015 Schröder			
† (independent) application by MS of Union legislation †† cooperative application of Union legislation			
* Held inadmissible before the CJEU (all but Lesieur Cotelle concern the reimbursement of a specific sum). ** Contractual liability			

4.3.3 Independent application of Union legislation by member states

Table 10: Categorisation of multi-actor situations in EU law: situation 1

Actor / Unlawfulness	**Union liability**	**Member state liability**
Primary law	No	?
Union legislation	**Yes** *	No
Application	Yes, if application by Union body †	**Yes, if application by MS authority * †**

4.3.3.1 Liability of the Union for unlawful Union legislation

The Court has consistently held that the Union is liable for unlawful Union legislation. Crucially, this is so regardless of the fact that the damage may have only materialised due to the application (or lack thereof) of the unlawful provision(s) by member states.

An early example is the so-called *Quellmehl and Maize Gritz* cases, in particular *Ireks-Arkady*.[1220] The case concerned producers of *Gritz* and *Quellmehl* who used to benefit from compulsory production refunds. These refunds were abolished, whilst those for a competing product were retained. After the CJEU had found this to be incompatible with the principle of equality, the refunds in question were reintroduced with effect from the date of the judgment onwards.[1221] The applicants in *Ireks-Arkady* claimed compensation from the Community for their damage resulting from the unavailability of production refunds in the period between their abolition and their reinstitution. The Court dismissed the admissibility objection raised by the defendants, who argued that the payment of production refunds was a matter for the national authorities, against whom the applications should have been brought. In essence, it reasoned that the applicants did not challenge the failure of the national authorities to grant production refunds that were due under Community law. They based their claim on the unlawfulness of Community law itself, precisely because it did not provide for the possibility of these sums being paid, a failure for which the Community would – and eventually did – incur liability.[1222]

The Court followed a similar approach in *Biovilac*.[1223] The case concerned a Belgian company producing animal feed that was in competition with skimmed-milk powder. Biovilac argued that a special scheme introduced within the Community that included the sale of skimmed-milk powder at a low price undermined the market for its own products. Since the actual sales were conducted by national intervention agencies, the Commission contended that the action was inadmissible. The Court dismissed that objection, observing that 'the applicant does not challenge the measures adopted by the national authorities to implement Community law but the Commission's measures themselves'.[1224] On that basis, it affirmed its jurisdiction to

1220 CJEU, Case 238/78 *Ireks-Arkady* (n 904); see also n 904.

1221 CJEU, Joined Cases 117/76 and 16/77 *Ruckdeschel and Others v Hauptzollamt Hamburg-St. Annen*, 19 October 1977, ECLI:EU:C:1977:160.

1222 CJEU, Case 238/78 *Ireks-Arkady* (n 904) para 6; more clearly see AG Capotorti, 2979-2980, who pointed out that the applicants 'do not raise any question of a mistaken appraisal of their qualification for Community aid. Instead the applicants rely on the damage flowing from the infringement of the principle of equality on the part of the Council'.

1223 CJEU, Case 59/83 *Biovilac v EEC*, 6 December 1984, ECLI:EU:C:1984:380.

1224 Ibid para 6.

examine whether the enactment of the regulations in question gave rise to liability on the part of the Community.[1225]

Later case law, *De Boer Buizen* and in particular *Mulder*, made clear that liability of the Union for damage arising from unlawful legislation implemented by a member state arose because the origin of the unlawfulness lay in a Union measure which member states had no choice other than to implement.

De Boer Buizen concerned a company that committed to export steel tubes to the United States.[1226] Between the purchase of the product from producers in France and Germany and the actual shipment, Community measures limited such exports. The total amount that could be exported to the United States under that regime was to be distributed among the member states, who were to allocate the respective quotas among the producers (not exporters) in that state. On that basis, the Netherlands did not allocate a quota to De Boer Buizen, who had to stock the purchased goods without being able to export them. The company lodged an action for damages against the Community. The Council and the Commission argued that the action should have been instituted before national courts, in particular because the respective decisions to grant the licences fell within the responsibility of the member states. The Court rejected the objection of inadmissibility, pointing out that the applicant was alleging the unlawfulness of the Community regulations itself, rather than the application thereof by the member state. The member state had no choice other than to refuse the licence to the applicant.[1227]

The dispute at the heart of the *Mulder* case concerned milk producers in the Netherlands who were denied a quota to produce milk without paying a levy.[1228] The refusal was a direct consequence of them having previously taken advantage of a scheme provided under Community law aimed at reducing overproduction of milk. The CJEU had held that the quota system violated the farmers' legitimate expectations and declared it invalid.[1229] The farmers subsequently sought compensation from the Community. The Council and the Commission argued that the decision to deny the applicants their reference quantities was taken by Dutch authorities, who were competent to implement the scheme. It was thus not a decision for which the

1225 Ibid para 7; however, the substantive conditions for liability were found to not be met, paras 10-26; see also AG Sir Gordon Slynn, 4085-4086, who observed, 'What is complained of here is the policy adopted by the Commission, not a specific implementation of it by a national authority. In view of this the Commission is the proper defendant.'

1226 CJEU, Case 81/86 *De Boer Buizen v Council and Commission*, 29 September 1987, ECLI:EU:C:1987:393.

1227 Ibid paras 8-11.

1228 CJEU, Joined Cases C-104/89 and C-37/90 *Mulder* (n 906).

1229 CJEU, Case 120/86 *Mulder v Minister van Landbouw en Visserij*, 28 April 1988, ECLI:EU:C:1988:213; CJEU, Case 170/86 *Von Deetzen v Hauptzollamt Hamburg-Jonas*, 28 April 1988, ECLI:EU:C:1988:214.

Community would incur liability. The Court rejected that objection. It noted that even the defendants seemed to accept that, on the basis of the relevant Community law, the member states had no choice other than refusing the reference quantity. Thus, it found that 'the unlawfulness alleged in support of the claim for damages must be regarded as issuing, not from a national body, but from the Community legislature'. As a consequence, 'any damage ensuing from the implementation of the Community rules by national bodies is attributable to the Community legislature'.[1230] The Court concluded that the failure was such so as for the Community to incur liability.[1231]

The principle that the Union is liable for unlawful Union law, even when its application is within the competence of the member states was confirmed on numerous occasions, including the cases *Exporteurs in Levende Varkens*, *Bocchi*, *Cordis*, *Biret*, and *Cantina sociale*.[1232]

4.3.3.2 No liability of member states for application of unlawful Union legislation

In contrast, a member state who applies unlawful Union law without having 'enough' margin of discretion to act lawfully, does not incur liability. Even though their conduct is, strictly speaking, also unlawful, it is 'inherited' from Union legislation. Whilst the Court has never explicitly spelled that out, there are several indications as to such a rule.

In *De Boer Buizen*, for example, the Court suggested that the applicants could not have recovered compensation for the damage from the member state concerned.[1233] Similarly, in *Mulder*, it found that the alleged unlawfulness stemmed '*not from a national body*, but from the Community legislature'.[1234] Two preliminary rulings, namely *Granaria II* and *Asteris v Greece*, are also sometimes considered to support the rule that member states incur no liability for the mere implementation of unlawful Union law.[1235]

The case *Granaria II* concerned a request for a preliminary ruling by Dutch courts where the applicant had sought compensation from the Netherlands for damage suffered as a result of provisions adopted by the Dutch interven-

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1230 CJEU, Joined Cases C-104/89 and C-37/90 *Mulder* (n 906) para 9.

1231 Ibid paras 15–21; see also above text to n 906.

1232 CJEU, Joined Cases T-481/93 and T-484/93 *Vereniging van Exporteurs in Levende Varkens and Nederlandse Bond van Waaghouders van Levend Vee v Commission*, 13 December 1995, ECLI:EU:T:1995:209, para 71; CJEU, Case T-30/99 *Bocchi* (n 1122) para 31; CJEU, Case T-18/99 *Cordis v Commission*, 20 March 2001, ECLI:EU:T:2001:95, para 26; CJEU, Case T-174/00 *Biret International v Council*, 11 January 2002, ECLI:EU:T:2002:2, para 33; CJEU, Case T-166/98 *Cantina Sociale di Dolianova and Others v Commission*, 23 November 2004, ECLI:EU:T:2004:337, paras 102-113.

1233 CJEU, Case 81/86 *De Boer Buizen* (n 1226) para 10.

1234 CJEU, Joined Cases C-104/89 and C-37/90 *Mulder* (n 906) para 9 [emphasis added].

1235 See also de Visser (n 876) 56.

tion agency.[1236] Those provisions implemented the Community's legislative framework for the compulsory purchase of certain skimmed-milk powder held by intervention agencies. This legislative framework had previously been declared void by the Court.[1237] The competent Dutch court was of the view that the plaintiff had in fact suffered damage. However, it was unsure whether, if the Community was liable for having enacted unlawful legislation, the member state would additionally be liable for having applied it, and requested a preliminary ruling on that matter.[1238] In his Opinion, Advocate General Capotorti observed that where member states simply implement unlawful Union law, there is in fact no infringement on their part and 'there is no reason to suppose that the State has incurred liability.'[1239] The Court limited itself to pointing out that the 'simple' unlawfulness of the legislation in question was insufficient to render the Community liable, and hence found it unnecessary to address the question of the member states' additional liability.[1240] Nevertheless, in *De Boer Buizen*, Advocate General Mancini referred to *Granaria II* when he noted that 'national institutions are not liable for the damage resulting from the application of a Community measure subsequently held to be invalid'.[1241]

In response to a similar question posed by a Greek court, the Court was somewhat more forthcoming. The case *Asteris v Greece* concerned a dispute over production aid for tomato concentrate.[1242] In an action brought by Greece, the Court had previously annulled the relevant Community legislation.[1243] Asteris, a tomato producer, sought compensation from the Community and Greece for having received too little aid on the basis of the unlawful regulation. His action for damages against the Community was dismissed by the CJEU, which was of the view that the unlawfulness complained of was not sufficiently serious to render the Community liable.[1244] The proceedings regarding his action for damages against Greece were then stayed, while the Greek courts sought clarification from the CJEU on the influence of the rejection of the Community's liability on Greece's liability. The CJEU found that its rejection of the Community's liability 'precludes a national

1236 CJEU, Case 101/78 *Granaria v Hoofdproduktschap voor Akkerbouwprodukten*, 13 February 1979, ECLI:EU:C:1979:38.
1237 CJEU, Case 116/76 *Granaria v Hoofdproduktschap voor Akkerbouwprodukten*, 5 July 1977, ECLI:EU:C:1977:117.
1238 See AG Capotorti, Opinion in CJEU, Case 101/78 *Granaria II* (n 1236) 643, who rephrases the questions with particular clarity.
1239 Ibid 644.
1240 Ibid para 10; it should be noted that the principle of member state liability had not been established yet at that point.
1241 AG Mancini, Opinion in CJEU, Case 81/86 *De Boer Buizen* (n 1226) 3685.
1242 CJEU, Joined Cases 106 to 120/87 *Asteris and Others v Greece and EEC*, 27 September 1988, ECLI:EU:C:1988:457.
1243 CJEU, Case 192/83 *Greece v Commission*, 19 September 1985, ECLI:EU:C:1985:356.
1244 CJEU, Joined Cases 194 to 206/83 *Asteris v Commission*, 19 September 1985, ECLI:EU:C:1985:357.

authority which merely implemented the Community legislative measure and was not responsible for its unlawfulness from being held liable on the same grounds.'[1245]

National courts have indeed denied liability of member states when they have implemented unlawful Union law without having enough room to make lawful choices. This was the case for example in Germany, where the national courts relied in particular on *Mulder* in this respect.[1246] In the Netherlands, too, national courts have adopted that approach, relying especially on *Asteris v Greece*.[1247]

In this light, *only* the Union is liable for unlawful Union legislation.[1248]

4.3.3.3 Liability of member states for unlawful application of Union legislation

Whilst member states are not liable for the implementation of unlawful Union legislation, they are liable for the unlawful implementation of lawful Union legislation.[1249] Importantly, this presupposes that they have enough room for manoeuvre to choose an implementing measure that is in conformity with Union law.[1250]

In this vein, the CJEU has consistently declared as inadmissible actions that seek compensation for damages arising from the unlawfulness of national measures implementing EU law. This was the case for example in *Société des Grands Moulins des Antilles*, where an exporter of cereals resident in the overseas department of Guadeloupe was of the view that he was entitled under Community law to certain payments, including export refunds and carry-over payments.[1251] The French authority competent to make those payments expressed doubts as to the applicants' entitlement. After having requested also requested that the Commission make the payments in question, the company lodged an action for damages against the Community. The Court dismissed the application as inadmissible. Most importantly, the

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1245 CJEU, Joined Cases 106 to 120/87 *Asteris v Greece* (n 1242) para 18.

1246 Ulf F Renzenbrink, *Gemeinschaftshaftung und mitgliedstaatliche Rechtsbehelfe: Vorrang, Subsidiarität oder Gleichstufigkeit?* (Peter Lang 2000) 126–128.

1247 This was held for example in the *Mulder* case before Dutch courts, see AG Van Gerven, Opinion in CJEU, Joined Cases C-104/89 and C-37/90 *Mulder* (n 906) para 8.

1248 See also 4.3.3.1.

1249 The Court has frequently confirmed that the unlawful implementation of Union law is in principle suitable to give rise to their liability, for example in CJEU, Case C-318/13 *Proceedings brought by X* (n 1040); CJEU, Joined Cases C-501/12 to C-506/12, C-540/12 and C-541/12 *Specht* (n 989); CJEU, Case C-429/09 *Fuß* (n 991).

1250 This is explicitly pointed out by AG Capotorti, Opinion in CJEU, Case 101/78 *Granaria II* (n 1236) 644–645, 'In so far as implementing measures by a State give rise to infringements of Community law which may be imputed to specific options chosen by the State it may be held to be answerable therefore.'

1251 CJEU, Case 99/74 *Société des Grands Moulins des Antilles v Commission*, 26 November 1975, ECLI:EU:C:1975:161.

applicant company alleged that Community law entitled it to the benefits, and its damage arose from the misapplication of those rules, which was a matter for the national authorities.[1252] It was thus for national courts to rule on the legality of these measures, with recourse, where necessary, to the preliminary ruling procedure.[1253]

Another example is the case of *Debayser*.[1254] The case concerned three French sugar exporters who were charged substantially higher monetary compensatory amounts as a result of the devaluation of the French franc. The relevant Community legislation on the basis of which the amounts were charged authorised member states in those situations to exempt specific exports from the monetary compensatory amounts. The three sugar exporters applied for exemption to the relevant French authority, but were only partly successful, upon which they lodged an action for damages against the Community. They based it on the failure to apply the exemption provided for under the relevant Community legislation to their exports of sugar. Thus, the applicants alleged the unlawfulness of the implementation of Union law, for which the member states were responsible. Consequently, the Court concluded that 'Since the action is in substance directed against measures taken by the national authorities pursuant to provisions of Community law […] the conditions for instituting proceedings before the Court of Justice […] are not fulfilled.'[1255]

Also, in *Wagner* an action for damages was declared inadmissible for those reasons.[1256] The company Wagner had successfully submitted a tender under the relevant Community legislation for the export of sugar, which it was informed of by the competent German authority. Wagner subsequently applied for an export licence and lodged the concomitant security guaranteeing the export, as required under Community law. The licence was issued but due to alterations in the representative rates for member states' currencies effectuated by Community law, Wagner wanted to have the export licence cancelled. The application for cancellation was rejected by the competent German authority on the basis of new Community legislation that limited the possibilities for cancellation. Wagner used the licence but was bound to make a loss, for which the company sought compensation from the Community. In essence, Wagner was of the view that since the German authority wrongly relied on the Community legislation limiting cancellations of export licences, its decision to refuse cancellation was unlawful. The Court pointed out that the purpose of an action for damages was not 'to enable the Court to examine the validity of decisions taken by national agencies responsible for the implementation of certain [Community] mea-

1252 Ibid para 21-22.
1253 Ibid para 23.
1254 CJEU, Joined Cases 12, 18 and 21/77 *Debayser* (n 1185).
1255 Ibid para 25.
1256 CJEU, Case 12/79 *Wagner v Commission*, 12 December 1979, ECLI:EU:C:1979:286.

sures […] or to assess the financial consequences resulting from any invalidity of such decisions.'[1257] Indicating that the national decision may indeed have been unlawful, in the Court's view this was a matter for the respective national courts to decide, following recourse, if necessary, to the preliminary ruling procedure.[1258] Even though during the proceedings the applicant in fact claimed that the unlawfulness originated in Community law, this, in the view of the Court, was 'a fresh issue' that had been put forward too late and could therefore not be taken into account.[1259]

In sum, member states are exclusively liable if they unlawfully implement (lawful) Union law. Since there is no unlawful conduct on the part of the Union in such situations, there is no liability on the part of the Union.

4.3.4 Cooperative application of Union law

When Union bodies and member states cooperate in the application of Union legislation, most commonly one authority is entrusted with the responsibility of taking a final decision, whilst another plays a supporting role.

Support can take various forms. A Union body may for example have some authority to advise, guide, or otherwise help member states when they implement Union legislation. Such 'guidance' can range from mere recommendations or legal advice, to legally binding instructions. Support may also be rendered in the form of preparatory work, for example compiling factual information for another authority to base their decision on.

In light of the previous sections, the starting point is that the authority primarily responsible for the application is liable for the consequences of an unlawful application of Union legislation. However, support rendered in the application of Union legislation may be of such a nature that liability shifts to the supporting body. The following analyses the circumstances that lead to a shift of liability from the EU to a member state or vice versa.

Table 11: Categorisation of multi-actor situations in EU law: situation 2

Actor / Unlawfulness	**Union liability**	**Member state liability**
Primary law	No	?
Union legislation	Yes *	No
Application	**Yes, if application by Union body †**	**Yes, if application by MS authority * †**

1257 Ibid para 10.
1258 Ibid para 12.
1259 Ibid para 8.

4.3.4.1 Non-binding advice, recommendations, and opinions

The consequences for Union liability of guidance offered by a Union body in areas where member states are competent to implement Union legislation was already marginally addressed in *Société des grands Moulins des Antilles* and *Debayser*.[1260] However, it was dealt with in more detail for the first time in *Société pour l'Exportation des Sucres*.[1261] After the purchase of sugar from France, the Belgian company Société pour l'Exportation des Sucres had applied for exemptions from monetary compensatory amounts that were levied on exports from France. The competent French authority rejected the exemption, noting that the Commission, who had a right to object to intended exemptions, had expressed a negative opinion in relation to contracts comparable to those of Société pour l'Exportation des Sucres. In an action for damages, the Belgian company claimed *inter alia* that the refusal of the French authorities to grant exemption from the monetary compensatory amounts was the result of unlawful conduct on the part of the Commission, arguing that in such cases liability for the unlawful implementation of Community law shifted to the Community. Essentially, the Court found that in this specific case, the rejection was an independent decision by the French authorities, in particular because the Commission had not expressed any view in relation to the contracts entered into by Société pour l'Exportation des Sucres.[1262] It, however, seemed to leave the possibility open that the Community may indeed incur liability, if the relevant decision of the national authority could not be considered 'independent'.[1263]

An important clarification came with the cases *Sucrimex* and *Interagra*.[1264] In *Sucrimex*, the German company Westzucker obtained licences for the export of sugar with advance fixing of the export refund it would receive. It assigned the export rights to the French company Sucrimex, from whom Westzucker bought the sugar, so that Sucrimex exported the sugar on behalf of Westzucker. The licence extracts got lost, upon which the German authority issued new, identical licences. In its communications to the German and French authorities, the Commission took the view that the second licences issued by the German authority were in fact only duplicates and could not be used for export. Consequently, the applicants received a lower refund than the one fixed in advance in the original licence. When turning down the application for the higher refund, the French authority explicitly invoked the opinion expressed by the Commission. Similarly, in *Interagra*, the French authorities denied an export refund after having consulted the Commission

1260 CJEU, Case 99/74 *Société des Grands Moulins des Antilles* (n 1251) paras 19, 24; CJEU, Joined Cases 12, 18 and 21/77 *Debayser* (n 1185) para 23; see above 4.3.3.3.

1261 CJEU, Case 132/77 *Société pour l'Exportation des Sucres* (n 1180).

1262 Ibid paras 23-25.

1263 Ibid in particular para 27.

1264 CJEU, Case 133/79 *Sucrimex v Commission*, 27 March 1980, ECLI:EU:C:1980:104; CJEU, Case 217/81 *Interagra* (n 1182).

on the matter, who had informed them that under Community legislation in force at the time, Interagra's request was to be rejected.

In both cases, the applicants sought compensation from the Community, essentially arguing that in fact the Commission's conduct was the source of their damage since the French authorities had acted on the basis of the Commission's instructions when refusing the respective refunds. The Court noted that the application of Community law in the relevant area was a matter for national authorities. The Commission had no authority to interpret the relevant provisions of Community legislation in a manner binding on the national authorities, but could only express non-binding opinions. Its communications were therefore merely 'part of the internal cooperation between the Commission and the national bodies responsible for applying the Community rules in this field and as a general rule […] cannot make the Community liable to individuals'.[1265] The relevant decisions as a result of which the applicants had suffered damage, were therefore to be considered 'as having been adopted by the French [competent authority]'.[1266] As a consequence, both applications were inadmissible.[1267]

The Court expressed the same view in *L'Étoile commerciale*, a case concerning the Community system for subsidies for oil seeds.[1268] The national authority in France in charge of operating the system was of the view that a subsidy could be granted even where the requisite Community certificate was strictly speaking applied for too late. In that vein, it granted a subsidy to the applicants. Since the Commission did not share that view and did not reimburse the French authority for the subsidy paid, the latter reclaimed it from the applicants. In doing so, the French authorities explicitly invoked a decision by the Commission and a report from which it was clear that the applicants' subsidy was among the expenditure not recognised as reimbursable. When the applicants sought compensation from the Community, the Court in essence found that the relevant decision of the Commission 'was concerned solely with internal financial relations between the Commission and the French Republic' and 'was not intended to give, and could not have the effect of giving, instructions to the [relevant national authority] to adopt the decision giving rise to the alleged damage.'[1269] Since the damage hence derived exclusively from the decision of a national authority, the court rejected the application as inadmissible.[1270]

1265 CJEU, Case 217/81 *Interagra* (n 1182) para 8; see also CJEU, Case 133/79 *Sucrimex* (n 1264) paras 16, 22.

1266 CJEU, Case 217/81 *Interagra* (n 1182) para 9; see also CJEU, Case 133/79 *Sucrimex* (n 1264) para 23.

1267 CJEU, Case 217/81 *Interagra* (n 1182) para 11; CJEU, Case 133/79 *Sucrimex* (n 1264) para 25.

1268 CJEU, Joined Cases 89 and 91/86 *Étoile commerciale and CNTA v Commission*, 7 July 1987, ECLI:EU:C:1987:337.

1269 Ibid para 19.

1270 Ibid paras 20-21.

As a final example, *Sunzest* concerned a company that imported citrus fruit from Northern Cyprus. For plant protection reasons, Community legislation required such imports to be accompanied by a statement from the relevant authority that the product did not contain certain harmful substances. The certificates Sunzest received were issued by the 'Turkish Republic of Northern Cyprus'. In a letter, the Commission informed the relevant authorities of the member states that according to Community law, only certificates issued by the Republic of Cyprus could be considered valid. Sunzest, who was of the view that this letter would unlawfully prevent it from importing citrus fruit originating from the northern part of Cyprus, applied to the CJEU seeking *inter alia* compensation for the damage it suffered. The Court, relying on *Société pour l'Exportation des Sucres*, *Sucrimex*, and *Interagra*, dismissed the application, in essence because the Commission did not have the authority to issue anything but an opinion which was not binding on the national authorities.[1271]

This line of case law was confirmed in later cases.[1272] It is hence safe to conclude that mere recommendations, legal advice, or similar kinds of interference from a Union body are, as a rule, not capable of rendering it liable for the unlawful application of Union legislation by a member state. As the Court clearly pointed out in *Eurico*, it is irrelevant in this respect how actively a Union body intervenes or how the advice is drafted, as long as they have no legal effect other than to express an opinion.[1273]

4.3.4.2 Legally binding instructions

Occasionally, a Union body has the authority to legally oblige the member states to follow its views. This was the case in *Krohn I*.[1274] The German company Krohn had requested that the competent national authority issue import licences for manioc products from Thailand. The relevant Community legislation provided that such licences were to be granted, except where the Commission informed the competent national authority otherwise. The Commission did so in relation to Krohn's application, on the basis of which the national authority refused the issue of an import licence. As a consequence, Krohn had to pay the full rate of import levy for a subsequent ship-

1271 CJEU, Case C-50/90 *Sunzest v Commission*, 13 June 1991, ECLI:EU:C:1991:253, paras 13, 18, 19.

1272 CJEU, Case T-54/96 *Oleifici Italiani* (n 1178); CJEU, Case T-92/06 *Lademporiki and Parousis & Sia v Commission*, 8 September 2006, ECLI:EU:T:2006:248, para 26; CJEU, Case T-212/06 *Bowland Dairy Products v Commission*, 29 October 2009, ECLI:EU:T:2009:419, para 41; the same was confirmed for the area of contractual liability, see CJEU, Case 109/83 *Eurico v Commission*, 18 October 1984, ECLI:EU:C:1984:321.

1273 CJEU, Case 109/83 *Eurico* (n 1272) para 20, where the Court pointed out that 'the fact that the Commission intervened in a very active way […] is without significance as regards the divisions of powers and liability as between the Community and the Italian intervention agency'.

1274 CJEU, Case 175/84 *Krohn I* (n 895).

ment of manioc products. Krohn *inter alia* brought an action for damages seeking compensation from the Community.

In a detailed Opinion, Advocate General Mancini offered two solutions. The first was based on the argument that the refusal decision was taken by a national body, who therefore ought to bear liability for it. He suggested that the unjust consequences for the member states could be offset by granting them reimbursement from the Community. Mancini conceded that this approach might be 'excessively formalistic', which is why he was 'not altogether convinced' by it. However, the second solution gave him 'still greater cause for doubt.' The second solution was to assess in each case the powers conferred upon the Commission and the national body. If the Commission's involvement was to be considered a mere suggestion, the national authority would be liable. In contrast, if the Commission's opinion was binding, the decision at the national level would be imputable to the Commission and render the Community liable. In Mancini's view, this solution was 'theoretically more plausible', but he could 'scarcely imagine a worse' one. It would have 'disastrous practical consequences' since applicants would have to 'pore over every document in the procedure leading to the measure adversely affecting them in order to establish whether the national body or the Commission made the greater contribution to its adoption.' This, Advocate General Mancini argued, would be difficult to reconcile with the principle of legal certainty 'which requires that all rules, and rules conferring jurisdiction most of all, be defined in a clear and intelligible manner.' He thus suggested that the Court adopt a decision based on the first solution.[1275]

The Court opted for the second solution. It stated that in order to establish its jurisdiction in situations where a decision adversely affecting the applicant was adopted by a national authority in implementation of Community legislation, it is necessary 'to determine whether the unlawful conduct alleged in support of the application for compensation is in fact the responsibility of a Community institution and cannot be attributed to the national body.'[1276] The Court pointed out that there was no doubt that Community legislation empowered the Commission to give legally binding instructions to the member states, an authority which the Commission used in the particular case.[1277] On that basis, it concluded that 'the unlawful conduct alleged […] is to be attributed not to the [national authority], which was bound to comply with the Commission's instructions, but to the Commission itself.'[1278] Accordingly, the Court was competent to hear the action.[1279]

1275 AG Mancini, Opinion in ibid 760–762.
1276 Case 175/84 *Krohn I* (n 895) para 19.
1277 Ibid paras 21-22.
1278 Ibid para 23.
1279 Ibid para 23; However, in a subsequent judgment the Court considered the Commission's conduct lawful and thus rejected the application as unfounded. See CJEU, Case 175/84 *Krohn II* (n 1184).

Vice versa, where member states are competent to legally determine a Union body's decision, liability shifts to the member state concerned. This was the case in *Borelli*.[1280] The Italian company Borelli had submitted an application to the Community for financial aid for the construction of an oil mill. The competent national authority issued an unfavourable opinion owing to their assessment of of the project as incompatible with the conditions for funding under Community law. On that basis, the Commission rejected the application. Borelli, who was of the view that the project complied with the relevant conditions under Community law, sought annulment of the Commission's decision and compensation for the damages it suffered. Under the system in place at the time, the approval of the member state concerned was a condition for the grant of aid. The national authority's opinion was therefore binding on the Commission when unfavourable.[1281] Since the damage thus originated from a national authority, rather than the Commission, the Court dismissed the application for compensation against the Community.[1282]

The same applies where one authority determines the conduct of another in forms other than instructions or legal opinions. For example, where one authority is required by law to rely on information provided by another, the latter is liable for damages arising as a consequence of the inaccuracy of the information. Conversely, if the preparatory work is mere support, without exempting the deciding authority from its responsibility to ensure the accuracy of the information provided, liability remains with the deciding authority.[1283] This was dealt with by the Court for example in *Emerald Meats*.[1284] Emerald Meats, an Irish meat importer, had applied for a tariff quota under which he would be exempt from the payment of the high import duties otherwise applicable. Under the system in place at the time, the allocation was based on the quantities that the traders imported the three previous years. That information was collected and verified by the member states, who sent a list of importers fulfilling the requirements to the Commission. On that basis, the Commission allocated the quotas. Emerald Meats was of the view that the Irish authorities had submitted incorrect information to the Commission and informed the Commission of the alleged irregularities. The Commission nevertheless refused the grant of the quota on the basis of the lists it had received from the national authority. In actions before the CJEU, Emerald Meats requested that the Court annul the Commission's allocation decision and order the Commission to compensate it for the damages suffered. The Court denied the Community's liability in relation to the adop-

1280 CJEU, Case C-97/91 *Oleificio Borelli v Commission*, 3 December 1992, ECLI:EU:C:1992:491.
1281 Ibid para 11, see also AG Darmon's Opinion, paras 27-32.
1282 Ibid paras 20-21, see also AG Darmon's Opinion, para 39.
1283 Säuberlich (n 68) 96, 118-120.
1284 CJEU, Joined Cases C-106/90, C-317/90 and C-129/91 *Emerald Meats v Commission*, 20 January 1993, ECLI:EU:C:1993:19; this was confirmed by the Court in CJEU, Case T-93/95 *Laga v Commission*, 4 February 1998, ECLI:EU:T:1998:22.

tion of the allocation decision. It found that the Commission could not be considered to have acted unlawfully. Community law required the Commission to rely on the information provided by the national authorities and did not empower, even less oblige, it to verify the lists in question.[1285]

It can be concluded that legally binding instructions or similar forms of legally binding interference are capable of rendering the interfering body liable.

4.3.4.3 The pivotal role of the legal room for manoeuvre

The rule that emanates from this case law is that guidance or support by one authority in the unlawful implementation of Union legislation by another, may only render the former liable if it was empowered to determine the latter's conduct in a legally binding manner. The overarching reason for this approach seems to lie in the fact that non-binding guidance does not limit the room for manoeuvre of the 'guided' authorities, since they remain free to adopt measures other than those suggested. Indeed, Union law requires them to disregard the suggestion and act lawfully instead.

The pivotal role of the legal room for manoeuvre has met with mixed reactions. Some authors support the view of the CJEU that liability has to depend on legal decision-making power.[1286] Others are more critical of the CJEU's approach.[1287] It has been pointed out that the distinction between legally binding and non-binding guidance may be too formalistic. This is so, in particular, when considering the legal effects non-binding guidance may have. For example, national courts are required to take into account guidelines issued by the Commission when they interpret Union and national law.[1288] Moreover, guidelines and opinions of Union bodies may on some occasions develop a *de facto* binding force, even where the member states formally retain legal decision-making power. Especially when the respective

1285 CJEU, Joined Cases C-106/90, C-317/90 and C-129/91 *Emerald Meats* (n 1284) paras 36-41, 56.

1286 Renzenbrink (n 1246) 120–122; Säuberlich (n 68) 90–96.

1287 Astrid Czaja, *Die ausservertragliche Haftung der EG für ihre Organe* (Nomos 1996) 129–132; Wils (n 876) 194, n 15; see also Oliver (n 876) 306, arguing that it 'appears harsh', but only on first sight because the actual loss in the relevant cases (*Sucrimex* and *Interagra*) was borne by the European Agricultural Guidance and Guarantee Fund; Biondi and Farley (n 909) 189.

1288 Czaja (n 1287) 130–131; for the requirement for national courts to take guidelines into account, see CJEU, Case C-322/88 *Grimaldi v Fonds des maladies professionnelles*, 13 December 1989, ECLI:EU:C:1989:646; I would like to thank Claartje van Dam for drawing my attention to the potential legal effects of non-binding guidelines; for a more detailed discussion of the necessity of different forms of control over non-binding interpretative communications by the Commission, see Silvere Lefevre, 'Interpretative communications and the implementation of Community law at national level' (2004) 29 European Law Review 808.

Union body has considerably more expertise than the national authority or the disregard of the Union body's opinion has financial consequences for the member state, it may be practically difficult for the member state to not follow it.[1289]

The Court itself draws legal implications from the *de facto* binding force of legally non-binding guidance in other areas of public liability law. As discussed in more detail above, the opinion of Union bodies on the lawfulness of the conduct of a member state is a factor taken into account in assessing the seriousness of a member state's breach. In particular, when a member state breaches Union law following a suggestion, opinion, or other guidance by a Union body, it may not incur liability due to lack of seriousness of the breach.[1290] As a result, if non-binding guidance by a Union body is insufficient to render the Union liable, but sufficient to exclude member states' liability, none of them is liable precisely because of the role the other played in the implementation.

On at least one occasion, the Court has seemed more willing to hold the Union liable for a Union body's legally non-binding interventions in a member state's implementation of Union legislation. This was the case in *KYDEP*.[1291] KYDEP was a Greek agricultural cooperative that bought products from Greek producers to stock and sell them. In 1986 a nuclear accident occurred at Chernobyl (now in Ukraine), driving a radioactive cloud over large parts of Europe and contaminating agricultural products. KYDEP alleged that as a result of unlawful conduct by the Council and the Commission, it was not able to market the products from the year of the Chernobyl accident as anticipated. It in particular argued that the Commission had only adopted rules limiting the radioactivity tolerance for products to be imported, but had sent a note to all member states, informing them that in accordance with Community law, the EU would not bear the costs for intervention purchases or export refunds regarding Community products that exceeded the radioactivity tolerance set for imports.

The Court acknowledged that the note in question was not binding on the member states, but contained only an opinion of the Commission with respect to the interpretation of relevant Community law.[1292] However, it found that it was nonetheless 'likely to prompt the competent authorities of the Member States to refuse to buy in for intervention agricultural products whose radioactivity levels exceeded certain maximum limits or to grant

1289 Czaja (n 1287) 131–132.
1290 For more detail see above text to n 1074-1075.
1291 CJEU, Case C-146/91 *KYDEP v Council and Commission*, 15 September 1994, ECLI:EU:C:1994:329.
1292 Ibid paras 24-25.

export refunds for such products.'[1293] This was so in particular because they would otherwise be at risk of having the reimbursement of their expenditure refused by the Community.[1294] For that reason, the Court proceeded to examine the alleged incompatibility of the Commission's note with Community law.[1295]

It is unclear whether the Court in *KYDEP* intended to extend liability of Union bodies to 'factually binding' advice, in particular because it did not engage with its previous case law in the area.[1296] It seems that *KYDEP* may have been an anomaly rather than a change of direction in the Court's case law, not only because the Court has never explicitly confirmed *KYDEP*, but has indeed considered the legal room for manoeuvre as determinative in a number of 'post-*KYDEP*' cases, without mentioning *KYDEP*.[1297]

Thus, the rule remains that only legally binding instructions, or similar forms of legally binding interference are capable of rendering the interfering body liable. The *de facto* binding force of legally non-binding guidance is, as a general rule, of no relevance.

4.3.5 Finding the competent court

This section elaborates on the distribution of competences between the CJEU and national courts. As noted before, questions of procedure do not form part of the subject matter of this study as such. However, the Court has not always been very clear when admitting or dismissing an application, whether this was on substantive or procedural grounds. Hence, in order to define generally applicable rules on allocation of liability, this section provides a closer look at the relationship between substance and procedure.

4.3.5.1 The starting point: procedure follows substance

As the Court has frequently reiterated, it is exclusively competent to hear actions for compensation against the Union, whilst national courts retain jurisdiction to hear claims for compensation for damage caused to individuals by national authorities.[1298] However, it has sometimes been suggested that whenever Union law is implemented by member states, remedies have

1293 Ibid para 26.
1294 Ibid para 26.
1295 Ibid para 27; However, the Community did not incur liability because the Court considered the note to be in conformity with Community law.
1296 Renzenbrink (n 1246) 111; Säuberlich (n 68) 116–117.
1297 Renzenbrink (n 1246) 111–112; Säuberlich (n 68) 118; for 'post-*KYDEP*' case law confirming the determinative role of the legal room for manoeuvre, see above n 1271, 1272, 1284.
1298 CJEU, Case 101/78 *Granaria II* (n 1236) para 14; CJEU, Joined Cases 106 to 120/87 *Asteris v Greece* (n 1242) para 15; CJEU, Case C-275/00 *First and Franex*, 26 November 2002, ECLI:EU:C:2002:711, paras 33, 43.

to first be sought before national courts, regardless of whether unlawfulness of Union law or its implementation is alleged.[1299]

The argument essentially derives from the Court's decision in *Haegeman*.[1300] The Belgian company Haegeman traded in wines and liquors and predominantly imported wines from Greece, then not yet a member of the EU. Whilst these wines used to be admitted freely into the Community territory, new Community legislation made it subject to a countervailing charge. The Belgian authority levied this charge on wines that Haegeman imported from Greece on the basis of a contract entered into before that legislation was effective. After an unsuccessful exchange of correspondence with the Commission in which Haegeman asked for a refund on the levies, the company sought to be compensated by the Community for the damages suffered. The Court rather cryptically found, 'The question of the possible liability of the Community is in the first place linked with that of the legality of the levying of the charge in question.'[1301] Since the latter came under the jurisdiction of national courts, the Court dismissed the claim for compensation against the Community.[1302] Actions were dismissed on similar grounds soon after in *IBC* and *Lesieur Cotelle*.[1303]

Advocate General Mayras, whose Opinion in *Haegeman* had not been followed by the Court, convincingly showed in a later case that it is unclear whether the Court was concerned with the unlawfulness of the legal foundation on the basis of which the Belgian authorities had levied the charge, i.e. unlawful Community law, or with the unlawfulness of its collection, i.e. unlawful implementation of Community law.[1304] However, in subsequent case law, the Court gradually clarified its position.

1299 This was in particular brought forward by the Commission and/or the Council when acting as defendants in the cases discussed in this section, for example in CJEU, Case 126/76 *Dietz v Commission*, 15 December 1977, ECLI:EU:C:1977:211, for more detail see below text to n 1311-1314; or in CJEU, Joined Cases 197 to 200, 243, 245 and 247/80 *Ludwigshafener Walzmühle v Council and Commission*, 17 December 1981, ECLI:EU:C:1981:311, 3220–3222, for more detail see below text to n 1332-1335.

1300 CJEU, Case 96/71 *Haegemann v Commission*, 25 October 1972, ECLI:EU:C:1972:88.

1301 Ibid para 15.

1302 Ibid paras 16-17.

1303 CJEU, Case 46/75 *IBC v Commission*, 27 January 1976, ECLI:EU:C:1976:10; CJEU, Joined Cases 67-85/75 *Lesieur Cotelle v Commission*, 17 March 1976, ECLI:EU:C:1976:42; even though – as shown in more detail below – *Lesieur Cotelle* seems to be the only case that departs from the Court's line of case law and has been strongly criticised *inter alia* for that reason, see for example Andrew Durand, 'Restitution or Damages: National Court or European Court?' (1976) 1 European Law Review 431, 438–439; Renzenbrink (n 1246) 136–137; see also AG Tesauro, Opinion in CJEU, Case C-63/89 *Assurances du Crédit v Council and Commission*, 18 April 1991, ECLI:EU:C:1991:152, expressing the view that *Lesieur Cotelle* may not be fully in line with the Court's case law.

1304 AG Mayras, Opinion in CJEU, Case 43/72 *Merkur* (n 1183) 1081–1082.

In *Merkur*, a decision rendered only a year after *Haegeman*, a company that exported products processed from barley to third countries, had requested that the German authorities grant it compensatory allowances for the exported products. However, since the relevant Commission regulation authorising the member states to grant such allowances did not mention barley, the German authorities denied the request, arguing that there was no legal basis under Community law for compensatory allowances of this kind. The applicant lodged an action for damages against the Community, arguing that the regulation on which the German authorities based their decision was unlawful. Invoking *Haegeman*, the Commission put forward the argument that the application was inadmissible since the dispute concerned the refusal of the German authorities to grant compensatory amounts, i.e. conduct of a member state, and should therefore be dealt with in front of German courts.

