Chapter 3: The Potential of EU Liability Law

The third chapter argues that the EU's factual conduct in EU hotspots can be reviewed via the action for damages under Art. 41 para 3 ChFR, Art. 340 para 2 TFEU. The argument proceeds in four main steps. The first step is to provide a brief overview of non-judicial review mechanisms. This is necessary because, in practice, the so-far perceived lack of access to the CJEU has made non-judicial review increasingly relevant (1). The second step is to explain why, in the specific context of the EU hotspot administration, established pathways to the CJEU structurally fail. As will be shown, both enforcement from *above*, i.e. the infringement procedure under Art. 258 TFEU, and indirect enforcement from *below*, i.e. the preliminary reference procedure under Art. 267 TFEU fail because basic assumptions underlying these procedures are not fulfilled. As a result, the main discussion revolves around two options of direct enforcement from below: the action for annulment or failure to act under Art. 263, 265 TFEU, and the action for damages under Art. 340 para 2 TFEU (2). On this basis, the third argumentative step is to explain why and how the action for damages functions as a 'makeshift fundamental rights remedy'.[1] Although the action for damages was not originally conceived as a fundamental rights remedy, it has, for lack of procedural alternatives, acquired this function. At the same time, it comes with in-built deficiencies and, in this sense, remains a 'makeshift' solution (3). The fourth step, then, is to apply the argument to the specific case of the integrated EU hotspot administration. This requires defining the potential trigger for EU liability and the relevant legal basis for an action for damages against the Commission, the EUAA and Frontex, or the Union as such (4). The final part explains that the central doctrinal questions arise in the context of attribution and causation, clarifies these concepts, identifies the concrete doctrinal questions, and defines the relevant case law (5).

1 Relying on recent studies, including in particular Melanie Fink, *Frontex and Human Rights. Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law*, Oxford University Press 2018; Timo Rademacher, *Realakte im Rechtsschutzsystem der Europäischen Union*, Mohr Siebeck 2014. See in more detail chapter 4, 3.

1 Auxiliary Character of Non-Judicial Review

Clearly, non-judicial review mechanisms fall short of the standard enshrined in Art. 47 ChFR, already because neither an agency-internal forum nor the Ombudsman qualifies as an independent tribunal in the sense of that provision.[2] Still, it must be recognised that non-judicial remedies have an important function in practice. This is precisely due to the so-far prevailing opinion that there is no possibility of access to the CJEU: in fact, misconduct by EU bodies in the EU hotspot administration has so far been challenged only via non-judicial remedies. Scholarship, too, tends to place a clear emphasis on non-judicial review[3] and often prioritises questions of accountability in a broad sense over issues related to judicial redress in the sense of Art. 47 ChFR.[4]

As mentioned already, non-judicial review in the context of the EU hotspots consists of two main fora: agency-internal complaints mechanisms and the European Ombudsman. The main problem with agency-internal complaints mechanisms is their poor design. Frontex's complaints mechanism exemplifies the problems. Until today, it falls short of the basic requirements enshrined in Art. 41 ChFR.[5] First, it does not allow for review

2 See only Jürgen Bast, Frederik von Harbou, Janna Wessels, *Human Rights Challenges to European Migration Policy. The REMAP Study*, Nomos 2022, p. 138; Jorrit R Rijpma, *The Proposal for a European Border and Coast Guard: evolution or revolution in external border management? Study for the LIBE Committee*, European Parliament 2016, p. 30.

3 See for instance Sergio Carrera, Marco Stefan, „Complaint Mechanisms in Border Management and Expulsion Operations in Europe. Effective Remedies for Victims of Human Rights Violations?", *CEPS Policy Insights* (2018); ECRE, „Holding Frontex to Account. ECRE's Proposals for Strengthening Non-Judicial Mechanisms for Scrutiny of Frontex", *Policy Paper 7, May 2021* (2021).

4 Usually with the argument that judicial review of agency conduct before national courts is not possible, and without in-depth analysis of procedural ways reach the CJEU, see for instance, Evangelia (Lilian) Tsourdi, „Holding the European Asylum Support Office Accountable for its role in Asylum Decision-Making: Mission Impossible?", *German Law Journal* 21 (2020), p. 506–531, p. 252–530; Salvatore F. Nicolosi, David Fernandez-Rojo, „Out of control? The case of the European Asylum Support Office", in Miroslava Scholten, Alex Brenninkmeijer (ed.), *Controlling EU Agencies. The Rule of Law in a Multi-jurisdictional Legal Order*, Edward Elgar 2020, p. 177–195, p. 186–194.

