Chapter 5: Causation of Fundamental Rights Violations by the EU

This last chapter continues the application of the action for damages to the case of the EU hotspots and addresses the doctrinal matters related to causation. The main question here is under which conditions the EU's administrative misconduct – i.e. the EUAA's and Frontex's informal recommendation or the European Commission's failure to adequately exercise its supervisory obligations – is causal for resulting fundamental rights violations. The first section explains why causation is difficult to establish in multi-actor settings (1). The second and third sections then provide a detailed analysis of the relevant case law. This shows that the CJEU's case law has developed from a binding/non-binding dichotomy towards a more flexible approach. Regarding administrative support, the 1994 judgement in the case of *KYDEP* represents the decisive turning point.[1] With this judgement, the CJEU established that the EU's administrative support is causal when it meets a certain threshold of bindingness (2). Regarding administrative supervision, the CJEU similarly held in its 2016 judgment in *Ledra*[2] that the EU's supervisory measures are causal when they are sufficiently binding (3). The fourth section defines the threshold of bindingness more precisely. Based on the case law analysis, it shows that the required 'bindingness-threshold' is met when the EU's conduct is 'de facto binding' upon national authorities: In these cases, the EU predetermines the national decision (4). The last section applies these findings to the case at hand, leading to the conclusion that the relevant conduct by the EUAA, Frontex and the Commission reaches the threshold of de facto bindingness. In sum, the chapter argues that the EU and its bodies incur liability for fundamental rights violations in the EU hotspots that result from the agencies' or the Commission's misconduct (5).

1 CJEU, Court, judgement of 15 September 1994, Koinopraxia Enoseon Georgikon Synetairismon Diacheiriseos Enchorion Proionton *(KYDEP)* v Council of the European Union, C-146/91.

2 CJEU, Court (Grand Chamber), judgement of 20 September 2016, Ledra Advertising Ltd et al v European Commission et al, Joined Cases C-8/15 P to C-10/15 P.

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1 Causation in Multi-Actor Situations

To substantiate its argument, this chapter conducts a detailed analysis of the case law on causation.

1.1 Failure of the Conventional Causation Criterion

This is necessary because, in the specific context of the integrated administration, the CJEU's well-established general formula does not lead to unequivocal results. According to this formula, causation requires that the conduct is a *condition sine qua non* to the damage and that there is a sufficiently direct link between the conduct and the damage.[3] Where several actors are involved, however, the conduct of each involved actor typically constitutes a *condition sine qua non* to the damage. The criterion of the sufficiently direct link leaves ample room for interpretation already where only one actor is involved and is – as such – simply too vague to determine the contribution of which of several involved actors shall be considered as causal.[4] These shortcomings of the conventional causation test are well illustrated in case 1.

Case 1 – Sara Esmaili – Futile Application of the Conventional Causation Test

In the case of Ms Esmaili and her daughter, the failure of the EUAA to conduct a correct vulnerability assessment clearly constitutes a *condition sine qua non* for their subsequent stay in the EU hotspots, i.e. for the resulting violation of Art. 4 ChFR. The same, however, holds true for the Commission's failure to adequately supervise as well for the host member state's decision to consider Ms Esmaili as non-vulnerable. If the

3 See only CJEU, Court (Fourth Chamber), judgement of 18 March 2010, Trubowest Handel GmbH and Viktor Makarov v Council of the European Union and European Commission, C-419/08 P, para 53. For a detailed analysis see Martin Weitenberg, *Der Begriff der Kausalität in der haftungsrechtlichen Rechtsprechung der Unionsgerichte*, Nomos 2014, p 317 referring to these two criteria as establishing factual and juridical causation.

4 Uwe Säuberlich, *Die außervertragliche Haftung im Gemeinschaftsrecht. Eine Untersuchung der Mehrpersonenverhaltnisse*, Springer 2005, p. 76–79; similarly A.G. Toth, „The Concepts of Damage and Causality as Elements of Non-Contractual Liability", in Ton Heukels, Alison McDonnell (ed.), *The Action for Damages in Community Law*, Wolters Kluwer 1997, p. 179-198, p. 191–198. On the function of the sufficiently-direct-link criterion in the context of multi-actor situations see below fn. 161 et seq.

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EUAA had acted correctly, if the Commission had adequately exercised supervision, or if the host member state had issued a correct vulnerability decision, Ms Esmaili would not have been exposed to the reception conditions in the EU hotspot camp so that her right under Art. 4 ChFR would not have been violated. At the same time, all three contributions have a sufficiently direct link to the damage. The conventional definition of the causation criterion does hence not lead any further.

The legal question that must be analysed can hence be formulated more precisely as to whether the causal link between an earlier non-formally binding administrative support issued by one actor, e.g. a recommendation to take a certain decision, is 'broken' by a later formally-binding decision issued by the other actor.

Given that the CJEU's jurisprudence on that matter is extensive and partly contradictory, an extensive discussion has emerged in legal scholarship, which essentially aims to develop a coherent doctrine on causation by making sense of the case law.[5] Contributing to that discussion, the following argues that the CJEU has developed its approach to causation in multi-actor constellations in two major steps. In the first step, the strict binding/non-binding dichotomy was abandoned. While earlier jurisprudence considered bindingness as a precondition for certain conduct to be causal, the CJEU has gradually let go of that requirement.[6] The second step, then, was to replace the bindingness-criterion with a more flexible approach according to which causation requires a certain degree or threshold of bindingness.

5 See only Timo Rademacher, *Realakte im Rechtsschutzsystem der Europäischen Union*, Mohr Siebeck 2014, p. 264–288; Melanie Fink, „EU Liability for Contributions to Member States' Breaches of EU Law", *Common Market Law Review* 56 (2019), p. 1227–1264; Uwe Säuberlich, *Die außervertragliche Haftung im Gemeinschaftsrecht* (fn. 4), p. 31–37, 72–181, and passim; Mariolina Eliantonio, „Judicial Review in an Integrated Administration: the Case of 'Composite Procedures'", *Review of European Administrative Law* 7 (2015), p. 65–102.

6 Insofar, the reading proposed here is in line with the prevailing interpretation. Although some contributions interpret more recent case law as a return to the strict non-binding/binding dichotomy (see fn. 80 et seq.), most contributions agree that bindingness is no longer a precondition for causation. The currently most prominent version of this opinion is probably Melanie Fink, „EU Liability for Contributions to Member States' Breaches of EU Law" (fn. 5). While her contribution is based on the alternative approach adopting a broad understanding of attribution (see chapter 3, 5.2.), the following shows that an analysis based on the traditional approach leads to the same conclusion.

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1.2 Why *WS et al. vs. Frontex* is No Counterargument

The following reconstruction of the CJEU's case law will show that the General Court's recent decision in the case of *WS et al.* is not convincing insofar as the court's argument on causation is concerned.[7] The General Court, in essence, repeats the standard answer of Frontex itself to allegations of misconduct. The point is as commonplace as it is inconsistent, suggesting that the causal link between Frontex's conduct and the resulting damage is not established because Frontex 'only assists'. In other words, the argument is that Frontex does not have the competence to issue return decisions, and therefore, its operations cannot be considered causal for damages resulting from the execution of the deportations.

Based on the CJEU's own doctrine, as established in more detail in the following, the General Court's argument is not tenable.[8] The court made two basic mistakes. First, it failed to define Frontex's misconduct. Instead of beginning its assessment with the identification of what exactly Frontex did wrong, the General Court jumped directly to the criterion of the causal link[9] and based its assessment of causation on a general reference of 'Frontex misconduct before, during and after the deportation'.[10] This is problematic because a meaningful evaluation of causation necessarily presupposes a precise definition of the conduct at stake. Although the conditions for EU liability are cumulative, as the General Court rightly stresses,[11] it seems logically impossible to assess the causal link between

7 CJEU, General Court (Sixth Chamber), judgement of 6 September 2023, WS et al v Frontex, T-600/21. The following paragraph is based on Catharina Ziebritzki, „A Hidden Success. Why the EU General Court's Frontex Judgment is Better Than it Seems", Verfassungsblog of 13/10/23. As argued in chapter 3, 3, *WS et al* is convincing insofar as it deems the action for damages admissible. When it comes to the merits, however, the judgment remains doctrinally weak – this is the part of the judgement that justifies the harsh scholarly criticism.

8 As shown by Joyce De Coninck, „Shielding Frontex. On the EU General Court's "WS and others v Frontex"", Verfassungsblog of 09/09/2023; Christopher Paskowski, „Verwaltung ohne Verantwortung. Zur Abweisung der ersten Schadensersatzklage gegen Frontex durch das EuG", Verfassungsblog of 27/09/2023.

9 CJEU, judgement of 6 September 2023, WS et al v Frontex, T-600/21 (fn. 7), para 55.

10 Ibid., para 57.

11 Ibid., para 53.

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the conduct and the damage without prior identification of the relevant conduct.[12]

Second, the General Court started its analysis of causation with the wrong question. Instead of asking whether Frontex's conduct properly defined was causal for the resulting damage, the General Court implicitly asked which conduct was causal for the resulting damage.[13] It then concluded that the national decision to reject the applicants' asylum claims and to issue their deportation orders was causal for the deportation.[14] While this statement is correct in itself, it ignores what has been explained above: there can be multiple causes for one result, i.e., both a national administrative decision and EU administrative support can be causal for the resulting damage. Based on its wrong assumption, however, the General Court then observed that Frontex was not competent to issue the relevant administrative decisions and, from this, concluded that Frontex's conduct could hence not have been causal.[15] Again, the argument here misses the point. While it is, of course, true that Frontex's competences are limited, this, as such, does not say anything about whether its factual conduct is causal for the resulting damage.

As WS et al. have appealed the General Court's decision, it will now be up to the Court of Justice to make things right.[16] The Court of Justice will have to first clearly define Frontex's relevant conduct. Second, it will have to ask the right question on causation, namely whether Frontex's participation in the process of deportation was causal for the damage resulting from the deportation. This question will have to be answered on the basis of an extensive case law analysis, which – as this chapter shows – should lead to the conclusion that Frontex's conduct is causal for the resulting damage as soon as it is de facto binding on national authorities.

12 This is why this study proceeds as it does: firstly, to define the relevant conduct, and then, secondly, assess the questions of causation.

13 CJEU, judgement of 6 September 2023, WS et al v Frontex, T-600/21 (fn. 7), para 62.

14 Ibid., para 64 and 65.

15 Ibid., para 66.

16 As Gareth Davies, „The General Court finds Frontex not liable for helping with illegal pushbacks: it was just following orders", europeanlawblog of 11 Sept 2023 put it, 'things do not look good for Frontex' and 'the Court of Justice must now sort out this mess on appeal'.

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2 Doctrine on Causation I: Lessons from KYDEP

As regards non-formally binding administrative support provided here by the EUAA and Frontex, the key question is whether support can be considered causal for resulting fundamental rights violations and hence trigger EU liability under Art. 340 para 2 TFEU, despite the fact that the relevant violations are ultimately evoked by formally-binding decisions of national authorities.

This question actually consists of two. The first is whether the EU can incur liability for administrative *support*, i.e., inter-administrative conduct. This question relates to the tension between the separation principle and administrative integration and arises whenever the Union leaves it to a member state to issue the formally-binding decision towards an individual. The second question is whether the EU can incur liability for acts that are *non-formally binding*. This question relates to the broader issue of legal protection against factual acts,[17] and arises whenever the Union refrains from issuing formally-binding decisions but nonetheless determines the outcome of an administrative procedure. While these two issues are obviously closely interrelated, keeping the distinction in mind is useful for the sake of a clear argument.

The CJEU's doctrine on both aspects has evolved considerably in recent decades. In its earlier jurisprudence, the CJEU excluded liability for administrative support as well as for non-formally binding conduct. While this approach provided legal clarity,[18] it was increasingly at odds with administrative reality and hindered individual judicial protection. Taking into account scholarly criticism, the CJEU hence gradually adjusted its jurisprudence. In a first step, it recognised that administrative support, at least when formally-binding, can trigger liability. In a second step, with its landmark decision in the 1994 judgement on *KYDEP*,[19] it recognised that this also applies when administrative support is non-formally binding. In a third step, the CJEU then confirmed with more recent judgements, such as

17 On this question in detail Timo Rademacher, „Factual Administrative Conduct and Judicial Review in EU Law", *European Review of Public Law* 30 (2017), p. 399–435; Napoleon Xanthoulis, „Administrative factual conduct: Legal effects and judicial control in EU law", *Review of European Administrative Law* 12 (2019), p. 39-73.

18 Daniel Thym, European Migration Law, 2023, p. 219 still stresses that 'judges have held repeatedly that preparatory acts are controlled at a subsequent stage, when reviewing the legality of the final outcome of the procedure'.

19 CJEU, judgement of 15 September 1994, *KYDEP*, C-146/91 (fn. 1).

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Ledra and *Bourdouvali*, that the '*KYDEP* doctrine', as it is called here, is still applicable today.

2.1 Liability for Administrative Support

In its early case law, the CJEU applied the separation principle in a strict manner and argued that inter-administrative conduct by EU bodies could not incur EU liability already due to the lack of external legal effects towards an individual. This doctrine was prominently spelt out in the judgement of *Sucrimex* of 1980.[20] *Sucrimex* forms part of a series of similar cases concerning the regulation of the sugar and milk market. *Interagra* of 1982[21] and *Société pour l'Exportation des Sucres* of 1987[22] also form part of this series, to mention only the most prominent examples.[23] In all these cases, import-export companies had applied to national authorities for export refunds. The national authorities rejected these applications based on instructions that the European Commission had sent via telex. As a result, the companies suffered financial losses. They then claimed damages from

20 CJEU, judgement of 27 March 1980, Sucrimex S. A. and Westzucker GmbH v Commission of the European Communities, 133/79.

21 CJEU, Court, judgement of 10 June 1982, Compagnie Interagra S.A. v Commission of the European Communities, 217/81.

22 CJEU, Court, judgement of 10 May 1987, Société pour l'Exportation des Sucres S.A. v Commission of the European Communities, 132/77.

23 Timo Rademacher, *Realakte im Rechtsschutzsystem der Europäischen Union* (fn. 5), p. 266–267 refers to these judgements as a 'first generation' of case law. For further similar cases see Melanie Fink, „EU Liability for Contributions to Member States' Breaches of EU Law" (fn. 5), p. 1240. It must be noted here that also *IBM* (CJEU, Court, judgment of 11 November 1981, International Business Machines Corporation (IBM) v Commission of the European Communities, 60/81) and *Borelli* (CJEU, Court, judgement of 3 December 1992, Oleificio Borelli SpA v Commission of the European Communities, C-97/91) are often cited as landmark cases for the CJEU's early doctrine of a strict binding/non-binding dichotomy. A closer look, however, shows that these judgements do not form part of the *Sucrimex* doctrine as understood here. The CJEU's main argument in these cases was that once the Commission's letter at stake had left its sphere of influence, the Commission might still change its opinion before the issuance of the actual decision and that *therefore*, the letter did not have binding effects on the national authority (see only CJEU, IBM, para 9). This shows that the CJEU's reasoning in *IBM* already departs from *Sucrimex* insofar as the CJEU argues that a lack of formal bindingness does not per se lead to a lack of bindingness.

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the Union, arguing that the Commission's telex had caused the damage.[24] In all these cases, the CJEU rejected the claim for damages as inadmissible, arguing that 'internal co-operation between the Commission and the national bodies (…) as a general rule (…) cannot make the Community liable to individuals'.[25] Instead, the CJEU argued that the concerned companies should seek legal protection against the national administrative decision before national courts.[26]

In the late 1980s, the *Sucrimex* doctrine was met with fierce scholarly criticism. In a nutshell, the doctrine was seen as insufficient in light of the principle that any Union conduct must be subject to legal review, as spelt out in *Les Verts* in 1986.[27] More precisely, the critique focused on the two aspects mentioned above. The first point of critique was that inter-administrative conduct should be considered as a potential trigger for liability. The CJEU's interpretation of the separation principle was criticised as overly formalistic. The *Sucrimex* doctrine was seen as inappropriate given the increasing integration of the administration,[28] as the traditional judicial habit of focusing on formal administrative decisions impaired the right to an effective remedy in the context of an integrated administration.[29] The second aspect of the criticism was that non-formally binding conduct should be considered as a potential trigger for liability. In this regard, the main argument was that the CJEU attached too much importance to the criterion of legal bindingness. In particular, the *Sucrimex* doctrine was considered inappropriate in cases in which non-formally binding support reduced the room for manoeuvre of the decision-issuing actor in a legally relevant manner, thereby de facto determining the decision.[30]

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24 CJEU, Court, judgement of 27 March 1980, Sucrimex, 133/79 (fn. 20), para 9; CJEU, Court, judgement of 10 May 1987, Exportation des Sucres, 132/77 (fn. 22), para 7–9.

25 CJEU, Court, judgement of 27 March 1980, Sucrimex, 133/79 (fn. 20), para 22; CJEU, Court, judgement of 10 June 1982, Interagra, 217/81 (fn. 21), para 8.

26 CJEU, Court, judgement of 27 March 1980, Sucrimex, 133/79 (fn. 20), para 24.

27 CJEU, Court, judgement of 23 April 1986, Parti écologiste 'Les Verts' v European Parliament, 294/83, para 23.

28 Filipe Brito Bastos, „Derivate Illegality in European Composite Administrative Procedures", *Common Market Law review* 55 (2018), p. 101–134, note 57 to 60 with further references to contributions criticizing the CJEU's early approach.

29 Quoted literally from Giacinto Della Cananea, „The European Union's Mixed Administrative Proceedings", *Law and Contemporary Problems* 68 (2004), p. 187–218, p. 210 with reference to *Borelli*.