In his opinion, Advocate General Mayras strongly advocated for the admissibility of the action, pointing out that *Haegeman* was 'difficult to follow'.[1305] Two main arguments are worth noting at this point, both of which were relied upon by the Court in later cases.

First, it would, in Advocate General Mayras' view, be 'absurd' to require applicants to go to a national court when the lawfulness of Union legislation is at stake because they would have to end up in front of the CJEU either way. The national court may well raise that question in the framework of a preliminary ruling procedure. However, no matter the outcome, they would not be in a position to award compensation for the damages suffered by the applicant, simply because only the Union would incur liability, the determination of which is exclusively for the CJEU to make.[1306] This was also pointed out by Advocate General Capotorti in *Ireks-Arkady* when he argued that referring applicants to national courts in these situations would be 'to offer them a form of action doomed to failure'.[1307]

Second, obliging applicants in these situations to embark on that 'long march', 'makes short work of the interests of the parties and, more important, of the proper functioning of the judicial process.' In all likelihood, more than five years would pass between the occurrence of the damage and the final judgment of the national court, thus making a subsequent application for damages against the Union impossible due to the expiry of the limitation period.[1308]

1305 AG Mayras, Opinion in ibid 1078.

1306 AG Mayras, Opinion in ibid 1079–1080; a similar point was made by the Court in CJEU, Case 81/86 *De Boer Buizen* (n 1226) para 10; and in CJEU, Case 126/76 *Dietz* (n 1299) para 5; moreover, this argument seems at the heart of the exhaustion of local remedies rule as it applies today, for detail see below 4.3.5.2.

1307 AG Capotorti, Opinion in CJEU, Case 238/78 *Ireks-Arkady* (n 904) 2979.

1308 AG Mayras, Opinion in CJEU, Case 43/72 *Merkur* (n 1183) 1079–1080.

In *Merkur* the Court followed Advocate General Mayras and held the application admissible. It found that having the case before it, it was bound to adjudicate on the lawfulness of the regulations at stake. It argued that 'It would not be in keeping with the proper administration of justice and the requirements of procedural efficiency to compel the applicant to have recourse to national remedies and thus to wait for a considerable length of time before a final decision on his claim is made.'[1309] Soon after, the Court similarly upheld actions targeting the unlawfulness of Community law in *Holtz & Willemsen* and *CNTA*.[1310]

This was further clarified a few years later in *Dietz*.[1311] In that case, a German company trading in sugar was faced with a reduction of the compensatory amounts it was granted for exports to Italy as a consequence of Italian monetary measures. When the applicant company claimed damages from the Community, it was very clear that it was of the view that the damage suffered did not result from measures adopted by the national authorities but from the Commission's conduct within the context of regulations it had adopted. The Commission nevertheless argued that whenever Community law is applied by member states, individual applicants must contest the implementing measure. The action for damages, it argued, 'may only be used in a case in which the alleged damage is due directly to the conduct of the Commission.'[1312] Recalling that the applicant was alleging unlawful conduct of the Community, the Court pointed out that it had previously only denied its jurisdiction 'in cases in which the application was in fact directed against measures adopted by the national authorities for the purpose of applying provisions of Community law.' Moreover, it clarified that in a case like *Dietz*, where the unlawfulness of Union law was at stake, there would always be a need for the applicants to come before the CJEU, since member states were not in a position to remedy their situation, even after requesting a preliminary ruling from the CJEU.[1313] Since the application had therefore been brought 'within the bounds of its jurisdiction', the Court held the application admissible.[1314]

In subsequent case law, the Court consistently held actions admissible where the applicant alleged the unlawfulness of Union law, regardless of the existence of a member state's implementing measure.[1315] Conversely, it held actions that concerned the unlawfulness of a member state's imple-

1309 Ibid paras 6-7; the application was, however, unfounded since the regulation was not considered to be unlawful, see paras 8-26.

1310 CJEU, Case 153/73 *Holz & Willemsen GmbH v Council and Commission*, 2 July 1974, ECLI:EU:C:1974:70; CJEU, Case 74/74 *CNTA v Commission*, 15 June 1976, ECLI:EU:C:1976:84.

1311 CJEU, Case 126/76 *Dietz* (n 1299).

1312 Ibid 2433–2434.

1313 Ibid para 5.

1314 Ibid para 6.

1315 See in particular the cases referred to above 4.3.3.1.

mentation as inadmissible.[1316] Thus, as a general rule, actions alleging the unlawfulness of Union law have to be brought before the CJEU, even when there is an act by a member state applying or implementing it. Conversely, actions alleging unlawfulness of a member state's application of Union law have to be brought before national courts. In other words, court competence follows substantive liability.

However, there are circumstances under which applicants may have to seek available remedies before national courts, despite alleging the unlawfulness of Union conduct.[1317] These are discussed in the following section.

4.3.5.2 Exhaustion of local remedies

The conditions under which applicants have to seek available remedies before national courts, despite alleging the unlawfulness of Union conduct, were set out particularly clearly for the first time in *Unifrex*.[1318] Unifrex was a French undertaking that exported, among other things, cereals to Italy. When the Commission froze monetary compensatory amounts that would otherwise have been due, Unifrex brought an action for damages before the CJEU. The Commission argued that the application was inadmissible because Unifrex had not first exhausted national means of redress available to it. The Court found that despite the independent character of the action for damages, it had to be 'viewed in the context of the entire system established by the Treaty for the judicial protection of the individual'. As a consequence, it set out the following:

> Where an individual considers that he has been injured by the application of a Community legislative measure that he considers illegal, he may, when the implementation of the measure is left to the national authorities, contest the validity of the measure, when it is implemented, before a national court in an action against the national authorities. That court may, or even must […] refer the question of the validity of the Community measure in dispute to the Court of Justice. However, the existence of such a means of redress will be capable of ensuring the effective protection of the individuals concerned only if it may result in making good the alleged damage.[1319]

In other words, lodging an action for damages may be conditional on the prior exhaustion of local remedies, provided these ensure effective protection for the individuals concerned in that they are capable of resulting in compensation for the damage alleged.

1316 See in particular the cases referred to above 4.3.3.3 and 4.3.4.1.

1317 For a detailed analysis see Christopher Harding, 'The Choice of Court Problem in Cases of Non-Contractual Liability under E.E.C. Law' (1979) 16 Common Market Law Review 389; Mark L Jones, 'The Non-contractual Liability of the EEC and the Availability of an Alternative Remedy in the National Courts' (1981) 8 Legal Issues of Economic Integration 1; Renzenbrink (n 1246) 129–156; Säuberlich (n 68) 123–160.

1318 CJEU, Case 281/82 *Unifrex v Council and Commission*, 12 April 1984, ECLI:EU:C:1984:165.

1319 Ibid para 11; see also the Opinion of AG Mancini in the same case.

In the Court's case law, one situation has crystallised where national proceedings are considered to grant effective protection. This is where individuals pay a charge or levy to national authorities pursuant to unlawful Union legislation. This was the case in *Trubowest*, where the ECJ confirmed that the CFI was right in declining its jurisdiction, observing that 'the national courts alone have jurisdiction to entertain actions for recovery of amounts wrongly levied by a national body on the basis of Community legislation declared subsequently to be invalid'.[1320] In essence, a similar situation formed the basis of the claims at stake in *Haegeman* and *IBC*, discussed above. Even though they preceded the more detailed elaboration of the exhaustion of local remedies rule, it seems that they were decided on the same rationale.[1321]

Actions for recovery of such amounts can be satisfied through annulment of the national implementing measure and reimbursement of the sum unduly charged. Thus, they have to be brought before national courts, who have to request a preliminary ruling from the CJEU in order to ascertain the legality of the Union law on which the national measure is based, and are inadmissible before the CJEU.[1322] Questions strictly ancillary to a dispute involving the reimbursement of sums unduly paid to national authorities, such as lawyers' fees, also have to be dealt with by the national court.[1323] Compensation for any damage going beyond this, such as costs of a bank guarantee needed to pay a wrongful levy, is to be adjudicated before the CJEU.[1324]

The exhaustion of local remedies rule was confirmed in numerous other cases, where the Court eventually found no national remedies to be available (e.g. *Krohn I*; *De Boer Buizen*; *Roquette Frères v Commission*; *Nölle*; *Cantina*

1320 CJEU, Case C-419/08 P *Trubowest* (n 1168) in particular para 23; this was also the view of AG Mengozzi in that case, see paras 31-57.

1321 This also appears to be the view of AG Mengozzi in his Opinion in ibid, see para 35 in the footnote (8); and of AG Darmon in his Opinion in CJEU, Case 20/88 *Roquette Frères v Commission*, 30 May 1989, ECLI:EU:C:1989:221, para 15; for more detail see above text to n 1300-1303.

1322 This was pointed out by the Court for example in CJEU, Case 20/88 *Roquette Frères v Commission* (n 1321) para 14; CJEU, Case C-282/90 *Vreugdenhil v Commission* (n 993) para 12; CJEU, Case C-351/04 *Ikea Wholesale*, 27 September 2007, ECLI:EU:C:2007:547, para 68; see also AG Tesauro, Opinion in CJEU, Case C-63/89 *Les Assurances du Crédit* (n 1303) para 7.

1323 CJEU, Case 26/74 *Société Roquette Frères v Commission* (n 1142) para 12; CJEU, Case T-167/94 *Nölle v Council and Commission*, 18 September 1995, ECLI:EU:T:1995:169, paras 36-39; CJEU, Case T-429/04 *Trubowest Handel and Makarov v Council and Commission*, 9 July 2008, ECLI:EU:T:2008:263, paras 77-82; confirmed in CJEU, Case C-419/08 P *Trubowest* (n 1168) paras 27-28.

1324 CJEU, Case C-282/90 *Vreugdenhil v Commission* (n 993) paras 12-15; see also CJEU, Case T-167/94 *Nölle* (n 1323) paras 41-43; on the question of 'ancillary damage' see Biondi and Farley (n 909) 191–194.

sociale; *Holcim (Romania)*; *Schröder*).[1325] Most importantly, when a national measure refuses a benefit or advantage on the basis of Union law, the relevant national courts cannot grant protection to the applicants without the prior intervention of the Union legislature, even after annulment of the national and/or Union measures at stake. In those cases, it is safe to say that no exhaustion of national remedies is thus required.[1326] More recently, the Court emphasised that for an action for damages against the Union to be admissible, it is sufficient that the effectiveness of the domestic remedies is doubtful. Thus, pleas of inadmissibility may also be dismissed when the outcome of domestic remedies is 'highly uncertain' or the domestic remedies are 'excessively difficult' to exercise.[1327]

Where an existing national remedy is unavailable in a specific case, national remedies do not have to be exhausted. A national remedy may be unavailable, because the CJEU itself excluded it, as was the case in *Roquette Frères v Commission*.[1328] At the origin of the case was a judgment of the Court in which it considered the method according to which the Commission had fixed the monetary compensatory amounts for starch to be unlawful. In that same judgment, it also held that amounts collected by national authorities prior to the judgment could not be challenged on that basis.[1329] The company Roquette Frères sought compensation from the Community for the damage allegedly suffered as a result of being obliged to pay excessive monetary compensatory amounts due to the application of the invalid provisions. The Court found that national remedies for obtaining reimbursement were unavailable to the applicant for the very reason that the Court itself had excluded them. There was therefore no remedy under national law that could effectively ensure reparation for the damage suffered.[1330] Accordingly, it declared the action admissible.[1331]

1325 CJEU, Case 175/84 *Krohn I* (n 895) paras 26-29; CJEU, Case 81/86 *De Boer Buizen* (n 1226) paras 9-11; CJEU, Case 20/88 *Roquette Frères v Commission* (n 1321) para 15; CJEU, Case T-167/94 *Nölle* (n 1323) para 35; CJEU, Case T-166/98 *Cantina sociale* (n 1232) para 115; CJEU, Case T-317/12 *Holcim (Romania)* (n 1198) paras 73-74; the issue was not addressed in the appeal case before the ECJ; CJEU, Case T-205/14 *Schröder v Council and Commission*, 23 September 2015, ECLI:EU:T:2015:673, para 18; see also the parallel case decided on the same day, CJEU, Case T-206/14 *Hüpeden v Council and Commission*, 23 September 2015, ECLI:EU:T:2015:672, para 19.

1326 See in particular CJEU, Case 281/82 *Unifrex* (n 1318) paras 12-13; CJEU, Case 175/84 *Krohn I* (n 895) paras 28-29; CJEU, Case 81/86 *De Boer Buizen* (n 1226) paras 10-11; CJEU, Case T-166/98 *Cantina sociale* (n 1232) paras 116-120.

1327 CJEU, Case T-205/14 *Schröder* (n 1325) paras 20-21; see also CJEU, Case T-166/98 *Cantina sociale* (n 1232) para 117.

1328 CJEU, Case 20/88 *Roquette Frères v Commission* (n 1321).

1329 CJEU, Case 145/79 *Roquette Frères v France*, 15 October 1980, ECLI:EU:C:1980:234.

1330 CJEU, Case 20/88 *Roquette Frères v Commission* (n 1321) para 16.

1331 Ibid para 17.

Where a national remedy is unavailable for other reasons, it may also be assumed that no exhaustion of local remedies is required. In *Ludwigshafener Walzmühle*, for example, the applicants challenged the level of the Community threshold prices for durum wheat.[1332] The levies in question that gave rise to the financial burden in respect of which the applicants claim damages, were collected by national authorities on the basis of Community law.[1333] However, the Court observed that none of the applicants actually imported the durum wheat themselves but rather made use of importers who paid the levies.[1334] Since no action before national courts was therefore in fact open to them, no objection of inadmissibility could be based on their failure to exhaust national remedies.[1335]

Advocate General Darmon suggested that the exclusion of the exhaustion of local remedies rule in cases where a remedy is unavailable is simply an 'application of the principle of the "right to a forum", which prohibits a 'situation in which an individual who considers that he has suffered damage cannot, because of the existence of two separate but closely-linked legal orders, find a court to declare whether his claim is well-founded or not would be unacceptable.'[1336]

4.3.6 Interim findings: identifying the rules on allocation of liability

4.3.6.1 Allocation of liability between the Union and its member states

Four substantive rules for the allocation of liability between the Union and its member states emanate from the case law discussed in the previous sections.

1. The Union is liable when the unlawfulness complained of originates in Union legislation.
2. Member states are not liable for the implementation of unlawful Union legislation if they have no margin of discretion to implement it lawfully.
3. Member states are liable if they unlawfully implement (lawful) Union legislation.
4. Guidance or support from one authority, in the unlawful implementation of Union legislation by another, shifts liability to the former, if it was empowered to determine the latter's conduct in a legally binding manner.

1332 CJEU, Joined Cases 197 to 200, 243, 245 and 247/80 *Ludwigshafener Walzmühle* (n 1299).
1333 Ibid para 7.
1334 Ibid para 8.
1335 Ibid para 9.
1336 AG Darmon, Opinion in CJEU, Case C-282/90 *Vreugdenhil v Commission* (n 993) para 34, that case concerned the situation where a national court (wrongly) excluded the otherwise available remedy, see paras 25-35.

The overarching principle that emerges is that liability follows legal decision-making power. In other words, the authority that enjoys legal room for manoeuvre is legally capable of choosing lawful over unlawful conduct and incurs liability if opting for the latter. Whether that choice may be more limited in practice than in law is typically of no relevance. At best, exceptionally dominant (factual) influence may shift liability despite remaining below the threshold of legally binding instructions. In sum, under Union law, liability is allocated between the Union and its member states on the basis of normative control.[1337]

Ultimately, this is what the Commission argued on behalf of the Union in the drafting process of the ARIO as a more general rule for the allocation of international responsibility between international organisations and their member states. Also, the view that a special attribution rule emerged with respect to the EU and its member states is similarly based on the extensive normative control the EU may exercise over its member states. However, as discussed in more detail in Chapter 3, no such rule has been included in the law of international responsibility, or has later developed as a (widely applicable) *lex specialis*.[1338] As a consequence, under international law, attribution of conduct with respect to the EU and its member states is governed by the general rules applicable to all international organisations. Notably, when international organisations make use of member state organs, the relevant rule is Article 7 ARIO, which requires the exercise of factual control by the international organisation over member state organs in order to make their conduct attributable to the organisation.[1339] Thus, the key threshold for determination of the allocation of direct responsibility among the EU and its member states under international law is *factual* control, whilst under EU law it is *normative* control.

However, it is worth recalling that, as opposed to international law, in EU law this is not necessarily based on an attribution rule in the narrow sense.[1340] In essence, what is important here is that the Court allocates liability on the basis of normative control. Whether this is conceptually achieved on the basis of a rule of attribution of conduct, attribution of damage, attribution of liability, or any other rule, remains unclear.

As regards the procedural implementation of liability, it is sufficient to note that court competence generally follows substantive liability. This means that actions contesting the lawfulness of Union conduct have to be brought before the Union courts, whereas those alleging unlawful member state con-

1337 The same conclusion is reached by other authors, see for example Säuberlich (n 68) 109–123; Renzenbrink (n 1246) 103–115.

1338 See above 3.2.2.1.

1339 For detail see above 3.2.1.2 and 3.3.3; see also Table 3.

1340 See also above 4.3.1.2.

duct are adjudicated before the respective national courts. However, if there is an implementing measure by a member state, the applicant first has to seek national remedies, provided they effectively ensure protection of the aggrieved individual. This is so when the only damage claimed is a sum unduly charged by a national authority on the basis of unlawful Union legislation and a national remedy that offers reimbursement of that amount is available.

4.3.6.2 Allocation of liability between member states

The question of how liability is allocated when conduct of several member states is at the origin of an unlawful outcome, as is the case in Frontex operations, has so far not arisen before the CJEU. Hence, the Court has not yet developed rules governing the allocation of liability as between member states. Consequently, this issue remains unclarified.

As explained below, it is assumed here that the same thresholds govern the allocation of liability between the Union and its member states on the one hand, and between member states on the other.[1341] In this vein, for the current purposes the rules set out in the previous section also govern the allocation of liability between member states.

4.3.6.3 Possibilities of joint or concurrent liability

In all the cases above, liability lies with only *one* authority. In 'situation 1', the independent application of Union law by member states, the origin of the unlawfully used legal decision-making power is commonly *either* Union legislation, excluding member state liability for lack of room for manoeuvre to apply the legislation lawfully (rule 1 and 2 above), *or* a member state's application of the legislation, in which case there is no unlawful conduct on the part of the Union (rule 3 above). Theoretically, the only possibility for joint liability between the Union and a member state in this context is that the Union enacts unlawful Union legislation (rule 1) *and* a member state unlawfully applies it (rule 3). In that case, they may both incur liability for two separate violations. However, such a scenario seems highly hypothetical.

Also, in 'situation 2', the cooperative application of Union law, the legal decision-making power commonly lies *either* with the Union *or* a member state. In this vein, in *Borelli* and *Emerald Meats*, the liability of the Community was explicitly excluded, because its conduct was legally determined by the member states in question.[1342] Even though the Court did not rule on the liability of the national authority, it may be assumed that they would

1341 See below 4.3.7.
1342 See above text to n 1280-1285.

have been liable *vis-à-vis* the applicant instead.[1343] Conversely, in *Krohn I*, the Court suggested that the member state would not incur liability for having followed the instructions of the Commission, again presumably for lack of legal decision-making power.[1344] In this light, the only possibility for joint liability between the Union and a member state in this context is if they *both* retain legal decision-making power. This may occur where they *share* legal decision-making power with respect to a specific course of conduct. It may also occur, and more likely so, where two separate courses of conduct in breach of Union law result in the same damage (rule 4 applicable to both). That indeed seems to have been the case in *Holcim (Romania)*, where, however, the potential of joint liability never materialised because the Court denied the existence of unlawful conduct on the part of the Commission in the first place.[1345]

In sum, it is, as a rule, possible to locate the origin of the unlawfully used legal decision-making power with *either* the Union *or* a member state. Importantly, liability then lies *only* with the authority that enjoyed legal decision-making power. Hence, as a rule, there is no joint liability between the Union and a member state in the area of primary liability.[1346] The only exceptions in this respect appear to be the situations, first, where two (or more) authorities *share* legal-decision making power with respect to a specific course of conduct and, second, where two separate courses of conduct in breach of EU law result in the same damage.

Section 4.4.3 shall return to the question of joint or concurrent liability in the context of associated liability.

4.3.6.4 Overview

Figure 25 illustrates the general rules deduced from the Court's case law and the competence of the CJEU and national courts in that respect.

1343 This is clearer from the Advocate General's opinion, see AG Gulmann, Opinion in CJEU, Joined Cases C-106/90, C-317/90 and C-129/91 *Emerald Meats* (n 1284) paras 72-77.

1344 CJEU, Case 175/84 *Krohn I* (n 895) paras 19, 23; similarly see CJEU, Joined Cases 89 and 91/86 *Étoile commerciale* (n 1268) para 18.

1345 CJEU, Case T-317/12 *Holcim (Romania)* (n 1198), the possibility of joint or concurrent liability was not discussed on appeal.

1346 Renzenbrink (n 1246) 113–115; Wils (n 876) 206, argues for 'a clear acceptance of the principle of joint and several liability'; Oliver (n 876) 308, points out that 'joint liability […] will occur only exceptionally. Where it does occur, it is beset with procedural difficulties'.

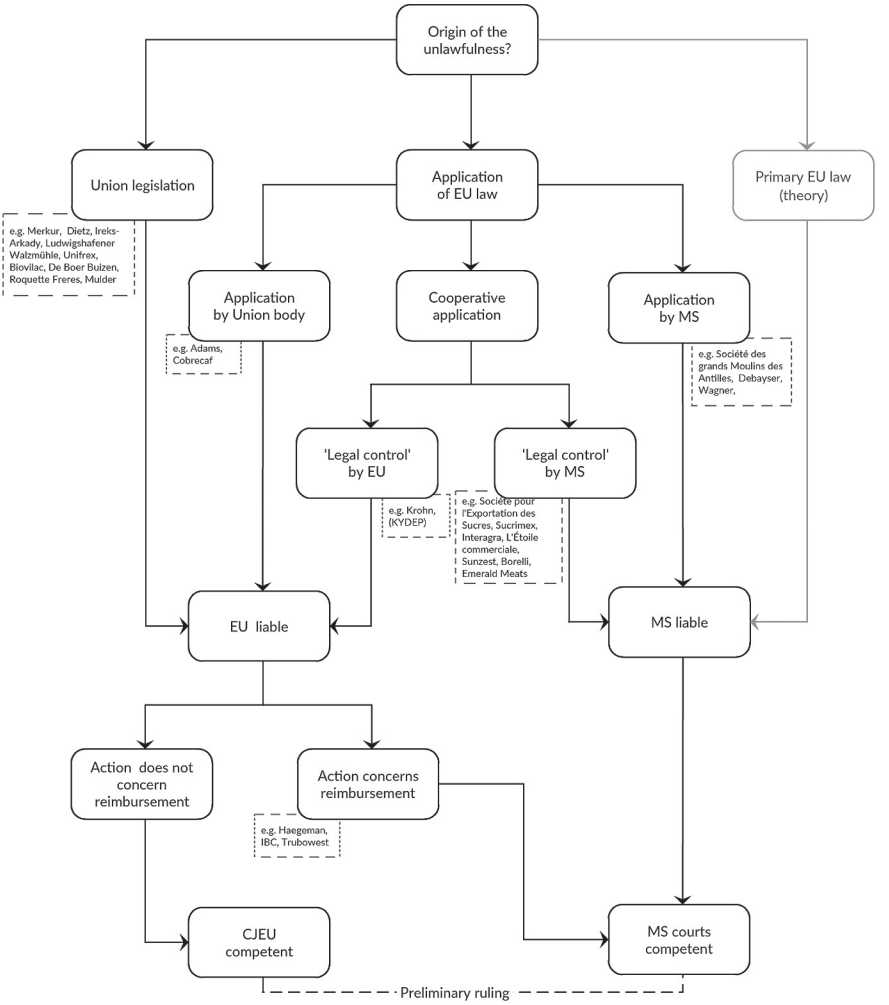

Figure 25: Allocation of liability flowchart

4.3.7 Allocation of liability during Frontex operations

It is useful to recall that Frontex is liable for fundamental rights violations that may be committed by its own coordinating personnel deployed during joint operations.[1347] This section deals with the liability for fundamental rights violations committed in particular by local staff or team members, who operate under a multi-layered authority regime.

1347 See above 4.3.2.1.3.

It was concluded above that, in situations where the impugned conduct was under the partial authority of more than one entity, liability under EU law depends on legal decision-making power. This principle applies more specifically in the area of cooperative application of EU law (see also Figure 26).[1348] Thus, if team members commit fundamental rights violations during joint operations, liability lies with the actor that was empowered to determine the conduct at the origin of the violations in a legally binding manner. For example, if a border guard uses excessive force, the allocation of liability for it depends on who was legally entitled to prescribe that border guard's actions.

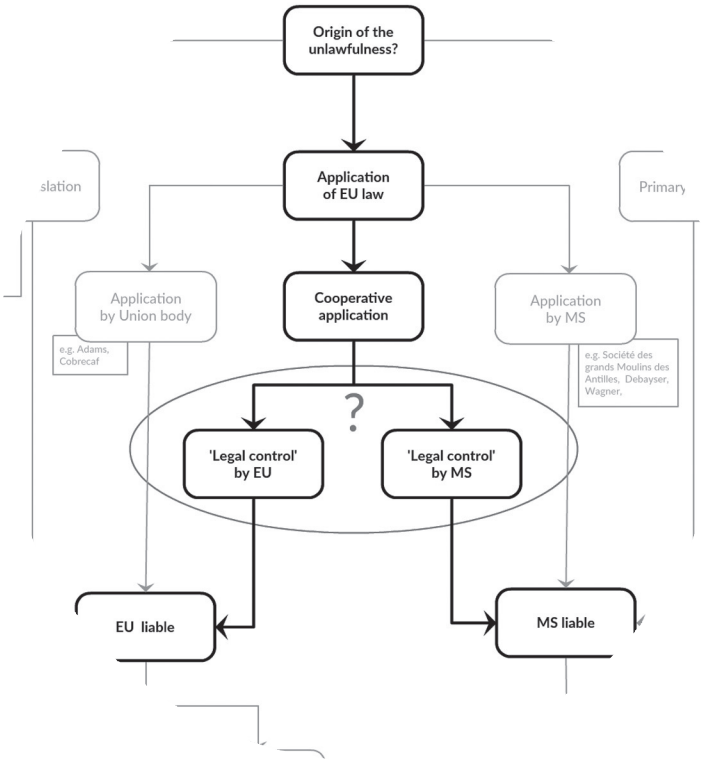

Figure 26: Relevant rule applicable in the context of Frontex operations

Before applying the threshold of normative control to Frontex operations, two remarks are in order. First, it is important to recall that the threshold of normative control was developed from the CJEU's case law on allocation of liability between the Union and its member states. As pointed out above, the Court is yet to clarify how liability is allocated among several member states whose conduct may be at the origin of an unlawful outcome.[1349] This raises a

1348 See above 4.3.4.3; and more broadly see 4.3.6.1.
1349 See above 4.3.6.2.

significant challenge in the context of Frontex operations. The reason is that here, liability needs to be allocated not only between Frontex and member states, but also between the host and participating states, i.e. among member states themselves. The following analysis starts from the assumption that, as long as there are no indications to the contrary, there is no reason to believe that the CJEU would apply different thresholds governing the allocation of liability between the Union and its member states on the one hand, and between member states on the other. Against this background, the assumption is that the threshold of normative control governs the allocation of liability under EU law more broadly, including between member states.

The second remark concerns the relationship between the analysis in Chapter 3 and this chapter. As pointed out above, the thresholds to determine the allocation of legal responsibility among the EU and its member states differ under international and EU law respectively.[1350] Whereas in international law *factual* control is decisive, it is *normative* control under EU law. Having said this, it is useful to recall at this point that when states lend organs to each other, the relevant attribution rule applicable under international law is Article 6 ASR. This rule requires the exercise of exclusive normative control by the receiving state over lent organs in order to make their conduct attributable to the receiving state.[1351] In other words, in public international law, attribution of conduct as between the EU and its member states depends on *factual* control, but attribution of conduct as between member states depends on *normative* control. Thus, assuming that the CJEU distributes liability among member states according to the threshold of *normative* control, this is a similar threshold to that applicable in international law. This means that in relation to the relationship among member states, the analysis conducted in Chapter 3 may indeed prove a valuable source of inspiration, in particular because the details of the threshold of legal control have been studied in more depth and applied more frequently in international than in EU law.

4.3.7.1 Frontex: normative control over conduct during joint operations?

The key question is whether Frontex' support during joint operations renders it liable for violations of the CFR that are not directly committed by its staff, but by member state officers, e.g. local officers or persons deployed as team members. The previous sections have demonstrated that normative control exercised by a Union body over unlawful conduct of a member state authority may indeed render the former liable. Thus, if Frontex can be considered, through conduct of its departments or staff, to legally determine the conduct of member states during joint operations, it is liable for breaches of the CFR committed under its control.

1350 See above 4.3.6.1.
1351 See above 3.2.1.1 and 3.3.2; see also Table 3.

There are essentially two ways in which Frontex may exercise legal control over the conduct of team members when they apply Union law during joint operations. First, together with the host state, it adopts an Operational Plan that is legally binding on all participating parties.[1352] The Operational Plan provides the framework within which all activities have to take place. However, it does not usually set out who is to do exactly what, when, and how. These details on the running of the operation are decided by the Joint Coordination Board and communicated to the personnel on the ground through specific instructions. Hence, fundamental rights violations are, as a general rule, not legally pre-determined in the Operational Plan. This means that under normal circumstances Frontex, by adopting the Operational Plan, cannot legally be considered as the deciding authority behind conduct during joint operations that may violate fundamental rights. Having said this if, in a specific case, fundamental rights violations are indeed inherent in the design of a specific operation, breaches that may occur during joint operations can be considered as having been legally determined by both Frontex and the host state. Even though it is unclear exactly what effect the exercise of shared legal control has for the purposes of EU liability law, it may be assumed that it makes them jointly liable to compensate the victims of the violations.[1353]

The second, more immediate instrument through which Frontex may influence conduct during joint operations, is the right to communicate its views on instructions to the host state. This allows Frontex to guide and supervise the host state in implementing the Operational Plan. However, the host state is only required to take these views into consideration and follow them to the extent possible. Thus, Frontex cannot legally oblige the host state to modify certain instructions. Importantly, Frontex does not have the opportunity to directly issue instructions to deployed personnel (other than its staff exercising coordinating tasks). In this vein, Frontex, by communicating its views on instructions to the host state, cannot be considered to legally determine conduct during joint operations that may violate fundamental rights.

In sum, Frontex is liable for fundamental rights violations that are committed by its own coordinating staff during joint operations and infringements that directly result from the Operational Plan. Beyond that, however, Frontex as a rule does not have the authority to determine the conduct of member states' personnel during joint operations in a legally binding manner. As a consequence, it is not directly liable for breaches of fundamental rights they may commit during joint operations. This is in essence because public authorities are only liable under EU law if they are availed of legal

1352 See above 2.4.1.2.

1353 See above 4.3.6.3; similarly in the context of international law see also Papastavridis, 'The EU and the obligation of non-refoulement at sea' (n 25) 257.

decision-making power with respect to the impugned conduct. They do not incur primary liability for merely financing or otherwise supporting unlawful conduct.

Having said this, Frontex' influence over member state's conduct is not without relevance in the assessment of liability for a fundamental rights violation that may occur.[1354] As discussed in more detail above, the opinion of Union bodies on the lawfulness of the conduct of a member state is a factor taken into account in assessing the seriousness of a member state's breach.[1355] If a host or participating state commits a fundamental rights violation but, in that particular situation, followed the suggestion, opinion, or other guidance by Frontex, this may affect the assessment of the seriousness of the breach. In particular circumstances, the influence exercised by Frontex, whilst insufficient to shift liability to the agency, may render the member states' breach not serious enough for them to incur liability.[1356]

4.3.7.2 Member states: normative control over conduct during joint operations?

Having established that Frontex' authority over local staff or team members during joint operations is insufficient to render it liable for their fundamental rights violations, this section examines how the legal control over personnel is distributed among the member states involved. At the outset, it is important to note that with respect to local officers, no authority is transferred to participating states. Thus, the host state is liable for fundamental rights violations committed by them.

However, since team members are subject to the authority of both, the host state and their home state, liability depends on which one of them can be considered to exercise normative control over their impugned conduct.

As pointed out above, this threshold is similar to that applicable under international law.[1357] For this reason, it is useful at this point to recall the relevant findings of Chapter 3.[1358] It was found that in principle all team members have to observe the national law of the host state and follow the host state's instructions. However, the host state's power to issue instructions to team members is less comprehensive in reality than it is by design. In particular, the relevant instructions are not decided by the host state alone, but within the Joint Coordination Board, which is established by, situated in, and led by the host state, but takes decisions in different 'configurations' depending on the operational resources concerned.

1354 Frontex' influence is also relevant for determining liability for associated conduct, e.g. a failure to prevent fundamental rights violations. This is, however, discussed below 4.4.

1355 See above 4.2.2.2.3

1356 This was also pointed out above 4.3.4.3.

1357 See above 4.3.7.

1358 See above 3.3.2.3, in particular 3.3.2.3.3.

Most importantly, decisions that do not concern large assets, such as vessels, aeroplanes, or helicopters, contributed by a participating states are taken under the lead of the host state without the possibility for other members to formally 'block' them, and are communicated to the personnel on the ground by a host state official. Against this background, it was found that the relevant conduct of standard team members is exclusively subject to the legal authority of the host state. Like under the ECHR, the host state is thus also liable for their fundamental rights violations under EU law.

In contrast, decisions that concern team members deployed on large assets that are, as noted in Chapter 2, often military assets, require that the representative of the respective participating state within the Joint Coordination Board (National Official) is consulted.[1359] In addition, the relevant instructions are communicated to the asset personnel concerned by the National Official via the Commanding Officer, who is of the same nationality as the asset. In this light, it was found in Chapter 3 that team members deployed on large assets are under the *shared* legal control of the host state and their home state. Under the ECHR, this meant that the relevant home state *alone* is responsible for human rights violations committed with the involvement of its large assets. In essence, the applicable rule (Article 6 ASR) requires the receiving state to have *exclusive* authority over a lent organ, if the receiving state is to incur responsibility for the lent organ. As was also noted in the previous section, in EU liability law the effects of shared legal control over a specific course of conduct are less clear.[1360] However, it does not seem that 'exclusivity' of legal control is specifically required for incurring liability. It may thus be assumed that shared legal control over a specific course of conduct triggers joint liability. Hence, fundamental rights violations committed by large assets are likely to trigger the liability of both the host state and the participating state who contributed the specific asset, because of the shared legal control they exercise.

In sum, under EU law, the host state is liable for fundamental rights violations committed by local staff and by standard team members. The host state and the respective home state are jointly liable for fundamental rights violations committed by large assets.

4.3.8 Interim conclusion

This section analysed the liability of Frontex and member states that arises directly from a fundamental rights violation committed during a joint operation. The key question addressed was how liability for such breaches is allocated between them.

1359 See above 2.4.3.1.3.
1360 See above 4.3.6.3.

As a starting point, it was found that Frontex is liable for fundamental rights violations that may be committed by its own coordinating personnel deployed during joint operations. The liability for fundamental rights violations committed by local staff and team members, however, is less straightforward because they operate under a multi-layered authority regime.

Thus, this section set out to develop from the Court's case law general rules on allocation of liability that govern situations where breaches of EU law are committed under the partial authority of the Union and one or more member states, and apply these to joint operations. For that purpose, this section developed a categorisation of the most common multi-actor situations in EU law. These were identified as the (independent) application of Union legislation by member states on the one hand, and the cooperative application of Union legislation on the other. Since Frontex does not have the competence to legislate, joint operations generally fall into the second category.

The key principle deduced from the Court's case law is that liability follows legal decision-making power. In essence, this means that with respect to each fundamental rights violation committed by local staff or team members during Frontex operations, the actor that was empowered to determine the conduct at the origin of the infringement in a legally binding manner will incur liability. This means that if a border guard uses excessive force, the allocation of liability for it depends on who was legally entitled to prescribe that border guard's actions.

The analysis showed that whilst Frontex has numerous ways in which to shape conduct during joint operations, fundamental rights violations will rarely be the result of conduct that Frontex was capable of determining in a legally binding manner. On the one hand, whilst Frontex has full authority over its own coordinating staff deployed during joint operation, their conduct is unlikely to directly infringe fundamental rights. On the other hand, one of its most 'intrusive' tools is the right to let the host state know its views on the instructions it gives to other deployed personnel. Ultimately, however, the crucial point is that the host state is not legally bound to follow them. The only relevant situation where Frontex could be considered to exercise legal control over conduct that resulted in a fundamental rights violation is when the breach directly stems from the Operational Plan, i.e. when it is not possible to implement the Operational Plan in conformity with fundamental rights. In that case, Frontex incurs primary liability jointly with the host state, because they are the authors of the Operational Plan.

Thus, despite the theoretical possibility of Frontex being primarily liable for fundamental rights violations that may occur during joint operations, it is unlikely that it materialises in reality. Both instances—fundamental rights violations directly committed by coordinating staff and breaches stemming directly from the Operational Plan—are rare occurrences.

The analysis also showed that the host state exercises comprehensive authority over persons deployed as team members during joint operations. They must all observe the national law of the host state and follow its instructions. The host state thus exercises legal control over their conduct, making it liable in case of fundamental rights violations on their part. However, in relation to large assets, e.g. vessels or aeroplanes, it shares this legal control with the relevant home state. The latter is required to consent, through its representative on the Joint Coordination Board, to decisions concerning its assets, and it maintains the command structure aboard the large asset intact. Thus, fundamental rights violations by large assets give rise to the joint liability of both the host and the home state. It is noteworthy that this conclusion differs from the one reached in the relevant part of Chapter 3, where it was held that *only* the contributing state is responsible for breaches by its large assets because the host state's legal control is not exclusive.[1361]

The result of the analysis is therefore as follows:

- Frontex is liable for breaches of its own (coordinating) staff.
- Frontex is liable *jointly with* the host state for breaches that directly result from the Operational Plan.
- The host state is liable for breaches of host state officers ('local staff').
- The host state is liable for breaches of persons deployed as team members by Frontex.
- The host state is liable for breaches of persons deployed as standard team members by participating states.
- The host state is liable *jointly with* the respective home state for breaches of large assets.

It is useful to highlight that the analysis revealed two particular instances where joint liability would arise. The first is the unlikely scenario that a fundamental rights violation stems directly from the Operational Plan, in which case Frontex and the host state are liable together. The second, and more likely, is the scenario that a fundamental rights violation is committed by a large asset contributed by a participating state. This is indeed the situation on which Example 2 is based. In Example 2, a vessel deployed by State B to a sea border operation hosted by State A, hands over migrants on an intercepted boat to the authorities of a third state and thereby infringes the prohibition of *refoulement*. Under EU law, States A and B are jointly liable for the breach committed by B's vessel. This outcome in particular differs from the one reached under the ECHR, where only State B incurs direct responsibility in situations such as Example 2.[1362] Beyond these two possibilities, joint liability is also conceivable where several persons on the ground that engage the liability of different actors commit a fundamental rights violation

1361 For the conclusion reached in Chapter 3 see above 3.3.2.3.4 and 3.3.4.
1362 See above 3.3.4.

together.[1363] The difficulties associated with implementing joint liability are discussed in more detail below.[1364]

The findings of this section are summarised in Table 12.

Table 12: Summary of findings (3)

	ECHR			CFR	
	Primary responsibility	**Associated responsibility (obligations to protect)**	**Associated responsibility ('complicity')**	**Primary liability**	**Associated liability**
Frontex/EU	No responsibility	No responsibility	No responsibility	Liability for breaches by Frontex staff; liability for breaches that result directly from OPlan	*Chapter 4.4*
Host state	Responsibility for breaches by local staff and standard team members	Responsibility for not preventing breaches of others, e.g. breaches by team members on large assets contributed by participating states	Responsibility for assisting in breaches of others, e.g. breaches by team members on large assets contributed by participating states	Liability for breaches by local staff and team members, including those on large assets	
Participating state (minor technical equipment)	No responsibility	No responsibility (no jurisdiction)	As a rule no responsibility (impact of assistance low, lack of knowledge and possibilities)	No liability	
Participating state (standard team member)	No responsibility	No responsibility (no jurisdiction)	Responsibility for assisting in breaches they have knowledge of	No liability	
Participating state (large assets, e.g. vessels, aircraft)	Responsibility for breaches by team members on large assets they contributed	Responsibility for not preventing breaches by the host state or other participating states if they had the means to prevent	Responsibility for assisting in breaches of the host state or other participating states	Liability for breaches by team members on large assets they contributed	

1363 See also above 4.3.6.3.
1364 See below 4.4.3.

4.4 Liability for associated conduct

Frontex has an important and prominent role in the context of joint operations. It renders extensive financial and administrative support, and has far reaching possibilities, but also duties, to monitor and supervise the implementation of joint operations. However, in light of the previous section, its primary liability for fundamental rights violations that may occur during joint operations is limited to the unlikely event of breaches that are committed by coordinating staff or stem directly from the Operational Plan. This raises the question of whether the agency's support may render it liable beyond these limited instances.