5 Elspeth Guild, „The Frontex Push-Back Controversy: Lessons on Oversight (Part I)", eumigrationlawblog of 19/04/2021; Sergio Carrera, Marco Stefan, „Complaint Mechanisms in Border Management and Expulsion Operations in Europe. Effective Remedies for Victims of Human Rights Violations?" (fn. 3), p. 24–26; David Fernandez-Rojo,

by a truly independent body. While the fundamental rights officer shall be responsible for handling complaints, their competence is limited to reviewing the admissibility of a claim.[6] Substantial review is exercised by the executive director or, in case of complaints concerning deployed staff, by the home member state. In case of complaints concerning the agency's own staff, the outcome of a complaints procedure hence entirely depends on the discretion of the executive director.[7] Moreover, the fundamental rights officer is an ordinary employee and is thus required to report to the Frontex management board.[8] Second, the complaints mechanism is subject to a relatively high threshold of admissibility: complaints cannot be lodged anonymously, a complaint popularis is not allowed, and complaints can only be submitted in writing.[9] Due to these structural shortcomings, the mechanism is also of limited practical relevance: between 2016 and 2021, only 69 complaints had been lodged, out of which only 22 were deemed admissible.[10] As regards the EUAA, a legal basis for an internal complaints procedure was introduced only with the 2022 Regulation,[11] and the mechanism has not been established yet.[12] Given that it is modelled after the Frontex one, similar problems can be expected.

With regard to review by the Ombudsman, three points require mention here. First, and from a more theoretical perspective, it must be stressed that the Ombudsman holds an important constitutional function. It unites elements of the rule of law and democracy and, as such, constitutes an im-

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„The introduction of an individual complaint mechanism within FRONTEX: two steps forward, one step back", *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* 4 (2016), p. 225-234, p. 232–234.

6 See Art. 111 para 4 Frontex Regulation.

7 The fundamental rights officer can recommend appropriate measures to the executive director but the decision on which measures are taken lies with the latter, see Art. 111 para 6 Frontex Regulation.

8 Herbert Rosenfeldt, *Frontex im Zentrum der Europäischen Grenz- und Küstenwache. Bestandsaufnahme, Unionsrechtmäßigkeit und Verantwortlichkeit*, Mohr Siebeck 2021, p. 275 argues that this issue has been overcome with Art. 109 para 4 and 5 Frontex Regulation.

9 Art. 111 para 2 Frontex Regulation.

10 European Ombudsman, Decision of 15 June 2021, on the functioning of the European Border and Coast Guard Agency's (Frontex) complaints mechanism for alleged breaches of fundamental rights and the role of the Fundamental Rights Officer, Case OI/5/2020/MHZ.

11 EUAA Regulation (introduction, fn. 39).

12 As of 3 October 2024, to the best knowledge of the author, based on the information available on the EUAA's homepage.

portant complement to judicial review.[13] Second, and from a more practical perspective, it must be kept in mind that access to the Ombudsman in the asylum system is subject to important practical hurdles. The lack of legal aid and difficulties concerning the collection of evidence make it practically very difficult to lodge a complaint.[14] In fact, Ombuds-complaints depend on comprehensive support by strategic litigants and thus remain rare.

Third, the relevance of Ombuds-review in the asylum context largely depends on the officeholder's own political approach. In this regard, it appears that their approach has developed from a rather cautious position in 2016 to a rather proactive stance in 2022. This is well illustrated by the Ombudsman's positioning towards the EUAA: In the context of the 2015 EU hotspot approach, they refrained from opening an own initiative inquiry against EASO. And when a complaint was eventually lodged in 2017, they still adopted a rather deferent attitude: although they agreed with the applicants that the agency systemically overstepped its competences, they nonetheless concluded that further inquiries were not required.[15] In a similar decision concerning a complaint from 2018, they found a significant procedural error but merely asked the agency to explain how it would avoid such errors in the future.[16] Things seem to have changed; however, in 2022, the Ombudsman decided to open their first own inquiry initiative against the EUAA and proactively looked into compliance with fundamental rights obligations and accountability for potential fundamental rights violations.[17]

The Ombudsman's approach towards the Commission has been subject to a similar development. In the context of the 2015 EU hotspot approach, they still avoided confronting the Commission and refrained from opening

13 Anne Peters, „The European Ombudsman and the European Constitution", *Common Market Law Review* 42 (2005), p. 697-743.

