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## **Infringement proceedings and conditionality in EU funding instruments: addressing the violation of fundamental rights at the external borders of the European Union**

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**ADDRESSING THE VIOLATION OF FUNDAMENTAL  
RIGHTS AT THE EXTERNAL BORDERS OF THE  
EUROPEAN UNION**

**INFRINGEMENT  
PROCEEDINGS AND  
CONDITIONALITY IN EU  
FUNDING INSTRUMENTS**

A study by **Jorrit Rijpma** and **Apostolis Fotiadis**

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# INTRODUCTION

Violations of fundamental rights at the external borders, including pushbacks and violence committed towards third country nationals, have been well-reported and documented by journalists and NGOs. Meanwhile, national courts, the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) have on various occasions established the existence of pushbacks at the external borders of the European Union.

Following an inquiry into the way in which the European Commission monitors and ensures respect for fundamental rights by the Croatian authorities in the context of border management operations supported by EU funds, the Ombudsman agreed with the Commission's argument that it "does not have the authority or means to investigate or directly monitor border activities itself", it also held that the Commission "has the authority and an obligation to ensure that EU funds granted to a Member State are spent in compliance with fundamental rights and EU law, and to insist on safeguards to this end."<sup>1</sup>

This note will look at the Commission's enforcement powers in relation to fundamental rights compliance at the external borders, outlining the context of the infringement proceedings (Part I). It will then look more specifically at the funding instruments available to Member States for the management of immigration, asylum and the external borders, examining the safeguards and possibilities for conditionality contained in this instruments (Part II).

# PART I

# INFRINGEMENT PROCEDURE

## 1. LEGAL BASIS

The infringement procedure, laid down in articles 258-260 of the Treaty on the Functioning of the European Union (TFEU) is one of the direct actions before the CJEU to ensure compliance by the Member States with EU law. It can be brought either at the initiative of the Commission (article 258 TFEU) or another Member State (article 259 TFEU).<sup>2</sup> It is a legal procedure, which is separate from the political procedure of article 7 TEU against a Member State that infringes the EU foundational values.<sup>3</sup> Failure to comply with an infringement finding may result in a new round of infringement proceedings leading to the imposition of a penalty or lump sum payment under article 260 TFEU.<sup>4</sup> On the basis of article 279 TFEU and article 160(3) of the Court's Rules of Procedure, the Court may provide for interim measures to prevent irreparable damage. In recent years, more specifically in the context of the rule of law crisis, the Court has imposed unprecedented daily penalty payments for failure to comply with such interim measures.<sup>5</sup>

## 2. INFRINGEMENT

The European Commission has identified three types of infringements of EU law:

1. A failure to notify the transposition of directives;
2. Non-conformity or non-compliance of national legislation with EU legislation;
3. Incorrect or bad application of EU law by national authorities.<sup>6</sup>

Being archetypes, these infringements may overlap. For instance, in *Commission v Hungary* (Access to International Protection), the Court held that Hungary had infringed EU law through a combination of the national legislation, as well as a "consistent and generalised administrative practice" by the authorities, both of which limited access to international protection as provided under the Asylum Procedures Directive.<sup>7</sup>

## **INFRINGEMENT PROCEEDINGS FOR ADMINISTRATIVE PRACTICE**

Both administrative inaction and action may give rise to infringement proceedings.<sup>8</sup> Even if a Member State's national legislation is fully compliant on paper, they may still fail to comply with Union law, if there is "to some degree, a consistent and general administrative practice" inconsistent with Union law.<sup>9</sup> In *Commission v Ireland* ("Irish Waste"), the Court ruled that nothing prevented the Commission:

"from seeking in parallel a finding that provisions of a directive have not been complied with by reason of the conduct of a Member State's authorities with regard to particular specifically identified situations and a finding that those provisions have not been complied with because its authorities have adopted a general practice contrary thereto, which the particular situations illustrate where appropriate."<sup>10</sup>

Although it did not provide much detail on when a systemic and persistent breach may be assumed, Advocate General Geelhoed referred in his opinion to this case to the scale, duration and seriousness of the infringement, which has subsequently been endorsed in literature.<sup>11</sup>

Infringement actions on the basis of "repeated and persistent breaches" or general practices, allow the Commission to address ongoing violations of EU law, or a series of (smaller) infringements, which together constitute evidence of a systemic failure to comply with EU law in practice. An infringement finding would not merely require a Member States to remedy individual infringements, but radically amend its administrative practice if it wishes to prevent an article 260 TFEU procedure for failure to comply with the Court's judgment.<sup>12</sup>

## **APPLICATION TO FUNDAMENTAL RIGHTS**

The potential to use infringements proceedings to address violations of fundamental rights, specifically in the context of the rule of law crisis, has been recognised for years.<sup>13</sup> However, most cases that have been brought, have relied on the violation of national legislation violating specific provisions of EU (secondary) law. In *Hungary v Commission* (Access to International Protection), it was the first instance of infringement proceedings also addressing administrative conduct in violation of secondary law protecting fundamental rights. The case is particularly relevant in relation to the management of the external borders, which is by its very nature concerned with the exercise of executive power by the Member States in a human rights-sensitive field.

Member States are bound by the rules of the Schengen borders acquis, as well as the rules of the Common European Asylum System, all of which either give expression to fundamental rights obligations, such as the right to asylum, or expressly mandate that they be applied in full compliance with fundamental rights obligations. Moreover, when Member States manage their external borders, they implement EU law and hence act within the scope of EU law. This means that they are bound by the Charter of Fundamental Rights (CFR, article 51 CFR) and general principles of EU law, which include fundamental rights. Member State legislation or administrative action that is in violation of fundamental rights can therefore be subject to infringement proceedings.<sup>14</sup> To the extent that the Charter contains rights that are also protected in the European Convention

on Human Rights (ECHR), these rights shall be interpreted the same way, without preventing Charter from providing more extensive protection (article 52(3) CFR).

