Effective Judicial Protection in the External Dimension of the EU's Migration and Asylum Policies?

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The Informalisation of the EU's External Action in the Field of Migration and Asylum

Eva Kassoti
Narin Idriz *Editors*

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Effective Judicial Protection in the External Dimension of the EU's Migration and Asylum Policies?

Melanie Fink and Narin Idriz

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Abstract This contribution examines the impact of two trends in the external dimension of the EU's migration and asylum policies on the judicial protection of individuals: informalisation on the one hand and operationalisation on the other. The first is exemplified by the EU-Turkey Statement, known as the EU-Turkey deal, and the second by the operational cooperation the EU agency Frontex carries out in joint operations with and on the territory of third states. While the legal nature of the practices under scrutiny is quite different, their examination demonstrates that both trends pose significant challenges to individuals whose rights have been violated to have access to EU courts in search of a remedy. The underlying reason for these challenges is the fact that the system of remedies set up by the Treaties has not been revised to correspond to EU's ever-expanding toolbox of instruments and activities,

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which by now go beyond those enshrined in the Treaties. The result is that this gap in judicial protection leaves a particularly vulnerable group of people, namely irregular migrants, exposed to human rights violations.

Keywords informalisation · operationalisation · judicial protection · EU-Turkey Statement · operational cooperation · Frontex joint operations

7.1 Introduction

This contribution examines the impact of two trends in the external dimension of the EU's migration and asylum policies on the judicial protection of individuals: informalisation on the one hand and operationalisation of cooperation through 'on the ground' assistance on the other. Informal instruments employed in cooperation with third countries to stem migration flows have long been on the rise and are notorious for making the judicial enforcement of the rights of irregular migrants and asylum seekers almost impossible. However, increasingly the external dimension of the EU's migration and asylum policies is also shaped by executive action of an operational nature which similarly limits the possibilities for individuals to claim their rights, even though such action is often based on formal legal instruments.

This contribution looks at two such examples of cooperation with third countries. The informal instrument to be examined is the EU-Turkey Statement, known as the EU-Turkey deal (Sect. 7.2).[1] As an example for operational cooperation we look at the EU agency Frontex and its competence to carry out joint operations together with and on the territory of third states (Sect. 7.3).[2] Both forms of cooperation are the first of their kind. This contribution maps the possibilities of individuals whose human rights have been violated to access EU courts in order to challenge the respective instruments or practices. Rather than providing an exhaustive overview of all complaints mechanisms available, this contribution focuses on judicial protection before the Court of Justice of the EU (CJEU) more specifically. The aim is to highlight the main obstacles individuals will face, leaving an in-depth analysis of each of these obstacles for future research.

This contribution concludes that while the legal nature of the practices under scrutiny is quite different, both trends—informalisation and operationalisation—pose significant challenges to individuals whose rights have been violated to have access to EU courts in search of a remedy. Ultimately their common origin lies in the design of the EU's remedies system that primarily caters for an EU that acts formally through law. However, the EU has over time expanded its 'toolbox' to include instruments and activities of an informal or operational nature, a development that has not been reflected in the mechanisms for judicial protection.

[1] Council of the European Union 2016.

[2] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [in the following 'EBCG Regulation'], OJ L295/1, Article 74.

7.2 The EU-Turkey Deal

The EU-Turkey Statement, also known as the 'EU-Turkey deal', was the first informal arrangement of cooperation between the EU and a third country during the so-called 'migration crisis' of 2015. There is no need to recite the process that led to the adoption of the deal or the role played by Union institutions, by the Commission and the (European) Council in particular, as those have been documented in detail elsewhere.[3] What is important for our purposes is to briefly examine the measures taken for the implementation of the deal (Sect. 7.2.1), and identify the obstacles that make it almost impossible for individuals to have access to EU courts to challenge the EU-Turkey Statement under the existing legal avenues provided under EU law (Sect. 7.2.2).

To recall once again, the gist of the deal was Turkey's agreement to accept the return of "all irregular migrants crossing from Turkey into Greek islands as from 20 March 2016".[4] These returns were to take place in compliance with international law and the principle of *non-refoulement*. This was envisaged as "a temporary and extraordinary measure which is necessary to end the human suffering and restore public order".[5] All migrants arriving to the islands were to be registered and all asylum applications were to be processed individually in line with the EU's Asylum Procedures Directive (APD).[6] Those migrants whose applications were considered to be unfounded or inadmissible under the APD and those who had not applied for asylum were to be returned to Turkey. For every Syrian returned to Turkey one Syrian from Turkey would be resettled to the EU.[7] In addition, Turkey was to prevent the opening of new illegal migration routes to Europe.[8] In return, it was promised an additional 3 billion euros for the Refugee Facility for Turkey, visa liberalization for its citizens, the upgrading of its Customs Union with the EU as well as the acceleration of its stymied accession process.[9]

What enabled the speedy implementation of the deal was the existence of a Readmission Protocol between Greece and Turkey, which was barely used since its entry into force in 2002.[10] This Protocol turned out to be crucial both in the period between

[3] Both in academic writing and the media. See Smeets and Beach 2020; Gürkan and Coman 2021; Gatti and Ott 2018, pp. 180–182 and 195–197; Idriz 2018, pp. 65–67; Pop V (2015) EU's Timmermans Talks About Expectations of Turkey-EU Pact. https://www.wsj.com/articles/BL-RTBB-5249. Accessed 24 June 2021.

[4] See point 1 in Council of the European Union 2016.

[5] Ibid.

[6] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [In the following 'ADP'], OJ L180/60.

[7] See point 2 in Council of the European Union 2016.

[8] Ibid., point 3.

[9] Ibid., points 5–8.

[10] The Greek-Turkish Readmission Protocol, signed in Athens on 8 November 2001, and ratified by the N 3030/2002, Government Gazette A-163/07.15.2002. See Icduygu and Aksel 2014, p. 351; and Baldwin-Edwards 2006, p. 120.

20 March 2016 (the starting date for the implementation of the deal) and 1 June 2016 (the planned date of entry into force of the relevant provisions of the EU-Turkey Readmission Agreement (EUTRA)) as well as in its aftermath.[11] The latter Agreement together with the Readmission Protocol, are two of the most important pillars on which the implementation of the deal depended. Other important legal instruments and practices which were relevant for the full and effective implementation of the deal were the Greek Law that reshuffled the national asylum system and introduced the fast-track border procedure, and the application of the 'hotspot approach' to the islands. All these measures are the pillars on which the deal relied for its operation. While at first sight they might seem to be standard instruments used in EU migration policy, which are in principle compatible with human rights, their joint functioning in this context, combined with difficulties in their implementation contributed to serious human rights violations on the Greek islands.[12] Therefore, it is worth providing a brief description of their aims and content.

7.2.1 The Legal Framework of the Deal

To elaborate on our analogy further, the EU-Turkey deal is the umbrella instrument, or the head of the temple which the pillars hold in place. The deal needed the pillars it stands on, or teeth to bite if you will, for its practical existence and effective functioning. Some of the pillars used to prop the temple already existed, even if barely used, such as the Turkey-Greece Readmission Protocol, while others had to be put in place to make the process more efficient and compatible with fundamental rights. The Greek law that transposed parts of the APD[13] to create the fast-track border procedure and the 'hotspot approach' that enabled the EU bodies and agencies to assist the Greek authorities on the islands are examples of the latter.

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[11] Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation [in the following 'EUTRA'], OJ L 134/3. The initial deadline set for the implementation of the entire EUTRA was 1 October 2017, but this deadline was changed to the earlier date of 1 June 2016 in a meeting of EU Heads of State and Government with Turkey that took place on 29 November 2015. See point 5 in Council of the European Union 2015. However, Turkey did not take the necessary steps to meet this earlier deadline. According to the progress reports of the European Commission, it refused to implement the provisions on the readmission of third country nationals after the October 2017 deadline too on the ground that the EU failed to fulfil its corresponding promise on visa liberalisation. See European Commission 2018, p. 46; and European Commission 2020, p. 49.

[12] See Amnesty International 2017; Legal Centre Lesbos 2018; Oxfam and GCR 2019; and International Rescue Committee 2020. Wemove Europe and Oxfam International requested the Commission open infringement proceedings against Greece for not complying with its obligations to respect fundamental rights under EU law. For a detailed analysis of the different types of human rights violations, see De Brauw Blackstone Westbroek 2020.

[13] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L180/60.