30 Astrid Czaja, *Die außervertragliche Haftung der EG für ihre Organe*, Nomos 1996, p. 139–132. By contrast Peter Oliver, „Joint Liability of the Community and the

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Both points of critique were addressed by the CJEU. As regards the response to the first criticism, the landmark case was the 1986 judgement in *Krohn*.[31] With *Krohn,* the CJEU partially overturned its *Sucrimex* doctrine and henceforth applied the separation principle in a less strict manner. Departing from its earlier jurisprudence, the CJEU now held that inter-administrative conduct as such can incur liability.[32] The new *Krohn* doctrine was confirmed in subsequent judgements such as *Emerald Meats* of 1993.[33]

This change in the CJEU's doctrine is remarkable because the facts of *Krohn* are very similar to those of the *Sucrimex* cases. The judgment concerned a dispute between the import-export company Krohn and the Commission. Krohn sought compensation for damages incurred as a result of the refusal of the national authority to grant import licences. Compensation was sought from the Commission because national authorities were acting upon instruction by the Commission.[34] As elaborated by Advocate General *Mancini* in his opinion on the admissibility of the claim, the court had two options: it could either stick to its formal understanding of the separation principle or adopt a more substantial understanding and determine whether the fault actually lies with the Commission or the national authority. While Mancini acknowledged the scholarly criticism of the former option as overly formalistic, he argued that, for the sake of legal clarity, this approach should nonetheless be given preference.[35] The CJEU instead opted for the substantial approach. Unlike Mancini, the court stressed that the national body had acted in order to ensure the implementation of Community rules. It further held that if the unlawful conduct is 'in fact

Member States", in Ton Heukels, Alison McDonnell (ed.), *The Action for Damages in Community Law*, Wolters Kluwer 1997, p. 306 justifies the judgements in *Sucrimex* and *Interagra* with the argument that the actual loss was borne by the pertinent EU fund anyways. Obviously, this argument does not persist in the context of a violation of fundamental rights.

31 CJEU, judgement of 26 February 1986, Krohn, 175/84.

32 Thereby transferring the doctrine developed in the context of legislative acts, namely, that the actor from which the unlawfulness emanates shall be liable (see for instance CJEU, Court, judgement of 19 May 1992, J.M. Mulder et al v Council of the European Communities et al, Joined Cases C-104/89 and C-37/90, para 16), to the context of administrative acts.

33 CJEU, Court, judgement of 20 January 1993, Emerald Meats Limited v Commission of the European Communities, Joined Cases C-106/90, C-317/90 and C-129/91, in particular para 35–38.

34 CJEU, Court, judgement of 26 February 1986, Krohn, 175/84 (fn. 31), para 1–14.

35 Opinion of Advocate General Mancini, 19 November 1985, Krohn, 175/84 (fn. 31), p. 760–761.

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the responsibility of a community institution', the Union's support, and not the national decision, ought to be considered as causal to the damage.[36] In applying this new doctrine to the case at hand, the court then argued that the national authority was legally bound to comply with the Commission's instructions and that, therefore, the Commission's conduct was to be considered as relevant misconduct.

Krohn thus overturned *Sucrimex* only insofar as inter-administrative conduct is formally binding upon the national authority. In other words, *Krohn* addressed only the first point of criticism. It did take into account the increasing integration of the administration, but left the overemphasis on the criterion of legal bindingness intact.[37]

2.2 Liability for Non-Formally Binding Conduct

With its judgement in *KYDEP* of 1994, the court eventually addressed the second criticism and held that non-formally binding inter-administrative conduct could also trigger liability, thereby fully overturning its *Sucrimex* doctrine. This turn in case law was consequential, given that the CJEU had, in previous years, gradually turned away from its overemphasis on legal bindingness. Since the 1970s, the CJEU has consistently ruled that factual acts of the Union towards individuals can trigger liability[38] and thereby

36 CJEU, Court, judgement of 26 February 1986, Krohn, 175/84 (fn. 31), para 19: 'Where, as in this case, the decision adversely affecting the applicant was adopted by a national body acting in order to ensure the implementation of Community rules, it is necessary, in order to establish the jurisdiction of the Court, to *determine whether the unlawful conduct* alleged (…) *is in fact a responsibility of a Community institution* and cannot be attributed to the national body.' (emphasis added). Given the CJEU's inconsistent terminology, it is not decisive that reference is made here to attribution instead of to causation, see chapter 3, 5.1.

37 For the case at hand, however, the second point is of particular importance because the EU's conduct in the EU hotspots generally lacks formal bindingness, see chapter 1, 4; chapter 2, 1 and 2.

38 CJEU, Court, judgement of 28 May 1970, Denise Richez-Paris et al v Commission of the European Communities, Joined Cases 16/69 et al, para 32; CJEU, Court, judgement of 9 July 1970, Fiehn, 23/69, para 19 et seq. (failure to provide information as legally required); CJEU, Court, judgement of 10 July 1969, Claude Sayag et al v Jean-Pierre Leduc et al, 9/69, para 5, 11; CJEU, judgement of 7 November 1985, Adams, 145/83 (non-compliance with duty of confidentiality); CJEU, judgement of 8 October 1986, Leussink, Joined cases 169/83 and 136/84, para 15 et seq. (mistakes in maintenance of the service vehicle); CJEU, Court, judgement of 17 March 1993, Moat

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recognised that legal bindingness is not a prerequisite for causation. With its *Grimaldi* judgement of 1989, the CJEU also recognised that non-formally binding support could have legal effects on the national judiciary.[39]

With *KYDEP*, the recognition of the legal relevance of non-formally binding conduct was then extended to the specific context of the integrated administration. Again, this change in the doctrine is particularly remarkable because the facts in *KYDEP* were parallel to the *Sucrimex* cases in that the applicant sought compensation from the Union for damages suffered allegedly as a result of non-formally binding inter-administrative conduct by the Commission. The dispute in *KYDEP* arose in the aftermath of the Chernobyl disaster in April 1986. *KYDEP* was a cooperative established under Greek law for the purpose of buying large quantities of cereals and vegetables for stocking and reselling. The Community, in reaction to the Chernobyl disaster, had progressively adopted rules concerning maximum radioactivity tolerances: In May 1986, a Regulation governing imports from third countries was adopted. As regards exports, however, a Regulation was adopted only in November 1988. Thus, at the time of the 1986 harvest, no Community rule was in place governing exports of agricultural products originating in the member states. Therefore, the Commission sent a telex to member states, pointing out that the common rules for export refunds were to be interpreted in light of the May 1986 Regulation so that refunds by the European Agricultural Guarantee Fund would not be granted for products which are not merchantable owing to an elevated level of radioactivity. As a consequence, Hellenic authorities refused to grant refunds to *KYDEP*,

v Commission, T-13/92; CJEU, judgement of 11 October 1995, Baltsavias, Joined Cases T-39/93 and T-554/93 (both mistakes in personal files); CJEU, Court, judgement of 19 October 1995, Dieter Obst et al, T-562/93 (mistakes in the preparation and implementation of an appointment decision).

39 CJEU, Court, judgement of 13 December 1989, Salvatore Grimaldi v Fonds des maladies professionnelles, C-322/88, para 19. Note that the combination of *Grimaldi* and *Sucrimex* led to a problematic legal protection gap. According to *Sucrimex*, it was for national courts to provide legal protection against a national decision, also when this decision was issued on the basis of the Commission's instructions. Now, according to *Grimaldi*, national courts were obliged to assume that the Commission's legal opinion is correct, which means that the action against the national decision will most likely be rejected. This result is highly problematic and arguably even amounts to a violation of the right of an effective remedy as enshrined in Art. 13 ECHR and Art. 47 ChFR, see Timo Rademacher, *Realakte im Rechtsschutzsystem der Europäischen Union* (fn. 5), p. 267; Astrid Czaja, *Die außervertragliche Haftung der EG für ihre Organe* (fn. 30), p. 130.

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meaning that *KYDEP*, had to bear the financial losses resulting from the buying in of the contaminated 1986 harvest. *KYDEP*, then sought damages from the Union, arguing that the Commission's telex was unlawful and had caused the financial losses.[40]

The CJEU began its argument by clarifying that the telex does not constitute a formally-binding administrative decision.[41] However, the CJEU then continued that the member states were at risk of reduced access to EU funding had they ignored the Commission's interpretation in the telex. For this reason, the court considered it 'necessary to examine the alleged incompatibility of the Commission's telex with Community law'.[42] In the concrete case, the CJEU came to the conclusion that the Commission's conduct was lawful and, therefore, dismissed the applicant's claim for compensation.[43] The crucial point here is that the CJEU in *KYDEP* finally departed from the traditional habit of focusing on formal bindingness and instead provided a more appropriate understanding of individual legal protection in the context of the integrated administration. In order to determine whether the Union's inter-administrative conduct is causal for the resulting damage, the CJEU assessed to what extent the Union's conduct is binding upon the national authority. In this assessment, the court took into consideration the factual and legal circumstances of the individual case and emphasised that financial incentives can have effects similar to bindingness. With *KYDEP*, the court thus fully replaced its earlier strict binding/non-binding dichotomy with the understanding of bindingness as a matter of degree.[44]

Lastly, and with a view to the case at hand, it is worth noting that the facts in the case of *KYDEP* bear remarkable parallels to the case of the EU hotspots. Both cases stem from a crisis context in which the Union legislator was not yet able to react; and in both cases, the Commission stepped in with non-formally binding instructions effectively guiding member states' conduct, including through financial pressure.[45]

40 CJEU, judgement of 15 September 1994, *KYDEP*, C-146/91 (fn. 1), para 1–8.
41 Ibid., para 23–25.
42 Ibid., para 26–30.
43 Ibid., para 81.
44 Similarly, albeit only with regard to interpretative communications by the Commission, Timo Rademacher, *Realakte im Rechtsschutzsystem der Europäischen Union* (fn. 5), p. 37 with further references in note 126.
45 See chapter 3, in particular 2.3.

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2.3 Confirmation of the '*KYDEP* Doctrine'

Having shown that the CJEU has recognised in *KYDEP* that non-formally binding inter-administrative conduct by EU bodies can trigger EU liability, the remainder of this section argues that this doctrine is still good law. This claim is relatively uncontroversial only insofar as a first post-*KYDEP* generation is concerned.[46] As regards the further development of the case law, there is quite some discussion. While some argue that it is yet to be awaited whether the CJEU will confirm *KYDEP*,[47] others argue that the CJEU has already returned to the strict binding/non-binding dichotomy.[48] Here, it is argued instead that the CJEU has consistently confirmed the *KYDEP* doctrine with a second and a third post-*KYDEP* generation.[49] As will be shown, the case law is indeed consistent insofar as the CJEU considers inter-administrative conduct as a potential trigger for liability, provided that the conduct meets the threshold of de facto bindingness.[50]

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46 Uwe Säuberlich, *Die außervertragliche Haftung im Gemeinschaftsrecht* (fn. 4), p. 8 raises doubts, referring to CJEU, Court of First Instance, judgment of 15 September 1998, Oleifici Italiani SpA et al v Commission, T-54/96, para 67, which leads him to conclude that the jurisprudence is contradictory.

47 Werner Berg, „Art. 340 AEUV", in Ulrich Becker, Armin Hatje, Johann Schoo, Jürgen Schwarze (ed.), *EU-Kommentar*, Nomos 2019, para 25.

48 Timo Rademacher, *Realakte im Rechtsschutzsystem der Europäischen Union* (fn. 5), p. 271–274.

49 Note that, in terms of results, the interpretation proposed here agrees with the interpretation proposed by Melanie Fink insofar as the case law is read as establishing that the Union can incur liability for non-formally binding inter-administrative conduct. The difference only lies in the doctrinal reconstruction (see chapter 3, 5). From the perspective of the alternative approach, *KYDEP* appears as an 'anormal' exception. Consequentially, the third post-*KYDEP* generation, in particular *Bourdouvali*, is considered as a return to the 'normal' binding/non-binding dichotomy – however, and this is crucial, in the context of *primary* liability (see Melanie Fink, „EU Liability for Contributions to Member States' Breaches of EU Law" (fn. 5), p. 1242–1243, 1277 – however noting at p. 1244 that *Bourdouvali* 'somewhat left the door ajar' to consider 'factually binding conduct' for the purpose of attributing conduct to the EU body; ibid, *Frontex and Human Rights. Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law*, Oxford University Press 2018, p. 10, 256–257). From the perspective of the traditional approach adopted here, however, *KYDEP* and also *Bourdouvali* appear as confirming the rule.

50 As here Martin Gellermann, „Art. 340 AEUV ", in Rudolf Streinz (ed.), *EUV/AEUV*, C.H. Beck 2018, para 16; Matthias Ruffert, „AEUV Art. 340 (ex-Art. 288 EGV)", in Matthias Ruffert, Christian Calliess (ed.), *EUV/AEUV*, C.H. Beck 2022, para 11 (explicitly welcoming that development); Marc Jacob, Matthias Kottmann, „Art. 340 AEUV", in Eberhard Grabitz, Meinhard Hilf, Martin Nettesheim (ed.), *Das Recht der*

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a *The First Post-KYDEP Generation – from Geotronics to Camós Grau*

The first post-*KYDEP* generation consists of judgements such as *Geotronics* of 1994,[51] *Oleifici Italiani* of 1998,[52] *New Europe Consulting* of 1999,[53] *Malagutti-Vezinhet* of 2004[54] and *Camós Grau* of 2006.[55] This first generation is important because it shows that the judgement in *KYDEP* was not exceptional crisis jurisprudence in the specific context of the Chernobyl disaster but instead represented a genuine change in the CJEU's doctrine.

In *Geotronics*, the CJEU, for the first time, applied the *KYDEP* doctrine to a non-crisis context. The dispute arose in the context of the so-called PHARE program that provided subsidies to Hungary and Poland.[56] Just as in *KYDEP*, the national administration, upon instructions by the Commission, issued a decision to the detriment of the applicant, and the applicant sought damages from the Union. In line with *KYDEP,* the CJEU examined the legality of the Commission's telex, remarkably, without even considering the argument that the telex could not have caused the damage due to a lack of formal bindingness.[57]

With its judgement in *Oleifici Italiani*, the CJEU again confirmed the *KYDEP* doctrine and specified how the degree of bindingness is to be determined. The case arose in the context of the Community's financial support for olive oil production. The applicants were entrusted by the Italian intervention agency with storage and carrying out intervention operations on the Italian oil market. Between 1991 and 1993, the applicants stored several thousand tons of olive oil. According to the Community support system in

Europäischen Union C.H. Beck 2023, para 65; Foroud Shirvani, „Haftungsprobleme im Europäischen Verwaltungsverbund", *Europarecht* 46 (2011), p. 619-635, p. 619.

51 CJEU, Court of First Instance, judgement of 26 October 1995, Geotronics SA v Commission of the European Communities (Geotronics I), T-185/94; confirmed by Court, judgement of 22 April 1997, Geotronics SA v Commission of the European Communities (Geotronics II), C-395/95 P.

52 CJEU, judgment of 15 September 1998, Oleifici Italiani, T-54/96 (fn. 46).

53 CJEU, Court of First Instance, judgement of 9 July 1999, New Europe Consulting Ltd v Commission of the European Communities, T-231/97.

54 CJEU, Court of First Instance, judgement of 10 March 2004, Malagutti-Vezinhet SA v Commission of the European Communities, T-177/02.

55 CJEU, Court of First Instance, judgement of 6 April 2006, Manel Camós Grau v Commission of the European Communities, T-309/03.

56 CJEU, judgement of 26 October 1995, Geotronics I, T-185/94 (fn. 51), para 1–16.

57 Ibid., para 37. As in *KYDEP*, the action was dismissed because the Commission's support was lawful, see CJEU, judgement of 26 October 1995, Geotronics I, T-185/94 (fn. 51), para 57.

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place, the national intervention agency was to be refunded by the European Agricultural Fund. In the case of Oleifici Italiani, however, the Agricultural Fund found that a large percentage of the oil was not of the declared quality. Therefore, the Commission notified Italy that its expenditures would not be refinanced. As a consequence, a legal dispute between Oleifici Italiani and the national intervention agency unfolded before Italian courts and the agency was ultimately ordered to pay the sums due to the applicants. The agency, however, refused to pay, arguing that the Commission had already made clear in a letter of 1996 that expenditures would not be refinanced.[58] In these circumstances, the applicants sought compensation for the harm resulting from the allegedly unlawful decision contained in the 1996 letter.[59]

The CJEU confirmed that the degree of bindingness of the measure at stake is decisive for establishing the causal link and specified that it must be taken into account how a reasonable addressee would have perceived the measure.[60] On this basis, the CJEU then concluded that the Commission's letter involved no decisional element and was a purely informal opinion that did not bind the Italian authorities in any manner whatsoever.[61] While the CJEU's assessment of the concrete circumstances is not convincing insofar as the concerned member state would indeed have faced financial disadvantages if it had ignored the Commission's letter, its argument clearly confirms the *KYDEP* doctrine.[62] The CJEU's detailed interpretation of the letter's effects, despite the fact that the letter was non-formally binding, clearly confirms the assumption that, in principle, non-formally binding conduct can trigger liability.

58 CJEU, judgment of 15 September 1998, Oleifici Italiani, T-54/96 (fn. 46), para 12–31.

59 More precisely, the applicants lodged two actions against the Commission, seeking the annulment of the decision allegedly contained in the 1996 letter, and compensation of the resulting financial harm, see CJEU, judgment of 15 September 1998, Oleifici Italiani, T-54/96 (fn. 46), para 36.

60 CJEU, judgment of 15 September 1998, Oleifici Italiani, T-54/96 (fn. 46), para 49. Note the similarity to the Court's approach in the context of attribution (see above 3.1 and 2). This is consequential because the requirement of effective individual legal protection requires to take into account the external appearance of the relevant conduct towards the individual.