Some doubt remains as to whether infringement proceedings could be brought exclusively on the basis of violations of Charter where Member States derogate from EU law, i.e. when they rely on a justification to defend their legislation, as opposed to implement EU law. This could be relevant where a Member State invokes public policy or national security exceptions, either under EU secondary legislation or under articles 4(2) TEU and article 72 TFEU.<sup>15</sup> Prete and Smulders rightly argue there may very well be situations in which a national measure breaches both non-Charter and Charter provisions, with each of those breaches being capable of standing alone.<sup>16</sup> They point out that a violation of the Charter may constitute an “aggravating factor”, adding to the seriousness of the infringement of non-Charter provisions.<sup>17</sup>

Finally, a breach of the principle of sincere cooperation (article 4(3) TFEU) can form the basis for an infringement proceeding, either in combination with a breach of a provision of EU law, or on its own. The principle can become the subject of separate infringement proceedings, when a Member State, in the context of an infringement proceeding, fails to cooperate with the Commission in providing necessary information on the alleged breach.<sup>18</sup> Importantly, the principle has served to bring proceedings against Member States which failed to take adequate steps against non-state actors violating EU law.<sup>19</sup> This could be relevant in the case of private parties operating in border areas, violating migrants’ and asylum seekers’ fundamental rights and preventing access to the safeguards provided by the Union’s border and asylum acquis.

### **3. COMMISSION'S DISCRETION AND ENFORCEMENT PRACTICE**

Although article 17 of the Treaty on European Union (TEU) clearly designates the Commission as guardian of the treaties, and article 258 TFEU arguably carries an obligation to issue a reasoned opinion, i.e. a coherent and detailed statement of reasons which led the Commission to conclude that a Member State has failed to fulfil one of its obligations, it is generally accepted that there is no obligation for the Commission to initiate infringement proceedings.<sup>20</sup> This is generally justified by “factors like political sensitivity, limited human resources and compliance management”.<sup>21</sup> In the words of Advocate General Mengozzi: “the Commission must be allowed to set an order of priority for its action which takes account of the nature and gravity of the infringements and the extent of the effects thereof.”<sup>22</sup>

In the absence of a designated monitoring or investigation service, information on infringements reaches the Commission in different ways, ranging from the media to national ombudspersons, and from European parliamentary questions to complaints from individual businesses and individuals. The Commission is increasingly relying also on technological sources, both in terms of monitoring the implementation of EU law, e.g. through a data bases that automatically flags late implementation, as well as in handling complaints (EU Pilot).<sup>23</sup> Enforcement by database has been criticised for fostering a technocratic enforcement at the expense of infringement that cannot be readily put in to a database, such a violations of fundamental rights.<sup>24</sup> Nearly all DGs organise their handling of complaints, EU pilot procedures and infringement cases by policy sector, legal

instrument or Member State.<sup>25</sup> The Commission is also not prevented from carrying out fact-finding missions in Member States, as in fact it did in relation to the Croatian border.<sup>26</sup> On the one hand, general reporting may indicate areas of concern in which the application of EU law merits closer scrutiny by the Commission. On the other hand, specific complaints can form the basis upon which the Commission requests additional information from the Member State in question.

## **PRIORITY SETTING AND FUNDAMENTAL RIGHTS**

Over the years, the Commission has in a number of communications indicated its priorities for initiating infringement actions.<sup>27</sup> While priorities in policy areas shift, there is a consistent reference to the need to address “systematic and persistent” infringements.<sup>28</sup> The Juncker Commission, as part of its better regulation agenda, advocated a more strategic approach focussing on the most important breaches of EU law affecting the interests of its citizens and business.<sup>29</sup> The Commission also indicated it would address non-compliance of national legislation with EU law, since this could affect “citizens’ ability to assert their rights including their fundamental rights”, as well as cases of persistent incorrect application of EU law.<sup>30</sup> Still, a coherent and principled use of the power to bring infringement proceedings, in particular in the field of fundamental rights, remains lacking.

The lack of references to non-EU citizens who may also benefit from EU legislation is striking. In its 2010 Communication on Fundamental Rights Compliance, the Commission stated that it was “determined to use all the means at its disposal to ensure that the Charter is adhered to by the Member States when they implement Union law”, including infringement procedures.<sup>31</sup> It indicated it would focus on issues of principle or those having a particularly far-reaching negative impact for citizens. In its 2020 Strategy to strengthen the application of the Charter, the Commission reaffirmed it would launch infringement proceedings where appropriate and would “closely monitor” cases of systemic failure.<sup>32</sup> Yet, the annual Commission reports on monitoring the application of EU law, or the accompanying working documents, only contain scarce references to fundamental rights, with perhaps the exception of article 47 CFR on access to Court as central to the rule of law crisis.<sup>33</sup>

A systematic evaluation of the rule of law in Member States takes place on a yearly basis, but the focus thereof is of limited value when addressing fundamental rights violations at the external borders.<sup>34</sup> E.g. in the country of Croatia for 2021 under “Other Institutional Issues related to Checks and Balances”, reference is made to the role of the national ombudsman in investigating pushback at the external borders and the establishment of an independent border monitoring mechanism at national level, but the report itself does not provide the necessary detail to be of use in infringement proceedings.<sup>35</sup>

The same holds true for annual reports on the application of the Charter that have been published since 2010.<sup>36</sup> Even though the Commission has announced that as of 2021 these reports would “look more closely at the Charter’s application in the Member States and will provide further insight to the Commission for the assessment of compliance of national legislation with EU law”, the proposed thematic approach makes it unlikely that they would be able to furnish evidence that may be used in infringement proceedings.<sup>37</sup>



This also goes for the information compiled by the European Union Agency for Fundamental Rights (FRA). Not wanting to undermine the monitoring role of Council of Europe bodies, the Agency's mandate was limited to general reporting. Nonetheless, the line between "a focus on certain thematic issues and a focus on certain situations that occur in specific member states" is a thin one, with thematic reports including national-level examples.<sup>38</sup>

Despite numerous reports monitoring the situation of fundamental rights and the rule of law in Europe, their use is limited due to their general nature and the lack of a link between fundamental rights reporting and a coherent strategy to bring cases of fundamental rights violations within the scope of EU law before the CJEU through the infringement proceeding.