14 Sergio Carrera, Marco Stefan, „Complaint Mechanisms in Border Management and Expulsion Operations in Europe. Effective Remedies for Victims of Human Rights Violations?" (fn. 3), p. 35.

15 European Ombudsman, Decision of 5 July 2018, on the European Asylum Support Office's (EASO) Involvement in the Decision-Making Process Concerning Admissibility of Applications for International Protection Submitted in the Greek Hotspots, in particular Shortcomings in Admissibility Interviews, Case 735/2017/MDC.

16 European Ombudsman, Decision of 30 September 2019, on the Conduct of Experts in Interviews with Asylum Seekers Organised by the European Asylum Support Office, Case 1139/2018/MDC.

17 European Ombudsman, Decision of 23 February 2023 on how the EU Asylum Agency complies with its fundamental rights obligations and ensures accountability for potential fundamental rights violations, SI/4/2022/MHZ.

an own-initiative inquiry, notably although the European Court of Auditors had found severe misconduct.[18] Concerning a complaint from 2016 against the Commission's failure to conduct a human rights assessment in the context of the implementation of the EU-Türkiye Statement, they merely suggested that the Commission deal more explicitly with human rights implications in its future reports.[19] Since 2022, however, they appear increasingly aware of the Commission's problematic involvement in the asylum administration and opened a first own-initiative inquiry concerning the Commission's misconduct related to the management of funds concerning the Croatian border management system[20] and a second concerning the Commission's mismanagement in the context of the EU hotspot approach 2.0.[21] These inquiries are remarkable because they show that the Ombudsman now assumes, unlike in earlier decisions,[22] that – even when the competence for formally-binding administrative decisions lies with the member state – EU bodies are, in principle, responsible for their own misconduct. In terms of outcome, however, the decisions remain relatively restrained. In the case concerning the EU-funded border management system in Croatia, the Ombudsman 'identified significant shortcomings', notably as regards the monitoring of fundamental rights compliance, but ultimately considered the steps taken by the Commission to address these shortcomings as sufficient and hence refrained from issuing formal recommendations. Similarly, in the case concerning the EU hotspots 2.0, they closed their inquiry with some 'suggestions for improvement', which, in essence, were

18 European Court of Auditors, Special Report No 06/2017, EU response to the refugee crisis: the 'hotspot' approach (report pursuant to Article 287(4), second subparagraph, TFEU), 25 April 2017: https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=41222 (hereinafter: ECA Special Report 2017), p. 34–35.

19 European Ombudsman, 18 January 2017, Decision of the European Ombudsman in the joint inquiry into complaints 506–509–674–784–927–1381/2016/MHZ against the European Commission concerning a human rights impact assessment in the context of the EU-Turkey Agreement, Case 506/2016/MHZ.

20 European Ombudsman, Decision of 22 February 2022, How the European Commission ensures that the Croatian authorities respect fundamental rights in the context of border management operations financed by EU funds, Case 1598/2020/VS.

21 European Ombudsman, Decision of 11 June 2023, How the European Commission ensures respect for fundamental rights in EU-funded migration management facilities in Greece, Case OI/3/2022/MHZ.

22 European Ombudsman, Decision of 5 July 2018, Case 735/2017/MDC (fn. 15), para 32.

limited to increasing transparency regarding the Commission's work and conducting a fundamental rights impact assessment.[23]

2 Structural Failure of Established Pathways to the CJEU

Concerning judicial review, the decisive question is which procedure is best suited to hold the EU responsible for its non-formally binding administrative conduct.

Laying the ground for the following argument in favour of the action for damages, this section shows that judicial review via more established pathways to the CJEU largely fails. The main problem is that the EU legal protection system is based on the traditional assumption that public power is exercised only through formally-binding decisions. Until today, the system has not yet been sufficiently adapted to challenges that arise when EU bodies exercise public power through factual conduct – let alone at the operational level and in an area that is particularly sensitive to fundamental rights. Neither the Treaties nor the CJEU's interpretation thereof takes into account recent developments in the European asylum administration. In this sense, the EU legal protection system lags behind administrative reality.