But participating states' involvement is also far-reaching. For example, states that contribute large assets, a vessel for example, have a representative present in the body running the operation (the Joint Coordination Board) and may thus influence joint operations well beyond the conduct of their own assets, for whose breaches they do incur primary liability. In addition, states may extensively contribute standard team members, and a wide range of smaller technical equipment, none of which triggers their primary liability. Thus, the question is whether they may be liable for violations other than those committed by their large assets.

Against this background, this section analyses the circumstances under which the actors not directly liable for a specific breach are nonetheless liable for conduct associated with it. The central question is whether contributing to, or not preventing, a violation of fundamental rights, may render the facilitating actor liable. More specifically, in light of the findings of the previous section, the questions that form the focus of this section are the following:

- Is Frontex liable *in addition to the respective state* for fundamental rights violations committed in the context of joint operations?
- Are participating states liable *in addition to the primarily liable state* for breaches other than those committed by their own large assets?

In contrast to Frontex and participating states, the host state is comprehensively liable for fundamental rights violations that occur in the context of joint operations. Thus, questions of associated liability of the host state will not commonly arise and are not dealt with in detail in this section. However, there appears to be one particular exception that will be briefly outlined here. This is where the host state implements a return decision in breach of the prohibition of *refoulement* in the context of a joint return operation.

Section 4.4.1 opens by setting out associated obligations under EU law, grouping them into obligations to supervise on the one hand and obligations to protect on the other. The central analysis is conducted in Section 4.4.2. It elaborates on each of the conditions for liability with a view to the particular challenges they raise in relation to associated liability. Section

4.4.3 explains the possibilities and procedural consequences of joint or concurrent liability between the primary and facilitating actors. The final Section 4.4.4 applies the findings to Frontex operations.

It is important to note that, even more so than for the previous section, relevant case law is difficult to identify and extremely scarce. This is so especially because the categorisation between primary and associated liability is not common in EU law. 'Associated liability' is thus strictly speaking not even an 'area' of EU liability law with a basis developed in a consistent, self-referential line of case law. Against this background, this section in particular is exploratory and can only offer tentative results.

4.4.1 Associated obligations under EU law

As explained in more detail in the previous section, contributions by one authority to the breach of another are considered 'part of the internal cooperation' which in principle cannot trigger liability, provided they do not curtail the legal room for manoeuvre of the latter.[1365] However, if in specific cases an obligation exists to prevent or not to contribute to breaches of EU law by another public authority, the failure to meet that obligation may give rise to liability.

Obligations to prevent or not to contribute to breaches of Union law may be divided into two main types.[1366] The first type is those requiring a Union body to supervise national authorities when they apply or implement Union legislation.[1367] The second type of obligation requires Union bodies or member states to protect individuals from violations committed by others.

4.4.1.1 Obligations to supervise

Obligations calling for Union bodies to supervise national authorities exist in various forms under EU law. Article 17(1) TEU very generally requires the Commission to 'oversee the application of Union law'. On some occasions, applicants have relied on Article 17(1) TEU, alone or together with other provisions, as a basis for the Union's liability when they found that the Commission failed to take steps in relation to unlawful conduct of member states (e.g. *FICF*; *Pellegrini*) or other international organisations (e.g. *Ledra Advertising*).[1368] For the purpose of ensuring compliance with Union

1365 CJEU, Case 217/81 *Interagra* (n 1182) para 8; for more detail see above 4.3.4.

1366 This distinction is made also by Säuberlich (n 68) 207–232.

1367 Exceptionally member states may also be required to supervise Union bodies, see ibid 207–208.

1368 CJEU, Case T-90/03 *Fédération des industries condimentaires de France and Others v Commission*, 11 July 2007, ECLI:EU:T:2007:208; CJEU, Case T-375/07 *Pellegrini v Commission*, 27 October 2008, ECLI:EU:T:2008:466; CJEU, Case T-289/13 *Ledra Advertising v Commission and ECB*, 10 November 2014, ECLI:EU:T:2014:981, on appeal, CJEU, Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising* (n 1000).

law, the Commission can *inter alia* bring infringement proceedings before the CJEU against a non-compliant member state (Article 258 TFEU). Even though applicants have also sought to invoke Article 258 TFEU (e.g. *Lefebvre*; *Smanor*; *Makedoniko*), in the view of the Court, the Commission is under no obligation to institute proceedings against a member state so that the failure to do so cannot be unlawful.[1369]

There are also numerous more specific supervisory obligations, some of which have given rise to actions for damages in the past, again either alone or together with Article 17(1) TEU. These may be found in the Treaties themselves. *Lütticke*, for example, concerned the obligation of the Commission to supervise member states in their application of the Treaties' provisions on taxation, explicitly mentioned in former Article 97(2) TEEC (repealed in the meantime).[1370] Several cases (e.g. *Produits Bertrand*; *Bretagne Angleterre Irlande*) concerned the Commission's obligations to ensure that state aid complies with EU law, set out in what is now Article 108(2) and (3) TFEU.[1371]

Specific obligations to supervise may also be laid down in secondary Union law. In a number of cases (e.g. *Kampffmeyer*; *Denkavit*; *Cato*) the applicants sought compensation for damage they suffered as a result of the alleged failure of the Commission to exercise supervisory powers granted to it in specific Community legislation.[1372]

4.4.1.2 Obligations to protect

Like obligations to supervise, obligations to protect individuals from breaches committed by others also exist in various forms in the EU legal order. The Court has, for example, consistently held that under certain circumstances Union law requires member states to protect the exercise of the

1369 CJEU, Case T-571/93 *Lefebvre and Others v Commission*, 14 September 1995, ECLI:EU:T:1995:163, paras 60-61; CJEU, Case T-201/96 *Smanor and Others v Commission*, 3 July 1997, ECLI:EU:T:1997:98, paras 30-31; CJEU, Case T-202/02 *Makedoniko Metro and Michaniki v Commission*, 14 January 2004, ECLI:EU:T:2004:5, paras 43-44; relying in particular on CJEU, Case 247/87 *Star Fruit v Commission*, 14 February 1989, ECLI:EU:C:1989:58, paras 11-12; CJEU, Case C-72/90 *Asia Motor France v Commission*, 23 May 1990, ECLI:EU:C:1990:230, para 13; for a discussion see Czaja (n 1287) 101–126; Säuberlich (n 68) 208–213; Oliver (n 876) 299–300.

1370 CJEU, Case 4/69 *Lütticke* (n 894).

1371 CJEU, Case 40/75 *Produits Bertrand v Commission*, 21 January 1976, ECLI:EU:C:1976:42; CJEU, Case T-230/95 *BAI v Commission*, 28 January 1999, ECLI:EU:T:1999:11.

1372 CJEU, Joined Cases 5, 7, 13-24/66 *Kampffmeyer* (n 977) [some authors consider the allegedly unlawful conduct at stake in *Kampffmeyer* a joint decision between the Commission and Germany, see for example Wils (n 876) 198; Stefanou and Xanthaki (n 876) 131; however, most authors qualify it as a national decision and a failure to supervise by the Commission, see Säuberlich (n 68) 121, 218-219; Oliver (n 876) 301–303; de Visser (n 876) 53]; CJEU, Case 14/78 *Denkavit Commerciale v Commission*, 5 December 1978, ECLI:EU:C:1978:221; CJEU, Case C-55/90 *Cato* (n 1174).

fundamental freedoms against obstruction by individuals.[1373] But EU fundamental rights law also entails duties to protect individuals from interference by others. Article 19(2) CFR, for example, requires public authorities to protect individuals from abuses by other states by prohibiting *refoulement*. As discussed in more detail above in Chapter 3, the prohibition of *refoulement* essentially forbids the expulsion of an individual to another state where especially serious maltreatment would be inflicted upon the person.[1374] More generally, Article 51(1) CFR requires that Union bodies and member states 'respect the rights [set forth in the Charter], observe the principles *and promote the application thereof*' [emphasis added]. In addition, Article 53(3) CFR requires that in areas where the Charter guarantees the same rights as the ECHR, it must at least offer the same level of protection. That includes positive obligations that have been accepted by the ECtHR.[1375] Hence, EU fundamental rights law also imposes positive obligations on the Union and its member states, including a requirement that public authorities protect individuals from fundamental rights violations committed by others.[1376]

However, it has been argued that in practice the CJEU's approach is predominantly 'negative', i.e. merely requiring EU bodies to respect fundamental rights.[1377] This view is in particular based on a line of case law expressed for example in *Parliament v Council* or *Lindqvist*. In essence, these cases suggest that it is sufficient that secondary legislation does not compel member states to violate fundamental rights. It does, however, not necessarily have to establish clear safeguards against such risks.[1378] A major difficulty in imposing wide-ranging positive obligations on EU bodies lies in reconciling

1373 This was pointed out for example by Advocate General Trstenjak in para 31 of her Opinion in CJEU, Case C-171/11 *Fra.bo*, 12 July 2012, ECLI:EU:C:2012:453; see in particular CJEU, Case C-265/95 *Commission v France*, 9 December 1997, ECLI:EU:C:1997:595, para 32; see also CJEU, Case C-112/00 *Schmidberger v Republik Österreich*, 12 June 2003, ECLI:EU:C:2003:333.

1374 See above 3.4.1.2.2.

1375 For an overview of positive obligations in the case law of the ECtHR see above 3.4.1.

1376 Olivier de Schutter, 'The Implementation of the EU Charter of Fundamental Rights through the Open Method of Coordination' (Jean Monnet Working Paper 07/04, 2004), 19–20; see also EU Network of Independent Experts on Fundamental Rights, 'Commentary of the Charter of Fundamental Rights of the European Union' (June 2006), 395–396; a similar argument was made prior to the adoption of the CFR, see Philip Alston and J. H H Weiler, 'An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights' in Philip Alston (ed), *The EU and Human Rights* (Oxford University Press 1999) 25.

1377 De Schutter (n 1376) 3–11; Israel de Jesús Butler and Olivier de Schutter, 'Binding the EU to International Human Rights Law' (2008) 27 Yearbook of European Law 277, 278-279, 293-298; Catherine Stubberfield, 'Lifting the Organisational Veil: Positive Obligations of the European Union Following Accession to the European Convention on Human Rights' (2012) 19 Australian International Law Journal 117, 125.

1378 CJEU, Case C-540/03 *Parliament v Council*, 27 June 2006, ECLI:EU:C:2006:429; CJEU, Case C-101/01 *Lindqvist*, 6 November 2003, ECLI:EU:C:2003:596; see Jesús Butler and de Schutter (n 1377) 294-296, in particular 295.

it with the principle of conferral and the allocation of competences between the EU and its member states. There is a concern that preventing breaches or promoting the enjoyment of fundamental rights may require the Union to act beyond its existing powers, which could result in a so-called competence-creep.[1379] To avoid such a scenario, Articles 51(1) and (2) CFR and 6(1) TEU unequivocally state that the Charter does not extend the application of Union law or the competences of the Union as defined in the Treaties.

Against this background, EU fundamental rights law imposes positive obligations, yet with respect to EU bodies only within the limits of existing competences.[1380] A rare example where the Court indeed seems to have accepted positive obligations on the part of EU bodies is *T. Port*, where it held that '[t]he Community institutions *are required to act* in particular when the transition to the common organization of the market infringes certain traders' fundamental rights protected by Community law'.[1381] More recently, in *Ledra Advertising*, the Court deduced obligations to ensure compliance with fundamental rights from the more general supervisory obligations of the Commission.[1382]

Even though EU fundamental rights law gives rise to obligations to protect, they do not seem to have given rise to actions for damages. Somewhat more susceptible to actions for damages may be obligations to protect arising in areas outside fundamental rights law. Notably, in É. R. and Others and *Coldiretti* (both relating to the outbreak of BSE, or 'mad cow disease'), the applicants alleged a failure by Union institutions to protect human health, without invoking fundamental rights in that respect.[1383] In addition, more

1379 Jesús Butler and de Schutter (n 1377) 314; Stubberfield (n 1377) 126; for a detailed discussion of this argument see Beijer (n 745) 179–220.

1380 CFR Explanations (n 1023) art 51; Jesús Butler and de Schutter (n 1377) 314–318; the extent of the Union's duty to act on the basis of its fundamental rights obligations has been discussed in particular after *Opinion 2/94* and a leaked interpretation thereof by the Council's Legal Service; the view expressed therein has been widely criticised, see for example Gráinne de Búrca, 'The drafting of the European Union Charter of Fundamental Rights' (2001) 26 European Law Review 126, 134–137; extensively also J. H H Weiler and Sybilla C Fries, 'A Human Rights Policy for the European Community and Union: The Question of Competences' in Philip Alston (ed), *The EU and Human Rights* (Oxford University Press 1999); see also the discussion by Miguel Poiares Maduro, 'The Double Constitutional Life of the Charter of Fundamental Rights of the European Union' in Tamara Hervey and Jeff Kenner (eds), *Economic and social rights under the EU Charter of Fundamental Rights: a legal perspective* (Hart Publishing 2003) 289–292.

1381 CJEU, Case C-68/95 *T. Port v Bundesanstalt für Landwirtschaft und Ernährung*, 26 November 1996, ECLI:EU:C:1996:452, para 40 [emphasis added]; I would like to thank Malu Beijer for drawing my attention to the case law of the CJEU in this area.

1382 This is discussed below 4.4.2.1.

1383 CJEU, Case T-138/03 *É.R. and Others v Council and Commission*, 13 December 2006, ECLI:EU:T:2006:390; CJEU, Case T-149/96 *Coldiretti and Others v Council and Commission*, 30 September 1998, ECLI:EU:T:1998:228.

specific obligations to protect, such as those arising from the Union's role as an employer, have also formed the basis for actions for damages.[1384]

It should be noted that obligations under EU law to protect individuals from interference by other EU member states may conflict with the principle of mutual trust, in particular in the AFSJ. That principle requires member states, to presume that fundamental rights have been observed by other member states without checking, 'save in exceptional circumstances', whether that is actually the case in a specific situation.[1385] The Court has indeed in the past found the presumption of human rights compliance to be rebutted only under exceptional circumstances. In *N. S. and Others* and in *Abdullahi*, for example, the Court found that member states were prohibited from transferring asylum seekers to another member state only if the latter's asylum procedure and reception conditions show 'systemic flaws' that result in inhuman or degrading treatment within the meaning of Article 4 CFR.[1386]

More recently, however, the Court lowered that threshold, first in *Aranyosi and Căldăraru* and then, more clearly, in *C.K. and Others*.[1387] The case of *Aranyosi and Căldăraru* concerned the execution of a European Arrest Warrant where the executing authority had doubts about the human rights conformity of the detention conditions in the issuing member state.[1388] The Court held that the surrender of a person to another member state has to be postponed if an examination of the general detention conditions in the issuing state and the specific situation of the individual concerned show that there is a real risk that the person will be subjected to treatment contrary to Article 4 CFR once surrendered.[1389] The Court further clarified its position in *C.K. and Others*, a case concerning a family that lodged an asylum application in Slovenia, even though under the Dublin Regulation Croatia would have been responsible to examine the application. There were no systemic deficiencies regarding the asylum procedure or reception conditions in Croatia.[1390] However, the Court found that Slovenia would nonetheless have to suspend the transfer of the family to Croatia, if the transfer itself would result in a real risk of inhuman or degrading treatment due to the medical condition of C.K.

1384 See in particular CJEU, Case F-50/09 *Missir Mamachi di Lusignano v Commission*, 12 May 2011, ECLI:EU:F:2011:55.

1385 CJEU, *Opinion 2/13* (n 452) paras 191-192

1386 CJEU, Joined Cases C-411/10 and C-493/10 *N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, 21 December 2011, ECLI:EU:C:2011:865, paras 86, 106; CJEU, Case C-394/12 *Shamso Abdullahi v Bundesasylamt*, 10 December 2013, ECLI:EU:C:2013:813.

1387 CJEU, Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, 5 April 2016, ECLI:EU:C:2016:198; CJEU, Case C-578/16 PPU *C.K. and Others v Slovenia*, 16 February 2017, ECLI:EU:C:2017:127.

1388 CJEU, Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* (n 1387).

1389 Ibid paras 88-94.

1390 CJEU, Case C-578/16 PPU *C.K. and Others* (n 1387) para 71.

These considerations applied because of the specific situation of the asylum seeker alone, irrespective of the quality of the reception and the care available in the member state responsible for examining the application.[1391] As a result, not only systemic deficiencies in another member state, but also the individual situation of the person concerned may require a state to refrain from returning an asylum seeker to another member state. The CJEU thus appears to have brought its case law in this area in line with the requirements under the ECHR, in particular the ECtHR's decision in *Tarakhel*.[1392]

Having said this, the main purpose of this section is to address the liability for violation of obligations to protect, rather than the precise circumstances under which obligations to protect arise. Whilst it is thus outside the scope of this study to elaborate in detail on the relationship between the principle of mutual trust and fundamental rights, it will be pointed out where the principle of mutual trust is most likely to pose an obstacle to associated liability in the context of joint operations. It should be emphasised, however, that the place and role of mutual trust and its impact on fundamental rights has so far not been addressed by the Court in relation to Frontex' activities.

4.4.2 Conditions for liability for associated conduct

Liability for associated conduct arises under the same conditions as liability for any other breach of Union law. In principle, it is assessed independently from the primary breach. This means that liability arises if the associated obligation confers rights on individuals, if the failure to meet that obligation was sufficiently serious, and if the associated conduct has a sufficiently direct causal link to the damage suffered.

However, cases regarding liability for associated conduct involve a triangular relationship, including the primary actor, the facilitating actor, and the victim of the breach. In some situations, the relationship between the primary actor and the victim may be relevant when assessing the liability of the facilitating actor. For example, where the primary breach has not yet been established, this may be necessary before it is possible to address liability for conduct associated with it. Similarly, a failure to adhere to an associated obligation can commonly only be considered to cause damage, if the primary breach did so in the first place. Consequently, it may be necessary to first establish the causal link between the primary breach and the damage. In the little case law there is, the Court does not always set out with particular clarity whether it is discussing the conditions of liability govern-

1391 Ibid paras 73-76.
1392 ECtHR, *Tarakhel* (n 488); for more detail see above 3.4.1.2.2.

ing the primary breach (as a preliminary question), or those relating to the associated conduct.[1393]

With this in mind, the following sections discuss the circumstances under which associated obligations confer rights on individuals, breaches of such obligations are sufficiently serious, and a sufficiently direct causal link between the associated conduct and the damage is considered to exist (see the illustration in Figure 27). The focus is on supervisory obligations, simply because to date obligations to protect have hardly ever formed the basis of actions for damages.

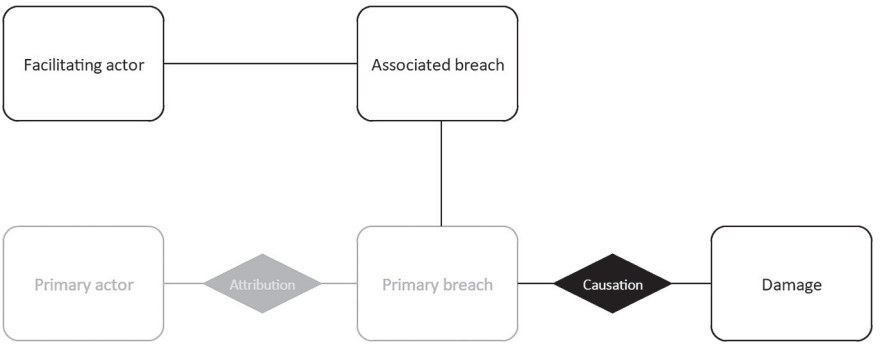

Figure 27: Analysing associated liability in EU law

4.4.2.1 Conferring rights on individuals

Obligations to protect, by definition, confer rights on individuals.[1394] In turn, supervisory obligations ensure respect for Union law more generally. It is necessary to assess each obligation individually to ascertain whether it confers rights on individuals.

The Commission's general supervisory obligation found in Article 17(1) TEU is, on its own, commonly considered as to conferring rights on individuals because it only defines the Commission's powers in a general manner and is thus a provision of institutional nature.[1395]

1393 See for example in CJEU, Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising* (n 1000) paras 68-75, where the Court seems to discuss the unlawfulness of the primary conduct; see also CJEU, Case 40/75 *Produits Bertrand* (n 1371) and CJEU, Case T-230/95 *BAI* (n 1371), where the Court discusses the causal link between the primary conduct and the damage.

1394 Säuberlich (n 68) 227.

1395 CJEU, Case T-90/03 *FICF* (n 1368) paras 61-62; CJEU, Case T-375/07 *Pellegrini* (n 1368) para 19; see also AG Wahl, Opinion in CJEU, Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising* (n 1000) paras 75-80; Czaja (n 1287) 101–128; Säuberlich (n 68) 208–213.

It is unclear whether and under what circumstances more specific supervisory obligations confer rights on individuals. In *Lütticke*, Advocate General Dutheillet de Lamothe essentially argued that there could be no difference between general and specific supervisory obligations provided for in the Treaty, since they fulfilled no substantially different purpose.[1396] In this light, he found that the provision at stake in *Lütticke* was 'not intended to protect individual interests but to ensure the observance of the institutional equilibrium brought about by the Treaty.'[1397] In his view, the interest which it was intended to protect was the 'Community public policy', rather than more specific interests of individual importers.[1398] In contrast, Advocate General Darmon in *Cato* defended the view that detailed supervisory obligations may give rise to legitimate expectations on the part of individuals that conduct of national authorities is in compliance with Union law to the extent that a Union body is required to ensure that compliance. The failure to sufficiently perform the supervisory obligations breaches that legitimate expectation, which is, in his opinion, 'sufficient to show that there has been a breach of a superior rule of law designed for the protection of individuals'.[1399]

The Court itself does not commonly discuss in detail whether the supervisory obligation at stake confers rights on individuals. However, in a number of cases it has directly engaged in a discussion of the lawfulness of the Commission's conduct, suggesting that it at least does not categorically exclude the possibility that specific supervisory obligations may confer rights on individuals.[1400] However, it did explicitly address the question in *Kampffmeyer* in relation to a supervisory obligation found in Community legislation.[1401] The applicants in that case suffered loss due to a protective measure taken by Germany which suspended the favourable conditions under which they had been importing maize. As required by the relevant provision (Article 22 of Council Regulation No 19), Germany notified the measure to the Commission who authorised it. The applicants argued that Article 22 would have required the Commission to abolish the German protective measure. The failure to do so, in their view, rendered the Community liable to make good the damage they suffered. The Court dismissed the defendant's argument that Article 22 was not intended to protect interests such as those of the

1396 AG Dutheillet de Lamothe, Opinion in CJEU, Case 4/69 *Lütticke* (n 894) 345.

1397 Ibid 345–346.

1398 Ibid 346.

1399 AG Darmon, Opinion in CJEU, Case C-55/90 *Cato* (n 1174) para 41; similarly also CJEU, Joined Cases 9 and 12/60 *Vloeberghs* (n 893) 216–217.

1400 CJEU, Case 4/69 *Lütticke* (n 894) paras 11-19; similarly see also CJEU, Case 14/78 *Denkavit Commerciale* (n 1372) paras 8-25; CJEU, Case C-55/90 *Cato* (n 1174) paras 23-29; see also CJEU, Case 40/75 *Produits Bertrand* (n 1371) and CJEU, Case T-230/95 *BAI* (n 1371), where the Court dismissed the actions for the lack of a causal link between the damage and the member state's conduct the Commission allegedly failed to supervise; see also Oliver (n 876) 299–303; Säuberlich (n 68) 207–225.

1401 CJEU, Joined Cases 5, 7, 13-24/66 *Kampffmeyer* (n 977).

applicants. It held that Article 22 had to be seen in the context of the more general aims of the Regulation, which included the development of the free movement of goods. On that basis the Court found Article 22 was indeed intended (also) for the protection of the interests of the applicants.[1402]

In light of these cases, it can be assumed that Article 17(1) TEU alone does not confer rights on individuals, but more specific supervisory obligations, alone or together with Article 17(1) TEU, can.

However, more recently, in *Ledra Advertising*, the Court indicated that in some circumstances it may be sufficient that the provision with which a Union body is required to ensure compliance (i.e. the primary obligation) confers rights on individuals.[1403] The case concerned depositors of two large Cypriot banks. Their deposits were reduced due to the bank restructuring that was part of the conditions that Cyprus had to fulfil in order to get financial assistance from the European Stability Mechanism ('ESM'). In their view, the memorandum of understanding concluded between Cyprus and the ESM, which laid down those conditions, infringed their right to property guaranteed under Article 17(1) CFR. Before the CJEU, they sought annulment of the memorandum of understanding and compensation for the damage suffered. However, the ESM is not an EU institution, but an international organisation with separate international legal personality. Thus, the actions were brought against the Commission and the European Central Bank due to the role they played in the process of adoption of the memorandum of understanding. In particular, the Commission conducts the negotiations with the state concerned and signs the memorandum of understanding on behalf of the ESM.

The Court held that when fulfilling their tasks within the framework of the ESM Treaty, the EU institutions can commit only the ESM. The adoption of the memorandum of understanding was consequently conduct attributable to the ESM.[1404] However, upon appeal, the ECJ essentially noted that even when being 'lent' to the ESM, the Commission does not cease to be an EU institution with the powers and obligations conferred on it by the Treaties.[1405] That being the case, their 'unlawful conduct *linked* […] to the adoption of a memorandum of understanding on behalf of the ESM' was capable of giving rise to claims for compensation.[1406] The ECJ clarified later, that the allegedly unlawful conduct of the Commission it was referring to consisted

1402 Ibid 262–263; AG Gand in *Kampffmeyer* was of the same view, see 274-275.
1403 CJEU, Case T-289/13 *Ledra Advertising* (n 1368); on appeal, CJEU, Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising* (n 1000).
1404 CJEU, Case T-289/13 *Ledra Advertising* (n 1368) paras 42-47 (damages), paras 56-60 (annulment); CJEU, Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising* (n 1000) paras 51-54.
1405 CJEU, Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising* (n 1000) paras 56-59.
1406 Ibid para 55 [emphasis added].

of *contributing* to a breach of Union law, by including unlawful paragraphs in the memorandum of understanding, or by *failing to prevent* that.[1407]

The Court found that the Commission is under an obligation to 'ensure that […] a memorandum of understanding is consistent with the fundamental rights guaranteed by the Charter.'[1408] That in particular required that the Commission should 'refrain from signing a memorandum of understanding whose consistency with EU law it doubts.'[1409] Whilst it pointed out that the Charter was binding on the Commission in the circumstances at stake, it predominantly relied on the Commission's supervisory duties under Article 17(1) TEU in combination with Article 13(3) and (4) ESM Treaty in order to establish that obligation.[1410] However, the right of individuals to enforce that obligation derived from the primary obligation, compliance with which the Commission allegedly failed to ensure. In the specific case, this was Article 17(1) CFR, the right to property, which, the Court held, 'is a rule of law intended to confer rights on individuals'.[1411]

This has two important consequences. First, breaches of supervisory obligations, at least when they are somewhat more specific than Article 17(1) TEU alone, are capable of giving rise to liability provided that the primary obligation breached confers rights on individuals.[1412] This is at least the case in the area of fundamental rights violations, even though there is nothing in *Ledra Advertising* that suggests that the same considerations are not applicable to other areas of EU law.

Second, by deriving an obligation to *ensure* compliance with EU fundamental rights law from the Commission's supervisory duties, the Court ultimately accepted enforceable positive obligations in the fundamental rights context, without doctrinally basing it on fundamental rights law. As a consequence, it seems that Union bodies have to ensure fundamental rights compliance whenever there is a supervisory obligation, presumably one that is more specific than Article 17(1) TEU alone.

4.4.2.2 Sufficiently serious breach

A number of aspects determine whether a duty to supervise has been breached in a specific case, and whether that breach was sufficiently serious. These include in particular (1) the extent of the supervisory obligation, (2) the required standard of diligence, and (3) the seriousness of the primary breach.

1407 Ibid combined reading of paras 63, 68.
1408 Ibid para 67.
1409 Ibid paras 59, 67.
1410 Ibid paras 59, 67.
1411 Ibid para 66.
1412 A similar conclusion may be drawn from CJEU, Joined Cases 9 and 12/60 *Vloeberghs* (n 893) 216–217.

4.4.2.2.1 The extent of the supervisory obligation

The first determinative aspect is the extent to which the supervisory body has to ensure the lawful behaviour of the supervised authority. This may be full compliance with Union law, or anything below that, such as compliance with the objectives of the policy area at stake or specific rules of Union law. The extent of the supervisory duty is (explicitly or implicitly) defined in the obligation itself. Hence, liability largely depends on the interpretation of that specific provision. A particularly good example in this respect is *Cato*.[1413]

Cato concerned a British fisherman, who sold his vessel to a couple who intended to use it as a houseboat. He applied for a cessation premium that Community law had authorised member states to grant with respect to vessels that would be permanently barred from fishing in Community waters. Soon after, however, the couple resold the vessel to two Irish nationals who requested that the Irish authorities re-register it as a fishing vessel. Having been informed by the British authorities that the cessation premium had not yet been paid, the Irish authorities issued the fishing licence. The British authorities subsequently rejected Mr Cato's application. After a series of unsuccessful actions in British courts, Mr Cato lodged an action for damages against the Community, seeking compensation for the damage resulting from the non-payment of the cessation premium. The basis of Mr Cato's claim was the alleged failure of the Commission to adequately supervise the British authorities. According to the directive in question, the Commission was required to examine whether the measures proposed by the member states to reduce fishing capacity fulfil the conditions for financial contributions from the Community, in particular on the basis of their conformity with the Community legislation in question. The Commission had found that the measure proposed by the United Kingdom, including the conditions and procedures for awarding cessation premiums, fulfilled these conditions. Mr Cato did not share that view. In his opinion, the Commission had thus improperly approved a national scheme which did not comply with the directive.

The Court and the Advocate General reached opposite conclusions regarding the Commission's liability. The crucial difference was their interpretation of the extent of the supervisory duty.[1414] Advocate General Darmon was of the view that the Commission's obligation amounted to ensuring full compliance of the national measures with Community law.[1415] Since he found that the scheme introduced by the United Kingdom showed some infringements of Community law, the Commission had failed to comply with its

1413 CJEU, Case C-55/90 *Cato* (n 1174).
1414 See also Säuberlich (n 68) 120–121.
1415 AG Darmon, Opinion in CJEU, Case C-55/90 *Cato* (n 1174) para 20 (Opinion 1).

supervisory obligation in such a way as to incur liability.[1416] In contrast, the Court held that the Commission was merely required to verify whether the national measures complied with the objective of the directive, i.e. reduction of production capacity in the fisheries sector.[1417] Any other inconsistencies, e.g. '[t]he fact that the actual conduct of the United Kingdom 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 obligations.[1418] Since the national measures complied with the objective of the directive, the Commission had lived up to its supervisory obligations.[1419]

The Court reached a similar result in *Francesconi*, a case concerning damage suffered due to Italian wine adulterated with methanol, the presence of which on the wine market the Commission allegedly did not appropriately prevent or respond to.[1420] The Court observed that the Community institutions were required to intervene only if there was evidence that the supervision by national bodies was inadequately carried out.[1421] Since that was not the case in *Francesconi*, no obligation to intervene arose and the Commission's conduct could not be considered unlawful.[1422]

In contrast to *Cato* and *Francesconi*, the Court in *Kampffmeyer* found that the obligation at stake required the Commission to ensure full compliance of the national measures with Community law. It had, in a judgment rendered prior to *Kampffmeyer*, already found that the Commission's authorisation of the German protective measures was unlawful.[1423] Essentially, there was no threat of 'serious disturbances' to the market in Germany, meaning no protective measures were justified.[1424] In *Kampffmeyer*, the Court clarified that Article 22 indeed required the Commission 'in respect of each protective measure notified to it to conduct as exhaustive an examination as that required to be made by the Governments of the Member states'. For that reason, it bore 'independent responsibility' for the retention of the unlawful protective measure.[1425]

1416 Ibid paras 36, 38 (Opinion 1); paras 11-13 (Opinion 2).
1417 Case C-55/90 *Cato* (n 1174) paras 23-24.
1418 Ibid para 28.
1419 Ibid paras 25-27, 29.
1420 CJEU, Joined Cases 326/86 and 66/88 *Francesconi and Others v Commission*, 4 July 1989, ECLI:EU:C:1989:282; these allegations are particularly clearly outlined in the Opinion of AG Lenz, paras 3-5.
1421 Ibid paras 10-12; see also the Opinion of AG Lenz, paras 7-8.
1422 Ibid paras 21-26; see also the Opinion of AG Lenz, paras 9-29.
1423 CJEU, Joined cases 106 and 107/63 *Toepfer v Commission*, 1 July 1965, ECLI:EU:C:1965:65.
1424 Ibid 412–414.
1425 CJEU, Joined Cases 5, 7, 13-24/66 *Kampffmeyer* (n 977) 262; for the facts of the case see above text to n 1401-1402.

4.4.2.2.2 The required standard of diligence

The second determining aspect is the standard of diligence that supervisory bodies are required to meet. Whilst in principle that depends on the specific provision at stake, it can be observed that many supervisory obligations are understood to be due diligence obligations. Hence, the supervisory body is required to act in accordance with what a reasonable authority would do.

This may be exemplified by *Lütticke*, a case concerning an importer of milk and milk powder based in Germany.[1426] Lütticke was of the view that upon importation, Germany levied taxes on his products that exceeded what was permissible under Community law. After he had unsuccessfully requested that the Commission take action against Germany, he brought an action to recover the damages he had allegedly suffered as a result of the Commission's inaction. By that failure, Lütticke argued, the Commission had infringed its obligations under the Treaty, which provided that the Commission would 'address appropriate directives or decisions' to states that infringed the relevant prohibitions regarding the imposition of taxes. The Court acknowledged that the Treaty conferred upon the Commission 'a special power of supervision' for the purpose of ensuring that the national tax systems conform to the requirements of free movement and non-discrimination.[1427] In the exercise of this power, the Commission had to take into account the margin of discretion left to the member states, and itself enjoyed discretion to appraise the factors which the state took into consideration in applying the relevant rules.[1428] Upon examination of the tax in question, the Commission had indeed found it was too high, which led Germany to reduce the rate.[1429] Whilst experts reached different conclusions on whether the rate would have required further reduction, the view of the Commission that the reduced German rate was in conformity with Community law was one of several justifiable solutions.[1430] Since the Commission's view was thus reasonable, it had not infringed its obligations regarding the supervision of member states' compliance with Community rules on taxation.[1431]

Another example is *Denkavit Commerciale*.[1432] In that case, the applicant company intended to import feeding stuff from the Netherlands into Italy. The consignment was, however, stopped at the Italian border and sent back to the Netherlands because the products' nitrate level exceeded the maximum

1426 CJEU, Case 4/69 *Lütticke* (n 894).
1427 Ibid paras 14-15.
1428 Ibid paras 14, 16.
1429 Ibid para 17.
1430 Ibid para 18.
1431 Ibid para 19.
1432 CJEU, Case 14/78 *Denkavit Commerciale* (n 1372).

permissible that had been fixed by an Italian measure. By setting a maximum permissible amount of nitrate in feeding stuff, Italy had made use of a power granted to member states under Community law that allowed for such protective measures to be taken, as long as the Union legislator had not itself done so with respect to the specific substance in question. However, the relevant Community legislation laid down a procedure enabling Community authorities to supervise the use that member states made of this power. In essence, the Commission was required to take an immediate decision as to whether Community legislation should be amended to include the substance in question. The member state's protective measure would stay in force until that decision was made. When the Commission did not take any decision in respect of the Italian protective measure for approximately a year and a half, Denkavit Commerciale lodged an action for damages against the Community.[1433] It alleged that the Community should be ordered to pay compensation for the Commission's failure to require Italy to repeal the protective measure.[1434]

The Court noted that a period of nearly 21 months had elapsed between the date of the Italian measure and the Commission's decision to require Italy to withdraw it.[1435] Because the Italian measure constituted an obstacle to trade, the Court found it 'necessary to consider whether the Commission […] did not improperly contribute to the maintenance of that obstacle and thereby incur liability.'[1436] Having investigated in detail the Commission's decision-making process in that case, the Court found that the Commission could not be blamed for the delay, in particular due to the complexity of the matter and (implicitly) the fact that human or animal health were at stake. It thus concluded that the conduct of the Commission was not such for it to incur liability.[1437]

In contrast, in *Kampffmeyer*, the Court found that contrary to the Commission's submissions, its conduct was not 'excusable', since it had not merely mistakenly evaluated some facts, but had ignored certain provisions of the supervisory obligation that were 'of a crucial nature'. This conduct 'constituted a wrongful act or omission capable of giving rise to liability on the part of the Community.'[1438]

1433 On 30 May 1978, the Commission eventually adopted a decision finding that it was unnecessary to fix maximum permitted levels of nitrate in feeding stuff and compelling Italy to repeal the protective measure.

1434 See also the summary of the allegations by AG Mayras, Opinion in CJEU, Case 14/78 *Denkavit Commerciale* (n 1372) 2510.

1435 Case 14/78 *Denkavit Commerciale* (n 1372) para 7.

1436 Ibid para 8.

1437 Ibid paras 9-25; see also the Opinion of AG Mayras, 2511-2515.

1438 CJEU, Joined Cases 5, 7, 13-24/66 *Kampffmeyer* (n 977) 262; for the facts of the case see above text to n 1401-1402.

Thus, broadly speaking, factors taken into account in assessing whether a supervisory obligation has been breached include the discretion enjoyed (*Lütticke*), the clarity of the supervisory obligation (*Lütticke*), the complexity of the situation (*Denkavit Commerciale*), the importance of the public interest at stake (*Denkavit Commerciale*), the excusability of the conduct (*Kampffmeyer*), and the extent of measures taken (*Lütticke*; *Denkavit Commerciale*).

Against this background, in the context of assessing whether there is a breach of a supervisory obligation, the Court generally seems to take into account factors akin to those that determine the seriousness of a breach.[1439] To the extent that supervisory duties are understood as due diligence obligations, it may therefore be assumed that a breach of a supervisory duty is *per se* sufficiently serious to incur liability. However, if in a specific case, the establishment of a breach of a supervisory duty does not already include an assessment of the obviousness and reprehensibility of the allegedly unlawful conduct, this may have to be taken into account for the purposes of determining the seriousness of the breach.

4.4.2.2.3 The seriousness of the primary breach

In *Ledra Advertising*, discussed in more detail above, the Court suggested that the seriousness of the primary breach is relevant in determining the seriousness of the associated breach. Having established that individuals had a right to compensation if the Commission failed to ensure that memoranda of understanding concluded by the ESM comply with fundamental rights, the Court set out to examine 'whether the Commission contributed to a sufficiently serious breach of the appellants' right to property'.[1440] Notably, of relevance for the purposes of compensation seemed to be whether the primary breach was sufficiently serious, rather than whether the contribution to it was. However, the Court found the interference with the rights of the applicants was not 'disproportionate and intolerable', in particular with a view to the general interest in ensuring the stability of the banking system which the measures in question pursued.[1441] Since there was no unjustified restriction on the applicants' rights, the Commission could not be considered to have contributed to a breach.[1442]

1439 On the factors the Court takes into account to determine the seriousness of a breach see above 4.2.2.

1440 CJEU, Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising* (n 1000) para 68, see above 4.4.2.1.

1441 Ibid paras 69-74.

1442 Ibid para 75.

4.4.2.3 Causal link

As explained in more detail above, a 'sufficiently direct' causal link between the unlawful conduct alleged and the damage suffered needs to be established, in order for the Union or its member states to incur liability.[1443]

The starting point is that a causal link exists if it can be established with sufficient certainty that the same damage would not have occurred had the obligation not been breached. Whilst the level of certainty required is not entirely clear, as a general rule that is only the case if the lawful execution of the obligations to supervise or protect would have prevented the member state's unlawful conduct altogether, led to the repeal of the national measure, or eliminated its negative consequences.[1444] In *Lütticke*, Advocate General Dutheillet de Lamothe found that the link between the national measure and the 'reaction' by the Community must be 'so close that they are indissociable' in that the action by the Community 'would necessarily and almost automatically have had the effect of altering' the relevant conduct of the member state concerned.[1445]

The fact that a member state's unlawful conduct may have been the immediate cause for the damage does not as a rule 'break' the chain of causation between a Union institution's breach of an obligation to supervise or protect and the damage suffered. Most importantly, damage may have several determining causes that all contributed decisively to its occurrence. The unlawfulness alleged does not need to be the sole cause of damage in order for the link between them to qualify as 'sufficiently direct'.[1446] In addition, as the Court held in *Rechberger*, whether imprudent conduct by others may 'break' the chain of causation, also depends on the purpose of the specific obligation breached.[1447] The Union institutions' supervisory or protective obligations are specifically aimed at preventing unlawful conduct of member states and, under the conditions discussed above, confer rights on indi-

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1443 See above 4.2.3.2.