61 CJEU, judgment of 15 September 1998, Oleifici Italiani, T-54/96 (fn. 46), para 54, 57, 58 and 67.

62 If the CJEU had adopted the opinion that only formally-binding conduct can incur liability, it would simply have dismissed the action for damages on the same grounds that led to the inadmissibility of the action for annulment, namely with the argument that the letter was no formally-binding decision.

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In *New Europe Consulting,* the application of the *KYDEP* doctrine for the first time resulted in the liability of the Union for unlawful non-formally binding administrative support. The case also concerned the PHARE program.[63] The Commission had informed the responsible national authorities of its view that the company New Europe Consulting was in financial difficulties and hence strongly recommended that national authorities not consider any application by that company.[64] When the concerned company sought damages from the Union, the CJEU applied the *KYDEP* doctrine and argued that the Commission's telex had caused the national administration's decision.[65] Consequently, the court examined the legality of the telex, concluded that it was in breach of the principle of sound administration, and thus ordered the Union to pay compensation.[66]

The court's argument in *Malagutti-Vezinhet* then shows that *KYDEP* had already become a consolidated doctrine. The case concerned a dispute between the fruit import-export company Malagutti-Vezinhet SA and the Commission. Malagutti suffered financial loss because the Commission had issued a rapid alert message notifying the presence of pesticide residues in apples from France and giving the applicant's name as the relevant exporter.[67] The company sought damages from the Union, arguing that the Commission's email at stake had caused its financial losses. The Commission argued, remarkably still relying on the *Sucrimex* doctrine, that the communication took place in the context of internal cooperation and that such cooperation cannot cause the Community to incur liability.[68] This argument was plainly dismissed by the CJEU, which stated that 'in that connection, suffice to say that the unlawful conduct complained of by the applicant in the present case is that of the Commission and cannot be regarded as attributable to the national agencies'.[69]

63 CJEU, judgement of 9 July 1999, New Europe Consulting, T-231/97 (fn. 53), para 1–8.
64 Ibid., para 5.
65 Ibid., para 30–43, in particular para 43.
66 Ibid., para 44–49.
67 CJEU, judgement of 10 March 2004, Malagutti-Vezinhet, T-177/02 (fn. 54), para 1–20.
68 Ibid., para 27.
69 Ibid., para 29. The action was dismissed because the CJEU considered the Commission's support as lawful, see ibid, para 60–67.

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With its judgement in *Camós Grau* of 2006, the CJEU, for the first time, applied the *KYDEP* doctrine to the conduct of an EU agency.[70] The case concerned an action lodged by Manel Camós Grau, an official of the Commission, who was involved in the management of the Institute for European-Latin American Relations. Due to budgetary and accounting irregularities at that Institute, the European Anti-Fraud Office (OLAF) initiated an investigation regarding, inter alia, Mr Camós Grau. In the ensuing report, OLAF criticised the management of the Institute and the role assumed by the Commission in that regard. In particular, the report recommended that disciplinary proceedings be initiated against Mr Camós Grau. Even though OLAF's report was an internal document, a newspaper shortly after published an article on the issue and mentioned the applicant by name. The Commission then carried out further investigations and, unlike OLAF, concluded that no misbehaviour of Mr Camós Grau could be found. Thus, Mr Camós Grau lodged several complaints and actions against OLAF. With regard to his claim for compensation, Mr Camós Grau argued that OLAF had breached, inter alia, the right to a fair hearing, the principle of sound administration, and the rule of impartiality.[71] As in *Malagutti-Vezinhet,* the CJEU considered the causal link as entirely unproblematic. Although the agency's report was an internal document with no bindingness and no external legal effects,[72] the CJEU discussed the question of causation only very briefly[73] and instead examined in detail only its lawfulness.[74] The judgement in *Camós Grau* hence clearly shows that the *KYDEP* doctrine has become a permanent and stable element of the CJEU's doctrine on causation – that must apply, as a matter of course, also to the conduct of EU agencies.

70 The action was filed against the Commission as a consequences of the administrative and budgetary attachment of OLAF to the Commission, see CJEU, judgement of 6 April 2006, Camós Grau, T-309/03 (fn. 55), para 66.

71 CJEU, judgement of 6 April 2006, Camós Grau, T-309/03 (fn. 55), para 18, 20, 25, 83–89, 160.

72 Ibid., para 24–58. All actions for annulment were dismissed because OLAF's conduct was without binding effects.

73 Ibid., para 141: 'such an infringement constitutes a fault capable of giving rise to liability on the part of the Community, since there is a direct and causal link between the wrongful behaviour and the damage claimed.'.

74 Ibid., para 104–141.

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b *The Second Post-KYDEP Generation – Tillack and Arizmendi*

The second post-*KYDEP* generation consists of the 2006 judgement in *Tillack*[75] and the 2009 judgement in *Arizmendi*.[76] As mentioned above, some have interpreted these judgements as a return to the earlier *Sucrimex* doctrine.[77] Instead, it is argued here that the second generation must be read as an application and precision of the *KYDEP* doctrine to very specific case constellations. In *Tillack*, the national authority in question was a public prosecutor, while in *Arizmendi*, the Union conduct in question was a reasoned opinion in an infringement procedure. As will be shown, the CJEU confirmed that non-formally binding support could trigger Union liability and merely clarified the implications of the *KYDEP* doctrine in these specific constellations.

The case of *Tillack* concerns a dispute between OLAF and a journalist, Mr Hans-Martin Tillack. OLAF conducted investigations into alleged irregularities in the Commission's services and drew up a confidential note. Shortly after, Mr Tillack published articles which were based on the OLAF note. OLAF obtained information that Mr Tillack had paid somebody within the EU institutions for access to the confidential note and forwarded this information to judicial authorities in Brussels and Hamburg. These accordingly opened investigations into alleged corruption, and the Belgian police carried out search and seizure measures in the applicant's home and office. Mr Tillack, supported by the International Federation of Journalists, then filed several actions against the Commission.[78] Inter alia, he sought compensation for non-material harm suffered as a result of OLAF's complaint to the national judicial authorities.[79]

What is of interest here is the CJEU's argument concerning the bindingness of OLAF's note. Those who interpret the judgment as a return to

75 CJEU, Court of First Instance, judgement of 4 October 2006, Hans-Martin Tillack v Commission of the European Communities, T-193/04.

76 CJEU, General Court, judgement of 18 December 2009, Jean Arizmendi et al v Council of the European Union and European Commission, Joined Cases T-440/03 et al.

77 Timo Rademacher, *Realakte im Rechtsschutzsystem der Europäischen Union* (fn. 5), p. 271–274, referring to these cases as 'third generation' contradicting the 'second generation'.

78 CJEU, judgement of 4 October 2006, Tillack, T-193/04 (fn. 75), para 34–40.

79 See on the further damages for which compensation was claimed, see ibid., para 126–136.

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the *Sucrimex* doctrine[80] usually rely on one paragraph in particular, where the court held that the forwarding of information by OLAF was 'in no way binding' upon the national judicial authorities and that, therefore, the applicant's harm was caused by the conduct of national authorities.[81] A reading of the judgment as a whole, however, shows that the CJEU did not depart from the *KYDEP* doctrine. To begin with, the judgement clearly confirmed that formal legal bindingness is not a precondition for Union liability. The CJEU explicitly emphasised that the admissibility of Art. 263 and Art. 340 para 2 TFEU are to be assessed independently of each other, and considered the action for damages admissible, notably although OLAF's conduct lacked formal bindingness.[82] In fact, the CJEU clearly distinguished between a measure which is 'not (…) a legally binding measure'[83] and a measure which is 'in no way binding' and applied the latter criterion in the context of the assessment of causation under Art. 340 para 2 TFEU.[84] The CJEU's conclusion, then, is due to the particular circumstances of the case. As the Court explains, the note by OLAF could not determine the relevant national decision to initiate criminal proceedings because the national authority in question was a public prosecutor. The court hence applied the *KYDEP* doctrine and merely clarified that the assessment of the degree of bindingness must take into consideration that national public prosecutors are independent in their decision-making.[85]

The case of *Arizmendi* concerned the liberalisation of the port business. A few years after the EU adopted a liberalisation Regulation, the French monopoly for ship brokers was still in place. The Commission hence issued a reasoned opinion under the predecessor of Art. 258 TFEU, to which the French legislator reacted by abolishing the monopoly. Mr Jean Arizmendi, a shipbroker himself, along with many of his colleagues, then claimed compensation from the Community for the harm caused by the abolition of the

80 Timo Rademacher, *Realakte im Rechtsschutzsystem der Europäischen Union* (fn. 5), p. 273–274.

81 CJEU, judgement of 4 October 2006, Tillack, T-193/04 (fn. 75), para 121–125.

82 His action for annulment, as in *Camós Grau*, was rejected as inadmissible with the argument that OLAF's did not issue legally binding measures, see CJEU, judgement of 4 October 2006, Tillack, T-193/04 (fn. 75), para 66–82.

83 CJEU, judgement of 4 October 2006, Tillack, T-193/04 (fn. 75), para 81–82.

84 Ibid., para 100.

85 Ibid., para 70 and 122, 142.

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monopoly.[86] When assessing the action for damages, the court argued that a causal link between the Commission's reasoned opinion and the damage was not established because the opinion, due to the 'absence of any binding effect',[87] could not determine the conduct of member states.[88] Again, an isolated reading of this passage might suggest that the Court overturned the *KYDEP* doctrine.[89] A comprehensive reading in context, however, shows that such an interpretation is not very plausible. As in *Tillack*, the CJEU held that the action for damage was admissible and that, insofar as it was considered irrelevant, the reasoned opinion was not a measure intended to produce binding legal effects.[90] The CJEU's substantial argument, then, is clearly tailor-made to the specific case of infringement proceedings. The lack of a causal link was, in fact, only an auxiliary argument.[91] The main consideration underlying the CJEU's decision instead seems to be that the EU cannot incur liability for issuing reasoned opinions under Art. 258 TFEU because this would mean that the EU would pay compensation for 'damages' that arise due to the correct implementation of EU law. This alone shows that *Arizmendi* must not be understood as a general return to *Sucrimex* but instead as a clarification of the *KYDEP* doctrine in the specific context of infringement proceedings.

c *The Third Post-KYDEP Generation – Ledra and Bourdouvali*

This reading is further supported by the fact that the CJEU has recently again confirmed the *KYDEP* doctrine with its jurisprudence in the context

86 The CJEU limited its assessment to the question whether the loss was caused by the Commission's reasoned opinion, CJEU, judgement of 18 December 2009, Arizmendi, Joined Cases T-440/03 et al (fn. 76), para 56.
87 CJEU, judgement of 18 December 2009, Arizmendi, Joined Cases T-440/03 et al (fn. 76), para 93.
88 Ibid., para 86 to 87.
89 Timo Rademacher, *Realakte im Rechtsschutzsystem der Europäischen Union* (fn. 5), p. 273 note 271.
90 CJEU, judgement of 18 December 2009, Arizmendi, Joined Cases T-440/03 et al (fn. 76), para to 69–71.
91 Ibid., para 77–79.

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of the Eurozone crisis. In this sense, *Ledra* of 2016[92] and *Bourdouvali* of 2018[93] constitute the third-post *KYDEP* generation.

Both disputes arose in the context of the Cypriot bank restructuring in the aftermath of the sovereign debt crisis. To briefly recall: After certain banks had encountered severe financial difficulties, the Republic of Cyprus submitted a request to the Eurogroup for financial assistance. That support was granted, subject to the conditionalities of a macro-economic adjustment programme as set out in a memorandum of understanding (MoU) between Cyprus and the ESM, which provided, among other things, for large Cypriot banks to be resolved. This was implemented by Cyprus in 2013 on the basis of a parliamentary law and several decrees. Ledra Advertising Ltd, a Cypriot company, and the other applicants had funds on deposit at the resolved banks. As the restructuring measures led to a substantial reduction in the value of these deposits, Ledra and others claimed compensation from the Union. The applicants' main argument was that the Cypriot measures merely implemented the conditionalities defined in the MoU and that, therefore, the financial losses were actually caused by the Union. More precisely, the applicants argued that their damages resulted, inter alia, from misconduct on the part of the Commission.[94]

The Commission, in fact, had a central role in the restructuring process. Although the ESM was established as an international financial institution among member states, the Commission was entrusted with two important tasks, namely, negotiating and signing the MoU on behalf of the ESM and monitoring compliance with the conditionalities as laid down in the MoU. More precisely, the Commission was supposed to conduct the negotiations and the monitoring as part of the so-called Troika, i.e. in liaison with the European Central Bank (ECB) and, wherever possible, the International Monetary Fund (IMF).[95] Against this background, the applicants submitted that the Commission should have refrained from signing the MoU because it contained certain paragraphs that allegedly violated EU law. In essence, the applicants hence argued that their damages resulted from the

92 CJEU, judgement of 20 September 2016, Ledra, C-8/15 P et al (fn. 2).
93 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.
94 CJEU, judgement of 20 September 2016, Ledra, C-8/15 P et al (fn. 2), para 1, para 42–47.
95 Ibid., para 9.

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Commission's failure to ensure that the MoU was in conformity with EU law.[96]

The Court, therefore, had to assess whether the Commission's misconduct was causal for the damage, notably despite the fact that the temporally latest condition for the occurrence of the damage had been set by the member state and despite the fact that the Commission's conduct was not formally binding upon the member state.[97] The Court, however, did not even discuss this question in detail – and this is precisely the point. In fact, the CJEU's entire argumentation is based on the implicit assumption that non-formally binding conduct can, as a matter of course, trigger Union liability. This becomes clear from the course of the argumentation: The judgement begins with recalling that the Commission was not entrusted with making legally binding decisions in the context of the ESM and that the activities pursued by the Commission commit the ESM alone.[98] Although this was one of the main reasons for the General Court to dismiss Ledra's action,[99] the Court did not deal further with the lack of legal bindingness. Instead, it examined whether the Commission had 'contributed' to the breach of fundamental rights[100] and, in this regard, succinctly stated that the Commission had failed to provide adequate technical expertise, legal advice and guidance in the context of the negotiation and the monitoring of the MoU, and thereby had failed to fulfil its obligations as the guardian of the Treaties.[101] Subsequently, the Court entered into a detailed assessment of whether the Cypriot bank restructuring, as foreseen in the MoU, violated

96 Ibid., para 63.

97 It is that particular question, and not the probably most prominent question of whether the Commission was bound to the Charter although it was acting outside the realm of EU law, that is of interest here. See on the latter matter only Anastasia Poulou, „Financial Assistance Conditionality and Human Rights Protection: What is the Role of the EU Charter of Fundamental Rights?", *Common Market Law Review* 54 (2017), p. 991–1026.

98 CJEU, judgement of 20 September 2016, Ledra, C-8/15 P et al (fn. 2), para 51.

99 CJEU, General Court, judgement of 10 November 2014, Ledra Advertising et al v European Commission and European Central Bank, T-289/13, para 45–46, para 51–55, arguing that a causal link between the Commission's failure to ensure compliance with EU law and the damage could not be established because the reduction in the share of the applicant's deposit resulted from the entry into force of the Cypriot decree.

100 CJEU, judgement of 20 September 2016, Ledra, C-8/15 P et al (fn. 2), para 68.

101 Ibid., para 52.

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the applicants' fundamental right to property, concluded that this was not the case, and hence dismissed the action for that reason.[102]

The Court's argument in *Ledra* hence clearly shows that it considered the economic pressure attached to the Commission's conduct as sufficient to establish causation in the sense of Art. 340 para 2 TFEU.[103] Otherwise, there would have been no reason for the Court to discuss the politically charged and doctrinally intricate questions of whether the fundamental right to property was applicable and violated. It was perfectly clear and undisputed that the Commission's conduct was not formally binding upon Cyprus. Thus, if the Court had considered the lack of legal bindingness as preventing the causal link, invoking that argument would have been a much simpler and less disputed way to reject Ledra's claim. The fact that the Court, notably unlike the General Court,[104] did not dismiss Ledra's action on that basis but instead discussed the difficult questions related to the Charter of Fundamental Rights unequivocally indicates that the Court did not consider the lack of legal bindingness as a relevant argument in the context of causation.

This reading is confirmed by the textbook-like *Bourdouvali* judgement issued by the General Court in 2009. As in *Ledra*, the applicants, among them Ms Bourdouvali, claimed compensation from the Union for a reduction of the value of their deposits with the resolved Cypriot banks.[105] The General Court started its argument by recalling the separation principle.[106] It then went on to remind that, nonetheless, the Union may incur liability in two constellations, namely: first, if the damage must be considered as having been caused by the EU because the national authorities de facto had no discretion in the implementation of EU measures,[107] or second, on

102 Ibid., para 65–76.

103 Differently René Repasi, „Judicial protection against austerity measures in the euro area: Ledra and Mallis", *Common Market Law Review* 54 (2017), p. 1123-1156, p. 1135 who argues that the Court did not pronounce itself on the existence of a causal link because it dismissed the action already on the ground of lawfulness of the conduct at stake.

104 CJEU, General Court, judgement of 10 November 2014, Ledra, T-289/13 (fn. 99), para 51–55.

105 CJEU, judgement of 13 July 2018, Bourdouvali, T-786/14 (fn. 93), para 47–48, 73.

106 Ibid., para 79.

107 Ibid., para 80, 97–192, remarkably with reference to Krohn 'by analogy', but not to *KYDEP*. Note that judgement's terminology is not only inconsistent but also unusual insofar as it differentiates between acts which are attributable 'formally' and those which are attributable 'in reality' to the Union, para 82–83, 89, 95. In the

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the basis of non-formally binding conduct related to the EU's negotiation and monitoring tasks.[108] Whereas the *Ledra* judgement had already established that legal bindingness is not a precondition in the second case, the *Bourdouvali* judgement now clarified that legal bindingness is also not a precondition in the first case.[109]

Certainly, the General Court ultimately focused on a formally binding decision by the Council to establish that Cyprus had no margin of discretion.[110] This focus, however, was due to the facts of the case and must not be misunderstood to indicate that legal bindingness is a precondition to establishing causation.[111] Quite to the contrary, the *Bourdouvali* judgment is exceptionally unequivocal in that not only legal bindingness but also financial pressure is sufficient to establish causation within the sense of Art. 340 para TFEU. The General Court not only examined whether the contested EU acts were obligatory but also took into account the economic and financial pressure to which the Republic of Cyprus was confronted and, on this basis, concluded that the Cypriot authorities de facto had no choice but to implement the Union's conditionalities.[112]

In sum, the judgements in *Ledra* and *Bourdouvali* clearly show that the CJEU consistently considers the degree of bindingness of the Union's conduct decisive for establishing causation.