To substantiate this argument, this section goes through the various procedures that lead towards the CJEU and examines which would allow – or not – to challenge the EU's factual conduct. A distinction is made between enforcement from *above*, i.e. enforcement by the European Commission via the infringement procedure under Art. 258 TFEU; and enforcement from *below,* i.e. enforcement by individuals. Concerning the latter, a further distinction is made between *indirect* enforcement from below, i.e. enforcement of individual rights via the preliminary reference procedure under Art. 267 TFEU; and *direct* enforcement from below, i.e. enforcement of individual rights via the annulment procedure and the action for failure to act under Art. 263, 265 TFEU, or via the action for damages under Art. 41 para 3 ChFR, Art. 340 para 2 TFEU.

23 European Ombudsman, Decision of 22 February 2022, Case 1598/2020/VS (fn. 20); European Ombudsman, Decision of 11 June 2023, Case OI/3/2022/MHZ (fn. 21).

2.1 Failure of Enforcement From Above (Art. 258 TFEU)

When assessing the infringement procedure in the context of the EU hotspot administration, it must first be clarified whether this procedure is suitable at all to address misconduct by the EU itself. Clearly, Art. 258 TFEU requires that 'a member state' has failed to fulfil its obligations under EU law, and the CJEU's verdict is directed only to the concerned member state. Still, it would arguably be possible for the CJEU to assess the EU's conduct in a procedure under Art. 258 TFEU. If the Commission launched an infringement procedure against the member state involved in the integrated administration, here Greece, the CJEU could argue that the member state's responsibility for a breach of EU law was limited because the EU itself also bears part of the responsibility. In this manner, the CJEU could incidentally examine the legality of the EU's conduct.[24]

This being said the key point with regard to the infringement procedure is that its legislative conception is based on the assumption that the European Commission has a political interest in enforcing EU law – and hence, structurally fails where this is not the case. Put bluntly, the infringement procedure only works insofar as the Commission wants it to work. If, however, the Commission has strong political incentives to refrain from initiating infringement proceedings – e.g. in cases involving potential misconduct by its own staff or by staff deployed by EU agencies – the mechanism appears to fail. This requires some explanation.

a *The Commission's Unequal Enforcement Policy*

To evaluate the potential of the infringement procedure in the context of the asylum administration, it must be noted that the Commission's approach differs strongly among member states. The matter is well illustrated with the differences between its approach towards Greece and that towards Hungary. Whereas the Commission has initiated several infringement procedures to ensure Hungary's compliance with the EU asylum acquis, it has for over a decade refrained from doing the same in the case of Greece, with the first formal letters of notice having been sent only in January 2023.[25]

24 To the best of the author's knowledge, the CJEU did so far not make this argument.

25 It was only in January 2023 that the Commission opened infringement proceedings against Greece for its failure to fully transpose the Reception Conditions Directive

Remarkably, the Commission's unequal approach even extends to areas that are only politically related to the EU asylum acquis, as the example of anti-NGO campaigns shows. While both Greece and Hungary have, in the late 2010s, enacted legislation that severely restricted the work of NGOs and lawyers in the area of migration and asylum,[26] the Commission has initiated infringement proceedings in this regard only against Hungary.[27]

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and the Qualification Directive by sending formal letters of notice, see European Commission, 26 January 2023, January Infringements package: key decisions, section 3. According to media reports, the Commission's letters of notice focused on failures to comply with EU law in the context of detention and social benefits, see ECRE, 3 February 2023, Greece: Infringement Letters from the European Commission, NGOs Urge More Oversight on Greek Islands, Joint Civil Society Rule of Law Submission, Hundreds of Thousands 'Prevented' Entry, with further reference to https://www.efsyn.gr/ellada/dikaiomata/376712_apologoymeni-gia-zitimata-prosfygon-i-ellada.