1444 Czaja (n 1287) 112–121; Renzenbrink (n 1246) 60–63; Oliver (n 876) 300; Peter Aubin, *Die Haftung der Europäischen Wirtschaftsgemeinschaft und ihrer Mitgliedstaaten bei gemeinschaftsrechtswidrigen nationalen Verwaltungsakten* (Nomos 1982) 104–113; as regards the level of certainty required see in particular CJEU, Case F-50/09 *Lusignano* (n 1384) paras 178-181, and the case law cited.

1445 AG Dutheillet de Lamothe, Opinion in CJEU, Case 4/69 *Lütticke* (n 894) 346–347, he denied the existence of a causal link on that basis. In his view, it was unlikely that the Community's diligent exercise of its supervisory function would have avoided the alleged damage.

1446 CJEU, Case F-50/09 *Lusignano* (n 1384) para 181; citing in particular CJEU, Case C-308/87 *Grifoni I* (n 884) paras 17-18; CJEU, Case T-178/98 *Fresh Marine* (n 1037) paras 135-136; see also Toth (n 905) 193–194; Czaja (n 1287) 112; Säuberlich (n 68) 236–237; Aubin (n 1444) 104.

1447 CJEU, Case C-140/97 *Rechberger* (n 1172) paras 73-77; see above text to n 1172.

viduals in that respect. Those rights would be meaningless if liability was precluded by imprudent conduct on the part of member states.[1448]

In *Vloeberghs*, a case concerning an alleged failure of supervision by the European Coal and Steel Community's High Authority (who fulfilled functions later taken over by the Commission), Advocate General Römer explicitly pointed out the following:

> The fact that conduct contrary to the Treaty on the part of a Member State is at the commencement of a chain of cause and effect does not prevent the subsequent omission of the High Authority from being regarded as the direct cause of the damage. If the High Authority has failed to exercise its functions of supervision with regard to a Member State it is liable for the damage which follows from the original behaviour of a Member State contrary to the Treaty.[1449]

The same view was expressed by the Advocates General in *Kampffmeyer*, *Denkavit*, and *Lütticke*.[1450] Advocate General Gand in *Kampffmeyer*, citing Advocate General Römer, pointed out that the fact that the German authorities were 'the primary cause', did 'not prevent the Commission also from having caused the damage'.[1451]

In this light, a member state's conduct that is at the origin of a primary breach, as a rule, does not render a Union body's failure to supervise too remote for the Union to incur liability. However, the exercise of the supervisory tasks may under certain circumstances break the chain of causation between the original unlawful conduct of the member state and the alleged damage. This was suggested by Advocate General Darmon in *Cato*. He pointed out that the member state measure could never have applied in the first place, were it not for the approval by the Commission. In his view, the United Kingdom's failure to comply with the provisions of the directive 'was not capable *per se* of causing the damage suffered by Mr Cato'. Rather, the 'direct origin' of his damage was the unlawful approval of the national scheme by the Community.[1452]

1448 Säuberlich (n 68) 237–238.

1449 CJEU, Joined Cases 9 and 12/60 *Vloeberghs* (n 893) 240.

1450 AG Gand, Opinion in CJEU, Joined Cases 5, 7, 13-24/66 *Kampffmeyer* (n 977) 279; AG Mayras, Opinion in CJEU, Case 14/78 *Denkavit Commerciale* (n 1372) 2511 [emphasis added], 'I shall concede, for the purposes of this application, that there has been damage and that the immediate cause was, *at least in part*, the Commission's failure to act in the manner desired by the applicants.'; AG Dutheillet de Lamothe, Opinion in CJEU, Case 4/69 *Lütticke* (n 894) 346, who, even though applying a high threshold for the establishment of the causal link, acknowledges that '[I]n truth, the fact that in this case they are essentially national decisions […] is not by itself decisive.'; implicitly also AG Darmon, Opinion in CJEU, Case C-55/90 *Cato* (n 1174) para 44.

1451 AG Gand, Opinion in CJEU, Joined Cases 5, 7, 13-24/66 *Kampffmeyer* (n 977) 279.

1452 AG Darmon, Opinion in CJEU, Case C-55/90 *Cato* (n 1174) para 45.

4.4.3 Joint or concurrent liability

In light of the previous sections, the Union or its member states may be liable for contributing to or not preventing breaches by other authorities. The liability of the facilitating actor does not *per se* affect the liability of the primary actor. This is indeed the only situation of joint or concurrent liability that has been unequivocally recognised by the CJEU (in *Kampffmeyer*).[1453] Thus, as a rule, the primary and the facilitating actor both incur liability.

This raises a number of questions. The following outlines which court(s) applicants may turn to in those situations and discusses the effects of proceedings instituted in parallel in more than one legal order.

4.4.3.1 Court competence

The existence of more than one authority potentially liable for the same damage does not affect the distribution of competences between the CJEU and national courts in the area of non-contractual liability. Actions against the Union are still to be brought before the CJEU, whereas national courts retain jurisdiction to hear claims for compensation against national authorities. This means that even in circumstances where the Union and a member state are liable for the same damage, the respective actions against them cannot be brought before a single court.[1454]

Procedurally, the action for damages against the Union is not subsidiary to the action before a national court. In other words, an application is not inadmissible merely because another authority may be liable for the same damage. This means that applicants do not have to first seek compensation from the member state, unless the general 'Unifrex-rule' applies.[1455] In this vein, only actions for compensation of damage that consists of a sum unduly charged by a national authority require exhaustion of national remedies that offer reimbursement of these amounts. That rule indeed affected a group of applicants in *Kampffmeyer*, where the Court distinguished two categories of applicant in relation to whom the Community was in principle liable.[1456] The first consisted of applicants that had made the imports in question

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1453 CJEU, Joined Cases 5, 7, 13-24/66 *Kampffmeyer* (n 977); Säuberlich (n 68) 238–247; Oliver (n 876) 301–303; Renzenbrink (n 1246) 113–115; Harding (n 1317) 402–405; see also CJEU, Case C-30/66 *Becher v Commission*, 30 November 1967, ECLI:EU:C:1967:44; *Becher* will not be further referred to, since it merely reiterates the findings in *Kampffmeyer*.

1454 Oliver (n 876) 286–289.

1455 This is evident from CJEU, Joined Cases 5, 7, 13-24/66 *Kampffmeyer* (n 977); more recently this approach was confirmed in CJEU, Case T-138/03 *É. R. and Others* (n 1383) paras 40-43; CJEU, Case T-317/12 *Holcim (Romania)* (n 1198) paras 73-77; the question was not addressed upon appeal; for the more general 'Unifrex-rule' see above 4.3.5.2.

1456 CJEU, Joined Cases 5, 7, 13-24/66 *Kampffmeyer* (n 977) 263; There was a third category of applicant—those that had not concluded import contracts at all. The Court dismissed these actions since no recoverable damage had been incurred (see 267).

but were unlawfully compelled to pay levies. The second concerned those importers that repudiated their contracts of purchase after their licences had been refused. Their recoverable damage consisted of the penalties which they had had to pay for repudiating the contracts and to some extent a loss of profit.[1457] The Court required (only) the applicants belonging to the first group to prove that they had exhausted all local methods of recourse to obtain reimbursement of the sums improperly charged. Only after obtaining such evidence, would the Court decide whether any damage still existed that the Community may have to make good.[1458]

In this light, applicants suffering damage for which the Union and one or more member states are liable can choose to bring their action against either of them or institute parallel proceedings in Union and national courts. Whilst the Court has never explicitly addressed this question, it seems that in any case, they may claim compensation for the entire damage (note: not just a specific 'portion' equivalent to the respondent's share of the 'blame'). This is so in particular because neither court is competent to assess the contribution of the other authority to the damage, which would be necessary in order to allocate the shares of liability.[1459] Any apportionment of the monetary compensation paid would have to be dealt with as between the liable parties, even though it is unclear under what procedure.[1460]

4.4.3.2 The impact of parallel proceedings

Even though applicants can choose whether to bring an action against any one of the liable authorities or lodge parallel complaints, the latter option has consequences for each of the proceedings. These were set out by the Court in *Kampffmeyer*. The applicants in relation to whom the Court had found the Community to be liable in principle, informed the Court of parallel actions instituted against Germany concerning the same damage. The Court held that,

> It is necessary to avoid the applicants' being insufficiently or excessively compensated for the same damage by the different assessment of two different courts applying different rules of law. Before determining the damage for which the Community should be held liable, it is necessary for the national court to have the opportunity to give judgment on any liability on the part of the Federal Republic of Germany.[1461]

1457 Ibid 263–266.

1458 Ibid 263–264.

1459 In this vein, in ibid, the Court did not limit the Community's liability to only part of the damage and indeed left open the possibility that it could be liable for the whole, if Germany was not ordered to pay compensation; see also the Opinion of AG Gand, 269, in the same case; see also AG Darmon, Opinion in CJEU, Case C-55/90 *Cato* (n 1174) para 44 (Opinion 1); in detail explaining the reasons, Säuberlich (n 68) 241–247; Renzenbrink (n 1246) 169–174; This principle seems to apply only as between several public authorities. If the 'other causes' are private, or the applicant, the Union may be held liable only for its 'share', see in particular CJEU, Case F-50/09 *Lusignano* (n 1384) paras 185-197.

1460 Säuberlich (n 68) 253–257; Renzenbrink (n 1246) 174–176.

1461 CJEU, Joined Cases 5, 7, 13-24/66 *Kampffmeyer* (n 977) 266.

The Court thus stayed the proceedings awaiting the decision of the national court on the matter.

This approach in *Kampffmeyer* has been widely criticised.[1462] Most importantly, it renders Union liability substantively subsidiary to member state liability, for which there is no compelling reason.[1463] Moreover the approach chosen by the Court may also render it particularly lengthy and complicated for applicants to obtain compensation, to the extent that the fact that more than one authority is liable for the same damage proves disadvantageous to applicants.[1464] In *Kampffmeyer*, after the CJEU had decided to stay the proceedings awaiting the final decision of the German courts on the matter, a German court at first instance, in a decision that was later overturned on appeal, indeed did the very same. As a consequence, the applicant concerned was caught in 'a vicious circle, the European Court and the German court waiting for each other's final judgment'.[1465] Altogether, the proceedings in *Kampffmeyer* remained stayed for almost 20 years and were only finally removed from the Court's register only in 1986.[1466]

However, it does not currently seem that the Court has abandoned the approach in *Kampffmeyer*. In two more recent cases, É. R. and Others and *Holcim (Romania) I*, it reiterated that where the same damage is subject to parallel actions for compensation before the CJEU and national courts, it may be necessary to await the outcome of the national proceedings in order to avoid the applicant being insufficiently or excessively compensated.[1467]

4.4.4 Liability for associated conduct in the context of joint operations

It is clear from the above that the mere fact that one authority assists another in the commission of a breach of Union law does not *per se* lead to liability. In this vein, the financial and administrative support Frontex renders

1462 In addition to the authors cited in the following, see in particular the alternative suggestions made by Harding (n 1317) 404–405; Renzenbrink (n 1246) 176–183; see also AG Darmon, Opinion in CJEU, Case C-55/90 *Cato* (n 1174) para 18 (Opinion 2), who suggested that the Court take the opportunity presented by *Cato*, to respond to the criticism voiced against *Kampffmeyer* and 'demonstrate that the principles laid down in *Kampffmeyer* result, in certain special circumstances where reparation can no longer be obtained from national courts, in the imposition on the Community of *the obligation to ensure* that the individual whose subjective rights have been infringed will be adequately compensated.'

1463 Oliver (n 876) 288; Säuberlich (n 68) 242–243; Renzenbrink (n 1246) 161–162; see also Harding (n 1317) 404–405, who indeed suggests regarding Community liability as primary in cases such as *Kampffmeyer*.

1464 Harding (n 1317) 403–404; Oliver (n 876) 288.

1465 Theodor Elster, 'Non-contractual Liability under two Legal Orders' (1975) 12 Common Market Law Review 91, 95; also Renzenbrink (n 1246) 163–164.

1466 Oliver (n 876) 302.

1467 CJEU, Case T-138/03 *É. R. and Others* (n 1383) para 42; CJEU, Case T-317/12 *Holcim (Romania)* (n 1198) paras 78-83, this question was not addressed upon appeal.

in the preparation and implementation of joint operations is as such insufficient to make it liable for fundamental rights violations that may occur in that context. The same is true for its contributions with technical or human resources. Similarly, participating states are not liable for fundamental rights violations during joint operations merely because they contributed technical or human resources to that operation.

Having said this, there are circumstances in which liability arises under EU law for contributing to or not preventing breaches by other authorities. In light of the previous sections, such liability arises if the following cumulative conditions are met:

1. An obligation to supervise another authority in the application of Union law, or an obligation to protect individuals from violations committed by others exists (an 'associated obligation').[1468]
2. The associated obligation confers rights on individuals.[1469]
3. There is a breach of the associated obligation that can be considered sufficiently serious.[1470]
4. There is a sufficiently direct causal link between the breach of the associated obligation and the damage sustained by the individual.[1471]

Whether these conditions are met has to be assessed with respect to each specific situation. Nonetheless, the following sections set out the general circumstances under which Frontex, participating states, and the host state incur associated liability.

4.4.4.1 Associated liability of Frontex

Frontex' primary liability is limited to the unlikely event of breaches that are committed by coordinating staff or stem directly from the Operational Plan. Against this background, the question addressed here is whether Frontex' extensive financial, administrative, and other support, renders the agency liable *in addition to the respective state* for having contributed to or facilitated fundamental rights violations committed in the context of joint operations. Associated liability only arises under the four conditions mentioned above, i.e. a sufficiently serious breach of an associated obligation that confers rights on individuals and has a direct causal link to the damage.

As part of its coordinating and supervisory function, Frontex is required to oversee the correct implementation of the operation according to the Operational Plan. This duty is predominantly exercised by the Coordinating Officer designated for the specific joint operation. It explicitly includes

1468 See above 4.4.1.
1469 See above 4.4.2.1.
1470 See above 4.4.2.2.
1471 See above 4.4.2.3.

monitoring the protection of fundamental rights.[1472] Moreover, the Executive Director is under an obligation to withdraw financial support, or suspend or terminate the joint operations, when fundamental rights violations are concerned that are of a serious nature or likely to persist.[1473]

In addition to its monitoring and supervisory obligations, Frontex is also bound more generally by fundamental rights law, encompassing in principle (positive) obligations to protect, i.e. obligations to take all reasonable measures to protect individuals from fundamental rights risks known to the agency. Considering the agency's presence in the Joint Coordination Board and the extensive reporting obligations of personnel involved in joint operations, Frontex can be assumed to generally have knowledge of (risks of) fundamental rights violations that may occur in the context of operations it coordinates.[1474] Frontex' positive obligations in this respect are reiterated in the EBCG Regulation, which indicates that fundamental rights obligations during joint operations are not limited to *respecting* them but include the duty to *guarantee* and *ensure* they are complied with.[1475] In relation to return operations more specifically, Article 28 EBCG Regulation, whilst clarifying that Frontex may not enter into the merits of a return decision, unequivocally states that the agency 'shall ensure that the respect for fundamental rights, the principle of *non-refoulement*, and the proportionate use of means of constraints are guaranteed during the entire return operation'.[1476]

However, as explained in more detail above, positive obligations of EU bodies only arise within the limits of their existing competences.[1477] In this vein, also Frontex can only be called upon to step in and protect individuals, if and to the extent it can do so with the competences conferred on it. For instance, maintaining migrant reception facilities is outside Frontex' competences. Thus, if the conditions in a specific facility within an area where a joint operation takes place infringe Article 4 CFR (such as in Example 3), Frontex is under no obligation to rebuild or restock that facility, or set up an entirely new one. However, the agency does have the competence to take a broad range of other measures to protect individuals in such circumstances. For example, it has to ensure that the facilities used during an operation fulfil minimum fundamental rights standards before launching the operation. If the inadequacies only become evident at a later stage, it can still stop sending migrants apprehended during a joint operation to a facility, or terminate the operation altogether should other options not be feasible.

1472 This is explicitly mentioned in EBCG Regulation (n 18) art 22(3)(b).
1473 Ibid art 25(4); for more detail see above 2.4.4.3.
1474 For more detail see above 2.4.2 and 2.4.4.1.
1475 EBCG Regulation (n 18) art 34(1) and (2) [emphasis added]; see also Rijpma, 'The Proposal for a European Border and Coast Guard' (n 23) 29; Rijpma, 'Hybrid agencification in the Area of Freedom, Security and Justice and its inherent tensions' (n 46) 97.
1476 EBCG Regulation (n 18) art 28(1, 3, 7).
1477 See above 4.4.1.2.

In this light, it may be assumed that Frontex has
- a general duty to monitor the correct implementation of the Operational Plan, including fundamental rights,
- a specific duty to withdraw financial support, or suspend or terminate a joint operation when fundamental rights violations occur that are serious or likely to persist, and
- a duty, under fundamental rights law, to protect individuals from violations that are foreseeable, as far as this is within the competences of the agency.

Whilst it is thus clear that Frontex indeed has various 'associated obligations', the crucial question is whether a breach thereof is capable of giving rise to liability.

Generally speaking, this is so only if they can be considered to confer rights on individuals. It should be recalled in this context that obligations to protect arising from fundamental rights law *per se* confer rights on individuals, even though they have so far not directly given rise to liability.[1478] Also, the obligation to withdraw financial support, or suspend or terminate a joint operation when fundamental rights violations occur that are serious or likely to persist appears to be clearly designed for the protection of individuals. In light of *Kampffmeyer*, this may also be argued with respect to the more general obligation to oversee the correct implementation of the Operational Plan, in particular because it specifically mentions the requirement to monitor fundamental rights compliance.

However, as discussed above, the case of *Ledra Advertising* suggests that breaches of supervisory obligations may also be capable of giving rise to liability, if the primary obligation breached confers rights on individuals, at least where fundamental rights are concerned.[1479] Since the fundamental rights commonly at stake during joint operations confer rights on individuals, this in itself may be sufficient to render a breach by Frontex of its obligations to monitor compliance with fundamental rights capable of giving rise to its liability.[1480]

In any case, breaches by Frontex of its supervisory or protection obligations only trigger liability if they are sufficiently serious. A number of factors are relevant in this respect. These include, first, how clear it was for the agency that the obligations at stake required it to take action in a specific case. In other words, the question is whether it knows about a violation in the first place. In this respect, it is useful to recall that all incidents occurring during joint operations are immediately reported to the Frontex Situation Centre.[1481]

1478 See above 4.4.2.1.
1479 See above 4.4.2.1.
1480 See above 4.2.1.3.
1481 See above 2.4.4.1.

In addition, Frontex has a representative present at all times within the Joint Coordination Board.[1482] In this light, it is safe to assume that the agency commonly has, or should have, knowledge of fundamental rights violations that occur. In those circumstances, its monitoring obligations unequivocally require it to take action.

Second, and most importantly, the establishment of the breach and its seriousness depend on the extent to which the agency has to and actually did make use of the measures available to it to respond to a fundamental rights violation by a member state. Whilst Frontex cannot chose *whether* to monitor the implementation of the Operational Plan and compliance with fundamental rights, it has a margin of discretion regarding *how* to do that.

As a rule, the more obvious and persistent a fundamental rights violation, the more actively Frontex can be expected to take measures to prevent or stop it. Three more general observations can be made in this respect. First, clearly, if it takes no measures whatsoever, this is likely to amount to a sufficiently serious breach of its monitoring obligations, making Frontex liable alongside the respective state. Second, if it takes some measures, it will be necessary to assess whether a reasonably acting authority could have considered them appropriate and sufficient to respond to the violations at stake. In other words, the question is whether Frontex acted with due diligence. Possible measures include communicating views to the host member state through the Coordinating Officer, withdrawing financial support, or suspending or terminating a joint operation.[1483] In addition, in practice, it may use its position within the Joint Coordinating Board to prevent member states from breaching fundamental rights during operations. Third, in case of fundamental rights violations that are serious or likely to persist, the Frontex Regulation clearly prescribes that the agency has to take one of several measures, i.e. it has to withdraw its financial support, or suspend or terminate the operation. Thus, in this situation, Frontex has a more limited degree of discretion in deciding how to respond to a violation. The failure to take any of these measures is capable of making Frontex liable.

Finally, a sufficiently direct causal link between the breach of an associated obligation and the damage sustained by the individual only exists if the lawful execution of the obligation would (almost certainly) have changed the member state's behaviour in such a way as to reduce or prevent the negative consequences. Thus, each specific case requires an assessment of the likely effects of the measures Frontex should have taken.

In sum, Frontex has a number of obligations to supervise or protect, arising from the EBCG Regulation, but also fundamental rights law more generally.

1482 See above 2.4.2.

1483 See in particular EBCG Regulation (n 18) arts 21(2), 21(3), 22(3)(d), 25(3), 25(4).

These obligations can be considered to confer rights on individuals, either alone or, in light of *Ledra Advertising*, together with the primary fundamental rights obligation at stake. Thus, Frontex incurs liability for contributing to, facilitating, or not preventing breaches of fundamental rights that may occur during joint operations, provided the breach can be considered sufficiently serious and has a causal link with the damage in the specific case.

4.4.4.2 Associated liability of participating states

As opposed to Frontex, participating states have no supervisory obligations arising from the EBCG Regulation or the Operational Plans. Thus, an obligation not to contribute to or to prevent fundamental rights violations during joint operations can only stem from obligations under general fundamental rights law. Whilst EU fundamental rights law in principle imposes positive obligations to protect, the CJEU has not yet established the detailed conditions under which they arise. Since the CFR guarantees at least the same level of protection as the ECHR, it is assumed for the current purposes that obligations to protect an individual from violations committed by others arise when the violation was foreseeable and the state had means available to prevent it.[1484]

Even if positive obligations under the ECHR and the CFR arise under the same circumstances, legal responsibility for breaches thereof does not. For the current purposes, there are two important differences. First, a major limiting factor under ECHR law has turned out to be its extraterritorial applicability. This was found to rule out the otherwise possible responsibility of states contributing team members.[1485] In contrast to the ECHR, the CFR's applicability does not seem to be more limited extraterritorially than it is territorially.[1486] Accordingly, the CFR applies to member states when they participate in Frontex operations, even when the relevant conduct occurs extraterritorially from their viewpoint.

Second, whilst a 'simple' breach of the ECHR leads to responsibility, EU public liability law requires a breach to be sufficiently serious and to have a causal link with the damage. Thus, the circumstances under which liability arises for breaches of the CFR are more limited than is the case with respect to responsibility under the ECHR.

1484 This is the threshold developed by the ECtHR, see above 3.4.1.

1485 See above 3.4.1.3.2.

1486 Violeta Moreno-Lax and Cathryn Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014); see also AG Mengozzi in CJEU, Case C-638/16 PPU *X and X v Belgium,* ECLI:EU:C:2017:173, in particular paras 89-101. However, it should be noted that the precise extent of Charter obligations in extraterritorial settings remains unexplored in detail.

With these two caveats in mind, however, the analysis of participating states' responsibility for breaches of positive obligations in Chapter 3 may provide a starting point for the purposes of the current section.

Two aspects of participating states' involvement, from which their associated responsibility could arise, were distinguished in Chapter 3.[1487] The first concerns their contribution of human and technical resources as such. As was pointed out in Chapter 3, if fundamental rights law requires states to prevent infringements they know or ought to know of, they are clearly also prohibited from actively assisting in the activity in question. Participating states may be assumed to have knowledge of an imminent risk of human rights violations during a joint operation they intend to contribute to, where there are structural deficiencies in the host state, or the infringements are inherent in the design of the specific operation. For example, if a host state's human rights record exposes systemic failures that would inevitably materialise during a Frontex operation, it would be unlawful under fundamental rights law for participating states to contribute. Similarly, if the Operational Plan itself sets out a course of conduct that would be in violation of EU fundamental rights law, participating in it would also be unlawful under fundamental rights law.

At the same time, however, they are under an obligation, in accordance with the EBCG Regulation, to make personnel registered in a human resources pool available for joint operations, unless they are faced with an exceptional situation substantially affecting the discharge of national tasks.[1488] This is even more so when the specific operation in question is a rapid border control intervention, where states have to make personnel from the rapid reaction pool immediately available, as a general rule, regardless of their own needs.[1489] Whether or not the Court would nonetheless consider participating states to be entitled, or indeed obliged, to withdraw their support where this is required under fundamental rights law, remains open.

In any case, to incur liability, the breach of a participating state by contributing to such an operation would have to qualify as sufficiently serious. Factors relevant in this regard include the obviousness of the deficiencies of the specific operation and the extent of the contribution. Thus, liability for the contribution of human and technical resources as such only arises if the contribution is substantial, and the host state's fundamental rights record in the area of border management is clearly and immensely poor, or the Operational Plan contains blatant fundamental rights infringements. For example, if a participating state contributes a large military vessel to a sea border control operation whose Operational Plan unmistakeably sets out practices that

1487 See above 3.4.1.3.2.
1488 EBCG Regulation (n 18) arts 20(3), 29(3), 30(3), 31(3); see also above 2.3.2.1.1 and 2.3.2.1.3.
1489 Ibid art 20(5, 7); see also above 2.3.2.1.2.

would be in violation of the prohibition of *refoulement*, this may be sufficient to engage its liability.

The second conceivable possibility for participating states to incur associated liability is a failure to intervene or otherwise react at the moment a fundamental rights violation they (ought to) have knowledge of occurs. In Chapter 3, responsibility was found to depend on the type of contribution rendered by the participating state because different contributions come with different possibilities for gaining knowledge of and reacting to fundamental rights violations. In essence, there are three types of participating state.

The first type is states whose involvement is marginal. They, for example, contribute only minor technical equipment. As was pointed out in Chapter 3, they do not generally have the opportunity to gain knowledge of or the means to prevent fundamental rights violations. Thus, no obligations to prevent will commonly be triggered. In any case, a breach thereof would be unlikely to qualify as sufficiently serious.

In contrast, the second type, states contributing team members, might gain knowledge of imminent fundamental rights violations, especially if their team members report back to them. Since they are not commonly represented within the bodies running the joint operation (in particular the Joint Coordination Board), they do not have a broad range of response possibilities. One option would be for them to withdraw their assistance altogether. However, by doing so, as noted above, they would appear to thereby violate their obligations under the EBCG Regulation to make personnel registered in a human resources pool available for joint operations.

Either way, it is unlikely that they would incur liability under EU law for failing to withdraw their support, even if they could do so. On the one hand, this is because the failure would have to qualify as sufficiently serious, presupposing in particular that they *clearly* infringed their protective duties under fundamental rights law and that the fundamental rights violation they failed to prevent was obvious and severe. On the other hand, there would have to be a causal link between the participating state's failure to prevent and the damage sustained by the victim. This requires the victim to prove that a withdrawal of assistance would have 'almost certainly' prevented the fundamental rights violation. In conclusion, in relation to states contributing team members, their possible knowledge of fundamental rights risks may trigger positive obligations under EU fundamental rights law. However, they are unlikely to incur liability for breaches thereof due to the high threshold for liability to arise.

Finally, there is the third type, states contributing large assets, e.g. vessels, aeroplanes, or helicopters. These states are represented on the Joint Coordination Board via their representatives (the National Officials) throughout the whole operation. This ensures that they stay informed about incidents

during joint operations and the course of action taken. Whilst the consent of their respective National Official is only explicitly required for decisions of the Joint Coordination Board that affect their own large assets, their possibilities for influencing decisions extend to the activities during joint operations more generally. This is in particular because they are present and may voice their views in all daily meetings of the Joint Coordination Board, not only those that concern their own assets. In this light, they normally gain knowledge of risks of fundamental rights violations and have means to shape conduct during joint operations so as to prevent them.

If they fail to take all reasonable steps, despite knowing of a risk of a fundamental rights violation, states contributing large assets are likely to incur associated liability. On the one hand, their detailed knowledge of the events and course of conduct makes it clear to them when their positive obligations under fundamental rights law require them to take action. Thus, their failure to prevent is more likely to qualify as sufficiently serious than a failure by states only contributing team members. On the other hand, their possibilities for shaping conduct during joint operations may be sufficient to make an actual impact. Hence, their failure to use them is more likely to have a causal link to the damage than a failure by states contributing team members to withdraw assistance.

In sum, there appear to be only two situations where associated liability for violation of obligations to prevent may arise. The first is where a state substantially contributes to an operation that blatantly involves serious fundamental rights infringements. It is unclear, however, how their obligations to contribute assets under the EBCG Regulation would affect this assessment. The second is where a state contributes large assets, learns of a fundamental rights violation, but then does not use all reasonable means in order to prevent the breach.

Finally, it should be noted that it is unclear how the principle of mutual trust impacts on the analysis. Does it prevent associated obligations in the context of Frontex operations from arising under EU fundamental rights law in the first place? And/or is it an additional factor to be taken into account when analysing the seriousness of the breach? If that is the case, it is unlikely that participating states incur liability for having contributed to an operation despite knowing of imminent risks of fundamental rights violations.

4.4.4.3 Associated liability of the host state

As regards the host state, it is useful to recall here that questions of associated liability will not commonly arise. However, there appears to be one particular exception. This is where the host state, in the context of a joint return operation, returns a person that received a return order from another state, but doing so breaches the prohibition of *refoulement*.

Generally speaking, the host state is under an obligation, by virtue of Article 19(2) CFR, to refrain from returning individuals to states where they would face a real risk of being subjected to torture or inhuman or degrading treatment or punishment (the prohibition of *refoulement*). Clearly, the host state squarely infringes this prohibition when it orders a person that faces such a risk to leave its territory, and then executes this order. Consider, for instance, the possibility that in Example 4 a reasonable suspicion of ill-treatment upon expulsion arises in relation to one of the ten returnees 'contributed' by the host state.[1490]

But what if the return decision that is being executed within the framework of the return operation is issued by a participating state? The principle of mutual trust, as the CJEU held in *Opinion 2/13*, is of 'fundamental importance in EU law' and requires that member states consider all other member states 'to be complying with EU law and particularly with the fundamental rights recognised by EU law'.[1491] Indeed, the set-up, and even the idea, of joint return operations implies that the basic assumption is that all participating states comply with *inter alia* their fundamental rights obligations. The question this raises is whether and to what extent the principle of mutual trust affects the host state's obligations and/or liability in the context of return operations. In particular, is the host state allowed, or even required, to execute the return decision of another member state regardless of the principle of *non-refoulement*?

The principle of mutual trust appears to have one particular core consequence. Member states are prohibited, 'save in exceptional cases', from checking whether another member states has, in a specific case, observed the fundamental rights guaranteed under EU law.[1492] This was indeed one of the aspects rendering the Draft Agreement on Accession of the EU to the ECHR incompatible with EU law. The Draft Agreement, the CJEU pointed out, made no exception for EU member states in situations where they would, under the ECHR, be required to check each other's compliance with the Convention. This, in the view of the Court, was 'liable to upset the underlying balance of the EU and undermine the autonomy of EU law'.[1493]

Cases involving the principle of mutual trust and its relationship with fundamental rights typically concern transfers of individuals from one member state to another. Consider, for instance, *N. S. and Others*, *Abdullahi*, or *C.K. and Others*, all of which involved the transfer of individuals between member states under the Dublin Regulation.[1494] Another example is the more

1490 For Example 4 see above 1.3.1.
1491 CJEU, *Opinion 2/13* (n 452) para 191.
1492 Ibid para 192.
1493 Ibid paras 193-194.
1494 CJEU, Joined Cases C-411/10 and C-493/10 *N. S. and Others* (n 1386); CJEU, Case C-394/12 *Abdullahi* (n 1386); CJEU, Case C-578/16 PPU *C.K. and Others* (n 1387).

recent case of *Aranyosi and Căldăraru*, in which the transfer of an individual from one member state to another following a European Arrest Warrant was at stake.[1495] These types of case indeed touch upon the core of the principle of mutual trust because they raise the question of a direct assessment of the fundamental rights situation in one member state by another. Whilst this is generally prohibited under the principle of mutual trust, the CJEU did accept that some shortcomings cannot be overlooked, even when they occur in another member state. In *N. S. and Others* and *Abdullahi*, these were found to be 'systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum […], which provide substantial grounds for believing that the applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter'.[1496] In *Aranyosi and Căldăraru* as well as in *C.K. and Others*, however, the threshold was lower and the Court required member states to take into account the specific situation of the individual concerned in determining whether there is a real risk that the person will be subjected to treatment contrary to Article 4 CFR once surrendered or transferred.[1497]

Against this background, two considerations appear to be of specific importance for the present purposes. One is that at the core of the principle of mutual trust is the prohibition of EU member states checking up on each other's fundamental rights performance. Hence, a host state may generally not assess the conformity with EU law of a return decision issued by another state, including fundamental rights law. This is indeed explicitly set out in relation to Frontex, which, as set out in Article 28(1) EBCG Regulation, may not enter into the merits of return decisions.[1498] In light of the principle of mutual trust, it may, however, be assumed that also the host state is not allowed, much less required, to do so.

This is, however, not what is at stake here. The question is not whether the host state may assess the legality of a return decision, but rather whether it has to rely on and implement it, in the process of returning an individual to a third state. In other words, the question is whether a state may assess the risks an individual would face upon expulsion to a third state despite the general assumption that another member state has already done so. Relying, in this sense, on a participating state's return decision does not seem to be required by the EBCG Regulation. To the contrary, Article 28(3) EBCG Regulation explicitly obliges all states participating in a return operation as well as the agency, to *ensure* the respect for fundamental rights, in particular the

1495 CJEU, Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* (n 1387).

1496 CJEU, Joined Cases C-411/10 and C-493/10 *N. S. and Others* (n 1386) para 106; CJEU, Case C-394/12 *Abdullahi* (n 1386) para 60; see also above 4.4.1.2.

1497 CJEU, Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* (n 1387) paras 88-94; CJEU, Case C-578/16 PPU *C.K. and Others* (n 1387) paras 73-76; see also above 4.4.1.2.

1498 EBCG Regulation (n 18) art 28(1).

principle of *non-refoulement* during the entire return operation. This indeed seems to *prohibit* a host state from carrying out a return blindly relying on the return decision of another member state.

The other consideration is that the principle of mutual trust is not absolute. In 'exceptional circumstances', it is rebutted. In this context, the CJEU afforded particular significance to the prohibition of torture and inhuman or degrading treatment or punishment, including the protection against *refoulement*. In both *Aranyosi and Căldăraru* as well as in *C.K. and Others* for example, it specifically pointed out the absolute nature and fundamental importance of that right.[1499] If the prohibition of *refoulement* is capable of rebutting the principle of mutual trust in the context of its core area of application, this also has to be the case in situations that do not even involve assessing the legality of another member state's conduct, but are primarily concerned with the risks an individual faces in a third state. There is no doubt that this approach, whereby the principle of mutual trust does not exempt member states from carrying out an individualised examination of the situation of the person concerned, is indeed required under fundamental rights law.[1500]

In light of these considerations, it is submitted here that the principle of mutual trust does not require a state hosting a return operation to abstain from assessing the risks that an individual who has received a return order from a participating state would face upon expulsion to a third state. Even if it did, the presumption of fundamental rights compliance of that order would be rebutted where, in the context of a return operation, a reasonable suspicion arises that the expulsion would infringe the prohibition of *refoulement*. Hence, if returning an individual to a third state, despite a real risk of treatment contrary to Article 4 CFR in that state, the host state of the return operation violates its fundamental rights obligations under EU law and consequently incurs liability. That liability, it should be noted, leaves the possible liability of the participating state that issued the decision unaffected.

4.4.5 Interim conclusion

This section analysed the circumstances under which the actors not directly liable for a specific breach are nonetheless liable for conduct associated with it. The central question examined was whether contributing to, or not preventing, a violation of fundamental rights, may render the facilitating actor liable.

1499 CJEU, Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* (n 1387) paras 85-87; CJEU, Case C-578/16 PPU *C.K. and Others* (n 1387) para 59.

1500 See in this respect in particular ECtHR, *Tarakhel* (n 488) para 104; see also above 3.4.1.2.2; in CJEU, Case C-578/16 PPU *C.K. and Others* (n 1387) the CJEU indeed appears to have brought its case law in line with *Tarakhel*.

It was found in this section that contributions by one authority to breaches by another do not as such trigger liability. This is unless four conditions are met:

1. An obligation to supervise another authority in the application of Union law, or an obligation to protect individuals from violations committed by others exists (an 'associated obligation').
2. The associated obligation confers rights on individuals.
3. There is a breach of the associated obligation that can be considered sufficiently serious.
4. There is a sufficiently direct causal link between the breach of the associated obligation and the damage sustained by the individual.

In the context of Frontex operations, three broad situations were identified, in which questions of associated liability may arise.

The first concerns Frontex, who extensively contributes to and monitors joint operations, but is unlikely to ever incur primary liability. The question this raises is whether Frontex is liable *in addition to the respective state* for fundamental rights violations committed in the context of joint operations.

The analysis revealed that Frontex incurs far-reaching associated obligations. In particular, it has to supervise the conduct of member state authorities during joint operations, which includes ensuring they comply with EU fundamental rights law. In addition, it incurs positive obligations under EU fundamental rights law to protect individuals from violations committed by others. All of these obligations can, as a general rule, be considered to confer rights on individuals, either alone or together with the primary fundamental rights obligation at stake. Thus, Frontex incurs liability for a breach of its supervisory or protective obligations if the breach can be considered sufficiently serious.

Both types, the supervisory and protective obligations, are generally due diligence obligations. As a rule, the more obvious and persistent a fundamental rights violation, the more actively Frontex can be expected to take measures to prevent or stop it. Once Frontex gains knowledge of a fundamental rights violation, it may for example use its position within the Joint Coordination Board to prevent fundamental rights violations, communicate its views on the host state's instructions to the host state, withdraw its support from the joint operation, or terminate it altogether. It is generally up to the agency to decide which measures to take (not: whether to take measures). However, in the case of persisting and serious violations, it *has to* withdraw its support or terminate the operation. If it does not act at all, does not take sufficient measures, or does not withdraw or terminate in case of persistent violations, it is liable.

In practice, this means that Frontex is likely to incur associated liability for

having failed to correctly monitor the operations and protect the affected individuals in Examples 2, 3, and 4. In contrast, in Example 1, liability is unlikely, in particular because the violation at stake hardly seems foreseeable.

The second situation concerns participating states. The question addressed in this section was whether they are liable *in addition to the primarily liable state* for breaches other than those committed by their own large assets (e.g. vessels, airplaines). It was found that participating states have no particular supervisory obligations. Yet, to the extent they have knowledge of and means to prevent fundamental rights violations, they are required, under EU fundamental rights law, to protect individuals from violations committed by others.

However, the analysis showed that there appear to be only two scenarios where associated liability for a violation of obligations to protect may arise. On the one hand, this is where a state substantially contributes to an operation that blatantly involves serious fundamental rights infringements. Consider, for instance, Example 3, in which individuals are transferred to a reception facility that does not meet minimum fundamental rights standards. It may be that State A's reception facilities in or near the operational area are notoriously sub-standard, or that the inadequate conditions become blatantly obvious in the context of the operation. In those circumstances, State C may be liable, if it can be considered to have substantially contributed to the operation or failed to take available measures to protect the affected individuals. This is assuming that the CJEU would consider obligations to protect under fundamental rights law as displacing participating states' obligations under the EBCG Regulation to contribute assets to joint operations.

On the other hand, a participating state may also incur associated liability if it contributes a large asset, learns of a fundamental rights violation, but then does not use all reasonable opportunities that accompany that sort of participation in order to prevent the breach. Imagine, for instance, that a migrant boat is handed over by a host state vessel to third state authorities in violation of the principle of *refoulement* (see the Variation to Example 2). Even though the operation was not conducted by State B's vessel, State B was still present on the Joint Coordination Board when the relevant decisions were discussed and made. If it failed to use all the means reasonably available to it to change the course of conduct, it is liable for not having protected the affected individuals.

In all other instances, the involvement of a participating state, or its possibilities for gaining knowledge of and effectively preventing fundamental rights violations, are generally insufficient to trigger an associated obligation in the first place, but in any event for a breach thereof to qualify as sufficiently serious.

The third situation concerns the host state. In light of its comprehensive primary liability, the host state's associated liability will not regularly arise. However, there is one practically relevant situation where it does. This is the scenario illustrated in Example 4, in which the state hosting a return operation returns a person that received a return order from another state, but doing so breaches the prohibition of *refoulement*. Whilst the precise effects of the principle of mutual trust in this context remain unclear, the analysis showed that under EU fundamental rights law, the host state has to carry out an individualised assessment of the situation and may indeed incur liability if it returns an individual despite a risk of maltreatment.

