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Systemic accountability of the European Border and Coast Guard: the legal responsibility of Frontex for human rights violations

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Part IV

Applied: Legal Remedies and Litigation Avenues

8 Legal Accountability in Practice: CJEU

1 Introduction

The previous chapters have focused on describing the work of the agency and the different actors that participate in joint EBCG operations, the possible human rights breaches, the allocation of responsibility, and the appropriate accountability framework that fits the aims and needs of such operations. The Nexus theory and joint responsibility have been presented as a solution to the *problem of many hands*, and the need has been noted for the legal accountability of Frontex within a framework of *systemic accountability*.

The notion of *systemic accountability* as it is applied in EBCG operations revolves around the idea of holding all actors responsible for a violation to account, including Frontex, to provide structural solutions and achieve systemic change. Notwithstanding its essential role as a matter of principle in an academic or political context, in order for the idea of *systemic accountability* to lead to realisable conclusions, it needs to be backed up with arguments that weigh more in the world of legal practice. An argument, supporting the attribution of (shared) responsibility to all actors involved in a violation of rights, can be constructed outside the library to fit in the reality of courtrooms.

While institutions, academics, and civil society organisations have been insisting on the need for the agency to be held accountable before courts for a breach of human rights law, no such case has seen the light yet. Next to the complications regarding the allocation of responsibility and the lack of transparency, which inhibits evidence-collection, one of the reasons that explain the lack of legal action against Frontex is procedural difficulties, which include limited access to justice and lack of clarity regarding the nature of the specific legal routes to achieve accountability.

Therefore, the core purpose of the last two chapters is to sketch these litigation routes by studying legal accountability in practice in the case of Frontex, and examining how joint responsibility, the Nexus theory, and *systemic accountability* can come together under one roof. In particular, the questions asked are: Which are the potential litigation routes that can be followed to ensure the legal accountability of Frontex, as the main application of *systemic accountability*? How can any potential obstacles in this process be overcome? How can they accommodate the joint responsibility of all the different actors involved in a violation, which follows from the Nexus theory?

Chapter VIII deals in particular with the possible litigation routes before the CJEU, through which the enforcement of legal obligations can be achieved, and the model of *systemic accountability* can be actualised. The victim of a violation has the opportunity to access the CJEU either in an indirect manner, following the preliminary reference procedure and through the EU Institutions, or directly, bringing an action for annulment or action for damages and requesting interim measures.[1] In the following sections, a concise account is given of the different litigation routes, in an attempt to identify the different possible courses of action in a case regarding Frontex, in the context of *systemic accountability*.

The goal is to map possibilities that the system of judicial protection at the CJEU provides and identify possible procedural boundaries in bringing a case against Frontex. Possible procedural solutions are proposed for these problems, and possible judicial tactics are identified. I start with an examination of accountability in the EBCG Regulation. Following that, the available legal remedies are presented separately, categorised as providing indirect or direct access to the Court for individuals. These are presented first in general terms, before delving into their more particular requirements, especially as these apply in the case of Frontex.

2 Legal accountability in the EBCG regulation

A natural first step in the process of studying the practical legal accountability of Frontex is looking into relevant provisions of the agency's own Regulation. Typically, next to the general framework on liability provided by primary EU law (TFEU), the contractual and non-contractual liability of agencies is covered in their founding Regulation. Commonly, contractual liability is governed by the law applicable to the contract and jurisdiction is given to the CJEU. Concerning non-contractual liability, the Regulations, except for the agencies established by the Council, commonly follow the pattern of Article 340(2) TFEU stating that 'The agency shall, in accordance with the general principles common to the laws of the Member states, make good any damage caused by it or its servants in the performance of their duties'.[2]

1 Article 256 TFEU.
2 Craig 2012, p. 157.

Concerning the review of legality of the agency's actions, the founding Regulations differ significantly.[3]

The Frontex Regulation, notwithstanding its numerous amendments and the extensive calls for improved accountability, for many years remained silent as to the liability of the agency itself and the possibility of legal remedies. Since 2016, however, the EBCG Regulation (now Article 97(4)), has followed the common pattern on non-contractual liability and provides that 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, including those related to the use of executive powers'. Article 97 (5) gives jurisdiction to the CJEU in related disputes.

Article 84 of the EBCG Regulation covers matters of liability regarding the member states and attributes liability for any damage caused by members of a team deployed in a member state to that member state, in accordance with its national laws. Exceptionally, in cases of gross negligence and willful misconduct, the host state may turn to the home state for part of or the whole sum paid in damages. Article 85, covering the criminal liability of the deployed team members stipulates that they are subject to the national law of the host in the same way as officials of that state.

The acknowledgement in Article 97 of the potential liability of the agency constitutes a step forward compared to past Regulations, which only acknowledged the personal liability of the agency's staff members, rather than that of the agency. There are no specific rules that determine a priori the attribution of responsibility amongst the different actors involved, which could prevent the *problem of many hands*. Moreover, it should be investigated how Article 97 of the EBCG Regulation is to be actualised within the general EU public liability regime.

Finally, a notable change brought by the 2019 amendment of the ECBG Regulation is Article 98, which for the first time deals with the review of the legality of the agency's actions. Even though the gap until now could still be remedied within the general EU legal framework on judicial review, the Regulation now explicitly gives jurisdiction to the CJEU to hear proceedings for the annulment of acts of the Agency that are intended to produce legal effects vis-à-vis third parties, and for failure to act.

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3 Some Regulations establish a detailed system of internal appeal followed by legal review by the EU Courts (e.g. EASA). Others provide for the judicial review before the CJEU under Article 263 TFEU (e.g. EUMC). They may also empower the Commission to decide on such issues, its decision being challengeable before the CJEU (e.g. ECDC). Others yet do not explicitly pronounce the possibility to challenge the Commission's decision, but such a decision is bound to have binding legal effects and would be therefore reviewable under Article 263 TFEU (e.g. EU-OSHA). In cases where the final decision is made by the Commission, there does not seem to be a legal gap, since it is that act, rather than that of the agency, that is reviewable. Yet in other Regulations, no mention is made of legality review (e.g. EMSA). This is mostly the case with agencies created by act of the Council.; Craig 2012, pp.: 157, 158.

3 Legal remedies and the jurisdiction of the CJEU

The CJEU has been set up to ensure the uniform interpretation and application of EU law across the EU, and settle legal disputes amongst EU institutions and member states. Individuals can, under certain conditions, also take action before the Court claiming the infringement of their rights.

The CJEU may issue preliminary rulings upon request of national courts to interpret or determine the validity of EU law. It may enforce the law through the process of infringement proceedings initiated by the EC of a member state against another member state for failure to comply with EU law. It may also annul EU acts (action for annulment) or ensure that the EU takes action (action for failure to act) if an EU act or omission is in violation of the Treaties or the EU Charter. Finally, it rules upon the liability of and sanctions EU institutions through an action for damages, while it can issue interim measures in case a serious violation is imminent.

4 Preliminary reference procedure

The preliminary reference procedure is the most common way to approach the CJEU. The CJEU has competence to give preliminary rulings on disputed questions of EU law, concerning the interpretation of the Treaties and the validity and interpretation of acts of EU agencies, among other EU bodies and institutions.[4] A preliminary ruling is binding upon the referring court and all domestic courts in the EU.

An applicant can challenge the validity of EU acts indirectly by inviting their national court to send the CJEU a request for a preliminary ruling. This procedure could be used, for instance, to determine the mandate of Frontex to engage in certain activities, such as cooperation with third states in the context of AFIC in the absence of working arrangements. Such a relevant question could concern the distinction between operational and technical assistance and whether the cooperation with Niger in this context can be deemed as technical assistance within the meaning of Article 54(9) of the EBCG Regulation. Another instance where the preliminary reference procedure could be useful is with respect to determining questions regarding the distribution of responsibility between a host state and the agency. Such a question could arise in the context of an action for damages against the host state before its national courts, where the host state would deny part or the whole of the responsibility and engage the responsibility of the agency. Finally, in a request for a preliminary ruling, the Court could be asked to rule on the validity of an act of Frontex, for instance, a decision in the context of the individual complaints mechanism.

4 Article 267 TFEU.

This procedure provides a useful path around the direct access to the Court, which is highly restricted, as will be shown below. The obvious drawback of this route is that the individual needs to go through the domestic procedure and rely on the discretion of the national court to bring the matter before the CJEU.[5] An applicant cannot usually claim a legal right for the domestic court to send a request for preliminary ruling to the CJEU.[6] The preliminary reference procedure is not, strictly speaking, a remedy but a prerogative of the national court.[7] Nevertheless, the domestic court is obliged, according to the jurisprudence of the ECtHR to give reasons for not sending a preliminary reference to the CJEU. Failure to do so can lead to a violation of the right to a fair trial under Article 6 ECHR.[8]

Delays and costs stemming from the preliminary reference procedure would also weigh upon the decision of the applicant to use this route. Although, according to justice Koen Lenaerts, president of the ECJ, the annual productivity of the Court is at a historical level,[9] the process is slow and statistics concerning the backlog of cases pending and the overall duration of the proceedings, show discouraging delays.[10]

What is also important to note is that in the preliminary reference procedure, the CJEU has jurisdiction to provide genuine interpretation of the law and acts of the agency. It cannot, however, judge on the facts of the given case, find a violation, nor rule on damages. In that case, the proceedings would need to continue at the national level or through one of the remedies of direct access to the CJEU. In practice, this route cannot be followed if there is no national implementing measure against which a case would be brought at the domestic courts of a member state. While this would be the case regarding a violation occurring in the context of a EBCG joint operation, where domestic proceedings could start against the host state, this may prove more difficult regarding the conduct of Frontex within the AFIC network and the cooperation of the agency with third countries more generally.

Moreover, this measure cannot lead on its own to the liability of the agency and will not be adequate to hold it accountable, as the agency will not be asked to answer for any wrongdoings or make amends. This proce-

5 Article 267 TFEU. Only courts and tribunals of last instance are under the obligation to refer the case to the CJEU.

6 CJEU 22 October 1987, C-314/85, ECLI:EU:C:1987:452 (*Firma Foto-Frost v Hauptzollamt Lübeck-Ost*); D. Chalmers, G. Davies and M. Giorgio, *European Union Law, Cases and Materials*, Cambridge: Cambridge University Press 2010, p.p.: 159, 160.

7 C. Timmermans, 'Some Personal Comments on the Accession of the EU to the ECHR', in V. Kosta, N. Skoutaris, and V. P. Tzevelekos (eds.), *The EU Accession to the ECHR*, Oxford and Portland: Hart Publishing 2014, p. 334.

8 ECtHR 8 April 2014, Judgment, App. No. 17120/09 (*Dhahbi v Italy*); ECtHR 21 July 2015, Judgment, App. No. 38369/09 (*Schipani et al. v Italy*).

9 Court of Justice of the European Union, *Annual Report 2018. Year in review*, Luxembourg: Court of Justice of the European Union 2019, p.p.: 9, 159, 161.

10 Court of Justice of the European Union 2018, p.p.: 118, 159, 244, 245.

dure may not provide adequate scrutiny of the agency's activities,[11] but the possibility still exists to start judicial proceedings on the national level and reach the CJEU through the preliminary reference procedure. While not providing the full answer, the benefit of this route is that it has a relatively low access threshold and it can prove useful as a first step towards an action for damages. Finally, what could also prove helpful is the openness of the Court to use this procedure to hear questions concerning the non-binding instruments, which could cover, for instance, operational plans or working arrangements of the agency with third countries.[12]

5 Complaints by priviledged applicants

The Commission, the Parliament, the Council, and member states are 'privileged applicants', and may thus bring an action for the Court to review the legality of EU acts (action for annulment or failure to act) directly, without the need to fulfil any special accessibility requirements, like in the case of individual applicants.[13]

An action for annulment can be brought by an EU institution against an EU agency on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or any other legal rule related to their application, or misuse of powers.[14] One of the EU institutions may also ask the Court to have an infringement established due to failure of an agency to act.[15]

The procedure described here does not constitute a judicial remedy strictly speaking, as an EU institution bringing such an action does not do so on behalf of an individual, who is also not a party to the proceedings. Nevertheless, the victim and civil society organisations can petition one of the privileged applicants to request the review of the legality of an act, circumventing, thus, the difficulties of the preliminary reference procedure, and those of direct individual access to the Court.

In cases regarding the legality review of the conduct of Frontex, EU institutions may act on their own initiative, but individuals may also submit a formal complaint, for instance, with the EP and lobby so that the latter makes a direct appeal to the CJEU. Such an action would be brought directly to the Court of Justice, rather than the General Court, as the Court of Justice has sole jurisdiction over inter-institutional actions.[16]

11 LIBE 2011, p. 82.
12 LIBE 2011, p. 82.
13 Section 6.1.
14 Article 263(2) TFEU.
15 Article 265(1) TFEU.
16 Article 51 Statute of the Court of Justice, Protocol 3 to the TFEU. An example of such action is *European Parliament v Council of the European Union*.

The effectiveness of this path is disputable, as the individual needs to rely on the discretion of the institutions and the political balances within the Union since these are not under an obligation to take up such a case. The unwillingness of the EC to start infringement proceedings on matters of systematic violations of human rights in immigration and asylum law is notable in this respect.[17] Nevertheless, the possibility exists depending on the circumstances surrounding a particular case, and this route could prove to be a strategic choice.

Having discussed the major forms of indirect access to the ECJ, we can now move to a discussion of forms of direct access.

6 Action for annulment and failure to act

The legality review procedure can be used in order to ask for the review of the legality of acts of Frontex (and of other institutions, offices, bodies, and agencies of the EU) (Article 263 TFEU) or of failure to act (Article 265 TFEU) on the ground of infringement of the Treaty or of any rule of law relating to its application, as also provided in Article 98 EBCG Regulation. This obviously includes breaches of the Charter, as well as human rights as they have developed in the context of general principles of EU law. If the claim is successful, the Court declares the act void (Article 264 TFEU), or declares the failure to act contrary to the Treaties (Article 265 TFEU). Following the Court's ruling, the agency will be required to undertake the necessary action in order to comply with the judgement (Article 266 TFEU). In case the agency does not comply with the judgement, the applicant may ask the Court to enforce the decision, by requesting to be granted a warrant of execution, an attachment of earnings order or a third party debt order or a European enforcement order in the case of cross-border claims.[18]

Despite the substantive potential of the legality review, applicants and litigators may hesitate to use it as a litigation strategy due to the restrictive standing requirements of Article 263 TFEU, which are often discussed as a

17 The first judgment on the CJEU on infringement proceedings on migration and asylum was published in December 2020. CJEU 17 December 2020, C-808/18, OJ C 155, 6.5.2019 (*European Commission v Hungary*).

18 Procedures for enforcing a judgment, https://e-justice.europa.eu/content_procedures_for_enforcing_a_judgment-52-en.do?clang=en; Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims.

thorny issue in the direct access to the CJEU.[19] Contrary to member states, the Commission, the Council and the EP, individual claimants have the status of non-privileged applicants before the Court and their possibilities to start a review procedure are significantly restricted.

Despite the difficulties, however, direct access to the court through an action for annulment or failure to act is not impossible. The following sections focus on discussing the issues that originate from the strict locus standi requirements for individuals in a case regarding the review of a Frontex act before we move on to the more substantive discussion of which acts of the agency could be reviewable before the Court. These issues will be discussed first in abstract terms, laying out the legal framework and the discussions surrounding its interpretation, before applying them to Frontex.