7.2.1.1 The EU-Turkey Readmission Agreement and the Turkey-Greece Readmission Protocol

The EUTRA was the main pillar of the deal, as it enabled the return to Turkey of people who made the crossing to the Greek islands illegally. While the agreement entered into force on 1 October 2014 some of the commitments contained in the agreement, such as the readmission of Turkish nationals (Article 3 EUTRA), and the readmission of third country nationals and stateless persons, were to take place three years later (Articles 4 and 24(3) EUTRA), by 1 October 2017. Since the signing of this agreement was interlinked with the visa liberalization process for Turkish nationals, the idea was to give Turkey time to fulfil the necessary requirements to that end, so that the corresponding objectives of the parties could be achieved simultaneously. However, the mass exodus of people in 2015 led to a change of plans. The parties agreed to a 'Joint Action Plan' to step up cooperation in the area of migration,[14] and to make the EUTRA fully applicable as of 1 June 2016.[15] However, Turkey did not take the necessary internal steps to make the latter possible,[16] which meant reliance on the Readmission Protocol with Greece continued for longer than initially envisaged.

As mentioned above, the immediate execution of the deal would not have been possible without the existing Turkey-Greece Readmission Protocol, as the deal was to take effect as of 20 March 2016 and the relevant provisions of EUTRA would enter into force more than two months later.[17] It should be noted that the role of the Protocol was not only to fill in that gap of two months, but it also made the deal more resilient. This is why when Turkey suspended or threatened to suspend one of these instruments, the deal was left unaffected as it could continue operating based on the other instrument.[18] The returns from the islands to Turkey continued without

[14] European Commission 2015.

[15] This decision was taken in a meeting of EU Heads of State and Government with Turkey that took place on 29 November 2015. See point 5 in European Council 2015.

[16] Tukey's failure to take the necessary steps for the earlier entry into force of the provisions of EUTRA on the readmission of the third country nationals was a response to the EU's failure to take the promised steps on visa liberalisation. See Öztürk and Soykan 2019, p. 2. See also European Commission 2018, p. 46; and European Commission 2020, p. 49.

[17] European Commission 2016.

[18] Reuters (2018) Turkey suspends migrants' readmission deal with Greece: Anadolu. https://www.reuters.com/article/us-turkey-security-greece-idUSKCN1J31OO. Accessed 11 February 2021; Euractiv (2019) Turkey suspends deal with the EU on migrant readmission. https://www.euractiv.com/section/global-europe/news/turkey-suspends-deal-with-the-eu-on-migrant-readmission/. Accessed 11 February 2021. Since readmissions by Turkey continued after the suspension of the Readmission Protocol with Greece, the assumption is that they were made possible by relying on the relevant provisions of EUTRA. Interestingly, readmissions continued also after the vague announcement on the suspension of EUTRA. The legal basis of readmissions after that point is not very clear.

interruption until the second half of March 2020 when Turkey closed its borders due to the corona pandemic.[19]

7.2.1.2 The Greek Law No 4375/2016

To enable the implementation of the deal and the 'hotspot approach', two weeks after the deal became operational, Greece passed Law No 4375/2016 which introduced important changes to its asylum system and procedures.[20] The most contested of these were the fast-track border procedure and the "mandatory (blanket) detention of all newly-arrived third-country nationals".[21] The premise on which the deal operated, that is the recognition of Turkey as a 'safe third country' (STC) to which migrants could be returned, was equally contested, especially within Greece. The composition of the Appeals Committees had to be overhauled later in the year as they disagreed with that premise.[22]

What was worrying about the fast-track border procedure was that it provided for "an extremely truncated asylum procedure with fewer guarantees".[23] The whole procedure was to be concluded within two weeks.[24] It was supposed to be an exceptional and temporary procedure and apply only to migrants who arrived to the five Greek islands (Lesvos, Chios, Samos, Leros and Kos), where hotspots were created. However, in practice, it was extended many times until the end of 2019 and introduced as a 'regular' procedure under the new law on asylum (IPA) as of 1 January 2020.[25] It should be noted however, that the procedure did not apply to vulnerable

[19] The exact number of deportations to Turkey can be tracked via the website of Deportation: Monitoring Aegean (2021) https://dm-aegean.bordermonitoring.eu/category/monthly-update/. Accessed 11 February 2021; Euractive (2020) Turkey shuts borders with Greece and Bulgaria amid Corona virus fears. https://www.euractiv.com/section/global-europe/news/turkey-shuts-borders-with-greece-and-bulgaria-amid-coronavirus-fear/. Accessed 11 February 2021.

[20] Greek Law 4375/2016 on the organization and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC, Gazette 51/A/3-4-2016.

[21] ECRE 2016, p. 118.

[22] ECRE 2016, p. 41; Gkliati 2017, pp. 215–216. These Committees were renamed as 'Independent Appeals Committees' at this stage, however, to avoid confusion, this article will keep referring to them as 'Appeals Committees'.

[23] ECRE 2016, p. 58.

[24] ECRE 2016, p. 60. For the specific deadlines provided for the different parts of the procedure, see Article 60(4)(c)–(e) of Law 4375/2016 (above n 19). For example, under the procedure applicants are given one day to prepare for their interview and five days to submit their appeal to a negative decision.

[25] Greek Law 4636/2019 on international protection and other provisions, Gazette 169/A/1-11-2019. See also ECRE Update 2019, pp. 89 and 92.

groups and to those who fell within the scope of the family reunification provisions of Regulation 604/2013 (Dublin III).[26]

7.2.1.3 The 'Hotspot Approach'

The last component that was relevant for the implementation of the deal was the so-called 'hotspot approach'. This approach was the new tool proposed by the Commission in its 2015 Agenda on Migration to help coastline states faced with increased number of arrivals to identify, register and process asylum applications.[27] EU bodies and agencies, such the European Asylum and Support Office (EASO) and Frontex were to play an active role in assisting the local authorities in, respectively, processing asylum applications and coordinating the return of those who are not in need of international protection. The EU-Turkey deal changed the nature of the hotspots that were created on the Greek islands.[28] For the implementation of the deal the open registration and reception sites were turned into closed detention facilities.[29] Once registered, those subject to the deal faced a 'geographical restriction' prohibiting them from leaving the islands.[30] This is what distinguishes the 'hotspot approach' on the Greek islands from those on the Italian islands and mainland. While irregular migrants in the Italian hotspots were sent to the mainland after their registration, which took no longer than a few days, those on the Greek islands were stuck there for the entire time that it took to process their applications, which was on average more than 7 months in 2019.[31]

As a reaction to the deal, many humanitarian actors on the Greek islands, including the UNHCR,[32] suspended their activities.[33] The situation deteriorated rapidly. The limited reception capacity, combined with new arrivals and delays of transfer to the mainland of those with positive first/second instance decisions, resulted in overcrowded camps and horrid living conditions.

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[26] Article 60(4)(f) of Law 4375/2016 (above n 20). The provision refers to Articles 8–11 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180/31. Vulnerable groups were listed in Article 14(8) of Law 4375/2016 (above n 20).

[27] European Commission 2015, p. 6; The 'hotspot approach' was endorsed by the European Council of 25–26 June 2015.

[28] The 'hotspots' in Greece were created by Joint Ministerial Decision 2969/2015 issued in December 2015 as First Reception Centres on the Eastern Aegean islands of Lesvos, Kos, Chios, Samos and Leros, Gazette 2602/B/2-12-2015.

[29] Guild et al. 2017, p. 48; Amnesty International 2017, p. 8.

[30] ECRE 2016, p. 25; Luyten and Mentzelopoulou 2018, p. 4.

[31] ECRE 2019, p. 93; see also FRA Update 2019, p. 16.

[32] EU Observer (2016) UNHCR suspends activities on Greek islands. https://euobserver.com/tickers/132775. Accessed 12 February 2021.

[33] EU Observer (2016) Aid agencies suspending operations in Greece. https://euobserver.com/migration/132798. Accessed 12 February 2021.

7.2.2 *Legal Avenues for Individuals to Challenge the Deal in front of the CJEU*

It is a well-established principle of EU law that all measures emanating from the EU legal order are subject to judicial review, since the EU is based on the rule of law. To that effect, the CJEU ruled back in the 1980s that Treaties provide for a "complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions".[34] In addition, in its seminal *Kadi* ruling the Court strongly emphasized that the protection of fundamental rights, and the judicial review of the lawfulness of EU measures regarding their consistency with these rights, are principles that "form part of the very foundations of the [Union] legal order".[35] This led to arguments that the protection of fundamental rights constitutes part of the 'constitutional foundations' or 'constitutional core values' of the EU legal order.[36] However, as it will be demonstrated below, theory and practice diverge significantly as far as the protection of fundamental rights of those to whom the deal applies is concerned.