Against this background, it should be highlighted that when fundamental rights violations are committed during joint operations, in most situations at least two actors will be liable under EU law. Commonly, this is the host state (who regularly incurs primary liability), together with Frontex (who incurs associated liability for many violations), and sometimes also one or more participating states contributing large assets (who incur primary liability for the violations of their own large assets, and potentially also associated liability for violations of others). Hence, in the context of Frontex operations, joint liability is not the exception, but the rule. In this light, it is important to recall the difficulties individuals may face in implementing joint liability under EU law. In particular, there is no common forum to bring such claims. Moreover, proceedings instituted in parallel may result in a long wait for resolution if the relevant courts decide to wait for each other's judgments.[1501]

The findings of this section are summarised in Table 13.

1501 For more detail see above 4.4.3.

Table 13: Summary of findings (4)

	ECHR			CFR	
	Primary responsibility	**Associated responsibility (obligations to protect)**	**Associated responsibility ('complicity')**	**Primary liability**	**Associated liability**
Frontex/EU	No responsibility	No responsibility	No responsibility	Liability for breaches by Frontex staff; liability for breaches that result directly from OPlan	Liability if not performing its supervisory obligations; liability if not meeting its positive obligations under fundamental rights law
Host state	Responsibility for breaches by local staff and standard team members	Responsibility for not preventing breaches of others, e.g. breaches by team members on large assets contributed by participating states	Responsibility for assisting in breaches of others, e.g. breaches by team members on large assets contributed by participating states	Liability for breaches by local staff and team members, including those on large assets	Liability for implementing a return decision in violation of the prohibition of *refoulement*
Participating state (minor technical equipment)	No responsibility	No responsibility (no jurisdiction)	As a rule no responsibility (impact of assistance low, lack of knowledge and possibilities)	No liability	No liability
Participating state (standard team member)	No responsibility	No responsibility (no jurisdiction)	Responsibility for assisting in breaches they have knowledge of	No liability	As a rule no liability (not sufficiently serious)
Participating state (large assets, e.g. vessels, aircraft)	Responsibility for breaches by team members on large assets they contributed	Responsibility for not preventing breaches by the host state or other participating states if they had the means to prevent	Responsibility for assisting in breaches of the host state or other participating states	Liability for breaches by team members on large assets they contributed	Liability for not preventing breaches by the host state or other participating states if they had the means to prevent

4.5 Conclusion

This chapter has determined the circumstances under which the actors participating in Frontex operations are liable under EU law if breaches of fundamental rights are committed in the course of the operations.

The liability of Frontex is based on Article 60(3) of its founding Regulation, which replicates Article 340(2) TFEU regarding the liability of the Union. The member states' liability is not explicitly mentioned in the Treaties, but was recognised as being implicitly required under Union law by the CJEU in *Francovich* and case law building on it. Despite having different bases, Union bodies and member states incur liability under the same conditions.

There is no fundamental rights-specific liability regime under Union law. Thus, the **conditions for public liability** apply to fundamental rights just like any other breach of Union law. This means that Frontex and participating member states incur liability under EU law for breaches that may occur during a joint operation, if a number of conditions are fulfilled. Liability presupposes (1) a sufficiently serious breach (2) of a rule of law that confers rights on individuals, (3) damage on the part of the applicant, and (4) the existence of a causal link between the unlawful conduct and the damage complained of. Whilst the lack of fundamental rights-specific cases in the area of public liability law mandates caution in drawing general conclusions, the following may be inferred from the Court's case law in the area of public liability law.

A provision is considered to confer rights on individuals when it includes the protection of individuals as one of its objectives, as long as the right ensuing from that provision is sufficiently identifiable. In total, only a small number of fundamental rights have provided the basis of liability claims. Nonetheless, they are commonly more generally considered, or assumed, to confer rights on individuals. This is certainly the case with respect to those provisions of the CFR containing 'rights', as opposed to 'principles'. In this light, the rights commonly at stake during Frontex operations, in particular the freedom from torture, the right to life, the prohibition of *refoulement*, the right to asylum, and the right to private and family life, confer rights on individuals that they may rely on in order to seek compensation for damage suffered as a result of a breach thereof.

A breach is considered sufficiently serious when the authority concerned manifestly and gravely disregarded the limits on its discretion. The key rule that emanates from the Court's case law in this respect is that breaches based on a 'reasonable unlawful interpretation' of the provision in question are not sufficiently serious, whereas those based on an 'unreasonable unlawful interpretation' are. An unlawful interpretation is 'unreasonable', especially when it must have been clear what a lawful interpretation would have

been and the situation the provision was applied to was not particularly complex. Often, in areas of reduced or even no discretion, the distinction between lawful and unlawful conduct is straightforward. Hence, in those areas a mere breach may be sufficient to trigger liability.

The Court's application of these factors to the fundamental rights context has not been entirely consistent. However, some general remarks can be made. First, with respect to the rights at stake during joint operations, discretion regularly has to be considered limited or non-existent. Second, by the very nature of these rights, in particular the prohibition of torture and inhuman or degrading treatment or punishment, any violation has to be considered sufficiently serious. Finally, many fundamental rights obligations that apply during border control operations have already been clarified, for example by the ECtHR. Against this background, it seems that when fundamental rights violations occur in the context of Frontex operations, these will commonly qualify as sufficiently serious.

If all four conditions for liability are fulfilled in a particular case, the central question is whether it is Frontex, or one or more member states, alone or together, that have to compensate the victims for the breaches they suffered.

This chapter first analysed how liability arising directly from a fundamental rights violation committed during joint operations is allocated among the actors involved (**primary liability**). Frontex, according to Article 60 EBCG Regulation, is liable for damage caused by its staff. In the context of Frontex operations, that means Frontex is liable for fundamental rights violations that may be committed by its own coordinating personnel. However, the major challenge is that all other deployed personnel, e.g. local staff or team members, are subject to the multi-layered authority regime. In other words, their breaches are under the shared authority of several actors that may include Frontex, the host member state, and/or other participating member states. This renders the allocation of liability for their conduct more complex.

In this light, this chapter set out to develop general rules on allocation of liability from the Court's case law that govern situations where breaches of EU law are committed under the partial authority of the Union and its member states. For that purpose, it proposed a categorisation of the most common multi-actor situations in EU law. These were identified as the (independent) application of Union legislation by member states on the one hand, and the cooperative application of Union legislation on the other. Since Frontex does not have the competence to legislate, joint operations, as a rule, fall into the second category.

The key principle deduced from the Court's case law is that liability follows legal decision-making power. In other words, the authority that enjoys legal room for manoeuvre is legally capable of choosing lawful over unlawful conduct and incurs liability if opting for the latter. Whether that choice

may be more limited in practice than in law is typically of no relevance. In essence, this means that with respect to each fundamental rights violation committed by local staff or team members during Frontex operations, the actor that was empowered to determine the conduct at the origin of the violations in a legally binding manner will incur liability.

The analysis showed that in the context of Frontex operations, as a general rule, the host state enjoys legal decision-making power. Not only local staff, but also persons deployed as team members have to observe the national law of the host state and follow its instructions. Consequently, the host state incurs liability if fundamental rights violations are committed during joint operations. There is, however, one exception. The legal authority over large assets, such as vessles, aeroplanes, or helicopters, is shared between the host state and the relevant home state, who has to consent to decisions affecting its assets. Thus, fundamental rights violations by large assets give rise to the joint liability of both the host and the home state.

Frontex, in contrast, only has one instrument with which it may determine the conduct of local officers or team members in a legally binding manner—the Operational Plan. In the unlikely event that the Operational Plan itself infringes fundamental rights, Frontex is liable, together with the host state, for the resulting breaches. Beyond that, however, Frontex' means of influence may give it some factual control over conduct during joint operations, but no legal control. Thus, as long as fundamental rights violations do not result from the conduct of its own coordinating staff or the Operational Plan itself, Frontex incurs no primary liability.

In sum, the primary liability for breaches of fundamental rights committed during Frontex operations lies with the host state if they result from conduct of local staff or any of the team members deployed during joint operations, including breaches committed by large assets. In relation to breaches committed by large assets, the host state is liable jointly with the respective contributing state. Breaches resulting from the joint conduct of two or more persons that engage the liability of different entities make them jointly liable to compensate the victim for the damage sustained.

These findings raise the question of whether those actors not directly liable for a breach in a specific case may still be liable for contributing to, or not preventing it. More specifically, is Frontex liable *in addition to the respective state* for fundamental rights violations committed in the context of joint operations? Similarly, are participating states liable *in addition to another state* for breaches other than those committed by its own large assets?

Such **associated liability** has rarely formed the basis of actions for damages. Generally speaking, it requires that an obligation to supervise another authority in the application of Union law, or an obligation to protect individuals from violations committed by others, has been breached in a suf-

ficiently serious manner, provided it confers rights on individuals. In addition, it is necessary to establish that the lawful exercise of these obligations would have reduced or prevented the negative consequences.

The analysis showed that Frontex has far-reaching obligations to supervise the conduct of member state authorities during joint operations. It also incurs obligations to protect under EU fundamental rights law. All of these obligations are capable of giving rise to Frontex' liability where it fails to live up to them, provided the breach can be considered sufficiently serious. In that context, the seriousness of the infringement to be prevented, and the measures actually taken by Frontex, determine whether or not a specific breach can be considered sufficiently serious. Frontex may, for example, use its position within the Joint Coordination Board, communicate its views on instructions to the host state, withdraw its support from the joint operation, or terminate it altogether. As a rule, the more obvious and persistent a fundamental rights violation, the more actively Frontex has to take measures to prevent or stop it.

Considerably more complex, as this analysis found, is the associated liability of participating states. They incur obligations to protect under EU fundamental rights law, triggered, in essence, as soon as they know or ought to know of a violation. As due diligence obligations, these obligations to protect require participating states to act upon their knowledge by using all means reasonably available. Some participating states are unlikely to gain knowledge of human rights violations and even more so to prevent them. These are in particular states whose involvement does not go beyond the contribution of minor technical equipment. Other states may indeed gain knowledge of a human rights violation, but have few possibilities to act upon that knowledge. Consider, in particular, a state that contributes standard team members. Those team members may report back to their home state on matters that include fundamental rights. However, once learning of a fundamental rights risk, virtually the only possibility for the participating state is to withdraw its assistance altogether. This, in turn, conflicts with the obligation under the EBCG Regulation to make personnel available in the first place. In any case, however, such a failure to react would be unlikely to qualify as sufficiently serious, considering *inter alia* the lack of clarity of the obligation at stake and the actual options of the state in question.

In this light, this chapter identified two practically relevant situations in which participating states may incur associated liability. The first is the scenario where a state substantially contributes to an operation even though it blatantly involves serious fundamental rights infringements, even though it is also unclear in this situation how the obligation under the EBCG Regulation to contribute to joint operations would affect the analysis. The second concerns the case where a state who is involved in an operation with large assets learns of a fundamental rights violation but does not use all reason-

able means available to it, in particular its position on the Joint Coordination Board, to prevent the breach. In both cases, the certainty that fundamental rights violations occur and the possibility of affecting the outcome may qualify the failure to protect the affected individuals as sufficiently serious.

As opposed to Frontex and participating states, questions regarding the host state's associated liability arise with less frequency, given its comprehensive primary liability. The only relevant situation identified in this chapter was return operations in which the suspicion arises that the return of an individual may violate the prohibition of *refoulement*. The analysis revealed that the impact of the principle of mutual trust in this context is not entirely clear. However, fundamental rights law requires the host state to carry out an individualised assessment, regardless of the return decision the participating state adopted prior to the operation. If the host state returns an individual despite a risk of maltreatment upon expulsion, it may thus incur liability under EU law separate from the possible liability of the state that adopted the return decision in question.

In sum, individuals that have suffered fundamental rights violations in the context of joint operations have the following possibilities for claiming compensation within the EU legal order: In most circumstances the host state incurs primary liability for fundamental rights violations that occur during joint operations. Thus, an individual victim may hold the host state liable before the national courts of that state. In some instances, a participating state will be liable alongside the host state. This is true in particular where a participating state's large assets were directly involved in the breach. Even if they were not, a participating state may be liable if it could have, but did not protect the persons affected. Individual victims may additionally hold Frontex liable before the CJEU if the agency did not make use of the means available to it in order to prevent the fundamental rights violation. Frontex' liability will arise alongside the primarily liable state.

In conclusion, liability for breaches of the CFR during Frontex operations is allocated among the actors involved as follows:

- Host states
  - incur primary liability for breaches committed by local staff, and by persons deployed as team members by participating states or Frontex, including team members on large assets,
  - incur liability for returning an individual in violation of the prohibition of *refoulement*, regardless of the fact that another state adopted the return decision.
- Frontex
  - incurs primary liability for breaches committed by its own (coordinating) staff and, together with the host state, for breaches that directly result from the Operational Plan,

  - incurs associated liability if it fails to supervise the conduct of member state authorities during joint operations, or if it is fails to protect individuals from breaches by host or participating states.
- Participating states that contribute large assets
  - incur primary liability for breaches committed by large assets they contributed,
  - incur associated liability if they fail to protect individuals from breaches by the host state or other contributing states, e.g. breaches by team members or large assets of another state, or by local staff.
- All other participating states
  - incur no primary liability,
  - incur no associated liability.

The **practical implications** of these findings are discussed in the following.

EXAMPLE 1: EXCESSIVE USE OF FORCE

A Frontex operation, hosted by State A, is ongoing at A's land border. A team of border surveillance officers, including officers of A, but also of State C, spot a large group that has just crossed the border. Upon request, the persons detected are unable to show the necessary documents. When the border guards try to apprehend them, the situation gets out of hand and they have to use force in order to transfer them to a local reception facility. During an ensuing screening interview, one of the migrants plausibly claims that he had been subjected to excessive force by C's officer in violation of the prohibition of inhuman or degrading treatment (Article 3 ECHR, Article 4 CFR).

State A is liable for the infringement of Article 4 CFR committed by State C's officer. The reason is that it has the power to determine the conduct of C's officer in a legally binding manner, in particular because it is entitled to issue instructions which C's officer has to obey. In contrast, State C is not liable for its officer's breach because it transferred the relevant aspects of authority over its officer to A.

State C is also not liable for failing to prevent the breach committed by its officer. State C incurs obligations to protect under EU fundamental rights law, but these require it to prevent only those breaches that were foreseeable and possible to prevent. Under normal circumstances, it is unlikely that the excessive use of force was foreseeable. More importantly, State C has virtually no means to react to breaches other than withdrawing its officer(s) altogether, which in turn contradicts its obligation under the EBCG Regulation to make assistance available to the host state. In any case, given the difficulties in foreseeing and preventing violations such as the excessive use of force by a deployed officer, a failure to prevent is unlikely to amount to a breach that is sufficiently serious so as to trigger liability.

Finally, Frontex is also not directly liable for the breach committed by C's officer, essentially because it had no authority to legally determine the conduct of C's officer. More importantly, however, in the circumstances described in Example 1, it is also not liable for having failed to prevent it. Frontex, under its founding Regulation, is required to supervise member states in the implementation of joint operations, which includes ensuring that activities are in conformity with fundamental rights. In addition, under EU fundamental rights law it incurs obligations to protect individuals from fundamental rights violations committed by others. These are, however, due diligence obligations. Importantly, Frontex' staff on the ground are not commonly scheduled to be on patrol with other officers, but work from offices set up in the area. In this light, it is likely that they would have learned of the excessive use of force too late to be able to prevent it. Since a diligent authority could therefore not have been expected to act any differently, Frontex is not liable for not having prevented the breach. Only if the circumstances were such that Frontex could have prevented the excessive use of force by State C's officer but did not do so, may it indeed be liable for failing to live up to its obligations to supervise and protect.

In conclusion, only State A is liable in Example 1.

EXAMPLE 2: REFOULEMENT AT SEA

A Frontex operation, hosted by State A, is ongoing at A's sea border. A vessel contributed to the operation by State B (variation: by State A itself) is patrolling the operational area, when it observes a suspicious boat. Once the boat is within sight, it can be confirmed that the boat carries a large number of migrants accompanied by smugglers. The vessel attempts to intercept the boat by the repeated use of light and sound signals but the boat refuses to comply. After warning shots into the air, a crew member fires shots at the engine of the boat, immobilising it. The boat is towed to the territorial waters of a third state and handed over to its authorities in violation of the prohibition of *refoulement* and the prohibition of collective expulsions (Article 3 ECHR, Article 4 Protocol No. 4 ECHR, Article 19 CFR).

States A and B are liable together for the violation of the CFR committed by State B's vessel. The reason is that together they have the power to determine the conduct of B's vessel in a legally binding manner. State A is in principle entitled to decide on instructions issued to B's vessel via its central position within the Joint Coordination Board, the body running the operation. However, State B has a national representative on the Joint Coordination Board who has to be consulted whenever decisions affect B's vessel. In addition, the vessel's Commanding Officer receives the instructions that result from the Joint Coordination Board's decisions only from the national representative. The crucial point is that States A and B thus share the authority over the conduct of B's vessel. Even though the consequences of shared

legal control for the purposes of liability have not yet been clarified by the CJEU, it can be assumed that it triggers the joint liability of States A and B.

If the same infringement occurs but is committed by State A's vessel, States A and B may both still be liable, but on different bases. State A is directly liable for the breach committed by its vessel, State B is not. However, State B incurs obligations to protect under EU fundamental rights law, requiring it to prevent breaches that were foreseeable and possible to prevent. As opposed to State C in Examples 1 and 3, State B is more involved in the operation. It is represented on the Joint Coordination Board, which not only allows it to stay informed in relation to daily occurrences during joint operations, but also provides it with the possibility to react if it learns of a risk of a fundamental rights violation. If it fails to use these possibilities, it breaches its obligations to protect under EU fundamental rights law. In particular, if the fundamental rights violation it failed to protect was obvious and serious, and it took no measures at all, this breach may also qualify as sufficiently serious so as to engage State B's liability alongside the liability of State A.

In addition to States A and B, Frontex is also liable in both of the two scenarios. Even though its legal control over State B's (or State A's) vessels is insufficient to incur primary liability, Frontex is required, as pointed out in relation to Example 1, to take all reasonable measures to ensure member states do not commit fundamental rights violations during joint operations. It is crucial in this regard to emphasise that Frontex is represented in the Joint Coordination Board at all times and therefore gains knowledge of any circumstances or decisions that may lead to a fundamental rights violation. As a diligent authority, it has to use all reasonable means available to it to change the course of conduct in order to prevent or mitigate the foreseeable breach by State B's vessel. This includes, for example, communicating to the relevant states (in particular to State A) that the decision with respect to the course of conduct of State B's vessel is in violation of the Operational Plan and EU fundamental rights law. If that is unsuccessful, it may withdraw its financial support, or suspend or terminate the operation altogether. If it fails to take any of these measures, Frontex is liable alongside States A and B for not preventing the breach committed by State B's vessel.

The question Example 3 poses is whether State C and Frontex are liable for having failed to prevent the fundamental rights infringements suffered by the migrants that were brought to State A's reception facilities after having been picked up in the context of a Frontex operation.

EXAMPLE 3: INHUMAN CONDITIONS IN RECEPTION FACILITIES

A Frontex operation, hosted by State A, is ongoing at A's external borders. As part of this operation, a team of border surveillance officers including officers of A, but also of State C, apprehends a group of persons that had previously been dropped off by a smugglers' boat. The group is transferred to a local reception facility. On site, screening and debriefing experts deployed by Frontex conduct interviews with migrants in order to identify their country of origin and collect intelligence regarding the routes and practices of human smugglers. Frontex has an 'office' in the area, from where a Frontex representative coordinates local activities. The conditions in the reception facility had been deteriorating for a while. The most pressing problem is that A's authorities have run out of money to buy sufficient food for everyone. Even though forcing persons to stay there violates the prohibition against treating them in an inhuman or degrading manner, the team, including officers of A and C, transfer the apprehended migrants to that facility (Article 3 ECHR, Article 4 CFR).

Note: Setting up and maintaining migrant reception facilities is outside the mandate of Frontex operations. The responsibility of states for human rights violations directly resulting from the conditions in reception facilities is thus outside the scope of this study. However, migrants may be in a reception facility because they were brought there in the context of a Frontex operation. This raises the question whether the actors involved in joint operations may be responsible for having brought a migrant to a reception facility where the conditions do not live up to minimum human rights standards.

State C's officer indeed helps to realise the fundamental rights violation, by handing over apprehended migrants to the facility in question. It is important to remember, first, that the conduct of State C's officer only engages direct liability of State A, because the officer acts under A's legal control. However, State C, as pointed out already in Example 1, incurs positive obligations to protect under EU fundamental rights law that require it to prevent breaches that were foreseeable and possible to prevent. The infringement could have been foreseeable for State C. Consider, for example, that C's officer may continue to report back to C, raising issues such as these. In any case, if State A notoriously fails to maintain reception facilities that live up to minimum fundamental rights requirements, State C must be assumed to be aware. The crucial question then is whether State C took all reasonable measures to prevent the violation. This will depend on a number of circumstances, for example whether C could have made sure other reception facilities would be used, or whether C could have been expected to refuse participation in the first place, or withdraw its assistance later on. As noted already in relation to Example 1, the latter option may conflict with C's obligation under the EBCG Regulation to assist the host state in the context of joint operations. Depending on how clear it was that the reception facility did not meet minimum fundamental rights standards, how extensive State C's contribution was, and what measures State C could have, and actually did take,

a breach by State C of its positive obligations may qualify as sufficiently serious and thus trigger its liability. Considering the CJEU's strict interpretation of the conditions for liability, however, it seems that this would only be the case under exceptional circumstances.

Frontex, in contrast, is more likely to be liable for not having prevented the infringement of the CFR. As noted in relation to Examples 1 and 2, Frontex is required to take all reasonable measures to ensure member states do not commit fundamental rights violations during joint operations. In the context of Example 3, it is clear that Frontex knew the state of the reception facility. If the conditions did not live up to fundamental rights standards before the operation was launched, a diligent authority could have been expected, for example, to implement the operation in a different area, make sure State A improves the conditions in the reception facility before the start of the operation, or design the operation so as to avoid having to transfer migrants there. Taking into account the fundamental rights risks (including the detention conditions in a member state) before launching a joint operation is indeed envisaged as the first step according to the standard operating procedure Frontex has adopted in order to ensure respect of fundamental rights in joint operations. If the conditions only deteriorated whilst the operation was under way, Frontex could have made the necessary changes so migrants were not transferred to that specific facility anymore. Ultimately, if that was not possible, Frontex would have had the option to withdraw its support, or suspend or terminate the operation altogether. Failing to take any of these measures means that Frontex is liable for not having lived up to its obligations to supervise and protect.

EXAMPLE 4: REFOULEMENT AND RETURN OPERATIONS

State A organises a return operation. The destination is State Z (who is not a Schengen state). Persons that have been identified as nationals of Z and have received individual return orders qualify as 'returnees'. 10 returnees are already in State A. Participating states escort returnees to A, bringing the total number to 30. A Frontex project manager travels with them. Before take-off, it becomes apparent that three returnees escorted from participating State C had been presented with a return order immediately after their arrival. They convincingly argue that they would be at risk of being subjected to torture if returned (Article 3 ECHR, Article 19 CFR).

Note: The adoption of return decisions is outside the mandate of Frontex operations. The responsibility arising directly from the adoption of a return decision is thus outside the scope of this study. However, joint return operations involve the execution by a host state of return decisions issued by a participating state. This raises the question whether actors involved in Frontex return operations may be responsible for returning a person in violation of the prohibition of refoulement in the implementation of another state's return decision.

In Example 4, a reasonable suspicion arises that executing the return decision issued by a participating state would violate the prohibition of *refoulement*. Regardless of the legality of and liability for the return decision itself, this raises the question of whether the host state and Frontex are liable for the execution itself.

The principle of mutual trust allows, and sometimes requires, the authorities of one member state to trust in the fundamental rights compliance of decisions issued by the authorities of another. This study found, however, that the principle of mutual trust does not require State A to execute the return decision issued by State C when this would violate that prohibition of *refoulement*. Being bound to ensure the respect for the prohibition of *refoulement* during return operations it hosts, State A has to assess whether an individual would face a real risk of treatment contrary to Article 4 CFR, if a reasonable suspicion arises. In Example 4, if State A carries out the return regardless, it incurs liability under EU law.

In addition, Frontex too is required to ensure that return operations are carried out in conformity with the principle of *non-refoulement*. In Example 4, it was apparent to the Frontex officer on the ground that the implementation of the operation would be in violation thereof. A failure to halt the return of the individual at risk engages Frontex' liability under EU law.

5 Conclusion

This study examined the legal responsibility for human rights violations that may occur in the context of operations coordinated by Frontex. Frontex is an EU agency that supports Schengen states in the management of their external border *inter alia* by organising joint operations. In the framework of a joint operation, a state (referred to as a 'host state') receives assistance in order to carry out border control activities at its external borders or to return third country nationals that have no right to stay. This assistance mainly consists of additional human and technical resources made available by other Schengen states (referred to as 'participating states') or Frontex. In addition, Frontex finances the operations and coordinates the activities of the various actors involved.

Practically speaking, this means that a migrant intending to cross the EU external border in State A may encounter a border guard of State B using equipment provided by State C in an operation funded by Frontex. This poses the fundamental question of how responsibility is distributed among the parties involved, where unlawful activities are performed during a joint operation. It is particularly important to clarify the allocation of responsibility among the actors involved in joint operations because border control and return operations inherently touch upon a broad range of human rights. In this light, this study centred on the distribution of responsibility among the actors involved in Frontex operations, determining to what extent each of their contributions may trigger responsibility.

Two regimes of legal responsibility were chosen as frameworks for the analysis: responsibility for breaches of the ECHR on the one hand, and liability under EU law for breaches of the CFR on the other. 'Liability' refers to the non-contractual liability of Frontex under Article 60(3) EBCG Regulation (which in turn is based on the non-contractual liability of the Union under Article 340 TFEU), and state liability as developed by the CJEU. The approach adopted within both legal frameworks was to first determine the general rules applicable to multi-actor situations more generally and then apply them to Frontex operations.

The following summarises the findings and practical implications of this study. It then sets out the main obstacles to determining, incurring, and implementing responsibility identified throughout this study and puts forward recommendations on how to address them.

5.1 Joint operations and legal responsibility under the ECHR and EU public liability law

5.1.1 Joint operations, deployed resources, and transfer of authority

Joint operations coordinated by Frontex may either be border control or return operations. During border control operations, the host state receives assistance in controlling its external air, land, or sea borders, that is, in detecting, preventing, and responding to irregular migration flows. In this vein, the additional human and technical resources made available by participating states and Frontex are typically deployed in order to verify whether a person fulfils the conditions governing entry, to conduct screening and debriefing interviews, and to surveil the border with a view to preventing unauthorised border crossings. In the context of return operations, member states, under the lead of a host state, together carry out the return of persons that have no right to stay. Whilst not all return operations include the deployment of additional human resources, when they do, this may include return monitors, forced-return escorts, or other specialists. Hence, the most characteristic element of joint operations, when compared to unilateral operations, is that foreign personnel, such as border guards, return specialists, or other relevant staff, using foreign equipment, carry out law enforcement activities in the host state.

A large majority of personnel, and definitely all law enforcement personnel, are deployed from 'pools' set up by Frontex in order to plan activities more efficiently and make swift reaction possible. These pools consist of officers contributed by Schengen states, and officers seconded to Frontex and then contributed to the pool by the agency. Personnel deployed from a pool have the status of 'team members' (formerly 'guest officers'). This is crucial because that status brings with it a range of executive powers conferred by virtue of EU law. In particular, they have the capacity to perform all tasks and exercise all powers in relation to border control and return, can carry service weapons, and under certain circumstances may resort to the use of force. Together with the local staff, team members therefore form the central corps of personnel relied on to carry out joint operations. In addition to personnel from a human resources pool, Frontex can also deploy its own staff to joint operations. However, these can only fulfil coordinating and similar tasks, and may in particular not exercise law enforcement activities and are not conferred executive powers. There seems to be a misconception that participating as a foreign officer in a Frontex operation makes a person a 'Frontex officer'. That is, however, not true. In fact, persons deployed to a host state in the framework of a Frontex operation may be 'Frontex officers', but most of them are not. In the narrowest sense, only Frontex staff deployed with coordinating tasks are 'Frontex officers'. Beyond this, personnel seconded to the agency and then contributed to an operation are also considered contributions by Frontex. Whilst these may be called 'Frontex

officers' in a broader sense, they are not, as revealed in this study, for the purposes of responsibility.

All joint operations are based on an Operational Plan that is drawn up specifically for each operation and sets out *inter alia* the aims of the operation, area and period of implementation, tasks of each participant, and command and control arrangements. The Operational Plan is central to determining the allocation of responsibility among the actors involved, particularly because it regulates the relationship between them and the authority they exercise over the deployed resources.

In terms of responsibility, the most important aspect of the implementation of joint operations is the transfer of authority over deployed resources that takes place. Whilst the EBCG Regulation clearly and unequivocally envisages an exclusive authority of the host state to issue instructions to team members, command and control arrangements are more complex in practice. In accordance with the Operational Plan, an International Coordination Centre is set up for each operation. It is located in the host state and serves as the focal point for leading and coordinating the implementation of all operational activities. Within the International Coordination Centre, a Joint Coordination Board is established to run the operation. It is led by a host state officer. Importantly, those participating states that contribute large (often military) assets, such as vessels or aeroplanes, send a so-called National Official, who represents them in the Joint Coordination Board throughout the whole operation. The Joint Coordination Board holds daily meetings where the past 24 hours are discussed and the course of action for the ensuing 24 hours is decided. The Joint Coordination Board's 'decision-making' is informal and largely relies on consensus among all participants. However, even though as a rule they are informed and consulted, the National Officials have no general *right* to be consulted, even less to take or block decisions. Yet, there is an important exception. Decisions that affect the course of conduct to be adopted by large assets *require* the National Official of the state who contributed the assets to be consulted. Whilst there is no formal right to block a decision, in practice any course of conduct involving a participating state's large asset is only implemented with the consent of the respective National Official. The decisions reached by the Joint Coordination Board are communicated by a host state official to the team leaders on the ground, who are also host state officers and in turn instruct the members of their teams accordingly. Only instructions to large assets are communicated directly by the National Official of the state who contributed it to the Commanding Officer of the assets, an officer of the same state, who in turn instructs the asset's crew accordingly. It is noteworthy that the representation on the Joint Coordination Board and resultant privileges of states contributing large assets have, as this study showed, far-reaching implications for the human rights responsibility of these states.

Joint operations may touch upon a number of human rights of affected migrants. Most frequently, this concerns the protection from *refoulement*, i.e. the prohibition against sending individuals back to a place where they would face especially serious maltreatment, and the prohibition of collective expulsion. However, as a law enforcement activity, border management may also include coercion or the use of physical force and is thus particularly sensitive to a person's human dignity and physical integrity. Importantly, if human rights violations occur in the context of a joint operation, or are suspected to have occurred, these must be immediately reported to Frontex and the host state in the framework of a strict incident reporting system. Under certain circumstances, this triggers an obligation for Frontex to suspend or terminate an operation, or withdraw its financial support.

5.1.2 Preconditions for legal responsibility under ECHR and EU law

States are responsible under the ECHR when conduct that is attributable to them is in breach of the Convention. These two preconditions, attribution and breach, are sufficient for responsibility to arise. This is fundamentally different under EU law, where liability only arises for breaches of individual rights that qualify as sufficiently serious and have a causal link to damage that the victim suffers. Since there is no fundamental rights-specific liability regime, these conditions apply to fundamental rights just as to any other breach of Union law. In the fundamental rights context, neither the individual rights requirement, nor damage and causal link generally pose significant obstacles to liability. The sufficiently serious breach requirement, however, may.

A breach only qualifies as sufficiently serious, and consequently triggers liability, when the authority in question manifestly and gravely disregarded the limits on its discretion. The key rule in determining the seriousness of a breach was found to be that breaches based on a *reasonable* unlawful interpretation of the provision in question are not sufficiently serious, whereas those based on an *unreasonable* unlawful interpretation are. Essentially, the clearer an obligation and its application to a specific situation, the more 'unreasonable' it is to disobey it. In this vein, where the content of an obligation has been clarified, for example by the Court, or is otherwise evident either more generally or in a specific situation, a breach thereof is sufficiently serious to trigger liability. Similarly, the narrower the extent of discretion that an authority enjoys, the more 'unreasonable' it is to overstep the limits of discretion in a specific case.

What exactly this means for breaches of fundamental rights obligations is unclear. A fundamental rights analysis already involves a balancing exercise in order to distinguish (lawful) interference from (unlawful) breaches. Moreover, fundamental rights form particularly important guarantees in democratic societies. With this in mind, there is an argument to be made that

all fundamental rights breaches are 'unreasonable', and consequently sufficiently serious for the purposes of public liability law. The CJEU, however, has so far failed to develop a consistent line of case law in this respect. This renders it highly unpredictable whether, and under what circumstances, fundamental rights violations give rise to public liability. One may speculate that much depends on the type of right involved. In the context of Frontex operations, where infringements typically concern rights such as the right to life, the prohibition of torture and inhuman or degrading treatment or punishment, and the prohibition of *refoulement*, this means that breaches may automatically be considered as sufficiently serious, simply because of the nature of the rights involved. This is even more so when considering that many of the obligations at stake have already been clarified, for example by the ECtHR.

Based on the higher threshold for responsibility under EU law than under ECHR law, it may be expected that actors involved in Frontex operations are less likely to incur liability under EU law than they are to incur responsibility under the ECHR. However, the analysis revealed that this is not the case. In essence, ECHR law imposes other obstacles on responsibility in cases of cross-border multi-actor situations, such that the final result differs less from EU law than might have been expected.

5.2 Allocation of responsibility in multi-actor situations: the general rules

Under both ECHR and EU law, responsibility was analysed in the framework of two different conceptual bases. The first is the responsibility that arises *directly* from a human rights violation committed during an operation, referred to here as primary or direct responsibility. For example, if a person is expelled in violation of the prohibition of *refoulement*, primary responsibility is the responsibility that directly results from that breach.

The second is the responsibility that arises for *conduct associated with the primary violation*, referred to here as associated or indirect responsibility. Associated responsibility arises for assistance in, or failure to protect an individual from, breaches of human rights for which another actor is primarily responsible. For example, if a person is expelled in violation of the prohibition of *refoulement* and the host state is directly responsible for it, Frontex or participating states may incur responsibility for failing to prevent that infringement.

This section summarises the general rules identified under both ECHR and EU law in relation to primary and associated responsibility.

5.2.1 Allocation of primary responsibility under ECHR and EU law

A state is directly responsible for a breach of the ECHR only insofar as it can be considered the 'author' of the breach, in other words, if the course of conduct at the origin of the breach is *attributable* to it. 'Attributable' means that the conduct of a physical person is characterised, from the point of view of the Convention, as an act of a specific state. In this vein, where several actors were involved in a breach, the distribution of responsibility directly resulting from it depends on whether the impugned conduct is attributable to one, some, or all of them.

International law provides for a set of rules on attribution of conduct, represented by the Articles on State Responsibility (ASR) and the Articles on Responsibility of International Organizations (ARIO), that are applicable in the context of the ECHR. These envisage, generally speaking, that conduct of persons in a public function qualifies as state conduct. In most cases, this means that the conduct of a state's organs is attributable to its 'home state'. That basic rule is stipulated in Article 4 ASR. The same applies *mutatis mutandis* to international organisations, as set out in Article 6 ARIO.

However, the ASR provide a specific rule for cases where one state lends its organs to another. This is indeed what happens in the context of Frontex operations. Participating states and Frontex lend personnel to the host state so they can support it in carrying out border management activities. The relevant attribution rule is Article 6 ASR. It sets out that the conduct of a lent organ may be attributable to the receiving state, but only under very strict circumstances. This study found that, most importantly, the lent organ needs to exercise governmental authority for the purposes and under the law and exclusive instructions of the receiving state, not under the instructions of the sending state. In other words, Article 6 ASR requires that the lent organ is under the genuine and exclusive legal authority of the receiving state. Practically speaking, this means that the host state is directly responsible for human rights infringements during joint operations, provided the participating actors transfer sufficient authority to it, so that their personnel can be considered 'lent' to the host state within the meaning of Article 6 ASR.

Notably, the application of Article 6 ASR 'breaks' the original link between the lent organ and its home entity. In other words, if the authority of the receiving state over the lent organ is sufficiently exclusive to trigger the application of Article 6 ASR, so is attribution. This means that lent organs are considered organs *only* of the receiving state under whose exclusive legal authority they operate, not joint organs of the sending and the receiving state. Consequently, if the conduct of personnel deployed during Frontex operations is attributable to the host state, they do not engage the responsibility of their home states.

In the same vein, Article 7 ARIO sets out the circumstances under which the conduct of organs lent by states to an international organisation is attributable to the latter. Because during Frontex operations not only the host state, but also Frontex exercises a certain degree of authority over personnel involved, this raises the question of whether Article 7 ARIO renders their conduct attributable to the EU whilst they exercise their tasks and powers during joint operations. Even though neither the EU nor Frontex itself can be held directly responsible under the ECHR, Article 7 ARIO is relevant to this study because if the conduct of personnel deployed to joint operations is indeed attributable to the EU, it does not necessarily trigger the (primary) responsibility of the states involved under the ECHR.

Article 7 ARIO provides that conduct of organs lent to an international organisation is attributable to it if the international organisation exercises 'effective control'. This has been defined as factual control that is exercised over the specific impugned conduct. What is remarkable is that, on this issue, Article 7 ARIO sets out a different threshold from its twin provision Article 6 ASR. In particular, it requires a *de facto* relationship to the international organisation, instead of a *de jure* relationship. It is also noteworthy that, as opposed to Article 6 ASR, the application of Article 7 ARIO does not necessarily 'break' the link of the organ in question with its home entity because it only requires the control of the international organisation to be 'effective', but not 'exclusive'.

The allocation of direct responsibility under EU law is even more complex than under the ECHR. In essence, the reason is that there is simply neither a conceptual framework to address questions of allocation of liability, nor explicit substantive rules that govern such situations. It is unclear whether liability is distributed on the basis of rules on attribution of conduct, rules on attribution of damage, rules on causation, or any other concept. The conceptual foundation on the basis of which liability is allocated, however, matters. Most importantly, this is because different substantive rules may apply. Further adding to the lack of clarity, the CJEU is also not explicit about the substantive rules on the basis of which it distributes liability among several potential wrongdoers and has failed to develop a coherent line of case law in this area. The Court's *ad hoc* approach makes it difficult to deduce any general rules that would govern multi-actor situations.

This study sought to address primarily the question of what substantive rules apply to multi-actor situations, rather than their theoretical foundation. For this purpose, it identified and categorised multi-actor situations that are likely to arise under EU law and examined the results the Court reached regarding the liability of the actors involved. On that basis, this study defined a tentative set of key rules that seemed to inform the allocation of liability to one or another actor. The overarching principle that emerged is that liability follows legal decision-making power. Importantly,

this threshold was developed exclusively from the CJEU's case law concerning the distribution of liability between the Union and its member states, as it has yet to clarify how liability would be allocated among several member states whose conduct may be at the origin of an unlawful outcome.

How do the rules on allocation of primary responsibility under ECHR and EU law compare? First, among states, both legal frameworks set out the threshold of normative control as decisive. Of course, this is assuming that the CJEU would not apply different thresholds governing the distribution of liability between Union bodies and member states on the one hand, and between member states on the other. There is, however, one noteworthy difference in this respect. Whereas ECHR law requires normative control to be exclusive if it is to trigger the responsibility of a state for the conduct of a 'foreign' organ, this does not seem to be necessary under EU law.

Second, the decisive threshold governing the distribution of responsibility between the EU and its member states differs under ECHR and EU law respectively. Whereas under ECHR law *factual* control is decisive, it is *normative* control under EU law. The analysis in this study, as described below, showed that in the specific case of Frontex, this difference does not affect the final result reached, because neither of the two thresholds that would trigger the EU's/Frontex' responsibility is met. However, if Frontex' powers further expand, it will make a crucial difference for the distribution of responsibility for unlawful conduct during joint operations, whether these powers equip it with factual or legal control, or both.

5.2.2 Allocation of associated responsibility under ECHR and EU law

When a state cooperates in the unlawful activity of another, or watches it happen without using its powers to prevent it, this inevitably raises the question whether that state should share some of the responsibility for the undesired outcome. Exploring this question, this study found that this may be, but is not always, the case. The mere fact of having helped another authority to act unlawfully is not, in itself, sufficient to engage the facilitating actor's responsibility. Generally speaking, associated responsibility only arises when the supporting action or omission is prohibited by an 'associated obligation' and the facilitating actor did not live up to that obligation in the specific case.

