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

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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.

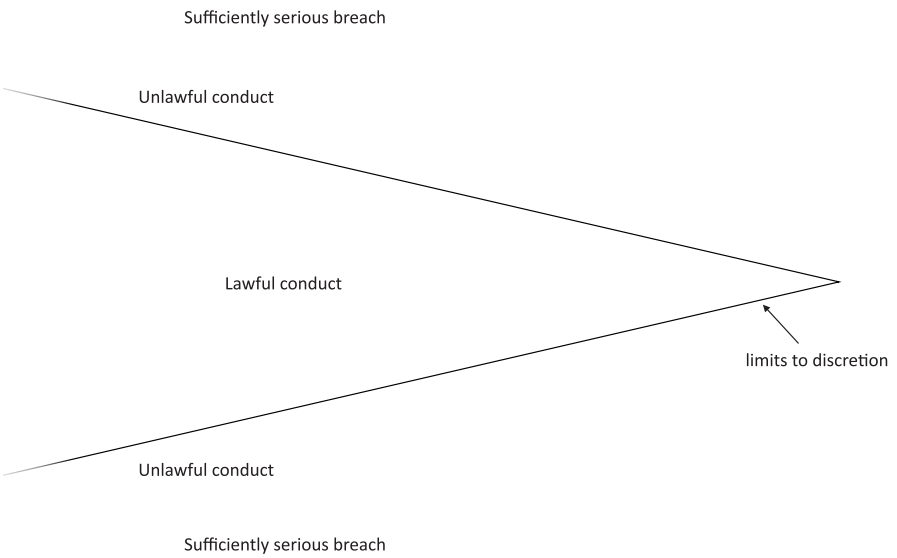

Figure 20: Discretion and its limits in public liability law

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]

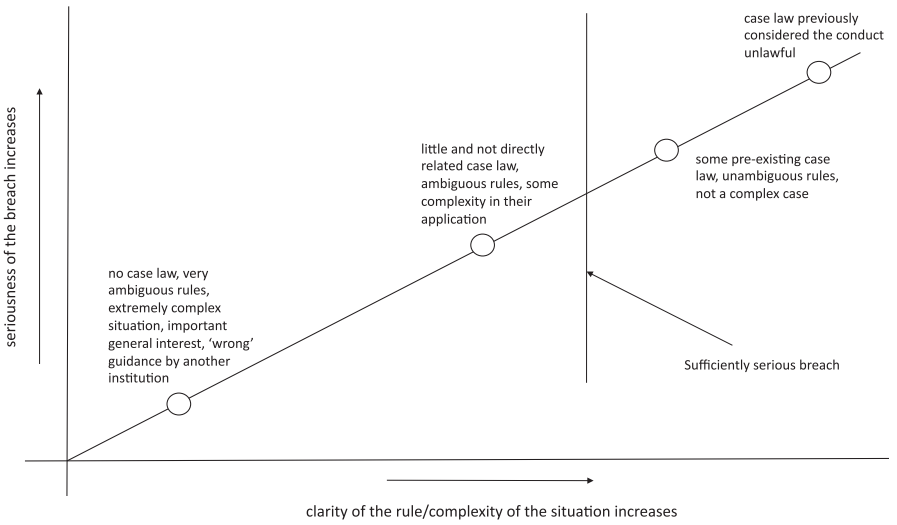

Figure 21: Clarity of the rule/complexity of the situation and seriousness of the breach

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]