There are two different avenues foreseen in the EU Treaties to challenge the legality of measures which emanate from the EU legal order in front of the EU courts, namely the preliminary ruling procedure (Article 267 TFEU) and the annulment procedure (Article 263 TFEU). Even though the Court still insists that the Treaties provide for a "complete system of legal remedies",[37] the use of these procedures by individuals is by no means easy or straightforward even for 'regular' EU measures adopted in line with Treaty procedure. In the case of the preliminary ruling procedure, it is the discretion enjoyed by national courts in deciding whether or not to make a preliminary reference that hinders individuals from accessing the CJEU.[38] Whereas in the case of the annulment procedure, it is the strict admissibility requirements that make CJEU access possible only under very special circumstances.[39] The implication

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[34] CJEC, Case 294/83 *Parti écologiste "Les Verts" v European Parliament*, Judgment, 23 April 1986, ECLI:EU:C:1986:166, para 23.

[35] CJEU, Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Judgment, 3 September 2008, ECLI:EU:C:2008:461, para 304.

[36] See, respectively, Eckes 2009, p. 351; and Kokott and Sobotta 2012, p. 1024.

[37] CJEU, Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union (UPA)*, Judgment, 25 July 2002, ECLI:EU:C:2002:197, para 40.

[38] Both lower courts and courts of last instance have discretion in deciding whether or not to make a preliminary reference, despite the difference in wording between Article 267(2) and (3) TFEU. It should be noted however, that the discretion enjoyed by the courts of last instance is more limited. See CJEEC, Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, Judgement, 6 October 1982, ECLI:EU:C:1982:335, paras 10–14.

[39] Past examples to such circumstances are being part of a closed group or being in possession of a graphic trade mark. See respectively, CJEC, Cases 41-44/70 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit,* Judgment, 12 December 1972, ECLI:EU:C:1971:53; and CJEU, Case C-309/89 *Codornú SA v Council of the European Union*, Judgment, 18 May 1994, ECLI:EU:C:1994:197.

of this for challenging a measure of a dubious legal nature,[40] such as the EU-Turkey Statement, is that it becomes a true Herculean task.

The few cases that reached the General Court seeking the annulment of the deal were dismissed on the ground that the Court had no jurisdiction.[41] According to the General Court, the deal was concluded by Heads of State and Government and not by the EU. The appeals to the CJEU were also not successful. They were dismissed on procedural grounds.[42] Since there is already considerable commentary and criticism on these cases,[43] the analysis on the annulment procedure will be brief (Sect. 7.2.2.1), and the main focus will be on the possibility to challenge the deal via the preliminary ruling procedure. Scholars, including judge Lenaerts saw this still as a possibility in 2019.[44] Section 7.2.2.2 explains why such a challenge is indeed possible in theory, but not very probable in practice. A third avenue for individuals in front of the EU courts is the possibility to invoke the non-contractual lability of the Union under Article 340(2) TFEU for damages caused by its institutions or servants. This part does not examine this avenue as it has been closed by the above-mentioned orders of the General Court, which established that the Statement was not an act of Union institutions.

7.2.2.1 The Obstacles to Challenging the Deal under the Annulment Procedure

The main obstacles to challenging the deal under the annulment procedure relate to the nature of the legal instrument (whether it is a 'reviewable' act) and the strict standing requirements for individuals in front of the General Court (whether the act is of 'direct and individual concern' to the applicants).[45] Regarding the former, an act is considered reviewable under Article 263(1) TFEU, if it is "intended to produce legal effects *vis-á-vis* third parties". The very first point of the Statement strongly suggests that this was the intention. It clearly states that "[a]ll new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned

[40] On the legal nature of the deal, see Chap. 11 by Kassoti and Carozzini in this volume. See further Gatti and Ott 2019; Cannizzaro 2017; den Heijer M and Spijkerboer T in: Is the EU-Turkey Refugee and Migration Deal a Treaty? (2016) http://eulawanalysis.blogspot.com/2016/04/is-eu-turkey-refugee-and-migration-deal.html. Accessed 12 February 2021.

[41] CJEU, Case T-192/16 *NF v European Council*, Order of the General Court, 28 February 2017, ECLI:EU:T:2017:128; CJEU, Case T-193/16 *NG v European Council,* Order of the General Court, 28 February 2017, ECLI:EU:T:2017:129; CJEU, Case T-257/16 *NM v European Council*, Order of the General Court, 28 February 2017, ECLI:EU:T:2017:130.

[42] CJEU, Joined Cases C-208/17 P to C-210/17 P *NF and Others v European Council*, Order of the Court, 12 September 2018, ECLI:EU:C:2018:705.

[43] See Canizzaro 2017; Carrera et al. 2017; Gatti and Ott 2019; Idriz 2017; Idriz 2018.

[44] Lenaerts 2019, p. 10; Lenaerts also cites Carlier and Leboeuf 2018, p. 97. See also Gatti and Ott 2019, p. 186.

[45] Addressees of a legal act have automatic standing in front of the CJEU. Individuals have to fulfil the requirements of the 'direct and individual concern' when they want to challenge acts that are not addressed to them. See Article 263(4) TFEU.

to Turkey". Human Rights Watch reported that the first deportations back to Turkey took place as early as 4, 7 and 8 April 2016, that is before the entry into force of Part C of Law No 4375/16 that transposed provisions of the APD.[46] More than 300 people had been sent back to Turkey before Greece announced on the 9th of April that it suspended the deportations for two weeks until proper safeguards were put in place.[47] It was the deal that triggered those deportations. Arguably, the deal brought about 'a distinct change' in the legal situation of these individuals,[48] as there would be no deportations without the deal (at least not at that point in time and under those conditions). Once this change in the legal position of people is established, the form in which the legal measure is issued is considered irrelevant by the Court.[49]

Regarding the latter requirement, which applies to individuals when they are not the addressees of the measure, the General Court examines the substance of cases only if individuals are able to prove that the measure in question is of 'direct and individual concern to them'. It is the strict definition of the concept of 'individual concern' in the *Plaumann* case that usually forms an insurmountable obstacle to bring a successful challenge to a legal act or measure, as it requires the person bringing the challenge to be distinguished from everybody else to whom the measure applies by virtue of special attributes they possess.[50] While it would have been difficult for the applicants to prove how they had been affected differently than everybody else to whom the deal applied, in these cases, it would have also been difficult to prove 'direct concern'. To be considered of 'direct concern', a measure needs to affect directly "the legal situation of the individual and leave no discretion to the addressees of that measure who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from the Community rules without the application of other intermediate rules".[51] As mentioned above, the implementation of the deal relied on the adoption and use of other laws and agreements, which means that the applicants in this case might also not have been able to fulfil what is considered to be the easier criterion of 'direct concern'.

Challenging the concrete measures adopted to implement the deal would also not be a realistic option. To begin with the Readmission Protocol, which is a bilateral agreement between Turkey and Greece, it cannot be challenged in front of the CJEU,

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[46] Human Rights Watch (2016) EU/Greece: First Turkey Deportations Riddled with Abuse. https://www.hrw.org/news/2016/04/19/eu/greece-first-turkey-deportations-riddled-abuse. Accessed 25 June 2021. In line with Article 83 of Law No 4375/16, Part C of the law relating to the transposition of the APD was to enter into force two months after publication of the Law in the Official Gazette, with the exception of Article 60(4) containing the details of the fast-track border procedure, which was to take effect on the date of publication, that is on 3 April 2016.

[47] Ibid.

[48] CJEC, C-60/81 *International Business Machines Corporation v Commission of the European Communities,* Judgment, 11 November 1981, ECLI:EU:C:1981:263, para 9.

[49] Ibid.

[50] CJEEC, Case 25-62 *Plaumann & Co. v Commission of the European Economic Community,* Judgment, 15 July 1963, ECLI:EU:C:1963:17.

[51] CJEC, Case C-386/96 *P Société Louis Dreyfus & Cie v Commission of the European Communities*, Judgment, 5 May 1988, ECLI:EU:C:1988:193, para 43.

as it is not an EU measure. The EUTRA on the other hand, is an EU measure; however, the difficulty to fulfil the standing requirements for individuals, in particular the criterion of 'individual concern', remains in place. Moreover, the time limit under Article 263(6) TFEU, which is "within two months of the publication of the measure", constitutes another limitation on the use of this procedure.[52] There is no such limitation on the use of the preliminary ruling procedure to challenge the validity of an EU measure. However, as mentioned above, national courts, except for courts of last instance, have wide discretion in the context of this procedure and are not obliged to make preliminary references. As it will be demonstrated below, in practice, even courts of last instance, such as the Greek Council of State, which have more limited discretion compared to lower courts, might choose not to make a preliminary reference.[53]

7.2.2.2 The Obstacles to Challenging the Deal under the Preliminary Ruling Procedure

Article 267 TFEU provides individuals with an indirect route (via a reference from national courts) to the CJEU to challenge the legality of Union acts. The strict admissibility requirements and the time limit that needs to be complied with under Article 263 TFEU, make the preliminary ruling procedure the main and often the only avenue available for individuals to challenge acts of the Union. An additional advantage is its wording which allows challenging the validity of "acts of the institutions, bodies, offices or agencies of the Union" without excluding any types of measures.[54] While the issue of authorship might constitute an obstacle for the judicial review of the deal, were the CJEU to agree with the finding of the General Court, an obstacle that precedes the issue of authorship is the wide discretion given to national courts to decide on whether they consider a preliminary reference to be necessary to rule on the issue at hand. Individuals cannot force a national court to take that step.