6.1 Individual access hindrances in an action for annulment

The strict admissibility criteria, placed by the EC Treaty, have also been interpreted narrowly by the Court of Justice, causing widespread criticism among legal academics.[20]

The locus standi requirements are covered in Article 263(4), which states that:

> *"Any natural or legal person may (…) institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures."*

"against an act"

The formulation of former Article 230 (4) TEC permitted the challenging of a 'decision', while drafters of the Lisbon Treaty broadened the scope of the provision permitting the challenging of an 'act'. The Court of Justice had already interpreted the term broadly allowing for the admission of cases

19 Among others, H. Rasmussen, 'Why is Art 173 Interpreted Against Plaintiffs?', *European Law Review,* 5, 1980. p. 114; P. Craig, 'Standing, Rights, and the Structure of Legal Argument', *European Public Law,* 9, 4, 2003, p. 493; S. Enchelmaier, 'No-One Slips Through the Net? Latest Developments, and Non-Developments, in the European Court of Justice's Jurisprudence on Article 230(4) EC', *Yearbook of European Law*, 24, 1, 2005, p. 173; S. Flogaitis and A. Pottakis, 'Judicial Protection Under the Constitution', *European Constitutional Law Review,* 1, 1, 2004, p. 108; C. Harding, 'The Impact of Article 177 of the EEC Treaty on the Review of Community Action', *Yearbook of European Law*, 1, 1, 1981, p. 93; and C. Harlow, 'Towards a Theory of Access for the European Court of Justice', *Yearbook of European Law*, 12, 1, 1992, p. 213.

20 Among others, Rasmussen 1980, p. 114; Craig 2003, p. 493; Enchelmaier 2005, p. 173; Flogaitis and Pottakis, p. 108; Harding, 1981, p. 93; and Harlow 1992, p. 213.

concerning legislative regulations,[21] and even directives, in case that they are substantially clear, precise and unconditional to be able to produce legal effects vis-à-vis individuals before their transposition.[22] This amendment is seen as 'a welcome and overdue clarification,' since it represents a more expansive approach that would allow even international agreements – such as Frontex agreements with third countries, to be challenged by individuals.[23]

According to the established case law of the CJEU, an 'act' refers to any measure the legal effects of which are binding on[24] and capable of affecting the interests of the applicant by bringing distinct change in his legal position.[25] This covers acts of general application, legislative or otherwise, and individual acts. The CJEU has so far seen 'acts' quite broadly at times covering even oral statements.[26]

"of direct and individual concern"

The *direct concern* requirement is fulfilled, according to the case law,[27] when the challenged act affects the legal position of the individual directly and has automatic application. The applicant must establish a direct link or an unbroken chain of causation between the act of the agency and the damage sustained. The measure needs to impose obligations on the applicant without leaving a member state discretion in implementation. It must be the contested measure that was sufficient in itself to cause the change in the applicant's legal position and which did so directly. In other words,

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21 Peers and Costa 2012, p. 83; CJEU 6 September 2011, T-18/10, ECLI:EU:T:2011:419 *(Inuit Tapiriit Kanatami and Others v. Commission) ;* CJEU 25 October 2011, T-262/10, ECLI:EU:T:2011:623 *(Microban v. Commission)*; Joined Cases CJEU 21 February 1984, C-239 and 275/82, ECLI:EU:C:1984:68 (*Allied Corporation and others v Commission*); CJEU 16 May 1991, C-358/89, ECLI:EU:C:1991:214 (*Extramet v Council*); and CJEU 18 May 1994, C-309/89, ECLI:EU:C:1994:197 (*Codorniu v Council*).

22 CFI EU 27 June 2000, Joined cases T-172/98, T-175/98 to T-177/98, ECLI:EU:T:2000:168 (*Salamander and others v Parliament and Council*).

23 Chalmers, Davies and Monti 2010, p. 141.

24 CJEU 11 November 1981, C-60/81, ECLI:EU:C:1981:264 (*IBM v Commission*), par. 9; *Commission of the European Communities v Council of the European Communities,* par. 42; *European Parliament v Council of the European Union*, par. 8; CJEU 24 November 2005, C-138/03, C-324/03 and C-431/03, ECLI:EU:C:2005:714 (*Italy v Commission a*), par. 32; CJEU 1 December 2005, C-301/03, ECLI:EU:C:2005:727 (*Italy v Commission b*) par. 19; CJEU 1 October 2009, C-370/07, ECLI:EU:C:2009:590 (*Commission v Council*), par. 42.

25 *IBM v Commission*, par. 9; CJEU 17 July 2008, C-521/06, ECLI:EU:C:2008:422 (*Athinaïki Techniki v Commission*), par. 29; CJEU 18 November 2010, C-322/09, ECLI:EU:C:2010:701 (*NDSHT v Commission*), par. 45; CJEU 13 October 2011, C-463 and 475/10 P, ECLI:EU:C:2011:656 (*Deutsche Post and Germany v Commission*), par. 37.

26 CFI EU 24 March 1994, T-3/93, ECLI:EU:T:1994:36 (*Air France v Commission*); LIBE 2011, p. 2.

27 CJEU 13 May 1971, C-41-44/70, ECLI:EU:C:1971:53 (*NV International Fruit Company and others v Commission*) ; CJEU 23 November 1971, C-62-70, ECLI:EU:C:1971:108 (*Bock v Commission*); CJEU 16 June 1970, C-69-69, ECLI:EU:C:1970:53 (*Alcan and others v Commission*).

a contested act of the agency is not of direct concern to the applicant if it required implementation measures by the member state.[28]As a second dimension of direct concern is that measure must affect a legal entitlement of the applicant rather than any other interest.[29]

There have been instances in the case law of the Court, where the criterion of direct concern has been applied with certain flexibility. First of all, actions concerning EU competition law have been deemed admissible even though the effects on the applicants were not legal, but merely factual.[30] Second, a limited margin of discretion left to the member state did not automatically disqualify the action in cases where discretion would be exercised in a manner that could be predicted with sufficient probability.[31]

The *individual concern* requirement is applied more restrictively and has been proven to be a significant impediment for individual applicants. 'Individual concern' means that the challenged act affects the person because of a real situation, which personalises her in a way comparable to one of the addressees of the act and so the result of the procedures could improve her legal position[32]. The prevailing interpretation of individual concern dates back to the development of the '*Plaumann test*', which requires the non-privileged applicant to prove that she is in a unique position towards the contested act and no one else could be affected by it in the same way at any given time in the future.[33] Due to this extremely narrow interpretation, it is hardly possible to imagine cases, where an act would be eligible and in fact, the requirements have been met only in very few cases.[34]

More liberal interpretations of the 'individual concern criterion', based on the principle of effective judicial protection, have been proposed by the Court of First Instance in *Jégo-Quéré v Commission* case[35] and by the

28 CJEU 23 April 1986, C-294/83, ECLI:EU:C:1986:166 (*Les Verts v Parliament*).

29 Chalmers, Davies and Monti 2010, p.p. : 41, 417.

30 CJEU 28 January 1986, C-169/84, ECLI:EU:C:1986:42 (*Cofaz and others v Commission*); and CJEU 22 November 2007, C-525/04 P, ECLI:EU:C:2007:698 (*Spain v Lenzing*) ; CFI EU 3 April 2003, T-114/02, ECLI:EU:T:2003:100 (*BaByliss v Commission*), par. 89; CFI EU 30 September 2003, T-158/00, ECLI:EU:T:2003:246 (*ARD v Commission*), par. 60.

31 *Bock* v *Commission*, paras.: 6-8; CJEU 17 January 1985, 11/82, ECLI:EU:C:1985:18 (*Piraiki-Patraiki and Others* v *Commission*), para. 8-10; CJEU 5 May 1998, C-386/96 P, ECLI:EU:C:1998:193 (*Dreyfus v Commission*), par 44.

32 G. Siouti, *Environmental Law*, Athens: Ant. N. Sakkoulas Publishers 2003, p 95.

33 CJEU 15 July 1963, C-25-62, ECLI:EU:C:1963:17 (*Plaumann v Commission*); C. Kiss and P. Černý, *The Aarhus Regulation and the future of standing of NGOs/public concerned before the ECJ in environmental cases*, Czech Republic: Justice and Environment 2008, Chapter 1; Chalmers, Davies and Monti 2010, p. 419.

34 For instance: CFI EU 17 June 1998, T-135/96, ECLI:EU:T:1998:128 (*UEAPME v Council*); Joined Cases CJEU 11 July 1985, C-87 and 130/77, C-22/83 and C-9-10/84, ECLI:EU:C:1985:318 (*Salerno v Commission*).

35 The suggestion of the Court of First Instance was that an individual is regarded as individually concerned if the measure 'affects his legal position in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him'. CFI EU 3 May 2002, T-177/01, ECLI:EU:T:2002:112, (*Jégo-Quéré et Cie SA v Commission*), par. 51.

Advocate-General Jacobs in *UPA* case.[36] However, the Court of Justice rejected these arguments and reaffirmed the *Plauman test*,[37] shifting the responsibility to the domestic courts to establish a system of legal remedies that can ensure the right to effective judicial protection, allowing thus the challenging of any decision.[38]

'and against a regulatory act'

The third admissibility criterion of Article 263(4) TFEU opens a window of opportunity for individuals to bring actions for annulment, as it allows for the challenging of an act of general application that is only of direct concern to the applicant, circumventing, thus, the unaccommodating *Plauman test* of individual concern.

However, besides the fact that the considerable limitations of the 'direct concern' requirement still remain, further problems arise with respect to the meaning and scope of the 'regulatory act'. The Court had the opportunity to interpret it in *Inuit Tapiriit Kanatami*,[39] a case concerning the interests of 50,000 Inuit people represented by a Canadian NGO. The applicant challenged a Regulation of the Parliament and the Council on seal products, arguing that it constituted a regulatory act, thus allowing them access to the Court.

The CJEU, agreeing with the prevailing interpretation in the field,[40] concluded that the meaning of a regulatory act must be understood as covering non-legislative acts of general application.[41] According to Article 289(3) TEU a legislative act is a legal act adopted by one of the EU legislative procedures. These can take the form of directives, regulations, or decisions, adopted under the ordinary or the special legislative procedure. *A contrario*, delegated (Article 290 TFEU) and implementing acts (Article 291 TFEU), such as recommendations and opinions should count in principle as regulatory acts.[42] Regulations, directives or decisions may also constitute

36 The Advocate General proposed a new test for individual concern: 'the measure has, or is liable to have, a substantial adverse effect on [the applicant's] interests'. CJEU 25 July 2002, C-50/00, ECLI:EU:C:2002:462 (*Union de Pequenos Agricultores v Council*), points 60, 75.

37 *Union de Pequenos Agricultores v Council*.

38 *Union de Pequenos Agricultores v Council*, paras. 41, 42, 45; *Jégo-Quéré et Cie SA v Commission*, par. 33 and 34. The opportunity was provided again after the Lisbon Treaty in Inuiit case, but the Court concluded that the wording of the provision had not changed and there was nothing to suggest that there had been such intention, reaffirming once more the Plauman formula. EGC 6 September 2011, T-18/10, ECLI:EU:T:2011:419 (*Inuit Tapiriit Kanatami and Others v Parliament and Council)*, paras. 55, 70.

39 CJEU 3 October 2003, C-583/11 P, ECLI:EU:C:2013:625 (*Inuit Tapiriit Kanatami and Others v Parliament and Council*).

40 M. Dougan, 'The Treaty of Lisbon 2007: Winning Minds, not Hearts', *Common Market Law Review*, 45, 3, 2008, p. 77; Chalmers, Davies and Monti 2010, p. 415.

41 *Inuit Tapiriit Kanatami and Others v Parliament and Council*.

42 Chalmers, Davies and Monti 2010, p. 415; Peers and Costa 2012, p.p.: 87, 88.; Order of 6 September 2011, *Inuit Tapiriit Kanatami and Others v. Commission*; *Microban v. Commission*.

non-legislative acts,[43] as do acts of the bodies, offices and agencies of the EU.[44] The first example of regulatory act accepted by the Court was a decision of the Commission concerning the withdrawal of the material triclosan from the list of permitted additives indented to come into contact with foodstuffs, in the landmark case of *Microban*.[45] The Court held that the decision constituted a non-legislative act, adopted through the commitology procedure that 'applies to objectively determined situations' and produces legal effects vis-à-vis a general and *in abstracto* defined category of persons.

In the same case, the Court has expressly ruled that the criterion of direct concern when viewed in the context of contesting a regulatory act cannot be interpreted any more restrictively than its definition in the pre-Lisbon case law.[46] This has been read as leaving some hope that it may be interpreted more generously in the future.[47] However it would be questionable if the Court would allow the same term to be interpreted differently in the third limb of Article 263(4) than in the second limb.[48]

As far as the requirement for the regulatory act not entailing any implementing measures is concerned, the Court held in *Microban* that the case is admissible if any implementing measures adopted are of ancillary nature rather than *necessary* (emphasis added) to implement legally binding Union acts.[49] The Court chose here a more restrictive interpretation of the term, which, since it concerns a restriction, leaves more space for the direct challenging of non-legislative acts of general application.

6.1.1 Public interest litigation

The doors of the CJEU have been half-closed for public interest groups representing the interests of specific groups of individuals or the general public. A case concerning the responsibility of Frontex can be considered a public interest action challenging the legality of actions conducted during joint operations for the interest of the large and unidentified group of affected individuals but also in order to prevent further breaches of fundamental rights in the future.

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43 Article 297(2) TEU.

44 Opinion of A-G Kokott in *Inuit Tapiriit Kanatami and Others v Parliament and Council*, points 49-56, and the Commission's

argument at par. 41; CJEU 22 January 2014, C-270/12, ECLI:EU:C:2014:18 (*United Kingdom v Parliamant and Council*).

45 *Microban v. Commission*.

46 *Microban v. Commission*, par. 32.

47 Peers and Costa 2012, p. 91; *Inuit Tapiriit Kanatami and Others v. Commission ; Microban v. Commission*.

48 The Court has already ruled that the meaning of direct concern in the second limb of Article 263(4) remains unchanged after the revision of the locus standi requirements by the Lisbon Treaty. *Inuit Tapiriit Kanatami and Others v Parliament and Council*, par. 70.

49 *Microban v. Commission*, par.: 33-38.

Public interest litigation, as a form of strategic litigation has been identified as one of the applications of *systemic accountability*.[50] In practice, interest groups and civil society organisations which could bring such actions before the CJEU need to abide by the same rules of standing as individuals. Since direct and individual concern is highly unlikely to be established in their case,[51] access to the CJEU seems improbable. Therefore, a case concerned with the accountability of Frontex would still need to be brought by an individually concerned victim.

The option for collective interests to trigger rights-based litigation before the CJEU appears mostly in the areas of environmental law, consumer law, and access to documents.[52] Although the CJEU has at times accommodated public interest litigation,[53] these instances remain exceptional. As a rule, the Court has not been welcoming to civil society representatives.[54]

6.2 Admissibility in EBCG operations

Regarding the locus standi criteria, we observe that the activities of the agency are structured in such a way, taking the character of coordination and assistance, that the agency avoids direct contact with the individual.[55] Therefore, the applicant would be unlikely to be the addressee of the act. However, in the context of the increase of the operational competences of the agency, it becomes more likely that Frontex addresses an act to an individual.[56] In addition to that, commentators have expressed the hope that the Court will choose a flexible approach to the admissibility criteria to include 'less traditional acts of EU agencies', as it has already done in the *Sogelma* case.[57] This, however, may prove not more than wishful thinking in light of the *Plauman* line of cases.

