Chapter 4: Attribution of Conduct to the EU

The last two chapters of this study test the argument developed in the previous chapters and confirm that the action for damages functions as a makeshift fundamental rights remedy against the EU. The present chapter discusses questions of attribution before the following chapter turns to the issue of causation. Specifically, this chapter seeks to answer under which conditions administrative conduct that is performed by staff working for Frontex or the EUAA in EU hotspots, i.e. as members of the so-called migration management support teams (MMST), is to be attributed to the agency themselves.[1] To do so, the first section provides a detailed reconstruction of the CJEU's emerging attribution doctrine (1). This will show that two criteria are decisive: the external appearance of the relevant conduct towards a reasonable addressee and the internal competences (2). Based on these two criteria, the last section shows that and why the administrative conduct of MMST staff – including deployed, statutory and contracted staff – is to be attributed to the EUAA and Frontex, respectively. As a consequence, fundamental rights violations that are inherent in the MMST members' conduct can be challenged via the action for damages under Art. 340 para 2 TFEU (3).

1 Emerging Doctrine on Attribution

As mentioned above, the CJEU has not yet explicitly pronounced itself on the specific matter of attribution to agencies. Existing scholarly analysis remains limited to regular Frontex teams deployed for the purpose of border protection. Concerning these, most contributions conclude, albeit with varying arguments, that the conduct of deployed staff is attributable to the host member state or, under specific circumstances, to the home member state.[2]

1 As explained in previous chapter, this question arises because MMSTs consist of staff deployed by member states, statutory staff of the agencies and contracted staff.

2 See Matthias Lehnert, *Frontex und operative Maßnahmen an den europäischen Außengrenzen. Verwaltungskooperation – materielle Rechtsgrundlagen – institutionelle Kon-*

The specific case of MMSTs deployed for the purpose of support in EU hotspots, however, has not been discussed yet.[3] Therefore, the present argument is developed on the basis of the CJEU's general doctrine on attribution as it currently stands. Considering the scarcity of the jurisprudence on this matter, the analysis necessarily remains tentative.

The CJEU has addressed the question of attribution in two different contexts. First, attribution became pertinent in the context of alleged ultra vires conduct. In judgements such as *Sayag v Leduc*[4] and *A.G.M.-COS-MET,*[5] the Court had to decide whether the relevant conduct was to be considered as an act of a Union body or whether it was ultra vires and, hence, a private act of the staff in question. Second, attribution was discussed in the context of the conclusion of international agreements or memoranda of understanding. In judgements such as *ERTA*[6] and the orders in *NF et al. v Council,* the Court had to decide whether the relevant agreement was concluded by the Union or by the member states, which depended on whether it was the Council or the member states who had acted. Similarly, in judgements such as *Bourdouvali,*[7] the Court had to decide whether the conduct in the context of the sovereign debt crisis was attributable to the Eurogroup or to the European Stability Mechanism (ESM), which again depended on to whom the relevant conduct was to be attributed.

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trolle, Nomos 2014, p. 319–332 arguing on the basis of the German concept of 'Organleihe'; Anna Mrozek, *Grenzschutz als supranationale Aufgabe. Der Schutz der europäischen Außengrenzen unter der Beteiligung der Bundespolizei*, Nomos 2013, p. 244–245 applying the criteria of Art. 263 TFEU; Roberta Mungianu, *Frontex and Non-Refoulement. The International Responsibility of the EU*, Cambridge University Press 2016, p. 68–87 arguing on the basis of DARS/DARIO (see chapter 3, fn. 358).

3 To the best knowledge of the author. Melanie Fink, *Frontex and Human Rights. Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law*, Oxford University Press 2018, p. 35 makes explicit that she does not discuss the specific case of MMST.

4 CJEU, Court, judgement of 10 July 1969, Claude Sayag et al v Jean-Pierre Leduc et al, 9/69.

5 CJEU, Court, judgement of 17 April 2007, A.G.M.-COS-MET Srl v Suomen valtio, Tarmo Lehtinen et al, C-470/03.

6 CJEU, Court, judgement of 31 March 1971, Commission of the European Communities v Council (ERTA), 22/70.

7 CJEU, General Court (Fourth Chamber), judgement of 13 July 2018, Eleni Pavlikka Bourdouvali v Council of the European Union, European Commission, European Central Bank, Euro Group and European Union, T-786/14.

1.1 Public Conduct vs. Ultra Vires Conduct

In the case *Sayag v Leduc*, the question which is of interest here was whether certain conduct by Mr Claude Sayag, an official of the European Atomic Energy Community, was attributable to the Community or whether it was his private act because he had acted ultra vires. Mr Sayag, while driving his private car from Brussels to Mol, had caused an accident in which two persons were injured. As Mr Sayag was in possession of a travel order which provided for the use of his own car, he argued that he had acted in performance of his professional duties and that, accordingly, the Community was liable for the damage resulting from the accident.[8]

The CJEU found that attribution to the Union presupposes an internal and direct relationship between the conduct and the tasks entrusted to the institution so that the conduct appears as a necessary extension of those tasks.[9] While the preconditions for such an internal and direct relationship are not explicitly clarified, it becomes apparent from the Court's reasoning that the decisive factor is the internal administrative structure. In the case of Mr Sayag, the CJEU concluded that a direct relationship did not exist because the travel order was merely intended to enable reimbursement of travel expenses and that the conduct in question could thus not be attributed to the Union.[10] The court hence considered the conduct of EU staff attributable to the Union only insofar as it qualifies as a performance of their duties as defined in the relevant institution's competences.

The facts in *A.G.M.-COS.MET* were similar. Here, the case concerned a dispute between AGM, an Italian company selling vehicle lifts, and Mr Lehtinen, an official of the Finnish Ministry of Social Affairs and Health. Mr Lehtinen had publicly expressed his opinion that AGM's products did not meet the safety standards required by EU legislation. While the head of the Ministry had also publicly made clear that these were Mr Lehtinen's personal views, the AGM sought damages not only from Mr Lehtinen but also from the Finnish State. The national court referred several questions to the CJEU, including whether Mr Lehtinen's statements were attributable to Finland.[11]

8 CJEU, Court, judgement of 10 July 1969, Sayag v Leduc, 9/69 (fn. 4), p. 331.
9 Ibid., para 7–8.
10 Ibid., para 9–12.
11 CJEU, Court, judgement of 17 April 2007, A.G.M.-COS-MET, C-470/03 (fn. 5), para 40.

Remarkably, and despite the similarity in terms of facts, the CJEU did not rely on its previous jurisprudence. Instead, it considered decisive whether the persons to whom the statements were addressed could reasonably suppose, in the given context, that the official expressed the relevant positions with the authority of his office.[12] In this assessment, the CJEU took into account, inter alia, whether the official letterhead of the competent institution was used, whether TV interviews were given on the institution's premises, whether the staff themselves qualified their statements as personal or as official, and whether the institution publicly distanced itself from the relevant statement.[13] In sum, the CJEU hence held that attribution depends on how the statements in question may have been perceived by a reasonable addressee.

With a view to applying these findings to the case of the agencies operating in EU hotspots, two points require clarification. First, the pertinence of the judgement in *A.G.M.-COS.MET* appears to require justification because that case concerned attribution of conduct to a member state, whereas the case at hand concerns attribution of conduct to the Union.[14] In this regard, it suffices to recall that the criteria for Union liability and member-state liability are largely aligned.[15] It is, therefore, not a uniform notion of attribution but, instead, a distinction that would require justification. Such justification, however, is not apparent. From the outset, there is no plausible reason why the conditions for establishing a link between a certain conduct and a certain actor should depend on whether that actor is a member state or the Union. Instead, the fact that the structure of the integrated administration is determined by EU law speaks in favour of a uniform notion of attribution.

Second, it must be noted that both *Sayag v Leduc* and *A.G.M.-COS.MET* concern the demarcation of public from private conduct, whereas the question in the case at hand concerns the demarcation of member state

12 Ibid., para 56–58.

13 Having clarified the preconditions for attribution, the CJEU then left the application of these criteria to the referring national court. The relevance of these factors, however, follows from the facts of the case, see CJEU, Court, judgement of 17 April 2007, A.G.M.-COS-MET, C-470/03 (fn. 5), para 27–36.

14 Melanie Fink, *Frontex and Human Rights* (fn. 3), p. 239, for instance, argues that this case is not particularly relevant in the context of Union liability because it concerns the liability of member states.

15 See chapter 3, fn. 160 et seq.

conduct from Union conduct.[16] This difference, however, is less relevant than it might seem at first glance. In both cases, the decisive question is whether a certain act can be attributed to the Union or not. The fact that the alternative actor is a member state in one case and a private person in the other case cannot justify a difference in the attribution criteria. Otherwise, it would be entirely unpredictable for EU staff who are deployed by member states under what circumstances their conduct is attributable to the Union.