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[52] EUTRA entered into force on 1 October 2014, except for the reciprocal obligation to readmit third-country nationals, which became applicable on 1 June 2016 (instead of the originally planned date of 1 October 2017).

[53] It is possible for Member States to be held liable for the omission of their highest courts to make preliminary references where the interpretation of EU law was not clear and where they should have made preliminary references. For such an example, see CJEU, Case C-224/01 *Gerhard Köbler v Republik Österreich,* Judgment, 30 September 2003*,* ECLI:EU:C:2003:513. However, while this was a legal battle that a professor in EU law could take on in *Köbler*, that is not the case for asylum seekers on the islands. Another avenue in cases of consistent non-compliance with EU law would be an infringement proceeding brought by the Commission for failure to fulfil obligations under the Treaties. However, this course of action is also not very likely, as the Commission has a wide discretion in picking the cases it brings in front of the CJEU.

[54] Article 263(1) TFEU excludes from judicial review recommendations and opinion of the Council, the Commission and the ECB. Noting there is no such exclusion under Article 267 TFEU, in a recent judgment, the CJEU reviewed a recommendation of the European Banking Authority. For details, see CJEU, Case C-501/18 *BT v Balgarska Narodna Banka*, Judgment, 25 March 2021, ECLI:EU:C:2021:249, para 82.

In the specific case of challenging the deal, there are additional practical difficulties that come on top of existing procedural ones. The most important of these is the fact that the people who are subject to the deal have limited resources, that is limited access to information, legal aid, and language interpretation facilities, which translates into extremely limited access to courts. According to the 2019 Report of the EU's Fundamental Rights Agency (FRA) "availability of legal support is a prerequisite for full access to the right of asylum", that is the case especially considering "the complexity of the asylum procedures as well as language barriers".[55] Unfortunately, the "[l]egal support capacity on the Greek islands has not improved significantly since [2016] despite genuine efforts".[56]

– *Obstacles raised by the Greek law and its application*

To go through the procedure by which asylum seekers were supposed to reach a national court in which they could raise issues of legality concerning the EU-Turkey deal, or the transposition of Article 43 of the APD into Greek law (that is the implementation of the fast-track border procedure), the first step was the identification and registration of the asylum seekers upon their arrival to the islands. Subsequently, they were given an interview date. Under the Law 4375/16, which was introduced to facilitate the implementation of the deal, the asylum seekers had one day to prepare for the interview and consult a lawyer.[57] Such consultations were only possible for those who had the financial means or for those who were able to obtain legal aid from NGOs or UNHCR, as there was no state-funded legal aid scheme provided at first instance.[58] Under this fast-track procedure, decisions had to be issued on the day following the interview. They were to be notified to those concerned at the latest the day after they are issued. Negative decisions needed to be appealed within five days after the date of notification. Law 4375/16 provided for a state funded legal aid scheme at this stage, however, the limited capacity available for that purpose meant such access would depend on luck.[59] According to an Oxfam report, on the islands "only two out of 100 people [were] able to get free legal aid needed to appeal their cases".[60] Once appeals were lodged, they had to be examined within three days.[61]

As is well known, the procedure did not work as planned on paper. It took months and in some cases years to finalize instead of the two weeks specified by law. In 2019, "[t]he average time between full registration and the issuance of first instance

[55] FRA 2019, p. 38.

[56] Ibid. There is no state-funded legal aid scheme provided at first instance. The law provides only for such a scheme in Appeal Procedures before the Appeals Authority (Article 44(2) Law 4375/2016).

[57] Article 60(4)(c) of Law 4375/2016 (above n 20).

[58] ECRE Update 2017, p. 52.

[59] At the end of 2017 there were four lawyers that were operating on the islands under the state funded legal aid scheme which was launched in September 2017: one on Lesvos, one on Chios, one on Kos and one on Rhodes. See ECRE 2017, p. 75. As of 31 December 2019, that number was five. See ECRE 2019, p. 101.

[60] Oxfam and GCR 2019, p. 5.

[61] Article 60(4)(e) of Law 4375/2016 (above n 20).

decision […] was 228 days",[62] which amounts to a period longer than 7 months. What worked to the detriment of asylum seekers was also the fact that the deadlines they had to abide by were applied strictly.[63] Not bringing an appeal within the five-day limit meant the inadmissibility of the appeal, whereas no limits applied to the prolongation of the procedure by the Greek authorities.

The possibility to access courts for judicial review appeared at the stage when an appeal was rejected by an Appeals Committee. However, what happened in practice turned it into an illusion rather than a real possibility. Upon the notification of the rejection of the appeal, appellants were "immediately detained … and face[d] an imminent risk of readmission to Turkey".[64] Moreover, the detainees were "not promptly informed of their impending removal".[65] Other obstacles in front of judicial review were the fact that administrative courts were accessible only through a lawyer, and the law did not provide for legal aid at this point.[66] On top of this, the application for annulment did "not have automatic suspensive effect, even if combined with an application for suspension".[67] According to the Greek Council of Refugees, judicial procedures were quite lengthy and there were cases of removal to Turkey of applicants awaiting a court to rule on their applications for suspension.[68] This practice clearly violated Article 46(5) APD, which requires Member States to allow asylum applicants to remain on their territory "pending the outcome of the remedy", that is until the conclusion of the appeal process.[69]

The new law (IPA) that entered into force on 1 January 2020,[70] despite the concerns and critique raised by the UNHCR and NGOs,[71] makes it even more difficult to access judicial review as it designates the First Instance Administrative Court of Athens as the competent court for reviewing second instance negative decision submitted from the Aegean islands.[72] The law also sets additional hurdles for asylum seekers' access to a lawyer. The law requires not only a signed authorization for a lawyer to be able to represent an asylum seeker, but it also requires proof that the signature belongs to the asylum seeker who is to be represented.[73] This is not an easy requirement to fulfil

[62] ECRE 2019, p. 93.

[63] Ibid.

[64] ECRE 2019, p. 100.

[65] ECRE 2019, p. 100, citing The Greek Ombudsman 2017, p. 20.

[66] ECRE 2019, pp. 68 and 100. According to the ECRE 2019 Report, legal aid may be requested under the general provisions of Greek law (Articles 276 and 276A of the Code of Administrative Procedure), however, there are other obstacles to obtaining such aid, one of them being the language in which the application needs to be made, this being Greek.

[67] ECRE 2019, p. 100.

[68] ECRE 2019, p. 68.

[69] See Article 46(1)(a)(iii) and (5) APD. See also Kaya 2020, p. 95.

[70] IPA was adopted in November 2019. See, Law 4636/2019 (IPA), Gazette 69/A/1-11-2019.

[71] GCR 2019; UNHCR (2019) UNHCR urges Greece to strengthen safeguards in draft asylum law https://www.unhcr.org/gr/en/13170-unhcr-urges-greece-to-strengthen-safeguards-in-draft-asylum-law.html. Accessed 25 June 2021.

[72] See Article 115(2) IPA, and ECRE Update 2019, pp. 100–101.

[73] Article 71 IPA.

for people who might be in detention or stripped of their ID documents after a first instance negative decision.[74] What aggravates the situation further is the fact that the new law makes having a lawyer prerequisite to access the Appeals Committees too. An appeal needs to be brought within five days after the first negative decision in the form of a memorandum indicating precise grounds of appeal, which must be in Greek.[75] This means that both access to a court and effective appeal become close to impossible for most asylum seekers on the Aegean islands.

– *Other obstacles making it difficult to challenge the deal*

Two of the most important examples that demonstrate why challenging the deal is difficult and highly unlikely are firstly, the determination and political will shown to make the deal work at all costs, and secondly, the fact that the most controversial aspects of the deal have already been settled by the Greek Council of State, which chose not to make a preliminary reference to the CJEU. To begin with the first example, the Director of the Greek Asylum Service expressed her experience with the process of implementation of the deal as follows: "Insufferable pressure is being put on us to reduce our standards and minimize the guarantees of the asylum process... to change our laws, to change our standards to the lowest possible under the EU [Asylum Procedures] directive."[76] The concerted effort made on the part of the EU to make the deal work was also illustrated clearly by the pressure put on the reorganization of the Appeals Committees following their overturning of 390 out of 393 decisions on the ground that Turkey was not a STC for the appellants in question.[77] The reorganization was pushed through the Greek Parliament as early as June 2016,[78] despite various concerns raised by the National Commission on Human Rights (NCHR), such as non-compliance with the right to an effective remedy.[79] The reorganization achieved the desired result as the new committees rejected around 90% of the appeals on the merits in the rest of 2016.[80]

The second obstacle or example that makes challenging the deal or the implementation of the APD unlikely is the fact that the highest administrative court in Greece,

[74] Oxfam and GCR 2019, p. 9.