This study overall identified three different types of associated obligation. Obligations to protect, obligations to supervise, and obligations to abstain from rendering aid or assistance. The first type arises under both ECHR law and EU fundamental rights law. The second type, in the present context, arises only under EU law. The third type, for the purposes discussed in this study, is specific to international law. It is, strictly speaking, not concerned with 'obligations', but rather with responsibility arising for a contribution to a wrong regardless of whether the facilitating actor has engaged in conduct

prohibited by a primary obligation under international law. These rules are relevant to the ECHR because they may, as this study revealed, offer protection where obligations to protect do not.

All of these are in essence due diligence obligations. On the one hand, typically there needs to be a trigger for these obligations to arise in a specific case. The trigger is commonly related to the knowledge a facilitating actor has, or should have, about the risk of unlawful activities or their continuation. On the other hand, associated obligations tend to be obligations of means, not of result, in that they require authorities to make the effort that they can reasonably be expected to make in the circumstances of the case. If the authority does so, it is typically not considered to have infringed its associated obligations, regardless of whether the unlawful outcome occurs anyway.

Despite these similarities, there are also important differences between these types of associated obligation.

Obligations to protect individuals from interference by others may be negative, where the protection requires an authority to abstain from a certain course of conduct, such as in the context of the prohibition of *refoulement*. However, in most situations, that will not be sufficient and the effective protection of an individual requires an authority to actively interfere with the course of conduct of the direct perpetrator. So, obligations to protect are often positive obligations. These in turn are heavily dependent on the actual options an authority has in a specific situation. As a rule, they arise only when the authority knew or should have known that an individual's rights were at risk of being interfered with, and only to the extent the authority has means available to protect the individual. Obligations to protect, positive or negative, in principle exist under both ECHR and EU law. However, positive obligations are considerably less developed under EU fundamental rights law and, most importantly for the present purposes, do not seem to have given rise to actions for damages. In addition, they may conflict with the principle of mutual trust, a challenge that has not yet been addressed by the CJEU in the context of Frontex' activities.

Like obligations to protect, obligations to supervise also require authorities to take positive action. As noted already, in the present context, these only arise under EU law in the sense that Frontex is required to ensure all actors during joint operations comply with fundamental rights, at least to some extent. However, as opposed to obligations to protect, the general orientation of obligations to supervise is towards ensuring compliance with the law more generally, rather than specifically protecting individuals. They may thus not always confer rights on individuals that can be invoked in the context of an action for damages. This study found that very general supervisory obligations alone do not confer rights on individuals, but more specific supervisory obligations may. In this vein, it may be assumed that Frontex'

supervisory obligations do confer rights on individuals. The Court more recently suggested that it may be sufficient that the provision with which an authority is required to ensure compliance (the 'primary obligation') confers rights on individuals. Thus, simply speaking, if Frontex is required to ensure that host and participating states comply with fundamental rights, then individuals can invoke breaches of Frontex' supervisory obligations in the context of the action for damages because fundamental rights confer rights on individuals. It is, if this argument is accepted, irrelevant whether Frontex' supervisory obligations themselves confer rights on individuals. However, for the time being, the Court has not yet fully clarified the precise circumstances under which obligations to supervise confer rights on individuals and to what extent that is always necessary.

Finally, there are the rules on aid or assistance, specific to international law. These rules provide that states who knowingly aid or assist another state in the commission of an internationally wrongful act are responsible, as long as they are themselves bound by the obligation which is breached by the state receiving the support. As opposed to obligations to protect and obligations to supervise, responsibility under the rules on aid or assistance generally only arises for active conduct in support of another authority, but not for omissions. However, this study found that where a state is already generally involved in a situation, a failure to intervene, once it becomes clear that unlawful conduct occurs or is about to occur, also triggers the facilitating actor's responsibility. In this vein, in the context of Frontex operations, states that learn of a breach may be responsible if they do not react to it. However, the most important aspect in relation to the rules on aid or assistance in the present context is the following: Whilst it is required that the breach by the state receiving the support would be unlawful if committed by the assisting state, there is no need, in addition, for an obligation that prohibits a state from rendering assistance. For example, if the host state breaches the prohibition of *refoulement* during a Frontex operation, participating states may incur responsibility for rendering aid or assistance regardless of whether they additionally are under an obligation not to assist in that violation. This study showed that for this reason, the rules on aid or assistance may prove a useful tool for the protection of individuals to fill the 'gap' left by obligations to protect discussed in the following paragraphs. However, associated responsibility under the ECHR currently only arises if and to the extent a state infringes its obligations to protect.

Both ECHR and EU law each pose significant obstacles to associated responsibility. In ECHR law, these arise when the facilitating acts or omissions happen across state borders. The ECHR, according to its Article 1, requires all contracting parties to secure to everyone *within their jurisdiction* the rights and freedoms defined in the Convention. Whilst an individual that is within a state's territory is also within that state's jurisdiction it is more complex when the individual is not. In essence, individuals that are outside a state's

own territory or a territory that the state controls, are only considered to be within that state's jurisdiction, if they are otherwise under the authority and control of that state's organs. Authority and control over an individual may consist of physical power, e.g. detention, or the (legal) exercise of public powers that are normally exercised by the government of the territory in question. This is important because from the perspective of participating states, individuals whose rights may be infringed during a joint operation are outside their territory. In this vein, a participating state may be held responsible under the ECHR for having failed to protect an individual from human rights interference by the host state within its own jurisdiction only if and to the extent that it exercises authority and control over the individual in question. This study revealed, as will be recalled in the following section, that this threshold is indeed not met with respect to most participating states.

EU fundamental rights law does not have a limitation similar to Article 1 ECHR. However, there is a different obstacle to associated liability. It should be noted at the outset that the CJEU has hardly ever, and indeed never in much detail, dealt with the question of associated liability. Whilst much is therefore left open for speculation, it appears that the generally high threshold for liability may pose a significant obstacle to associated liability. On the one hand, liability only arises if a facilitating actor's failure to protect or supervise qualifies as 'sufficiently serious'. In that context, the extent of the obligations to protect or supervise, the required standard of diligence, the extent of involvement of the facilitating actor, and the seriousness of the primary breach may play a role. A further challenge seems to be that for a causal link to be established between the breach of the associated obligation and the damage, it is necessary that the lawful execution of the associated obligation would have changed the course of the events with some certainty. These high thresholds for liability, as the study showed, will not regularly be met with respect to most participating states.

5.3 Allocation of responsibility in multi-actor situations: the case of Frontex

At the outset, it is important to recall that public actors generally incur direct responsibility when they exercise control over the course of conduct that was at the origin of an infringement. Indirect responsibility typically arises when a public actor is aware of a potential interference with human rights, but nonetheless assists or fails to use means available to it to protect the individual at risk. In other words, responsibility is heavily dependent on the authority exercised by each actor involved, the opportunities they have to foresee and react to violations. This means that from the point of view of distributing responsibility, it is crucial to understand the degree of authority the host and participating states, as well as Frontex, exercise over deployed personnel and the reaction capacity they have.

It is in this light that it turned out to be essential to make two important distinctions. The first is between different types of personnel, because the authority over them varies. There are, on the one hand, personnel in respect of which no substantial transfer of authority occurs. This includes in particular Frontex coordinating staff and local staff of the host state. There are, on the other hand, personnel in respect of which a substantial shift of authority occurs. These are team members. Practically speaking, participating states transfer key elements of authority over the personnel they contribute to the host state, but partly also to Frontex. Importantly, because different types of personnel are subject to the authority of different entities, where a human rights violation occurs it is essential to know what type of personnel was involved.

The second fundamental distinction is between different types of participating state. States contribute to joint operations to varying degrees. They may only be marginally involved, for example with some minor technical equipment. Typically, however, they send at least some officers to assist the host state as part of teams of border patrol, screening, or debriefing officers (these officers are referred to in this study as 'standard team members'). Some states may even contribute large (military) assets, such as vessels, aeroplanes, or helicopters. The key point here is that depending on the extent of their involvement, participating states retain authority and gain influence to varying degrees. Most importantly, states contributing large assets retain a significant degree of authority over their assets and are represented on and consulted in the Joint Coordination Board. The analysis revealed that this, as set out in more detail below, has major implications for their responsibility.

With this in mind, the following summarises the key findings regarding the responsibility of the host state, participating states, and Frontex, first more generally and then with respect to the more specific examples set out in Chapter 1.[1502]

5.3.1 Primary responsibility of host states, participating states, and Frontex

It should be noted that, as a general rule, local staff and team members are the most likely of the personnel deployed during joint operations to be involved in human rights violations. The simple reason is that they exercise the core border management tasks and thus engage in more human rights-sensitive activities. The focus is thus on responsibility for human rights violations that may be committed by local staff or team members.

Unsurprisingly, human rights violations that originate in the conduct of local staff engage the host state's direct responsibility under both ECHR and EU law. The reason is simply that they are host state organs acting under the authority of the host state.

1502 See above 1.3.1.

More interestingly, however, this study found that the host state is also directly responsible for human rights violations that originate in the conduct of standard team members. Under both ECHR and EU law, the relevant threshold triggering direct responsibility for the unlawful conduct of a foreign organ was found to be normative control exercised over that conduct. In the context of the ECHR, the relevance of that threshold stems from the attribution rule expressed in Article 6 ASR. In the context of EU law, the rules governing allocation of primary liability are less clear. However, on the basis of the CJEU's case law in this area, this study found that the legal decision-making power of an authority is decisive.

In this vein, the reason for the host state's direct responsibility for human rights violations that originate in the conduct of standard team members is the comprehensive normative control it exercises over them during their deployment. Most importantly, this control stems from the authority of the host state to issue instructions, and thus legally determine what course of conduct these team members are to follow. Even though instructions are in practice decided in the Joint Coordination Board, rather than by the host state unilaterally, the host state's lead within that body and the lack of rights of other board members to interfere, strongly suggest that, as a rule, the host state has to be considered the 'author' of these instructions.

Due to the host state's near exclusive authority over the conduct of standard team members, the host state is exclusively responsible. This means, in particular, that states contributing these officers are not directly responsible for their unlawful conduct.

The situation is more complex in relation to human rights violations that originate in the conduct of personnel on large assets. It was found in this study that the host state's authority over large assets is not exclusive. Importantly, whilst participating states do transfer a substantial degree of authority over deployed large assets to the host state, they retain enough to effectively *share* legal authority with the host state. In essence, when the Joint Coordination Board takes decisions that affect large assets, the National Official of the state who contributed them has a *right* to be consulted. In practice, decisions are not taken without the consent of the National Official.

This shared authority over large assets has different consequences in ECHR and EU law respectively. Under the ECHR, if the conduct of a lent organ is to be attributable to the receiving state, this requires the legal authority of the receiving state to issue instructions to be *exclusive*. Sharing legal authority with the sending state is simply not sufficient. Because Article 6 ASR is not applicable, the conduct of personnel on large assets is not attributable to the host state. At the same time, this means that the default rule, i.e. the rule that the conduct of a state's organs is attributable to it (Article 4 ASR), continues to apply and the conduct of persons on large assets is attributable to the respective contributing state. Thus, under the ECHR, *only* participat-

ing states are directly responsible for human rights violations that originate in the conduct of personnel on large assets they contributed to a joint operation.

Under EU law, in contrast, the consequences of shared legal control are less clear. However, there are no indications in the Court's case law that the legal decision-making power of an authority would have to be exclusive in order to trigger liability. Hence, shared legal control may be assumed to lead to shared liability. In this vein, participating states are liable together with the host state for human rights violations of large assets they contributed.

As opposed to the host and participating states, neither the EU nor Frontex incur direct responsibility for the conduct of local staff or team members. Whilst this is obviously the case under ECHR law because the EU is not a signatory to the Convention, this finding would generally remain unchanged even in the event of accession of the EU to the ECHR. In light of the attribution rule set out in Article 7 ARIO, the EU's international responsibility for conduct of local staff or team members would require Frontex to exercise effective control over it. This study found, however, that due to the lack of possibilities for directly issuing operational instructions to deployed personnel, Frontex cannot be considered to exercise such control. Thus, even in the event of accession, the EU does not incur primary responsibility, unless Frontex coordinating staff are involved or a breach stems directly from the Operational Plan.

Under EU law, Frontex is capable of being directly liable for human rights violations, including those that occur during joint operations. Nonetheless, the agency is liable only in rather exceptional scenarios. On the one hand, it is directly liable in the unlikely event that its coordinating staff are directly involved in a breach of fundamental rights. In contrast, breaches committed by member state officers, i.e. local staff or team members, only engage its direct liability if Frontex has the power to legally determine their conduct during joint operations. The simplest way to do so would be by issuing instructions to them, a power that Frontex, however, does not possess. The only realistic possibility for Frontex to legally determine deployed officers' conduct appears to be the Operational Plan, which is adopted by Frontex and the host state together and is legally binding on all participating parties. In this vein, in the exceptional case that a fundamental rights violation is inherent in the Operational Plan, Frontex incurs primary liability for the ensuing breaches jointly with the host state.

In conclusion, the host state incurs direct responsibility for almost any human rights violation that may occur during joint operations. The most important exception is those committed by persons on large assets deployed by other states, which do not engage its primary responsibility under the ECHR. Participating states' direct responsibility is considerably more limited and, under both ECHR and EU law, comprises only human rights vio-

lations that originate in the conduct of persons on their own large assets. Frontex, in turn, is not typically directly responsible at all, unless a breach is committed by its own (coordinating) staff or is inherent in the Operational Plan.

5.3.2 Associated responsibility of host states, participating states, and Frontex

Associated responsibility, this study found, does not arise from the mere fact of having supported another authority in what turned out to be a human rights violation. This means, in particular, that the additional resources and other assistance that participating states and Frontex provide to the host state, do not automatically make them indirectly responsible for human rights violations occurring during operations. Generally speaking, associated responsibility only arises when the facilitating actor breached an obligation to protect, an obligation to supervise, or an obligation to abstain from rendering aid or assistance. These are typically triggered when the facilitating actor has (or should have) knowledge of an interference and has the possibility to intervene.

In light of the host state's comprehensive direct responsibility, questions of associated responsibility of the host state do not arise as frequently as with respect to the other actors involved. However, where they do, it is important to note that the dominant role of the host state in the implementation of joint operations ensures that it regularly has knowledge of as well as possibilities to prevent human rights violations that may be committed by Frontex or a participating state. Under these circumstances, the host state incurs obligations under the ECHR and EU fundamental rights law to protect the individual victim with all reasonable means available to it. Failing to do so, means that it incurs responsibility alongside the primary responsible actor. There are two situations where the host state's associated responsibility may arise in practice. The first is only relevant to ECHR law and concerns human rights violations involving large assets, for which the respective contributing state is directly responsible. The second concerns return operations where the return of an individual would violate the prohibition of *refoulement*. This study found that in both cases the host state incurs responsibility, frequently alongside another state.

Almost as far-reaching are the possibilities Frontex enjoys. Its involvement in joint operations is particularly far-reaching. It not only takes the lead in the organisation of operations, but more importantly also comprehensively supports and monitors them throughout their implementation. Under EU law, Frontex is indeed under an obligation to supervise the conduct of member state authorities during joint operations, including with respect to fundamental rights compliance. It also incurs obligations to protect under EU fundamental rights law. All of these obligations are capable of giving rise

to Frontex' liability under EU law, should it fail to meet them, provided the breach can be considered sufficiently serious. In that context, the seriousness of the infringement to be prevented, and the measures Frontex actually took, determine whether or not a specific breach can be considered sufficiently serious. Frontex may, for example, use its position within the Joint Coordination Board, communicate its views on instructions to the host state, withdraw its support from the joint operation, or terminate it altogether. As a rule, the more obvious and persistent a fundamental rights violation, the more actively Frontex has to take measures to prevent or stop it, the failure to do which may lead to its liability.

The most complex is the associated responsibility of participating states. As explained above, they incur primary responsibility under both ECHR and EU law only if a human rights violation originates in the conduct of persons on a large asset they contributed. Thus, for instance, if one of their vessels hands over a migrant boat to third state authorities in violation of the prohibition of *refoulement*. They do, however, play an important role in supporting the host state during joint operations, even when they do not contribute such large assets. In light of their contribution, the question arises whether there are circumstances in which they are indirectly responsible for human rights violations committed in particular by the host state. For instance, if the host state has a notoriously bad human rights record in its border management, can the participation in and contribution to a joint operation make a participating state responsible for having rendered support in a human rights violation? Similarly, if a participating state learns of human rights violations that are taking place in the context of a joint operation it is participating in, does it incur responsibility for failing to intervene?

Even more so than all other actors, the role and contribution of a participating state will have to be assessed in each individual situation, in order to determine its associated responsibility. The main reason is the vast diversity among participating states. On one end of the spectrum is the state that contributes some minor technical equipment, and does not care to follow-up at all. On the other end, there is the state that contributes military vessels and helicopters, and is thoroughly involved in the running of the operation. In this light, the involvement of a participating state, as well as its possibilities to gain knowledge of and prevent a human rights violation that may take place, have to be analysed in each specific case in order to determine whether an associated obligation arises, whether it is breached, and whether that breach is capable of leading to responsibility.

Having said this, it is important to note that depending how extensively participating states contribute to a joint operation, their insight into the daily occurrences and their possibilities to influence the course of conduct vary quite significantly. Thus, a specific type of contribution typically comes with a specific range of possibilities. On this basis, some general remarks can be made.

In light of this study, it is undisputable that a contribution of minor technical equipment can hardly secure a participating state the knowledge and possibilities required to engage its responsibility. In the same vein, it is relatively safe to conclude that states contributing large assets will regularly incur indirect responsibility for human rights violations that others, in particular the host state, commit during joint operations. This is predominantly due to their involvement in the Joint Coordination Board, which allows them to stay informed of all events that occur and provides them with opportunities to steer the course of action in certain directions. The extensive involvement and influence of these participating states triggers obligations under both the ECHR and EU fundamental rights law to use their position in order to protect affected individuals from human rights violations. A failure to do so may give rise to associated responsibility under both legal frameworks. It should be noted, in relation to the ECHR, that the fact that the relevant breaches occur outside the territory of participating states does not seem to be an obstacle to responsibility in the case of states contributing large assets. This is so because they may be considered to exercise public powers during joint operations capable of bringing the affected individuals within their jurisdiction for the purposes of Article 1 ECHR. In relation to EU law, it is worth pointing out that depending on the circumstances of the case, it appears that the failure of a state who contributes large assets may qualify as sufficiently serious, depending, of course, on the seriousness of the primary violation, and the measures they actually took.

The situation is most complex in relation to participating states whose contribution lies somewhere between small equipment and large (military) assets. This concerns in particular states that contribute personnel, i.e. standard team members. Their possibilities indeed go significantly beyond those of states with minor contributions. Consider, for example, the situation that a state requires the team members it contributed to report back 'home' on a regular basis. Whilst their associated responsibility seems conceivable at first, this study revealed that it is beset with a broad range of difficulties. One concerns their actual possibilities to react, even if they learn of a human rights violation. The most realistically available option appears to be a withdrawal of their assistance. Under EU law, however, it is unclear how an 'obligation to withdraw' under fundamental rights law would affect their obligation under the EBCG Regulation to make their personnel available in the first place. Another difficulty, also under EU law, is that a failure to react to a foreseeable breach would seem to qualify as sufficiently serious only under highly exceptional circumstances. This is so in particular when considering the rather limited possibilities for these states to react, and the lack of clarity as to whether, or under what circumstances, such an obligation arises in the first place. It seems that only a substantial contribution to a blatant and clearly foreseeable violation would be capable of engaging the indirect liability of a state that is involved in an operation with its human resources.

The final difficulty to be mentioned here relates to ECHR law. It is indeed equally unlikely under ECHR law as under EU law that a state contributing standard team members incurs associated responsibility. The reason is the limited applicability of the Convention extraterritorially. In particular, states contributing standard team members do not exercise the control required to bring the individuals in question within that state's jurisdiction within the meaning of Article 1 ECHR. Hence, these states' obligations to protect under the ECHR are not triggered. It should be noted that the same difficulty does not arise in relation to the rules on aid or assistance under general international law. Most importantly, there is no need for the assisting state to be under an obligation, for example under the ECHR, to abstain from rendering assistance. In other words, a participating state may incur responsibility for being complicit in a human rights violation by the host state, regardless of whether the victim of the violation is within its jurisdiction according to Article 1 ECHR. Whilst the rules on aid or assistance could thus fill the 'gap' left where the ECHR's obligations to protect are inapplicable, the ECtHR does not generally hold states responsible on that basis. Outside the ECHR context, however, the rules on air or assistance are largely unenforceable by individual victims.

In conclusion, both the host state and Frontex have far-reaching possibilities to influence the course of action during joint operations. A failure to do so may trigger their responsibility under ECHR (with respect to the host state) and EU law (with respect to both). Participating states' associated responsibility is highly dependent on the knowledge and possibilities of each of them. However, as a general rule, this study found that only states who contribute large assets have the involvement and influence necessary to engage their associated responsibility.

5.3.3 Summary of findings

Table 14 summarises the findings of this study in relation to primary and associated responsibility in the context of Frontex operations.

Table 14: Summary of findings (final)

	ECHR			CFR	
	Primary responsibility	**Associated responsibility (obligations to protect)**	**Associated responsibility ('complicity')**	**Primary liability**	**Associated liability**
Frontex/EU	No responsibility	No responsibility	No responsibility	Liability for breaches by Frontex staff; liability for breaches that result directly from OPlan	Liability if not performing its supervisory obligations; liability if not meeting its positive obligations under fundamental rights law
Host state	Responsibility for breaches by local staff and standard team members	Responsibility for not preventing breaches of others, e.g. breaches by team members on large assets contributed by participating states	Responsibility for assisting in breaches of others, e.g. breaches by team members on large assets contributed by participating states	Liability for breaches by local staff and team members, including those on large assets	Liability for implementing a return decision in violation of the prohibition of *refoulement*
Participating state (minor technical equipment)	No responsibility	No responsibility (no jurisdiction)	As a rule no responsibility (impact of assistance low, lack of knowledge and possibilities)	No liability	No liability
Participating state (standard team member)	No responsibility	No responsibility (no jurisdiction)	Responsibility for assisting in breaches they have knowledge of	No liability	As a rule no liability (not sufficiently serious)
Participating state (large assets, e.g. vessels, aircraft)	Responsibility for breaches by team members on large assets they contributed	Responsibility for not preventing breaches by the host state or other participating states if they had the means to prevent	Responsibility for assisting in breaches of the host state or other participating states	Liability for breaches by team members on large assets they contributed	Liability for not preventing breaches by the host state or other participating states if they had the means to prevent

5.3.4 Responsibility in Examples 1-4

EXAMPLE 1: EXCESSIVE USE OF FORCE

A Frontex operation, hosted by State A, is ongoing at A's land border. A team of border surveillance officers, including officers of A, but also of State C, spot a large group that has just crossed the border. Upon request, the persons detected are unable to show the necessary documents. When the border guards try to apprehend them, the situation gets out of hand and they have to use force in order to transfer them to a local reception facility. During an ensuing screening interview, one of the migrants plausibly claims that he had been subjected to excessive force by C's officer in violation of the prohibition of inhuman or degrading treatment (Article 3 ECHR, Article 4 CFR).

Under both ECHR and EU law, State A is responsible for the human rights breaches committed by State C's officer, whereas C is not. The reason is the transfer of the authority relevant for responsibility from State C to State A. The key element is the power to issue instructions that C's officer is bound to comply with. Essentially, because that power lies with State A, responsibility does so too.

Moreover, State C is not responsible for failing to prevent the human rights violations in question under either ECHR or EU law, even though the reasons are different. Under ECHR law, it is the lack of obligations to protect that State C incurs in that context. The human rights violation occurs extraterritorially from State C's perspective. Because State C does not exercise the authority and control in State A required to bring individuals that are abroad within the 'jurisdiction' of a state, the ECHR does not require State C to intervene in protection of the individual concerned in Example 1. Under EU law, it is the lack of possibility for C to effectively learn of and prevent the excessive use of force by its officer on the one hand, but more specifically the high threshold of liability that would require its failure to prevent to be 'sufficiently serious' for liability to arise on the other.

Finally, Frontex is neither responsible for the breach committed by C's officer, nor for having failed to prevent it. Even though the EU is in principle responsible under international law for the conduct of its agency, it is not a contracting party to the ECHR and may thus not be held responsible for breaches thereof. Under EU law, Frontex is capable of incurring liability. However, it lacks the legal control over the conduct of C's officer to be directly responsible for the infringements committed by that officer. More importantly, under the circumstances described in Example 1, it is also not liable for having failed to prevent the breaches. Whilst Frontex' failure to ensure that activities during joint operations comply with fundamental rights is in principle capable of giving rise to associated liability under EU law, it is unlikely that it does in Example 1. Frontex' staff on the ground are not commonly scheduled to be on patrol with other officers, but work from

offices set up in the area. Thus, the agency will have learned of the excessive use of force too late to be able to prevent it. Since a diligent authority could therefore not have been expected to act any differently, Frontex is not liable for not having prevented the breach. Of course, if this is a recurring problem with respect to that specific officer, this may affect the analysis.

In conclusion, only State A is responsible in Example 1.

EXAMPLE 2: REFOULEMENT AT SEA

A Frontex operation, hosted by State A, is ongoing at A's sea border. A vessel contributed to the operation by State B (variation: by State A itself) is patrolling the operational area, when it observes a suspicious boat. Once the boat is within sight, it can be confirmed that the boat carries a large number of migrants accompanied by smugglers. The vessel attempts to intercept the boat by the repeated use of light and sound signals but the boat refuses to comply. After warning shots into the air, a crew member fires shots at the engine of the boat, immobilising it. The boat is towed to the territorial waters of a third state and handed over to its authorities in violation of the prohibition of *refoulement* and the prohibition of collective expulsions (Article 3 ECHR, Article 4 Protocol No. 4 ECHR, Article 19 CFR).

Under ECHR law only State B is responsible for the breach committed by its vessel. In contrast, under EU law, both States A and B are liable. The reason for the diverging results is the different impact of the shared authority States A and B exercise over the conduct of B's vessel. The shared authority is a consequence of the specific decision-making and command regime in place with respect to large assets deployed by participating states. On the one hand, whilst State A enjoys a central position within the Joint Coordination Board, the body running the joint operation, State B always has a national representative present, who has to be consulted whenever decisions affect B's vessel. On the other hand, the vessel's Commanding Officer receives the instructions that result from the Joint Coordination Board's decisions only from the national representative.

In the context of the ECHR, the shared authority by States A and B over B's vessel prevents that vessel's conduct from being attributable to State A. The reason is that the rule governing attribution of conduct of organs lent by one state to another (Article 6 ASR) requires the receiving state's authority over the lent organ to be exclusive. If that is not the case, for example because the authority is shared between the sending and the receiving state, the conduct of the lent organ remains attributable to the sending state. Hence, the conduct of State B's vessel is exclusively attributable to State B. Therefore, only B is responsible for its vessel's conduct in violation of the ECHR. In the context of EU law, the consequences of shared authority for the purposes of liability are less clear. However, in the case law of the CJEU the exercise of legal control emerged as the determining factor for liability, with no specific

requirement of exclusive legal control. It may thus be assumed that shared legal control leads to shared liability. Therefore, both States A and B are liable for the conduct of B's vessel in violation of the CFR.

Having said this, whilst only State B is directly responsible under the ECHR for its vessel's conduct, State A is responsible for its own failure to prevent the breach committed by B's vessel. As a host state, it could have easily prevented the infringement, simply by not agreeing to the course of conduct that led to the violation. By not doing so, State A is responsible for a breach of its positive obligations to protect under the ECHR. Thus, ultimately, under the ECHR, too, both States A and B are responsible.

Finally, Frontex is also responsible in Example 2, but only under EU law. Under its founding Regulation and under EU fundamental rights law, Frontex is required to take all reasonable measures to ensure member states do not commit fundamental rights violations during joint operations. It is crucial in this regard to emphasise that Frontex is represented on the Joint Coordination Board at all times and therefore gains knowledge of any circumstances or decisions that may lead to a human rights violation. To prevent the foreseeable breach by State B's vessel Frontex can, for example, communicate to the relevant states (in particular to State A) that the decision with respect to the course of conduct of State B's vessel is in violation of the Operational Plan and EU fundamental rights law. If that is unsuccessful, it may withdraw its financial support, or suspend or terminate the operation altogether. If it fails to take any of the measures available, Frontex is liable alongside States A and B for not preventing the breach committed by State B's vessel.

In conclusion, in Example 2, under the ECHR, State B is directly responsible for its vessel's conduct in breach of the Convention. State A is additionally responsible for not preventing it. Under EU law, both State A and State B are directly liable for the breach of the CFR committed by State B's vessel. Frontex is liable if it did not take all reasonable measures to prevent the infringement.

The question Example 3 poses is whether State C and Frontex are responsible for having failed to prevent the human rights infringements suffered by the migrants that were brought to State A's reception facilities after having been picked up in the context of a Frontex operation. In this example, the results under ECHR and EU law diverge the most.

EXAMPLE 3: INHUMAN CONDITIONS IN RECEPTION FACILITIES

A Frontex operation, hosted by State A, is ongoing at A's external borders. As part of this operation, a team of border surveillance officers including officers of A, but also of State C, apprehends a group of persons that had previously been dropped off by a smugglers' boat. The group is transferred to a local reception facility. On site, screening and debriefing experts deployed by Frontex conduct interviews with migrants in order to identify their country of origin and collect intelligence regarding the routes and practices of human smugglers. Frontex has an 'office' in the area, from where a Frontex representative coordinates local activities. The conditions in the reception facility had been deteriorating for a while. The most pressing problem is that A's authorities have run out of money to buy sufficient food for everyone. Even though forcing persons to stay there violates the prohibition against treating them in an inhuman or degrading manner, the team, including officers of A and C, transfer the apprehended migrants to that facility (Article 3 ECHR, Article 4 CFR).

Note: Setting up and maintaining migrant reception facilities is outside the mandate of Frontex operations. The responsibility of states for human rights violations directly resulting from the conditions in reception facilities is thus outside the scope of this study. However, migrants may be in a reception facility because they were brought there in the context of a Frontex operation. This raises the question whether the actors involved in joint operations may be responsible for having brought a migrant to a reception facility where the conditions do not live up to minimum human rights standards.

Under the ECHR, Frontex is evidently not responsible, but neither is State C. In essence, the reason is the same as in Example 1, namely the lack of extraterritorial applicability of the ECHR to State C. Because the individuals in question do not come within State C's jurisdiction, C incurs no positive obligations to prevent breaches from occurring during joint operations. The outcome would be different if the ECtHR were to hold contracting parties responsible under the rules on aid or assistance ('complicity'). Under that regime, it is irrelevant that the operation does not take place under State C's jurisdiction. The responsibility of State C then depends on the knowledge it has that its assistance to the operation is used in the context of a human rights violation. In this vein, in particular if the reception facilities in State A are known to not live up to basic human rights requirements, State C may incur responsibility for nonetheless having participated in and substantially contributed to the operation. In this vein, Example 3 illustrates the difference between obligations to protect under the ECHR and the rules on aid or assistance, and the potential of the latter to complement the former.

Under EU law State C may be liable for having failed to protect the victim of the fundamental rights violation, but probably only under exceptional circumstances. The obligations to protect that State C incurs under EU fundamental rights law apply to all activities of C within the context of EU law. Thus, there is no necessity for the individual to be under the 'jurisdiction'

of C in order to trigger the obligation to take all reasonable measures to prevent foreseeable breaches. The infringements at stake could have been foreseeable for State C. Consider, for example, that C's officer may continue to report back to C, raising issues such as these. In any case, if State A notoriously fails to provide reception facilities that live up to minimum fundamental rights requirements, State C must be assumed to be aware. The crucial question then is, whether State C took all reasonable measures to prevent the violation. This will depend on a number of circumstances, for example whether C could have made sure other reception facilities would be used, or whether C could have been expected to refuse to participate in the first place, or withdraw its assistance later on. As noted already in relation to Example 1, the latter option may conflict with C's obligation under the EBCG Regulation to assist the host state in the context of joint operations. Depending on how clear it was that the reception facility did not live up to fundamental rights standards, how extensive State C's contribution was, and what measures State C could and actually did take, a breach by State C of its positive obligations may qualify as sufficiently serious and thus trigger its liability. Considering the strict interpretation by the CJEU of the conditions for liability, however, it seems that this would only be the case under exceptional circumstance.

Under EU law, Frontex is also liable, more likely so than State C, for not having prevented the infringement of the CFR. As noted in relation to the earlier example, Frontex is required to take all reasonable measures to ensure member states do not commit fundamental rights violations during joint operations. In the context of Example 3, it is clear that Frontex knew in what state the reception facility was. If the conditions did not live up to fundamental rights standards before the operation was launched, a diligent authority could have been expected, for example, to implement the operation in a different area, make sure State A improved the conditions in the reception facility before the start of the operation, or design the operation so as to avoid having to transfer migrants there. Taking into account the fundamental rights risks (including the detention conditions in a member state) before launching a joint operation is indeed envisaged as the first step according to the standard operating procedure adopted by Frontex in order to ensure respect of fundamental rights in joint operations. If the conditions only deteriorated whilst the operation was under-way, Frontex could have made the necessary changes so migrants were not transferred to that specific facility anymore. Ultimately, if that was not possible, Frontex would have had the possibility of withdrawing its support, or suspending or terminating the operation altogether. Failing to take any of these measures, Frontex is liable for not having lived up to its obligations to supervise and protect.

In conclusion, State C is not responsible under the ECHR, but may be liable under EU law. In addition, Frontex is liable under EU law.

EXAMPLE 4: REFOULEMENT AND RETURN OPERATIONS

State A organises a return operation. The destination is State Z (who is not a Schengen state). Persons that have been identified as nationals of Z and have received individual return orders qualify as 'returnees'. 10 returnees are already in State A. Participating states escort returnees to A, bringing the total number to 30. A Frontex project manager travels with them. Before take-off, it becomes apparent that three returnees escorted from participating State C had been presented with a return order immediately after their arrival. They convincingly argue that they would be at risk of being subjected to torture if returned (Article 3 ECHR, Article 19 CFR).

Note: The adoption of return decisions is outside the mandate of Frontex operations. The responsibility arising directly from the adoption of a return decision is thus outside the scope of this study. However, joint return operations involve the execution by a host state of return decisions issued by a participating state. This raises the question whether actors involved in Frontex return operations may be responsible for returning a person in violation of the prohibition of refoulement in the implementation of another state's return decision.

In Example 4, a reasonable suspicion arises that executing the return decision issued by State C would violate the prohibition of *refoulement*. Regardless of the legality of and liability for the return decision itself, this raises the question of whether the host state and Frontex are liable for the execution thereof.

Under both ECHR and EU law, the prohibition of *refoulement* generally requires states to verify whether an individual faces a real risk of torture if returned, provided that a reasonable suspicion arises in the context of returning that person. Whilst the principle of mutual trust under EU law does not affect this obligation under the ECHR, this is less clear under EU law. The principle of mutual trust allows, and sometimes requires, the authorities of one member state to trust in the fundamental rights compliance of decisions issued by the authorities of another. This study found, however, that the principle of mutual trust does not require State A to execute the return decision issued by State C when this would violate that prohibition of *refoulement*. Being bound to ensure the respect for the prohibition of *refoulement* during return operations it hosts, State A has to assess whether a returnee sent by another member state would face a real risk of treatment contrary to Article 4 CFR, if a reasonable suspicion arises. In Example 4, if State A carries out the return, it is responsible under both the ECHR and EU law.

Under EU law, Frontex is also required to ensure that return operations are carried out in conformity with the principle of *non-refoulement*. In Example 4, it was apparent to the Frontex officer on the ground that the implementation of the operation would be in violation thereof. A failure to halt the return of the individual at risk engages Frontex' liability under EU law.

5.4 A way forward: obstacles and recommendations

5.4.1 Determining responsibility

This study set out to clarify the allocation of responsibility in the context of Frontex operations, with the goal to thereby positively affect the performance of human rights obligations on the one hand, and strengthen the position of the individual victims of infringements on the other. Analysing the roles and powers of the actors involved, identifying general rules governing the allocation of responsibility in multi-actor situations, and discussing them in the context of Frontex operations, the study largely achieved the generation of a clearer picture with respect to the distribution of responsibility.

However, some aspects turned out to be especially difficult to determine, or remained open altogether. These are bound to continue to pose substantial obstacles to achieving clarity in the allocation of responsibility, either in relation to Frontex operations specifically, or indeed in the context of multi-actor situations more generally. The following sections set out the two most significant areas where uncertainties remain and propose solutions to address the shortcomings identified.

5.4.1.1 The authority regime

This study showed that the existence and extent of responsibility of all actors involved in Frontex operations heavily depends on the precise powers each of them exercises over deployed resources. It is thus essential to know, for example, whose instructions border guards, other specialists, or deployed vessels have to follow, and who decides on these instructions. For a number of reasons, these questions proved especially difficult to determine.

One reason is that essential documents are not accessible. This concerns in particular key parts of the Operational Plans that contain the most detailed description of the specific authority and decision-making powers of the actors involved. Operational Plans are not publicly available. Even upon request, they are only partially made available, only for completed operations, and only for EU citizens. It should be pointed out that persons actually affected by the operations therefore have no general right to request (even partial) access. Whilst courts may be able to grant an individual applicant access within the framework of proceedings brought against activities during a joint operation, that is insufficient. As this study showed, the authority regime under which deployed resources operate largely determines the allocation of responsibility among the actors involved. Access to the documents setting out this authority regime is therefore necessary in order to determine against whom and where to bring legal action in the first place.

A further difficulty in clarifying the authority regime is that the relevant rules are too dispersed. The applicable framework has to be deduced from

a broad range of documents—the EBCG Regulation and other relevant legislative instruments, the Handbooks to the Operation Plans, as well as the Main Parts and Annexes of the Operational Plans. On their own, none of these describe the roles and authority of the actors involved in joint operations in sufficient detail to get a complete picture of their authority over deployed resources.

Moreover, there is no uniform terminology used with respect to the authority regime as described in the EBCG Regulation on the one hand, and the Operational Plans on the other. Whereas the EBCG Regulation speaks of 'instructions' without further specification, the Operational Plans refer to 'instructions', but also to variations of operational and tactical command and control. This makes it difficult to understand how they relate to each other and what their respective meaning is. It is particularly striking that this seems to be the result of a mismatch between what the drafters of the legislative documents (in particular the EBCG Regulation and its predecessors) consider a lawful and politically feasible authority regime on the one hand, and what operational personnel find workable and effective in practice. One of the reasons for this mismatch may be the specific nature of Frontex operations. They are law enforcement, not military operations, so officials in administration and law departments appear to be keen to avoid terminology perceived as 'military'. At the same time, however, they rely on military assets, e.g. certain vessles or aeroplanes, and thus share some of the limitations and needs that are typically found in relation to military operations, especially when it comes to command and control arrangements.

Finally, the difficulty in clarifying the authority regime is further exacerbated by the practical implementation thereof. In particular, many arrangements are made *ad hoc*, largely shaped by practical needs, and 'decision-making' relies heavily on consensus among all actors involved. This is *per se* neither uncommon nor problematic. However, from a legal perspective it is nonetheless significant who, if anyone, has the authority, if need be, to 'overrule' the opinions of other actors involved and take a binding decision. Whilst this legal authority plainly lies with the host state according to the EBCG Regulation, it is neither sufficiently clear from the Operational Plans, nor their practical implementation how this power operates within the more detailed and elaborate authority regime that applies in practice.

It is thus safe to say that the limited accessibility of Operational Plans, the fragmentation of the authority regime, the inconsistent use of terms, and the distribution of legal authority in practice make it immensely difficult to conclusively determine the specific authority regime under which all operational resources work during joint operations. Even having studied the available documents, interviewed a number of relevant actors at different levels, and examined the practical implementation, some uncertainty remains.

In light of the significance of the authority regime for the existence and extent of responsibility of all actors involved, it is recommended here that the following measures are adopted in order to further clarify and thus strengthen both the performance of human rights obligations and the position of individual victims.

- It is necessary to draft a comprehensive and unambiguous authority regime in a single document. This is indeed not uncommon for multi-national operational resources that operate under multilayered authority structures. In the context of the EU more specifically, also in relation to EU CSDP operations, a document exists that generally describes the powers and authority of the actors involved over deployed resources.[1503]
- This document needs to be fully and unconditionally publicly available. Neither public security nor privacy considerations, on the basis of which access to Operational Plans is typically denied, militate against public availability. The document required for the purposes of determining the distribution of legal responsibility needs to contain neither sensitive information, such as the operational area or specific methods applied, nor names or other details of persons involved in a specific operation.

Taking these measures will be even more important in the near future. In April 2017, Frontex for the first time deployed a vessel with a multinational crew on board to a joint operation. Contributed by Finland, the crew of the vessel includes officers provided by seven other member states. It is not yet clear how the authority regime described in in Chapter 2 applies in these circumstances.