Yet, one last objection must be considered. The reading of *Ledra* and *Bourdouvali* as confirming the *KYDEP* doctrine requires justification insofar as the third post-*KYDEP* generation, unlike the first and the second one, which concerned factual conduct in the context of the integrated administration, concerned factual conduct in the context of international agreements. There are two ways to justify the reading proposed here.

The first argument is that Eurozone judgements must be read as extending the *KYDEP* rationale from administrative to legislative acts. Seen from

terminology adopted here (see chapter 3, 5), 'formal' attribution means causation on the basis of formal legal bindingness; attribution 'in reality' means causation on the basis of de facto legal bindingness.

108 CJEU, judgement of 13 July 2018, Bourdouvali, T-786/14 (fn. 93), para 81, 193–206.

109 Note that the second case can also be formulated as a sub-category of the first case, and vice versa. Seen from this perspective, *Ledra* already establishes the relevant doctrine, which *Bourdouvali* then only makes explicit.

110 CJEU, judgement of 13 July 2018, Bourdouvali, T-786/14 (fn. 93), para 182–190.

111 For such reading see Melanie Fink, as cited in fn. 49, albeit with doubts, from the perspective of the alternative approach.

112 After having examined several other relevant measures by Union bodies, in CJEU, judgement of 13 July 2018, Bourdouvali, T-786/14 (fn. 93), para 101–170.

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this perspective, *Ledra* and *Bourdouvali* appear not only as applications of the *Les Verts* rationale to factual conduct but also as consequential applications of the *KYDEP* rationale to administrative and legislative conduct.[113] In other words, the *KYDEP* doctrine today follows a fortiori from the Eurozone jurisprudence. If financial pressure is sufficient to establish that a member state was de facto obliged to adopt a certain legislative act, it a fortiori must also be sufficient to establish that a member state was de facto forced to adopt a certain administrative decision.[114]

The second argument is specific to the case of the EU hotspots. As argued above, the EU hotspot administration can at least partially be understood as forming part of the Commission's implementation of the EU-Türkiye Statement.[115] If one adopts this understanding, the EU hotspots case bears remarkable parallels to the *Ledra* case. Both cases arose from a crisis context.[116] In both cases, member states concluded an agreement on common crisis management outside the scope of Union law.[117] In both cases, the Commission, assisted by other agencies or institutions, was entrusted with implementing that agreement, including monitoring compliance with EU law, which entails that the Commission exercised an important influence on how the agreement was implemented without however issuing formally binding decisions. It is hence only consequential that the Commission, in both cases, must exercise its tasks in compliance with its role as guardian of the Treaties and that a failure to do so can trigger EU liability.[118]

113 This understanding is supported by the CJEU's reference to Krohn 'by analogy', see fn. 107 above.

114 If legal bindingness is not even required when it comes to legislative acts of the member states, legal bindingness can also not be required when it comes to merely administrative acts of the member states.

115 See chapter 1, 2.

116 For a comparison see Franz Schimmelpfennig, „European integration (theory) in times of crisis. A comparison of the euro and Schengen crises", *Journal of European Public Policy* 25 (2018), p. 969-989; Felix Biermann, Nina Guérin, Stefan Jagdhuber, Berthold Rittberger, Moritz Weiss, „Political (non-)reform in the euro crisis and the refugee crisis: a liberal intergovernmentalist explanation", *Journal of European Public Policy* (2019), p. 246-266. Note, however, that the present study contradicts the cited literature insofar as it argues that the crisis of the asylum system has increased integration, too.

117 The ESM Treaty respectively the EU-Türkiye Statement.

118 CJEU, judgement of 20 September 2016, Ledra, C-8/15 P et al (fn. 2), para 56; CJEU, judgement of 13 July 2018, Bourdouvali, T-786/14 (fn. 93), para 196–197, 200–203.

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3 Doctrine on Causation II: Lessons *from* Ledra

Based on the case law analysis conducted so far, this third section examines whether non-formally binding administrative supervision, more precisely the Commission's failure to adequately supervise, can be considered as causal for resulting fundamental rights violations and hence trigger EU liability under Art. 340 para 2 TFEU, despite the fact that these violations are ultimately evoked by formally-binding decisions of national authorities. Insofar as the question relates to the fact that supervisory measures are *non-formally binding*, the second section has shown already that such conduct can be causal if the threshold of de facto bindingness is met. What remains to be discussed here are, hence, only those elements of the question that arise due to the specific nature of administrative *supervision* in contrast to administrative support.

To this end, the following provides an overview of the case law dealing with breaches of the Commission's supervisory obligations specifically. The analysis starts with the court's earlier jurisprudence in the context of competition law and then moves on to the more recent jurisprudence in the context of the Eurozone crisis. This will show that the CJEU's doctrine on causation is largely consistent. Certainly, there are important differences between the two strands of jurisprudence – in particular, that, in the context of competition law, the Commission's supervisory duties arise from secondary law and the relevant breach for the purpose of Art. 340 para 2 TFEU is defined as the supervisory obligation, whereas, in the context of the Eurozone crisis, the Commission's supervisory duties arise from Art. 17 TEU and the relevant breach is defined as the supervisory standard, i.e. for instance, the concerned fundamental rights.[119] Yet, the case law is consistent insofar as the CJEU considers it decisive, irrespective of the context concerned, whether the supervisory measures at stake bear a sufficient degree of bindingness. In other words, the CJEU's case law on liability in the context of administrative supervision confirms the *KYDEP* doctrine in that de facto binding measures – or the lack thereof – can be considered as causal for resulting damages.[120]

119 On the implications for the individual-rights criterion and the sufficiently-serious-breach criterion see chapter 3, 3.3.

120 On the Commission's supervisory duties more generally see Sabino Cassese, „European Administrative Proceedings", *Law and Contemporary Problems* 86 (2004), p. 21-36, p. 21 with further references; Gerard C. Rowe, „Administrative supervision of

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3.1 Liability for Breach of Supervisory Obligation

One of the CJEU's earliest judgments on Union liability for the Commission's breach of its supervisory obligations is *Kampffmeyer* of 1967.[121] The case concerns the common cereal market. Germany had suspended the issue of import licences for certain cereals for which the import levy was fixed at equal to zero, and the Commission then issued a decision authorising the German government to keep those protective measures in force. After the Commission's decision had been annulled by the Court of Justice, the applicants claimed compensation, arguing that the Commission had failed to adequately exercise its obligation to supervise national authorities, as established under the relevant secondary law. The Commission submitted that a breach of supervisory duties cannot, under a general principle common to the laws of the member states, incur public liability, except in the case of gross malfeasance.[122] The CJEU, however, plainly dismissed the Commission's argument as irrelevant; it instead interpreted the Commission's duties under the relevant Regulation and concluded that the Commission was obliged to comprehensively examine the national protective measures. Therefore, the court held, the Commission bears independent responsibility for the retention of a protective measure.[123] While the claim in the specific case was dismissed due to the speculative nature of the damage invoked by the applicant, the *Kampffmeyer* ruling is fundamental in that it established that a breach of a supervisory duty on the part of the Commission could, in principle, trigger Union liability. Until today, *Kampffmeyer* is one of the central references for applicants substantiating such claims before the CJEU.[124]

The chronologically next relevant judgements, it is argued here, were *Sucrimex* of 1980 and the related cases as set out above.[125] This reading is justified already because the facts in *Sucrimex* and *Kampffmeyer* are

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administrative action in the European Union", in Herwig Hofmann, Alexander Türk (ed.), *Legal Challenges in EU Administrative Law*, Edward Elgar 2009, p. 179–217, p. 190–209.

121 CJEU, Court, judgement of 14 July 1967, Firma E. Kampffmeyer et al v Commission of the European Economic Community, Joined Cases 5/66 et al.

122 Ibid., p. 254.

123 Ibid., p. 262.

124 For instance, the applicants' argument in CJEU, judgement of 13 July 2018, Bourdouvali, T-786/14 (fn. 93), para 195.

125 See 2.1.

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quite similar: Both cases concerned inter-administrative measures of the Commission to ensure the legality of member states' activities. The main difference is only that *Kampffmeyer* is concerned with an omission, while Sucrimex is concerned with an act on the part of the Commission. Yet, both strands are hardly read together.[126] In the context of supervisory duties, most arguments refer only to cases in which the misconduct consisted of a failure to act. Whereas this is understandable insofar as, in cases of omission, it is especially obvious that the misconduct consisted in a violation of supervisory duties, the measures taken in cases such as *Sucrimex*, e.g. in the form of letters or telexes to the national authorities, also serve to ensure the legality of the member state's activities, and in this sense also qualify as supervisory measures. From this perspective, *Sucrimex* appears to be a step back. Whereas in *Kampffmeyer*, the court did not even call into question that the Commission's inter-administrative conduct could trigger liability, this implicit assumption was revoked with *Sucrimex,* where it found that inter-administrative conduct cannot per se trigger Union liability.[127]

Consequentially, the 1986 *Krohn* judgment also forms part of the jurisprudence relevant to supervisory duties.[128] As set out above, *Krohn* partially overturned *Sucrimex* insofar as the CJEU held that inter-administrative instructions by the Commission can trigger Union liability, provided that those instructions are formally-binding upon the national authority issuing the administrative decision. Now, seen in the context of the earlier case law, *Krohn* appears as a partial return to the earlier *Kampffmeyer* doctrine.

On this basis, the 1994 *KYDEP* judgement and the first post-*KYDEP* generation, ranging from *Geotronics* to *Malagutti-Vezinhet*, are relevant here, too. Again, this case law now appears as confirming the *Kampffmeyer* insofar as non-formally binding supervisory conduct can be considered as

126 *Kampffmeyer* is often cited as a reference for supervisory duties of the Commission, and *Sucrimex* as a reference for the exclusion of liability for inter-administrative action.

127 As was confirmed with CJEU, Court, judgement of 10 June 1982, Interagra, 217/81 (fn. 21), and CJEU, Court, judgement of 10 May 1987, Exportation des Sucres, 132/77 (fn. 22).

128 As confirmed with CJEU, judgement of 20 January 1993, Emerald Meats, C-106/90 et al (fn. 33).

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causal for resulting damages, even when these are ultimately evoked by national decision, and hence trigger EU liability.[129]

Further, the judgements in *Francesconi* of 1989 and *Coldiretti* of 1998[130] are of particular interest in the context of supervisory duties. Unlike in earlier cases, the applicants here claimed compensation for damages to interests that are protected by fundamental rights. Consequentially, these are the first judgements in which the CJEU established supervisory duties directly on the basis of fundamental rights.[131]

Francesconi is one of the very few cases where compensation was claimed from the Union for human death. The applicants, among them Benito Francesconi, invoked damages suffered as a result of the presence of adulterated Italian wine on the market.[132] They complained of bad management and a failure to supervise the market on the part of the Commission, which allegedly failed to ensure the proper implementation of the applicable rules governing the wine market.[133] In concrete terms, the applicants argued that their losses resulted from the Commission's failure to take action to prevent the presence of adulterated wine on the market and its failure to disclose information concerning that matter in a particular press conference. The judgment of *Francesconi* is insightful for two reasons. First, the court established the Commission's supervisory duties on the basis of the fundamental right to human health. More specifically, it held that the Commission is obliged to intervene where member states do not sufficiently comply with their obligations to protect health, although the applicable secondary law does not provide for such obligation.[134] The second instructive point is that the court does not rule out, at least not in principle, that the Commission's failure to supervise member state authorities is causal for resulting

129 CJEU, judgement of 15 September 1994, *KYDEP*, C-146/91 (fn. 1); CJEU, judgement of 26 October 1995, Geotronics I, T-185/94 (fn. 51); CJEU, judgement of 10 March 2004, Malagutti-Vezinhet, T-177/02 (fn. 54).

130 CJEU, Court, judgement of 30 September 1988, Portuguese Republic v Council of the European Union (Coldiretti), T-149/96.

131 In detail on this Uwe Säuberlich, *Die außervertragliche Haftung im Gemeinschaftsrecht* (fn. 4), p. 225–228.

132 The applicants consisted of, first, dealers, restaurateurs and producers of Italian wine claiming damages for financial loss consisting in a reduction of export of Italian wine, and second, persons who claimed damages for a loss of a member of their family who died from wine containing methanol.

133 CJEU, Court (Second Chamber), judgement of 4 July 1989, Benito Francesconi and others v Commission of the European Communities, 326/86 and 66/88, para 5.

134 Ibid., para 12.

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fundamental rights violations, although the formally-binding decision that ultimately evoked these damages was issued by the member state. This follows from the course of the argumentation: If the court had considered causation to be excluded in principle, it could have dismissed the claims on this basis alone. Instead, however, the court examined in detail the scope of the supervisory duties and whether the Commission had complied with these. More specifically, it found that the Commission had adopted all required measures in relation to the management of the wine market and stressed that the Commission had insufficient facts at its disposal to require a review of the Italian monitoring measures.[135] The court, therefore, rejected the actions on the grounds that the applicants had failed to establish unlawful conduct on the part of the Commission.[136]

The case of *Coldiretti* is similar in that it also concerns damages to human health. The Italian trade organisation Coldiretti, along with more than one hundred Italian farmers, claimed compensation for the damage allegedly suffered as a result of acts and omissions of the Council and the Commission following the outbreak of BSE, a deadly disease affecting cattle. In particular, the applicants argued that the Commission, even though it was informed from 1989 onwards of the discovery of the BSE outbreak in the UK, failed to exercise its supervisory powers in order to ensure that member states took the necessary steps to prevent the epidemic from spreading. In particular, the applicants complained that the Community institutions had not adopted already in 1990 the measures they adopted in 1996, namely a ban on sales of beef from the UK to continental Europe.[137] The *Coldiretti* judgment focused specifically on causation. Unlike in *Francesconi,* the CJEU started its assessment with a detailed examination of the causal link, ultimately denied causation, and therefore refrained from discussing the scope of the Commission's supervisory obligations in much detail. As regards causation, the court recalled its doctrine in the context of omission, namely that one must assess the hypothetical situation if the measure at stake would have been taken.[138] The court also noted that conducting this assessment is particularly difficult due to the specific circumstances of the case. Having said this, however, it held that the applicants did not

135 Ibid., para 10–19, 22.
136 Ibid., para 24 to 26.
137 CJEU, judgement of 30 September 1998, Coldiretti, T-149/96 (fn. 130), para 67, 70–71, 79.
138 Ibid., para 115–123.

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submit any indication whatsoever in support of their argument concerning causation. Rather, the court inferred from the applicants' submission that their losses were, in fact, due to alarmist media reports. Consequentially, the court considered it unlikely that the adoption of a sales ban in 1990 could have prevented losses of cattle farmers in Italy.[139] As no causal link could be established, the action was dismissed.[140] Hence, the court did not even examine the concrete scope of the Commission's supervisory duties. Nonetheless, it is clear from the judgement that the court assumed that supervisory duties can, at least in principle, arise from fundamental rights.[141]

3.2 Liability for Breach of Supervisory Standard

Based on this earlier jurisprudence, the doctrine of liability for breach of supervisory obligations was then fully unfolded with the case law in the context of the Eurozone crisis. Out of the many cases, *Ledra* of 2016[142] and *Bourdouvali* of 2018[143] deserve particular attention.[144] As established above, the applicants argued that the Commission had breached its supervisory obligations relating to the conclusion and the implementation of a memorandum of understanding (MoU). Remarkably, the CJEU agreed with the applicants insofar as it established relatively far-reaching supervisory obligations of the Commission on the basis of Art. 17 TEU. The respective claims under Art. 340 para 2 TFEU were dismissed only because the CJEU concluded that the fundamental right to property of the applicants was not violated in the specific cases.[145] As has been shown above already, *Ledra* and *Bourdouvali* established the degree of bindingness of the Union's conduct as the decisive factor in the context of causation; only

139 Ibid., para 115, 108–118, 122.
140 Ibid., para 123.
141 Ibid., para 77, 123.
142 CJEU, judgement of 20 September 2016, Ledra, C-8/15 P et al (fn. 2).
143 CJEU, judgement of 13 July 2018, Bourdouvali, T-786/14 (fn. 93).
144 For an overview see Anastasia Karatzia, „An Overview of Litigation in the Context of Financial Assistance", *Hungarian Yearbook of International Law and European Law* (2016), p. 573-590. Note that CJEU, Court, judgement of 20 September 2016, Konstantinos Mallis et al v European Commission et al, C-105/15 P et al. is less relevant here because it concerns only an action for annulment.
145 CJEU, judgement of 20 September 2016, Ledra, C-8/15 P et al (fn. 2), para 75; CJEU, judgement of 13 July 2018, Bourdouvali, T-786/14 (fn. 93), para 359.