## **THE DISCRETION TO INITIATE INFRINGEMENT PROCEEDINGS**

The CJEU has consistently confirmed that the Commission cannot be forced to initiate infringement proceedings in an action for failure to act.<sup>39</sup> The exercise by the Commission of its discretion has been criticised in the past, amongst others by the Ombudsman in relation to the treatment of individual complaints.<sup>40</sup> In its 2017 Communication on the better application of EU law, the Commission recognised the importance of becoming aware of infringements through complaints and called for a "revision of the existing administrative procedures for the handling of relations with the complainant on these points".<sup>41</sup>

The focus on violations of EU law that hinder access to national courts may be explained from the idea that the infringement procedure complements private enforcement action by individuals before Member State courts, based on the supremacy and direct effect of EU law. However, it must be stressed that the infringement procedure, like the procedure for failure to act (article 265 TFEU), is a distinct form of public enforcement of EU law against the Member States. Its main purpose is not individual redress but ensuring Member State compliance.<sup>42</sup>

Preliminary questions that raise doubt on the compatibility of Member State action in the context of an individual case before a national court, may alert the Commission to infringements of a more general and systemic nature, giving rise to enforcement action. In a similar vein, cases brought before the ECtHR may bring to the attention of the Commission infringements of fundamental rights falling within the scope of EU law. The fact that infringement proceedings have been initiated also does not exclude enforcement action before national courts based on the primacy and direct effect of EU law.<sup>43</sup> However, it would be highly problematic for the Commission to rely solely on individuals to bring such actions before national courts. Not only is the obligation to refer question to the CJEU limited to courts of last instance, meaning it may take a long time before infringements come to the attention of the CJEU,<sup>44</sup> Hofmann has rightly pointed out that private enforcement tends to privilege resourceful claimants, such a commercial actors, over individuals with limited means.<sup>45</sup> Migrants and refugees are by their very nature vulnerable groups that are less likely to have access to national courts to enforce their rights under EU law.

Since 2004, the Commission has brought an ever smaller number of infringement cases. According to Hoffman, this cannot be explained by the Commission focussing its resources on the most pressing cases, but rather that it is withdrawing from centralised enforcement.<sup>46</sup> A similar observation is made by Kelemen and Pavone, who explain this decline by pointing at the politicisation of the infringement procedure, which is accompanied by a more central role of the Commission President and the Secretariat General. This politicisation means that a set of wider political considerations is brought into the equation when deciding to launch infringement proceedings, which are not necessarily connected to the infringement proper.<sup>47</sup>

This being the case, the Parliament's words from 2006 resonate even louder: "If [...] article 226 (now article 258 TFEU) is essentially a political procedure – granting powers but not legal obligations to the Commission – then political control over the guardian of the Treaties on behalf of EU citizens should be exercised by the Parliament or by interested parties themselves.<sup>48</sup> Moreover, the fact that the European Parliament cannot initiate infringement proceedings, does not do justice to the increased powers of the Parliament within the Treaties' institutional structure.<sup>49</sup>

#### **4. EVIDENCE AND STANDARD OF PROOF**

The burden to prove the existence of an infringement of Union law lies with the Commission. Whilst in a preliminary ruling procedure it is for the referring national Court to establish the facts, in an infringement proceeding it is for the CJEU to assess the information put before it by the parties. In a case of non-implementation, incorrect implementation or national legal provisions violating EU law, the argument brought before the Court may be quite straightforward, based on a comparison between the applicable EU norms and the offending national legal provisions. It may prove more difficult to demonstrate an infringement where the action is based on the incorrect application of EU law or a national administrative practice in violation of EU law. The Court itself has held that cases of systemic and persistent administrative practices in violation of EU law require different evidence from cases regarding national provisions.<sup>50</sup>

Because, as was noted above, the Commission does not have a dedicated investigating service, it remains largely dependent on the information provided for by complainants, as well as on the information provided by Member States under their obligation of loyal cooperation.<sup>51</sup> However, even after an infringement procedure has been formally induced with the sending of a letter of formal notice, the role of complainants remains limited. As a general rule, they do not have access to documents exchanged between the Commission and the Member State concerned. During the administrative phase of the infringement proceedings, the Commission and the Member State must engage in a constructive dialogue and aimed at remedying the infringement. The CJEU has held that:

"the disclosure of document during this phase would [...] be likely to change the nature and progress of that procedure, given that, in those circumstances, it could prove even more difficult to begin a process of negotiation and to reach an agreement between the Commission and the Member State concerned putting an end to the infringement alleged, in order to enable European Union law to be respected and to avoid legal proceedings."<sup>52</sup>

This reasoning has been criticised as unduly restricting the right to access to documents, as well the freedom of expression, in cases in which the lack of access hampers NGOs in exercising their function as “watchdog”.<sup>53</sup> An additional reason to allow for more transparency in the pre-litigation phase would be to ensure a form of outside control, allowing for interested parties to bring additional evidence to the table and challenge, if necessary, information put forward by the Member State in question, as such limiting the Commission’s reliance on the cooperation by the Member State.

Once a case on a systemic and persistent practice has entered the judicial phase, the Commission must provide the Court with all necessary information and may not rely on any presumption.<sup>54</sup> It is only once the Commission has put forward sufficient evidence that there is an incorrect application of EU law, the Member State concerned must challenge in substance and in detail the information produced.<sup>55</sup> The Commission must provide “sufficiently documented and detailed proof of the alleged practice”.<sup>56</sup>

### **THIRD PARTY INFORMATION PROVING A CONSISTENT AND GENERALISED PRACTICE**

The hurdle of providing sufficient evidence can be met by detailed complaints revealing substantiated and repeated failures to comply with EU legislation, but also, it is submitted here, by having recourse to information from third parties, such as independent media outlets, non-governmental organisations, as well as bodies and agencies of the European Union, the Council of Europe and United Nations. In addition, the rulings of Member State courts and the ECtHR should be taken into consideration.