1.2 Union Conduct vs. Intergovernmental Conduct

In its *ERTA* judgement, the CJEU pronounced itself further on the conditions under which certain conduct is attributable to the Union. The case concerned a dispute between the Commission and the Council of the then European Communities on the European Agreement on Road Transport (ERTA). In 1967, negotiations for the revision of the ERTA were resumed within the UN Economic Commission for Europe, and the agreement was made available for signature by the member states in 1970. Meanwhile, the Commission had undertaken similar work, which in 1969 resulted in a Regulation on those issues. Against this background, the Commission sought from the CJEU the annulment of the Council's proceedings relating to the conclusion of the ERTA. The Council submitted that the application was inadmissible because the proceedings were nothing more than a coordination of policies amongst member states within the framework of the Council.[17]

The Court, in deciding whether the Council was the author of the conduct in question, explicitly considered decisive the division of competences. The test established by the Court was whether, at the date of the proceedings in question, power to negotiate and conclude the ERTA was vested in the Community or in the member states. The core argument was that a matter falling within the competence of the Community could not be regulated by member states. On this basis, the court concluded that the proceedings in question, which potentially deviated from the Treaty proce-

16 Many thanks to Melanie Fink for this remark.
17 CJEU, Court, judgement of 31 March 1971, ERTA, 22/70 (fn. 6), para 36.

dure on the conclusion of agreements with third countries, were indeed authored by the Council and thus subject to legal review by the CJEU.[18]

The case of *NF et al. v Council* was very similar to *ERTA* – at least in terms of facts. The CJEU was called upon to decide whether the EU-Türkiye Statement was attributable to the Council or to the member states who had been meeting, allegedly for practical reasons alone, in the Council's building. Again, the decisive question was whether it was the Union or the member states who had concluded the relevant agreement with the third country.[19]

Astonishingly, however, the court's reasoning in *NF et al. v Council* differed considerably from *ERTA*. Instead of applying the competence test, the court focused on an analysis of the external appearance of the relevant conduct to a reasonable addressee. More precisely, the court assessed the presentation of the conduct, taking into account the location of the meeting and official documents relating to the meeting, such as press releases, working programmes and time schedules.[20] On this basis, the CJEU then concluded that the EU-Türkiye Statement could not be regarded as a measure adopted by the European Council or, moreover, by any other institution, body, office or agency of the European Union, but instead, be considered as an act of the member states.[21] The applicant's claim was accordingly dismissed as inadmissible.[22]

The court's argument in *NF et al. v Council* was met with fierce criticism, and rightly so. In particular, the decision was considered doctrinally unconvincing because the CJEU departed from its previous *ERTA* doctrine without even mentioning that decision.[23] Instead, the CJEU introduced the external appearance criterion with reference to its 1993 judgement *Parlia-*

18 Ibid., para 3–5, 52, 54–55.

19 CJEU, General Court (First Chamber, Extended Composition), order of 28 February 2017, NF v European Council (EU-Turkey Statement), T-192/16, para 47.

20 Ibid., para 47–70.

21 Ibid., para 71.

22 Ibid., para 53–60, 71. The applicants' appeals to the Court were dismissed as manifestly inadmissible, see CJEU, Court, order of 12 September 2018, NF, NG and NM v European Council, Joined Cases C-208/17 P to C-210/17 P.

23 Jürgen Bast, „Scharade im kontrollfreien Raum: Hat die EU gar keinen Türkei-Deal geschlossen?", Verfassungsblog of 03/03/2017; Rainer Hofmann, Adela Schmidt, „'EU-Türkei-Deal' ohne Beteiligung der EU? – Die Beschlüsse des EuG zur Erklärung EU-Türkei vom 18. März 2016", *Europäische Grundrechte-Zeitschrift* 44 (2017), p. 317-327.

ment v Council and Commission.[24] This reference, however, is misleading because that judgement corresponds to the ERTA doctrine insofar as the starting point of the assessment is the division of competences.[25] Even based on the external appearance criterion, the reasoning in *NF et al. v Council* still cannot convince, as the Statement had been pre-negotiated by the Commission, the relevant meeting took place in the Council's building, the Statement was published on the homepage of the Council and was clearly designated and publicly communicated as an agreement between the EU and Türkiye.[26] In sum, the decision in *NF et al. v Council* can only be understood as an avoidance strategy which allowed the CJEU to remain silent on the highly controversial and politicised questions concerning the quality and legality of the EU-Türkiye Statement.[27] This criticism – while entirely justified – is not the main point here.

The main point here is that the decision in *NF et al. v Council* shows that the CJEU considers the external appearance of the relevant conduct as decisive for the question of attribution. Just as the judgement in *ERTA*, the decision in *NF et al. v Council* established criteria for distinguishing Union conduct from member state conduct and hence forms part of the CJEU's emerging doctrine on attribution.

Seen from this perspective, the CJEU's *Bourdouvali* judgment then appears to combine the two different approaches from *NF* and *ERTA*. The case concerned the Cypriot bank restructuring. During the first months of 2012, certain banks established in Cyprus encountered severe financial difficulties in context of the sovereign debt crisis. The Republic of Cyprus thus considered it necessary for them to be recapitalised and submitted

24 CJEU, orders of 28 February 2017, NF v European Council (EU-Turkey Statement), T-192/16 (fn. 19), para 42, 44–45, 52, referring to CJEU, Court, judgment of 30 June 1993, European Parliament v Council of the European Communities, Joined Cases C-181/91 and C-248/91, para 12–14.

25 CJEU, Court, judgment of 30 June 1993, Parliament v Council, Joined Cases C-181/91 (fn. 24), para 15–25, in particular 16: 'it should be pointed out that the Community does not have exclusive competence in the field of humanitarian aid, and that consequently the Member States are not precluded from exercising their competence in that regard collectively in the Council or outside it.'.

26 Catharina Ziebritzki, Robert Nestler, „'Hotspots' an der EU-Außengrenze. Eine rechtliche Bestandsaufnahme", *MPIL Research Paper Series (SSRN)* 17 (2017), p. 13–14.

27 Enzo Cannizzaro, „Denialism as the Supreme Expression of Realism. A Quick Comment on NF v. European Council", *European Papers* (2017), p. 215-257; Sergio Carrera, Leonhard Den Hertog, Marco Stefan, „It wasn't me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal", *CEPS Policy Insights* (15/04/2017).

a request to the Eurogroup for financial assistance. In June 2012, the Eurogroup declared that such assistance would be granted through the European Stability Mechanism (ESM), subject to the conditionalities of a macro-economic adjustment programme to be defined in a memorandum of understanding (Mou) between Cyprus and the ESM. Ms Eleni Pavlikka Bourdouvali, along with other applicants, argued that the bank restructuring had caused damages to her and hence sought compensation from the Union. More precisely, the applicants submitted that the damages had occurred as a result of several acts, including formally binding decisions and non-formally binding conduct of the ECB, the Council, the Commission, and the Eurogroup.[28]

While the *Bourdouvali* judgment is instructive in many respects, the point that is of interest here is the court's argument concerning the attribution of conduct in the context of the claim against the Eurogroup. Based on the assumption that the latter qualified as an institution in the sense of Art. 340 para 2 TFEU,[29] the court examined whether the conclusion of the MoU must be attributed to the Eurogroup as an EU body or to the ESM as an international financial institution. To begin with, the CJEU considered it decisive that member states had conferred the competence to conclude the MoU to the ESM and not to the Eurogroup.[30] It hence relied on the division of competences and insofar returned to its *ERTA* doctrine. At the same time, the CJEU also took into account that the member states had clearly stated that the relevant conduct was governed by international law and not by EU law and thus followed the rules and procedures provided for by the ESM treaty and not by the Eurogroup.[31] Hence, it also relied on the external appearance of the conduct in question towards reasonable addressees and, insofar applied its *NF* doctrine. As both approaches led to the same result,

28 CJEU, judgement of 13 July 2018, Bourdouvali, T-786/14 (fn. 7), para 73.

29 Note that this assumption is no longer valid. CJEU, Court, judgement of 16 December 2020, Council of the European Union v Dr. K. Chrysostomides and Co. LLC et al, Joined Cases C-597/18 P, para 78–90 found that the Eurogroup does not qualify as an institution in the sense of Art 340 para 2 TFEU. See, for a critical analysis, Giacomo Rugge, „The Euro Group's informality and *locus standi* before the European Court of Justice: *Council v. K. Chrysostomides & Co. and Others*", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (Heidelberg Journal of International Law)* (2021), p. 917–936.