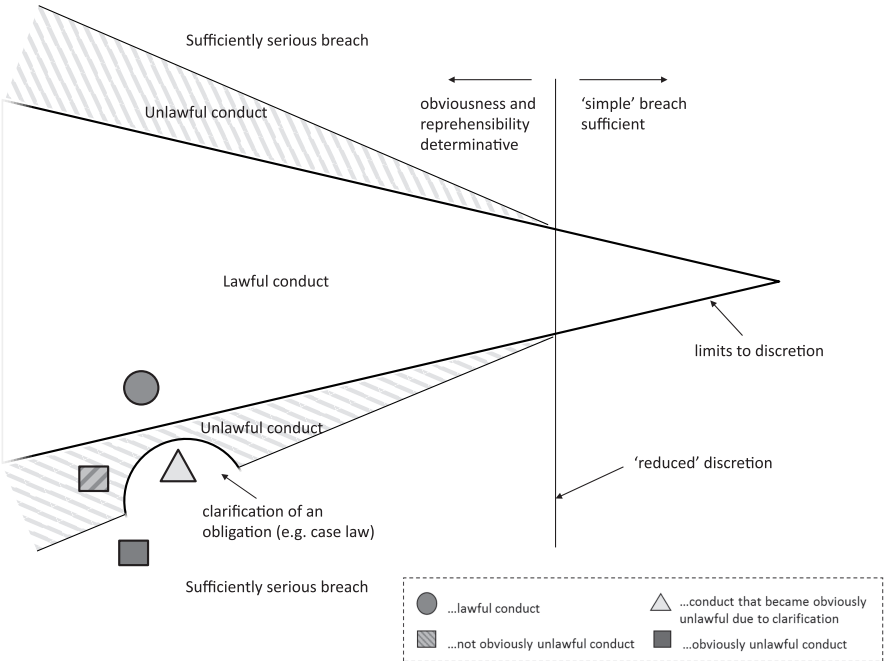

Figure 22: Relationship between factors determining seriousness (phase two)

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]

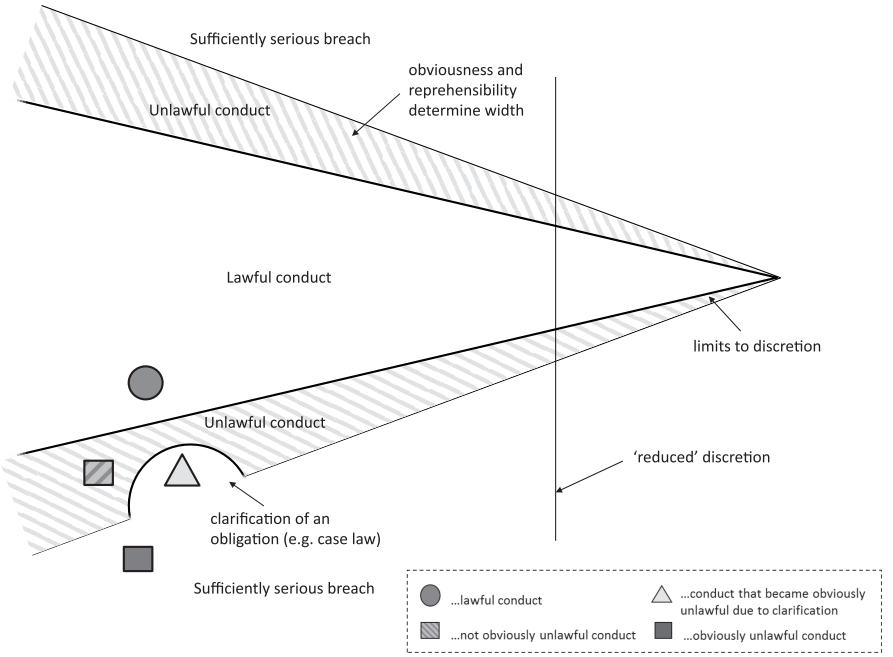

Figure 23: Relationship between factors determining seriousness (phase three)

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.

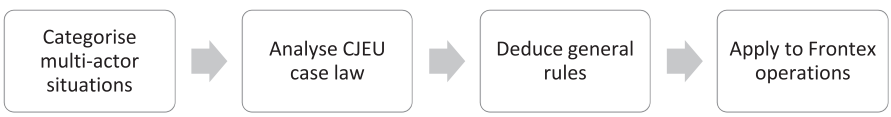

Figure 24: Approaching questions of allocation of liability in EU law

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'.