50 Chapter V, section 3.11.

51 e.g. CJEU 2 April 1998, C-321/95, ECLI:EU:C:1998:153 (*Greenpeace and Others v Commission*); CJEU 11 July 1996, C-325/94, ECLI:EU:C:1996:293 (*WWF v Commission*).

52 C. Warin, 'Individual rights and collective interests in EU law: Three approaches to a still volatile relationship', *Common Market Law Review,* 56, 2, 2019, p.p.: 463–488.

53 e.g. CJEU 25 October 1977, C-26/76, ECLI:EU:C:1977:167 (*Metro-SB-Großmaerkte GmbH v Commission*); O. De Schutter, 'Public Interest Litigation before the European Court of Justice', *Maastricht Journal of European and Comparative Law*, 13, 1, 2006, p.p.: 9-34.

54 C. Harlow, *Accountability in the European Union (Collected Courses of the Academy of European Law*, New York: Oxford University Press 2002, p. 150.; H. W. Micklitz and N. Reich, *Public Interest Litigation before European Courts*, Baden-Baden: Nomos 1996.

55 LIBE 2011, p.p.: 82, 83.

56 LIBE 2011, p.p.: 82, 83.

57 LIBE 2011, p.p.: 82-86, CFI EU 8 October 2008, T-411/06, ECLI:EU:T:2008:419 (*Sogelma v AER*), The court then extended the scope of judicial redress to agency acts, even though that was not possible then under the Treaty.

The strict interpretation of the element of direct concern can, in fact, block access to the CJEU in the cases that are the object of this study. For instance, an applicant wanting to challenge the practice of Frontex to surrender intercepted aliens to the Greek authorities, which then would detain them in inhumane conditions, would be automatically excluded. This is because the acts of the Greek authorities would be regarded as measures implementing the Returns Directive, which would, thus, interrupt the direct concern.

Things seem more manageable with respect to the second dimension of direct concern, i.e. the nature of the interest affected by the Union measure. According to the reading of the CJEU, the measure must affect a legal entitlement of the applicant rather than any other interest.[58] This requirement is not expected to hinder the access of individuals affected by acts of Frontex, as their human rights are predominantly legal interests.

Equally unproblematic can be the element of individual concern. Frontex acts are unlikely to concern a particular individual, but they usually concern specific or unspecified groups of people. To the extent that the group in question is sufficiently individualised, for example, people on boat X, the *Plauman* test is satisfied. From a different perspective, several operational activities of the agency that are of a technical nature, such as the risk analyses and plans, are conducted at the Frontex headquarters in Warsaw. Due to their abstract nature, it is argued that they cannot affect individuals in the manner defined under the *Plauman* test. Thus, in principle they cannot affect the rights of individuals in the direct and individual way envisaged by the CJEU in its case law,[59] not allowing the individual to use the direct path to address the Court. Finally, the third element of Article 263(4) TFEU, regulatory acts, seems, at first sight, to be promoting the accountability of Frontex, since the acts of the agency seem to be non-legislative in nature.

In sum, in light of the above regarding individual access to the CJEU as a whole, and in the case of Frontex in particular, we can conclude that the admissibility obstacles may be large, but they are not insurmountable, especially if an argument on the basis of Article 47 of the Charter on effective legal remedy is pursued. Moreover, as the agency acquires more powers and competences, the likelihood increases that the requirements of Article 263(4) are met.[60]

As long as a case passes that first admissibility stage, the next step would be to look at the reviewability of the contested act, which will be investigated in the following section.

58 Chalmers, Davies and Monti 2010, p.p.: 41, 417.
59 Fischer-Lescano and Tohidipur 2007, p. 32.
60 LIBE 2011, p. 84.

6.3 Reviewable acts of the agency

Next to the accessibility criteria, another point of friction in a case regarding Frontex would be the reviewability of its acts, given the position that the agency's acts are rather of a technocratic nature and not sufficiently operational.[61] This requires us to look at the meaning and scope of 'act' within Article 263(4).

The CJEU has so far seen 'acts' quite broadly at times covering even oral statements.[62] However, this case law is not settled and commentators fear that development to the opposite direction could prove to be too restrictive. If the Court interprets the term narrowly, i.e. as acts that can bring about a change in a party's legal position, then most of Frontex activity 'would fall outside the radar'.[63]

By virtue of Article 263 TFEU, the CJEU can look into the legality of acts of agencies that have legal effects vis-à-vis third parties. In other words, the contested acts need to be, as a general rule, legally binding, in order to cover the material scope of admissibility for an action for annulment or failure to act. More precisely, if an act by an agency, in particular Frontex, is to be challenged before the CJEU, it should be able to produce legal effects, which are binding in their own right and which are capable of affecting the interests of the individual.[64] No act that falls short of that requirement can, in principle, be susceptible to the judicial review of the CJEU for breach of the Charter.

Following the line of argumentation that Frontex only has a coordinating role in the operations, and that its acts are not final and do not produce legal effects vis-à-vis individuals, one major issue for applicants would be finding acts of the agency that can be reviewed under Article 263 TFEU. As already shown, however, the merely coordinating role for the agency, the acts of which have no effects vis-à-vis individuals, is largely disputable.[65] In the following section, we give examples of such potentially reviewable acts.

6.3.1 The reviewability of the decision on individual complaints mechanism

First of all, the reviewability of the decision of the Executive Director in the context of the individual complaints procedure is proposed. Article 111 EBCG Regulation provides for an individual complaints mechanism that monitors and ensures the respect for fundamental rights in all the activities of the agency. Through this mechanism, any person who is 'directly affected' by the actions 'of staff' of the agency during an operation, resulting

61 LIBE 2011.
62 *Air France v Commission*; LIBE 2011, p. 82; section 6.1.
63 Chalmers, Davies and Monti 2010, p. 421.
64 CJEU 1 December 2005, C-46/03, ECLI:EU:C:2005:725 (*United Kingdom v Commission*); *IBM v Commission*, par. 9.0.
65 See also LIBE 2011, p.p.: 85-95.

in a breach of their human rights, will be able to submit a complaint to the agency. The FRO is responsible for handling the complaints at the first stage, deciding on the admissibility of a complaint. She further forwards the admissible complaints that concern the agency to the Executive Director and those that concern national border guards to the host member state. This means that the FRO essentially decides on the prima facie attribution of responsibility. Subsequently, the Executive Director decides on the substance of the complaint and will ensure appropriate follow-up, the nature of which has not been adequately specified in the Regulation.[66]

Article 111 does not constitute a system of legality review as such.[67] However, there are reasons to suggest that such an individual complaints mechanism is part of a more extensive system of legality review. Specifically, this internal administrative process can be seen as the first line of legality review. Such a system has been exemplified in the founding Regulations of other agencies, with this first line of legality review being executed either by the Management Board of the agency (EASA) or the Commission (ECDC).[68]

The inclusion of Article 111 within a broader system of legality review can be argued on the basis of the aims and objectives of this provision, the will of the drafters, as well as the nature of the mechanism itself, but also placing the provision within its context and interpreting it in relation to Regulations of other agencies with respect to the legality review procedure. In particular, the mechanism is derived from the recommendations of the European Ombudsman, following an own initiative inquiry on the implementation by Frontex of its fundamental rights obligations,[69] which also led to the adoption of a resolution by the EP.[70] The Ombudsman called for a 'monitoring mechanism'. Despite its name, it becomes obvious from the text of the Ombudsman's report that it does not only concern monitoring, but also remedying of violations. The purpose was to promote and monitor compliance with fundamental rights obligations, while the Ombudsman also specifically requested the establishment of concrete measures for the follow-up of complaints.[71] The same aim of monitoring and ensuring the respect for fundamental rights is expressed in the main body of the EBCG Regulation itself (Article 111(1)), as well as in the Explanatory Memorandum

66 For further detail on the individual complaints mechanism, see Chapter V, section 3.5.5.

67 The complaints mechanism of the Border Guard Regulation is too restrictive in the sense that it concerns only the staff, rather than the responsibility of the agency as a whole with respect to the organisation, execution, or consequences of a joint operation. Furthermore, disciplinary measures are not sufficient to ensure compliance with fundamental rights and an effective legality review. Finally, it becomes obvious that it falls short of the standards of a legality review since it only concerns compliance with fundamental rights, rather than all legal obligations of the agency.

68 Craig 2012, p.p.: 157, 158.

69 European Ombudsman 2012; European Ombudsman 2013c.

70 European Parliament 2015.

71 European Ombudsman 2013b.

accompanying the Regulation Proposal.[72] It becomes obvious that the purpose of the provision, supported by the intention of the drafters is to ensure compliance with fundamental rights in a forum, where the legality of acts can be reviewed against human rights standards and possible violations can be remedied. This constitutes the essence of legality review or legal accountability more generally.

In conclusion, the decision of the Executive Director is essentially a decision on the legality of an act of the agency. Specifically, he will decide whether the agency has violated human rights. The same holds with respect to the FRO, who decides on the admissibility of the claim and on the allocation of responsibility. In cases where an agency's founding Regulation empowers the Commission to rule upon issues of legality, that decision of the Commission is, according to Paul Craig, reviewable under Article 263 TFEU whether this is explicitly mentioned in the Regulation or not.[73] Similarly, I suggest the reviewability of the decision of the Executive Director and/or of the Fundamental Rights Officer in this respect.[74]

6.3.2 Reviewability of the risk analysis

Secondly, I suggest the reviewability of the risk analysis conducted by the agency. Frontex has important advisory functions through the research and risk analysis it conducts, which constitute the necessary basis for every operation. In fact, according to the former Frontex Executive Director: 'All Frontex activities are based on risk analyses, the "engine" of Frontex activities'.[75] The results of the risk analysis are reflected in the operational plan, which is drafted by the agency and approved by the host member state.

Madalina Busuioc, writing in the context of agencies more broadly, describes such advisory functions as offering scientific advice to member states upon which they base their decision.[76] Such opinions are not final acts, but rather preparatory. They are however essential for the operation, which heavily relies upon them. This advice, although not formally binding, would be hard to circumvent due to the research and technical expertise of the agency.

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72 European Commission, Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision, 2005/267/EC, COM(2015) 671 final, 2015/0310 (COD) of 15/12 /2015.

73 Craig 2012, p. 158.

74 M. Gkliati and H. Rosenfeldt, *Accountability of the European Border and Coast Guard Agency: Recent Developments, Legal Standards and Existing Mechanisms*, Refugee Law Initiative (RLI) Working Paper, London: School of Advanced Study, University of London 2018, p. 6.

75 I. Laitinen, *Introductory talk to the Joint Parliamentary Meeting initiated by the European Parliament and the Parliament of Finland: 'From Tampere to the Hague'*, Brussels: European Parliament 2006.

76 Busuioc 2013, p. 192.

Such considerations lead Busuioc to the observation that often the boundaries between scientific advice and decision-making become obscured in practice and, as a result, the final decision belongs de facto to the agency. Therefore, she makes the bold suggestion to review the legality of non-binding acts. Busuioc's argument is that although doing that sounds provocative if not, that would mean an insurmountable gap in the accountability of the 'de facto operative decision maker'.[77]

Paul Craig agrees that if judicial review is to be effective, it needs to be capable of being applied to 'the institution that made the operative decision'. He gives an example concerning the supervision of medicinal products developed for use in the EU, where the Commission, who is the formal decision-maker, heavily relies upon the recommendations of the European Medicines Agency (EMA). He argues that reviewing the Commission decision would not suffice, since normally the Commission would simply adopt the recommendation of the agency without independent input. Therefore, judicial control needs to focus on the reasoning of the recommendation that lies behind the final decision.

Although provocative, the argument is convincing and is supported by judicial precedent in the case of *Artegodan*.[78] This case is innovative in many respects. Next to developing the essence of the precautionary principle, the obligation for EU institutions 'to prevent specific potential risks',[79] the Court also introduced the reviewability of non-binding acts. The case concerned Commission Decisions to withdraw marketing authorisations for medicines of the pharmaceutical company *Artegodan*, which contained 'amfepramone', an agent with anorectic properties. The Commission had based its decision on the opinion of the Committee from Proprietary Medicinal Products (CPMP), a scientific committee of EMA. Although the CFI recognised that the opinion was not formally binding, it considered that the consultation with the CPMP was mandatory and that the Commission was not able to make an individual assessment of the product. It had to base its reasoned decision on the scientific evidence produced by the CPMP.[80] The Court then held that the first step of the review process was the review of the lawfulness of the scientific opinion.[81]

The Court applied a marginal legality review test, as it is not empowered to examine the substance of the scientific opinion. In particular, it considered the proper functioning of the CPMP, the internal consistency of the opinion and whether there was a comprehensible link between the medical evidence relied on and the conclusions of the scientific committee.

77 Busuioc 2013, p. 193. Perhaps it is important to note that Busuioc does not talk about Frontex in particular.

78 *Artegodan v Commission*.

79 *Artegodan v Commission*, par. 184; J. L. da Cruz Vilaça, *EU Law and Integration: Twenty Years of Judicial Application of EU law*, Oxford and Portland: Hart Publishing 2014, p. 350.

80 *Artegodan v Commission*, par. 198.

81 *Artegodan v Commission*, par. 199.

In that respect, the CPMP was obliged to refer to the scientific reports on which it based its opinion and explain why it disagreed with the reports and expert opinions presented by Artegodan.[82] Finally, the CFI found that the Commission had exceeded its competences and annulled the Commission decisions.[83]

Should this line of argument be applied in the case of Frontex, the final decision belongs to the host member state that has the power of command. However, the advice produced as a result of research and risk analysis conducted by the agency, although not formally binding, is so influential, that it makes the agency the de facto decision maker. Therefore, the advice should be reviewable in those cases.

6.3.3 Reviewability of the refusal to access documents

Last but not least, the reviewability of the refusal to access to documents is proposed. The lack of transparency on the part of the agency has been criticised as a structural problem of Frontex. The EP has noted that a 'culture of secrecy' characterises the work of the agency. This issue becomes most vivid when it comes to the right to public access to documents, which has been included in the Charter as a fundamental right. Freedom on information requests are often refused, and more often than not, the released documents are extensively redacted on the ground of public security concerns.[84]

Access to documents is enshrined in Article 42 CFR, in accordance to which, any citizen or resident of the Union, has a right of access to EP, Council and Commission documents. The right has been extended with Article 15(3) TFEU to cover documents of institutions, bodies and agencies of the Union.

The decision of the agency for total or partial refusal of access to requested documents is an act of direct effect conducted by the agency and can, therefore, be reviewed by the CJEU. Not every unlawful refusal of access to documents constitutes a human rights violation, and the limits and conditions for which provision has been made in Article 15(3) TFEU will need to be taken into account. Factors that can be taken into account in this regard is the extent and the systematic nature of refusals, that will need to be established on a case-by-case basis. Applicants can also bring an action for annulment under Article 230 EC against decisions on access to documents taken by the agency pursuant to Article 8 of Regulation (EC) No

82 *Artegodan v Commission*, par. 200.