30 CJEU, judgement of 13 July 2018, Bourdouvali, T-786/14 (fn. 7), para 124–128.

31 Ibid., para 122–124.

the court then concluded that the conduct at issue was to be attributed to the ESM.[32]

Remarkably, the decisions in *ERTA*, *NF,* and *Bourdouvali* are rarely considered relevant to the attribution of conduct to EU agencies. Therefore, the reading proposed here and their application to the EU hotspots case requires justification.

Two points need to be considered. First, *ERTA* and *NF* concern actions for annulment under Art. 263 TFEU, whereas the case at hand concerns an action for damages under Art. 340 para 2 TFEU. In this regard, it suffices to recall that the question of who the author of a certain conduct is cannot depend on the action at stake. Otherwise, one single act could be attributable to the Union for the purpose of one action and to a member state for the purpose of another action. This would not only be illogical but also endanger the coherence of legal protection. The criteria for attribution must hence be coherent across the EU legal protection system. Second, the conduct at stake in *ERTA*, *NF* and *Bourdouvali* does not qualify as administrative conduct. Instead, these cases concern the attribution of conduct related to the conclusion of international agreements or memoranda of understanding. In this regard, a similar argument applies. The nature of the relevant conduct cannot be decisive for attribution. As the court made clear in *NF*, it is rather the other way round: the question of who has acted is prior to the question of the nature of the act.[33]

This being said it becomes apparent that the questions of attribution in *ERTA*, *NF* and *Bourdouvali* are indeed very similar to the questions of attribution in the case at hand. Specifically, both *ERTA* and *NF* deal with the question of whether certain conduct adopted in the framework or the premises of the Council is attributable to the Council or whether it must be qualified as an act of the member states instead. Similarly, the question in *Bourdouvali* was whether certain conduct is attributable to the Eurogroup as an EU body or to the ESM as an international institution established among member states. In the case of EU hotspots, the decisive question is whether certain conduct, which is performed by MMST members who are deployed by a member state and who act within the framework of an EU agency, is attributable to that agency or to the member state instead. The legal question is parallel because the institutional structure of the

32 Ibid., para 101–114, in particular 113, 115–129.

33 CJEU, orders of 28 February 2017, NF v European Council (EU-Turkey Statement), T-192/16 (fn. 19), para 44, passim.

Council is arguably quite similar to that of EU agencies insofar as both are supranational bodies with intergovernmental elements. In this sense, a German or French asylum officer who is deployed as an MMST member and acts in the EU hotspots is comparable to a member state representative who acts in the Council premises.

2 Internal Competence and External Appearance

The case law analysis has shown that the CJEU considers decisive for establishing attribution, first, the internal competences of the actor in question and, second, the external appearance of the conduct at stake. This is conceptually convincing because the criteria correspond to the structural principles of the European administration. The external appearance criterion corresponds to the principle of a functionally unified administration insofar as the integrated administration appears as a uniform entity against which legal protection must be granted. The competence criterion corresponds to the principle of separation insofar as individual legal protection must be sought from the competent actor. The following section takes a closer look at the respective criteria and discusses their relation.

2.1 External Appearance Criterion

The external appearance criterion was introduced with the judgement in *A.G.M.-COS.MET*, and then prominently spelt out in the orders on *NF et al. v Council*. The CJEU considers decisive whether the persons to whom the relevant conduct is addressed could reasonably suppose that it was undertaken with the authority of the relevant office, and to this end, provides a detailed analysis of the external appearance of the relevant conduct towards a reasonable addressee, including a whole range of factors ranging from press releases and locations to letterheads and explicit statements.[34]

In general terms, the external appearance test can hence be formulated to ask whether a reasonable addressee would perceive certain conduct as the conduct of the Union, i.e. here of the respective agency. In order to establish whether this is the case, the concrete circumstances must be com-

34 CJEU, Court, judgement of 17 April 2007, A.G.M.-COS-MET, C-470/03 (fn. 5), para 56–58; CJEU, orders of 28 February 2017, NF v European Council (EU-Turkey Statement), T-192/16 (fn. 19), para 53–60, 71.

prehensively assessed, including factors such as the appearance of offices, uniforms, public statements, and official reports.

2.2 Internal Competence Criterion

The internal competence criterion was established in *Sayag v Leduc,* where the CJEU held that attribution presupposes an internal and direct relationship between the conduct and the tasks entrusted to the institutions. Whereas it became apparent from the CJEU's reasoning in that case already that such a relationship depends on the relevant institutions' competences,[35] this was clearly spelt out in the judgement on *ERTA*. Here, the CJEU explicitly considered decisive whether the power to negotiate and conclude the relevant international agreement was vested in the Community or in the member states.[36] In *Bourdouvali*, the CJEU then confirmed this approach, arguing that attribution depended on which institution had the competence to conclude the relevant memorandum of understanding.[37]

In general terms, the CJEU hence considers decisive which institution has the competence to perform the conduct in question. This formulation, however, is not sufficiently precise because it does not provide a clear answer in two constellations that are key to the case of EU hotspots, namely when an agency's misconduct consists in an omission to act,[38] or when it systematically exceeds its competences.[39]

A more precise formulation of the competence test requires a better understanding of the underlying idea. It follows from the CJEU's jurisprudence that the competence criterion serves to concretise the concept of imputation. Imputation, in turn, serves to determine which entity shall bear responsibility for a certain damage and thus requires a risk assessment. In

35 The officer's conduct is attributable to the Community only if it qualifies as a performance of his duties as defined in the internal administrative structure. In the case of Mr Sayag, the CJEU concluded that a direct relationship was absent because the relevant travel order was merely intended to enable a reimbursement of travel expenses, see CJEU, Court, judgement of 10 July 1969, Sayag v Leduc, 9/69 (fn. 4), para 7–12.

36 CJEU, Court, judgement of 31 March 1971, ERTA, 22/70 (fn. 6), para 36, para 3–5, 52, 54–55.

37 CJEU, judgement of 13 July 2018, Bourdouvali, T-786/14 (fn. 7), para 122–128.

38 This becomes especially relevant in the case of the Commission, as its main misconduct in an omission to adequately exercise supervisory obligations.

39 Both the agencies' and the Commission's misconduct is systemic in nature, see chapter 2, 1 to 3.

this context, it is not only decisive how the course of action actually was but also how the course of action should have been according to the legal order. It is precisely this twofold dimension of imputation that explains why the competence criterion is decisive. At the first level, the competence criterion ensures that the actor who actually determined the course of action incurs liability. This is well illustrated with *Sayag v Leduc*, where the CJEU, in essence, held that the Union should not be liable for damages resulting from a purely private decision to undertake the harmful conduct. At a second level, the competence criterion also ensures that the actor who should have acted according to the legal order incurs liability. This is well illustrated with *ERTA*, where the CJEU held that responsibility should lie with the actor who bears the risk for misconduct because it should have acted according to the Treaties.

It follows that the competence test can be formulated as to whether the respective entity, in the concrete case, has made use of its competences to determine the actual unlawful course of action, or whether it should have made use of its competences to bring about an alternative lawful course of action.[40] This formulation is still not sufficiently precise insofar as it leads to ambiguous and inadequate results in the case of omissions.[41] The test could mean that the conduct must be attributed to the entity which has the competence to prevent the occurrence of unlawful conduct in general terms. This interpretation would lead to an overly broad concept of attribution, as omissions on the part of member states were attributable to the agencies already if the agency could have ensured, e.g. through better training, that the error did not occur. In the alternative, the test could mean that the conduct is attributable to the entity which could have carried out the required concrete lawful conduct. This understanding would lead to an overly narrow definition of the attribution criterion, as the agencies would not be liable even if they had breached their duty to inform the member state about certain circumstances in their sphere of knowledge and the member state had, therefore, issued an unlawful decision.

For the attribution criterion to be meaningful also in the context of omissions, the test must hence be formulated as to which entity could have prevented the specific unlawful omission in the circumstances of the

40 In case of shared administrative competences within an integrated administration, this might require to take into account the internal division of tasks.

41 Many thanks to Melanie Fink for this remark.

concrete case.[42] Accordingly, an unlawful omission is attributable to an agency if it has the competence either to carry out the specific required lawful conduct itself or to ensure that the relevant member state does so.