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two points concerning the specificities of supervisory obligations remain to be discussed, namely, first, the doctrinal shift from supervisory obligations under secondary law to those under Art. 17 TEU, and second, the shift from the focus on the supervisory obligation to the focus on the supervisory standard.

a *The Doctrinal Shift From Supervisory Obligations Under Secondary Law to Art. 17 TEU*

The *Ledra* doctrine is often read as a fundamental innovation or even as a surprise.[146] Seen in context with the earlier *Kampffmeyer* doctrine, however, it rather appears as a consequential development thereof. In fact, *Ledra* is not innovative in that the Union may incur liability for the Commission's breach of supervisory obligations.

What is innovative is only the legal basis for the supervisory obligation. Whereas the earlier jurisprudence established the Commission's supervisory obligations solely on the basis of the relevant secondary law, *Ledra* and *Bourdouvali* established the Commission's obligations on the basis of Art. 17 TEU. Although the CJEU also relied on the relevant provisions of the ESM Treaty, the decisive argument was that Art. 17 TEU defined the Commission's role as the guardian of the Treaties.[147] Referring to its earlier jurisprudence in *Pringle*, the court recalled that the Commission is obliged under Art. 17 TEU to promote the general interest of the Union and to oversee the application of Union law.[148] It then stressed that the Commission had retained this role within the framework of the ESM Treaty and that it must, therefore, exercise its obligations in that context, namely to negotiate and to sign the conclusion of the MoU between the ESM and the concerned member state as well as to monitor the implementation thereof, in compliance with Art. 17 TEU. In concrete terms, the Commission was

146 See only René Repasi, „Judicial protection against austerity measures in the euro area: Ledra and Mallis" (fn. 103), p. 1154.

147 CJEU, judgement of 20 September 2016, Ledra, C-8/15 P et al (fn. 2), para 57–59; CJEU, judgement of 13 July 2018, Bourdouvali, T-786/14 (fn. 93), para 200–203.

148 CJEU, Court (Full Court), judgement of 27 November 2012, Thomas Pringle v Government of Ireland et al, C-370/12, para 163.

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hence obliged to refrain from signing an MoU whose consistency with EU law it doubts.[149]

The argumentative continuity, as well as the innovation relating to Art. 17 TEU, becomes particularly clear from the court's reasoning in *Bourdouvali*. The applicants supported their argument that the Commission's inadequate monitoring was capable of incurring Union liability with reference to *Kampffmeyer*. Adopting that argument in principle, the court then introduced a distinction, namely between the Commission's mere approval and its authorisation of certain national measures. According to the court, *Kampffmeyer* is concerned with the latter category, which means that the mere approval of certain measures is not sufficient to incur Union liability. Crucially, however, the court then argued that the Commission's supervisory obligations as guardian of the Treaties go beyond mere approval and that a breach of Art. 17 TEU can trigger liability, too.[150]

This new focus on Art. 17 TEU is remarkable because that provision defines the role of the Commission and thus establishes a normative programme but does not define the concrete duties of the Commission in a given context. With a view to an action for damages, however, it is indispensable to identify a specific misconduct. Art 340 para 2 TFEU thus requires the concretisation of the Commission's obligations under Art. 17 TEU. The CJEU solves this problem through contextual interpretation: In *Ledra* and *Bourdouvali*, for instance, it identified the concrete duties of the Commission by interpreting Art. 17 TEU in conjunction with the ESM Treaty. In similar judgements, it also relied on the Commission's obligations under secondary law, which must be understood as ultimately arising from Art. 17 TEU, even though the CJEU did not always make this explicit.[151]

While this approach is convincing in terms of substance, it also carries a procedural risk. As the applicants bear the burden of proof, they must be able to identify the scope of the Commission's duties in a given context. If, however, the applicants do not know what exactly the Commission's obligations are under Art. 17 TEU, it is very difficult to determine whether a certain failure constitutes unlawful conduct within the meaning of Art. 340

149 CJEU, judgement of 20 September 2016, Ledra, C-8/15 P et al (fn. 2), para 57–59; CJEU, judgement of 13 July 2018, Bourdouvali, T-786/14 (fn. 93), para 200.

150 CJEU, judgement of 13 July 2018, Bourdouvali, T-786/14 (fn. 93), para 195, 197–203, 219–225.

151 CJEU, judgement of 20 September 2016, Ledra, C-8/15 P et al (fn. 2), para 57–59; CJEU, judgement of 13 July 2018, Bourdouvali, T-786/14 (fn. 93), para 200–203; CJEU, judgement of 14 July 1967, Kampffmeyer, 5/66 et al (fn. 121), p. 260–267.

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para 2 TFEU. This problem is further aggravated in contexts – such as the Eurozone crisis or the asylum administration – where applicants do not have sufficient insights into the Commission's workings to even prove what exactly the Commission did or did not do.[152]

As mentioned above, the CJEU seems to have recognised and mitigated that risk by a certain generosity regarding the definition of unlawful conduct. In fact, the court considers it sufficient for an applicant to state a bundle of measures, or acts and omissions as a whole, that has allegedly caused damage.[153] The CJEU's approach, hence, is to examine whether the invoked bundle of acts and omissions constitutes a breach of the Commission's supervisory obligations, thereby both identifying the relevant conduct and specifying the obligations under Art. 17 TEU at the same time.[154]

b *The Doctrinal Shift From the Supervisory Obligation to the Supervisory Standard*

The second innovative point of the *Ledra* doctrine is that the court does not consider the breach of the supervisory obligation, i.e. here of Art. 17 TEU, as the breach triggering liability under Art. 340 para 2 TFEU, but instead focuses on the breach of the supervisory standard, i.e. here, the fundamental rights with which the Commission must ensure compliance.

After the court had established in *Ledra* and *Bourdouvali* that the Commission had breached its supervisory obligations under Art. 17 TEU, one would now expect that Art. 17 TEU is the relevant rule that must qualify as conferring rights upon individuals, and the breach of which must be sufficiently serious. Instead, however, the court went on to examine whether the Commission, by not complying with its supervisory obligations, had violated the fundamental rights invoked by the applicants, inter alia Art. 17 ChFR and Art. 41 ChFR,[155] and defined these fundamental rights as the rel-

152 Note that in the case of the EU hotspots, the minutes of the relevant meetings in the responsible supervisory fora are not published. For the relevant fora see chapter 2, 2.6.

153 CJEU, judgement of 13 July 2018, Bourdouvali, T-786/14 (fn. 93), para 200–201; see fn. 30.

154 CJEU, judgement of 20 September 2016, Ledra, C-8/15 P et al (fn. 2), para 51–60, 65–73.

155 Ibid., para 47, 66–75; CJEU, judgement of 13 July 2018, Bourdouvali, T-786/14 (fn. 93), para 247, 247 to 508.

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evant rules the breach of which triggers liability, and which must accordingly fulfil the individual-rights criterion and the sufficiently-serious-breach criterion.[156] The supervisory obligation enshrined in Art. 17 TEU hence merely serves as a bridging argument. Although the breach thereof was established, the court dismissed the actions in *Ledra* and *Bourdouvali* on the grounds that the applicants' fundamental rights were not violated.[157] This is particularly noteworthy because the court, at the same time, considered the breach of Art. 17 TEU as decisive in the context of attribution and causation.

Hence, the *Ledra* doctrine introduced a split in the liability doctrine. Whereas the breach of the supervisory obligation, i.e. Art 17 TEU, must be attributed to the Commission and constitutes the conduct that must be causal for the damage, the breach of the relevant fundamental right must fulfil the individual-rights criterion and the sufficiently-serious-breach criterion.[158] Unlike under the *Kampffmeyer* doctrine, the qualified unlawfulness in the sense of Art. 340 para 2 TFEU is hence not established by the breach of the supervisory obligation but by the breach of the supervisory standard.

From a practical perspective, however, this development is of limited relevance. Although one might think at first sight that the *Ledra* doctrine increases the threshold for Union liability by requiring applicants to prove a breach of both the supervisory obligation and the supervisory standard, a closer look shows that this is actually not correct. The *Ledra* doctrine does not make it more difficult for an applicant to successfully claim damages from the Union. This is because the breach of the supervisory obligation and the supervisory standard are inextricably linked. In fact, it can only be said that the Commission has breached its obligations under Art. 17 TEU once it is established that its failure resulted in a fundamental rights violation. For the same reason, the qualification of the supervisory obligation depends on the qualification of the supervisory standard. It is, therefore, actually easier for an applicant to establish a qualified breach of the supervisory standard, in particular where that standard consists of fundamental rights.

156 CJEU, judgement of 20 September 2016, Ledra, C-8/15 P et al (fn. 2), para 65–68.
157 Ibid., para 74; CJEU, judgement of 13 July 2018, Bourdouvali, T-786/14 (fn. 93), para 247–508.
158 Note that the fundamental rights violation as such constitutes the damage, see chapter 3, 3.3.c.

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In any event, the doctrinal shift from *Kampffmeyer* to *Ledra* is practically irrelevant in cases where both the supervisory obligation and the standard fulfil the individual-rights criterion and the sufficiently-serious-breach criterion – and, as established above, the case of the EU hotspot administration falls within this category.[159]

4 The De Facto *Bindingness Threshold*

The case law analysis has shown that non-formally binding administrative conduct by a Union body is to be considered causal, provided that it is *de facto binding* upon the decision-issuing national authority. In order to apply this doctrine to the case of the EU hotspot administration, three points require clarification. First, the theoretical considerations underlying the CJEU's case law must be made explicit because this facilitates the application of the doctrine to new constellations. Second, the required degree of bindingness must be defined with regard to the specific case in which the misconduct consists of an omission to act.[160] Third, the concrete circumstances establishing *de facto* bindingness must be defined more precisely.

4.1 Degree of Bindingness as Decisive Factor

To understand why the degree of bindingness is a decisive factor for establishing causation, it is useful to start from the function of the causation criterion.[161] In general terms, causation serves to establish whose fault has led to the damage.[162] For a more precise understanding of this function in the specific context where several administrative actors are involved, consider the following example. Imagine a case in which actor A provides administrative support, such as, e.g. information or interpretative guidelines, with the content n, towards another actor B, who then issues an

159 See chapter 3, 4.2.

160 As set out in chapter 3, 4.1, the Commission's misconduct typically consists in an omission to act.

161 For a similar approach see Uwe Säuberlich, *Die außervertragliche Haftung im Gemeinschaftsrecht* (fn. 4), p. 75–97. He however makes a different argument, and comes to the conclusion that de facto binding support cannot trigger liability, see ibid., p. 97.

162 See chapter 3, 5.1.

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administrative decision with the content n1 towards an individual who, as a result, suffers damage. Assuming that the individual claims damages from A, the decisive question is whether n is causal for the damage. As set out above, the CJEU's general formula on causation requires that the conduct is a *condition sine qua non* to the occurrence of the damage and that there is a sufficiently direct link between the conduct and the damage.[163] In multi-actor situations, where both the conduct n of actor A and conduct n1 of actor B constitute a *condition sine qua non*, the sufficiently direct link becomes the decisive criterion. In other words, the function of the sufficiently-direct-link criterion is to determine whether the contribution n of A, or rather the contribution n1 of B, is to be considered as the fault which has led to the damage.[164] In light of this function, it follows that the closeness of n to the damage is decisive for establishing a sufficiently direct link. Crucially, closeness must not be understood in terms of the chronological order of events but rather in substantive terms. The more A has contributed to the occurrence of the damage, the more speaks in favour of considering n as having a sufficiently direct link to the damage. Taking into account that n1 occurs chronologically later than n, it therefrom follows that the stronger n determines n1, the more speaks in favour of considering A as having caused the damage.

In other words, the sufficiently-direct-link criterion has the function of setting a *threshold of determinacy*.[165] This has three important implications for the argument of bindingness in the context of causation. First, the determinacy function is the very reason why legal bindingness is an argument for establishing causation. If the support provided by A, as in *Krohn* and *Emerald Meats,* is legally binding upon B, n fully determines n1, and

163 See fn. 3.

164 It must be kept in mind here that A and B could also be jointly liable. As defined above, this question and the ensuing complicated issues regarding the relation of A's and B's liability, however fall outside the scope of this study. See further Wouter P. J. Wils, „Concurrent liability of the Community and a Member State", *European law review* 17 (1992), p. 191-206; Peter Oliver, „Joint Liability of the Community and the Member States" (fn. 30); Georgios Anagnostaras, „The Common European Asylum System: Balancing Mutual Trust Against Fundamental Rights Protection", *German Law Journal* 21 (2020), p. 1180–1197.

165 Similarly, Melanie Fink, „EU Liability for Contributions to Member States' Breaches of EU Law" (fn. 5), p. 1240 who, from the perspective of the alternative approach focusing on attribution instead of causation, refers to 'the *threshold* required to attribute conduct of member state authorities to the Union' (emphasis added).

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therefore, A is to be considered as having caused the damage.[166] If, however, as in *Tillack* and *Oleifici Italiani,* the support provided by A is in no way binding upon B, n does not determine n1 at all, and therefore, A cannot be considered as having caused the damage.[167] Second, and this is crucial, the determinacy function also shows that legal bindingness is not an argument in itself. The legal bindingness of n matters only because it has the effect that n determines n1. As legal bindingness matters only insofar as it reflects the determinacy function, a lack of legal bindingness does not per se speak against establishing causation. Therefore, the argument that A shall not be liable simply because n is not legally binding upon B cannot persist. Third, and instead, the determinacy function shows that the *degree* of bindingness is decisive for establishing causation. As n can determine n1 to a lesser or stronger extent, n can be said to be more or less binding upon B. Indeed, administrative reality shows that attaching legal bindingness to n is not the only way for A to make sure that n determines n1. Another option for A to make sure that n1 corresponds to n is to announce financial disadvantages for B in case of non-correspondence. Also, A could rely on its political authority or technical expertise, meaning that B routinely issues n1 in line with n because it trusts in A's assessment. Yet another option to ensure that n1 corresponds to n would be to rely on limits in terms of practical feasibility. For instance, if B does not have the capacity to double-check whether n is correct, B would generally issue n1 in line with n. All these scenarios show that the legal bindingness of n is not a precondition for n to determine n1.[168] Instead, whether or not the administrative support n determines n1 depends on the extent to which it is binding upon the actor B issuing the administrative decision n1. In this sense, the degree of the

166 See fn. 31 and fn. 33.

167 See fn. 75 and fn. 46.

168 Similarly Filipe Brito Bastos, „Derivate Illegality in European Composite Administrative Procedures" (fn. 28), p. 106, 114, stressing that where the decision-issuing actor has sufficient room for manoeuvre to make a lawful choice, it cannot be said that the supporting actor has caused the damage. Similarly, in terms of the approach, also Uwe Säuberlich, *Die außervertragliche Haftung im Gemeinschaftsrecht* (fn. 4), p. 86–93, although he concludes that the relevant criterion is the 'legal room for manouevre' and that, therefore, factual conduct cannot trigger liability. Similarly, in terms of result, also Melanie Fink, *Frontex and Human Rights* (fn. 49), p. 256–257 and Melanie Fink, „EU Liability for Contributions to Member States' Breaches of EU Law" (fn. 5), p. 1236, 1242 who argues that 'non-binding guidance does not limit the room for manoeuvre of the 'guided' authority', therefore establishes associated liability in these cases.

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bindingness of n is the decisive factor in establishing the sufficiently direct link and, thus, causation.[169]

4.2 Degree of Bindingness in Case of Omission

In order to illustrate the specific questions arising in the case of omission to act, consider the following example. Imagine that actor A is responsible for supervising the conduct of supervisee B and that A fails to perform its supervisory task n, resulting in B issuing an unlawful decision n1, which results in damage to the interests of a concerned individual. The required conduct n is of a non-formally binding nature, which means that A would not have been able, also if it had complied with its supervisory obligations, to legally oblige B to issue a lawful decision n1. The question now is under which conditions A's failure to perform n is to be considered as causal for the resulting damage. As both the omission of n and n1 constitute a sine qua non to the damage, the decisive criterion, again, must be that of the sufficiently direct link.

Since causation in cases of omission involves an assessment of the consequences of actions that did not take place, it is obvious that probability plays a key role. In essence, causation depends on the level of certainty with which a certain damage would not have occurred if a certain action had been taken.[170]

The crucial question in determining the sufficiently direct link is hence with which level of certainty the performance of n would have prevented the damage, more specifically, whether it is sufficient to establish that the risk of the occurrence of the damage would have been reduced, or whether it is required to establish that the damage would certainly not have occurred if n had been performed. What is discussed in particular in this context is whether A's liability is excluded if B could have, despite the lack of adequate supervision, still have issued a lawful decision n1, or in other

169 If one adopts a narrow understanding of 'bindingness' as meaning only 'legal bindingness', one could also speak of the degree of 'influence' on the decision. This term is however not less ambiguous, as 'influence' is also sometimes defined as presupposing 'legal bindingness', see e.g. Opinion of Advocate General Ruiz-Jarabo Colomer, 7 September 2004, Portuguese Republic v Commission, C-249/02, para 44.

170 See Melanie Fink, „EU Liability for Contributions to Member States' Breaches of EU Law" (fn. 5), p. 1257–1259 with further references to the relevant case law.

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words, whether discretion or room for manoeuvre to act lawfully on the part of B excludes the liability of A.

Some argue that an omission can only be said to be causal for damage if the required conduct would have prevented the occurrence of the damage with a level of probability close to certainty.[171] According to this opinion, any discretion on the side of B excludes A's liability. If B has the option to issue a lawful decision n1, regardless of the content of n, it cannot be said with certainty that the performance of n would have prevented the occurrence of the damage. Others correctly note that such understanding, in combination with the rules on the burden of proof,[172] would have the consequence that the supervising authority would almost never be held responsible for any omission to adequately supervise. Some of the latter authors conclude that the probability criterion is unsuitable for establishing causation and propose a competence criterion instead. According to this proposal, it should be decisive which body has the legal competence to prevent the occurrence of the damage.[173] While this approach is generally useful, it does not lead much further in the case of non-formally binding conduct. Where n is non-formally binding in nature, it cannot be said with certainty that A could have prevented the damage, so the application of the competence test would still require an assessment of the level of probability with which A could have prevented the occurrence of the damage.[174]

Therefore, it is argued here that in order to establish causation in the case of omission, a *reasonable* level of certainty is required.[175] This understanding is conceptually sound and plausible in light of administrative reality. If A's supervisory measure consists of issuing a legally binding decision n towards B, it is appropriate to consider A's omission as causal because

171 Astrid Czaja, *Die außervertragliche Haftung der EG für ihre Organe* (fn. 30), p. 112; Uwe Säuberlich, *Die außervertragliche Haftung im Gemeinschaftsrecht* (fn. 4), p. 236.