26 For Hungary see only Heinrich Böll Stiftung, News of 29 December 2017 by Nóra Köves, Hungary 2017: Detained refugees, persecuted NGOs, lack of legal certainty, https://www.boell.de/en/2018/01/03/hungary-2017-detained-refugees-persecuted-ngos-lack-legal-certainty. For Greece see the legislative amendments introduced with Law 4986/2020 and with the Joint Ministerial Decision 10616/2020; for comment see ECRE, 29 October 2021, Greece: Criminalisation of Rescuers, Death for People on the Move, Impunity for Vigilantes, States Persist with Dublin Take-Back Requests Despite Risks and Deficiencies, https://ecre.org/greece-criminalisation-of-rescuers-death-for-people-on-the-move-impunity-for-vigilantes-states-persist-with-dublin-take-back-requests-despite-risks-and-deficiencies/; ECRE, 3 December 2021, Greece: Government Continues NGO Crackdown, Closed Controlled Centres Close in on Asylum Seekers, Significant Jump in Negative Decisions Since Türkiye Declared Safe Third Country, https://ecre.org/greece-government-continues-ngo-crackdown-closed-controlled-centres-close-in-on-asylum-seekers-significant-jump-in-negative-decisions-since-Türkiye-declared-safe-third-country/; and more recently European Parliament, Resolution of 7 February 2024 on the rule of law and media freedom in Greece, 2024/2502(RSP), para 18: '(the European Parliament) (i)s concerned by the attacks against civil society and, in particular, smear campaigns and judicial harassment by Greek authorities targeting human rights activists; is alarmed by the recent trials against humanitarian workers and people who provide humanitarian assistance to migrants and refugees; calls on the Greek authorities to drop all charges immediately and ensure that humanitarian workers and volunteers can provide assistance safely and freely'.

27 CJEU, Court (Grand Chamber), judgment of 16 November 2021, European Commission v Hungary (Incrimination de l'aide aux demandeurs d'asile), C-821/19. Concerning developments in Greece, the Commission remained silent, leaving it to the UN to react to the criminalisation of NGOs in that member state, see the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, the Special Rapporteur on the situation of human rights defenders, and the Special Rapporteur on the human rights of migrants in a letter of 31 March 2021 conclude that the amendments '*unnecessarily and disproportionally restrict the right to freedom of association*, as provided by Article 22 of the International Covenant of Civil and Polit-

The differing approach becomes particularly clear in case of refugee camps at external borders. Although EU law has since 2015 been systemically violated in this context in both Greece and Hungary, the Commission has made use of Art. 258 TFEU only against Hungary. In fact, the Commission has swiftly initiated a series of infringement procedures concerning the so-called transit zones in Hungary, thereby effectively improving compliance with EU law.[28] In the case of Greece, by contrast, the Commission chose to refrain from making use of Art. 258 TFEU and instead increased its own administrative involvement by setting up the EU hotspots 2.0.[29]

Seen from a strictly formal perspective, the Commission's practice is legal. Art. 258 TFEU leaves the Commission unfettered discretion and allows it to take into account both legal and political considerations.[30] This is clearly reflected in the CJEU's case law, which establishes that individuals who have brought a particular issue to the attention of the Commission cannot challenge its decision not to initiate infringement proceedings before the court.[31] In fact, the only option is a kind of mitigated plausibility check before the Ombudsman.[32] According to the CJEU, the Commission is

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ical Rights (ICCPR)' and therefore urge the Greek government 'to undertake a review of (those amendments) to ensure that they are in accordance with Greece's international human rights obligations.' Letter available at: https://www.equal-rights.org/articles/61.

28 Although deficiencies the Hungarian asylum system persist, the infringement procedure was effective in improving compliance with EU law in the concrete case. After the CJEU had found several violation of EU law, Hungary responded and remedied the situation insofar as the transit zones were abolished, see ECRE, 22 May 2020, Hungary: Abolishment of Transit Zone Following CJEU Ruling, https://ecre.org/hungary-abolishment-of-transit-zone-following-cjeu-ruling/.

29 As described above, this strategy, although arguably intended to improve the application of EU law, actually only led to the Commission becoming entangled in the systemic violations of fundamental rights, see chapter 2, 2 and 3.

30 According to Art. 258 TFEU, the Commission 'shall' deliver a reasoned opinion when it considers that a member state has breached EU law, but merely 'may' bring the matter before the CJEU, even in case of persisting non-compliance.

31 For instance, via Art. 340 para 2 TFEU. For earlier case law see CJEU, decision of 25 May 2005, Retecal et al v COM, T-44/03, para 44 et seq.; CJEU, decision of 14 January 2004, T-202/02, Makedoniko Metro et al v Commission, para 43; judgement of 18 December 2009, Arizmendi, T-440/03 et al, para 62. More recently see the dismissal as inadmissible of similar actions in the Hungarian context CJEU, order of 22 March 2019, T-566/18, PITEE Fogyasztóvédelmi Egyesület, para 9 to 11; confirmed by order of 26 September 2019, C-358/19 P, PITEE Fogyasztóvédelmi Egyesület, para 16.