The consequentiality of this formulation is confirmed by the fact that it leads to unequivocal and adequate results also in cases of systemic ultra vires conduct. According to the formulated test, the decisive question is whether the agency had the competence to prevent specific unlawful conduct. Where the unlawful ultra vires act is an exceptional case, one might wonder whether it was the private decision of a staff member to exceed the competence limits. However, when the ultra vires act represents a systemic practice, it is clear that the relevant supervisory staff must have been informed and thus had not only the competence but even the duty to prevent the occurrence and persistence of the practice.[43] Otherwise, EU agencies could evade the EU legal protection system simply by exceeding their competences. Put differently, it is the principle of estoppel which prevents an agency as a defendant in the context of Art. 340 para 2 TFEU from invoking the exceeding of its competences as an argument against attribution, where it at the same time presents that conduct as its own towards potential addressees.[44] The competence test thus shows that a systemic overstepping of competences per se speaks in favour of attribution to the respective agency.[45]

2.3 Relationship Between the Criteria

Having said this, the relationship between the two criteria requires clarification. The CJEU applies the criteria alternatively, and the reasons for the court's choice of one or the other criterion are not apparent. This becomes problematic when the application of either criterion leads to differing results – which occurs, in particular, where the external appearance deviates structurally from the internal competences, i.e. where it systemi-

42 For a similar approach, albeit in the context of causation see Uwe Säuberlich, *Die außervertragliche Haftung im Gemeinschaftsrecht. Eine Untersuchung der Mehrpersonenverhaltnisse*, Springer 2005, p. 236.

43 This follows from the agency's internal supervisory obligations, see in detail below 3.3.

44 At least to the extent that the unlawfulness results from the exceeding of the agency's competences.

45 Many thanks to Anna Lübbe for suggesting to base the argument on the structural incongruence between internal competences and external appearance.

cally appears that the Union acts although it does not have the required competence.

In order to solve such cases, one must first be aware of the telos underlying each criterion. As regards the competence criterion, it has been shown that its rationale is to ensure that the actor who was responsible according to the Treaties to do things correctly incurs liability if things are not done correctly. As regards the external appearance criterion, in turn, the case law shows that the underlying rationale is to empower concerned persons to sue the actor they have faced.[46] This is particularly important in the case of the European asylum administration. As the European Ombudsman put it, 'persons affected by Frontex operations are typically under stress and vulnerable, and it cannot possibly be expected from them to investigate what is undoubtedly a complex allocation of responsibility'.[47] In a nutshell, the main idea underlying the internal competence criterion is a formal understanding of the rule of law, whereas the main idea underlying the external competence criterion is a substantial understanding of the rule of law.

Second, one must also be aware of the telos of the action for damages. As argued above, it serves, at least inter alia, to ensure that individuals can exercise their right to an effective remedy against the Union.[48]

Consequently, it is argued here that, in case of conflicting results, the criterion that is better suited to ensure judicial protection in the sense of Art. 47 ChFR should prevail. This conclusion is supported by the reasoning in *Bourdouvali,* where the CJEU made explicit that ensuring judicial protection is a central consideration in the context of attribution.[49]

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46 Although the CJEU put the focus on the other side of the coin, namely on the fact that it must not adjudicate on matters that fall outside its jurisdiction (see CJEU, orders of 28 February 2017, NF v European Council (EU-Turkey Statement), T-192/16 (fn. 19), para 44), it becomes clear from the CJEU's list of criteria (see ibid., para 47–70; CJEU, Court, judgement of 10 July 1969, Sayag v Leduc, 9/69 (fn. 4), para 9–12) that the purpose of the assesment is to determine who was perceived as the 'author' of the conduct in question by a reasonable addressee.

47 European Ombudsperson, Decision of 12 November 2013, closing own-initiative inquiry concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), case OI/5/2012/BEH-MHZ, para 16–18, 23, 31–41, summary.

48 See chapter 3, 3.

49 CJEU, judgement of 13 July 2018, Bourdouvali, T-786/14 (fn. 7), para 107, albeit in the context of the interpretation of the term institution in the sense of Art 340 para 2

Which criterion prevails thus depends on the concrete circumstances of the case. But two general observations can be made. On the one hand, the external appearance criterion bears particular weight where the internal competence order is overly complex and regulated in non-public or informal inter-administrative agreements, or when EU bodies structurally overstep their competences. In such circumstances, the competence criterion would frustrate the very purpose of individual legal protection.[50] For in order to determine which body is competent, applicants would have to delve into the complexities of internal decision-making structures which in turn would require several access to documents requests and comprehensive empirical and legal research.[51] De facto, it would hence become almost impossible for applicants to determine to whom certain conduct must be attributed and thus against whom to lodge an action for damage. Crucially, the point here is not to say that the law must be so simple that any layperson must be able to determine the correct respondent of an action for damages in every case. However, when even specifically trained lawyers experienced in the field who spend a reasonable part of their resources on this issue are unable to determine to whom an alleged fundamental rights violation should be attributed, then the application of the competence criterion seems disproportionate in light of the function of the action for damages.[52]

On the other hand, the internal competence criterion is of particular significance where the external appearance structurally misleads reasonable

TFEU. Similarly, CJEU, judgement of 16 December 2020, Chrysostomides, C-597/18 P (fn. 29), para 92–94.

50 Jens Hofmann, *Rechtsschutz und Haftung im Europäischen Verwaltungsverbund*, Duncker & Humblot 2004, p. 380 noting that the external-appearance-criterion would mean maximal clarity and simplicity with regard to the choice of the correct legal procedure, and proposing a similar solution with reference to the Opinion of Advocate General Mancini, 19 November 1985, Krohn & Co. Import-Export v Commission of the European Communities, 175/84.

51 The present study, for instance, required several access to documents requests, many of which remained unanswered, several years of observation of the administrative practice on the ground, several semi-structured qualitative interviews with representatives of the European Commission and EUAA (introduction, fn. 102), only to understand, first, which actor is competent to do what, and second, which actor does what within the integrated EU hotspot administration. Further on the method see introduction, 7.

52 As here, Jens Hofmann, *Rechtsschutz und Haftung im Europäischen Verwaltungsverbund* (fn. 50), p. 379 arguing that 'the individual cannot be expected to rummage through every nook and cranny of the procedure' (translation by author).

addressees in the sense that the conduct of a Union body structurally appears as the conduct of a member state authority.[53] In such a situation, the application of the external competence criterion would de facto preclude individual legal protection because applicants would typically assume that member states have acted and thus turn towards national courts for review. The internal competence criterion thus serves to prevent a situation in which Union bodies blur or alter their external appearance to the extent that they de facto escape judicial review.[54]

3 Conclusions on Attribution

This last section applies the findings on the CJEU's attribution doctrine to the case of EU hotspots. This will lead to the conclusion that the conduct of all MMST members, notably including deployed staff, is attributable to the EUAA and Frontex, respectively.

3.1 Attribution of Conduct to the EUAA

First, applying the criterion of external appearance, the key question is how a reasonable addressee would perceive the conduct of EUAA staff operating in the EU hotspots. This analysis must take into account the manner in which the EUAA itself presents its operations to the public, to the cooperating national authority, and particularly to the concerned asylum seeker.

Several factors indicate that a reasonable observer would perceive the conduct of EUAA MMST members as the conduct of the agency itself. EUAA staff wear EUAA uniforms and badges during deployment[55] and present themselves as EUAA representatives to asylum seekers.[56] Moreover,

53 An illustrative example in the context of administrative cooperation is the so-called embedded model, which structurally conceals conduct of the EUAA, see chapter 2, 1.3.b. For the parallel problem in the context of international agreements see Sergio Carrera, Leonhard Den Hertog, Marco Stefan, „It wasn't me! The Luxembourg Court Orders on the EU-Türkiye Refugee Deal" (fn. 27).

54 This was the core of the critique on the judgement in CJEU, orders of 28 February 2017, NF v European Council (EU-Turkey Statement), T-192/16 (fn. 19), see the literature cited above in fn. 23.

55 Unlike in the case of deployed Frontex staff, the respective home member state cannot be identified from the external appearance of deployed EUAA staff.

56 Own observation of the author (see introduction, fn. 103).

the EUAA depicts the MMST's actions as the agency's conduct in public reports and on its homepage.[57]

As regards further circumstances, one must distinguish between the period before and after the introduction of the so-called embedded model in 2020.[58] Prior to 2020, asylum applicants were usually informed that EUAA, then EASO, was in charge of conducting the interview, and the emblem of the agency was usually the only official sign in the offices where agency staff worked. Also, the interview transcripts and legal opinions prepared by agency staff were clearly identifiable as such. Furthermore, agency staff could be recognised because they spoke English instead of Greek, unless in exceptional cases, and hence also relied on interpreters translating from the applicant's language to English.[59] A reasonable addressee would hence have perceived agency staff as 'officers of the EU asylum agency'. Since 2020, however, it has become more difficult to identify agency staff on the basis of their external appearance. Usually, they now also speak Greek, and it can no longer be discerned from the interview transcript whether the agency or the Greek Asylum Service conducted the interview. Still, agency staff remains identifiable as such from a badge that distinguishes them from national staff.[60] Considering all circumstances together, it is hence still likely – although not certain anymore – that a reasonable addressee would perceive the conduct of agency staff as the conduct of the agency.