83 The decision was upheld on appeal. However, the case before the ECJ did not concern the issue at stake here. CJEU 24 July 2003, C-39/03, ECLI:EU:C:2003:418 (*Commission v Artegodan and Others*).

84 See for more information, Chapter V, section 3.3.

1049/2001 regarding access to EU documents.[85] In fact, a stepping stone in this direction could be a case before the CJEU regarding the refusal of access to documents.[86]

7 Action for damages

This section examines a remedy with a lower access threshold for individuals compared to the action for annulment, the action seeking to establish the liability of the Union and award compensation. The issue of admissibility and the examination of the merits of this remedy are first studied regarding a case of Frontex liability, before going in detail into more particular procedural problems, such as establishing liability based on non-binding opinions.

This remedy, which obliges the EU to make good any damage caused by its institutions, was already introduced by the Treaty of Rome, establishing the European Economic Community from the very beginning.[87] Since then, modest use has been made of the remedy. According to the statistics of the Court of Justice, only 29 claims for damages were brought before the General Court in 2018. Although the number has been doubled since 2011, it still corresponds to less than 3.5% of the activity of the Court, compared to 35% which is the percentage of actions for annulment.[88]

The right to claim for damages has also been introduced as an expression of the right to good administration in Article 41(3) of the Charter. The provision reiterates the text of the Treaties, merely adding a fundamental rights angle to it.[89] A generous time-limit of five years from the time the harmful event took place, allows applicants to bring a liability action relatively long after the damage has occurred, which can prove particularly helpful in the case of long-lasting related national proceedings, for instance on the issue of the liability of the host state. In a case concerning the liability

85 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

86 Such a case was heard by the General Court, where the applicants, two freedom of information activists and journalists, Arne Semsrott and Luisa challenged the agency's refusal to provide information about the vessels deployed by the agency during the Joint Operation Triton. The General Court dismissed the action, ruling that the agency had rightfully refused access to the requested documents. EGC 27 November 2019, T-31/18, ECLI:EU:T:2019:815 (*Izuzquiza and Semsrott v Frontex*).

87 Articles 178 and 215(2) EEC. The provisions were renumbered in the Amsterdam Treaty provisions as Arts. 235 and 288(2) EC, respectively. Lisbon Treaty in Article 340 TFEU has not changed the substantive content of these provisions.

88 Court of Justice of the European Union 2018, p. 237.

89 Advocate General Dutheillet de Lamothe had already in 1972 stated that the action for damages was essentially the exercise of a substantive right. CJEU 13 June 1972, C-9 and 11/71, ECLI:EU:C:1972:52 (*Compagnie d'Approvisionnement v Commission*), par. 411.

of Frontex, the time-limit also accommodates the sensitive situation of irregular migrants facing the risk of deportation and other related risks and difficulties, such as lack of access to information.[90]

Such an action for damages can be brought for instance, regarding allegations that Frontex has failed to use its supervisory powers to prevent violations during return flights,[91] or with respect to the agreements of Frontex with third countries. In fact, there is relevant case-law on the liability of the Community for external agreements.

In *Odigitria* the Court of First Instance examined in its substance a claim regarding damages caused to European fishers due to the non-renewal of the fishing agreement between the EC and Morocco.[92] Also, according to an earlier opinion of Advocate General Darmon,[93] the examination of liability claims for external agreements is in principle possible since the Court has jurisdiction over an *a posteriori* review of such agreements. A difficulty foreseen by Fines would be to establish the applicable legal basis.[94]

7.1 Admissibility

The exclusive competence in disputes relating to the Union's non-contractual liability belongs to the CJEU.[95] Thus, before entering into the merits of the case, the Court needs to decide upon its jurisdiction of the case, namely decide whether the conduct it is asked to adjudicate upon is attributable to the EU.[96] According to Article 340 TFEU, the Union, in case of

90 Relevant for the case of irregular migrants, which may lack the necessary information as to the facts of the harmful event or be ambiguous as to the division of responsibility in a Frontex joint operation, is also that the claimant's ignorance as to the origin of the injury can postpone the commencement of the limitation period. CJEU 7 November 1985, C-145/83, ECLI:EU:C:1985:323 (*Adams v Commission*). See T. Heukels and A. McDonnell, 'Limitation of the Action for Damages Against the Community: Considerations and new Developments' in T. Heukels and A. McDonnell (eds.), *The Action for Damages in Community Law*, The Hague, London and Boston: Kluwer Law International 1997, p.p.: 225-229.

91 N. Nielsen and A. Fotiadis, ''Inhuman' Frontex forced returns going unreported', *EUobserver,* 2019, https://euobserver.com/migration/146090; CPT 2018.

92 CJEU 6 July 1995, T-572/93, ECLI:EU:T:1995:131 (*Odigitria v Council and Commission*).

93 Opinion in CJEU 1 June 1989, Case C-241/87, [1990] ECR I-1790 (*Maclaine Watson v Council and Commission*).

94 '(…) in French law, for example, the *Conseil d'Etat* has established strict liability with regard to treaties, for "rupture de l'egalité devant les charges publiques", while in Community law the judges do not recognise this basis.', F. Fines, 'A General Analytical Perspective on Community Liability' in T. Heukels and A. McDonnell (eds.), *The Action for Damages in Community Law*, The Hague, London and Boston: Kluwer Law International 1997, p. 11-40, p. 27.

95 Article 268 TFEU.

96 This question is commonly decided upon at the admissibility stage of the proceedings. However, cases have been noted where the Court deals with attribution as a fourth element of the liability test, belonging in the substantive part of the proceedings. Fink 2017, p. 281.

non-contractual liability, needs to rectify any damage caused by its institutions or its servants in the performance of their duties. The same provision is made in the EBCG Regulation with respect to the liability of Frontex in particular (Article 97).[97] Moreover, the acts of staff members give rise to the liability of Frontex, as long as they have acted in the performance of their duties (Article 340 (2) TFEU).

The TFEU provides for two separate regimes with respect to EU liability: one regarding the liability of the Union, and one regarding the conduct of its servants acting outside the performance of their duties. This distinction and the interpretation of the element of 'in the performance of their duties' can be of relevance to EBCG operations in terms of the admissibility of an action for annulment.

In this respect, a distinction can be made between official acts, performed by employees in the performance of their duties, and private acts, performed by the public servants in their capacity as private individuals. This does not prevent the attribution to the organisation of acts that have been conducted ultra vires.[98] It is only when the agent has acted in a private capacity, or in the language of the CJEU, not 'in performance of their duties', that the act will not be attributed to the organisation and the liability of the EU will not be in question.

The CJEU has interpreted 'in performance of their duties' rather narrowly in *Sayage v Leduc*, limiting the concept to acts that 'by virtue of an internal and direct relationship, are the necessary extension of the tasks entrusted to the institutions'.[99] Here the CJEU has held that a servant of the Union, entrusted with escorting two representatives of private firms on a visit to a nuclear plant, was not acting in the performance of his duties when causing a car accident driving them there in his private car.[100]

This interpretation differs, in fact, from the interpretation of the same principle in state liability by the CJEU. In *A.G.M.-COS.MET* the CJEU rules that the decisive factor is whether the person to whom a certain statement (in that case) is addressed can reasonably suppose that these are official positions taken by the state, i.e. that it was the state acting, rather than personal opinions of the public servant.[101]

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97 On questions regarding the appropriate authority to bear responsibility (the EU rather than Frontex), see Chapter VI, section 2.2.

98 Article 6 ARIO.

99 CJEU 10 July 1969, C-9/69, ECLI:EU:C:1969:37 (*Sayage and Others v Leduc and Others*), par. 7; see H. G. Schermers and C. R. A. Swaak, 'Official Acts of Community Servants and Article 215(4) EC' in T. Heukels and A. McDonnell (eds.), *The Action for Damages in Community Law*, The Hague, London and Boston: Kluwer Law International 1997, p.p.: 168-171.

100 *Sayage and Others v Leduc and Others*, paras. 10-11.

101 CJEU 17 April 2007, C-470/03, ECLI:EU:C:2007:213 (*AGM-COS.MET v Suomen valtio and Tarmo Lehtinen*), paras. 84-85.

In considering state liability, the Court comes closer to the principles existing in international law, according to which all acts, including both de jure and de facto competences, are able to engage the responsibility of the actor unless they are made in a private capacity.[102] The interpretation adopted by the Court in *Sayage v Leduc,* however, would leave here a considerable gap, as it would consider an act not attributable to the agency when the latter has exceeded its de jure competencies. Such an interpretation would create an accountability gap, also affecting the effectiveness of legal protection.

The contrast between the interpretation in *Sayage v Leduc* and in *A.G.M.-COS.MET* is inconsistent with the Court's priorities. In particular, in the interest of establishing a fundamental common law on liability, the CJEU has been progressively converging the criteria of member state and Union liability.[103] Evidently, the interpretation of the element of 'in performance of their duties' has not yet reached the desired level of convergence, when applied in state liability and when applied in EU liability. In this vein, the Court could strive to further harmonise the two types of liability, drawing inspiration from the principles of international law so as to cover accountability gaps.

Thus, it is suggested here that in a case concerning the liability of Frontex, the CJEU uses the interpretation of Art 6 ARIO in international law[104] as a form of inspiration, in order to interpret 'acting in the performance of their duties', as including all acts resulting from both de jure and de facto competences, unless they are made in a private capacity. This would also be in accordance with the aim of the Court to converge the standards between state and EU liability and establish a fundamental common law on liability.

Consequently, if a standard closer to *A.G.M.-COS.MET* was to be adopted in a case concerning the responsibility of Frontex, then the impression given by the members of the border guard teams to migrants on the ground could make their acts attributable to the agency, even if the conduct were outside the agency's de jure competencies. This could apply for instance, in a case where Frontex officers would perform ultra vires executive powers, such as identity checks and refusal of entry.

In case the Court chooses to insist on the interpretation of *Sayage v Leduc* and consider acts conducted outside the de facto competences as not incurring the liability of the EU, the injured party may still initiate legal proceedings against the servant of the Union personally under national law. Usually, under national law, any non-contractual liability for damages is

102 Chapter VI.

103 CJEU 4 July 2000, C-352/98 P, ECLI:EU:C:2000:361 (*Bergaderm and Goupil v Commission*); Joined Cases CJEU 5 March 1996, C-46 and 48/93, ECLI:EU:C:1996:79 (*Brasserie du pêcheur and Factortame and Others v Germany and United Kingdom*), par. 42.

104 Commentary to Article 5 ARS, paras. 7 - 9.

to be incurred by the employer and not the staff member personally. As a national court does not have the competence to rule on the liability of the employer, which in this case is the EU, and the CJEU has already declared that the EU is not liable, the national court would need to dismiss the action, leaving a gap with respect to access to court. The only avenue left would be starting criminal proceedings at the national level.[105] In this case, they would not be covered under the immunity of officials and servants of the Union from legal proceedings, as the act in question was not in the performance of their official capacity.[106]

7.2 Merits

In an action for damages, the Court applies a non-contractual liability test structured around three cumulative criteria. Namely, an action can be brought against a) an illegal act of the Union for b) damage, which c) was directly caused by the aforementioned Union act.[107]

It should be noted, that in contrast to the ARIO framework, EU liability law does not distinguish between direct responsibility, resulting from the attribution of conduct, as based on the exercise of effective control on the one hand, and indirect responsibility due to aid and assistance on the other. It applies the same test and standards to both.

We shall now take these elements one by one.

7.3 Illegal act

The wrongful act or omission needs to be attributed to one of the institutions, organs and agencies of the Union. The infringed principle must be intended to confer rights on individuals[108] and must be sufficiently serious[109]. The additional requirement of it also being a 'superior rule of law' in the case of legislative action, introduced with *Schöppenstedt*, is no longer relevant since *Bergaderm*.[110] These two cases were the foundations on which the criteria of unlawfulness have been developed.

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105 A solution to this problem has been proposed by Schermers and Swaak 1997, p.p.: 172, 173.

106 Article 11 (a) of Protocol (No 7) to the Lisbon Treaty on the privileges and immunities of the European Union.

107 CJEU 28 April 1971, C-4/69, ECLI:EU:C:1971:40 (*Lütticke v Commission*), par. 337; CJEU 10 December 2002, C-312/00, ECLI:EU:C:2002:736 (*Commission v Camar and Tico*), para. 53. The landmark case in this context is *Bergaderm and Goupil v Commission*, para. 42.

108 CJEU 13 March 1992, C-282/90, ECLI:EU:C:1992:124 (*Vreudenhil v Commission*); *Commission v Camar and Tico*, para. 53.

109 *Bergaderm and Goupil v Commission*, para. 43.

110 CJEU 2 December 1971, C-5/71, ECLI:EU:C:1971:116 (*Aktien-Zuckerfabrik Schöppenstedt v Council*), para 11; *Bergaderm and Goupil v Commission*, para. 42.

The requirement of fault is strictly interpreted as the existence of a 'sufficiently flagrant violation of a rule of law'.[111] The violation is sufficiently serious when the EU institution concerned 'manifestly and gravely disregarded the limits on its discretion'.[112] However, when the institution has significantly reduced (or no) discretion, the mere infringement of EU law may suffice to fulfil the criterion.[113] In this respect, the Court will take into account, in particular the freedom of action of institutions, the difficulties in the application or interpretation of the law, and the complexity of the particular circumstances.[114] There are instances where the Court uses additional criteria, such as the clarity and precision of the provision.[115]

Discretion is a key determining factor, which can play a role in the case of Frontex, for instance, with respect to the obligation of the Executive Director to suspend or terminate an operation. The General Court considers it possible that the requirement of fault is also fulfilled in the case of manifest and serious errors in the analysis on which a policy decision is based.[116] This can be the case with respect to the risk analysis conducted by Frontex. However, other factors, such as the complexity of the factual circumstances or the degree of clarity or precision of the infringed rule,[117] can in any case affect the outcome of whether the breach was sufficiently flagrant.

The requirement for the breached provision to confer individual rights is meant as protective of individual interests rather than the public good and the interests of the general society.[118] Otherwise, this condition is interpreted rather generously by the CJEU.[119] In exceptional circumstances, liability can also be incurred for acts, where the element of illegality is

111 *Aktien-Zuckerfabrik Schöppenstedt v Council*, para 11; CJEU 25 May 1978, C-83 and 94/76, C-4, 15 and 40/77, ECLI:EU:C:1978:113 (*HNL and Others v Council and Commission*); CJEU 4 October 1979, C-64 and 113/76, C-167 and 239/78 and C-27-28 and 45/79, ECLI:EU:C:1979:223 (*Dumortier Fréres v Council*).

112 *Brasserie du pêcheur and Factortame and Others v Germany and United Kingdom*, par. 55; CJEU 7 October 1996, C-178 and 179/94, C-188 and 189/94 and C-190/94, ECLI:EU:C:1996:375 (*Dillenkofer and Others v Germany*), par. 25; *Bergaderm and Goupil v Commission*, par. 43.

113 *Bergaderm and Goupil v Commission*, par. 44.

114 CJEU 30 January 1992, C-363 and 364/88, ECLI:EU:C:1992:44 (*Finsider and Falck v Commission)*; CFI EU 4 May 2005, T-86/03, ECLI:EU:T:2006:90 (*Holcim v Commission*), paras. 98-118.

115 CFI EU 26 January 2006, T-364/03, ECLI:EU:T:2006:28 (*Medici Grimm KG v Council*), paras. 82-98; EGC 3 March 2010, T-429/05, ECLI:EU:T:2010:60 (*Artegodan v Commission b*), paras 59-62.