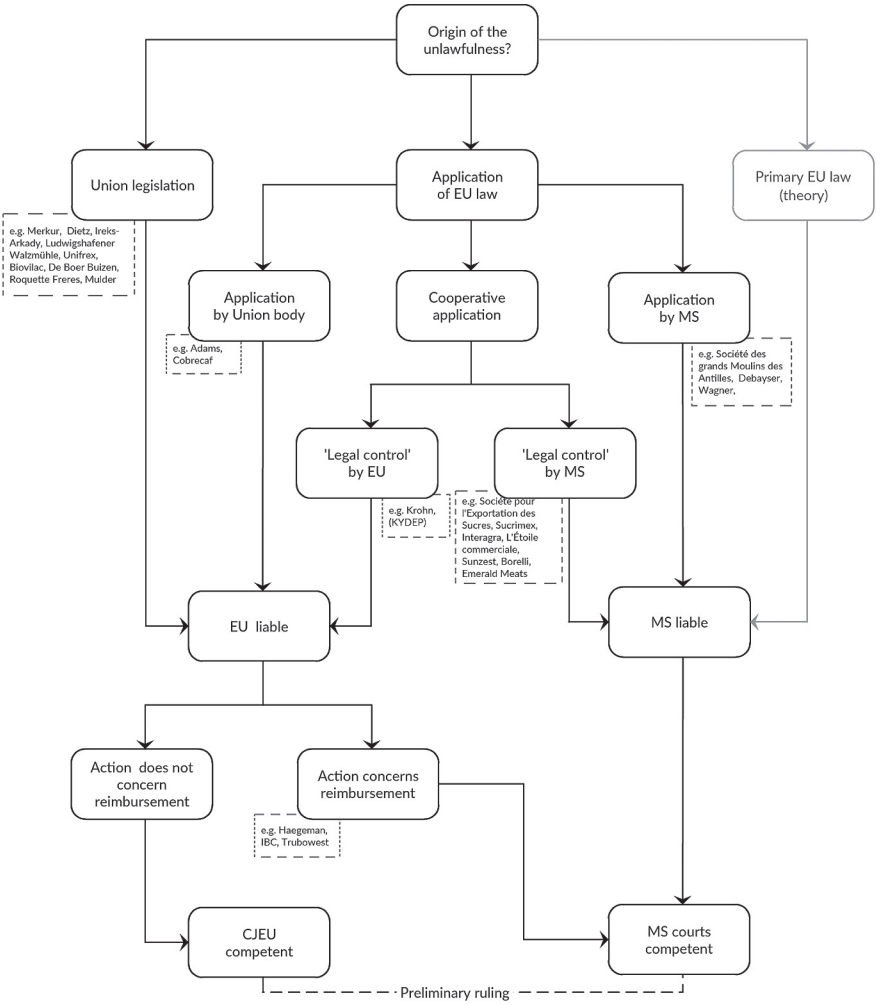

Figure 25: Allocation of liability flowchart

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.

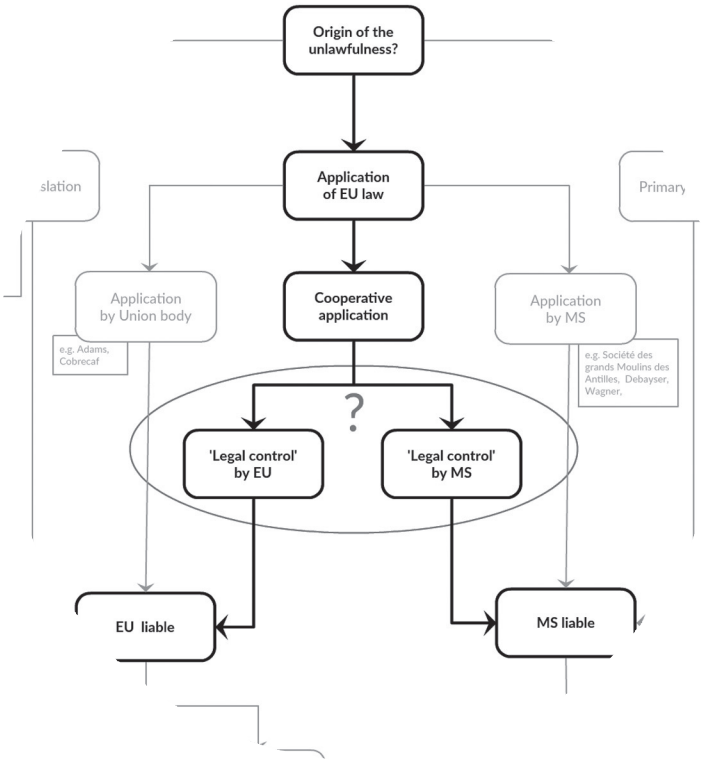

Figure 26: Relevant rule applicable in the context of Frontex operations

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.

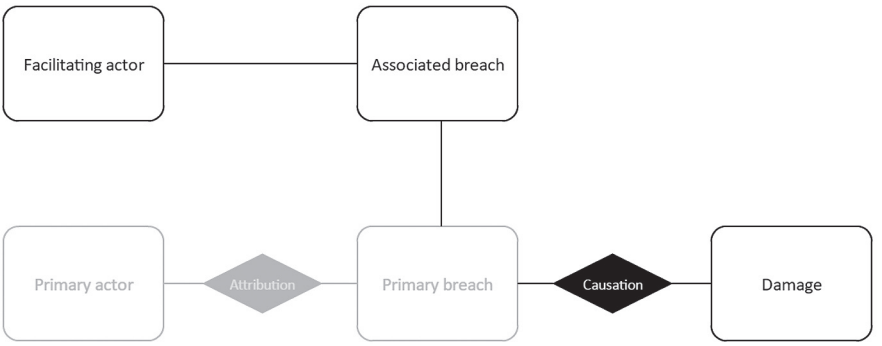

Figure 27: Analysing associated liability in EU law

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.