Applying the second criterion, the internal competence test, requires determining whether the EUAA had the competence to determine unlawful conduct or to prevent unlawful omission in the specific circumstances of the case. This requires a detailed examination of the supervisory structure of the MMSTs and the EUAA's role within it. As explained above, MMSTs are subject to supervision by the host member state and the respective agency at the first level and by the Commission at the second level. Since the introduction of the embedded model, the first level has been organised

57 EASO, *EASO Asylum Report 2021. Annual Report on the Situation of Asylum in the European Union*, p 59–61; EASO, *EASO Annual General Report 2020*, p 9–10, 25–31; EASO, *EASO's support to Greece*, available online: https://www.easo.europa.eu/operational-support/types-operations.

58 The embedded model differs from the previous mode of cooperation insofar as daily instructions to EASO staff are now mainly given by the Greek Asylum Service, see chapter 2, I.3.b.

59 Own observation of the author (see introduction, fn. 103).

60 On some islands, the EUAA has during some periods even refrained from issuing a written recommendation, own observation of the author (see introduction, fn. 103).

in such a manner that the host member state is responsible for day-to-day instructions, and the EUAA is responsible for more general compliance of its operations with EU law. This general supervision is carried out by the EUAA through its coordinating officers, who are appointed by and report to the Executive Director.[61]

Thus, defining what the EUAA can or should have done to prevent concrete unlawful conduct or omission requires a precise understanding of the tasks and competences of the coordinating officer and the Executive Director respectively.

The coordinating officer's mandate is defined in Art. 25 EUAA Regulation.[62] Inter alia, they are responsible for monitoring the correct implementation of the operational plan and reporting to the Executive Director when the operational plan is not adequately implemented. As regards the supervisory standard, the implementation can only be 'correct' in that sense when it complies with EU law, and especially with the ChFR.[63] The supervisory measures follow the coordinating officer's mandate that they must be able, at least, to issue instructions to the EUAA team members. Otherwise, it would be impossible for the coordinating officer to ensure that the operational plan is implemented in compliance with EU law.

Crucially, the introduction of the embedded model cannot absolve the coordinating officer from their obligations under Art. 25 EUAA Regulation.[64] Although the embedded model has shifted responsibility for issuing daily instructions from the coordinating officer to the host member state,[65] decision-making and reporting structures, as established by secondary law, remain intact. As the embedded model was introduced via operational plans only, it cannot amend supervisory structures under the EUAA Regulation. The shift of responsibility for daily instructions must hence be understood as meaning that the coordinating officer exercises their responsibility under Art. 25 EUAA Regulation by delegating the daily coordination to the national authority. This understanding is clearly reflect-

61 See chapter 2, I.2.

62 The coordinating officer was formerly called 'Union contact point', but the tasks were similar, see Art. 20 para 2 EASO Regulation.

63 As follow from an interpretation of Art. 25 EUAA Regulation in light of Art. 51 ChFR.

64 Especially Art. 25 para 3 EUAA.

65 In practice, the EASO coordinating officer usually appointed EASO team leaders who then issued instructions towards the staff, interviews with the EASO Union Contact Point (i.e. the predecessor of the coordinating officer) conducted on 13 December 2019 and on 19 February 2021 (introduction, fn. 102).

ed in administrative practice. In fact, the coordinating officer continues to conduct quality-ensuring measures, organise coordination meetings, issue general instructions and report to the Executive Director on all aspects of the deployment,[66] thereby clearly exercising their tasks under Art. 25 EUAA Regulation.

Ultimately, responsibility for supervision lies with the Executive Director. This is consequential because their mandate, as defined in Art. 46, 47 EUAA Regulation is sufficiently broad to actually ensure the legality of the agency's practice. For instance, when the coordinating officer's instructions are not sufficient, the Executive Director could step in and arguably, at least as an interim measure, even give direct instructions to the team members.[67] When misconduct is performed only by a particular staff member, the Executive Director could exercise its powers related to staffing,[68] and when misconduct arises due to conceptual deficiencies in the operational plan, the Executive Director could amend that plan, albeit only in agreement with the host member state.[69] As a last resort, the Executive Director could arguably even withdraw the agency's support. While the EUAA Regulation does not explicitly regulate the matter, notably unlike the Frontex Regulation,[70] it is obvious that the agency cannot be obliged to violate EU law. Therefore, the Executive Director's obligations relating to the day-to-day administration and the implementation of operational plans as defined in Art. 47 para 5 lit a, lit u EUAA Regulation must be interpreted as enabling them, at least in case of persisting and systemic fundamental rights violations, to unilaterally terminate a deployment.

Against this background, the crucial point here is that the identified typical misconduct on the part of EUAA is systemic in nature. While it cannot reasonably be expected from the Executive Director and the coor-

66 Ibid., stressing that EASO staff is still supervised by the coordinating officer, also in the context of the embedded model (see fn. 53).

67 Art. 7, 17–21, 25, 46–47 EUAA Regulation, especially Art. 47 para 5 lit m, according to which the Executive Director is responsible for taking all decisions relating to the management of the agency's internal structures; previously Art. 18 para 1 lit d, Art 20 para 2 lit a and b, para 3, Art 31 para 6 lit a and i EASO Regulation. This must hold true at least when giving direct instructions is the only way to prevent public liability of the agency for fundamental rights violations.

68 Art. 47 para 5 lit k, 60 EUAA Regulation; previously Art. 31 para 6 lit g, Art 38 EASO Regulation.

69 Art 18 para 5 EUAA Regulation.

70 Art. 46 para 4 Frontex Regulation, see in more detail below fn. 97.

dinating officer to prevent every single or exceptional misconduct,[71] they are certainly obliged under Art. 25, 47 EUAA Regulation to ensure that the agency's operations generally comply with EU law. What is more, the Executive Director and the coordinating officer even have the duty to make use of their supervisory competences to ensure that systemic malpractice is remedied and that the agency's practice is generally realigned with EU law. As the interpretation of Art. 25, 47 EUAA Regulation in light of Art. 51 para ChFR confirms that neither the Executive Director nor the coordinating officer can be allowed to ignore the agency's involvement in systemic fundamental rights violations. In such cases, their supervisory discretion is hence reduced to the question of how to act.[72]

Therefore, to the extent that a specific misconduct is an expression of a systemic deficiency, the agency – namely its Executive Director and the coordinating officer – is obliged to prevent the occurrence of that specific misconduct by preventing the systemic issue. In other words, the agency has not only the competence but even the duty to prevent specific misconduct insofar as it constitutes an expression of systemic malpractice.

With regard to the case at hand, this means that because the typical misconduct identified above reflects systemic deficiencies, the EUAA's coordinating officer and Executive Director were competent and obliged to prevent the occurrence of that misconduct. This is well illustrated, for instance, with the EUAA's misconduct relating to deficient asylum interviews or the misapplication of the safe third country concept.

In the case of deficient asylum interviews, the Executive Director should arguably have refrained from concluding the operating plan in the first place, as it was clear that this plan required the agency to assess individual asylum claims which meant systemically overstepping its competences as defined under the former EASO Regulation.[73] Further, the coordinating officer should have correctly monitored the implementation of the operating plan so as to ensure that the agency's conduct generally complies with EU law. In particular, the coordinating officer should have made use of its monitoring competence to instruct the EUAA staff to either not conduct

71 Especially where it results from unlawful daily instructions on the part of the host member state.

72 This is further supported by the telos of Art. 46 para 4 and 5 Frontex Regulation. For a parallel argument concerning the Commission's supervisory discretion see chapter 2, 2.4.

73 See chapter 1, fn. 186 et seq.

interviews with asylum seekers or to conduct these interviews in a lawful manner. These mistakes are well exemplified in case 2.

> *Case 2 – Magan Daud – Deficient asylum interview – Art. 41 ChFR (attribution to EUAA)*
> In the case of Mr Daud, the responsible EUAA caseworker conducted the asylum interview in a deficient manner. Crucially, the malpractices described were not limited to individual cases but of a general nature. There can thus be no doubt that the responsible coordinating officer and the Executive Director were aware of the ongoing malpractices. In addition, the misconduct in the individual case of Mr Daud was even brought to the attention of the agency via the internal complaints mechanism. Thus, the coordinating officer and the Executive Director were obliged to make use of their respective competences to ensure that interviews were generally conducted in compliance with EU law. The EUAA coordinator officer and the Executive Director thus had the competence, and even the duty, to prevent the misconduct in the case of Mr Daud.