32 More precisely, the Ombudsman reviews whether the Commission has complied with its own guidelines enshrined in European Commission, Commission communication

not even obliged under Art. 258 TFEU to treat several member states who are in a comparable situation alike. As the court argues, the principle of equal treatment under Art. 4 para 2 TEU cannot be brought forward by member states to justify their own failures in a procedure under Art. 258 TFEU. The Commission is, hence, free to make political decisions about which member states to sue and which ones not. As long as the Commission does not engage in a manifest abuse of its discretion, i.e. as long as it can advance some kind of 'neutral and objective criterion', its choices will not be reviewed by the CJEU.[33]

b *Why the Commission's Practice is Problematic from a Broader Constitutional Perspective*

From a broader constitutional perspective, however, the Commission's practice of unequal enforcement is problematic.[34] When the Commission sues only some member states for their systemic violations of asylum law and fundamental rights but looks away when other member states do the same, it creates a system in which it depends on political and administrative

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to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law, COM(2002) 141 final. See European Ombudsman, Decision of 30 January 2001, on complaint 995/98/OV against the European Commission, Mekedoniko Metro; European Ombudsman, Decision of 27 February 2014, closing the inquiry into complaint 230/2012/ER against the European Commission; Decision of 2 March 2018, in case 425/2017/ANA on the European Commission's alleged failure to enforce EU law on online gambling services in certain Member States; and in more detail Anne Peters, „The European Ombudsman and the European Constitution" (fn. 13), p. 717–721; Nikos Vogiatzis, *The European Ombudsman and Good Administration in the European Union*, Palgrave Macmillan 2018, p. 86–107.

33 Advocate General Eleanor Sharpston, Opinion delivered on 31 October 2019, European Commission v Republic of Poland, Republic of Hungary and Czech Republic, Joined Cases C-715/17, C-718/17, C- 719/18, paras 107–121; CJEU, judgement of 2 April 2020, European Commission v Republic of Poland, Republic of Hungary and Czech Republic (Relocation Decisions), Joined Cases C-715/17, C-718/17, C- 719/18 para 75–82; CJEU, Court (Fourth Chamber), judgement of 3 March 2016, European Commission v Republic of Malta, C-12/14, para 25; CJEU, Court (Fifth Chamber), judgement of 11 July 2018, European Commission v Belgium, C-356/15, para 106.

34 The European Parliament in its Resolution of 7 February 2024 on the rule of law and media freedom in Greece (fn. 26), para 17 'condemns the Commission's dramatic failure to enforce EU laws with regard to reception conditions, pushbacks and human rights, and believes that infringement proceedings are more appropriate than the Commissioner's praise'.

relations of member states to the Commission whether or not their failure to comply with EU law will be brought before the CJEU. Ultimately, the Commission's practice creates a two-tier rule of law in the sense that the effectiveness of asylum law falls far behind the effectiveness of, say, competition law.

To make sense of the Commission's unequal approach, it must be taken into consideration that the use of the infringement procedure as such has strongly decreased in the past decade.[35] Moreover, the Commission generally tended to focus on technical issues related to the internal market, while being rather reluctant to address issues related to fundamental rights and other areas that are traditionally considered as sovereignty-sensitive.[36]

Insofar as the Commission ignores systemic violations of fundamental rights, its approach in the asylum system thus seems to fit into its general approach. In fact, the Commission has adopted this approach with regard to several aspects of the asylum system, with the deficient implementation of the 'Dublin system' being a prominent example. Even when member states intentionally and explicitly circumvented EU law through bilateral agreements and thereby systemically deprived third-country nationals of their rights under the Dublin III Regulation, the Commission refrained from intervening[37] and instead left the matter to be addressed by vigilant individuals.[38]

35 Daniel Kelemen, Tommaso Pavone, „Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union", *SSRN* (2021) observe a decrease at the latest since 2014; Melanie Smith, „Enforcement, monitoring, verification, outsourcing: the decline and decline of the infringement process", *European Law Review* 33 (2008), p. 777-802.

36 This well illustrated with the example of some member states' severe restrictions on media freedom and systemic disregard for minority protection in the early 2010s, where, although there was no doubt the Charter was systemically violated in several member states, the Commission refrained from initiating infringement procedures, see Armin von Bogdandy, Matthias Kottmann, Carlino Antpöhler, Johanna Dickschen, Simon Hentrei, Maja Smrkolj, „Reverse Solange – Protecting the Essence of Fundamental Rights Against EU Member States", *Common Market Law Review* 49 (2012), p. 489-520, p. 489–490 with further references espeically in fn. 2 and fn. 8.