172 See fn. 152.

173 Uwe Säuberlich, *Die außervertragliche Haftung im Gemeinschaftsrecht* (fn. 4), p. 236 with reference to Opinion of Advocate General Gand, 19 April 1967, Kampffmeyer, Joined cases 5/66 et al, p. 361, 376.

174 For a similar approach in the context of attribution see chapter 4, 2.2. In that context, the approach based on a competence to prevent is sufficient because the relevant conduct is formally-binding.

175 Similarly, Opinion of Advocate General Dutheillet de Lamothe, 17 February 1971, Lütticke, 4/69, p. 346–347 who refers to 'sufficient causality' and argues that the Union's conduct can only be considered as causal in this sense if it is 'indissociable' from the national conduct.

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it is certain that the issuance of that decision would have prevented the occurrence of the damage.[176] If A's supervision consists of a conduct n that is in no manner whatsoever binding upon B, it is appropriate to consider A's omission as non-causal because it is almost certain that the performance of that conduct, which is basically irrelevant to B, would not have prevented the damage. In administrative practice, however, most constellations are not that clear-cut. Usually, the supervising actor A does not act in formally-binding form, but nonetheless effectively determines the conduct of B. As set out above, in all cases from *KYDEP* to *Bourdouvali*, the Commission, if adequately exercising its supervision, would have acted in a non-formally binding form but would nonetheless have been able to effectively determine the content of n1.

The reasonable level of certainty hence depends on the degree of bindingness of the omitted conduct. The decisive question is whether A's supervisory conduct n, the omission of which is reproached in the context of Art. 340 para 2 TFEU would have been sufficiently binding upon B to conclude that it would have led B to issue a lawful decision n1. In other words, the sufficiently direct link between A's failure to adopt the supervisory measure n and the resulting damage is established if n would have been sufficiently binding upon B to conclude, with reasonable certainty, that the performance of that conduct would have resulted in B acting lawfully. Crucially, and in line with the argument set out above, this does not require formal legal bindingness. Supervisory measures that are de facto binding upon B have a similar effect to formally-binding measures in that B's discretion is effectively reduced. Therefore, de facto bindingness of n is sufficient to establish, with reasonable certainty, that B would have complied with n.

This understanding is implicit in the CJEU's jurisprudence. In *Kampffmeyer,* for instance, the court held that the Commission's failure to approve of certain national measures is not sufficient to establish causation.[177] This is consequential because the mere approval would not have been de facto binding upon national authorities. In similar cases, the court also held that the Commission's failure to authorise certain national measures is sufficient to establish causation, notably regardless

176 Of course assuming that B acts in line with legally binding measures, which – considering the grave implementation deficits in the EU legal order, and especially in the asylum system – is self-evident only in theory.

177 CJEU, judgement of 14 July 1967, Kampffmeyer, 5/66 et al (fn. 121).

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of whether that authorisation would have been formally-binding or not.[178] This is also consequential because the Commission's authorisation, in the relevant administrative contexts, would have been de facto binding upon the national authorities so that it could be said, with reasonable certainty, that the Commission's authorisation would have prevented the occurrence of the damage. Similarly, in *Ledra* and *Bourdouvali*, the court found that the Commission's failure to exercise its supervisory obligations was, in principle, to be considered as causal for the resulting damage, although it was clear that the Commission's supervisory measures would not have been formally binding upon the concerned member states.[179] The court hence considered the omission of de facto binding conduct as sufficient to establish causation.

4.3 Decisive Criteria Establishing *De Facto* Bindingness

In order to establish, in a concrete case, whether a particular conduct of an EU body is de facto binding upon national authorities, the CJEU conducts a comprehensive analysis and takes into account all relevant circumstances of the case. Three factors recur across different case constellations and are of particular weight in the assessment. These are, first, financial incentives or pressure on the member state, second, superior technical expertise or information on the part of the EU body, and third, political authority on the part of the EU body.[180] As will be shown, this is consequential because these three factors have the effect that a non-formally binding measure issued by an EU body, for instance an informal recommendation or a guideline, is almost as 'compulsory' on the concerned national authority as if it was formally binding. In other words, financial pressure, superior expertise or political authority can have a normative effect that comes very close to that of formal bindingness.

178 See above 2.2 and 2.3.

179 CJEU, judgement of 13 July 2018, Bourdouvali, T-786/14 (fn. 93); CJEU, judgement of 20 September 2016, Ledra, C-8/15 P et al (fn. 2).

180 Similarly, Astrid Czaja, *Die außervertragliche Haftung der EG für ihre Organe* (fn. 30), p. 131.

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a *Financial Incentives or Pressure*

First, attaching financial incentives or pressure to the supporting conduct n has a relatively strong effect on B because non-compliance with n would lead to considerable or severe disadvantages for the member state. Hence, the relevant EU conduct must be considered as de facto binding upon the member state, i.e. as sufficiently binding so as to establish causation.

This reasoning is clearly reflected in the Court's case law. In *KYDEP* already, the CJEU held that financial incentives provided by A are sufficient to consider the support n as sufficiently binding upon B.[181] Similarly, in *New Europe Consulting*, the Court argued that serious financial consequences are comparable to formal legal bindingness insofar as procedural guarantees become applicable.[182] *Ledra* and *Bourdouvali,* then, clearly confirm the similarity of financial incentives or pressure to formal legal bindingness. As has been widely discussed in that context, conditionalities attached to Union funding are an effective means of achieving member state compliance.[183] It is hence only consequential that the CJEU considered economic or financial pressure on the member state to adopt a certain measure as sufficient to consider the Union's non-formally binding conduct as triggering liability.[184]

When transferring this argument to the asylum system, one additional consideration must be taken into account. Unlike in the context of the internal market or in the Eurozone, EU support in the context of the asylum system encompasses both funding and administrative capacity. Where the Union provides administrative capacity, however, the host member

181 CJEU, judgement of 15 September 1994, *KYDEP*, C-146/91 (fn. 1), para 25–26.

182 CJEU, judgement of 9 July 1999, New Europe Consulting, T-231/97 (fn. 53), para 43. While the situation was different in that case insofar as the financial disadvantage arose on the part of the applicants, the argument nonetheless applies here insofar as the court argues that serious financial disadvantages have effects similar to formal legal bindingness.

183 See only Scott Greer, „Structural adjustment comes to Europe: Lessons for the Eurozone from the conditionality debates", *Global Social Policy* 14 (2013), p. 51-71; Kevin Featherstone, „External conditionality and the debt crisis: the 'Troika' and public administration reform in Greece", *Journal of European Public Policy* 22 (2015), p. 295-314.

184 CJEU, judgement of 13 July 2018, Bourdouvali, T-786/14 (fn. 93); CJEU, judgement of 20 September 2016, Ledra, C-8/15 P et al (fn. 2).

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state is usually truly dependent on that support.[185] The withdrawal of the Union's administrative support would lead to severe difficulties on the part of the concerned member state in upholding a functioning administration.[186] Seen from this perspective, it does not make a substantial difference whether the member state depends on monetary or administrative support from the Union. The reasons that have led the CJEU to consider the provision of EU funding as a relevant factor in the context of causation also apply to the provision of administrative capacity. Hence, not only explicit financial pressure, e.g. in the form of conditionalities, but also implicit financial pressure, e.g. in the form of dependency on the Union's administrative capacity, are decisive factors for establishing de facto bindingness.

b *Political Authority*

Second, political authority is a factor to be taken into account in assessing the legal effects of the Union's recommendations or advice. This becomes relevant, in particular, in the case of the Commission. Due to the its role as guardian of the Treaties, the Commission's measures, including informal 'advice' or 'guidelines', bear a particular political weight which makes it difficult for national authorities to disregard them. In general terms, it is particularly likely for a member state B to adopt an EU body's recommendation n and issue a decision n1 towards an individual where the relevant EU body is the Commission. In this sense, political authority can establish de facto bindingness.

The particular weight of the Commission's measures is generally recognised in scholarship but usually not analysed in much depth. Most authors simply observe that the Commission's recommendations factually determine national conduct.[187] Some identify psychological and political

185 This follows already from the applicable EU secondary law, according to which the Union provides administrative support precisely when the national asylum system is systemically deficient to an extent that it jeopardises the functioning of the Common Asylum System as a whole, see e.g. Art. 14–15, 22 EUAA Regulation.

186 This holds true especially in the case of 'weak members' as defined by Michael Ioannidis, „Weak Members and the Enforcement of EU Law", in András Jakab, Dimitry Kochenov (ed.), *The Enforcement of EU Law and Values. Ensuring Member States' Compliance*, Oxford University Press 2017, p. 476–492.

187 Timo Rademacher, *Realakte im Rechtsschutzsystem der Europäischen Union* (fn. 5), p. 37 with further references.

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pressure on national decision-makers as decisive factor.[188] A closer look, however, shows that it is not the psychological effect as such that is decisive for the threshold of bindingness but rather the political authority that generates this effect.

While it might sound counterintuitive at first sight to consider political authority as relevant to establishing de facto bindingness in a legal sense, it can hardly be denied that, in practice, the Commission's political authority makes it difficult for member states to not follow its opinions and guidelines.[189] At the same time, however, the Commission's authority alone cannot be considered as sufficient to establish de facto bindingness. For if that were so, every supervisory measure of the Commission's would have to be considered as de facto binding upon member states; and this understanding would certainly be too broad.

Conceptually, the derivation of legal effects from political authority is closely related to the concept of mutual trust. As well established concerning horizontal relations among member states, trust in the legal correctness and appropriateness of decisions taken by other authorities have hard legal consequences. Simply put, the principle of mutual trust establishes that one authority's trust that another authority works well, in general terms, has the result that the latter authority's decisions have legally binding effects for the former authority.[190] Transferring this idea from horizontal to vertical relations, it is only consequential that member states' trust in the Commission and their recognition of the Commission's role as guardian of the Treaties has the result that the Commission's informal advice has legal consequences. In other words, the Commission's informal measures have particular normative weight and are usually adopted precisely because the Commission is perceived by member states as political authority the opinions of which matter and are usually correct.

188 Astrid Czaja, *Die außervertragliche Haftung der EG für ihre Organe* (fn. 30), p. 131.

189 Ibid., p. 206.

190 CJEU, Court (Grand Chamber), judgment of 21 December 2011, N.S. v Secretary of State for the Home Department and M.E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, Joined cases C-411/10 and C-493/10, para 83–86; CJEU, Court, Opinion of 18 December 2014 on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 2/13, para 168, 191.

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c *Superior Technical Expertise or Information*

Third, superior technical expertise or an information monopoly are decisive in establishing de facto causation.[191] For when the Union body A holds superior technical expertise or information that is required to make the decision n1, it is particularly likely that B will issue n1 in accordance with the recommendation n. In this sense, an advantage in terms of expertise and information has effects similar to legal bindingness and must, therefore, be considered sufficient to establish causation.[192]

Again, this argument is clearly reflected in the CJEU's case law. In *Ledra,* for instance, the CJEU put a particular emphasis on the 'technical expertise' of the Commission and the ECB and the fact that they 'gave advice and provided guidance' to national authorities.[193] In *Bourdouvali,* the CJEU stressed that the ECB was dependent on information provided to it by national authorities.[194]

Unsurprisingly, the argument of superior expertise or advice is of particular importance in cases where EU agencies are involved, as these *per definitionem* hold superior information and expertise in one particular area.[195] Some even argue that, in the case of agencies, 'boundaries between scientific advice and decision-making become lost in practice' and that, as a result, 'the final decision de facto belongs to the agency'.[196] With regard to Frontex, more specifically, it has been noted several times that the agency's comprehensive information and expertise in the area of border control

191 As here Melanie Fink, „The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable", *German Law Journal* 21 (2020), p. 532–548.

192 Ibid., p. 539: 'Even though the Member Sate is, legally speaking, free to disregard the advice, it may be difficult to do so in practice, especially when the EU body has more expertise than the national authority.'.

193 CJEU, judgement of 20 September 2016, Ledra, C-8/15 P et al (fn. 2), para 52, albeit here in the context of attribution, and to make the argument that they acted within the limits of their competences.

194 CJEU, judgement of 13 July 2018, Bourdouvali, T-786/14 (fn. 93), para 137–139, 383.

195 See on the conception of agencies as experts providing specialised knowledge in areas of growing complexity, see European Commission, Communication from the Commission to the European Parliament and the Council, European agencies – The way forward, 11 March 2008, COM(2008) 135 final.

196 As here Madalina Busuioc, *European Agencies: Law and Practices of Accountability*, Oxford University Press 2013, p. 192–193, arguing that the legality of non-binding acts should be reviewed because otherwise there would be an insurmountable gap in the accountability of the 'de facto operative decision maker'.

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makes it especially difficult for national authorities to ignore the agency's non-formally binding advice.[197]

On this basis, and with a view to applying the criterion of superior expertise or information to the context at hand, it should be noted that a combination of financial pressure and expertise is particularly likely to establish de facto causation, and that this combination occurs, in particular, in the context of systemic deficiencies. When the national administration, due to systemic deficiencies, depends on the Union's support, national authorities will usually not have the capacity to obtain or verify the information and assessment provided by EU bodies. As a result, the national authority will be de facto left with no option but to trust in the Union bodies' expertise, rely on the information obtained by them, and adopt their recommendations.

5 Conclusions on Causation

Having reconstructed the doctrine of causation, this section now applies the findings to the case at hand. This will lead to the conclusion that the EUAA's and Frontex's procedural misconduct must, depending on the circumstances of the concrete case, be considered as causal for the fundamental rights violations that result from the reception conditions in the EU hotspot camps, i.e. in particular Art. 4 and Art. 6 ChFR. More precisely, it will be argued that the effects of the agencies' recommendations are so close to legal bindingness that the threshold of de facto bindingness is reached. This is due to implicit financial pressure upon the host member state, as well as superior technical expertise and information on the part of the agencies.

For similar reasons, the Commission's failure to adequately supervise must be considered as causal both for fundamental rights violations related to the reception conditions, as well as for infringements of Art. 41 ChFR

197 See only Melanie Fink, „The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable" (fn. 191), p. 541: 'given Frontex's accesss to relevant information, its expertise in the area of border management (…) national authorities may find themselves in a situation where it is difficult in practice to disregard a piece of 'advice' provided by the agency'; Mariana Gkliati, Herbert Rosenfeldt, „Accountability of the European Border and Coast Guard Agency: Recent developments, legal standards and existing mechanisms", *RLI Working Paper* 30 (2018), p. 12: Frontex's 'advice, although not formally binding, would be hard to disregard due to the research and technical expertise of the agency'.

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that occur due to systemic malpractice on the part of the agencies. As will be argued, the Commission's superior expertise and political authority in combination with financial pressure have the effect that the Commission's non-formally binding supervisory measures are de facto binding upon agencies and host member state.

5.1 The Agencies' Individual Recommendations

There are three main reasons which together have the effect that the agencies' recommendations are de facto binding upon the host member state.[198]

The first is that the agencies' recommendations come with implicit financial pressure. In order to understand the relevance of this kind of pressure, it must be recalled that the Greek asylum system heavily depends on Union support, both in terms of funding and in terms of administrative capacity.[199] As set out above, this holds true, especially for the EU hotspots, in which about half of the administrative staff is provided by agencies, and national staff is also partly seconded by the EUAA and partly funded by the Union. Considering that, even with the considerable support provided by the Union, the EU hotspot administration is at the edges of its capacity, and lacks all kind of equipment, from offices to paper, there can be little doubt that, without Union support, it would simply not be functionable.[200]

Against this background, it becomes clear that practical needs and capacity limits often leave the Greek administration with no choice but to routinely adopt the agencies' recommendations. This is well illustrated with the EUAA's procedural support. Overturning the EUAA's recommendations to accept or reject an individual claim would require the asylum service to schedule another interview, assess the claim and write the decision from scratch. Given the permanent time pressure and the high caseload, such

198 Differently, Herbert Rosenfeldt, *Frontex im Zentrum der Europäischen Grenz- und Küstenwache. Bestandsaufnahme, Unionsrechtmäßigkeit und Verantwortlichkeit*, Mohr Siebeck 2021, p. 321 stressing – albeit with reference to regular Frontex teams, and not with reference to MMST teams – that an action for damages is doomed to fail because Frontex cannot instruct national authorities in a legally binding manner.

199 Similarly for the Greek administration more generally Michael Ioannidis, „Weak Members and the Enforcement of EU Law" (fn. 186), p. 485–487; Evangelia (Lilian) Tsourdi, Cathryn Costello, „'Systemic Violations' in EU Asylum Law: Cover or Catalyst?", *German Law Journal* 24 (2023), p. 982–994, p. 990.

200 See chapter 2, I to 3.

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review procedure is simply not feasible on a regular basis. It is hence only consequential that the Greek asylum service in the vast majority of cases follows the comprehensive recommendation, thereby essentially limiting its additional work to translation.[201]

In the case of Frontex's procedural support, the same logic applies. The first registration of asylum applicants in the EU hotspots is usually a very hasty process, and the caseload is usually very high. Hellenic authorities rely on Frontex precisely for those procedural steps that are particularly time-consuming and require particular expertise and equipment. Once these tasks are taken over by Frontex, it appears counterproductive, from the perspective of the Hellenic authorities concerned with speeding up the registration process, to question Frontex's assessment. And when Frontex comes to the conclusion that a particular applicant is an adult, national authorities have an additional incentive to adopt that recommendation. Given that there is not sufficient room to adequately host minors,[202] it might even appear as a practical advantage, again from the perspective of national authorities, that a person is considered an adult.