As regards the misapplication of the safe third country concept, the Executive Director and the coordinating officer should have taken into consideration since March 2020 already that Türkiye no longer accepts readmissions. When it became obvious that asylum seekers could no longer be returned to Türkiye, the Executive Director and the coordinating officer were obliged to amend the operating plan, as well as the corresponding standard operating procedures and similar instructions, so as to ensure that the agency would no longer recommend the rejection of asylum applications on the basis of the argument that Türkiye could be considered as safe. These failures become relevant in case 5.

> *Case 5 – Kareem Rashid – Limbo situation – Art. 41 ChFR (attribution to EUAA)*
> In the case of Mr Rashid, the EUAA caseworker recommended the rejection of his asylum claim as inadmissible, arguing that Türkiye could be considered a safe third country for him. The reason for this misconduct on the part of the individual caseworkers was that the Executive Director had failed to adapt the operating plan to the changed circumstances and that the coordinating officer had failed to instruct his team members to refrain from applying the safe third country concept since March 2020. In this sense, the Executive Director and the coordinating officer had the

competence, and even the duty, to prevent the occurrence of the concrete misconduct that appears as an expression of a systemic issue.

In sum, the application of the external appearance test and the internal competence test as established by the CJEU hence shows that the identified typical misconduct on the part of EUAA staff must be attributed to the agency itself. While the external appearance is not entirely unequivocal, as the agency's staff tends to appear as staff of the host member state since the introduction of the embedded model in 2020, the internal competence test clearly shows that, insofar as misconduct is systemic, the EUAA is competent and obliged to prevent it. As regards the remaining doubts concerning the agency's external appearance, it must be taken into consideration that the embedded model structurally blurs legal responsibilities, thereby concealing which entity exercises public authority. The crucial point here is that the EUAA itself has changed its outward appearance so as to not be identifiable by reasonable applicants – and that, therefore, it cannot be allowed to argue in a procedure under Art. 340 para TFEU that is not the correct defendant, as this would not only be abusive and contradictory but also go to the detriment of the telos of Art. 47 ChFR. The concrete circumstances of the case, hence, suggest that the internal competence test must prevail.

3.2 Attribution of Conduct to Frontex

The application of the attribution doctrine to Frontex largely corresponds to the reasoning on the EUAA. Firstly, in applying the external appearance criterion, again, several and partly contradictory circumstances must be considered. To begin with, and unlike in the case of the EUAA, some factors suggest that Frontex's team members appear as staff of their respective home member states. In particular, the Frontex vessels bear the flag of the home state,[74] and Frontex team members usually wear the uniform of their home member state.[75] Other factors, however, as in the case of the EUAA, refer to the host member state. For instance, Frontex team members usually

74 Remarkably, Frontex has not been obliged to disclose under which flag specific vessels are operating, see CJEU, judgement of 27 November 2019, Luisa Izuzquiza and Arne Semsrott v Frontex, T-31/18.

75 Art 82 para 6 Frontex Regulation. Note that the new Frontex standing corps wears Frontex uniforms (see https://frontex.europa.eu/careers/standing-corps/about/) which alters the external appearance significantly.

operate in the presence of Greek authorities, and one might also argue that a reasonable addressee arriving in Greece would expect to encounter Greek officials.

The overwhelming number of factors, however, suggest that a reasonable addressee would perceive the administrative conduct of Frontex team members as the conduct of the agency itself. All deployed Frontex staff are clearly identifiable as working for Frontex and wear a visible personal identification and a blue armband with the insignias of the EU and of the agency.[76] Frontex vessels, albeit under the flag of the home Member States, bear the insignia of the agency, and Frontex offices are clearly marked as such.[77] Further, although the rule is that Frontex should operate in the presence of Greek authorities, the latter may authorise Frontex to act in its absence, notably including the use of force and the carrying and use of weapons,[78] and this option is often used in practice. As regards the operation of Frontex in EU hotspots, it must further be taken into account that asylum seekers will find an EU flag at the entrance of the camp.[79]

A reasonable addressee is hence regularly confronted with an officer who wears the uniform of any member state but presents itself as Frontex and acts independently of Greek authorities, including the use of force. On this basis, a reasonable addressee must assume that public power is exercised towards them by Frontex itself. Although the officers' uniform indicates the home member state, it cannot be expected from reasonable addressees to be able to identify uniforms of all EU member states. Also, anecdotal evidence suggests that reasonable addresses are generally informed that they would be 'checked and controlled' by 'Frontex officers' upon arrival to the EU; asylum seekers arriving at the EU external border are not always aware of which member state they find themselves in, but they are mostly aware of having entered the EU and would, hence, reasonably expect to encounter Frontex.

Lastly, Frontex itself presents the conduct of its teams in the EU hotspots as the agency's conduct and is therefore prevented from invoking that reasonable addressees would perceive it otherwise.[80] Frontex not only de-

76 Art. 82 para 6 Frontex Regulation.
77 Own observation of the author (see introduction, fn. 103).
78 Art. 82 para 4 and para 8 Frontex Regulation.
79 Own observation of the author (see introduction, fn. 103).
80 On the principle of estoppel in EU law see only CJEU, General Court (Second Chamber), judgement of 5 September 2014, Éditions Odile Jacob v Commission, T-471/11, para 52.

picts its conduct as the agency's on its homepage and in public reports. It also presents itself as 'Frontex' in its daily contact with asylum seekers and proactively informs asylum seekers that the conduct of its teams is to be challenged through the 'Frontex' complaints mechanism.[81] Against this background, not even lawyers working in EU hotspots would regularly notice which home member state a particular Frontex officer stems from. Even a legally trained addressee would perceive Frontex staff simply as 'Frontex' – and nothing else can be expected from a reasonable asylum seeker.

Concerning, second, the internal competence criterion, it must be determined whether Frontex, in the specific circumstances of the individual case, had the competence to determine the unlawful conduct or to prevent the unlawful omission at stake.

As mentioned above, the prevailing opinion in legal scholarship stresses that the internal supervisory structure – albeit only concerning regular Frontex deployments – is such that deployed staff, as a general rule, acts under the concrete instructions of the host member state.[82] In practice, however, the exception to that general rule is applied so often that deployed Frontex staff regularly acts without concrete instructions and in the absence of the host member state's authority, notably including the use of force. And in any case, the supervisory structure of the MMST differs from regular teams, so that the reasoning of the prevailing opinion cannot apply.

This being said the decisive point here is that the identified typical misconduct of Frontex in EU hotspots is systemic in nature. As in the case of the EUAA, the key argument is that Frontex – more precisely, the responsible coordinating officer and the Executive Director – are obliged to ensure that Frontex's operations generally comply with EU law. Notwithstanding the host member state's competence to issue daily instructions, systemic fundamental rights violations must be prevented or remedied by Frontex itself. Thus, Frontex has not only the competence but even the obligation to determine a specific misconduct or prevent a specific omission insofar as it appears as an expression of systemic malpractice.

81 Frontex Fundamental Rights Office regularly visits the islands and informs asylum seekers that they should contact the Frontex complaints mechanism in case of misconduct by any Frontex team member, own observation of the author (see introduction, fn. 103).

82 See the literature cited in fn. 2. This conclusion is supported by Art. 43 para 1, Art. 82 para 4 sentence 1 and para 8 sentence 2 Frontex Regulation.

This requires some explanation. The Frontex Regulation clearly formulates that the agency shall 'ensure' the legality of its conduct.[83] Art. 80 para 1 provides that Frontex 'shall guarantee the protection of fundamental rights',[84] and Art. 82 para 3 provides that 'while performing their tasks and exercising their powers, members of the teams shall fully ensure respect for fundamental rights.'[85] Frontex is thus obliged, under Art. 40, 43, 44, 46, 106, 1, 80 Frontex Regulation, Art. 51 para 1 ChFR, to do everything it can within its competences to ensure that the agency complies with EU law.