In *Commission v Hungary* (Access to International Protection), the Commission attached three UNHCR reports to its application, which were referred to by the Court in its findings.<sup>57</sup> In this regard the CJEU also pointed out the significant role given to the UNHCR in the 1950 Refugee Convention, with which EU asylum law has to comply with.<sup>58</sup> The Court further referred to reports by the Special Representative of the Secretary General of the Council of Europe on Migration and Refugees and, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, also annexed to the Commission’s application.<sup>59</sup>

It is thus beyond doubt that the CJEU accepts reports of these bodies as evidence in infringement proceedings. The Commission has also indicated that for the compilation of its annual report on the application of the Charter, it relies not only on other EU institutions and agencies, but also Member State Expert Groups, as well as United Nations and Council of Europe bodies, judicial networks, civil society organisations, etc.<sup>60</sup> It has also indicated that it does not wish to duplicate work of other bodies, but rather wants to support their work, implying its willingness to rely on the information provided by these bodies. The FRA has itself in its work on fundamental rights at the external borders relied on a wide range of sources, including national ombudspersons.<sup>61</sup> The Commission should, however, not be allowed to hide behind its reliance on external bodies and organisations for the provision of information on possible fundamental rights violations, and instead, it should be required to take an active role in liaising with these entities.<sup>62</sup>

Information provided by governmental and non-governmental actors, was also instrumental in the seminal case of *M.S.S. v Belgium and Greece*, in which the ECtHR found a violation of the prohibition of non-refoulement under article 3 of the ECHR.<sup>63</sup> Paragraph 160 of that judgment contains a long list of reports published by national, international and non-governmental organisations which formed the basis of its finding. The fact that the ECtHR takes this kind of evidence in consideration in its interpretation of the ECHR is relevant in proceedings before the CJEU, given the explicit reference to the ECHR in article 52(3) CFR. By extending the interpretation of the ECHR to the Charter, the case law of the ECtHR, including the use it makes of evidence to interpret the ECHR gain importance.

In the *N.S. and M.E.* case, the Court specifically referred to the ECtHR's judgment in the *M.S.S. v Belgium and Greece* case, and the "regular and unanimous reports of international non-governmental organisations" referred therein.<sup>64</sup> It also held that the availability of such information allowed the Member State to assess fundamental rights risks in relation to other Member States, which can be applied by analogy to the possibility for the CJEU to use such information in the assessment of systemic and persistent administrative practice.<sup>65</sup>

In *Aranyosi and Căldăraru*, a case in which the question was raised whether Member States could surrender individuals under the European Arrest Warrant when the prison conditions in the requesting country do not meet fundamental rights standards, the Court held that the executing judicial authorities should, initially rely on "objective, reliable, specific and properly updated information" on detention conditions.<sup>66</sup> This information could be obtained from, inter alia, judgments of international courts, such as judgments of the ECtHR, judgments of courts of the issuing Member State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN, which again proves to show the importance attributed to such information by the CJEU.<sup>67</sup>

## **INFORMATION FROM FRONTEX AND EU MONITORING MECHANISMS**

The Commission has increasingly resorted to alternative form of enforcement and compliance, which operate in parallel with infringement procedures.<sup>68</sup> In the context of the management of the external borders two of these mechanisms deserve special attention as they may serve as additional sources of information in the context of infringement proceedings. These are the Schengen Evaluation Mechanism and the Frontex Vulnerability Assessment Mechanism.

Under the Schengen Information Mechanism, the European Commission, in close cooperation with the Member States, and with input from Frontex, evaluates the compliance with the Schengen acquis, including the rules on external border management, of both Schengen members and Schengen candidate countries.<sup>69</sup> It does so in principle on a five-yearly basis. The mechanism in its current form is based on a regulation from 2013, but a proposal is pending to strengthen the

mechanism, in particular by ensuring a quicker follow up to recommendations following from the evaluations and horizontally including fundamental rights into the evaluation cycle.<sup>70</sup> Also here, the importance of reports by other Union bodies, as well as third parties is evident. An explicit reference is made to “[e]vidence from independent monitoring mechanisms or by relevant third parties at their own initiative such as ombudspersons, authorities monitoring the respect of fundamental rights, non-governmental and international organisations” which should feed into the evaluations.<sup>71</sup> Evaluation reports should identify deficiencies including fundamental right violations, and recommendations on how to remedy these.<sup>72</sup> Moreover, the Commission should have the possibility to organise revisits and verifications visits.<sup>73</sup>

The Vulnerability Assessment Mechanism under the responsibility of the European Border and Coast Guard Agency (Frontex) assesses the capacity and preparedness of Member States’ border management systems on a yearly basis, relying on the information provided by the Member States themselves, as well as the respective Frontex liaison officers posted to the Member State.<sup>74</sup> Frontex’s Fundamental Rights Strategy states that “the qualitative and quantitative aspects of a Vulnerability Assessment allow fundamental rights-related information to be factored in, and an assessment of the availability and effectiveness of mechanisms and procedures for the identification and referral of vulnerable persons and those who are in need of or wish to apply for international protection.”<sup>75</sup> It is, however, unclear to what extent this is systematically done.

A Member State’s refusal to follow up on the recommendations flowing from either mechanism could as an ultimate consequence result in the reintroduction of internal border controls under article 29 of the Schengen Borders Code.<sup>76</sup> However, neither of these mechanisms prejudices the enforcement powers of the Commission and, in fact, both could form a powerful source of information for the Commission in the framework of infringement proceedings for violations of fundamental rights at the external borders. Even if they fail to fulfil this role at the moment, a revised Schengen Evaluation Mechanism, and due attention for fundamental rights in the Vulnerability Assessment Mechanism, could remedy for the Commission’s lack of investigating powers. Importantly, the mechanisms are meant to reinforce one another, and the Commission and the Agency must share with each other in a regular, secured and timely manner all information related to the results of evaluation mechanisms.<sup>77</sup>

Finally, the monitoring role of Frontex’s Consultative Forum, Fundamental Rights Officer and Fundamental Rights monitors should be mentioned as a source of information on the fundamental rights violations at the external borders of the Member States.<sup>78</sup> All have the power to conduct on-site-visits in relation the Agency’s activities in the Member States.