116 CFI EU 11 July 2007, T-351/03, ECLI:EU:T:2007:212 (*Schneider Electric v Commission*); par. 129.

117 CJEU 25 January 2007, C-278/05, ECLI:EU:C:2007:56 (*Robins and Others v Secretary of State for Work and Pensions*), par. 73.

118 CFI EU 19 October 2005, T-415/03, ECLI:EU:T:2005:365 (*San Pedro and Others v Council*), par. 86.

119 Fink 2017, p. 238.

absent, under the condition that the applicant has suffered 'direct, special and abnormal' harm.[120]

An action for damages against Frontex in the context discussed in this study may concern, for instance, a violation of the right to non-refoulement, the right to asylum, or the rights of the child. Thus, in discussing the illegality criterion, it is important to look at the particular nature of fundamental rights. It is argued here that due to its nature, a breach of fundamental rights law constitutes by definition a sufficiently serious infringement. This can also be read in the case law of the Court, especially with respect to absolute rights,[121] but also regarding violations of fundamental rights law in general.[122] The Court has not always been consistent in its case law.[123] In any respect, while a more in-depth examination into the fulfilment of criteria may be in order with respect the right to property and private life, it can be reasonably expected that the Court would find a violation of basic rights that are at stake in an action for damages against Frontex to be sufficiently serious.

7.4 Damage

The damage sustained by the victim needs to be actual and certain.[124] Merely potential or hypothetical damage is not adequate to support a claim for non-contractual liability.[125] Imminent damage, however, that is foreseeable with sufficient certainty is permissible.[126]

The Court may not consider damage that is not quantifiable in monetary terms, as it would not be sufficiently concrete.[127] This, interpreted broadly, can exclude from the definition compensation in kind, such as in the form

120 CJEU 13 July 1961, C-14, 16, 17, 20, 24, 26 and 27/60 and 1/61, ECLI:EU:C:1961:16 (*Meroni & Co. and Others v High Authority*); H. J. Bronkhorst, 'The Valid Legislative Act as Cause of Liability of the Communities' in T. Heukels and A. McDonnell (eds.), *The Action for Damages in Community Law*, The Hague, London and Boston: Kluwer Law International 1997, p.p.: 153-165.

121 EGC 8 July 2008, T-48/05, ECLI:EU:T:2008:257 (*Franchet and Byk v Commission*), par. 219.

122 Joined Cases CJEU 20 September 2016, C-8-10/15 P, ECLI:EU:C:2016:701 (*Ledra Advertising v Commission and ECB*), par. 69-70.

123 EGC 23 November 2011, T-341/07, ECLI:EU:T:2011:687 (*Sison v Council*), par. 80.

124 Joined Cases CJEU 17 March 1976, C-67-85/75, [1976] ECR 391 (*Lesieur v Commission*), par 408; CJEU 17 December 1959, C-23/59, ECLI:EU:C:1959:33 (*F.E.R.A.M. v High Authority*), par. 250; *Meroni & Co. and Others v High Authority*, par. 170; *San Pedro and Others v Council*, paras 101-146.

125 CFI EU 27 June 1991, T-120/89, ECLI:EU:T:1991:32 (*Stahlwerke Peine-Salzgitter v Commission*), paras. 320, 321.

126 CJEU 2 March 1977, C-44/76, ECLI:EU:C:1977:37 (*Milch-, Fett- und Eier-Kontor v Council and Commission*), par. 407; *Aktien-Zuckerfabrik Schöppenstedt v Council*, p. 89.

127 *Aktien-Zuckerfabrik Schöppenstedt v Council*, p.p.: 983, 984; *San Pedro and Others v Council*, par. 110.

of injunctions to prevent future violations.[128] Non-material damage, such as mental and moral suffering sustained in the case of human rights violations, qualifies as damage.[129]

Finally, the damage must be proven with the burden of proof lying with the applicant.[130] The standard required by the Court in proving damage and causality, discussed in the next section, has been criticised as disproportionately high, making it excessively difficult for the applicant to produce the evidence.[131]

7.5 Causal link

This element does not merely require the damage to have been the result of the wrongful act of an institution of the Union. The causal link between the wrongful act and the damage needs to be direct, immediate and exclusive.[132] It is shown here and in section 8.2. that this creates a binary distinction on the issue of causality that allows for only one actor to be held accountable. This would not comply with the principle of *systemic accountability* and the Nexus theory, and would exacerbate the *problem of many hands*. I will address this difficulty in section 8.4.

In a strict interpretation of this requirement, liability cannot be established, if the same result could have occurred in the same way even in the absence of the conduct of the institution (conditio sine qua non).[133] Moreover, the Union's conduct needs to be the sole act, which caused the damage, since the latter needs to be the direct and immediate consequence of that act. The act itself, exclusively, without the intervention of a third party, needs to have caused the damage sustained by the injured parties.[134] Any such intervention could break the chain of causation.

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128 CFI EU 10 May 2006, T-279/03, ECLI:EU:T:2006:121 (*Galileo International Technology and Others v Commission*), para. 63 with respect to injunctions; CFI EU 16 December 2010, T-19/07, ECLI:EU:T:2010:526 (*Systran and Systran Luxembourg v Commission*) on confiscation and distraction of material, publication of the decision etc.

129 CJEU 10 December 2015, C-350/14, ECLI:EU:C:2015:802 (*Lazar v Allianz SpA*).

130 CJEU 6 June 1964, C-55-59 and 61-63/63, ECLI:EU:C:1964:37 (*Modena and Others v High Authority*), p. 229; CJEU 4 February 1970, C-13/69, ECLI:EU:C:1970:5 (*Van Eick v Commission*), p. 14.

131 A. G. Toth, 'The Concepts of Damage and Causality as Elements of Non-Contractual Liability' in T. Heukels and A. McDonnell (eds.), *The Action for Damages in Community Law*, The Hague, London and Boston: Kluwer Law International 1997, p. 184. See further Chapter VIII, section 8.4.

132 *Lütticke v Commission*; CJEU 7 June 1966, C-29, 31, 36, 39-47, 50 and 51/63, ECLI:EU:C:1966:29 (*Usines de la Providence v High Authority*); CJEU 14 July 1967, C-5, 7 and 13-24/66, ECLI:EU:C:1967:31 (*Kampffmeyer and Others v Commission);* EGC 18 March 2010, T-42/06, ECLI:EU:T:2010:102 (*Gollnisch v Parliament*); See further Chapter VIII, section 8.2.

133 CJEU 16 January 1992, C-358/90, ECLI:EU:C:1992:16 (*Compagnia Italiana Alcool v Commission*), par. 2505.

134 *Commission v Camar and Tico*, para. 53. The landmark case in this context is *Bergaderm and Goupil v Commission*, par. 42.

I should be mentioned that this would be particularly strict compared to the international law framework, where the causality requirement does not exist as such. Something that resembles this relationship in the ARIO is found in the discussion about aid and assistance.[135] However, this corresponds rather to the causality requirement of *Liability – Responsibility*, according to which, the harmful result should not be too remote of a consequence for an act to count as the cause. Still, the connection or relationship does not need to be so close so that the agent directly causes the harm, without any other intervention.

In this sense, the direct causal link may prove too strict of a requirement with respect to Frontex, since its actions occur in a multi-actor environment, where a nexus of responsibilities is created, where more acts and omissions may cause the harmful outcome. The agency's acts usually require a national implementation measure to be completed. The mere involvement of the host state could be sufficient under the Court's case law to break the chain of causation and prevent the liability of the agency from arising.[136]

Nevertheless, it always needs to be examined on a case-by-case basis whether the intervening act was indeed capable of breaking the chain of causation.[137] The Court has held that this is the case when the act has arisen from an independent decision of the member state.[138] Contrary to this, as the Court held in *Krohn*, when the member state was not acting independently but simply carrying out the binding instructions of the Union, the causal link remains intact, and the Court is able to adjudicate on the liability of the Union.[139] In *Krohn*, the damage was caused by protective economic measures introduced by the German Government. These measures had been authorised by the Commission, which brought with it the liability of the Union.

Based on this precedent, the same argument can be reproduced in the case of Frontex and the host member state. If it can be shown that the latter was implementing decisions taken at the agency level and that it had no discretion in carrying out the binding orders of the agency, then the illegal act of the state does not constitute the cause of the damage and is not capable of interrupting the causal link between the act of the agency and the damage. This is a rather difficult argument to make, as the host state still authorises the operational plan. Frontex may have effective control over the conduct of seconded officers, but this control is not exclusive and would not

135 Chapter VI.

136 LIBE 2011, p.p.: 82-86.

137 CJEU 21 May 1976, C-26/74, ECLI:EU:C:1976:69 (*Roquette v Commission*), at 687; Toth 1997, p. 193.

138 CJEU 10 May 1978, C-132/77, ECLI:EU:C:1978:99 (*Société pour l'Exportation des Sucres SA v Commission*), p. 1073.

139 CJEU 26 February 1986, C-175/84, ECLI:EU:C:1986:85 (*Krohn Import-Export v Commission*), p. 768 and [1987] ECR p.p.: 116-120.

factor out the effective control of the host state.[140] Exceptionally, the control of the agency could prove to be exclusive with respect to the outcome of the right to intervene afforded to the agency in the 2016 EBCG Regulation.

Similarly, the member state can be found to have no discretion, if the instructions at the Union level are not binding *sensu stricto*, but are able to put substantial pressure on the member state. This instance is illustrated in the *KYDEP* case, where the Commission had not been expressly provided with the power to issue binding communications, but the member states were in practice obliged to follow them, under threat of refusal of reimbursement by the Commission of their expenditure.[141] This was adequate for the Court to review the liability of the Union. Thus, if it can be proven that the control and command of the agency over the unlawful act of the host Member State was of a compelling nature *sensu lato*, the involvement of the member states will not result in the interruption of the causal link. This would ensure the liability of the agency.

Likewise, the causal link between the conduct of Frontex and the damage may still remain intact in the case of breach by the agency of its positive obligations, regarding its indirect responsibility for a human rights violation committed by a member state. Even though the member state's act may be the primary cause of the damage, the failure of the agency to 'exercise its powers of supervision with regard to a Member State' makes it 'liable for the damage which follows from the original behaviour of a Member State'.[142]

An occasion where the direct causal link may indeed be interrupted is the situation where the applicant failed to prevent (part of) the damage due to negligence. Applicants need to prove that they have shown due diligence in limiting the extent of the damage. In case they have failed to do so, they may be called to take upon them part of the responsibility. This would result in the proportional reduction of the awarded damages.[143] The Court's past case law points towards discouraging for the applicant predictions in cases where harm was caused on the applicant's bodily integrity. In *Grifoni case*, the Court ruled that the applicant was partly responsible for the damages he suffered having fallen from the roof of a Commission building construction

140 Chapter VII, section 2.3.

141 CJEU 15 September 1994, C-146/91, ECLI:EU:C:1994:329 (KYDEP v Counicl and Commission). Contrary to this, in Emerald Meats, the Commission's communication on tariff quotas was considered part of the internal cooperation with the national authorities on an equal level. CJEU 8 March 1991, C-66/91 and C-66/91 R, ECLI:EU:C:1991:110 (*Emerald Meats Ltd v Commission*).

142 Advocate General's opinion in CJEU, CJEU 12 July 1962, C-9 and 12/60, ECLI:EU:C:1962:25 (*Belgium v Vloeberghs and High Authority*), par. 240; See also Advocate General's opinion in *Kampffmeyer and Others v Commission*, par. 279.

143 CJEU 19 May 1992, C-104/89 and C-37/90, ECLI:EU:C:1992:217 (*Mulder and Others v Commission*); CJEU 10 July 2003, C-472/00 P, ECLI:EU:C:2003:399 (*Commission v Fresh Marine*).

since as a maintenance expert he should have refused to climb the ladder or have taken other precautionary measures.[144] Also, in *Adams* case, the applicant was refused full compensation. Mr Adams sued the EC for disclosing documents to the company 'Roche', violating the confidentiality obligations of Article 214 EC Treaty, and exposing his identity, which subsequently led to his criminal conviction in Switzerland for corporate espionage. The Court accepted the responsibility of the Commission but held that Mr Adams was also partly responsible and the Commission was therefore condemned to pay half the damage claim. One of the reasons for the Court holding Mr Adams partly responsible was that he returned to Switzerland 'while he should have been aware of the risks involved.'[145] It would be regrettable if this line of reasoning were followed in cases of breaches of fundamental rights, incurred in the context of irregular migration, where the victim could be held partially liable for the harm suffered for taking the risk of a dangerous journey or of irregular border-crossing.[146]

Once the Court finds that all the above criteria are fulfilled, illegal act, damage, and causal link, it will order for the responsible institution or agency to rectify the damage. The principle of full compensation also includes the award of interest where that applies.[147]

7.6 Complications of the action for damages in EBCG operations

After having examined the legal remedy in more general terms, this section looks at the action for damages as it can be applied in a case concerning the liability of Frontex. In particular, it zooms in to some more specific elements, which can be important for applying this remedy to Frontex. The aim is to foresee procedural problems that arise from the nature of the remedy itself and the jurisprudence of the Court, but also from the particular nature of Frontex activities, and work out plausible solutions to them.

It does so, first, by critically examining the source of such procedural problems that could inhibit the accountability of Frontex. It discusses, in particular, the limitations of the basic model of responsibility in EU law, i.e. the competence model, and the potential of the organic model to mitigate these limitations. Next, it applies this line of thought with respect to the positive obligations of the agency to prevent a violation and the de facto binding opinions it can issue.

144 CJEU 27 March 1990, C-308/87, ECLI:EU:C:1990:134 (*Grifoni v EACC*).

145 *Adams v Commission*.

146 On the degree of contributory diligence required, see Toth 1997, p.p.: 191-198.

147 On the issue of interest in claims for damages before the CJEU see, A. Van Casteren, 'Article 215(2) EC and the Question of Interest' in T. Heukels and A. McDonnell (eds.), *The Action for Damages in Community Law*, The Hague, London and Boston: Kluwer Law International 1997, p.p.: 199-216.

7.7 The limits of the competence model

This study has previously discussed 'organic model', adopted by the ARIO. This presents certain tensions with the 'competence model' that the EU adopts as a sui generis organisation.

The organic model is based on the principles of attribution of conduct that leads to direct responsibility and those of attribution of (complementary) responsibility leading to indirect responsibility. The competence model attributes responsibility on the basis of formal decision-making competence within the EU system. In areas where the EU has exclusive competence to adopt binding acts, it also carries the exclusive responsibility for unlawful, harmful outcomes. In areas of shared competence (where EBCG operations can be placed), responsibility is allocated on the basis of priorly agreed upon regimes of formal competencies. Such a priori allocation can be found in mixed agreements.

Such agreements do not ordinarily acknowledge factual control, double attribution or complementary indirect responsibility, which are necessary elements in determining joint responsibility within EBCG operations and the accountability of Frontex. Thus, I show in this section that the competence model is not adequate to fully address the *problem of many hands* as that appears in EBCG operations and that the organic model should be used instead, as that also takes into account de facto competences and factual control.[148] I, first, examine the competence model in more detail as that appears from the Court's case law, and while acknowledging its overarching nature as a sui generis regime and lex specialis (Article 64 ARIO), I also investigate its limits within an action for damages.