[75] Article 93 IPA.

[76] Psarapoulos J (2016) Greek asylum system reaches breaking point. https://www.thenewhumanitarian.org/news/2016/03/31/greek-asylum-system-reaches-breaking-point. Accessed 12 February 2021.

[77] This was the number of cases overturned between April and June 2016. See Gkliati 2017, p. 213.

[78] The reorganization took place with Law 4399/2016, Gazette 117/A/22-6-2016. See also ECRE 2016, p. 41. The Committees were to be composed of two administrative judges and a third member with a degree in Law, Political or Social Sciences or Humanities with a specialization and experience in international protection, human rights or international/ administrative law.

[79] NCHR (2016) Public Statement regarding the amendment of the composition of the Independence Appeals Committees. http://nchr.gr/images/pdf/apofaseis/prosfuges_metanastes/Dimosia%20dilwsi%20EEDA.pdf. Accessed 25 June 2021; also see ECRE 2016, p. 42.

[80] The calculation is based on the numbers in the period between July and December 2016. For more details, see ECRE 2016, pp. 42–43. This trend continued in 2017, 2018 and 2019. See ECRE 2019, p. 100.

which is competent to rule on these matters, settled the most controversial issues back in September 2017.[81] While in theory EU law empowers lower courts to make preliminary references to the CJEU irrespective of the view of higher courts, when they have doubts regarding the interpretation or application of EU law,[82] in practice, the hierarchy between courts in a legal order translates into lower courts following the rulings of the higher courts. When one also adds the high political stakes in the case of the deal, it becomes clear why the preliminary ruling procedure has been and will remain a closed route for the future.

The most important issues that the Greek Council of State ruled on that are worth mentioning for our purposes are its findings on the legality of the fast-track border procedure and whether Turkey could be considered a STC.[83] The Council of State upheld the legality of the fast-track procedure, as it was the transposition into national law of Article 43 of the APD. The exemption of vulnerable groups and family reunification cases under the Dublin Regulation (III) were also found to be justified.[84] It dismissed the appellant's claim that his case was unlawfully rejected in application of the EU-Turkey Statement. Confirming the approach taken by the Appeals Committee, it ruled that the appellant's application for international protection was dismissed based on provisions of national law,[85] which were implementing EU law,[86] and not on the basis of the Statement itself. This approach enabled the Court to sidestep the thorny issue of the nature of the EU-Turkey Statement. Last but not least, the Court went through the requirements of Article 38(1)(a) to (e) of the APD to establish that Turkey constituted a STC. The Court interpreted the requirement to "receive protection in accordance with the Geneva Convention" under Article 38(1)(e) APD broadly, to mean providing 'sufficient' protection of specific fundamental rights, inter alia, the right to access health care and the labour market".[87] It also took the existence of the Turkish Law on Temporary Protection and the guarantees provided by Turkish authorities in various letters as indications that Turkey could be considered an STC.[88]

[81] The decision not to make a preliminary reference was taken by 13 votes to 12. See Decision 2347/2017 of the Greek Council of State.

[82] CJEC, Case 166-73 *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel,* Judgment, 16 January 1974, ECLI:EU:C:1974:3.

[83] The Council of State also ruled on the constitutionality of the new Appeals Committees and the involvement of EASO. It declared both constitutional and in line with EU law. For the analysis on the Appeals Committees, see paras 19–26; and for the involvement of EASO, paras 31–34 of Decision 2347/2017.

[84] Decision 2347/2017, paras 29–30.

[85] Articles 54–56 of Law 4375/2016.

[86] Decision 2347/2017, para 44.

[87] Decision 2347/2017, para 54.

[88] For the respective arguments, see paras 40 and 45–46 of Decision 2347/2017.

7.2.3 Interim Conclusion

The EU-Turkey deal has been the source of a lot of suffering and violation of the human rights of individuals that are trapped on the islands. This contribution did not name or elaborate the specific violations in this context as they have been enumerated extensively elsewhere.[89] Instead, we demonstrated that the nature of this deal made it particularly difficult for individuals to access courts in order to challenge it. In this context, challenging the individual components of the deal also proved to be very difficult. The Greek Council of State, decided not to make a preliminary reference to CJEU on the interpretation of the STC concept or the fast-track procedure. It ruled on the legality of the fast-track procedure as it transposed parts of the APD. While this transposition might comply with the Directive on paper, the Council of State stopped short of examining whether the implementation also complied with the Directive. In short, all avenues to challenging the deal and its individual components were closed one by one. The European Parliament did not go to the CJEU to challenge the deal when it could have done so as a privileged applicant. The Commission has also been very unwilling to take any steps to bring the matter in front of the Court, despite pressure from human rights organizations to do so.[90]

For individuals, fighting the deal has been the equivalent of fighting a powerful hydra. Asylum seekers have been left alone and unequipped in any way for this fight. Therefore, they were not able to reach any of the heads of this monster. Unfortunately, damaging one of the heads would also not mean much in practice. It is not a single measure or law, but the combination of the measures taken to implement the deal that produced Moria. Not being able to challenge the underlying umbrella instrument translated into the continuation of the status quo and of the violations of the rights of those seeking asylum.

7.3 Frontex Joint Operations on Third State Territory

The external dimension of the EU's migration and asylum policies has not only been shaped by legally binding and informal instruments, but increasingly also by executive action of an operational or factual nature.[91] This is a development that has also taken place at agency-level. The EU agency Frontex, in particular, has always

[89] De Brauw Blackstone Westbroek 2020; Legal Centre Lesbos 2021; and International Rescue Committee 2020; Oxfam-GCR 2019; Amnesty International 2017.

[90] Oxfam International (2020) Rights groups press European Commission to investigate violations of EU law in Greece over treatment of migrants. https://www.oxfam.org/en/press-releases/rights-groups-press-european-commission-investigate-violations-eu-law-greece-over. Accessed 3 April 2021.

[91] Rijpma 2017, p. 572.

had an international cooperation mandate.[92] Its main instrument for international cooperation are the so-called working arrangements, written agreements entered into between Frontex and the authorities of third states competent in the area of border control.[93] But over the years, its competences to engage with third states have gradually shifted to include a more active operational role abroad.

Since 2016, Frontex has the possibility to operationally assist third states on the ground in the framework of a joint operation.[94] The first-ever joint operation on third state territory was launched in May 2019 at the Albanian-Greek border and is still ongoing.[95] As the recent investigations into 'push backs' at the Greek-Turkish sea border have once more illustrated, border control operations are human rights sensitive and touch upon guarantees such as the prohibition of *refoulement*, the right to asylum, or the prohibition to be treated in an inhuman or degrading manner.[96] In the case of operations in third states, the human rights risks are compounded by the fact that there is much less control over border management standards in third states than in EU Member States. In addition, the already existing unclarities in the allocation of responsibility for human rights violations during joint operations are further complicated by the involvement of third states and the applicability of their own legal systems.

This section discusses the challenges that Frontex's joint operations abroad raise in relation to the effective judicial protection of those that may become victims of human rights violations. The aim is to give an overview of the many hurdles that an individual may encounter when trying to bring Frontex to court rather than delving deeper into the systemic reasons for these hurdles or searching for a way out. This section will first give an overview of the legal framework for joint operations abroad (Sect. 7.3.1), followed by a categorization of potential human rights violations during joint operations abroad according to their source (Sect. 7.3.2). On that basis, this section discusses the hurdles for individuals to seek redress against human rights violations stemming from legal instruments on the one hand (Sect. 7.3.3) and factual conduct on the other (Sect. 7.3.4). It concludes that the possibilities for individuals affected by Frontex's joint operations abroad to access the CJEU are extremely limited, even more so than this is already the case in relation to Frontex's activities more generally.

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[92] See already Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L349/1, Article 14.

[93] Coman-Kund 2018, pp. 184–191.

[94] EBCG Regulation, Article 74.

[95] Frontex (2019) Frontex launches first operation in Western Balkans. https://frontex.europa.eu/media-centre/news/news-release/frontex-launches-first-operation-in-western-balkans-znTNWM. Accessed 25 June 2021.