The competences to exercise the required internal supervision lie with the Executive Director and the coordinating officer, whose tasks and competences largely correspond to those of the EUAA. The Executive Director appoints the coordinating officer who is in charge of monitoring the correct implementation of the operational plan and reports to the Executive Director on this.[86] The coordinating officer supervises the Frontex staff of the MMSTs together with the host member state. The division of tasks between

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83 See only Art. 1 para 1, Art 10 para 1 lit s; Art. 38 para 3 lit l; Art 44. para 1and para 3 lit b; Art. 50 para 3 sentence 1 and 2; Art. 80 para 2 and 3 Frontex Regulation: 'In the performance of its tasks, the European Border and Coast Guard shall *ensure* that no person, in contravention of the principle of non-refoulement, be forced to disembark in, forced to enter, or conducted to a country, or be otherwise handed over or returned to the authorities of a country (…). The European Border and Coast Guard shall in all its activities pay particular attention to children's rights and ensure that the best interests of the child are respected.'; Art. 106 para 4 lit b, lit j: The Executive Director shall 'take all necessary steps, including the adoption of internal administrative instructions and the publication of notices, to *ensure* the day-to-day administration and functioning of the Agency in accordance with this Regulation (…) and *ensure* the implementation of the operational plans (…).' (emphasis added).

84 Art. 80 para 1 Frontex Regulation reads: 'The European Border and Coast Guard shall *guarantee* the protection of fundamental rights in the performance of its tasks under this Regulation in accordance with relevant Union law, in particular the Charter, and relevant international law, including the 1951 Convention relating to the Status of Refugees, the 1967 Protocol thereto, the Convention on the Rights of the Child and obligations related to access to international protection, in particular the principle of non-refoulement.' (emphasis added).

85 Art. 81 para 3 Frontex Regulation reads: 'While performing their tasks and exercising their powers, members of the teams shall *fully ensure* respect for fundamental rights and shall comply with Union and international law and the national law of the host Member State.' (emphasis added).

86 Art. 44 Frontex Regulation. Insofar as monitoring fundamental rights compliance is concerned, the coordinating officer shall coordinate closely with the fundamental rights officer, see. Art 44 para 3 lit b. In more detail on the tasks of the coordinating officer see David Fernández-Rojo, *EU Migration Agencies. The Operation and Cooperation of FRONTEX, EASO and EUROPOL*, Edward Elgar 2021, p. 71.

the host member state and the coordinating officer is similar to the case of the EUAA, with the main difference being that the host member state remains involved to some extent.

Crucially, the fact that the host member state and the home member state are involved in the supervisory structure cannot absolve the coordinating officer from its obligations under the Frontex Regulation. As in the case of the EUAA, the coordinating officer is responsible for monitoring the correct implementation of the operational plan, which includes the responsibility to ensure the protection of fundamental rights during Frontex operations.[87] The home member state, in turn, retains the competence to exercise disciplinary power towards seconded or deployed staff and may also receive complaints via the complaints mechanism,[88] but it cannot directly determine the conduct of its deployed staff.[89] Instead, daily instructions are issued by the host member state. These instructions, however, are subject to implicit or explicit approval by the agency: from the outset, the host member state must take into account and follow the agency's views as communicated by the coordinating officer to the greatest extent possible.[90] If the host member state's instructions are not in compliance with the operational plan or violate EU law, the coordinating officer shall immediately inform the Executive Director.[91] The Executive Director shall then assess the situation and, in case the operational is not respected by the host member state, may even unilaterally decide to withdraw the financing or suspend or terminate the operational plan.[92]

Ultimately, responsibility for ensuring that Frontex generally complies with EU law, hence, lies with the Executive Director. According to their mandate as defined in Art. 106, 107 Frontex Regulation, they are responsible for the management of the agency, including for taking decisions related to the operational activities of the agencies, and have the last word on

87 Art. 44 para 1 and 3 Frontex Regulation.

88 See Art. 2 para 21, Art. 43 para 5, Art. 111 para 4, para 7 Frontex Regulation.

89 Except in cases where large vessels are involved, where the home member state retains some control of the vessel's use, see Melanie Fink, *Frontex and Human Rights* (fn. 3), p. 57–58, 70–71.

90 Art. 43 para 2, Art. 44 Frontex Regulation.

91 Art. 43 para 3 Frontex Regulation.

92 Art. 46 para 3 Frontex Regulation: 'The executive director *may*, after informing the Member State concerned, *withdraw the financing of an activity or suspend or terminate it if the operational plan is not respected* by the host Member State.' (emphasis added).

any decisions related to the conduct of Frontex staff in the EU hotspots.[93] In fact, the Executive Director can enforce compliance with EU law in a top-down manner: They instruct the coordinating officer to act in line with EU law and exercise staffing authority, if necessary.[94] Where this is not sufficient, the Executive Director can amend the operational plan, albeit subject to agreement by the host member state,[95] or suspend the implementation of the operational plan as mentioned.[96] In case of serious or persisting fundamental rights violations, the Executive Director can unilaterally suspend or terminate the deployment, according to Art. 46 para 4 Frontex Regulation.[97] In making that decision, the Executive Director shall take into account the opinion of the Fundamental Rights Officer, but they do not depend on the host member state's agreement.

The agency thus has not only the competence but even the obligation to prevent or address systemic malpractice. With regard to the case at hand, this means that the agency – namely its Executive Director and the coordinating officer – is obliged to prevent the occurrence of the identified specific misconduct by preventing breaches at a systemic level. This is well illustrated by Frontex's failures in the context of age assessment and deportations to Türkiye.

As described above, Frontex staff generally conducts age assessment in the context of initial registrations on the basis of visual inspection alone, thereby breaching relevant standards of child protection. Given that this deficient practice is applied systemically, both the coordinating officer and the Executive Director were obliged to address it. As provided for in Art. 80 para 3 Frontex Regulation, Frontex shall take into account the special needs of children and unaccompanied minors and shall pay particular attention to children's rights and ensure that the best interests of the child are respected. Accordingly, the agency is obliged to ensure that its statutory staff receives adequate training, including guidelines for addressing the special

93 As follows from Art. 40, 43, 44, 46, 106 Frontex Regulation.

94 Art. 106 para 4 in particular lit a, lit b, lit j, lit l Frontex Regulation.

95 Art. 38 para 4 Frontex Regulation.

96 Art. 46 para 4 Frontex Regulation, see fn. 70.

97 Art. 46 para 4 Frontex Regulation: 'The executive director *shall*, after consulting the fundamental rights officer and informing the Member State concerned, *withdraw the financing for any activity by the Agency, or suspend or terminate any activity by the Agency*, in whole or in part, if he or she considers that there are *violations of fundamental rights or international protection obligations* related to the activity concerned that are *of a serious nature or are likely to persist*.' (emphasis added).

needs of children, including unaccompanied minors, and to draw up a code of conduct laying down procedures with a particular focus on vulnerable persons, including children and unaccompanied minors.[98] In case that instructions issued by the host member states are unlawful, the coordinating officer is obliged to report to the Executive Director, who must then take the appropriate action.[99] If possible, the Executive Director must settle the matter in cooperation with the host member state, and in case of persisting and serious violations of Art. 24, 41 ChFR, they should decide to withdraw the agency's support. The agency's failures in this regard are well illustrated in case 3.

> Case 3 – Daniat Kidane – Age assessment through visual inspection (attribution to Frontex)
> As established above, Frontex's prima facie age assessments, resulting in the incorrect registration of minors as adults, is not an isolated phenomenon but a systemic flaw in the EU hotspot administration. The malpractice of the agency is widely known and has been brought to the attention of the agency. Therefore, the agency's failure to put an end to this unlawful practice constitutes a failure of the internal supervisory obligations of the Executive Director and the coordinating officer under Art. 106, 1, 44, 46, 80 Frontex Regulation. Insofar as the specific misconduct in the case of Daniat Kidane represents systemic malpractice, Frontex was hence not only competent but, in fact, obliged to prevent the occurrence of that mistake.

Similarly, Frontex also failed to address the issue of unlawful deportations to Türkiye. As follows from Art. 51 para 1 ChFR, and as specified in Art. 1, Art. 43 para 4, Art. 48 para 1, Art. 50 para 1 Frontex Regulation, Frontex is obliged to ensure the performance of return assistance with full respect to fundamental rights and pay particular attention to the rights of vulnerable persons. Accordingly, the Executive Director and the coordinating officer are obliged to ensure that the agency does not provide support with regard to deportation practices that are systemically unlawful. The agency's failures in this regard are well illustrated in case 4.

> *Case 4 – Nabeeh Al Badawi – Return to Türkiye (attribution to Frontex)*
> Mr Al Badawi was returned to Türkiye despite the fact that Türkiye cannot generally be considered a safe third country for asylum seekers

98 Art. 62 para 2, Art. 81 para 1 Frontex Regulation.
99 Art. 43 para 3 and Art. 44 para 3 lit d Frontex Regulation.

and despite the fact that Mr Al Badawi had raised specific concerns substantiating his reasonable fear, based on his previous experience of being deported from Türkiye to Syria, to be subject to chain refoulement in Türkiye. As established above, this was not an exceptional case, but in fact, representative of systemic malpractice, of which Frontex was informed due to previous complaints by other concerned persons through the agency's internal complaints mechanism. Insofar as Frontex's conduct is representative of systemic malpractice, the coordinating officer and the Executive Director were hence obliged to prevent the occurrence of that typical mistake in the case of Mr Al Badawi. In concrete terms, the relevant staff member should have informed the coordinating officer, who then should have raised the matter towards the Executive Director.