Second, national authorities routinely adopt the agencies' recommendations because these are based on an information advantage. As the agencies' legal opinions are necessarily based on factual information obtained during an interview or a less formal form of personal interaction with the applicant, national authorities usually lack the factual knowledge to even cast doubt on the accuracy of the legal evaluation.[203] In the case of the EUAA, the asylum service has only so much information about the facts of the case as contained in the interview transcript provided by the agency. Thus, if the information and the legal assessment provided by the EUAA are coherent, the Greek asylum service has no indication to initiate a review. In practice, it is therefore very unlikely that the Greek asylum service would challenge the agency's recommendation.[204]

Similarly, in the case of Frontex, national authorities usually base their decisions on the case file. For example, if Frontex estimates an applicant's age solely on visual inspection alone, Frontex's estimate is nonetheless accepted by national authorities in the vast majority of cases. In fact, national

201 Since the implementation of the embedded model (see chapter 2, 1.3.b), not even a translation is required because the opinion is now usually drafted in Greek.

202 See chapter 2, 3.

203 Many thanks to Anne Pertsch for stressing this aspect in our discussions.

204 See chapter 2, 1.3.

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authorities review the agency's recommendation only when the concerned applicant is represented by a lawyer willing to devote considerable capacity to the matter. And even in these cases, it is still extremely rare for Hellenic authorities to overturn a Frontex recommendation.[205]

Third, and closely related, the agencies' recommendations come with particular weight due to their particular professional expertise, or at least the perception thereof. The significant shortcomings in the agencies' administrative conduct notwithstanding, they are generally considered as experts in their specific areas of support. This perception is based on the fact that agency staff receive special trainings, for instance, on vulnerability in the case of the EUAA, or on document verification in the case of Frontex. In addition, the EUAA and Frontex provide trainings for national authorities, issue practical guidelines on how to apply EU asylum and border law, and publish comprehensive reports including legal evaluations.

Against this background, it is obvious that, for instance, a case officer of the national asylum authority who disagrees with an EUAA assessment will have to present a specific and well-reasoned argumentation to justify why they would not use the comprehensive recommendation of the expert agency and instead create additional workload for their own authority. Remarkably, the increasing institutional intertwinement between the EUAA and the Greek asylum authority makes the agency's knowledge advantage and professional expertise even more relevant. This is because the main reason for earlier divergences, namely the different policies of the two bodies,[206] disappears when the EUAA and the national asylum service work according to the same guidelines.

To conclude, the EUAA's and Frontex's recommendations are de facto binding upon Greek authorities. Therefore, the agency's recommendations must, in principle, be considered as causal for the violations of individual rights resulting from the national administrative decision that is based on the agency's recommendation. This is well illustrated with cases 1 and 3.[207]

Case 1 – Sara Esmaili – Inhumane reception conditions – Art. 4 ChFR (causation by the EUAA)

In the case of Ms Esmaili and her daughter Ayla, the EUAA officer failed in the winter of 2018 to conduct a correct vulnerability assessment and thus recommended considering them as non-vulnerable. National

205 Ibid.
206 See chapter 2, fn. 43.
207 Again, this list is not exhaustive.

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authorities adopted that opinion without further assessment and accordingly obliged them to stay in the EU hotspot camp, where they were exposed to inhuman reception conditions – whereas, under the applicable law, vulnerable persons were to be exempt from the border procedure and transferred to the mainland. Regarding the causal link between the EUAA's misconduct and the resulting violation of Art. 4 ChFR, the crucial point is that the Greek authorities were de facto bound by the EUAA's recommendation. The EUAA is considered an expert on issues related to vulnerability. Greek authorities operate only on the basis of the information obtained by the EUAA and have regularly no reason to cast doubt on the agency's assessment. What is more, none of the Greek authorities involved actually have the capacity to double-check whether the EUAA's recommendation is correct, which leaves them with no choice but to adopt the EUAA's recommendation. Therefore, the EUAA's recommendation must be considered as causal for the resulting violation of Art. 4 ChFR.

Case 3 – Daniat Kidane – Inhumane Reception Conditions – Art. 4 ChFR (causation by Frontex)

In the case of Daniat Kidane, the Frontex officer assessed her age alone through visual inspection and, on this basis, concluded that she was an adult. Responsible national authorities adopted that opinion, again without further assessment, and hence obliged Daniat Kidane to stay in the EU hotspot camp, where she was subject to substandard reception conditions in breach of Art. 4 ChFR – although minors, according to the applicable law, were to be housed in special centres where the particular needs can be met.[208] Regarding the causal link between Frontex's misconduct and the exposure of Daniat Kidane to inhumane reception conditions, the main considerations are similar to those in the EUAA case. First, that Greek authorities are subject to implicit financial pressure in the sense that national authorities cannot 'afford' to not adopt Frontex's recommendations because they do not have the additional capacity to conduct another correct age assessment. Second, Frontex's recommendation is based on superior information. As national authorities are informed only about the outcome of Frontex's assessment, they have regularly no reason to doubt the accuracy of the agency's recommendation. Third, Frontex's recommendation comes with particular weight because the agency is,

208 See Art. 23–24 Reception Conditions Directive.

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in practice, perceived as 'the expert' on age assessment. As a result, the agency's recommendation is de facto binding upon Greek authorities and must therefore be considered as causal for the resulting violation of Art. 4 ChFR.

5.2 The Commission's Failure to Supervise

For similar reasons, the Commission's supervisory measures must also be considered as de facto binding upon national authorities. As will be shown, this reasoning applies to those fundamental rights violations that are ultimately evoked by the misconduct of the agencies, i.e., in particular, violations of Art. 41 ChFR, and with regard to those that are ultimately evoked by the misconduct of the host member state, i.e. in particular, violations of Art. 4 and 6 ChFR.[209]

As a preliminary point, it must be stressed that the following argument applies only to systemic misconduct on the part of the host member state and the agencies, respectively. As established above, the Commission is obliged, under Art. 40 para 3 Frontex Regulation, Art. 21 para 2 EUAA Regulation, Art. 17 TEU, to ensure that the EU hotspot administration *generally* complies with EU law. Thus, and while it does not have the competences to ensure that each individual decision of the host member state and of the agencies is lawful, it can ensure that the host member state's and the agencies' practices are generally in line with EU law. In fact, the Commission's supervisory fora, especially the EURTF and the Steering Committees, were established precisely to ensure this compliance in general terms.[210]

This being said, there are three main factors which together have the effect that the Commission's supervisory measures have a de facto binding effect. First, the Commission's supervisory measures always come with implicit, and sometimes even with explicit, financial pressure. Given that Greece's whole asylum system, and in particular the EU hotspots, heavily depend on EU funding, the Commission's position in coordination fora such as the EURTF or the Steering Committees always comes with the powerful 'money argument'. Put bluntly, every participant knows that the

209 See on the distinction between procedure-related and reception-related violations see chapter 2, 3.

210 See chapter 2, 2.

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Commission has the last word on EU funding.[211] As a result, the Commission's position can be challenged only with very strong arguments. Not following the Commission's instructions is potentially expensive.

Especially in contexts of immediate crisis, the sheer amount of EU financial support often leaves Greek authorities with no choice but to adopt the Commission's policies. This is well illustrated with the 2015 EU hotspot approach. As Greece's asylum system had been systemically deficient since the early 2010s and was about to collapse in the crisis, it would have been politically untenable to refuse the Commission's hotspot approach, which promised operational as well as financial support from the Union. Today, implicit financial pressure is particularly obvious in the context of the EURTF and the Steering Committee Migration Management. In 2023, the functioning of Greece's asylum administration still largely depended on EU funding. In addition, Greece strongly depended on EU funding also in other policy areas. Although financial support in one area cannot be made formally dependent upon policy implementation in another area, Greece's general dependence on EU money de facto leads to a further increase in the negotiating power of the Commission.[212] As a result, the Commission's negotiating power and leverage within the EURTF and the Steering Committee is indeed considerable.[213]

Second, the Commission's guidelines come with a specific knowledge advantage. As the Commission chairs the relevant coordination meetings and gathers all relevant information from the numerous participants, it has access to a unique factual basis and is, hence, in a particularly advantageous position to make decisions about the overall course of the EU hotspot administration. As a consequence, it is particularly difficult for other participants, especially for national authorities, to challenge the Commission's recommendations. As in the case of the agencies, the knowledge advantage is so significant that it results in the Commission's measures being de facto binding.

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211 Interview with Commission representative 2 conducted on 12 February 2021 (introduction, fn. 102).

212 James D Savage, Amy Verdun, „Strengthening the European Commission's budgetary and economic surveillance capacity since Greece and the euro area crisis: a study of five Directorates-General", *Journal of European Public Policy* 23 (2015), p. 101–118; Michael W. Bauer, Stefan Becker, „The Unexpected Winner of the Crisis: The European Commission's Strengthened Role in Economic Governance", *Journal of European Integration* 36 (2014), p. 213–229.

213 Interview wirh Commission representative 2 conducted on 12 February 2021 (introduction, fn. 102).

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The third reason why the Commission's supervisory measures are regularly adopted lies in the Commission's political authority and its perceived professional expertise. Again, this is well illustrated with the implementation of the 2015 EU hotspot approach. As explained above, the Commission's role in this regard is closely connected to its responsibility to implement the EU-Türkiye Statement.[214] This means that all member states had agreed to entrust the Commission with the implementation of the return policy. Greece, as the country where that policy would be implemented, could hence not easily object to the administrative guidelines issued by the responsible Commission representative. Again, a comparison to the Eurozone crisis supports the argument. Greece's position in the asylum crisis was arguably very similar to that of Cyprus in the Eurozone crisis. In both cases, the Commission was entrusted with the implementation of an informal agreement in a relatively weak member state,[215] and in both cases, that member state, albeit itself part of the agreement, de facto had no option but to comply with the Commission's implementing guidelines.

Lastly, it must be recalled that the fact that the Commission's instructions are not always followed does not argue against their de facto binding nature. Non-compliance occurs also in case of formally-binding rules, and is not per se an argument against the normative force of these. Therefore, the Commission's complaints about a lack of compliance on the part of the member state only confirms that compliance is the rule, i.e. that the Commission's instructions are usually adopted and hence de facto binding.

To conclude, the Commission's supervisory measures under Art. 40 para 3 Frontex Regulation, Art. 21 para 2 EUAA Regulation, Art. 17 TEU have de facto binding force on the host member state and the agencies insofar as their general compliance with EU law is concerned. Thus, the Commission's failure to undertake, or to correctly implement, the required supervisory measures must be considered as causal for the resulting violations of fundamental rights, especially of Art. 4, 6 and Art. 41 ChFR. Insofar as reception-related deficiencies are concerned, this is well illustrated with

214 See chatper 2, 2.1.

215 On the state of the rule of law in Greece see European Parliament, Resolution of 7 February 2024 on the rule of law and media freedom in Greece, 2024/2502(RSP), para 27, where the Parliament calls upon the Commission 'to make full use of the tools available to it to address the breaches of the values enshrined in Article 2 TEU in Greece'; further on the rule of law in Greece and Hungary, in the specific context of asylum, see Evangelia (Lilian) Tsourdi, Cathryn Costello, „'Systemic Violations' in EU Asylum Law: Cover or Catalyst?" (fn. 199), p. 991 et seq.

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case 1, and insofar as procedure-related deficiencies are concerned, this is well illustrated with case 3.[216]

Case 1 – Sara Esmaili – Inhumane reception conditions – Art. 4 ChFR (causation by the Commission due to failure to adequately supervise host member state)

As established above, Greece's failure to provide adequate reception conditions is not limited to the case of Ms Esmaili. Vulnerable persons staying in the EU hotspots camps are systemically exposed to conditions below the standard of Art. 4 ChFR. Therefore, the violation of Art. 4 ChFR must be considered as having been caused by the Commission's failure to adequately exercise its supervisory obligations under Art. 40 para 3 Frontex Regulation, Art. 21 para 2 EUAA Regulation, Art. 17 TEU. While the Commission was informed about the conditions in the EU hotspots and thus obliged, according to the cited provisions, to ensure the overall legality of the EU hotspot administration, it failed to adequately exercise its supervisory powers. In particular, the Commission failed to make use of its possibilities within the EURTF and the Steering Committee to ensure that the living conditions generally meet the minimum requirements of Art. 4 ChFR, let al.one the minimum standards required under EU secondary law. Further, the Commission apparently failed to attach formal conditionalities to the funding provided by the Union. Due to implicit and explicit financial pressure, the Commission's perceived superior expertise, and its political authority as guardian of the Treaties, these measures would have been de facto binding upon Greece. Therefore, the Commission's failure to undertake these measures is to be considered as causal for the systemic violation of Art. 4 ChFR, and thus also of the violation of the rights of Ms Esmaili and her daughter, insofar as these violations reflect systemic deficiencies.

Case 3 – Daniat Kidane – Age assessment through visual inspection – Art. 24, 41 ChFR (causation by the Commission due to failure to adequately supervise Frontex)

Similarly, the case of Daniat Kidane reflects Frontex's systemic malpractice in conducting age assessments purely based on visual inspection. Therefore, the Commission's failure to adequately exercise its supervisory obligations must be considered as causal for the violation of Art. 24, 41 ChFR, as well as in the case of Daniat Kidane. Although the Commission

216 Again, this list is not exhaustive.

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does not have the competence to issue binding instructions towards Frontex, it is obliged to ensure, under Art. 40 para 3 Frontex Regulation, Art. 21 para 2 EUAA Regulation, Art. 17 TEU, that Frontex's practices in the EU hotspots generally comply with EU law, especially with fundamental rights. To this end, the Commission should have made use of its positions in Frontex's internal decision-making bodies as well as in the EURTF and the Steering Committees. Given that the Commission's measures within these fora are de facto binding upon Frontex, its failure to adequately exercise supervision must be considered as causal for the resulting fundamental rights violations.

5.3 The EU's Liability for Resulting Violations

To conclude, liability of the agencies and of the Commission for fundamental rights violations resulting from their misconduct can be established. In brief, the argument is summarised as follows: As regards, first, recommendations and advice issued by the EUAA and Frontex, the crucial point is that the national administration is systemically deficient and notoriously overburdened. Therefore, national authorities strongly depend on support from the agencies. This, in combination with the fact that the agencies base their recommendations on information to which national authorities regularly do not have access and that the agencies are in practice considered as the experts, has the effect that national authorities are de facto obliged to regularly adopt the agencies' opinions without further assessment. In other words, the agencies' recommendations and advice are de facto binding upon national authorities.

Concerning, second, the Commission's guidelines and supervisory measures or lack thereof, a similar argument applies. To be precise, a distinction must be made here between the host member state and the agencies.

Insofar as the relationship between the Commission and Greece is concerned, it is again central that the functioning of the Greek asylum system heavily depends on EU funding. Although the Commission can, of course, not withdraw funding simply because its opinions are not followed by national authorities, the fact that it is in charge of EU funding as such has the effect that national authorities are in a structurally weaker position. This, together with the fact that the Commission's recommendations are based on superior knowledge and that the Commission has a particular political authority due to its role as guardian of the Treaties, has the effect

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that the Commission's guidelines have the facto binding force upon both national authorities.

Insofar as the relation between the Commission and the agencies is concerned, the crucial point is that the agencies' conduct in the EU hotspots – where their staff operates as part of migration management support teams (MMST) – is subject to supervision by the Commission. Notwithstanding the agencies' general independence, the Commission thus has the competence to ensure that the agencies' operations in the EU hotspots generally comply with EU law. In practice, the agencies regularly follow the Commission's opinions and guidelines without further assessment. In this sense, the Commission's supervisory measures are de facto binding upon the agencies.

As a result, misconduct on the part of Frontex, the EUAA and the Commission must be considered as causal for resulting fundamental rights violations – i.e. those which are ultimately evoked by decisions of national authorities – at least insofar as these violations are representative of systemic malpractice. Provided that the remaining preconditions 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; and in case of their insolvency, damages can be claimed directly from the Union under Art. 340 para 2 TFEU. This becomes relevant in all cases where the agencies' de facto binding conduct results in fundamental rights violations, i.e. in cases 1, 3, 4 and 5. The Commission, in turn, incurs liability under Art. 340 para 2 TFEU for fundamental rights violations that result from systemic misconduct of Frontex and the EUAA, and for those that result from systemic misconduct of the host member state. The Commission's failure to adequately supervise the host member state and the agencies becomes relevant in cases 1, 2, 3, 4, 5 and 6.

Case 1 – Sara Esmaili – Inhumane reception conditions – Art. 4 and 41 ChFR (liability of the EUAA and the Commission)

In the case of Ms Esmaili and her daughter Ayla, the EUAA has failed to conduct a correct vulnerability assessment. As established above, the EUAA hence incurs liability for the breach of Art. 41 ChFR that is inherent in its misconduct.[217]

Further, the EUAA also incurs liability for the resulting violation of Art. 4 ChFR. As shown above, the relevant misconduct performed by

217 See chapter 3, 5.a, and chapter 4, 3.1.

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an MMST member must be attributed to the agency. As also shown, the breach of Art. 41 respectively Art. 4 ChFR constitutes a sufficiently serious breach of a rule conferring rights upon individuals.[218]

The question of causation remains, i.e., whether the EUAA's failure to conduct a correct vulnerability assessment is causal for the resulting violation of Art. 4 ChFR. As explained above, Ms Esmaili and her daughter were exposed to inhumane living conditions in the EU hotspots only because they were qualified as non-vulnerable. While the binding decision classifying them as non-vulnerable was formally issued by national authorities, the national authority merely rubberstamped the EUAA's opinion without further assessment. De facto, the national decision is predetermined by the EUAA's opinion. As empirical data shows, the EUAA's predetermination of national decisions is structural.[219] This structural determination is due to three factors in particular: First, the Greek administration factually depends on EU support and thus lacks the capacity to regularly double-check EUAA's opinions. Second, the Greek administration had no reason to cast doubt on the correctness of the EUAA's opinion because that opinion was based on the EUAA's interview with Ms Esmaili and, hence, on information that the national authority could not easily verify. Third, the EUAA was generally perceived as an expert on vulnerability assessments, so the Greek administration trusted in the correctness of the EUAA's opinions. In short, the EUAA's opinions are de facto binding on national authorities. According to the CJEU's established jurisprudence, the agency's opinions must hence be considered as causal for the resulting violations of Art. 4 ChFR.