The Fundamental Rights Officer is responsible for the handling of complaints under the Agency’s individual complaints mechanism.<sup>79</sup> He or she is therefore well-versed in assessing the on-the-ground situation at the external borders and should make this knowledge available when so requested by the Commission.<sup>80</sup> The same goes for Frontex liaison officers, who have as their tasks to “contribute to promoting the application of the Union acquis relating to the management of the external borders and return, including with regard to respect for fundamental rights and to cooperate with the fundamental rights officer to this effect.”<sup>81</sup> Finally, all participating border guards are held to report violations of fundamental rights in the context of joint operational activity must be reported, under the Serious Incident Reporting Standard Operational Procedure.<sup>82</sup>

## **PART II**

# FUNDAMENTAL RIGHTS CONDITIONALITY IN EU MIGRATION FUNDING INSTRUMENTS

Apart from the enforcement of EU law through infringement procedures, the European Commission has to ensure that activities financed with EU migration funds comply with the rights and principles enshrined in the Union acquis, the Charter of Fundamental Rights and other international obligations. These obligations are embedded in several regulations governing the implementation of EU funding in the field of asylum and migration. The following paragraphs will describe the legal provisions that enable the Commission to impose fundamental rights conditionality through EU funding, the efforts to impose such conditionality in the field of migration so far, and the monitoring and evaluation mechanisms available to the Commission to enforce compliance through possible adjustment or annulation of EU funding.

### **LEGAL PROVISIONS ENABLING CONDITIONALITY**

The Common Provisions Regulation, which lays down the common provisions for seven shared management funds in the framework of the Multiannual Financial Framework (MFF), including the Asylum and Migration Fund (AMIF), the Internal Security Fund (ISF) and the Border Management and Visa Instrument (BMVI), enables the Commission to introduce conditionality between fundamental rights compliance and funding. Furthermore, the regulations on the AMIF, ISF and BMVI include specific provisions that strongly link effective implementation of national programs to full compliance with fundamental rights.

### **Common Provisions Regulation (CPR)**

Article 15(1) and Annex III of the Common Provisions Regulation institute the effective application and implementation of the Charter of Fundamental Rights as a so-called 'horizontal enabling condition', including all border management and asylum systems related funds. In accordance with Article 15(6), non-fulfilment could lead to a decision not to reimburse expenditure.

### **Border Management and Visa Instrument (BMVI)**

According to Article 4 of the BMVI Regulation, actions funded under BMVI have to be implemented in full compliance with the rights and principles enshrined in the Union *acquis*, the Charter and with the Union's international obligations as regards fundamental rights, in particular by ensuring compliance with the principles of non-discrimination and non-refoulement.

### **Asylum and Migration Fund (AMIF)**

The AMIF Regulation explicitly states that Member States and the Commission have to take appropriate steps to exclude any form of discrimination prohibited by Article 21 of the Charter during the preparation, implementation, monitoring, reporting and evaluation of programmes and projects supported under the Fund.<sup>83</sup> In addition, Article 21(2) states that Member State have to comply with the relevant Union *acquis* and the Charter when they use the fund to finance operating support.

### **Internal Security Fund (ISF)**

According to Article 4 of the ISF Regulation, actions funded under the instrument have to be implemented with full respect for fundamental rights and human dignity. In particular, these actions have to comply with the Charter, with Union data protection law and with the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). When implementing actions under the Fund, wherever possible, Member States must pay specific attention to assisting and protecting vulnerable persons, in particular children and unaccompanied minors.

The BMVI, AMIF and ISF Regulations all state that entities are only eligible to receive funding if they ensure that the actions in which they participate comply with the principles enshrined in the Charter and contribute to the achievement of the objectives of the Fund. These objectives include full respect for the international obligations arising from the international instruments to which the Union and Member States are party.<sup>84</sup>

## **CONDITIONALITY IN PRACTICE**

The discussion about the introduction of conditionality criteria in EU migration funds gathered traction when the Commission started bilateral discussions with Croatia and Greece about the establishment of a mechanism to monitor fundamental rights compliance at EU external borders. As of 2019, the Commission engaged in a dialogue with the Croatian authorities on reports of pushbacks, which gradually evolved into a negotiation for introducing a national independent border monitoring mechanism. A visit of the Commission and Fundamental Rights Agency officials to Croatia in November 2020 resulted in the establishment of such a mechanism. The entry into force of this mechanism was announced in June 2021.<sup>85</sup>

On the 18th of June 2021, the European Commission signed an agreement with the Croatian Interior Ministry to provide €14.4 million in emergency assistance to Croatia. Under this third grant, €116,000 was allocated to activities of technical monitoring of border control and €320,000 supports the functioning of the Independent Monitoring Mechanism, which was set up on 8 June 2021.<sup>86</sup> Responding to a European Ombudsman's inquiry in the context of "how the European Commission ensures that the Croatian authorities respect fundamental rights in the context of border management operations financed by EU funds", the European Commission informed that in the agreement concluded with Croatia in summer 2021 "the Commission did include conditionality. Specifically, funding was granted after an independent monitoring mechanism was put in place."<sup>87</sup> This has been an important change in the European Commission's policy regarding the conditionality of funding border management, as until then EMAS grants for the reinforcement of border management by Croatia "did not include any conditionality".<sup>88</sup>

Meanwhile, the Commission and the Greek government had entered similar discussions during the summer of 2021. At the end of August 2021, media reports<sup>89</sup> revealed that the Commission had refused the extension of an emergency budget line (EMAS/ISF)<sup>90</sup> to finance border control operations at the Aegean Sea to the Hellenic Coast Guard. Approval of the extension was conditioned on the instalment of an independent border monitoring mechanism. Responding to this information the Home Affairs Commissioner has publicly commented, "Greece has requested additional funds for border management, especially in the Aegean. We have said that such a payment should be linked to the establishment of a fundamental rights monitoring mechanism. I expect progress on this issue."<sup>91</sup> This has been so far the most explicit introduction of conditionality as a pressure tool towards a Member State by the Commission.

Greek authorities circumvented the condition to establish an independent mechanism by awarding the border monitoring mechanism's mandate to an existing institution, the National Transparency Authority, despite concerns being raised by civil society actors and the media regarding lack of transparency and independence from the executive.<sup>92</sup> Despite this development, the emergency funding request has been denied on technical grounds. The Commission stated that "Following its assessment, the Commission rejected this request due to limited budgetary resources under the 2014-2020 Emergency Assistance envelope and the need to prioritise emergency support assistance to Member States affected by the situation with Belarus in 2021. The Commission understands that the Greek authorities are exploring possible funding options under the 2021-2027 Multiannual Financial Framework and the Border Management and Visa Policy Instrument National Programme".<sup>93</sup>

The application of conditionality in the Croatian and Greek cases provoked discussions whether existing legislation which regulates EU financing of border management allows and facilitates the application of such conditionality. In a recent response to questions from the European Parliament's committee on Civil Liberties, Justice and Home Affairs (LIBE), Commissioner Johansson stated:

"While the non-fulfilment of the horizontal enabling condition on the Charter of Fundamental Rights does not represent per se a reason for not adopting the programme, the failure to fulfil the requirement of that condition will lead to non-reimbursement by the Commission of the expenditure submitted by the Member State concerned".<sup>94</sup>



In this statement, the Commissioner confirms that the Commission carries the obligation to withdraw funding in case a Member State is not complying with fundamental rights. This raises the question why the numerous reports of fundamental rights violations - including reports on violations that took place in EU-funded border operations<sup>95</sup> - did not yet lead to the suspension or withdrawal of funds, and on what criteria the Commission bases its assessment of fundamental rights compliance.