The CJEU has often reaffirmed the competence model in its case law, allocating liability on the basis of normative control, or in other words on the basis of legal decision-making powers. The determinative questions are who exercised legal control, whether the actor had the authority to issue legally binding orders, or whether it had formal discretion to determine its conduct. In *Krohn I*, the Court rejected the liability of the member state as it came to the conclusion that it had no formal discretion to derogate from the instructions of the Commission.[149]

In the context of EBCG operations, in order to establish which actor had normative control over the human rights violation that occurred during an operation, the competence of the staff and the offices of the agency and those of the host member state needs to be examined. In accordance with the competence model, the opinion has been expressed in the literature that Frontex is directly liable only for violations directly committed by its own personnel on the ground, such as liaison and coordinating officers that belong to the agency's staff, when they act in their official capacity or viola-

148 See Chapter VII, section 4.

149 CJEU 26 February 1986, C-175/84, ECLI:EU:C:1986:85 (*Krohn Import-Export v Commission*).

tions that are inherent in the design of the operational plan.[150] The degree of normative control by the agency to the deployed personnel has been considered too weak to justify the claim that these act as de facto EU organs.[151] The comments of the coordinating officer, for instance, need to be taken into account by the authorities of the host state, but these are not formally binding, irrespective of the influence these may have on the border guards in practice. It has been noted that Frontex's own staff may only exercise tasks of a coordinating nature, and they do not possess executive or other operational powers which affect human rights directly. Thus, the normative control that the agency possesses over the officers operating on the ground is insufficient in practice to render it directly liable for violations.[152] This would result in the agency not being found responsible for violations that it has contributed to that have not been committed by its staff. Such a gap would have been incompatible with fundamental rights protection, according to the resolution of the European Parliament:

> *"(...) Frontex coordination activity cannot in practice be dissociated from the Member State activity carried out under its coordination, so that Frontex (and thereby the EU through it) could also have a direct or indirect impact on individuals' rights and trigger, at the very least, the EU's extra-contractual responsibility (...), whereas such responsibility cannot be avoided simply because of the existence of administrative arrangements with the Member States involved in a Frontex-coordinated operation when such arrangements have an impact on fundamental rights".*[153]

Here, the EP, one of the core EU institutions, without rejecting the competence model, openly acknowledges its limits. It holds that in terms of allocating non-contractual liability, the competence model should not enable avoiding responsibility, resulting in a gap in accountability for acts that impact on fundamental rights.

Other commentators have also corroborated this need to cover this gap. David Fernandez Rojo, studying the roles and competences of JHA agencies in the hotspots in Italy and Greece, notes that 'even though the national authorities in the hotspots have exclusive enforcement, decision-making, and discretional powers, the substantial operational assistance that Frontex provides on the ground should be reflected in a legal instrument and be subject to control.[154]

150 Fink 2017, p.p.: 312, 315, 316; similarly, according to Frontex, only complaints against Frontex employees will be attributable to the agency through its individual complaints mechanism, Frontex 2016a.

151 Chapter VII, section 2.2.

152 Fink 2017, p.p.: 282-283, 312, 315, 316.

153 European Parliament 2015, par. 327.

154 D. Fernández-Rojo, 'The European Border and Coast Guard: Towards the centralization of the external border management?', *Blogactiv* 7 February 2017, http://eutarn.blogactiv.eu/2017/02/07/the-european-border-and-coast-guard-towards-the-centralization-of-the-external-border-management, p. 328.

In such instances that the competence model reaches its limits, in order to achieve an equitable result in accordance with the rule of law, the Court can turn for inspiration to the organic model.

Under this model, the investigation does not stop at the formal arrangements[155] but continues through de facto powers and effective control. Even though seconded border guards cannot be considered de facto Frontex organs, the question that would arise in the organic model would be whether the agency would still be considered to have effective control over their conduct.

In the context of such joint operations, different levels of control by different actors have interlaced in a way that a singular answer to this question becomes impossible. The applicable test, in this case, would be that of operational command and control, taking into account the factual circumstances of each particular case.

Under this model, normative control is still important as one of the elements, which appear as a combination of formal arrangements on direction and control (e.g. decision-making powers, disciplinary powers) and factual circumstances. None of them is exclusive, and a complete answer calls for a balanced consideration of them all.

The analysis conducted in Chapter VII shows, first of all, that Frontex has, in fact, effective control over the deployed personnel through its various organisations, supervisory and other powers. Secondly, it shows that the answer to the question of who has effective control over the conduct of the seconded officers is a non-exclusive one. One actor's control does not negate the control and the subsequent responsibility of another actor. It is rather the degree of effective control exercised by either actor and not absolute control that is of importance. Thus, both the host state (and at times the sending state) and Frontex can have effective control leading to dual (or multiple) attribution.

Indeed, the development of the agency's operational powers over the years gives ample reason to apply the organic model, and look into whether the agency can have effective control over the conduct of seconded officers so that it can be held directly liable for a violation. The opportunities for such direct liability increase, as the operational role of the agency, keeps growing with the development of its mandate. This is even more so as the agency moves into its next phase of operational effectiveness and greater autonomy from the member states, acquiring its own operational arm of border guards and return escorts with executive powers parallel to those of the national officers, who will be increasingly operating on the agencies own equipment, such as planes and vessels.[156]

155 Allocation of liability on the basis of normative control e.g. *Krohn Import-Export v Commission*.

156 M. Gkliati, 'The next phase of the European Border and Coast Guard: towards operational effectiveness', *Blog EU Law Analysis*, 2018, http://eulawanalysis.blogspot.com/2018/10/the-next-phase-of-european-border-and.html.

7.8 Non-binding opinions

Similarly, with the action for annulment,[157] a non-binding opinion of the agency (Article 288 TFEU) can potentially give rise to an action for damages. In the framework of the competence model, it has been argued that, according to the Court's case law, mere recommendations, or similar kind of non-binding opinions by an EU body are, as a rule, not able to render that body liable for damages, as the opinion has non-binding effects and the final decision rests with the member states.[158] Although this indeed seems to be the rule that the CJEU has set with respect to non-binding opinions, it is important to note that this line of case law concerns decisions made by the responsible authorities of the member states upon an opinion of the EC.

This distinguishes them from cases where the Commission follows the opinion of a specialised EU agency. In such cases, it is the level of specialisation and technical knowledge as opposed to the broad and non-specific bureaucratic nature of the Commission, that supports arguments as to the de facto binding nature of the opinion.

Moreover, in that line of case law the applicants have been unable to prove that the formally non-binding opinion had de facto binding consequences upon the final decision-makers, in a way that would constitute the authority issuing the opinion a de facto decision-maker and render them liable for the damages.

Such circumstances distinguish cases concerning Frontex opinions from the norm regarding non-binding opinions and create possibilities for the risk analysis, the exercise of the right to intervene, or the newly acquired power of the agency to draft the return decisions to give rise to the liability of the agency.

This line of argumentation is not a straightforward one, as the Court has shown its preference towards a formalistic interpretation of the law, focusing on de jure responsibilities, in other words, a formal obligation to abide by the opinion, rather than de facto powers.[159] Nevertheless, Madalina Busuic and Paul Craig make a convincing argument regarding the 'de facto operative decision maker',[160] while cases such as *Ardegodan* and *KYDEP* create space for such alternative interpretations.[161]

157 Section 6.3.2.

158 Fink 2017, pp.: 294-6.

159 *Krohn Import-Export v Commission*, par. 19-23.

160 Section 6.

161 KYDEP v Counicl and Commission; CJEU 13 December 1989, C-322/88, ECLI:EU:C:1989:646 (*Grimaldi v Fonds des maladies professionnelles*), paras. 7, 16 and 18; Joint cases CJEU 18 March 2010, C-317-320/08, ECLI:EU:C:2010:146 (*Alassini and Others v Telecom Italia SpA*), par. 40. Contrary to this, in Emerald Meats, the Commission's communication on tariff quotas was considered part of the internal cooperation with the national authorities on an equal level. *Emerald Meats Ltd v Commission*.

Therefore, it can be argued that an act issued by an authority that possesses specialised and technical knowledge can have de facto binding power upon the final decision maker in a way that it can no longer be considered a 'genuine recommendation'. In such cases, as the Court has found in *Belgium v. the Commission*, it can exceptionally be subjected to judicial review.[162]

Finally, the Meijers Committee issued in 2018 a legal brief on soft law instruments, such as opinions, recommendations and guidelines, which may not be binding as such, but have legal effects, as they require EU institutions and national authorities to take them into consideration.[163] The interpretation of such opinions or recommendations can in principle be subject to a preliminary ruling by the CJEU, but they are, as a general rule, excluded from the judicial review of the CJEU under Article 263 TFEU. According to the Meijers Committee, such instruments, especially when they implicate the fundamental rights of individuals, should exceptionally allow for judicial control.

In sum, we can consider as non-genuine recommendations formally non-binding acts, that can, however, have legal effects, as they require national authorities to take them into consideration. These acquire a de facto binding power, as they are issued by an authority with specialised and technical knowledge. This specialised authority can then be considered to be the 'de facto operative decision maker'.[164]

7.9 Positive obligations – breach by omission or failure to act

As an exception to the strict causality criteria, the Court has already found that liability can occur as a result of the breach of positive obligations. This area is the equivalent to the indirect or derivative responsibility met in international law.[165]

Frontex has positive obligations under human rights law, while central, in this respect, are the positive duties that have been set out in the EBCG Regulation, such as the obligation of the agency to supervise the state of fundamental rights during all its activities. Frontex has a number of fundamental rights specific supervisory obligations, which are fleshed out for instance in the vulnerability assessments conducted by the agency, the obligation upon guest officers to report without delay any serious incidents, and in forced-return monitoring.

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162 CJEU 20 February 2018, C-16/16P, ECLI:EU:C:2018:79 (*Belgium v Commission*), par. 29.

163 Meijers Committee, *1806 Note on the use of soft law instruments under EU law, in particular in the area of freedom, security and justice, and its impact on fundamental rights, democracy and the rule of law*, 2018, https://www.commissiemeijers.nl/sites/all/files/cm1806_note_on_soft_law_instruments.pdf.

164 Busuioc 2013, p. 193.

165 Chapter VI, section 3.6.

Supervisory obligations are the core of the agency's positive duties, but these are transcended by the duty of the Executive Director to suspend or terminate an operation upon serious and consistent violations. To this, the obligation of the agency to include human rights safeguards in the operational plan can be added, such as the provision of interpreters and medical personnel.

As a result, failure to abide by these positive obligations to protect human rights, can make the agency complicit in a violation that could have been prevented with the intervention of the agency. But more importantly, this monitoring obligation, ensures that the agency has 'presumed knowledge' of the situation on the ground, which could trigger its responsibility in case of inaction.[166]

Failure to abide by such positive duties can result in liability if the conduct of the primary actor results in a violation. The requirements of the action for damages, as these are analysed above, especially regarding the nature of the illegal act, apply regardless of the nature of the unlawful conduct as an act or failure to act.[167]

In this regard, particularly relevant in order to establish negligent conduct when the actor has positive obligations, is the criterion of knowledge.[168] Here it becomes part of the assessment of whether the violation was sufficiently serious, as lack of knowledge can excuse inaction.[169] This requirement should be interpreted as a combination of strict definitive knowledge test and willful ignorance, according to which it would suffice to prove that the actor was consciously turning a blind eye even though it had access to credible information. In other words, responsibility can be triggered by presumed knowledge under which the actor knew or should have known about the wrongful act.[170] Thus, protection shall be provided not against all threats, but against threats of which the actor had knowledge, or at least against 'predictable reliable threats'. The extensive monitoring role of the agency, including vulnerability assessments and the recording of serious incident reports, along with the extensive reporting of systemic violations by NGOs and news reports, can, in most cases, lead to the conclusion that Frontex fulfils the requirement of presumed knowledge.

166 Responsibility is triggered, as established by the International Court of Justice in the Corfu Channel case, by 'presumed knowledge'. This principle of 'presumed knowledge' that engages the international responsibility of the actor is reaffirmed in the jurisprudence of the ECtHR, in M.S.S. and in Hirsi. *Hirsi Jamaa and Others v. Italy; United Kingdom v Albania*; *M.S.S. v. Belgium v. Greece*, paras. 160, 314, 348-9.

167 For further analysis of the applications of the illegal act requirement upon positive obligations, see Beijer 2017; See also Fink 2017, p.p.: 328-336.

168 We have seen this as the determinate mental criterion, identified by Hart, for attributing Liability-Responsibility, and as the requirement of international law that protection shall be provided not against all threats, but against threats of which the actor had knowledge.

169 Section 7.3.

170 *United Kingdom v. Albania*; Chapter VI, section 3.

Still, in the context of the illegal act, it is important to note that Frontex has in most cases a certain level of discretion concerning the measures it can take to safeguard fundamental rights. Judging on a case-by-case basis, it will need to be assessed whether the agency has 'manifestly and gravely disregarded the limits on its discretion'.[171] Additionally, the strict causality requirements can still be met in relation to a breach of supervisory obligations and its consequent violation of fundamental rights law.[172] This will need to be examined on a case-by-case basis. Thus, failure to comply with each of the specific supervisory duties of the agency, or with its supervisory duties as a whole, along with its other positive obligations, can give rise to the liability of the agency, as long as the regular requirements of the action for damages, examined above, are met.

8 Action for damages for joint liability

The accountability of Frontex could still potentially be reached with what has been discussed so far regarding the different proceedings. However, the previous chapters have shown that there is an underlying problem, that of *many hands,* which can be resolved with a change of perspective from a linear understanding of responsibility to a nexus of responsibilities, and from individualist to *systemic accountability*.

One of the practical effects of these conceptual constructions is that all actors involved in a violation need to be held accountable and that no one is able to hide their responsibility behind the wall of complications created by the *problem of many hands*.

Another core effect is the desirability for the different actors involved in a violation to be held jointly responsible before a court, in a way that the individual can seek compensation not only from any of the responsible actors (Nexus theory, *joint and several responsibility*) but also from both (*systemic accountability*).

This change of perspective requires us to search for a more holistic solution before the CJEU. Therefore, this section aims to actualise these practical effects by developing the legal routes for Frontex and the host state to be held jointly liable, against the background of the above principles.

8.1 Towards a fundamental common law on joint liability

The application of joint responsibility in the practice of the CJEU is rather challenging. The limited case law produced by the CJEU on the joint liability of the Union and its member states is barely adequate to give an impression of how the issue would be covered in a case concerning breaches

171 Section 7.3.
172 Section 7.

for fundamental rights in EBCG operations, where the responsibility can be attributed to both the agency and the host member state. In fact, bringing an action against both actors stumbles upon several procedural hurdles. An observer has even gone as far as suggesting that there is no place in EU law for concurrent or joint liability.[173] However, other commentators see space for joint liability in the Court's case law, filled with procedural difficulties regarding its implementation.[174]

The strongest jurisprudential evidence of the joint liability of the EU and its member states is to be found in *Kampffmeyer*, which is analysed below. The lack of solid case law leaves a gap that could be filled by resorting to the ARIO, in particular the provisions on joint responsibility. As argued extensively in Chapter VI the CJEU may draw inspiration from arguments taken from international law, where the matter has not been otherwise regulated within EU law.