Ms Esmaili's claim for compensation of immaterial damage against the EUAA, in the alternative against the Union, is successful. The CJEU would thus have to find, first, that the EUAA has breached Art. 4 ChFR. Second, the CJEU could either oblige the EUAA and, in the alternative, the Union, to pay an appropriate amount of monetary compensation to the applicant or 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.[220]

As regards Ms Esmaili's claim under Art. 340 para 2 TFEU against the Commission, a similar reasoning applies. As established above, the Com-

218 See chapter 3, 3.3.
219 See chapter 2, I.3.
220 See chapter 3, 3.4.

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mission's misconduct was its failure to adequately exercise its supervisory obligations under Art. 40 para 3 Frontex Regulation, Art. 21 para 2 EUAA Regulation, Art. 17 TEU. As also follows from what has been argued above, the Commission's failures qualify as a sufficiently serious breach of a rule conferring rights upon individuals.[221]

Again, remains only the question of causation, i.e. whether the Commission's failure to adequately supervise the host member state and the agencies is causal for the resulting violations of Art. 4 and 41 ChFR. In this regard, it must first be stressed that the Commission, while not obliged to prevent every single breach of EU law, has the obligation to ensure that the host member state and the agencies generally comply with EU law. In other words, the Commission's supervisory obligation is to prevent that the EU hotspot administration becomes systemically deficient. Precisely this, however, is the case. Both the EUAA's breaches of Art. 41 ChFR through deficient vulnerability assessments and the host member state's breaches of Art. 4 ChFR through the provision of inhumane reception conditions are systemic in nature.

Against this background, the decisive point is that the Commission would have been able to ensure the legality of the EU hotspot administration via de facto binding guidelines. Although the Commission does not have the competence to issue formally-binding decisions towards host member states and agencies, it can de facto oblige them to comply with EU law. The de facto bindingness of the Commission's guidelines is due to its superior information, political authority and the host member state's dependence on EU funding. Further, the adoption of the EU hotspot approach 2.0 clearly confirms that the Commission has the competences and practical possibilities to exert influence upon the host member state through a combination of policy and funding in a manner that can actually ensure that the host member state provides reception conditions that are in compliance with EU law.[222] Thus, it can be established with a reasonable degree of certainty that if the Commission had issued guidelines and made maximum use of its competence within the relevant supervisory fora, such as the EURTF and the Steering Committees, it could have de facto obliged member state and agencies to comply with EU law. According to the CJEU's doctrine on causation in the case of omission, as set out above, the Commission's failure to adequately

221 See chapter 3, 4.2.

222 See chapter 1, 2.1.d and chapter 2, 2.

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supervise the EU hotspot administration must hence be considered as causal for the resulting systemic violations of Art. 41 and 4 ChFR. With regard to the case of Ms Esmaili, this means that the fundamental rights violations must be considered as having been caused by the Commission insofar as they reflect systemic malpractice.

Ms Esmaili's claim under Art. 340 para 2 TFEU against the Commission, in the alternative against the Union, is hence successful. The CJEU would have to find that the Commission is responsible for the breaches of Art. 4 and 41 ChFR and, depending on the remaining circumstances of the case, either grant appropriate monetary compensation, a symbolic amount, or even no monetary compensation at all.[223]

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

In the case of Mr Daud, the EUAA has conducted the asylum interview in a deficient manner and hence wrongly recommended to reject his asylum claim. As established above, the EUAA hence incurs liability for the violation of Art. 41 ChFR that is inherent in its procedural misconduct.[224]

What remains to be discussed here is whether the Commission's failure to adequately supervise the EUAA also gives rise to liability under Art. 340 para 2 TFEU. As set out above, the Commission's obligation under Art. 40 para 3 Frontex Regulation, Art. 21 para 2 EUAA Regulation, Art. 17 TEU to supervise the EU hotspot administration encompasses the obligation to effectively exert influence upon the EUAA, especially in the framework of the EURTF and the Steering Committee, so as to ensure that the agency does not systemically violate EU law.[225] As also established already, the failure to ensure general compliance with Art. 41 ChCR constitutes a sufficiently serious breach of a rule conferring rights upon individuals, notably regardless of whether the supervisory obligation, i.e. Art. 40 para 3 Frontex Regulation, Art. 21 para 2 EUAA Regulation, Art. 17 TEU, or the supervisory standard, i.e. Art. 41 ChFR, is considered as decisive.

The decisive question is, hence, whether the Commission's failure to adequately supervise was causal for the breach of Art. 41 ChFR in the case of Mr Daud. The crucial point here is that the Commission's supervisory measures, especially in the framework of the EURTF and the Steering

223 See chapter 3, 3.4.
224 See chapter 3, 5.a, and chapter 4, 3.1.
225 See chapter 2, 2.

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Committee, are de facto binding upon the EUAA. First, the Commission, as the overall coordinator and supervisor of the EU hotspot administration, has access to information from all authorities and bodies involved and can thus base its guidelines on superior information. Second, the Commission is in charge of EU funding, which ultimately affects the operations of the EUAA and hence gives particular weight to its guidelines and directions. Third, the Commission, as the guardian of the Treaties, has the political authority to effectively guide and steer the EUAA's conduct in the EU hotspots. Notwithstanding the fact that the agencies are generally independent of the Commission, Art. 40 para 3 Frontex Regulation and Art. 21 para 2 EUAA Regulation clearly establish that, in the specific context of the EU hotspots, the Commission is responsible for ensuring that the cooperation of the agencies with national authorities generally complies with EU law. Therefore, it can be established with a reasonable degree of certainty that if the Commission had made maximum use of its competences, it could have ensured the legality of the EUAA's practices via de facto binding measures. In this sense, the Commission's failure to adequately supervise the EU hotspot administration was causal for the EUAA's systemic malpractice, and hence also for the EUAA's misconduct in the concrete case of Mr Daud insofar as it reflects systemic practice.

Ms Daud's claim under Art. 340 para 2 TFEU against the Commission, in the alternative against the Union, is hence successful. The CJEU would have to find that the Commission is responsible for the violation of Art. 41 ChFR and, depending on the remaining circumstances of the case, either grant appropriate monetary compensation, a symbolic amount, or no monetary compensation at all.[226]

Case 3 – Daniat Kidane – Age assessment through visual inspection – Art. 24, 41 and 4 ChFR (liability of Frontex and the Commission)

In the case of Daniat Kidane, Frontex has conducted the age assessment on the basis of visual inspection alone. As established above, Frontex hence incurs liability for the violation of Art. 24, 41 ChFR that is inherent in its misconduct.[227]

What remains to be discussed here is, first, whether Frontex, and in the alternative the Union, incurs liability also for the resulting violation of Art. 4 ChFR. As explained above, this violation occurred because

226 See chapter 3, 3.4.

227 See chapter 3, 5.a, and chapter 4, 3.1.

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Daniat Kidane was wrongly qualified as an adult and hence exposed to inhumane reception conditions in the camp instead of being transferred to adequate housing for unaccompanied minors. Second, it must be discussed whether the Commission incurs liability for the violation of Art. 41 ChFR and Art. 4 ChFR respectively.

First, regarding Frontex, it has already been established that its procedural misconduct constitutes a sufficiently serious breach of a rule conferring rights upon individuals. What remains to be discussed here is whether Frontex's procedural misconduct was causal for the resulting violation of Art. 4 ChFR. In this regard, the decisive point is that Frontex's misconduct was de facto binding upon national authorities. As set out above, Frontex's recommendations to register a certain age are regularly adopted by national authorities without further assessment. This is because Frontex is perceived as the expert on age assessment, because its recommendations are based on information to which national authorities usually do not have access and because the national administration heavily depends, in terms of capacity, on Frontex's support. These circumstances have the effect that Frontex's recommendations are de facto binding upon national authorities. Therefore, it can be established with a reasonable degree of certainty that if Frontex had recommended registering Daniat Kidane as a minor, she would have been registered as such and, hence, not have been exposed to inhumane living conditions in the camp. In this sense, Frontex's misconduct was causal for the resulting violation of Art. 4 ChFR. Daniat Kidane's claim for compensation against Frontex, and in the alternative against the Union, is hence successful.

Second, regarding the Commission, it has already been established that the Commission's misconduct consists in its failure to ensure that Frontex's practice in the context of age assessment in the EU hotspots generally complies with EU law.[228] It has also been established that this misconduct constitutes a sufficiently serious breach of a rule of law conferring rights upon individuals. As regards the decisive question of causation, the argument set out regarding case 2 applies respectively. It can hence be established with a reasonable degree of certainty that, if the Commission had made maximum use of its competences, especially in the framework of the EURTF and the Steering Committee, it could have ensured that Frontex conducts age assessments in compliance with EU

228 See chapter 2, 4.3.

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law. As a consequence, the rights of Daniat Kidane under Art. 41 ChFR would not have been violated.

Further, it has also been established that the Commission failed to ensure that the host member state provides reception conditions that are generally compliant with EU law, including Art. 4 ChFR. Again, it has also been established that this misconduct constitutes a sufficiently serious breach of a rule of law conferring rights upon individuals. As regards the decisive question of causation, the argument set out regarding case 1 applies respectively. Due to the Commission's superior expertise, information and political authority, its guidelines, especially in the context of the EURTF and the Steering Committee, are de facto binding upon the host member state. It can hence be established with a reasonable degree of certainty that, if the Commission had made maximum use of its competences, it could have ensured that the host member state provides adequate reception conditions. The Commission's failure to do so was hence causal for the violation of Daniat Kidane's rights under Art. 4 ChFR, at least insofar as the violation reflects systemic malpractice. As a result, Daniat Kidane's claim under Art. 340 para 2 TFEU against the Commission for failure to adequately exercise supervisory obligations is successful concerning both, the resulting violation of Art. 41 ChFR and that of Art. 4 ChFR.

Case 4 – Nabeeh Al Badawi – Return to Türkiye – Art. 4, 18, 19 ChFR (liability of the Commission)

In the case of Nabeeh Al Badawi, Frontex has failed to intervene during the process of deportation to Türkiye. As a result, Mr Al Badawi was deported to Türkiye, despite the fact that Türkiye could not be considered as safe third country for him. As established above, Frontex hence incurs liability for the violation of the procedural dimension of the non-refoulement principle as enshrined in Art. 4, 18, 19 ChFR.[229]

What remains to be discussed here is whether Mr Al Badawi can claim compensation for breach of his procedural rights under Art. 4, 18, 19 ChFR also from the Commission. Clearly, the basis of this claim is the Commission's failure to adequately supervise the EU hotspot administration. On this basis, a distinction must be made between the Commission's supervision of Frontex and that of the host member state.

229 See chapter 3, 5.a, and chapter 4, 3.1.

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As regards the supervision of Frontex, the crucial point is that Frontex is not responsible for issuing recommendations to deport or not deport specific applicants. Instead, Frontex only assists in the process of deportation. The Commission could hence only have prevented the violation of procedural rights in the case of Mr Al Badawi if Frontex's failure to intervene consisted of systemic malpractice. This, however, could only be established if the applicant could prove that deportees regularly raise their concerns against deportation to Türkiye towards accompanying Frontex staff and that Frontex staff regularly ignores these complaints. As this is not the case based on available information, the Commission's failure to adequately supervise Frontex's practice to accompany deportations cannot be considered as causal for the resulting violations of Art. 4, 18, 19 ChFR.

As regards the Commission's supervision of the host member state, however, the matter is different. The Commission has clearly supported, since 2015 and still in the context of the EU hotspot 2.0, that Greece would regularly reject asylum applications as inadmissible and deport the concerned persons to Türkiye. Crucially, the Commission still argued in favour of this solution when it was already clear that Türkiye could, in the vast majority of cases, not be considered a safe third country, even when Türkiye halted the readmission policy. This is decisive because, for the reasons set out above in the context of case 1, the Commission's instructions in the context of the EU hotspot administration have de facto binding force on the host member state. It is hence established with reasonable certainty that, if the Commission had urged the host member state, especially in the context of the EURTF and the Steering Committee, to stop the readmission policy, Greece would have responded to that guideline and generally halted readmissions. Insofar as the deportation of Mr Al Badawi represents systemic malpractice, the violation of Art. 4, 18, 19 ChFR in his case was hence caused by the Commission's failure to adequately supervise the EU hotspot administration. Therefore, Mr Al Badawi's claim for compensation for the violation of the non-refoulement principle against the Commission is successful.

Case 5 – Kareem Rashid – Limbo situation – Art. 4 and 41 ChFR (liability of the Commission)

In the case of Mr Rashid, the EUAA misapplied the safe third country concept and on this basis concluded that his asylum claim should be rejected as inadmissible, thereby ignoring the halt of the readmission

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policy since March 2021. As established above, the EUAA thus incurs liability for the breach of Art. 41 ChFR that is inherent in its procedural misconduct.[230]

What remains to be discussed here is Mr Rashid's claim for compensation, first, against the EUAA insofar as it is based on a violation of Art. 4 ChFR due to inhumane reception conditions, and second, against the Commission insofar as it is based on violations of Art. 4 and 41 ChFR respectively.

As regards the claim against the EUAA, the crucial point is that, unlike in case 1, the Greek asylum service was not de facto bound by the EUAA's opinion. The main reason for this is that the Greek asylum service was well informed about the halt of the readmission policy, and was therefore in a position to overrule the EUAA's opinion. In this specific case, the EUAA did not have a relevant information advantage, nor would it have cost the Greek asylum service much capacity to issue a decision stating that the claim cannot be rejected as inadmissible because Türkiye halted the readmission policy. Thus, and although the EUAA is generally perceived as expert, its recommendation to reject asylum claims as inadmissible despite the fact that deportations could not be carried out cannot be considered as de facto binding upon national authorities. Mr Rashied, hence, cannot claim compensation for the violation of Art. 4 ChFR from the EUAA.

As regards his claim against the Commission, however, the argument is parallel to cases 1 and 2. As established above, the Commission failed to exercise its supervisory powers so as to ensure that the EUAA would adapt its recommendation practice and that the host member state would adapt its deportation practice to the fact that readmissions had been halted by Türkiye since March 2020.[231] As also established above, this constitutes a sufficiently serious breach of a rule conferring rights upon individuals. As regards the question of causation, the decisive point is that the Commission would have been able to de facto oblige the EUAA and the host member state to adapt their respective practices. As in cases 1 and 2, the Commission, due to superior information, expertise and political authority, could have issued instructions towards the EUAA and the host member state, especially in the context of the EURTF and the Steering Committee, to halt readmissions, and it is established

230 See ibid.

231 See chapter 1, 2.c; chapter 2, 4.3.

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with reasonable certainty that this would have led the EUAA and the host member state to adapt their practices. It is hence established that the Commission's failure to address the halt of readmissions and the resulting limbo situation at the supervisory level was causal for systemic breaches of Art. 4 and 41 ChFR. Hence, Mr Al Badawi's claim for compensation for violations of Art. 4 and 41 ChFR is successful against the Commission, at least insofar as it reflects systemic malpractice.

Case 6 – Reem Saeed – Prolonged detention – Art. 6 ChFR (liability of the Commission)

Reem Saeed claims compensation from the Commission, and in the alternative from the Union, for the breach of Art. 6 ChFR that occurred due to prolonged detention on the island of Kos. As established above, the Commission's failure to address the practice of generic detention on the island of Kos constitutes a breach of its supervisory obligations under Art. 40 para 3 Frontex Regulation, Art. 21 para 2 EUAA Regulation, Art. 17 TEU.[232] The Commission, albeit informed about the fact that asylum seekers are generally detained in the EU hotspot on that island, failed to undertake concrete measures to remedy that situation and to ensure that the EU hotspot administration generally complies with EU law. As also established, the Commission's misconduct constitutes a sufficiently serious breach of a rule of law conferring rights upon individuals.

What remains to be discussed here is hence only whether the Commission's failure to adequately supervise the host member state's detention practices in the EU hotspots was causal for the application of the generic detention scheme in Kos. As in case 1 and 2, the crucial point here is that the Commission is capable to ensure the legality of the EU hotspot administration via de facto binding measures in the framework of the EURTF and the Steering Committee. Due to its superior information, expertise and political authority, it could have instructed the host member state to refrain from systemically detaining all new arrivals on the island of Kos and from holding them in detention for a prolonged period. As a last resort, the Commission could have withdrawn EU funding or urged the agencies to withdraw their operational support. Against this background, it is established with a reasonable degree of certainty that, if the Commission had made maximum use of its competences, it could have prevented that the host member state applies a generic

232 See chapter 2, 4.3.

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detention scheme in the EU hotspot in Kos. The Commission's failure to adequately supervise and issue de facto binding guidelines towards the host member state was causal for the violation of Art. 6 ChFR in the concrete case of Ms Saeed, at least insofar as it reflects general malpractice. Hence, Ms Saeed's claim for compensation under Art. 340 para 2 TFEU against the Commission is successful.

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