5.4.1.2 EU public liability law

The second main area where this study exposed uncertainties is EU public liability law. There are indeed a range of issues that seem underdeveloped in EU public liability law, including for example the precise circumstances under which liability arises for fundamental rights violations. Yet, questions of allocation of liability in multi-actor situations have received particularly little attention from the CJEU, as well as in academic research.

On the one hand, the Court has not developed a conceptual framework within which to decide questions of allocation of liability in multi-actor situations. It could not be conclusively determined in this study, for example, whether the allocation of liability depends on imputation, attribution, causation, a combination thereof, or a different concept altogether. Whilst it is hardly surprising, in light of the lack of a conceptual framework, that the Court's use of terms relating to distributing liability is inconsistent, it adds to the lack of clarity in this area.

1503 EU Concept for Military Command and Control (n 362).

On the other hand, the Court is not explicit about the existence and content of generally applicable rules or principles that govern situations where more than one actor is at the origin of an unlawful outcome. In cases that indeed raise questions relating to the involvement or interference of another public actor, the Court does not typically identify what general rules apply. This study, on the basis of an analysis of the Court's case law, revealed the rules and principles that the Court appears to adhere to when allocating liability among several potential wrongdoers. However, developing these implicit rules was particularly challenging for a number of reasons. Most importantly, the lack of a conceptual framework made it difficult at times to understand the legal reasoning behind specific decisions and judgments. In addition, that reasoning has not always been consistent. For example, typically, legal decision-making power seems to determine the outcome, but factual control was also sometimes relevant. The Court did not explain why and under what circumstances each of these thresholds would apply. These difficulties were further exacerbated by the fact that the Court, when dismissing a case on the basis of the involvement or interference of another actor, is often ambiguous about whether it did so on the basis of a substantive rule on allocation of liability, or on the basis of a procedural rule.

These uncertainties are problematic for a number of reasons. Most obviously, they render the Court's case law in this area highly unpredictable. One is left guessing when, why, and how it is relevant (or not) that more than one actor was at the origin of an unlawful outcome. It is illustrative that the Court does not seem to perceive this as an 'area' at all. It does not, for instance, typically refer to its own case law dealing with questions of allocation of liability, unless they concern the same policy area. The failure to recognise a pattern in cases across different policy areas that raise similar questions is particularly regrettable. It indeed may be the main reason why the Court has not so far identified a need to develop a conceptual framework and general rules governing those questions in the first place. This shortcoming also seems to have made it virtually impossible for the Court to appreciate and elaborate on associated liability and the specific questions it raises. This is unfortunate since the Commission's competences in supervising member states in the application of EU law make these questions relevant and important in the context of EU liability law.

Most fundamentally, the uncertainties are problematic because the analysis of the Court's case law in this study suggests that the allocation of liability to one or another actor is often *ad hoc*, or even 'accidental'. It would, however, be preferable for liability to be allocated among several potential wrongdoers on the basis of generally applicable and transparent rules and principles. This ensures that the consequences of the relevant rules are fully appreciated and that normative choices can be made accordingly.

Ultimately, the lack of clarity, unpredictability, and inconsistency of the Court's case law in this area may negatively affect compliance with EU law, but also considerably weakens the position of individuals seeking redress for infringements they have suffered. It seems, at this point, extremely difficult to assess when and to what extent one of several potential wrongdoers is liable, and when the involvement or interference of other actors is relevant. As a consequence, it is almost impossible for individual applicants to know with sufficient certainty where to lodge an application—before the CJEU or a member state court.

To be sure, these shortcomings are regrettable. But they are even more surprising. In EU law, multi-actor situations arise by design. Indeed, different forms of interaction and cooperation between the EU and its member states, but also among member states, are the rule, rather than the exception in EU law. For example, member states typically implement or otherwise apply provisions of EU law to specific situations, member states rely on decisions made by other states and assist each other in law enforcement, and the Commission has a broad range of powers in different policy areas to supervise member states. Moreover, and as opposed to many other international organisations, the EU has a particularly strong internal dispute settlement mechanism. In this light, in EU law, multi-actor situations are not only bound to arise, but EU law also seems particularly suitable to explore and experiment with different solutions to the various emanations of the 'problem of many hands'.

One reason why this has not happened so far may be the specific nature of EU public liability law. Whilst the EU is clearly not a state, the system of non-contractual liability bears a striking resemblance to national liability regimes. This is unsurprising, taking into account that in the absence of a detailed legislative framework at Union level, the national legal systems of the member states provide the main source of inspiration for the development of the EU's public liability law. The latter is hence inevitably 'domestic' in nature. However, at the same time, as an organisation deriving its powers from the 28 separate and sovereign entities it comprises, the Union's public liability system has to respond to challenges that do not commonly arise to the same extent in national liability law. This includes difficulties in allocating liability triggered by the division of competences in a multilevel system. In this area, it seems that international law may provide a more suitable source of inspiration for EU public liability law.

In light of the above, the following is recommended:

- The Court should develop a conceptual framework to address questions of allocation of liability in multi-actor situations and define, on that basis, general rules applicable to these scenarios. Both the conceptual framework and the general rules should be spelled out explicitly. The law of international responsibility may provide a source of inspiration in this respect.

- Further research on questions relating to allocation of liability in EU law is necessary. Existing research is mainly concerned with the possibilities of joint or concurrent liability. Academic engagement with other aspects of the topic is extremely rare.

5.4.2 Incurring responsibility

The main goal of this study was to establish clarity in the allocation of responsibility in the context of Frontex operations. It, however, also proceeded from the assumption that in situations where multiple actors cooperate in what leads to a human rights violation, all of them should bear responsibility, at least to a degree proportional to their respective contributions. In this respect, this study revealed a number of shortcomings in both ECHR and EU public liability law. They result from more general aspects of the responsibility mechanisms discussed in this study on the one hand, and the way these mechanisms deal with multi-actor situations on the other.

5.4.2.1 General aspects

The first and most obvious shortcoming is that under the ECHR neither Frontex itself nor the EU are responsible for Frontex' involvement in and supervision over joint operations because the EU is not a signatory to the Convention. Leaving the possibility of holding all EU member states collectively responsible for the conduct of the EU aside, the only way to address this lacuna is accession of the EU to the ECHR. As already pointed out in this study, this is unlikely to happen anytime in the near future, despite the obligation under EU law for the EU to accede.[1504] Nonetheless, two points should be noted here. First, even if the EU acceded to the ECHR, the EU would not incur primary responsibility for breaches that originate neither in conduct of Frontex staff nor in the Operational Plans themselves. The reason is the lack of effective control by Frontex over conduct of human resources deployed during joint operations, which would be required to make that conduct attributable to the EU. Second, this does not mean that the EU would incur no responsibility at all. In the event of accession to the ECHR, the EU incurs positive obligations to protect individuals from interference by third parties, just like any other contracting party to the ECHR. Thus, the EU would be responsible if Frontex failed to prevent Convention violations committed by member state officers during joint operations, despite having been able to do so. Importantly, it may be assumed that persons would be under the EU's jurisdiction whenever they are under the jurisdiction of a member state.[1505] Because individuals affected by Frontex operations are

1504 TEU (n 732) art 6(2).

1505 This was the solution envisaged in the Draft Agreement on the Accession of the EU to the ECHR (n 451) art 1(6).

within the jurisdiction of (at least) the host state, they would also be within the EU's jurisdiction.

The second shortcoming relates to the difficulty of invoking liability for fundamental rights violations within EU public liability law. As elaborated in detail in this study, public liability under EU law is subject to the satisfaction of a number of conditions, including the requirement that the breach in question is 'sufficiently serious'. Because the CJEU has not developed an approach specific to fundamental rights, this condition in principle also applies when fundamental rights violations are at stake. General public liability law was found to be flexible enough to consider fundamental rights violations sufficiently serious by their very nature. However, even though the Court's case law is neither entirely clear nor consistent in this respect, some cases suggest that fundamental rights violations, like any other breaches of EU law, are only sufficiently serious if they are obvious and reprehensible. In essence, this means that it cannot be excluded that there are fundamental rights violations that do not lead to liability because they are not serious enough within the meaning of public liability law.

This is problematic because in some circumstances, and Frontex operations are a good example in this respect, the action for damages is indeed the only remedy realistically available to individuals who claim to have suffered a fundamental rights infringement by an EU body. In other words, the action for damages may be essential in guaranteeing the right to an effective remedy. At least in these situations, it is necessary to address the obstacles identified in this study in relation to legal responsibility for fundamental rights violations. This can be achieved either by lowering the threshold for liability where fundamental rights violations are concerned, or by creating an alternative remedy for fundamental rights violations, e.g. a fundamental rights complaints procedure. In this light, the following is recommended:

- In light of the right to an effective remedy, there is a need to either lower the threshold for liability where fundamental rights violations are concerned, or set up a fundamental rights complaints procedure under EU law.
- In addition, and in particular in light of the difficulties individuals face in invoking the liability of Frontex before the CJEU, it is recommended that the EU accede to the ECHR.

5.4.2.2 Addressing multi-actor situations

This study revealed that some actors that participate in Frontex operations incur no responsibility at all for their involvement in or contribution to human rights violations that may occur in that context. This concerns in particular states that do not contribute large assets and are therefore not represented within the International Coordination Centre and on the Joint Coordination Board.

The reason why these participating states do not incur legal responsibility is two-fold. On the one hand, they do not exercise the control required to be directly responsible for unlawful conduct during joint operations, even when it stems from personnel they contributed. On the other hand, whilst both ECHR and EU law set out a range of associated obligations, requiring states in particular to protect individuals from human rights interference by others, each of them also poses significant obstacles for responsibility to arise in a context such as Frontex operations.

Under the ECHR, the main obstacle was found to be the limited applicability of the Convention extraterritorially, which prevents obligations to protect being triggered in relation to some participating states. There are a number of possible solutions to address this lacuna. One is a more lenient approach to the extraterritorial applicability of the ECHR. This could in particular consist of an interpretation that focusses more generally on the capability of a state to protect an individual in a specific case, irrespective of whether that individual is within its jurisdiction in the first place. Another possibility, one discussed in more detail in this study, is for the ECtHR to hold states responsible under the rules on aid or assistance provided for under general international law. Whilst the ECtHR may have used the rules on aid or assistance in some of its case law (e.g. *El-Masri v Macedonia*), it has not done so where positive obligations would otherwise not arise.[1506] This seems to be less far-reaching, and thus probably more feasible, than a more generally lenient approach to the extraterritorial applicability of the Convention. In particular, it requires the ECHR to be applicable with respect to the primary actor, and would thus largely be confined to instances where state parties to the Convention contribute to each other's human rights violations. It should be noted, that this requirement makes the rules on complicity unsuitable to bring the assistance of states participating in joint operations hosted by third states within the ambit of the ECHR. In this context, the gap in participating states' responsibility may only be addressed through a more lenient approach to the extraterritorial applicability of the Convention.

In this light, the following is recommended:

- The ECtHR should hold states responsible in accordance with the rules on aid or assistance provided under general international law, where human rights violations take plac eunder the jurisdiction of a contrating party to the ECHR but outside the territory of an assisting state. Alternatively, it may adopt a more lenient approach to the extraterritorial applicability of the Convention where positive obligations are concerned.

Under EU law, the main obstacle was found to be the high threshold for public liability to arise. As explained in detail in this study, public liability under EU law is subject to the satisfaction of a number of conditions,

1506 ECtHR, *El-Masri* (n 804); see above 3.4.1.2.2.

namely the sufficiently serious breach of a rule conferring rights on individuals, damage on the part of the applicant, and the existence of a causal link between the unlawful conduct and the damage complained of. A number of these, or indeed their combination, pose significant obstacles when the impugned conduct is dependent on, or related to the conduct of another actor.

A good example is the case of a breach of Union law by a member state in which a Union body was involved by giving advice, or other guidance. If one authority is involved in an infringement of Union law by another, this may affect the seriousness—within the meaning of public liability law—of that breach. The general idea is that a member state's breach of Union law is less reprehensible, if the member state was actually following advice from an EU body in that specific case. So, in those circumstances, the member state does not incur liability because the breach in question was not sufficiently serious.

At the same time, however, the Union body may itself not incur liability for the guidance given. On the one hand, if non-binding, it is insufficient to render the Union directly liable for the breach of the member state. On the other hand, the Union's associated liability is also uncertain. It depends on whether the Union body guiding the member state was, in the circumstances of that situation, under an obligation to ensure the correct application of Union law by that member state. It further depends on whether that obligation confers rights on individuals which they may invoke in the context of an action for damages, and whether the Union body violated it in that specific case. Finally, and most importantly for the present purposes, liability of the Union also depends on whether a causal link can be shown to exist between the supervisory obligation breached by the Union body and the damage that was the direct result of the member state's infringement. Even though the Court's case law is not entirely clear in this respect, it may be necessary that the lawful execution of the obligation to supervise would have prevented the member state's unlawful conduct with some certainty. In this vein, given the guidance was non-binding, the member state's own decision-making power with respect to the impugned conduct may break the causal link between the damage and the unlawful conduct of the Union body.

Ultimately, the member state is not liable because it was guided by a Union body, but the Union is not liable because it was a member state whose conduct directly caused the damage in question. Hence, in essence, it is conceivable that none of several actors involved is liable, precisely because of the role the other played. Admittedly, the example used here may be an extreme case. It does, however, illustrate that in EU public liability law, it is a disadvantage for an applicant who suffered damage when more than one authority was involved in the impugned infringement. In this light, the following is recommended:

- Recognising the specific challenges that multi-actor situations pose, the CJEU should avoid, as a rule, considering the involvement of a public authority in the breach of another as, first, a factor mitigating the seriousness of the breach, or, second, suitable to break the causal link.

5.4.3 Implementing responsibility

Even when responsibility clearly arises, the implementation thereof may be challenging. Whilst obstacles to the implementation of responsibility are not generally discussed in this study, there is one that should be pointed out here. It concerns the difficulty, or indeed impossibility, of implementing joint liability in EU public liability law. This is especially significant here because joint liability was found to be the rule rather than the exception in the context of Frontex operations.

It is clear that actions against, for instance, Frontex, the host state, and a participating state, cannot be brought before a single court. There is no court that is competent to conclusively establish the respective contributions of each of these actors to damage suffered by an applicant. For example, whilst an action for damages can be lodged with the CJEU, that can only concern unlawful conduct on the part of Frontex itself. For the CJEU to address the host and participating states' involvement, the individual would have to additionally lodge actions for damages in the respective national courts, who in turn could refer questions for a preliminary ruling to the CJEU before finally deciding on the matter.

Bringing parallel legal proceedings in such situations, however, raises a whole range of difficulties. In particular, the CJEU may stay the proceedings against Frontex awaiting the decisions of the national courts in the host state and one or more participating states. This is not only bound to render it lengthy and complicated for applicants to obtain compensation, but it is also unclear how diverging decisions in different national courts would be resolved. Moreover, there is no guarantee that the CJEU will resume the proceedings, if the individual applicant has in the meantime received compensation from one of the states involved. Ultimately, the combination of these factors would make Frontex' liability subsidiary to the liability of host and participating states and thus render the substantive allocation of liability an (unintended) side-effect of a procedural measure.

Against this background, there is a necessity for a single forum before which individuals that suffer human rights violations during Frontex operations can claim redress. Notably, in October 2016, the agency set up a fundamental rights complaints mechanism under which anyone who considers themselves to have been the victim of a human rights violation during a Frontex operation may submit a complaint to the agency. The procedure as such is handled by the Frontex Fundamental Rights Officer, who, however, may only decide on the admissibility of a complaint. Importantly, depending on

whose personnel are accused of having been involved in the infringement, it is the Executive Director or a member state authority who decides on the substance of the complaint. Hence, the new fundamental rights mechanism does *not* provide a common forum where fundamental rights complaints are decided on.

No doubt, it is conceivable to expand that mechanism by increasing the Fundamental Rights Officer's competences to include substantive decisions on complaints, and equipping her with the necessary additional resources. Whilst this would be a significant improvement, it would not be entirely satisfactory. On the one hand, a judicial mechanism within which legally binding and enforceable decisions can be made is preferable. On the other hand, and more importantly, to ensure full independence and impartiality, it is essential that the mechanism is external to Frontex. Finally, it may be assumed that similar challenges in implementing joint liability may arise in other multi-actor situations under EU law. It would thus seem advisable to set up a mechanism that is capable of addressing this obstacle more generally, beyond the specific case of Frontex.

The 'natural' forum on which to confer this competence may be the CJEU. There is, however, also the possibility of setting up an entirely new body to rule on such matters. This was done for example in the case of the European Union Rule of Law Mission in Kosovo (EULEX Kosovo), a CSDP mission set up in order to assist institutions in Kosovo.[1507] In light of the executive functions EULEX Kosovo was equipped with and its immunity before local institutions, the EU established an independent and external Human Rights Review Panel with a mandate to decide on human rights violations by EULEX Kosovo on the basis of complaints submitted by individual victims. Even though the Panel's decisions are not legally binding, it could provide a source of inspiration for a possible forum to be established in relation to human rights violations that occur in the context of Frontex operations.

In this light, the following is recommended:

- Victims of human rights violations that occur in the context of Frontex operations should be able to lodge a complaint against all actors that are involved and potentially responsible in a single forum that decides on admissibility and substance of the complaint in a legally binding manner. To ensure full independence and impartiality it is essential that this forum is external to Frontex. Ideally, the competence to hear such complaints is conferred on the CJEU.

1507 Council of the European Union, Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO (as amended).

5.5 Epilogue

International cooperation comes in different shapes and forms. It may consist of *ad hoc* bilateral meetings or take place within highly integrated international organisations that span entire continents or the whole world. International cooperation is indeed indispensable to maintain peace and security, ensure sustainable development, and protect human rights in a globalised world. It has, however, also opened up a broad range of challenges. At the heart of this study are the challenges raised by the interaction and cooperation between states and other public actors across borders for the allocation of responsibility among them.

As international cooperation intensifies, so does its impact on individual lives, reaching into areas particularly sensitive to human rights, such as migration and external border control. Whilst there is a more general trend towards cooperation in this field, the mutual assistance between EU member states is remarkable in its extent and institutionalisation. Frontex, the EU agency that supports Schengen states in the management of their external borders, has come to symbolise this cooperation in both its successes and difficulties. The latter have been laid bare in the wake of the efforts in dealing with rising numbers of persons that cross international borders fleeing poverty, conflict, or persecution. Joint return and border control operations organised by Frontex are emblematic of the human rights risks associated with external border management and the difficulty in allocating human rights responsibility among multiple actors.

This study exposed just how difficult it may be for individuals to find the right place for bringing complaints against violations of their human rights suffered at the EU's external borders. As the development of Frontex over its twelve years of existence demonstrates, channelling resources to the agency and increasing its tasks has been the 'standard' emergency response. In the course of Frontex' development, the commitment of the agency to human rights protection became more explicit and visible, especially with the establishment of the position of the Frontex Fundamental Rights Officer in 2011, and the setting up of an individual fundamental rights complaints procedure in 2016. Despite these positive steps, core weakenesses remain from the human rights perspective.

The official position of the agency continues to locate human rights responsibilities predominantly (if not exclusively) with member states, at least where operational personnel deployed to joint operations are concerned. However, this study showed that the agency itself indeed bears human rights responsibility, rooted in its extensive obligations to supervise member state conduct and protect individuals at risk. In addition, there exists no independent and impartial common forum where individuals can enforce their rights.

Victims of human rights violations still have to undertake lenghty proceedings within different jurisdictions. Far from practical, the current state of affairs also fails to offer them an effective remedy. If Frontex is to remain a key player in EU external border management that operates in full respect of human rights, these shortcomings must be addressed.

While tackling these concerns is important, it will not solve all challenges relating to the allocation of responsibility. As shown in this study, certain difficulties faced by individuals in holding Frontex and the states involved in joint operations to account lie beyond the agency itself. The study revealed that there are situations where substantial contributions by one public actor to the breach of another trigger no responsibility. The reason for this outcome lies partly in the treatment of responsibility by ECHR and EU public liability law. Responsibility is typically assessed for each actor individually. The broader picture, in particular the question of whether or not the impugned conduct was part of cooperative activities, is only marginally considered, and sometimes not at all. As a result, the assessment of responsibility often fails to sufficiently reflect the fact that several public actors can do more together than in insolation.

Against this background, it is urgent to address the shortcomings identified in this study. This entails taking the human rights obligations of the agency seriously. In addition, there is a need to develop clear and comprehensive rules on allocation of responsibility that take into account the reality of cooperative action. The present study offers not only an in depth analysis of these aspects, but also a set of recommendations that can assist in achieving this objective.

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Summary

This thesis examines the legal responsibility for human rights violations that may occur in the context of border control or return operations coordinated by Frontex.

Frontex is a European Union (EU) agency that supports Schengen states in the management of their external borders *inter alia* by organising joint operations. In the framework of a joint operation, a state (referred to as the 'host state') receives assistance in order to carry out border control activities at its external borders or to return third country nationals that have no right to stay. This assistance mainly consists of additional human and technical resources made available by other Schengen states (referred to as 'participating states') or Frontex. In addition, Frontex finances the operations and coordinates the activities of the various involved actors.

This means, for example, that a migrant intending to cross the EU external border in State A may encounter a border guard of State B using equipment provided by State C in an operation funded by Frontex. This poses the fundamental question of how responsibility is distributed among the involved parties, where unlawful activities are performed during a joint operation. Imagine the following scenario: During a border control operation at sea, a vessel forces a boat carrying migrants back to its place of origin. This may be in violation of the human rights of persons on that boat, for example the prohibition to send individuals back to a place where they would face persecution or serious maltreatment. The operation is hosted by State A, coordinated and financed by Frontex, but the vessel in question and its crew are from State B. The crew on State B's vessel did not decide alone to send the migrant boat back. Representatives of States A, B, C, D, and Frontex sat together and discussed possible courses of conduct, concluding this was the way to proceed. Whilst each may have contributed to the unlawful activity, their contributions vary in nature and degree. But which contribution leads to legal responsibility? In other words, who has to bear the consequences for and remedy the unlawful conduct?

The aim of this thesis is to clarify the allocation of responsibility among the actors involved in Frontex operations by determining to what extent each of their contributions may trigger legal responsibility if human rights violations occur during joint operations. Establishing such clarity fulfils a two-fold purpose. First, it strengthens the position of individual victims

of human rights violations. Knowing the roles, powers, and authority of each actor involved, and the rules on allocation of responsibility applicable in that context, individuals are better placed for taking legal action if their rights have been violated. Second, the more clarity there is, the smaller the scope for 'blame-shifting' from one actor to another, which may function as an incentive for compliance with human rights obligations. Importantly, difficulties in allocating responsibility are not unique to Frontex, but exist more generally when multiple actors contribute to an unlawful outcome ('*multi-actor situations*'). In this vein, the contribution of this study goes beyond the specific case of Frontex operations and provides a legal framework for addressing allocation of legal responsibility in multi-actor situations.

The study is divided into three main parts. The first, **Chapter 2**, discusses the powers of Frontex and the states involved. The extent and nature of each actor's contribution and the authority they exercise over the resources deployed, are relevant in determining the existence and degree of their legal responsibility. Thus, in Chapter 2, this study examines the detailed roles and powers of Frontex and the states involved enjoy during joint operations. It elaborates on the pooling of operational resources prior to launching operations, the process of deployment, the coordination bodies and instruments established for joint operation, and the procedures in place for dealing with fundamental rights related incidents. Its main focus, however, is on the respective authority exercised by the actors involved over the deployed operational resources, in particular on the decision-making processes and chains of command.

Importantly, Chapter 2 shows that during the implementation of joint operations, participating states partially transfer authority over resources they contribute to the host state and Frontex. The host state, in particular, has a key role in deciding the course of conduct of deployed resources and enjoys far-reaching authority to issue instructions to its own, but also to participating states' officers. Notably, however, participating states that contribute large (often military) assets, such as vessels or aeroplanes, retain crucial parts of authority through two mechanisms. First, they are represented within the body set up to run the operation (Joint Coordination Board) in the form of a so-called National Official. This National Official has to be consulted whenever a decision affects a large asset of a participating state. Second, with each asset the contributing state deploys a Commanding Officer responsible for commanding the asset's staff.

The second and third parts of this study, **Chapters 3 and 4**, discuss the rules that govern the allocation of responsibility in multi-actor situations and apply them to Frontex operations. Two regimes of legal responsibility were chosen as frameworks for the analysis: responsibility for breaches of the European Convention on Human Rights (ECHR) on the one hand, and liability under EU law for breaches of the Charter of Fundamental Rights of the European Union (CFR) on the other. The main reason for this choice is

that both forms of legal responsibility can be established before courts following an action by an individual and are in principle capable of addressing questions of allocation of responsibility.

In both ECHR and EU law, responsibility is analysed in the framework of two different conceptual bases. The first is the responsibility that arises *directly* from a human rights violation committed during an operation, referred to here as primary or direct responsibility. For example, if a person is expelled in violation of the prohibition of *refoulement*, primary responsibility is the responsibility that directly results from that breach. The second is the responsibility that arises for *conduct associated with the primary violation*, referred to here as associated or indirect responsibility. Associated responsibility arises for the assistance in, or a failure to protect an individual from breaches of human rights for which another actor is primarily responsible. For example, if a person is expelled in violation of the prohibition of *refoulement* and the host state is directly responsible for it, Frontex or participating states may incur responsibility for failing to prevent that infringement.

Chapter 3 examines the allocation of responsibility among states involved in Frontex operations for breaches of the ECHR committed in the course of the operations. The analysis in this context is based on the law of international responsibility as applied by the European Court of Human Rights (ECtHR). The law of international responsibility is understood as encompassing the rules represented in the Articles on the Responsibility of States for Internationally Wrongful Acts (ASR) and the Articles on the Responsibility of International Organizations (ARIO), which were formulated by the International Law Commission in 2001 and 2011 respectively.

Chapter 3 is divided into four main sections. The first outlines the 'basics' of the law of international responsibility, focussing on its relationship with the ECHR and application to the EU member states when they act within EU law. The subsequent section examines the conditions for responsibility. Given that in this thesis responsibility is analysed on the basis that violations do indeed occur, the focus is on the question of attribution of conduct, the only other precondition for responsibility to arise. The third section of Chapter 3 studies primary responsibility under the ECHR and is dominated by a discussion of attribution rules and their application to the actors involved in joint operations. The most basic of these rules is that the conduct of a person that a state or an international organisation has designated by law as their organ, is attributable to that state or international organisation (Articles 4 ASR and 6 ARIO). In the context of Frontex operations, this means that at the outset the conduct of personnel is generally attributable to the entity that contributed them. However, since participating states partially transfer authority over resources they contribute to the host state and Frontex, the crucial question is how this affects the attribution of their personnel's conduct.

The relevant rules are found in Articles 6 ASR and 7 ARIO, both of which are discussed in detail in Chapter 3. Article 6 ASR deals with the situation where an organ of one state is placed at the disposal of another and sets out the circumstances under which conduct of the 'lent' or 'transferred' organ is attributable to the receiving state. The parallel provision in the ARIO, Article 7, deals with the situation where an organ of a state or an international organisation is placed at the disposal of another international organisation. Whilst the situations these two articles address are similar, they differ in the thresholds established for attribution of the 'lent' organ's conduct to the receiving entity. Article 6 ASR essentially requires full and exclusive normative control for a 'transfer' of an organ from one state to another. In contrast, Article 7 ARIO provides that conduct of the lent organ is attributable to the receiving organisation, if and to the extent that the latter exercises effective (factual) control that need not necessarily be exclusive.

It is evident from the analysis of the application of these rules to Frontex operations, that conduct of both local staff and deployed officers (contributed by states or Frontex) is attributable to the host state. Thus, the host state is directly responsible for conduct of local and deployed officers in breach of the ECHR. Conversely, the conduct of personnel on large assets deployed by participating states, such as vessels or aeroplanes, remains attributable to their original home states, who are responsible if these assets are involved in a breach of the ECHR. Importantly, neither participating states that do not contribute large assets nor the EU typically incur direct responsibility under the ECHR for human rights breaches committed during joint operations.

Finally, in the fourth section, Chapter 3 analyses associated responsibility. More specifically, it discusses whether states that are not directly responsible for a specific breach may still be responsible for contributing to, or not preventing it. Questions of associated responsibility are examined in light of the obligations to protect as developed by the ECtHR, in particular under the doctrine of positive obligations. In essence, states may incur responsibility if they fail to prevent human rights violations committed by others. This, however, requires that they know or ought to know of the violation and have means to prevent it. In relation to the states involved in Frontex operations, the analysis shows that only the host state and participating states that contribute large assets are likely to incur responsibility on this basis, essentially due to their possibility to influence the course of action during joint operations. All other states do not exercise sufficient control in the context of joint operations so as to bring the relevant situations under their jurisdiction within the meaning of Article 1 ECHR. Hence, these states' obligations to protect under the ECHR are not triggered.

Against this background, Chapter 3 also discusses responsibility for rendering aid or assistance under public international law. The relevant rule, Article 16 ASR, provides that responsibility for 'complicity' arises whenever a state renders aid or assistance that makes it materially easier for the receiv-

ing state to commit an internationally wrongful act, provided the assisting state does so in the knowledge of the internationally wrongful act and is itself bound by the primary obligation the receiving state has breached. Most importantly, there is no need for the assisting state to be under an obligation, for example under the ECHR, to abstain from rendering assistance. In other words, a participating state may incur responsibility for being complicit in a human rights violation by the host state, regardless of whether the victim of the violation is within its jurisdiction according to Article 1 ECHR. Whilst the rules on aid or assistance could therefore fill the 'gap' left where the ECHR's obligations to protect are not applicable, the ECtHR does not generally hold states responsible on that basis.

Chapter 4 examines the allocation of liability under EU law among Frontex and EU member states involved in Frontex operations, and among EU member states themselves, for breaches of the CFR committed during operations. 'Liability' refers, on the one hand, to the non-contractual liability of Frontex under Article 60(3) of its founding Regulation (Regulation 2016/1624). This provision, in turn, is based on the non-contractual liability of the Union under Article 340 Treaty on the Functioning of the European Union. It refers, on the other hand, to state liability as developed by the Court of Justice of the European Union (CJEU).

Chapter 4 follows the same structure as Chapter 3. It opens by outlining the 'basics' of EU public liability law. Subsequently, it examines the conditions for liability and their application in the event of fundamental rights violations. Under EU law, liability only arises for breaches of individual rights that qualify as sufficiently serious and have a causal link to damage that the victim suffers. The analysis focusses on the sufficiently serious breach requirement. The rule identified in Chapter 4 is that breaches based on a *reasonable* unlawful interpretation of the provision in question are not sufficiently serious, whereas those based on an *unreasonable* unlawful interpretation are.

The third section addresses primary liability. It develops general rules on allocation of liability from the case law of the CJEU that govern situations where breaches of EU law are committed under the shared authority between the Union and its member states. The key principle derived from case law is that liability follows legal decision-making power. In other words, the authority that enjoys legal room for manoeuvre is legally capable of choosing lawful over unlawful conduct and incurs liability if opting for the latter. Whether the choice may be more limited in practice than in law is typically of no relevance. In essence, this means that with respect to each fundamental rights violation committed by officers deployed during Frontex operations, the actor that was empowered to determine the conduct at the origin of the violation in a legally binding manner incurs liability.

The analysis shows that in the context of Frontex operations, the host state enjoys legal decision-making power and consequently incurs liability if fundamental rights violations are committed during joint operations. The most relevant exception is large assets deployed by participating states, such as vessels or aeroplanes. The legal authority over these is shared between the host state and the home state, who has to consent to decisions affecting its assets. Thus, fundamental rights violations by large assets give rise to the joint liability of both the host and the home state. Frontex' means of influence, in contrast, may give it some factual control over conduct during joint operations, but not legal control. Thus, as long as fundamental rights violations do not result from conduct of its own coordinating staff or the Operational Plan itself, Frontex incurs no primary liability.

Finally, in the fourth section, Chapter 4 analyses associated liability. It discusses whether Frontex itself, or EU member states that are not directly liable for a specific breach, may still be liable for contributing to, or not preventing it. This, generally speaking, requires that an obligation to supervise another authority in the application of Union law, or an obligation to protect individuals from violations committed by others, is breached in a sufficiently serious manner. Since the host state comprehensively incurs primary liability for most violations that may occur, questions of associated liability under EU law typically arise with respect to Frontex and participating states.

The analysis in Chapter 4 shows that Frontex has far-reaching obligations to supervise the conduct of member state authorities during joint operations. It also incurs obligations under EU fundamental rights law to protect individuals from violations committed by states in the context of joint operations. All of these obligations are capable of giving rise to Frontex' liability if it fails to meet them, provided the breach can be considered sufficiently serious. Considerably more complex is the associated liability of participating states. They incur obligations to protect under EU fundamental rights law that are triggered, in essence, as soon as they know or ought to know of a violation. These obligations require participating states to act upon their knowledge by using all means reasonably available. Even if these obligations are triggered in a specific case, however, failure to react will often not qualify as sufficiently serious. Only participating states involved in an operation with large assets, it seems, have the knowledge and means available that may render their failure to protect individuals sufficiently serious.

The final **Chapter 5** summarises the main findings and their practical implications. Moreover, it identifies the obstacles that individuals, whose human rights have been breached during a Frontex operation, face when holding the actors involved to account. Most importantly, this study reveals that only the host state is comprehensively responsible for human rights violations that may occur during Frontex operations. Whilst Frontex and participating states may be partly responsible too, some of their contributions to

human rights violations during joint operations always remain below the threshold required for responsibility to arise under both the ECHR and EU public liability law. One of the reasons is that neither of these responsibility mechanisms systematically takes into account whether the impugned conduct was part of cooperative activities. In other words, the fact that several public actors can do more together than each of them alone is not always sufficiently reflected in terms of responsibility. In Chapter 5, this study puts forward a number recommendations on how to address the obstacles identified.

Zusammenfassung (Summary in German)

Frontex und Menschenrechte: Verantwortlichkeit in Mehrpersonenverhältnissen nach der EMRK und EU-Haftungsrecht

Diese Dissertation widmet sich der Frage der rechtlichen Verantwortlichkeit für Menschenrechtsverletzungen, die sich im Rahmen von Frontex-koordinierten Grenzkontroll- oder Rückführungseinsätzen ereignen.

Frontex ist eine Agentur der Europäischen Union (EU), die Schengenstaaten beim Schutz ihrer Außengrenzen unterstützt. Unter anderem beinhaltet dies die Organisation gemeinsamer Einsätze. Im Rahmen eines gemeinsamen Einsatzes erhält ein Mitgliedstaat (der „Einsatzstaat") Unterstützung, um Grenzkontrollmaßnahmen an den Außengrenzen durchzuführen oder Drittstaatsangehörige ohne Aufenthaltsrecht rückzuführen. Diese Unterstützung besteht im Wesentlichen aus der Bereitstellung zusätzlicher personeller und technischer Ressourcen durch andere Schengenstaaten (die „teilnehmenden Staaten") oder Frontex. Darüber hinaus finanziert Frontex die Einsätze und koordiniert die Tätigkeit der involvierten Akteure.

Beabsichtigt ein Migrant eine EU-Außengrenze in Staat A zu überschreiten, kann dieser dort dementsprechend auf einen Grenzschutzbeamten des Staats B treffen. Der Grenzschutzbeamte verwendet möglicherweise von Staat C im Rahmen eines von Frontex finanzierten Einsatzes bereitgestellte Ausrüstung. Dies wirft die grundlegende Frage auf, wie die rechtliche Verantwortlichkeit unter den involvierten Akteuren aufgeteilt wird, sollte es während des Einsatzes zu rechtswidrigem Verhalten kommen. Man stelle sich die folgende Situation vor: Während eines Grenzeinsatzes auf See erzwingt ein Schiff die Umkehr eines Bootes mit Migranten zum Herkunftsort. Diese Vorgehensweise könnte die Menschenrechte der Personen auf dem Boot verletzen, etwa das Verbot Personen an einen Ort zurückzuschicken, an dem sie Vertreibung oder ernsthafter Misshandlung ausgesetzt wären. Einsatzstaat ist Staat A. Frontex koordiniert und finanziert den Einsatz. Das betreffende Schiff und seine Mannschaft wurden jedoch von Staat B bereitgesellt. Die Schiffsmannschaft beschloss keineswegs alleine, das Boot mit den Migranten zur Umkehr zu zwingen. Vertreter der Staaten A, B, C und Frontex berieten gemeinsam über verschiedene mögliche Vorgangsweisen und beschlossen, was zu tun sei. Wenngleich sie daher alle zur Rechtsverletzung beitrugen, so unterscheiden sich die jeweiligen Beiträge in ihrem Wesen und Ausmaß. Welcher Beitrag jedoch führt zu rechtlicher Verantwortlichkeit? Mit anderen Worten, wer muss die Konsequenzen des rechtswidrigen Verhaltens tragen und Wiedergutmachung leisten?

Das Ziel dieser Dissertation ist es, die Verteilung rechtlicher Verantwortlichkeit unter an Frontex-Einsätzen beteiligten Akteuren zu klären. Es soll insbesondere bestimmt werden, wann Beiträge zu Menschenrechtsverletzungen, die sich im Rahmen von gemeinsamen Einsätzen ereignen, zu rechtlicher Verantwortlichkeit führen. Zum einen stärkt dies die Stellung der von Menschenrechtsverletzungen betroffenen Individuen. Personen, die Gewissheit über die Funktion, Befugnisse und Befehlsgewalt jedes beteiligten Akteurs haben und die anwendbaren Regeln über die Verteilung rechtlicher Verantwortlichkeit kennen, können rechtliche Schritte einleiten, sollten ihre Rechte verletzt worden sein. Zum anderen verringert eine klare Verantwortlichkeitsverteilung den Spielraum der beteiligten Akteure, sich gegenseitig die Schuld zuzuschieben, was Anreize zur Einhaltung von Menschenrechten schaffen kann. Hervorgehoben werden soll, dass Schwierigkeiten in der Verantwortlichkeitsverteilung keineswegs nur Frontex betreffen. Viel mehr bestehen diese ganz generell, wenn mehrere Akteure an rechtswidrigem Verhalten mitwirken (‘*multi-actor situations*’). In diesem Sinne geht der Beitrag dieser Dissertation über den spezifischen Fall von Frontex-Einsätzen hinaus und stellt einen rechtlichen Rahmen bereit, der dem Verständnis von Verantwortlichkeitsaufteilung ganz generell dient.

Die Dissertation umfasst drei Hauptteile. Der erste Hauptteil, **Kapitel 2**, befasst sich mit den jeweiligen Befugnissen, über die Frontex und die beteiligten Staaten verfügen. Wesen und Umfang der Beiträge jedes Akteurs und deren Befehlsgewalt über die eingesetzten Ressourcen bestimmen sowohl das Bestehen als auch das Ausmaß rechtlicher Verantwortlichkeit. Dementsprechend untersucht Kapitel 2 die Funktionen aller Beteiligten, die Bündelung der Ressourcen vor Einsätzen, den Auflauf bei deren Entsendung, die Konstituierung der Koordinationsgremien und -instrumentarien sowie die Vorgangsweisen bei menschenrechtsrelevanten Vorfällen. Das Hauptaugenmerk liegt jedoch auf der Befehlsgewalt, über die die Beteiligten verfügen, insbesondere den Entscheidungsfindungsabläufen und Befehlsketten.

Kapitel 2 zeigt auf, dass teilnehmende Staaten während gemeinsamer Einsätze bestimmte Aspekte ihrer Befehlsgewalt über von ihnen zur Verfügung gestellte Ressourcen dem Einsatzstaat sowie Frontex übertragen. Insbesondere der Einsatzstaat nimmt eine Schlüsselfunktion in der Entscheidungsfindung über die Tätigkeiten der eingesetzten Ressourcen wahr und verfügt über weitreichende Befehlsgewalt, Anweisungen an die eigenen Grenzschutzbeamten, aber auch an die der teilnehmenden Staaten zu erteilen. Bedeutend ist jedoch, dass teilnehmende Staaten, die große (oftmals militärische) Mittel, etwa Schiffe oder Flugzeuge, bereitstellen, wesentliche Aspekte ihrer Befehlsgewalt behalten. Dies äußert sich in zwei Mechanismen. Zum einen sind diese Staaten in Form von sogenannten *National Officials* im *Joint Coordination Board*, jenem Gremium, das zur täglichen Leitung des Einsatzes konstituiert wird, vertreten. Der *National Official* eines Staates muss dann in den Entscheidungsprozess eingebunden werden, wenn ein vom jeweiligen

teilnehmenden Staat bereitgestelltes Mittel betroffen ist. Zum anderen setzen teilnehmende Staaten gemeinsam mit deren Schiff oder Flugzeug einen *Commanding Officer* ein, der die Befehlsgewalt über die jeweilige Mannschaft ausübt.