An additional argument concerning the examination of a claim for damages, in particular, is to be found in Article 340 TFEU, which explicitly states that the Court should resort to the general principles common to the member states to draw inspiration and legitimacy for the rules governing the non-contractual liability of the Union.[175] The Lisbon Treaty and consequently, the CJEU take a comparative law approach in developing the criteria that apply to an action for damages. These 'general common principles' can be extracted from the national laws, but can also be shared fundamental characteristics, inferred from international law, such as the rules of responsibility enshrined in the ARIO.

The purpose of the drafters of the Treaties was to 'establish a fundamental common law',[176] and complement the EU legal order with principles derived from a modern ius gentium, constituting ius commune amongst its member states. This common law already exists as general principles common to the member states at the international level, and given the absence of a concrete rule at the EU level and the explicit intention of Article 340 TFEU to act in accordance with the general principles common to the laws of the member states, it should be expected from the CJEU, given the opportunity, to draw strong inspiration from the ARIO.

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173 A. W. H. Meij, 'Article 215(2) EC and Local Remedies' in T. Heukels and A. McDonnell (eds.), *The Action for Damages in Community Law*, The Hague, London and Boston: Kluwer Law International 1997, p.p.: 282-284.

174 P. Oliver, 'Joint liability of the Community and the Member States' in T. Heukels and A. McDonnell (eds.), *The Action for Damages in Community Law*, The Hague, London and Boston: Kluwer Law International 1997, p. 308; W. Wils, 'Concurrent liability of the Community and a Member State', *European Law Review*, 1992, p. 206.

175 See Fines 1997; The criteria followed by the CJEU draw significantly from State liability from breaches of Union law: *Brasserie du pêcheur and Factortame and Others v Germany and United Kingdom*; Opinion AG Maduro, CJEU 9 September 2008, Joined Cases C-120/06 P and C-121/06 P, ECLI:EU:C:2008:476 (FIAMM and others v Council and Commission), par. 55.

176 Fines 1997, p. 13.

Realistically speaking, however, the CJEU has proven quite hesitant to open up to international law. Perhaps the strongest reminder of this reality is Opinion 2/13 concerning the accession of the EU to the ECHR.[177] Moreover, the principle of Article 340 TFEU to follow the 'general principles common to law of the Member States', has not traditionally been abided by in the practice of the Court. A historical comparative law examination shows that the domestic principles 'have made no great contribution to the elaboration of the non-contractual liability of the European Community'.[178] Undoubtedly, elements of national legal mechanisms can be found in the Court's case law, but these are rather rare and cherry-picked,[179] forming a new stricter liability framework for the EU, compared to the national legal orders.

Nevertheless, joint liability is not foreign to the case law of the CJEU. Article 340 TFEU along with the composite legal order arguments can serve as motivations for the Court to receive inspiration from international law, in particular the ARIO.[180] The purpose would be twofold. This would allow the CJEU to firstly, introduce joint liability into its common practice, and develop its mechanisms within EU law, and secondly, to study through international law the intricacies of its application and get inspiration regarding its own interpretation of joint liability.

This proposal does not concern applying international law as such in the EU context, but allowing the Court to be influenced by it regarding the interpretation of a certain principle already existing in EU law, that is in need of further development. The control and ultimate decision-making power remain with the CJEU, while this line of interpretation is in accordance with the Court's own guidelines on developing a fundamental common law on liability.

8.2 The binaries of causality and the competent court

Procedural difficulties constitute considerable hindrances in applying the substantive law on joint liability. These concern the rules on attribution of liability, as discussed above with respect to the causal link, and the distribution of jurisdictional competencies among the courts. Specifically, the causation criterion creates, in most cases a binary distinction in the attribution of responsibility, where either the member state or the agency can be found to have caused the damage.[181]

177 Chapter IX, section 2.2.
178 Fines 1997, p. 32.
179 'We could note the example of a "sufficiently flagrant violation of a superior rule of law or the protection of individulas", a notion which was forged, in part, borrowing from various domestic orders, but it cannot be found in such a form in any one national system.', Fines 1997, p. 32.
180 Chapter IV, section 2.2.
181 Sections 7.5. and 7.9. for ways to circumvent the causality binary.

Such a binary distinction is also found with respect to the jurisdiction between national and EU courts. On the one hand, Article 340 TFEU is applicable 'only to the Community's liability for any damage caused by its institutions or by its servants'.[182] Furthermore, the CJEU has exclusive competence for claims of damages against the EU.[183] On the other hand, state liability for breaches of EU law is covered under 'Francovich liability'. According to the Francovich principle of state liability, in case of breach of EU law attributable to a member state, which causes damage to an individual, the member state incurs liability under EU law and compensation may be claimed before national courts. [184] These rules can only be interpreted as dividing jurisdiction in a way that actions for damages attributed to the Union are dealt with by the CJEU, and those attributed to member states are dealt with by domestic courts.[185] What is more, in cases concerning the implementation of EU law, where the lawfulness of the conduct of both member states and the EU can be contested, a legal remedy should first be sought before the domestic courts.[186]

Applying the above findings, in a case concerning the joint responsibility of Frontex and a host member state, the CJEU will apply the causality test to determine the perpetrator of the wrongful act that caused the damage. If the member state was following the binding instructions of the agency, the wrongful act will be attributed to the agency, and the case will be dealt with by the CJEU.[187] If it is found that the member state had adequate discretion over the implementation of the instructions, it will incur the liability, excluding the liability of the agency, and the applicants should bring the case before national courts.

In a case concerning the responsibility of both Frontex and a member state, two actions will need to be brought, one at the national level concerning a claim for damages against the member state, and one before the CJEU against Frontex. Moreover, the case before the CJEU may be

182 CJEU 13 February 1979, C-101/78, ECLI:EU:C:1979:38 (*Granaria v Hoofdproduktschap voor Akkerbouwprodukten*), paras. : 623-638.

183 CJEU 27 September 1988, C-106-120/87, ECLI:EU:C:1988:457 (*Asteris and Others v Greece and EEC*), par. 5538.

184 CJEU 19 November 1991, C-6 and 9/90, ECLI:EU:C:1991:428 (*Francovich and Others v Italy)*; The conditions of state liability are clarified in *Brasserie du pêcheur and Factortame and Others v Germany and United Kingdom*. Today, these correspond to the ones for EU liability as detailed above in section 7.

185 *Granaria v Hoofdproduktschap voor Akkerbouwprodukten*, par. 14.

186 CJEU 15 December 1977, C-126/76, ECLI:EU:C:1977:211 (*Dietz v Commission*).

187 In *Asteris* the Court dismissed an action for damages against the Communities, ruling that the national authorities had no liability because they simply implemented Community regulation. The Community did not incur any liability either, as it ruled that 'the technical error' that resulted in the violation was not a serious breach of a superior rule of law. When the applicants went subsequently before Greek courts to seek compensation against the national authorities, the Court of Justice held that national remedies could not be used, because it had already ruled that Greece was not liable. *Asteris v Commission*.

dismissed on the grounds that the local remedies need to be exhausted before compensation is sought by the Union body before the CJEU.[188]

The issue of the exhaustion of the local remedies could be resolved by arguing the lack of available remedies at the domestic level regarding the liability of the EU, as the CJEU has exclusive jurisdiction. The case law of the Court in *Unifrex*, however, a case concerning a French export company that brought an action for damages against the Commission and the Council for freezing compensation amounts, points in a different direction. There, the Court held that in a case concerning the implementation of an EU measure by the national authorities, the applicant needs to contest the implementation measure before national courts, before resorting to an action for damages against the EU. The availability of domestic remedies depends on whether these are able to ensure effective legal protection and result in compensation for damages.[189]

Thus, if the exhaustion of domestic remedies is interpreted as bringing an action for damages before national courts regarding the host state's responsibility, there would only be room for an action for damages against Frontex before the CJEU if the domestic courts do not award the victim full compensation. This type of case law makes effective legal protection the sole purpose of the justice system, prioritising individualist over *systemic accountability*. The alternative interpretation, proposed here that finds domestic remedies unavailable focuses on the responsibility element of liability. It asks the question of whether there is a domestic remedy available to address the responsibility of the actors and provide compensation (*systemic accountability*). The interpretation given in *Unifrex,* however, that would require the exhaustion of remedies regarding the national implementing measure focuses on the damage. The question it asks is whether there is a domestic remedy that can make good the alleged damage. Its mere aim is to provide compensation to the victim of a violation, rather than to hold to account all actors responsible for it (individualist accountability). Following such case law, a case of Union liability for the misconduct of Frontex may never see the light, and a gap would be left with respect to the accountability of Frontex.

The Court in its case law has brought the two actions for damages for state and Union liability closer, applying a common test, as the Court clarified in *Brasserie*[190] and *Bergaderm*.[191] Specifically, the same criteria that apply with respect to an action for damages against the state, as specified in *Francovich*,[192] should also govern the Union's liability. Nevertheless, while the liability test for the liability of member states and the EU are

188 Fink 2017, p.p.: 305-308. CJEU 12 April 1984, C-281/82, ECLI:EU:C:1984:165 (*Unifrex v Commission and Council*).
189 *Unifrex v Commission and Council*, par. 11.
190 *Brasserie du pêcheur and Factortame and Others v Germany and United Kingdom*, par. 42.
191 *Bergaderm and Goupil v Commission*.
192 *Francovich and Others v Italy*.

converging,[193] the remedies still remain separate, and two different proceedings need to be instituted before different judicial fora with respect to either liability. Moreover, there is also the possibility that a case before the CJEU, regarding, for instance, the responsibility of Frontex for aiding and assisting in a push back, or not preventing inhumane treatment taking place during return operations, will be dismissed on account of the liability proceedings against the host state before national courts. This solution does not adequately support joint responsibility and ensure *systemic accountability*, where all actors responsible for a violation are answerable. The following sections focus on finding a solution that does.

8.3 EU joint liability against the background of the nexus and systemic accountability

This section takes a closer look at the application of joint liability in EU law in an example of an EBCG operation against the background of the desirability of the Nexus theory and of *systemic accountability*.

Serious incidents of abuse were recorded by observers of the Committee Against Torture of the Council of Europe (CPT) in the Frontex coordinated return flight from Germany to Afghanistan on 14 August 2018. The CPT observers found the use of force and means of restraint applied by the German Federal Police to two returnees who attempted to forcefully resist removal, to be excessive and inappropriate, and constituting ill-treatment.[194] On the basis of this incident, press reports have called for the accountability of Frontex for failing to properly fulfil its monitoring obligations and prevent such ill-treatment during its return operation.[195] The CPT also noted that 'the current arrangements cannot be considered as an independent external monitoring mechanism'.[196]

If this case were to be brought before the CJEU seeking the liability of both the agency and Germany, in accordance with what was discussed above regarding joint liability in EU law, the Court would dismiss the claim for the part that concerns Germany.[197] It would only accept to hear both claims in case there are no effective remedies at the national level, or

193 This does not reach full harmonisation, as less strict conditions for establishing Member State liability may be applicable under national law. *Brasserie du pêcheur and Factortame and Others v Germany and United Kingdom*, par. 66. Other differences between the two and partial divergence have been observed by several commentators. For an overview, see K. Gutman, 'The evolution of the action for damages against the European Union and its place in the system of judicial protection', *Common Market Law Review,* 48, 3, 2011, p.p.: 709, 710.

194 CPT 2018, sections 50-56.

195 Nielsen and Fotiadis 2019.

196 CPT 2018, section 60.

197 The CJEU could, of course, deal with the issue in separate proceedings if the domestic court would refer a preliminary question to it regarding the liability of Frontex or the member state.

these have been exhausted ineffectively.[198] In order to do this, following the duality of causality and jurisdiction and its own rule regarding the exhaustion of domestic remedies, the CJEU would reject the case as inadmissible referring to the national court to decide on the responsibility of the member state, as non-exhaustion of domestic remedies, is a reason for inadmissibility of a damages claim. Thus, the national procedures need to finish first, for the action for damages against Frontex before the CJEU to be admissible. As shown above, unless the domestic courts have not ordered full compensation for the damage, counter to *systemic accountability*, the responsibility of Frontex will not be examined, and a gap will be left in accountability.

If we are to aim at *systemic accountability*, the CJEU would not render the claim against Frontex inadmissible, but merely pause the proceedings concerning Frontex waiting for the outcome of the national courts on the responsibility of the member state, in order to take it into account when adjudicating for the liability of Frontex.[199] This could also take the form of the CJEU ruling on the responsibility of the Frontex, but reserving its final ruling on the amount of the compensation owed by the agency.[200]

This is the solution followed by the Court of Justice in *Kampffmeyer I*. The case concerned a safeguard measure enacted by the German government and confirmed by the Commission on the basis of which the applicants were wrongfully refused a levy-free import license. There the Court held:

> *'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. This being the case, final judgment cannot be given before the applicants have produced the decision of the national court on this matter (…)'*[201]

At this stage, the national court may request a preliminary ruling, which can only be on a matter of law, and not on whether the agency is liable as such, as the CJEU cannot in a preliminary reference ruling adjudicate on matters of fact.[202]

Evaluating this solution provided by the CJEU against the standards of joint responsibility and *systemic accountability*, we note that the CJEU bases its ruling on the implicit assumption that the national authorities are primarily liable, with the Community only incurring subsidiary liability.[203]

198 Section 8.2.

199 This is always under the condition that effective legal remedies are available at the national level. *Roquette v Commission*; CJEU 11 June 1987, C-81/86, ECLI:EU:C:1987:277 (*De Boer Buizen BV v Commission*); *Unifrex v Commission and Council*.

200 Toth 1997, p.p.: 185-186.

201 *Kampffmeyer and Others v Commission*, p. 266.

202 *Granaria v Hoofdproduktschap voor Akkerbouwprodukten*, p. 638.

203 Oliver 1997, p. 288, footnote 11.

This assumption has been criticised by Paul Craig, who noted that even though in this case the primary liability should lie with Germany, there is, however, 'no reason (…) why the EU's liability should be seen as secondary to that of the Member State'.[204]

In *Kampffmeyer I* the Court, in practice, rejected the possibility for the EU and a member state to be jointly liable for the damage and stated that the Community would be liable to the extent that the damage was not covered through the national courts.[205] This resembles but does not fully reflect the construction of *joint and several responsibility*, according to which the injured party would bring an action for damages against each of the responsible parties, i.e. the member state and Frontex, and hold them to account, for the wrongful act as a whole, rather than for the part of the act that is attributable to it. If the damage is not covered to its full extent by the member state, the applicant may subsequently turn against the agency in a second claim for damages, this time before the CJEU, in a way that safeguards from double recovery. If, on the contrary, domestic courts order the member state to compensate the full damage, it may seek to recover a share of the damages paid, from the agency, by making use of its right of recourse before the CJEU as a privileged applicant (Article 263 TFEU). In particular, the member state may seek 'contribution', i.e. partial reimbursement or an 'indemnity', full reimbursement for an act fully attributable to the agency. This is a theoretically plausible but realistically improbable scenario given the current structures in irregular migration law and policy in Europe.

In any case, while a solution of *joint and several responsibility*, according to which reparation comes *from any* of the responsible actors, is in line with the Nexus theory, and its expression as joint and several responsibility, the model of *systemic accountability* demands that reparation comes *from both*.[206] Still, the solution offered by the CJEU does not fully reflect the notion of *joint and several responsibility,* as the reparation cannot be sought from any of the actors but only from the member state, and to the extent not covered, only then turn to the EU. As such, it is only partially in line with the Nexus theory.