## **FULFILMENT OF THE CONDITIONALITY CRITERIA - MONITORING, REVIEW AND EVALUATION MECHANISMS**

Even though the Commission has the possibility to make EU funds conditional on the fulfilment of fundamental rights criteria, the legislator avoids spelling out the exact criteria under which compliance with fundamental rights is not fulfilled. Thus, the Commission has the discretion to assess compliance with fundamental rights on a case-by-case basis and to define the exact procedural framework. In response to the LIBE committee's question on which measures the Commission takes to ensure that the programmes in Member States supported by these Funds comply with fundamental rights, Commissioner Johansson answered:

*"The Commission's assessment is based on the analysis of the Member States' self-assessment of fulfilment, in particular as regards the existence of mechanisms and arrangements able to address any substantiated potential risks that might jeopardise the ability of the Member State to effectively ensure compliance with the Charter in the Funds' management and implementation. To that end, the Commission is also taking due account of different sources of information, notably to establish whether there are material and systemic breaches of the Charter, such as infringement proceedings, CJEU judgments, well-substantiated complaints underpinned by evidence and national court cases".<sup>96</sup>*

As already mentioned in Part I of this study, despite numerous well-substantiated reports from both national and international organisations, the Commission has so far only initiated one infringement procedure based on administrative conduct in violation of secondary law protecting fundamental rights. Thus, in order to use infringement proceedings as a source of information, the Commission should decide to launch proceedings. It is furthermore unclear what the Commission accepts as "well-substantiated complaints underpinned by evidence". More clarification on the criteria for reports to be taken into consideration would ensure that effective monitoring can take place and would enhance transparency of the decision-making process, which is also necessary for the European Parliament to perform its scrutinising role over the EU funds.

The Commission states that its assessment is based on the analysis of the Member States themselves. Yet, the regulations entail criteria for the mechanisms that must be in place in order to ensure that funds are implemented in compliance with the Charter. These criteria and several other instruments enshrined in the regulations which can be used for the assessment of fundamental rights compliance will be described in the following paragraphs.

## **MONITORING COMMITTEES**

In order to examine the performance and implementation of programmes funded by the EU, Member States are obliged to set up “Monitoring Committees”. Alongside the implementation of programmes, monitoring committees are tasked to examine “the fulfilment of enabling conditions and their application throughout the programming period”.<sup>97</sup> This includes monitoring of the effective implementation of the Charter of Fundamental Rights. In this regard, the Annex of the Common Provisions Regulation states: “effective mechanisms have to be in place to ensure compliance with the Charter of Fundamental Rights of the European Union”. These mechanisms should include “arrangements” to ensure compliance of the programmes supported by the Funds and their implementation with the relevant provisions of the Charter.<sup>98</sup>

In case of non-compliance of operations supported by the Funds, reporting arrangements should be in place. These reporting arrangements must ensure the effective examination of complaints concerning the Funds. Upon request by the Commission, Member States shall examine complaints that fall within the scope of their programmes and inform the Commission of the results of these examinations.<sup>99</sup>

Regarding the membership of Monitoring Committees, Member States have to ensure a balanced membership, which can include:

- regional, local, urban and other public authorities;
- economic and social partners;
- relevant bodies representing civil society, such as environmental partners, non-governmental organisations, and bodies responsible for promoting social inclusion, fundamental rights, rights of persons with disabilities, gender equality and non-discrimination;
- research organisations and universities, where appropriate.

According to Article 39(2) of the CPR, representatives of the Commission have to participate in the work of the monitoring committee in a monitoring and an advisory capacity. For the AMIF, the ISF and the BMVI, relevant decentralised agencies may also participate in the work of the monitoring committee. In addition, according to Article 39(1) of the CPR, non-members can be allowed to participate in the work of the monitoring committee. This provision could open the way for national independent border monitoring officials to contribute to the work of the monitoring committees and facilitate its monitoring capabilities. In cases where the border monitoring mechanism mandate is carried by public authorities like the National Ombudspersons or similar entities, the work of the Monitoring Committee and the independent border monitoring mechanisms could complement each other.

## **APPLICATION OF CONDITIONALITY: EVALUATIONS, MID-TERM REVIEWS AND PERFORMANCE REPORTS**

There are a number of procedures foreseen in the seven-year cycle of the funds that can enable the application of conditionality based on the non-fulfilment of enabling conditions (such as violations of the Charter of Fundamental Rights).

Firstly, the IBMF, ISF and AMIF regulations prescribe that by 2023 Member States shall submit annual performance reports. These performance reports must be approved by the Monitoring Committees and should include information on the fulfilment of the applicable enabling conditions and their application throughout the programming period. According to the regulations, it is essential that information on compliance with fundamental rights should be included.<sup>100</sup>

Secondly, according to Article 44 of the Common Provisions Regulation, Member States have a duty to carry out evaluations to examine the effectiveness, efficiency, relevance, coherence and Union added value of the AMIF, ISF and BMVI. Member States have to ensure that these evaluations are entrusted to internal or external experts who are functionally independent. In addition, according to Article 45 of the Common Provisions Regulation, the Commission must carry out a similar evaluation of these funds by the end of 2024.

For the AMIF, the ISF and the BMVI, a mid-term evaluation has to be completed by 31 March 2024. After this mid-term review, the Commission will allocate additional funds for the adjustment of the allocations to the Member States' programmes. This entails EUR 1 045 000 000 under AMIF, EUR 225 000 000 for the ISF and 611 000 000 for BMVI. These additional allocations could be made conditional on compliance with the horizontal enabling condition (effective implementation of the Charter of Fundamental Rights) as provided for in the Common Provisions Regulation.