Der zweite und dritte Hauptteil, **Kapitel 3 und 4**, setzen sich mit den Regeln über die Verantwortlichkeitsverteilung in *multi-actor situations* auseinander und wenden diese auf Frontex-Einsätze an. Die Untersuchung wird im Rahmen zweier Rechtsregime vorgenommen: Verantwortlichkeit für Verletzungen der Europäischen Menschenrechtskonvention (EMRK) auf der einen Seite und Haftung im EU Recht für Verletzungen der EU Grundrechtecharta auf der anderen Seite. Die Wahl fiel auf diese beiden Formen rechtlicher Verantwortlichkeit, weil beide im Wege individueller Beschwerdeverfahren vor Gerichten durchgesetzt werden können und die prinzipielle Möglichkeit bieten, Fragen der Verantwortlichkeitsverteilung zu thematisieren.

Diese Dissertation analysiert rechtliche Verantwortlichkeit im EMRK- sowie EU-Recht im Rahmen zweier konzeptueller Grundlagen. Die erste betrifft die Verantwortlichkeit, die sich *direkt* aus einer während Frontex-Einsätzen begangenen Menschenrechtsverletzung ableitet und wird hier als primäre oder direkte Verantwortlichkeit bezeichnet. Zum Beispiel, sollte eine Person in Verletzung des *refoulement*-Verbots zurückgewiesen werden, ergibt sich primäre Verantwortlichkeit direkt aus dieser Verletzung. Die zweite Grundlage betrifft Verantwortlichkeit, die für Verhalten eintritt, *das mit der primären Verletzung im Zusammenhang steht*, und wird hier als assoziierte oder indirekte Verantwortlichkeit bezeichnet. Assoziierte Verantwortlichkeit entsteht für Beiträge zu einer Menschenrechtsverletzung eines anderen Akteurs oder auf Grund eines Versäumnisses, eine Person vor einer solchen Menschenrechtsverletzung zu schützen. Sollte der Einsatzstaat etwa direkt verantwortlich sein, eine Person in Verletzung des *refoulement*-Verbots zurückgewiesen zu haben, so könnten Frontex oder teilnehmende Staaten zusätzlich Verantwortlichkeit dafür tragen, dies nicht verhindert zu haben.

Kapitel 3 befasst sich mit der Verantwortlichkeitsverteilung zwischen an Frontex-Einsätzen beteiligten Staaten nach EMRK-Recht für Verletzungen der EMRK, die während Frontex-Einsätzen auftreten. Die Untersuchung basiert auf dem Recht der internationalen Verantwortlichkeit, wie es vom Europäischen Gerichtshof für Menschenrechte (EGMR) angewendet wird. Das Recht der internationalen Verantwortlichkeit umfasst, nach dem Verständnis, das dieser Dissertation zu Grunde gelegt wird, die von der Völkerrechtskommission formulierten Artikel über die Verantwortlichkeit von Staaten für völkerrechtswidriges Handeln (*2001 Articles on the Responsibility of States for Internationally Wrongful Acts*, „ASR“) und die Artikel über die Verantwortlichkeit Internationaler Organisationen (*2011 Articles on the Responsibility of International Organizations*, „ARIO“).

Kapitel 3 ist in vier Abschnitte gegliedert. Der erste beschäftigt sich mit den Grundlagen des Rechts der internationalen Verantwortlichkeit sowie dessen Verhältnis mit der EMRK und Anwendung auf EU-Mitgliedstaaten, wenn diese EU-Recht ausführen. Der zweite Abschnitt arbeitet die Bedingungen für die Entstehung von Verantwortlichkeit aus. Diese Dissertation geht im Wesentlichen vom Vorliegen einer Menschenrechtsverletzung aus. Folglich liegt das Hauptaugenmerk dieses Abschnitts auf Fragen der Zurechnung rechtswidrigen Verhaltens, die einzig andere Voraussetzung für das Entstehen von Verantwortlichkeit neben der Rechtsverletzung selbst. Der dritte Abschnitt in Kapitel 3 widmet sich der Untersuchung primärer Verantwortlichkeit nach EMRK-Recht und beinhaltet im Wesentlichen eine Erörterung der Zurechnungsregeln sowie deren Anwendung auf die an gemeinsamen Einsätzen beteiligten Akteure. Als Grundregel ist vorgesehen, dass das Verhalten von Personen, die durch einen Staat oder eine Internationale Organisation als deren Organe eingesetzt wurden, dem jeweiligen Staat oder der jeweiligen Internationalen Organisation zuzurechnen ist (Artikel 4 ASR und 6 ARIO). Der Ausgangspunkt in Bezug auf Frontex ist dementsprechend, dass das Verhalten der Grenzschutzbeamten oder anderen Experten dem Akteur zurechenbar ist, der die Person für den Einsatz zur Verfügung gestellt hat. Da jedoch teilnehmende Staaten Aspekte ihrer Befehlsgewalt über ihr Personal dem Einsatzstaat und Frontex übertragen, stellt sich die Frage, wie dies die Zurechnung des Verhaltens dieses Personals beeinflusst.

Die ausschlaggebenden Regeln finden sich in Artikel 6 ASR und 7 ARIO, die daher im Detail in Kapitel 3 besprochen werden. Artikel 6 ASR betrifft Situationen, in denen ein Organ eines Staates einem anderen zur Verfügung gestellt wird und legt fest, unter welchen Voraussetzungen das Verhalten des „geliehenen" Organs dem Empfangsstaat zurechenbar ist. Parallel dazu behandelt Artikel 7 ARIO die Situation, in der ein Organ eines Staates oder einer Internationalen Organisation einer anderen Internationalen Organisation zur Verfügung gestellt wird. Obwohl sich die Szenarien, mit denen sich Artikel 6 ASR und 7 ARIO beschäftigen, daher ähneln, setzen sie unterschiedliche Voraussetzungen für die Zurechenbarkeit des Verhaltens der „geliehenen" Organe fest. Artikel 6 ASR verlangt im Wesentlichen umfassende und ausschließliche normative Kontrolle des Empfangsstaats. Im Unterschied dazu legt Artikel 7 ARIO fest, dass das Verhalten eines „geliehenen" Organs dann der empfangenden Internationalen Organisation zurechenbar ist, wenn letztere „wirksame Kontrolle" über dieses Verhalten ausübt, ungeachtet dessen, ob diese Kontrolle ausschließlich ist.

Die Anwendung dieser Bestimmungen auf Frontex-Einsätze ergibt, dass das Verhalten von Personal, das vom Einsatzstaat, von teilnehmenden Staaten oder von Frontex zur Verfügung gestellt wird, dem Einsatzstaat zuzurechnen ist. Folglich ist der Einsatzstaat direkt für deren Menschenrechtsverletzungen verantwortlich. Das Verhalten von Personal auf Schiffen oder

Flugzeugen ist hingegen dem teilnehmenden Staat zurechenbar, von dem diese Mittel beigesteuert wurden. Sollten solche Schiffe oder Flugzeuge in eine Menschenrechtsverletzung involviert sein, so ist daher der entsprechende teilnehmende Staat dafür verantwortlich. Hervorzuheben ist, dass teilnehmende Staaten, die lediglich Personal oder kleinere Ausrüstungsgegenstände, jedoch keine großen Mittel wie Schiffe oder Flugzeuge zur Verfügung stellen, nicht direkt für während Frontex-Einsätzen begangene Menschenrechtsverletzungen verantwortlich sind. Genauso wenig ist die EU direkt verantwortlich.

Schließlich, im vierten Abschnitt, widmet sich Kapitel 3 der assoziierten Verantwortlichkeit. Abschnitt 4 untersucht, ob Staaten, die nicht direkt für eine bestimmte Menschenrechtsverletzung verantwortlich sind, dennoch für Beiträge dazu oder für Versäumnisse, eine Person vor einer solchen Verletzung zu schützen, verantwortlich sein können. Assoziierte Verantwortlichkeit wird im Lichte der Schutzverpflichtungen, die der EGMR insbesondere im Rahmen der Lehre der positiven Verpflichtungen entwickelt hat, untersucht. Im Wesentlichen sind demnach Staaten dann verantwortlich, wenn sie es verabsäumen, eine von anderen begangene Menschenrechtsverletzung zu verhindern. Dies verlangt jedoch, dass der Staat von der Verletzung weiß oder wissen sollte und die Möglichkeit hat, sie zu verhindern. In Bezug auf in Frontex-Einsätze involvierte Staaten zeigt die Untersuchung, dass grundsätzlich ausschließlich der Einsatzstaat sowie teilnehmende Staaten, die Schiffe oder Flugzeuge zur Verfügung stellen, auf dieser Grundlage verantwortlich sein werden. Diese leitet sich im Wesentlichen aus deren Einflussmöglichkeiten im Rahmen von Frontex-Einsätzen ab. Alle anderen teilnehmenden Staaten üben keine ausreichende Kontrolle aus, um die entsprechenden Sachverhalte in ihre Hoheitsgewalt im Sinne von Artikel 1 EMRK zu bringen. Daher entstehen für diese Staaten erst gar keine Schutzverpflichtungen nach der EMRK.

Vor diesem Hintergrund beschäftigt sich Kapitel 3 auch mit den Regeln über die Verantwortlichkeit eines Staates für Hilfe oder Unterstützung nach Völkerrecht. Die entsprechende Bestimmung in Artikel 16 ASR sieht vor, dass Verantwortlichkeit dann entsteht, wenn ein Staat Hilfe oder Unterstützung leistet, die es dem Empfangsstaat wesentlich erleichtert, eine Völkerrechtsverletzung zu begehen, sofern der unterstützende Staat dies in Kenntnis der Umstände des völkerrechtswidrigen Handelns tut und selbst an die verletzte Bestimmung gebunden ist. Entscheidend ist, dass Verantwortlichkeit ungeachtet dessen entsteht, ob der unterstützende Staat verpflichtet ist, etwa nach der EMRK, nicht zur Menschenrechtsverletzung beizutragen. Ein an Frontex-Einsätzen teilnehmender Staat kann daher auch dann für Beiträge zu Menschenrechtsverletzungen des Einsatzstaates verantwortlich sein, wenn der entsprechende Sachverhalt nicht in seine Hoheitsgewalt im Sinne von Artikel 1 EMRK fällt. Obwohl die Regeln über Verantwortlichkeit für Hilfe oder Unterstützung daher die Lücke füllen könnten, die entsteht,

wenn EMRK-Schutzverpflichtungen unanwendbar sind, wendet sie der EGMR in diesem Zusammenhang generell nicht an.

Kapitel 4 befasst sich mit der Haftungsverteilung zwischen Frontex und EU-Mitgliedstaaten sowie zwischen EU Mitgliedstaaten untereinander, nach EU-Recht für Verletzungen der EU-Grundrechtecharta, die während Frontex Einsätzen auftreten. „Haftung" bezeichnet zum einen die außervertragliche Haftung von Frontex nach Artikel 60(3) der Verordnung über die Errichtung der Agentur (Verordnung 2016/1624). Diese Bestimmung basiert ihrerseits auf der außervertraglichen Haftung der Union nach Artikel 340 des Vertrags über die Arbeitsweise der Europäischen Union. Auf der anderen Seite bezeichnet „Haftung" die vom Gerichtshof der Europäischen Union (EuGH) entwickelte Staatshaftung.

Die Struktur von Kapitel 4 folgt jener in Kapitel 3. In diesem Sinne beginnt Kapitel 4 mit einer Erörterung der Grundlagen des EU-Haftungsrechts. Anschließend folgen eine Ausarbeitung der Haftungsvoraussetzungen und deren Anwendung auf Menschenrechtsverletzungen. Nach ständiger EuGH-Rechtsprechung entsteht außervertragliche Haftung, wenn rechtswidriges Verhalten vorliegt, ein tatsächlicher Schaden eingetreten ist und ein Kausalzusammenhang zwischen dem Verhalten und dem Schaden besteht. „Rechtswidrigkeit" im Sinne des EU-Haftungsrechts verlangt das Vorliegen eines hinreichend qualifizierten Verstoßes gegen eine Rechtsnorm, die bezweckt, dem Einzelnen Rechte zu verleihen. Der zweite Abschnitt in Kapitel 4 beschäftigt sich im Wesentlichen mit der Voraussetzung des qualifizierten Verstoßes. Die Untersuchung zeigt, dass der Gerichtshof der folgenden Grundregel folgt: Basiert der Verstoß auf einer vertretbaren unrechtmäßigen Auslegung der verletzten Bestimmung, gilt der Verstoß als nicht ausreichend qualifiziert und es tritt keine Haftung ein. Im Gegensatz dazu führt ein Verstoß, der auf einer nicht vertretbaren Auslegung basiert, zu Haftung.

Der dritte Abschnitt in Kapitel 4 beschäftigt sich mit primärer Haftung nach-EU Recht. Im Wesentlichen erarbeitet dieser Abschnitt generell anwendbare Regeln zur Haftungsverteilung aus der Rechtsprechung des EuGH. Zu diesem Zweck werden insbesondere jene Fälle untersucht, in denen der EuGH einen Rechtsverstoß zu beurteilen hatte, der unter der gemeinsamen Befehlsgewalt der Union und ihrer Mitgliedstaaten begangen wurde. Die so erarbeitete Grundregel sieht vor, dass sich Haftung nach rechtlicher Gestaltungsmacht richtet. Mit anderen Worten, jener Akteur, der über rechtliche Gestaltungsmacht verfügt, kann rechtlich gesehen zwischen rechtskonformem und rechtswidrigem Verhalten wählen und haftet, wenn er sich für letzteres entscheidet. Ob die Wahl in der Praxis eingeschränkter ist als rechtlich vorgesehen, ist im Grunde irrelevant. Für Menschenrechtsverletzungen, die sich während Frontex-Einsätzen ereignen, heißt dies im Wesentlichen, dass jener Akteur dafür haftet, dem die Befugnis zukam, über das schadensverursachende Verhalten in rechtlich verbindlicher Weise zu bestimmen.

Die Untersuchung zeigt, dass dem Empfangsstaat rechtliche Gestaltungsmacht während Frontex-Einsätzen zukommt. Folglich haftet der Empfangsstaat für Menschenrechtsverletzungen, die sich im Rahmen von Frontex-Einsätzen ereignen. Die wichtigste Ausnahme sind Mittel wie Schiffe und Flugzeuge, die von teilnehmenden Staaten zur Verfügung gestellt werden. Die Hoheitsgewalt über solche Mittel wird vom Einsatzstaat und dem jeweiligen teilnehmenden Staat, der Entscheidungen, die seine Mittel betreffen, zustimmen muss, gemeinsam ausgeübt. In diesem Sinne führen Menschenrechtsverletzungen, die von Personal auf von teilnehmenden Staaten beigesteuerten Schiffen oder Flugzeugen zur gemeinsamen Haftung des Einsatz- und des teilnehmenden Staates. Frontex' Einflussmöglichkeiten statten die Agentur hingegen lediglich mit tatsächlicher (nicht rechtlicher) Kontrolle über gemeinsame Einsätze aus. Dementsprechend haftet Frontex grundsätzlich nicht direkt, zumindest solange Menschenrechtsverletzungen nicht unmittelbar durch von der Agentur abgestelltes Koordinierungspersonal begangen werden oder auf den Einsatzplan („*Operational Plan*") selbst zurückzuführen sind.

Schließlich, im vierten Abschnitt, widmet sich Kapitel 4 der assoziierten Haftung. Abschnitt 4 untersucht, ob Frontex selbst oder nicht primär haftende Mitgliedstaaten, für Beiträge zu Menschenrechtsverletzungen oder für Versäumnisse, diese zu verhindern, haften. Assoziierte Haftung tritt ein, wenn die Union oder ein Mitgliedstaat Schadensabwendungspflichten, d.h. Aufsichts- und Kontrollpflichten oder Schutzpflichten, auf hinreichend qualifizierte Weise verletzt. Da der Einsatzstaat ohnehin umfassend primäre Haftung für während Frontex-Einsätzen auftretende Menschenrechtsverletzungen trägt, stellt sich die Frage der assoziierten Haftung typischerweise hinsichtlich Frontex und teilnehmenden Staaten.

Die Untersuchung in Kapitel 4 zeigt, dass Frontex weitreichende Aufsichts- und Kontrollpflichten über die an Frontex-Einsätzen beteiligten Staaten hat. Darüber hinaus ist die Agentur im Rahmen des EU-Menschenrechtsschutzes verpflichtet, Personen vor Verletzungen zu schützen, die von Staaten während Frontex-Einsätzen begangen werden. Eine Missachtung dieser Aufsichts-, Kontroll- und Schutzpflichten kann die Agentur haftbar machen, sollte der Verstoß hinreichend qualifiziert sein. Ungleich komplexer ist die Frage der assoziierten Haftung teilnehmender Staaten. Schutzpflichten nach EU-Menschenrechtsschutz verlangen, dass teilnehmende Staaten dann einschreiten, wenn sie von einer Menschenrechtsverletzung wissen oder wissen sollten. Eine Missachtung dieser Verpflichtung wird meist nicht als hinreichend qualifizierter Verstoß gewertet werden können. Lediglich teilnehmende Staaten, die Mittel wie etwa Schiffe oder Flugzeuge beisteuern, sind mit ausreichend Möglichkeiten im Rahmen von gemeinsamen Einsätzen ausgestattet, sodass ein Versäumnis, zum Schutz von Individuen einzuschreiten, hinreichend qualifiziert sein kann.

Kapitel 5 fasst die wesentlichsten Untersuchungsergebnisse und deren praktische Auswirkungen zusammen. Zudem ermittelt es die Schwierigkeiten, die Individuen zu überwinden haben, wenn sie die an Frontex-Einsätzen beteiligte Akteure für in diesem Rahmen begangene Menschenrechtsverletzungen zur Rechenschaft ziehen wollen. Hervorzuheben ist, dass nur der Einsatzstaat umfassend für Menschenrechtsverletzungen verantwortlich ist. Zwar tragen Frontex und teilnehmende Staaten teilweise ebenfalls Verantwortlichkeit; jedoch bleiben viele ihrer Beiträge zu Menschenrechtsverletzungen unter jener Schwelle, die die EMRK und das EU-Haftungsrecht für rechtliche Verantwortlichkeit festlegen. Einer der Gründe liegt darin, dass keines der Verantwortlichkeitsregime systematisch mit Rechtswidrigkeit aus „kooperativer Tätigkeit" umgehen. Mit anderen Worten, die Tatsache, dass mehrere Akteure gemeinsam mehr Schaden anrichten können als jeder Einzelne von ihnen alleine, schlägt sich nicht in deren Verantwortlichkeit nieder. Abschließend empfiehlt diese Dissertation eine Reihe von Lösungsansätzen zur Überwindung der hier behandelten Schwierigkeiten.

Samenvatting (Summary in Dutch)

Frontex en Mensenrechten: aansprakelijkheid onder het EVRM en het EU-recht in 'Multi-Actor Situaties'

Dit proefschrift onderzoekt de juridische aansprakelijkheid voor mensenrechtenschendingen die kunnen plaatsvinden bij grenscontroles en terugkeeroperaties die zijn gecoördineerd door Frontex.

Frontex is een agentschap van de Europese Unie (EU) dat Schengenlanden ondersteunt ten behoeve van het beheer van hun buitengrenzen, onder andere door het organiseren van gezamenlijke operaties. In het kader van een gezamenlijke operatie ontvangt een lidstaat (aangeduid als het 'gastland') bijstand om grenscontroles uit te voeren nabij hun buitengrenzen of om derdelanders die geen recht hebben om te verblijven terug te sturen. De bijstand bestaat voornamelijk in aanvullende personele en technische middelen die beschikbaar zijn gemaakt door andere Schengenlanden (aangeduid als de 'deelnemende staten') of door Frontex. Bovendien financiert Frontex de operaties en coördineert het de activiteiten van de betrokken actoren.

Dit betekent bijvoorbeeld dat een migrant die een EU buitengrens over wil steken in Lidstaat A, een grenswacht kan tegenkomen van Lidstaat B, die gebruik maakt van apparatuur van Lidstaat C, in een operatie gefinancierd door Frontex. Dit werpt fundamentele vragen over de verdeling van aansprakelijkheid tussen de betrokken partijen, indien illegale activiteiten plaatsvinden tijdens een gezamenlijke operatie. Stel de volgende situatie voor: tijdens een grenscontrole op zee dwingt een schip een boot vol met migranten terug te keren naar de plaats van herkomst. Dit zou een schending kunnen opleveren van de mensenrechten van de personen op die boot, bijvoorbeeld van het verbod om personen terug te sturen naar een plaats waar ze te vrezen hebben voor vervolging of ernstige mishandeling. De operatie wordt gecoördineerd en gefinancierd door Frontex en uitgevoerd door Lidstaat A, maar met een schip en bemanning van Lidstaat B. De bemanning van het schip heeft niet uit zichzelf besloten om de boot met migranten terug te sturen. Vertegenwoordigers van Staten A, B, C, D en Frontex hebben samen de mogelijke handelwijze besproken en geconcludeerd dat dit de beste keuze was. Hoewel ieder van hen wellicht heeft bijgedragen aan de illegale activiteit, variëren de bijdrages in aard en omvang. Maar welke leidt tot aansprakelijkheid? Met andere woorden, wie draagt de consequenties voor de onrechtmatige gedraging?

Het doel van dit proefschrift is het verduidelijken van de toewijzing van aansprakelijkheid tussen de betrokken actoren in Frontex-operaties indien mensenrechtenschendingen plaatsvinden tijdens gezamenlijke operaties. Deze verduidelijking vervult twee doeleinden. Ten eerste versterkt het de positie van individuele slachtoffers van mensenrechtenschendingen. Door kennis te hebben van de rollen, bevoegdheden en gezag van elke betrokken actor, en van de regels over toewijzing van aansprakelijkheid, zullen slachtoffers beter in staat zijn om juridische stappen te ondernemen wanneer hun rechten zijn geschonden. Ten tweede, hoe meer duidelijkheid er is, hoe minder ruimte er is voor *blame shifting*, hetgeen op zichzelf een stimulans is om mensenrechtenverplichtingen na te leven. Belangrijk is dat problemen in het toewijzen van aansprakelijkheid niet uniek zijn voor gezamenlijk operaties onder coördinatie van Frontex, maar dat die vaker ontstaan wanneer meerdere actoren bijdragen aan een schadelijke, en wellicht onrechtmatige, uitkomst (*multi-actor situaties*). Daarom is de reikwijdte van deze studie breder dan slechts Frontex-operaties: het biedt een wettelijk kader voor de toewijzing van aansprakelijkheid in multi-actor situaties in het algemeen.

Het onderzoek is verdeeld in drie hoofdonderdelen. Het eerste deel, **hoofdstuk 2**, bespreekt de bevoegdheden van Frontex en de betrokken lidstaten. De aard en omvang van de bijdrage van elke actor en het gezag dat zij uitoefenen over de ingezette middelen, zijn allemaal relevant bij het bepalen van het bestaan en de mate van hun aansprakelijkheid. Hoofdstuk 2 onderzoekt dus de specifieke rol en het gezag van Frontex en de lidstaten tijdens gezamenlijke operaties. Er wordt dieper ingegaan op het bundelen van de operationele middelen voorafgaand aan operaties, het proces van implementatie, de coördinerende organen en instrumenten, en de procedures voor incidenten gerelateerd aan fundamentele rechten. Het zwaartepunt van dit hoofdstuk ligt echter op het gezag van de betrokken actoren over de ingezette operationele middelen, en met name op het besluitvormingsproces en de bevelsstructuur.

Hoofdstuk 2 laat zien dat de deelnemende lidstaten hun gezag over de middelen die ze leveren tijdens gezamenlijke operaties gedeeltelijk overdragen aan het gastland en aan Frontex. Het gastland heeft een sleutelrol in de besluitvorming over de inzet van middelen en het beschikt over vergaande bevoegdheden om instructies te geven aan de eigen functionarissen en deelnemende functionarissen van andere lidstaten. Deelnemende lidstaten die een bijdrage leveren met groot (meestal militair) materieel, zoals schepen en vliegtuigen, behouden echter een wezenlijk gedeelte van het gezag door middel van twee mechanismes. Ten eerste zijn deze lidstaten vertegenwoordigd in het orgaan dat de operatie coördineert (*Joint Coordination Board)* door een zogeheten *National Official*. De *National Official* moet worden geraadpleegd zodra een besluit van grote invloed is op het groot materieel van een deelnemende lidstaat. Ten tweede, bij elk schip of vliegtuig dat wordt ingezet, zet een deelnemende lidstaat een Commandant in die verantwoordelijk is voor het gezag over het personeel.

Het tweede en derde gedeelte van dit onderzoek, **Hoofdstuk 3 en 4**, bespreken de regels over de toewijzing van aansprakelijkheid in multi-actor situaties en passen deze regelgeving toe op Frontex operaties. Twee aansprakelijkheidsregimes dienen als raamwerk voor de analyse: aansprakelijkheid voor inbreuken op het Europees Verdrag voor de Rechten van de Mens (EVRM), en aansprakelijkheid op grond van het EU recht voor inbreuken op het Handvest van de Grondrechten van de Europese Unie (Handvest). De belangrijkste reden voor deze keuze is dat beide vormen van aansprakelijkheid kunnen worden vastgesteld door de rechter na een beroep door een individu en dat beide vormen in principe geschikt zijn om vragen te behandelen over de toewijzing van aansprakelijkheid.

In zowel het EVRM- als EU-recht worden twee soorten aansprakelijkheid onderscheiden. Ten eerste is er de aansprakelijkheid die *direct* ontstaat na een mensenrechtenschending tijdens een operatie, aangeduid als primaire of directe aansprakelijkheid. Stel, een persoon wordt uitgezet in strijd met het verbod van *refoulement*, dan is de primaire aansprakelijkheid de aansprakelijkheid die rechtstreeks voortvloeit uit de schending. Ten tweede is er de aansprakelijkheid die ontstaat als gevolg van *gedrag dat verband houdt met de primaire schending*, hier aangeduid als geassocieerde of indirecte aansprakelijkheid. Indirecte aansprakelijkheid vloeit voort uit het niet beschermen van een individu tegen mensenrechtenschendingen waarvoor een andere actor primair aansprakelijkheid is. Als een persoon wordt uitgezet in strijd met het verbod van *refoulement* en het gastland is hier direct aansprakelijk voor, dan kunnen Frontex of andere deelnemende lidstaten desalniettemin eveneens aansprakelijk worden gehouden wegens het niet voorkomen van deze inbreuk.

Hoofdstuk 3 onderzoekt de toewijzing van aansprakelijkheid op basis van EVRM-recht tussen de deelnemende staten in Frontex-operaties voor inbreuken van het EVRM die kunnen optreden tijdens deze operaties. De analyse is gebaseerd op het internationale aansprakelijkheidsrecht zoals toegepast door het Europese Hof voor de Rechten van de Mens (EHRM). Het internationale aansprakelijkheidsrecht wordt opgevat als de regels zoals weergegeven in de *Articles on the Responsibility of States for Internationally Wrongful Acts (ASR)* en de *Articles on the Responsibility of International Organisations (ARIO)* zoals geformuleerd door de *International Law Commission* in respectievelijk 2001 en 2011.

Hoofdstuk 3 is verdeeld in vier secties. De eerste bespreekt de grondslagen van het internationaal aansprakelijkheidsrecht, de relatie met het EVRM, en de toepassing ervan op EU-lidstaten wanneer zij handelen binnen EU-recht. De daaropvolgende sectie gaat in op de voorwaarden voor aansprakelijkheid. Dit proefschrift veronderstelt dat er reeds een schending heeft plaatsgevonden, waarmeede focus ligt op de *toerekening* van het gedrag, hetgeen de enige andere voorwaarde is voor het doen onstaan van aansprakelijkheid. De derde sectie van hoofdstuk 3 analyseert de primaire aansprake-

lijkheid onder het EVRM en omvat een discussie over de regels inzake de toerekening van gedrag en de toepassing daarvan op de betrokken actoren in gezamenlijke operaties. De fundamentele regel is dat het gedrag van een persoon die is aangewezen door een lidstaat of een internationale organisatie als 'hun orgaan', kan worden toegerekend aan die lidstaat of internationale organisatie (Artikel 4 ASR en Artikel 6 ARIO). Bij Frontex-operaties betekent dit dat het gedrag van personeel in beginsel is toe te schrijven aan de entiteit die hen heeft ingezet. Echter, de cruciale vraag is hoe de overdracht van gezag over ingezet personeel van invloed is op de toerekening van hun gedrag.

De relevante regels zijn te vinden in Artikel 6 ASR en 7 ARIO, die in detail worden besproken in Hoofdstuk 3. Artikel 6 ASR heeft betrekking op de situatie dat een orgaan van een land ter beschikking wordt gesteld van een andere land, en het benoemt de voorwaarden voor het toerekenen van gedrag van het 'geleende' of 'overgedragen' orgaan aan het ontvangende land. De gelijksoortige bepaling in artikel 7 ARIO heeft betrekking op de situatie dat een orgaan van een land of een internationale organisatie ter beschikking wordt gesteld aan een (andere) internationale organisatie. Hoewel de situaties in de twee artikelen op elkaar lijken, hanteren ze verschillende drempels voor de toerekening van het gedrag van het 'geleende' orgaan aan de ontvangende entiteit. Artikel 6 ASR vereist volledige en exclusieve inhoudelijke controle om te spreken van een 'overdracht' van een orgaan van de ene staat naar de andere. Daarentegen bepaalt Artikel 7 ARIO dat gedrag van het 'geleende' orgaan toe te rekenen is aan de ontvangende organisatie indien en voor zover de laatstgenoemde *feitelijke* controle uitoefent, die niet per se exclusief hoeft te zijn.

Uit de toepassing van deze regels op Frontex-operaties vloeit voort dat gedrag van lokaal personeel en ingezette functionarissen door lidstaten of Frontex toegerekend kan worden aan het gastland. De primaire aansprakelijkheid van gedrag in strijd met het EVRM tijdens Frontex-operaties ligt dus bij het gastland. Anderzijds zal de inzet van groot materieel door deelnemende staten, zoals schepen of vliegtuigen, toe te rekenen blijven aan de oorspronkelijke lidstaat. Belangrijk is dat noch deelnemende lidstaten die niet bijdragen door middel van groot materieel, noch de Europese Unie gewoonlijk directe aansprakelijkheid oplopen.

Ten slotte analyseert het vierde gedeelte van hoofdstuk 3 de indirecte aansprakelijkheid. In het bijzonder stelt het de vraag of lidstaten die niet direct aansprakelijk zijn voor een specifieke inbreuk toch aansprakelijk kunnen zijn voor het bijdragen aan de inbreuk, of voor het niet voorkomen ervan. Vragen over indirect aansprakelijkheid worden bestudeerd in het licht van de 'verplichting om te beschermen' onder de doctrine van positieve verplichtingen zoals ontwikkeld door het EHRM. In beginsel kunnen lidstaten aansprakelijk zijn als ze nalaten om mensenrechtenschendingen door anderen te voorkomen. Dit vereist echter dat de lidstaat kennis had van,

of kennis had moeten hebben van, de inbreuk en dat het de middelen had om de inbreuk te voorkomen. Met betrekking tot Frontex-operaties laat de analyse zien dat waarschijnlijk alleen het gastland en de deelnemende landen die groot materieel zoals schepen bijdragen, aansprakelijkheid kunnen zijn op basis hiervan. Dit is vooral zo omdat zij de mogelijkheid hebben de gang van zaken tijdens de gezamenlijke operaties te beïnvloeden. Andere lidstaten oefenen niet voldoende controle uit over individuen die getroffen zijn door gezamenlijke operaties om hen binnen hun rechtsmacht te brengen in de zin van Artikel 1 EVRM. Bij deze staten wordt de 'verplichting om te beschermen' onder het EVRM dus niet geactiveerd.

Hoofdstuk 3 behandelt ook de aansprakelijkheid voor het geven van hulp of bijstand onder internationaal publiekrecht. De relevante regel, zoals vastgelegd in Artikel 16 ASR, stelt dat aansprakelijkheid voor 'medeplichtigheid' ontstaat zodra een staat hulp of bijstand verleent die het wezenlijk makkelijker maakt voor de ontvangende staat om een internationale onrechtmatige daad te plegen, op voorwaarde dat de 'hulpverlenende' staat kennis heeft van de internationale onrechtmatige daad en dat het zelf ook gebonden is aan de primaire verplichting die wordt geschonden door de ontvangende staat. Het is hierbij niet nodig dat de medeplichtige staat verplicht was om af te zien van hun bijdrage onder bijvoorbeeld het EVRM. Met andere woorden, een deelnemende staat kan aansprakelijk worden gehouden voor medeplichtigheid in een mensenrechtenschending van een gastland, ongeacht of het slachtoffer van de schending binnen de rechtsmacht van die staat valt volgens Artikel 1 EVRM. Hoewel deze regel in theorie de lacune vultdie onstaat in situaties waarin het EVRM niet van toepassing is, houdt het EHRM normaal gesproken landen niet op deze grond aansprakelijk.

Hoofstuk 4 onderzoekt de toewijzing van aansprakelijkheid tussen Frontex en EU-lidstaten die betrokken zijn bij Frontex-operaties, als ook tussen deze lidstaten onderling, voor schendingen van het Handvest. 'Aansprakelijkheid' verwijst enerzijds naar de niet-contractuele aansprakelijkheid van Frontex onder Artikel 60(3) van de oprichtingsverordening (Verordening 2016/1624), gebaseerd op de non-contractuele aansprakelijkheid van de Unie op grond van Artikel 340 van het Verdrag betreffende de Werking van de Europese Unie. Anderzijds verwijst het naar het beginsel van lidstaatsaansprakelijkheid zoals ontwikkeld door het Hof van Justitie van de Europese Unie (HvJ-EU) .

Hoofdstuk 4 heeft dezelfde structuur als Hoofdstuk 3. Het begint met het uiteenzetten van de basis van EU-wetgeving inzake aansprakelijkheid. Vervolgens gaat het in op de voorwaarden voor aansprakelijkheid en de toepassing ervan bij schendingen van fundamentele rechten. In het EU-recht ontstaat aansprakelijkheid alleen als de schending van individuele rechten kan worden aangemerkt als voldoende gekwalificeerd, en als er een causaal verband bestaat tussen de schending en de schade die het slachtoffer lijdt. De analyse focust zich op de voorwaarde van de 'voldoende gekwalifi-

ceerde schending'. Hoofdstuk 4 stelt vast dat een inbreuk gebaseerd op een *redelijke* onrechtmatige interpretatie van een geschonden bepaling niet voldoende gekwalificeerd is, maar dat een inbreuk gebaseerd op een *onredelijke* onrechtmatige interpretatie dat wel kan zijn.

De derde sectie behandelt de primaire aansprakelijkheid. Het ontwikkelt algemene regels over de toewijzing van aansprakelijkheid op basis van de jurisprudentie van het HvJ-EU inzake inbreuken op EU-recht in het kader van het gedeeld gezag tussen de Unie en de lidstaten. Het belangrijkste beginsel dat kan worden afgeleid uit de jurisprudentie van het Hof is dat aansprakelijkheid volgt uit beslissingsbevoegdheid. Een entiteit die discretionaire bevoegdheid geniet is wettelijk in staat om een rechtmatige boven een onrechtmatige gedraging te kiezen, en wanneer voor de laatste optie wordt gekozen volgt aansprakelijkheid. Dat deze keuzemogelijkheid in de praktijk kleiner is dan volgt uit de wet, is gewoonlijk niet relevant. Dit betekent dat met betrekking tot elke schending van een fundamenteel recht, gepleegd door functionarissen ingezet tijdens een Frontex-operatie, de actor die de bevoegdheid had om het gedrag dat ten grondslag lag aan de schendingen op een juridisch bindende wijze te bepalen, aansprakelijk is.

De analyse laat zien dat bij Frontex-operaties het gastland de juridische beslissingsbevoegdheid heeft en derhalve aansprakelijk is voor schendingen van fundamentele rechten tijdens gezamenlijke operaties. De meest relevante uitzondering is die van de groot materieel ingezet door deelnemende staten, zoals schepen en vliegtuigen. Het wettelijk gezag hierover is gedeeld tussen het gastland en de thuisstaat die toestemming moet geven over besluiten die van invloed zijn op het materieel. Schendingen van fundamentele rechten door personeel op schepen en vliegtuigen geeft dus aanleiding tot hoofdelijke aansprakelijkheid van zowel het gastland als de thuisstaat. Frontex daarentegen heeft voornamelijk invloed op het feitelijke gedrag tijdens de gezamenlijke operaties, maar heeft geen juridisch gezag. Zolang schendingen van fundamentele rechten niet het gevolg zijn van het gedrag van het eigen coördinerend personeel of van het Operationeel Plan zelf, draagt Frontex geen primaire aansprakelijkheid.

In het vierde gedeelte analyseert hoofdstuk 4 de indirecte aansprakelijkheid. Het bespreekt de vraag of Frontex zelf, of EU-lidstaten die niet direct aansprakelijk zijn voor een inbreuk, toch aansprakelijk kunnen zijn voor het bijdragen aan of het niet voorkomen van de inbreuk. Dit vereist dat een verplichting om toezicht te houden op een andere autoriteit in de uitoefening van Unierecht, of een verplichting om individuen te beschermen voor schendingen gepleegd door andere, wordt geschonden op een voldoende ernstige wijze. Aangezien het gastland primair aansprakelijk is voor de meeste schendingen, ontstaan vragen over indirecte aansprakelijkheid onder EU-recht meestal ten aanzien van Frontex en deelnemende staten.

De analyse in hoofdstuk 4 laat zien dat Frontex vergaande verplichtingen heeft om toezicht te houden op gedragingen van autoriteiten van de lidstaten tijdens gezamenlijke operaties. Hieronder valt ook de positieve verplichting om het EU-recht inzake fundamentele rechten te waarborgen. Indien het agentschap niet aan deze verplichtingen voldoet, kan dit leiden tot de aansprakelijkheid van Frontex , mits de schending van zijn verpflichtingen als voldoende gekwalificeerd kan worden beschouwd. Aanzienlijk complexer is de indirecte aansprakelijkheid van deelnemende lidstaten. De verplichting om fundamentele rechten te waarborgen wordt geactiveerd zodra de lidstaten kennis hadden, of hadden moeten hebben, van een schending. Dit brengt met zich dat deelnemende lidstaten moeten handelen op basis van alleinformatie die redelijkerwijs beschikbaar is. Maar zelfs als deze verplichting wordt geactiveerd in een specifiek geval, zal het niet-handelen door een staat meestal niet als een voldoende gekwalificeerde schending gelden. Het lijkt erop dat alleen deelnemende lidstaten met grote schepen en vliegtuigen, de kennis en de beschikbare middelen kunnen hebben die kunnen leiden tot een voldoende gekwalificeerde schending wanneer ze nalaten om individuen te beschermen.

Het laatste hoofdstuk, **hoofdstuk 5**, geeft een samenvatting van de belangrijkste bevindingen en de praktische gevolgen daarvan. Daarnaast identificeert het de obstakels waarmee individuen, wier mensenrechten zijn geschonden tijdens een Frontex-operatie, worden geconfronteerd bij het aansprakelijk houden van de betrokken actoren. De belangrijkste bevinding van dit onderzoek is dat alleen het gastland in zijn volle omvang aansprakelijkheid draagt voor mensenrechtenschendingen die plaatsvinden tijdens Frontex-operaties. Hoewel daarnaast Frontex en deelnemende lidstaten gedeeltelijk aansprakelijk kunnen zijn, zal een deel van hun bijdrage aan schendingen van mensenrechten tijdens gezamenlijke operaties niet de drempel halen die nodig is voor aansprakelijkheid onder zowel EVRM- als EU-recht. Een van de redenen hiervoor is dat geen van de 'aansprakelijkheidsmechanismes' systematisch rekening houdt met de vraag of de verweten gedraging deel uitmaakt van samenwerkingsactiviteiten. Met andere woorden, het feit dat verschillende publieke actoren samen meer kunnen doen dan ieder van hen afzonderlijk, vindt niet altijd weerslag in de aansprakelijkheid voor dat handelen. Hoofdstuk 5 doet een aantal aanbevelingen om de besproken belemmeringen aan te pakken.

Curriculum Vitae

Melanie Fink (Dornbirn, 17 September 1985) completed high school at Bundesgymnasium Dornbirn, Austria. From September 2004 to May 2005 she worked in a shelter for women and refugees in Cuenca, Ecuador. She subsequently studied law at the University of Vienna and University College Dublin, acquired an additional diploma in human rights law and received further training in the areas of international law and migration law. After completing her law degree, Melanie worked as a Lecturer and PhD Researcher at the Department for European, International and Comparative Law of the University of Vienna (March 2011 to August 2013) and subsequently joined the Europa Institute of Leiden University. From October 2014 to April 2015, she carried out parts of her research at the Lauterpacht Centre for International Law, University of Cambridge. Melanie currently works as a Postdoctoral Researcher at the Europa Institute of Leiden University.

In de boekenreeks van het E.M. Meijers Instituut van de Faculteit der Rechtsgeleerdheid, Universiteit Leiden, zijn in 2016 en 2017 verschenen:

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