In sum, the application of the CJEU's doctrine on attribution hence shows that the identified typical misconduct on the part of Frontex staff operating as part of MMSTs is attributable to the agency itself. As set out, the competence criterion leads to the conclusion that misconduct, insofar as it reflects general malpractice, can and must be prevented by the agency itself. Also, a balanced consideration of all factors relating to the external appearance of Frontex's team members suggests that a reasonable addressee would perceive them as officials of the agency.

3.3 The Agencies' Liability for Inherent Violations

To conclude, the argument made in this chapter has shown that the agencies incur liability for those fundamental rights violations that are inherent in their conduct.

First, both the EUAA's and Frontex's external appearance is such that their conduct must be perceived by a reasonable addressee as the conduct of the respective agency. In the case of the EUAA, doubts remain insofar as the introduction of the embedded model in 2020 has blurred the EUAA's external appearance to the extent that it may now appear as the conduct of the host member state Greece – this, however, cannot be decisive already because the agency could otherwise absolve itself from liability by concealing its outward appearance.

Second, both the EUAA's and Frontex's internal competences are such that the agencies are not only competent but even obliged to prevent systemic malpractice, especially when it consists of systemic and persist-

ing fundamental rights violations. More precisely, the EUAA's respective Frontex's internal supervisory duties, as enshrined in the respective Regulations[100] and ultimately based on Art. 51 para 1 ChFR, oblige the respective coordinating officers and Executive Directors to do everything they can within their competence to ensure that the operations of the respective agency generally comply with EU law. This includes, in case of serious or persisting deficiencies, withdrawing the agency's support.[101] If the respective agency fails to exhaust its options, this constitutes a breach of internal supervisory obligation.

As a result, misconduct of EUAA's and Frontex's staff must be attributed to the respective agency, at least insofar as it is representative of systemic malpractice. Provided that the remaining conditions of public liability are met, the agencies are hence liable under Art. 97 para 4, Art. 98 Frontex Regulation and Art. 66 para 3 EUAA Regulation, respectively. In case the agencies are not solvent, damages can be claimed directly from the Union under Art. 340 para 2 TFEU. The agencies' liability for inherent violations becomes relevant in all cases where their misconduct as such is unlawful, i.e. in cases 1, 2, 3, 4 and 5.

Case 1 – Sara Esmaili – Deficient vulnerability assessment – Art. 41 EUAA (liability of the EUAA)

In the case of Ms Esmaili, the responsible EUAA staff failed to conduct a correct vulnerability interview, and on this basis qualified her and her 9-year-old daughter Ayla as non-vulnerable. Due to the central importance of the vulnerability assessment to the asylum procedure in the EU hotspots, the failure to give Ms Esmaili the opportunity to fully explain her particular situation constitutes not only a violation of her rights under the Asylum Procedures Directive[102] but also a violation of her fundamental right to be heard under Art. 41 para 2 lit a ChFR.

Ms Esmaili's claim for compensation of immaterial damages against the EUAA, and in the alternative against the Union, is successful. The

100 Art. 44, 46, 106, 1, 80 Frontex Regulation; Art. 7, 16–21, 25–29, 46–47, 1 EUAA Regulation; formerly Art. 20, 31, 1 EASO Regulation.

101 Enshrined explicitly in Frontex Regulation Art. 46 para 3, 4 Frontex Regulation; and arguably implicit in Art. 1, 4, 46–47 EUAA Regulation: for the EUAA Executive Director cannot be obliged to command their agency to participate in systemic fundamental rights violations, as this would not only run counter Art. 51 para 1 ChFR but also defeat the very purpose of the existence of the agency.

102 Now the reformed Asylum Procedures Regulation.

violation of Art. 41 ChFR qualifies as misconduct of the agency because, first, the conduct of the relevant staff must have been perceived as conduct of the agency,[103] and second, the agency's coordinating officer and Executive Director were competent and obliged to prevent the agency systemically conducted vulnerability assessments in a deficient manner. The violation of Art. 41 ChFR constitutes a sufficiently serious breach of a rule conferring rights upon individuals.[104] The question of causation does not arise because the violation of the fundamental rights itself constitutes the damage. Thus, the CJEU would have to find that the EUAA has breached fundamental rights. The CJEU could either consider monetary compensation as necessary and oblige the EUAA, and in the alternative, the Union, to pay an appropriate amount of monetary compensation to the applicant, or it could consider the finding of illegality as such as sufficient to remedy the immaterial harm and thus grant a symbolic amount of monetary compensation or even no monetary compensation at all.[105]

Case 2 – Magan Daud – Deficient asylum interview – Art. 41 ChFR (liability of the EUAA)

In the case of Mr Daud, the responsible EUAA staff failed to identify him as vulnerable and also failed to give him sufficient opportunity to express his reasons for seeking international protection. Given the gravity of these procedural errors, not only the rights under the Asylum Procedures Directive but also the right to be heard Art. 41 ChFR para 2 lit. a ChFR is violated.

Mr Daud's claim for compensation against the EUAA, and in the alternative against the Union, is successful. The misconduct must be attributed to the EUAA and constitutes a sufficiently serious breach of a rule of law conferring rights upon individuals. As the violation of the fundamental rights constitutes the damage, the link between misconduct and damage is established. The CJEU would hence have to establish that the EUAA's conduct was unlawful and, optionally, grant appropriate or symbolic monetary compensation.

103 The case took place in 2018, i.e. prior to introduction of embedded model (see fn. 53).

104 See chapter 3, 3.3.

105 See chapter 3, 3.4.

Case 3 – Daniat Kidane – Age assessment through visual inspection – Art. 24, 41 ChFR (liability of Frontex)
In the case of Daniat Kidane, the Frontex staff responsible for first identification failed to conduct a correct age assessment, which amounted to a violation of her fundamental rights under Art. 24, 41 ChFR.
Her claim for compensation against Frontex, and in the alternative against the Union, is successful. The misconduct must be attributed to Frontex because, first, the conduct of the relevant staff must have been perceived as the conduct of the agency by a reasonable addressee, and second, the agency's coordinating officer and Executive Director were competent and obliged to prevent that the agency systemically engages in unlawful age assessment practices. As the misconduct consists in a fundamental rights violation, it qualifies as a sufficiently serious breach of a rule of law. The fundamental rights violation constitutes the damage so that the question of causation does not arise. The CJEU would hence have to establish that Frontex's conduct was unlawful and, depending on whether monetary compensation is deemed necessary, grant appropriate, symbolic or even no monetary compensation.

Case 4 – Nabeeh Al Badawi – Return to Türkiye – Art. 4, 18, 19 ChFR (liability of Frontex)
In the case of Mr Al Badawi, the Frontex staff responsible for escorting deportations failed to intervene during the process of deportation or to raise his concerns about the legality of the deportation to his coordinating officer. Considering the gravity of these procedural mistakes, which resulted directly in a violation of the non-refoulement principle, Frontex's failures constitute a violation of Mr Al Badawi's procedural rights under Art. 4, 18, 19 ChFR.
Mr Al Badawi's claim for compensation against Frontex, in the alternative against the Union, is successful. As the misconduct reflects systemic malpractice, it must be attributed to Frontex. The fundamental rights violation qualifies as a sufficiently serious breach of a rule of law and constitutes damage. The CJEU would hence have to establish that Frontex's conduct was unlawful and, optionally, grant appropriate or symbolic compensation.

Case 5 – Kareem Rashid – Limbo situation – Art. 41 ChFR (liability of the EUAA)
In the case of Mr Rashid, the EUAA staff responsible for conducting asylum interviews failed to take into account that readmissions to Türkiye

had been halted. Instead, they applied a standard reasoning and on this basis considered Türkiye as safe for Mr Rashid. Given the gravity of these procedural mistakes, the failure to apply the safe third country concept correctly constitutes a violation of Mr Rashid's rights under Art. 41 ChFR.

His claim for compensation against the EUAA, and in the alternative against the Union, is successful. The misconduct must be attributed to the EUAA and constitutes a sufficiently serious breach of a rule of law conferring rights upon individuals. The fundamental rights violation constitutes the damage so that the link between misconduct and damage is established. The CJEU would hence have to establish that the EUAA's conduct was unlawful and, optionally, grant appropriate or symbolic monetary compensation.