# CONCLUSIONS AND RECOMMENDATIONS

Notwithstanding assurances by the Commission that it will use its enforcement powers where a Member State has a systemic failure in applying the Charter when implementing EU law, **there appears to be no systematic monitoring in place or systematic use of the infringement procedure in the field of fundamental rights violations by Member States in the context of external border management.** Existing monitoring mechanisms are of a too general nature to be able to identify the specific violations required in infringement proceedings. This may explain why there has been only one case brought before the Court in relation to Member States' conduct at the external borders, which was based in part on national legislation, notwithstanding the well-documented and widespread human rights abuses, including pushbacks, at the external borders. These violations are the result of a disregard for the provisions of the EU's migration and asylum acquis and the provision of the Charter of Fundamental Rights, sometimes in national law, but more often in practice.

Although the discretion of the Commission to initiate and pursue infringement proceedings is well-established and relatively undisputed, **the European Parliament should exercise more political pressure on the European Commission to proactively gather information on violations of fundamental rights at the external borders, using a wide range of sources, and to bring infringement proceedings on the basis of repeated and persistent practices.** In its role as co-legislator, it should aim to include mandatory monitoring mechanisms in secondary legislation, both at national and EU level, with accompanying safeguards for their independence, mandate and resources. The introduction of such mechanisms could be linked to the introduction of conditionality requirements in EU funding (see below). Currently, only the proposal for a Screening Regulation, provides for the establishment on national monitoring mechanisms.<sup>101</sup> In its recent ruling on the validity of the regulation introducing Rule of Law Conditionality, the CJEU explicitly held that it is permissible for the EU legislature to establish in secondary legislation, other procedures relating to the values contained in Article 2 TEU, which include the rule of law, provided that those procedures are different, in terms of both their aim and their subject matter, from the procedure laid down in Article 7 TEU. The same reasoning should apply in relation to the compliance with fundamental rights in the field of external border management and the infringement procedure.<sup>102</sup>

**Ultimately, and within the Framework of the Conference on the Future of Europe, it could advocate for a bigger role for the Parliament in the enforcement of EU law.** Private enforcement, when the violations of EU law concern vulnerable people, does not form a viable alternative to Commission enforcement.

**More transparency within the pre-litigation phase of the infringement proceedings could help the Commission in gathering the necessary evidence as to the existence of a breach.** More generally, the Commission may and should involve case law of European and national courts, as well as information gathered by UN bodies, NGOs, national human rights bodies and ombudspersons in its assessments of compliance by a Member State. Specific attention should be paid to the potential of information gathered under two EU monitoring mechanisms: the Frontex' vulnerability assessment mechanism and the Schengen Evaluation Mechanism. With the latter, now adopted in its proposed reform. Moreover, and although limited to joint operational activity, Frontex's fundamental rights actors (the Fundamental Rights Officer, the Consultative Forum and the Fundamental Rights Monitors) should be able to provide additional insight on the fundamental rights situation at the external borders.

**Apart from infringement procedures, the Commission has the possibility to use its funding instruments to ensure that Member States comply with EU law in their operations at the external border, which are (in part) funded with EU resources.** Monitoring Committees should pro-actively assess whether the programmes of Member States comply with the Charter of Fundamental Rights. The regulation enables Member States to include independent experts with sufficient expertise in this assessment. EU decentralised agencies and actors that already execute a role in the monitoring of fundamental rights at EU borders can further facilitate the work of the committee so that the funding requirements are effectively fulfilled. The Commission should use this information and include it in its mid-term review of the AMIF, the ISF and the IBMV. In case of **systemic non-compliance, the Commission can consider making the allocation of additional funds conditional on fulfilment of the fundamental rights related criteria.**

#### **RECOMMENDATIONS:**

- There are currently three situations in which the Commission, notwithstanding its limited investigative powers, would have had at its disposal the necessary information to start infringement proceedings if it were willing to do so. Not to act upon this information may be within the Commission's discretionary prerogative under the infringement procedure, but is unworthy of a Union that purports to respect and promote fundamental rights and the rule of law, in light of the abundantly available and detailed information to the contrary.
  - o First, the situation occurred late 2020 at the Belarussian borders in response to the "instrumentalization" of migrants by Belarussian dictator Lukashenko. In that case, it would suffice to request detailed information from Latvia, Lithuania and Poland on their response, both in law and practice, to the situation and combine a legal analysis of the national provisions with the manifold reports from independent media and human rights organisations about the closure of their external borders, the interim measures granted by the ECtHR, and the public statement of Frontex officials following serious incident reports.<sup>103</sup>

- o Second and third, in relation to pushbacks at the Croatian land border and at the Greek sea border, it is submitted that there is sufficient evidence to prove a consistent and generalised practice of national (border) authorities infringing EU law, consisting of a pattern of violent behaviour and pushbacks against migrants. There is, in fact, an overwhelming amount of information from third party sources on the structural disrespect for key provisions of the EU asylum acquis, as well the fundamental rights protected in the Charter. This includes information of the type referred to in the case law of the ECtHR, including its numerous interim measures, and the CJEU, such as judgments by national and European courts, reports by UN and Council of Europe bodies, NGO reports, but also independent media coverage.<sup>104</sup>
- The allocation of the additional funds available under the AMIF, the ISF and the BMVI for the adjustment of the allocations to the Member States' programmes must be made conditional on the fulfilment of effective implementation of the Charter of Fundamental Rights as provided for in the Common Provisions Regulation. The mid-term review, to be completed by 31 March 2024, has to include a sufficient assessment of the fundamental rights compliance of Member States programmes so far and set recommendations to Member States whose administrative practice poses a risk to the fulfilment of this condition.
- Bodies that are already tasked with monitoring of fundamental rights in the field of asylum could facilitate the capabilities of the Monitoring Committees to monitor the application of the Charter of Fundamental Rights in the implementation of EU funds. The inclusion of non-governmental organisations, bodies responsible for promoting fundamental rights and research entities in the Monitoring Committee can lead to more effective monitoring. It could also be possible for decentralised agencies such as the Fundamental Rights Agency (FRA) to contribute to the work of the committees. Lastly, the work of the Monitoring Committee and the independent border monitoring mechanisms which are envisaged in the Screening Regulation proposal could potentially complement each other, once the latter are established.
- The annual performance reports which Member States will submit to the Monitoring Committees by the end of 2023 should include sufficient information on the fundamental rights compliance of the Member States' activities and outline the reporting arrangements which are in place in case of (reports of) non-compliance. External and independent experts with sufficient expertise on fundamental rights should be included in the reports.