[96] See in particular the joint investigation conducted by Bellingcat, Lighthouse Reports, Der Spiegel, ARD, and TV Asahi: Bellingcat (2020) Frontex at Fault: European Border Force Complicit in "Illegal" Pushbacks. https://www.bellingcat.com/news/2020/10/23/frontex-at-fault-european-border-force-complicit-in-illegal-pushbacks/. Accessed 25 June 2021.

7.3.1 The Legal Framework for Joint Operations Abroad

Articles 73-74 EBCG Regulation provide the legal basis for launching joint operations on third state territories. While this possibility was initially geographically limited to countries neighbouring the EU, the 2019 revision of the EBCG Regulation extended it to all third states.[97] Frontex may render support by providing financial means, sending technical equipment necessary for border control, and deploying personnel that assist the local staff in their duties. The personnel is drawn from the 10,000 officers strong European Border and Coast Guard standing corps (EBCG standing corps), made up of two thirds by Member State officers and one third of Frontex officers.[98]

The nature of powers the deployed personnel may exercise abroad is further regulated in a status agreement that has to be concluded between the EU and the third country in question.[99] So far, three agreements have been concluded—Albania (February 2019), Montenegro (May 2020), and Serbia (May 2020)—and two more agreements are pending finalization—North Macedonia (initialled July 2018) and Bosnia and Herzegovina (initialled January 2019).[100] All of the agreements concluded so far explicitly allow for the exercise of all tasks and executive powers required for border control and return operations, such as verification of the identity and nationality of a person or patrolling a border.[101] For this purpose, deployed personnel may also carry service weapons and use force to the extent agreed upon in the status agreements.[102]

While the status agreements are applicable to all joint operations in a specific third country, the parties also conclude an Operational Plan for every joint operation that is launched. The Operational Plan further specifies the tasks and responsibilities of everyone involved, command and control arrangements, specific instructions to

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[97] Compare Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC OJ L251/1, Article 54(3) [no longer in force] with EBCG Regulation, Article 74(1).

[98] EBCG Regulation, Article 74(1), Annex I.

[99] Ibid., Article 73(3).

[100] Status Agreement between the European Union and the Republic of Albania on actions carried out by the European Border and Coast Guard Agency in the Republic of Albania, 28 February 2019, OJ L46/3 [in the following 'Status Agreement EU-Albania']; Status Agreement between the European Union and Montenegro on actions carried out by the European Border and Coast Guard Agency in Montenegro, 3 June 2020, OJ L173/3 [in the following 'Status Agreement EU-Montenegro']; Status Agreement between the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the Republic of Serbia, 25 June 2020, OJ L202/3 [in the following 'Status Agreement EU-Serbia'].

[101] Status Agreement EU-Albania, Article 4(1); Status Agreement EU-Montenegro, Article 5(1); Status Agreement EU-Serbia, Article 5(1).

[102] Status Agreement EU-Albania, Article 4(5–6); Status Agreement EU-Montenegro, Article 5(5–6); Status Agreement EU-Serbia, Article 5(5–6).

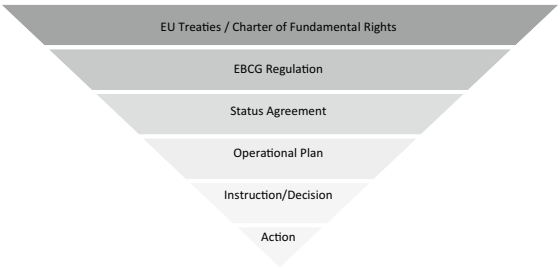

Fig. 7.1 Legal framework for joint operations abroad (simplified). *Source:* The authors

deployed personnel, and rules on how to ensure fundamental rights compliance. All parts of the Operational Plan are legally binding on the Agency, the host state, and participating states.[103] So far, only one joint operation has been launched abroad, at the Albanian-Greek border. Consequently, this is the only Operational Plan concluded to date. This Operational Plan is not publicly available and also not made accessible—not even in part or for past operations—upon request.

Command and control structures on the ground during joint operations implemented on the territory of third states follow the same principles as those within the EU. This means that the third state has the power to issue instructions to all personnel, including the officers deployed from the EBCG standing corps. The agency, in turn, only retains the power to communicate its views on those instructions to the third country or suspend/terminate the operation altogether.[104] All status agreements concluded to date reiterate these powers of the involved parties.[105]

The command and control framework under which deployed personnel works during joint operations abroad is unique. It is, in particular, not comparable to Common Security and Defence Policy operations where command always remains with an EU commander, never with a third state.[106] Frontex joint operations abroad are therefore the only case where EU personnel operates under third state command. This may not only require further debate from a constitutional perspective, but also has important practical implications. It severely limits the possibilities of Frontex and the Member States to direct the course of action on the ground and thus also their means to ensure fundamental rights compliance during a joint operation. This means that it is essential—even more so than usual—that additional measures are taken beforehand, e.g. taking the third state's fundamental rights record into account before launching an operation, establishing additional monitoring mechanisms, and clarifying how individuals are to seek redress in the event that violations do occur.[107]

[103] EBCG Regulation, Article 74(3) in conjunction with Article 38(3).

[104] Ibid., Article 74(3) in conjunction with Articles 43(1–2), 46.

[105] Status Agreement EU-Albania, Article 4(3); Status Agreement EU-Montenegro, Article 5(3); Status Agreement EU-Serbia, Article 5(3).

[106] Sari and Wessel 2013, pp. 137–138; Naert 2013, pp. 319–321.

[107] Rijpma and Fink forthcoming, Section 3.5.

Figure 7.1 represents the legal framework for joint operations abroad graphically, showing the hierarchical relationship between the various legal instruments and their implementation.

7.3.2 Distinguishing Sources of Human Rights Violations

When a human rights violation occurs during a joint operation, that action is often committed by one or more deployed officers exercising public authority. While they are the direct source of the violation in practical terms, they may not be from a legal perspective. The actual source of the violation may lie in any of the layers of legal authority illustrated in Fig. 7.1.

From bottom to top, the first category of violation is the unlawful individual decision. This may be a formal individual decision, such as a refusal of entry according to Article 14 Schengen Borders Code.[108] But it can also consist of a 'snap decision', where an individual officer makes a choice on the ground that results in a human rights violation. Using excessive force against a migrant would be an example of that. Next up is the unlawful instruction, where someone entitled to give instructions to deployed personnel orders a course of conduct that results in a human rights violation. That is the case, for instance, if the Joint Coordination Board responsible for the daily running of a joint operation decides that an unlawful 'push-back' is the best course of action and the host state officer in charge orders it to take place.

Human rights violations may also be inherent in the set-up of an operation when the Operational Plan itself prescribes an unlawful course of conduct. Because the operational personnel is bound to implement the Operational Plan, their actions will 'inherit' that unlawfulness. Less likely, but also thinkable, the Status Agreement or even the EBCG Regulation itself may contain human rights violations that then 'contaminate' all operations in a particular country or all operations abroad respectively. That is the case, for example, if they prescribe use of force or detention beyond what is permissible under human rights law.

Distinguishing human rights violations according to their source is useful because it informs the decision on how to seek redress. Due to the procedural avenues available in EU law there is a substantial difference between measures that can be characterised as legal instruments on the one hand and those that constitute mere factual conduct on the other. While the former can in principle be challenged and—if declared to be unlawful—annulled, the latter are not necessarily open to challenge as such. Often, thus, the only form of redress available against factual conduct is to seek compensation for the damage it may have caused.[109] In the context of Frontex joint operations

[108] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L77/1.

[109] Hofmann et al. 2011, Chapter 20.

abroad, only the Status Agreements, Operational Plans, and formal individual decisions may be qualified as legal instruments, whereas the instructions and physical actions that implement them constitute conduct of a factual nature. The following two sections discuss the regime to seek redress against each of these categories in turn.

7.3.3 Redress Against Unlawful Legal Instruments

Status Agreements, Operational Plans, and formal individual decisions are formal legal instruments. Difficulties in access to justice are often associated with the choice of an institution to act informally, suggesting that testing the legality of formal legal instruments is straightforward. However, as the following shows, for individuals—as so-called non-privileged applicants—the picture is much more complex and even formal legal instruments might not always be open for them to challenge.

The (only) direct procedure available to challenge the lawfulness of legal instruments is the action for annulment under Article 263 TFEU. This action can be brought when two conditions are fulfilled: the measure in question qualifies as a reviewable act and the applicant has standing to initiate the procedure.