Since *Kampffmeyer,* the Court tends to reject claims for damages against the EU, when the possibility exists to join the case against the member state and the case against the EU in the way described above, in order for compensation to be sought against the member states before the national courts.[207] In the example of the joint liability of Germany and Frontex for abuses during return operations, Germany, if found responsible, would be liable to cover the full amount of damages. Germany could then claim part

204 Craig 2018, p. 755.
205 *Kampffmeyer and Others v Commission*.
206 Chapter V.
207 Oliver 1997, p. 291; e.g. *Brasserie du pêcheur and Factortame and Others v Germany and United Kingdom*; *Francovich and Others v Italy*; A.G. Slynn in CJEU 6 December 1984, C-59/83, ECLI:EU:C:1984:380 (*SA Biovilac NV v EEC*), par. 4085.

of the compensation paid from Frontex, as part of joint and several liability, something that, as discussed, would be improbable in practice. Only to the extent that this would not be covered fully in the domestic courts, would the victim be able to start liability proceedings against Frontex before the CJEU.

This possible sequence of events would be incompatible with the model of *systemic accountability* and the principles of justice and the rule of law that accompany it, as, even though it provides for the compensation of the victim (*individualist accountability*) it practically renders the EU, in this case, Frontex, unaccountable for the damage caused and does not allow for the investigation of its responsibility (*systemic accountability*).

Moreover, the solution of staying the proceedings before the CJEU can present practical difficulties, such as in *Kampffmeyer*, where the German courts followed the example of the CJEU and ordered a stay of proceedings waiting for a ruling at the EU level. The applicants found themselves engaged in long and complicated legal battles that lasted two decades.[208]

Moreover, even though the applicants may return to the CJEU to seek any residual compensation not awarded in the domestic courts, given all the difficulties regarding the action for damages against the EU, it would be more straightforward for the Afghan returnees to make an application against Germany before the ECtHR, in the example studied in this section, rather than seeking compensation from Frontex before the CJEU. This speculation is in line with the practice so far, which shows that none of the applicants involved in the construction the Court set up in *Kampffmeyer* has returned to the CJEU after completing the domestic proceedings allowing the Court to examine the liability of the EU.[209] Therefore, due to this 'procedural peculiarity', even though the CJEU has dealt with them, it 'has never solved issues of shared responsibility and shared and allocated specific shares of responsibility to the EU and the member states'.[210]

The procedural and practical obstacles to the joint liability of the EU and the member states, caused by the CJEU ruling a stay of proceedings, make this structure incompatible with *systemic accountability*. In seeking an alternative structure that allows for all actors responsible for a violation to be held to account, we draw the conclusion that a structure, compatible with *systemic accountability*, is one that brings the respective actions before a single court that is to adjudicate the responsibility of all actors involved, the member state and the EU/Frontex. The following section suggests a path to such a structure.

208 Oliver 1997, p. 288.

209 P. T. Stegmann, *Responsibility of the EU and the Member States under the EU International Investment Protection Agreements, Between Traditional Rules, Proceduralisation and Federalisation*, Berlin: Springer 2018, p. 297.

210 Stegmann 2018, p. 297.

8.4 A new route for joint liability through the principle of subsidiarity

In order to avoid the dead-end of parallel proceedings or of the case on Frontex liability never getting its day in court, we can look for a solution in the jurisdiction of the CJEU under the principle of subsidiarity (Article 5(3) TEU), which would normally be triggered with the exhaustion of domestic remedies.[211] A teleological and contextual interpretation of Article 5(3) TEU, however, would justify the jurisdiction of the CJEU to adjudicate on the issue of shared responsibility further than it has in *Kampffmeyer* and ensure that the responsibility of the EU is examined.

Article 5(3) TEU states that in areas that the EU does not have exclusive competence, it shall, under the principle of subsidiarity, act only if and to the extent that the objectives of the act cannot be sufficiently achieved by the member states, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

Following the model of *systemic accountability*, it can be argued that the objectives of justice and the rule of law, in this case, are not fully covered by *individualist accountability*, in the sense of effective legal protection and of remedying the situation for the particular individual. Systemic problems need to be dealt with in a structural manner, holding all actors responsible to account in an effort to prevent similar violations in the future (*systemic accountability*).

If we interpret the 'objectives' of legal action mentioned in Article 5(3) TEU to be those of *systemic accountability*, which can only be achieved if the possibility exists for addressing the joint responsibility of the different actors, we find that these objectives can indeed not be sufficiently achieved by the domestic courts, as there is no available remedy that can ensure the accountability of Frontex. Following this interpretation, as the CJEU decides whether there are effective remedies at the national level, it can find that the objectives *of systemic accountability* are only achievable if the two cases are dealt with together, under its own jurisdiction in line with the principle of subsidiarity.

Admittedly, the subsidiarity clause cannot create new powers, while the creation of new remedies where none is provided is not allowed in general.[212] It only has regulatory nature. It regulates the exercise of competencies that have already been attributed to the EU and its organs. Namely, the CJEU within the exercise of its powers can have jurisdiction under the principle of subsidiarity, where 'the objectives can (…) be better achieved at Union level'.

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211 Article 5(3) TEU: 'Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member states, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.'

212 V. Moreno-Lax, *Accessing Asylum in Europe, Extraterritorial Border Controls and Refugee Rights under EU Law*, Oxford: Oxford University Press 2017, p. 431.

The proposition that the CJEU takes a more active role in cases regarding the alleged liability of Frontex is in line with that principle. The CJEU may be responsible as the ultimate arbiter, as all actors, including the host state, operate within the scope of EU law whenever they participate in a joint operation. Therefore, the provisions of the Charter apply (Article 51(1) Charter), for the interpretation of which it is the CJEU that should have the ultimate say, including deciding on division of powers and attribution of responsibility. This is also what the Court itself has unreservedly demonstrated in Opinion 2/13.[213] This solution gives it the opportunity to do so.

In order to implement this solution, there is no need to create a new remedy or to overturn *Kampffmeyer* completely. The Court could instead apply a subsidiarity test on how far it adjudicates issues of *many hands*. Based on the above argumentation, the CJEU can go further within its jurisdiction and examine the claim further. Instead of pausing the proceedings pending the decision of the national court, it can proceed to determine whether the conduct in question of the EU was, in principle, capable of giving rise to EU liability, as the General Court did in *Holcim*.[214] Following this precedent, the Court could give a provisional judgment on the responsibility of Frontex, while the domestic courts will be determining the liability of the member stage and the size of the damage. If the domestic court rules that the national authorities are liable, the cases can be joined before the CJEU for the purpose of the determination of joint liability and the exact allocation of the shares of responsibility of each actor and the corresponding compensation.

The available remedies and related procedures in EU law are not rigid. They are meant to, first and foremost, serve judicial protection, while there are plentiful examples in EU law of the adaptation of national procedural rules to serve the effective application of EU rights.[215] In adopting the role of 'jurisdictional court', however, cases of positive conflicts are imaginable, where both the national court, on the basis of *Francovich* and the CJEU on the basis of Article 5(3) would claim jurisdiction over the claim for damages against the member state.[216] The CJEU assuming jurisdiction can be seen as a 'high jacking' that goes against the principle of national procedural autonomy.[217] Nevertheless, there have been cases in the past where national courts had to give up their competence in favour of that of the CJEU, as the Court has adopted an approach that allows for the subordination of national procedural autonomy to the effectiveness of EU law rights.[218]

213 Chapter IX, section 2.2.
214 *Holcim v Commission*, paras. 79, 80.
215 Moreno-Lax 2017, p. 433.
216 Fines 1997, p. 21.
217 CJEU 16 December 1960, C-6/60-IMM, ECLI:EU:C:1960:48 (*Humblet v Belgium*), par. 559.
218 Moreno-Lax 2017, p. 431.

In sum, it can be argued that, under the current judicial status quo, domestic remedies do not fulfil the requirements of available remedy in terms of *systemic accountability* when it comes to the joint liability of a member state and an EU institution. Therefore Article 5(3) TEU can justify jurisdiction for the CJEU over the national case so that the two liabilities can be dealt with together within a framework of *systemic accountability*. That can be achieved if the CJEU, in line with the principle of subsidiarity, would adjudicate EU liability and issue a judgment on responsibility, without prejudging the outcome of the case in a national court as to the responsibility of the member state. This solution is in accordance with *systemic accountability*, as it ensures that the EU, in this case, Frontex, will be held accountable. Still, its effect on speeding up the proceedings is limited.

In order to truly avoid the risk of decades-long delays, such as in the case of *Kamffmeyer,* we need harmonised law regulating the matter at EU level. This would give primary jurisdiction to the CJEU for joint liability in situations of *many hands*. Such legislative change would require an amendment in the Treaties regulating the EU joint liability framework in general. As this is highly unlikely, an interpretation in accordance with the subsidiarity principle is the more plausible solution at the moment.

This solution provides for the holistic treatment that is required by the Nexus theory and the model of *systemic accountability*. This treatment cannot be given if the cases are split. The *problem of many hand*s should be practically solved by the court that has the most holistic jurisdiction.

8.5 Action for damages summarised

What seems to be the most appropriate litigation route is, in fact, the action for damages of Article 340 TFEU, where the individual who has suffered loss as a result of the acts of the agency, may demand reparation. There are several difficulties, however, that are inherent in this remedy. Experts have claimed that there is a limited degree of protection and a worsening of the treatment of individuals with respect to the action for damages and that the strict requirements account for a relatively large number of inadmissible applications. Indeed, its requirements, for instance, sufficiently flagrant violation, causal link, set a high threshold for the claims for damages. The applicants face an uphill battle with respect to overcoming them.

Firstly, the burden of proof for proving the damage incurred lies with the applicant. The institution responsible is required to assist the applicant in accessing information and documentation that is in its possession. The disproportionately high standard of proof can prove to be an obstacle for the applicant. The case discussed above regarding a Frontex return operation from Germany to Afghanistan is exceptional, as the incidents were reported by the CPT. However, independent observers are only exceptionally on board of return flights, while the Frontex monitoring mechanism is considered ineffective and lacking independence.

Secondly, the causal link between the wrongful act and the damage

needs to be direct, immediate and exclusive. In other words, liability cannot be established for the EU, if the same result could have occurred in the same way even in the absence of the conduct of the institution or agency. Moreover, the Union's conduct needs to be the sole act which caused the damage, since the latter needs to be the direct and immediate consequence of that act. The act itself exclusively, without the intervention of a third party needs to have caused the damage sustained by the injured parties. In this sense, the direct causal link may prove too strict of a requirement with respect to Frontex, since its actions usually require a national implementation measure to be completed. The mere involvement of the member state can be sufficient under the Court's case law to break the chain of causation and prevent the liability of the agency from arising. However, it always needs to be examined on a case-by-case basis whether the intervening act was indeed capable of breaking the chain of causation.

For instance, the Court held in *Krohn* that when the Member State has not been acting independently but simply carrying out the binding instructions of the Union, the causal link remains intact and the Court is able to adjudicate on the liability of the Union. This can also be the case regarding formally non-binding opinions with de facto binding consequences, in a way that constitutes the issuing authority of the opinion, i.e. Frontex, a de facto decision-maker. Hence, if it can be shown that the host state was implementing decisions taken at the agency level and that it had not adequate discretion in carrying out the orders of the agency, then the illegal act of the state does not constitute the cause of the damage and is not capable of interrupting the causal link between the act of the agency and the damage. In this case, the state can still be held liable via different constructions under national law, the Charter, or the ECHR.

Furthermore, the Court makes it theoretically possible in *Kampffmeyer I* for the liability to be attributed to both the member state and the agency, opening the door to joint responsibility. Nevertheless, the procedural and practical difficulties in its implementation warrant the current judicial construction for joint liability ineffective, regarding the responsibility of Frontex and incompatible with a model of *systemic accountability*, where all actors responsible for a violation are held to account. A new construction based on the jurisdiction of the CJEU under the principle of subsidiarity is proposed in this section that can allow for all actors responsible to be held jointly to account before the same forum when the *problem of many hands* appears.

9 Conclusions

This chapter seeks to sketch potential litigation avenues before the CJEU, assess the limitations of these avenues, and pan out procedural hurdles and possible solutions to them. It presents applications of *systemic accountability* and offers recommendations for further development in this direction.

This examination has shown that the reach of legal accountability under the current legal framework is rather short. The Lisbon Treaty may have liberalised the regime with respect to the Court's jurisdiction and the requirements for individual access, but it is still excessively difficult for non-privileged applicants to obtain effective legal remedies in case their rights have been violated through direct access to the Court. Thus, the first and most important obstacle that the victim has to overcome is accessing the court in the first place.

All routes before the CJEU come with considerable obstacles, which make litigation attempts challenging and ambitious. This is partly due to structural problems, such as the strict procedural requirements for direct actions, and partly due to the particular nature of the agency's work, for instance regarding the reviewable acts of the agency. Another important reason is that the current predominant conceptualisation of the system does not take into account the *problem of many hand*s. Nevertheless, the jurisprudence of the CJEU is still developing, and there is room for legal interpretations and judicial constructions that support joint responsibility and are adequate to ensure *systemic accountability*.

This chapter suggests that the CJEU can take the opportunity to cover its gaps in dealing with joint liability by learning and drawing inspiration from international law on the responsibility of international organisations. Such inspiration can be drawn in regard to responsibility for conduct ultra vires, the limits of the competence model, or the adoption of more relaxed application of the causality test, and other issues regarding the facilitation of joint responsibility. This is especially so in the action for damages, for which Article 340 TFEU prompts the Court to draw inspiration from the general principles common to the member states, thus developing a fundamental common law on liability, which should undoubtedly include the ARIO. In this respect, it has been shown that joint liability is not as such foreign to EU law (*Kampffmeyer*) and that the CJEU can still use the experience of international law in order to fine-tune its application and introduce it into its common practice.

The Kampffmeyer construction, however, though opening the door to joint liability, has proven to be ineffective in practice in holding the EU, in this case, Frontex accountable, and thus realising the objectives of *systemic accountability*. In particular, if a case were to be brought against a host member state and Frontex, the judicial precedent indicates that the CJEU would rule a stay of proceedings until the national court issues its ruling regarding the responsibility of the member state. The national court would need to determine the sum to be paid by the state and if the damage is not compensated (fully) only then will the CJEU allow for a review of the liability of the agency. Given that it would be simpler for the individual to resort to the ECtHR with an application against the member state, the outcome in practice would be that the agency will not be held to account. This outcome falls short of the requirements of joint responsibility and *systemic accountability*.

These objectives can, eventually, be fulfilled if the liability of both the member state and the Union/agency is determined by a single court. That can be achieved if the CJEU, in line with the principle of subsidiarity (Article 5(3) TEU), would adjudicate EU liability and issue a judgment on responsibility, without prejudging the outcome of the case in a national court as to the responsibility of the member state. Following that, it would further decide on the shares of damages owed by each actor.

Even though without a legislative change that would regulate the matter of joint liability at EU level and would give primary jurisdiction to the CJEU, its foundations could be precarious, the path to joint liability can still be created through the jurisdiction of the CJEU under the principle of subsidiarity. Then, the victim could seek compensation from both actors, the host state and Frontex, deemed responsible for the violation. Even if it is obstructed by strict admissibility requirements, and binary rules of causality and court jurisdiction, this path can still be utilised for strategic litigation purposes that aim at the accountability of Frontex.