## ENDNOTES

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- 3 See also Opinion Advocate General Tanchev of 11 April 2011 in Case C-619/18, *Commission v Poland* (Supreme Court), EU:C:2019:325, paras 48-51.
- 4 See the Communication from the Commission, *The Application of Article 228 of the EC Treaty*, SEC (2005) 1658, of 20 September 2006, and the Communication from the Commission, *The Implementation of Article 260 (3) of the Treaty*, OJ 2011, C12/1 of 15 January 2011. For the failure to notify measures transposing a directive adopted under a legislative procedure a lump sum or penalty payment may already be imposed in the same judgment finding the infringement under art. 258 TFEU. For other infringements a second round of proceedings will be required, although this may be difficult if compliance has meanwhile become impossible. See *Joined Cases C-715/17, C-718/17 and C-719/17, Commission v Poland and Others (Relocation)* of 2 April 2020, EU:C:2020:257, in which the emergency measures that these Member States refused to comply with had already expired at the time of the Court's judgment.
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- 86 Croatia's New Border-Monitoring Mechanism Seen as 'Toothless' and 'Ineffective' <https://balkaninsight.com/2021/10/12/croatias-new-border-monitoring-mechanism-seen-as-toothless-and-ineffective/>
- 87 Report on the inspection of documents and meeting on how the European Commission ensures that the Croatian authorities respect fundamental rights in the context of border management operations financed by EU funds <https://www.ombudsman.europa.eu/en/doc/inspection-report/en/148061>
- 88 Report on the inspection of documents and meeting on how the European Commission ensures that the Croatian authorities respect fundamental rights in the context of border management operations financed by EU funds <https://www.ombudsman.europa.eu/en/doc/inspection-report/en/148061>
- 89 <https://www.kathimerini.gr/opinion/561475783/i-kampoyl-dichazei-tis-vryxelles/>

- 90 The requested amount has been 15,8 million euros and the request had been placed by the Ministry of Maritime Affairs since March 2021. Consultations between the EC and the Greek government on establishment of a border monitoring mechanism have taken place since June 2021.
- 91 [https://www.spiegel.de/consent-a-?targetUrl=https%3A%2F%2Fwww.spiegel.de%2Fausland%2Fpush-backs-von-fluechtlingen-eu-kommission-kuerzt-griechischer-kuerstenwache-das-geld-a-028e8f42-cb75-41b9-97dd-bc28add93967%3Fsara\\_ecid%3Dsoci\\_upd\\_KsBF0AFjff0DZCxpPYDCQg01dEM-ph&ref=https%3A%2F%2Ft.co%2F](https://www.spiegel.de/consent-a-?targetUrl=https%3A%2F%2Fwww.spiegel.de%2Fausland%2Fpush-backs-von-fluechtlingen-eu-kommission-kuerzt-griechischer-kuerstenwache-das-geld-a-028e8f42-cb75-41b9-97dd-bc28add93967%3Fsara_ecid%3Dsoci_upd_KsBF0AFjff0DZCxpPYDCQg01dEM-ph&ref=https%3A%2F%2Ft.co%2F)
- 92 The findings of the National Transparency Authority audit  
<https://metadras.org/en/the-findings-of-the-national-transparency-authority-audit/>
- 93 Email exchange with European Commission December 22nd.
- 94 Ares(2022)1106205, European Commission, 24th of May 2022
- 95 <https://www.lighthousereports.nl/investigation/unmasking-europes-shadow-armies/>
- 96 Ares(2022)1106205, European Commission, 24th of May 2022
- 97 Common Provisions Regulation, Article 38
- 98 Common Provisions Regulation, Article 15(1), Annex III - Horizontal Enabling Conditions.
- 99 Common Provisions Regulation, Article 69(7)
- 100 Regulation (EU) 2021/1147 of the European Parliament and of the Council of 7 July 2021 establishing the Asylum, Migration and Integration Fund, Article 35(2), f.
- 101 Proposal for a Regulation of the Parliament and Council introducing a screening of third country nationals at the external borders ..., COM(2020) 612 final, recital 23 and art. 7.
- 102 Case C-156/21 of 16 February 2022, Hungary v Parliament and Council, EU:C:2022:97, para. 168.
- 103 Joint Statement of the European Council on Refugees and Exiles (ECRE) and the legal analysis of the domestic legislation of Poland, Latvia and Lithuania, referred to in that statement, at: <https://ecre.org/joint-statement-call-on-the-eu-restore-rights-and-values-at-europes-borders/> (last visited 1 March 2022); ECtHR, interim measures granted on 25 August 2021 in cases R.A. and Others v Poland (application no. 42120/21) and H.M.M. and Others v Latvia (application no. 42165/21). Note that already prior to these recent “border crisis”, Poland had been found to have violated the ECHR for pushbacks at the Belarussian border in ECtHR, M.K. e.a. v Poland, Application Nos 40503/17, 42902/17, 43643/17, judgment of 23 July 2020 .
- 104 By means of illustration, only a non-exhaustive selection can be given here. General: The sources referred to in the Final Report of the Frontex Scrutiny Working Group of the LIBE Committee on the fact-finding investigation on Frontex concerning alleged fundamental rights violations, 14 July 2021, pp. 3-4; Refugee Rights Europe, Pushbacks and Rights Violations at Europe’s Borders – The State of Play in 2020, at: [pushbacks-and-rights-violations-at-europes-borders.pdf](https://endpushbacks.com/pushbacks-and-rights-violations-at-europes-borders.pdf) (endpushbacks.com) (last visited 1 March 2022); UN Human Rights Council, Report on means to address the human rights impact of pushbacks of migrants on land and at sea, Special Rapporteur on the human rights of migrants (F. González Morales), 2021.
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