To qualify as reviewable, an act must be "intended to produce legal effects *vis-à-vis* third parties".[110] As binding legal instruments, Status Agreements, Operational Plans, and formal individual decisions are evidently intended to produce legal effects.[111] However, in the view of the Court, such 'objective' legal effects are not necessarily sufficient. To declare an act reviewable in proceedings brought by individual applicants, these legal effects have to be shown to affect the applicant's legal situation more specifically.[112] In those cases, the legal effects of the measure in question must be "binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position" in order to be reviewable by the Court.[113]

This 'subjective' requirement for reviewability of an act overlaps with the standing conditions set out for non-privileged applicants.[114] By virtue of Article 263(4) TFEU, individuals can always challenge an act that is formally addressed to them. However,

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[110] TFEU, Article 263.

[111] For detail on the complex and often inconsistent use of the terms 'legal effects' and 'legally binding' in the definition of the 'reviewable act', see Rademacher 2014, pp. 8–76.

[112] This is very clearly stated in CJEU, Case T-458/17 *Harry Shindler and Others v Council,* Judgment of the General Court, 26 November 2018, ECLI:EU:T:2018:838, paras 39–41; confirmed in CJEU, Case C-755/18 P *Shindler and Others v Council,* Order of the Court, 19 March 2019, ECLI:EU:C:2019:221, paras 36–37; Rademacher 2014, pp. 48–49.

[113] CJEC, C-60/81 *International Business Machines Corporation v Commission of the European Communities,* Judgment, 11 November 1981, ECLI:EU:C:1981:263, para 9; CJEU, Case C-362/08 P I*nternationaler Hilfsfonds eV v European Commission*, Judgment, 26 January 2010, ECLI:EU:C:2010:40, para 51.

[114] CJEU, Joined Cases C-463/10 P and C-475/10 P *Deutsche Post AG and Federal Republic of Germany v European Commission*, Judgment, 13 October 2011, ECLI:EU:C:2011:656, para 38.

with respect to a legal act they are not the addressees of, they have to prove that it is nonetheless of 'direct and individual concern' to them. 'Individual concern' requires applicants to show to be affected by the act in question differently than others to whom the act applies "by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons".[115] As noted above (see Sect. 7.2.2.1), proving individual concern often represents a challenge and an individual migrant affected by Frontex's operations abroad may be unlikely to fulfils this condition.

There are circumstances under which individuals are relieved of the requirement to prove individual concern. This is when the contested measure can be qualified as a regulatory act that does not entail implementing measures. The notion of 'regulatory act' has been construed broadly and, in the view of the Court, covers all acts of general application that do not qualify as legislative acts.[116] The more difficult criterion to fulfil is the lack of implementing measures. These have been found by the Court to include all intermediary acts taken by another authority through which the challenged act produces legal effects vis-à-vis the applicant, even if they are purely 'mechanical' and do not involve any discretion by the implementing authority.[117] While Status Agreements and Operational Plans would qualify as 'regulatory' for these purposes, both require 'implementing measures'. Applicants challenging them will thus need to prove to be individually concerned by the measures after all.

In any case, also the requirement of 'direct concern' represents a significant hurdle. Similar to the 'subjective' requirement for assessing the reviewability of an act, a measure is of direct concern to an applicant when it automatically affects his/her legal position, without any intermediary decision-making capacity of an implementing authority.[118] Importantly, an EU measure is of direct concern to an applicant even when there are implementing measures, as long as the implementing authority enjoys no discretion. While Status Agreements and Operational Plans require implementing measures to affect the legal position of individuals, the crucial question is thus whether the parties involved in joint operations enjoy discretion. Status Agreements do not circumscribe the implementing authorities' discretion in relation to the content of specific decisions on the grounds. Since they thus cannot 'directly' bring about a change in legal position for an individual, they are not of direct concern.

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[115] CJEEC, Case 25-62 *Plaumann & Co. v Commission of the European Economic Community,* Judgment, 15 July 1963, ECLI:EU:C:1963:17, 107; CJEU, Joined Cases C-463/10 P and C-475/10 P *Deutsche Post AG and Federal Republic of Germany v European Commission*, Judgment, 13 October 2011, ECLI:EU:C:2011:656, para 71.

[116] CJEU, Case C-583/11 P *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union,* Judgment, 3 October 2013, ECLI:EU:C:2013:625, para 60.

[117] CJEU, Case C-274/12 P *Telefónica SA v European Commission*, Judgment, 19 December 2013, ECLI:EU:C:2013:852, para 35; CJEU, C-456/13 P *T & L Sugars Ltd and Sidul Açúcares, Unipessoal Lda v European Commission*, Judgment, 28 April 2015, ECLI:EU:C:2015:284, paras 40–41.

[118] CJEC, Case C-386/96 *P Société Louis Dreyfus & Cie v Commission of the European Communities*, Judgment, 5 May 1988, ECI:EU:C:1988:193, para 43; CJEU, Case T-458/17 *Harry Shindler and Others v Council,* Judgment of the General Court, 26 November 2018, ECLI:EU:T:2018:838, para 33.

While the same is true for much of the content of Operational Plans, the EBCG Regulation explicitly notes that they may contain 'special instructions' for the deployed personnel.[119] Should such an instruction be the source of an alleged human rights violation in a specific case, the individuals affected would have to be considered to be directly concerned by the Operational Plan in question.

In sum, whereas individuals can clearly challenge formal decisions addressed to them, there are significant obstacles to challenging the legality of Status Agreements and Operational Plans under Article 263 TFEU. While individuals may be able, under certain circumstances, to prove that an Operational Plan directly concerns them, they would still have to show they are also individually concerned. In most cases, an instruction contained in an Operational Plan will be too general to fulfil that requirement.[120]

The idea behind limiting access to the CJEU in relation to EU acts that require implementation is that the implementing measures themselves can be challenged.[121] More specifically, a migrant affected by measures taken in the context of a Frontex joint operation abroad, e.g. a refusal of entry, can start proceedings against those measures in front of the competent national courts. If doubts as to the interpretation or validity of the Operational Plan or Status Agreement arise in those proceedings, the national court can make use of the preliminary ruling procedure under Article 267 TFEU to request the view of the CJEU on the matter. Importantly, this is possible in relation to any EU measure, without a need for it to fulfil the strict conditions of Article 263 TFEU. This has very recently been confirmed by the CJEU in *BT v Balgarska Narodna Banka*, where the Court explicitly noted that in the context of the preliminary ruling procedure it may rule on the interpretation and validity of EU acts "without any exception".[122]

Operational Plans and Status Agreements can thus in principle be the subject of a preliminary ruling procedure.[123] However, in addition to the more general limits in this respect (see above, Sect. 7.2.2.2), this avenue is not available in the particular context of Frontex joint operations abroad. Article 267 TFEU explicitly limits the possibility to initiate a preliminary ruling procedure to "any court or tribunal *of a Member State*".[124] Joint operations abroad are, by definition, hosted and commanded by third states. The third states' courts competent to hear challenges against measures taken on the ground cannot raise their concerns regarding the Operational Plans and Status Agreements before the CJEU. Avoiding a gap in judicial protection in this

[119] EBCG Regulation, Article 38(3)(d).

[120] See also Lehnert 2014, pp. 339–340.

[121] CJEU, C-456/13 P *T & L Sugars Ltd and Sidul Açúcares, Unipessoal Lda v European Commission*, Judgment, 28 April 2015, ECLI:EU:C:2015:284, paras 43–50.

[122] CJEU, Case C-501/18 *BT v Balgarska Narodna Banka*, Judgment, 25 March 2021, ECLI:EU:C:2021:249, para 82; see already CJEU, Case C-16/16 P *Kingdom of Belgium v European Commission*, Judgment, 20 February 2018, ECLI:EU:C:2018:79, para 44.

[123] Also suggesting this in relation to Operational Plans, see Lehnert 2014, p. 287.

[124] Emphasis added.

respect might thus require a more lenient approach to the reviewability of Operational Plans and possibly also Status Agreements in the context of Article 263 TFEU.

7.3.4 Redress Against Unlawful Factual Conduct

Under Article 263 TFEU, in theory also factual acts may qualify as reviewable, as long as they produce legal effects.[125] Without pronouncing itself on the question in a principled manner, the Court has nonetheless been reluctant to review factual conduct directly and where possible only did so indirectly by reviewing a prior decision by the relevant authority, even if that would be an implicit one.[126] Given that as opposed to the action for annulment, the action for damages is not limited to particular acts, this section will discuss the possibility to challenge instructions and 'snap decisions' through the latter.

According to Article 340(2) TFEU, the EU is liable to make good any damage caused by its institutions or by its servants in the performance of their duties. Article 340(2) TFEU itself does not define the conditions for the liability of the EU but instead leaves it to the Court, which shall be guided by the "general principles common to the laws of the Member States".[127] The CJEU has consistently held that the EU's liability is subject to three cumulative conditions: The unlawfulness of the conduct complained of, the occurrence of damage on the part of the victim, and a causal relationship between the unlawful conduct and the damage.[128] The condition of unlawfulness is qualified in two ways: The rule infringed must be intended to confer rights on individuals and the breach thereof must be sufficiently serious.[129] The decisive criterion in this respect is whether the Union authorities in question "manifestly and gravely disregard the limits on their discretion".[130]

[125] For a detailed analysis of the legal effects and reviewability of physical acts, see Xanthoulis 2019.

[126] See ibid., pp. 63–65; Rademacher 2017; CJEC, Case 53/85 *AKZO Chemie BV and AKZO Chemie UK Ltd v Commission of the European Communities,* Judgment, 24 June 1986, ECLI:EU:C:1986:256, para 17.

[127] TFEU, Article 340(2).

[128] One of the first clear statements is in CJEC, Case 4/69 *Alfons Lütticke GmbH v Commission of the European Communities*, Judgment, 28 April 1971, ECLI:EU:C:1971:40, para 10.

[129] CJEU, Case C-352/98 P *Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission of the European Communities,* Judgment, 4 July 2000, ECLI:EU:C:2000:361, para 42.

[130] Ibid., para 43.

These requirements for non-contractual liability also apply where the alleged breach concerns human rights obligations.[131] Because the Court accepts that fundamental rights confer rights on individuals and violations may cause at least non-material damage,[132] the central question is under what circumstances breaches of human rights are considered to be sufficiently serious. The Court does not seem to have taken a clear position on the question, but we may assume that much will depend on the nature or importance of the specific right in question.[133] If that is so, breaches of the rights typically at risk in the context of border control activities—such as the right to life, the prohibition of torture and inhuman or degrading treatment or punishment, and the prohibition of *refoulement*—would have to be considered as sufficiently serious *per se*. In addition, it is important to know that many human rights obligations that apply during border control operations have been clarified in cases before the CJEU, the ECtHR, or by the EU's Fundamental Rights Agency.[134] This renders violations more likely to be considered 'serious' within the meaning of EU liability law because the authorities in question cannot claim that the line demarcating legal from illegal conduct was unclear.[135]

In the case of Frontex's activities, it is a different aspect that forms the main obstacle for individuals to receiving compensation for human rights violations: the question who bears responsibility for it. By their very nature, joint operations involve a large number of participants, ranging from Frontex itself to national and local authorities, third states, private parties, and other EU bodies and agencies, all subject to different obligations depending on the legal order(s) they are subject to. When a human rights violation occurs during a joint operation, which one of these actors is to bear responsibility for it?

In the context of the action for damages, the CJEU has resolved situations with more than one potential 'perpetrator' by focusing on the question of formal decision-making power. In the view of the Court, liability lies with the authority that has, from a strictly legal point of view, decision-making power, no matter whether this power might (factually) be influenced by others.[136] In the case of Frontex operations, this means that it will often be the host state who bears liability because of its power to issue legally binding instructions to all deployed personnel. Where the host state is a third state, the rules on state liability developed by the CJEU do not apply, so the precise conditions for liability—and indeed whether an action can be brought at all—depends on the national law of the third state in question.

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[131] Machnikowski 2017, p. 574; Gutman 2017, p. 47; Ward 2012, p. 592.

[132] To name just one example for each, see CJEU, Joined Cases C-8 to C-10/15 P *Ledra Advertising v European Commission and European Central Bank (ECB)*, Judgment, 20 September 2016, ECLI:EU:C:2016:701, para 66; and CJEU, Joined Cases C-138 & C-146/17 P *European Union v Gascogne Sack Deutschland and Gascogne*, Judgment, 13 December 2018, ECLI:EU:C:2018:1013.

[133] van Gerven 2004, p. 268; Ward 2012, p. 601.

[134] See, for instance, FRA 2020.

[135] The way this aspect affects the seriousness of a violation for the purposes of EU public liability law is further developed in Fink 2018, pp. 44–67.

[136] This is discussed in depth in Fink 2019, pp. 1240–1244.

However, liability does not necessarily have to be exclusive. In addition to the host state, also Frontex or participating Member States may be liable. The CJEU has consistently held that also omissions may give rise to liability, provided there is an obligation to act.[137] Such obligations to act arise from human rights law which requires public authorities to take reasonable measures to protect individuals from foreseeable human rights violations.[138] In addition, Frontex incurs extensive monitoring obligations under its own founding Regulation, including the obligation to guarantee that human rights are complied with.[139] However, since the CJEU's case law regarding liability for omissions is underdeveloped, especially with respect to the causal link requirement, the precise circumstances under which Frontex and participating states incur liability are difficult to predict.[140]

A complicating factor in this respect is the distribution of competences between the CJEU and national courts in relation to establishing liability under EU law. The CJEU is exclusively competent to rule on the liability of EU bodies, including Frontex.[141] The liability of states is adjudicated by the respective national courts. As a consequence, an individual intending to claim compensation for human rights violations suffered during a Frontex operation will have to pre-determine who is responsible for it in order to bring the action in front of the competent court. Where more than one actor is potentially responsible, the applicant will have to lodge as many parallel proceedings as there are potentially responsible actors, something that is not only legally challenging but may also involve a significant financial risk.

7.3.5 Interim Conclusion

Frontex's competence to carry out joint operations hosted by third states on third state territory raises a range of constitutional questions, especially in light of the transfer of command over EU border guards to the third state authority. But it also poses significant human rights risks and judicial protection challenges. Some of these mirror those of Frontex-coordinated joint operations more generally. The strict understanding of what acts are reviewable under the action for annulment (Article 263 TFEU) and who can initiate proceedings is—also here—a major hurdle for individuals who wish to challenge the legality of Frontex's activities. Similarly, the

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[137] CJEU, *Autosalone Ispra Snc v European Atomic Energy Community,* Judgment of the Court of First Instance, 30 November 2005, ECLI:EU:T:2005:432, para 41; CJEU, Case C-146/91 *KYDEP v Council of the European Union and Commission of the European Communities*, Judgment, 15 September 1994, ECLI:EU:C:1994:329, para 58.

[138] This is discussed in detail in Fink 2020, in particular pp. 544–545.

[139] EBCG Regulation, Article 80.

[140] For more detail, see Fink 2020, p. 545; Fink 2019, pp. 1245–1259.

[141] TFEU, Article 268; CJEU, Case T-277/97 *Ismeri Europa Srl v Court of Auditors of the European Communities*, Judgment of the Court of First Instance, 15 June 1999, ECLI:EU:T:1999:124, para 49.

high threshold for liability to arise under the action for damages (Article 340 TFEU) is difficult to meet, especially when several actors closely cooperate.

Other risks are specific to join operations abroad. The 'completeness' of the EU's system of remedies heavily relies on the existence of remedies at the national level as well as the possibility of national courts to request a preliminary ruling from the CJEU under Article 267 TFEU. In the context of third states, however, the control over the kinds of remedies made available at national level is very limited and the preliminary ruling procedure is not available at all. In light of these constraints regarding the judicial avenues available to individuals, it is—in the short term—up to the EU institutions, the Commission in particular, to ensure—and if necessary enforce—that activities during Frontex-coordinated joint operations abroad comply with human rights law. In the long term, the protection of human rights would benefit from the creation of additional possibilities for individuals to access mechanisms to hold Frontex (judicially) to account.

7.4 Conclusion

The EU Treaties set up a system of 'dual vigilance' whereby the Member States and EU institutions as well as individuals are entitled to have the legality of Union measures checked.[142] The examination of the two case studies that form the subject of this contribution demonstrates that this system does not function properly in an area where it is most needed: the fundamental rights sensitive cooperation with third states on migration issues. The stronger 'leg' of this system of dual vigilance that grants Member States and Union institutions direct access to the CJEU as privileged applicants remains unused because the relevant actors are unwilling to take steps in this politically charged subject. The weaker 'leg' of the system that grants individuals access to EU Courts in theory is difficult to make use of in practice due to the many conditions that need to be fulfilled. In short, the able are unwilling to act and the willing are unable.

This is also a result of the fact that the EU system of remedies was not designed with human rights in mind. As the EU continues to expand its activities into ever more human rights sensitive areas, improving access to justice for individuals becomes more urgent. Living up to the promise of a 'complete system of remedies' requires reflection on how to make space for an EU that uses tools that go well beyond law-making and include informal instruments as well as executive action of an operational nature without leaving a gap of judicial protection. In other words, to cater for these forms of instruments and conduct we need to fine-tune existing mechanisms to enable access to the CJEU or even create new ones specifically designed to remedy human rights violations.

[142] CJEEC, Case 26/62 *van Gend en Loos v Nederlandse Administratie der Belastingen*, Judgment, 5 February 1963, ECLI:EU:C:1963:1, p. 13.

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