37 See Hannah Bru, Aikaterini Anastasopoulou, Heini Hyrkkö, „The Circumvention of the Dublin III Regulation Through the Use of Bilateral Agreements to Return Asylum Seekers to Other Member States", in European Council on Refugees and Exiles (ECRE) (ed.), *Research Paper Ghent University* 2019, p. 22 deemed it 'questionable' whether the Commission would act inter alia 'due to the political climate'.

38 Robert Nestler, Vinzent Vogt, „Dublin-III-reversed. Ein Instrument zur Familienzusammenführung", *Zeitschrift für Ausländerrecht und Ausländerpolitik* 37 (2017), p. 21-29.

Insofar as the Commission differentiates between member states, however, its approach requires further explanation. While several hypothesis have been proposed in this regard,[39] it is argued here that the Commission's approach can be explained with three inter-related factors that are all primarily politically motivated, namely forbearance, outcome-orientation and avoidance of self-indictment.

Forbearance refers to the deliberate under-enforcement of the law in order to secure the political support of those against whom the law ought to be enforced.[40] Applied to the Commission, this means that its increasing reluctance to use Art. 258 TFEU is due to its fear that judicial confrontation would lead to decreasing political support by member state governments.[41] The Commission's decision whether or not to initiate an infringement procedure no longer depends on the scope or gravity of the breach of EU law but rather on how the Commission estimates the political cost of activating Art. 258 TFEU. The Commission is, hence, likely to refrain from making use of Art. 258 TFEU when it considers that this would make cooperation with the concerned national government more difficult or lead to decreased political support for the Commission's policy agenda in the concerned or another area of EU law.

The practice of forbearance explains the general decrease in infringement proceedings. As empirical research has shown, the decline is neither due to improved compliance rates[42] nor increased reliance on enforcement from below nor the Commission's increased use of non-judicial strategies[43]

39 Daniel Thym, „Muddy Waters: A Guide to the Legal Questions surrounding 'Push-backs' at the External Borders at Sea and at Land", eumigrationlawblog of 06/07/2021, for instance, argued that the Commission's choices are related to procedural risks.

40 Alisha C Holland, „Forbearance", *American Political Science Review* 110 (2016), p. 232-246.

41 Daniel Kelemen, Tommaso Pavone, „Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union" (fn. 35), p. 3.

42 In this direction, however, Tanja A Börzel, Ulrich Sedelmeier, „Larger and More Law Abiding? The Impact of Enlargement on Compliance in the European Union", *Journal of European Public Policy* 24 (2016), p. 197-215, although they argue that compliance has been improved only in some member states and only in relative terms.

43 In this direction, however, Gerda Falkner, „A Causal Loop? The Commission's New Enforcement Approach in the Context of Non-Compliance with EU Law After CJEU Judgements", *Journal of European Integration* 40 (2018), p. 769-784, p. 773.

but to its politics of forbearance.[44] Forbearance also explains the Commission's decidedly unequal approach in context of asylum and migration matters. As the Commission is strongly concerned with safeguarding political support of national governments for the project of a Common European Asylum System as such, it seems ready to pay a particularly high price in terms of lack of enforcement. In fact, it appears that in the area of EU asylum law, the Commission has almost entirely sacrificed its role as guardian of the Treaties and has instead largely subscribed to its role as the 'motor of integration'.[45]

This leads to the second and most closely connected factor informing the Commission's decision. In fact, it seems that a particularly relevant factor in the Commission's decision-making process is the degree of functionality of the concerned national administration. For instance, if Greece or any other member state located at the external border that has a particularly weak national administration refused to cooperate with EU bodies, other member states would probably be faced with rising numbers of asylum applications very soon. If, however, Hungary or any other member state with a relatively strong national administration refuses to cooperate with EU bodies, the Commission can nonetheless trust these countries to effectively seal their borders – albeit at a high cost, namely that of accepting systemic breaches of EU law and fundamental rights. Hence, it seems that the Commission's approach is outcome-oriented in the sense that it tends to initiate infringement proceedings against those member states from which it can expect that they will implement a court decision. If a member state has a functional national asylum administration and generally complies with CJEU decisions, such as Hungary, the infringement procedure is a promising instrument of enforcement. If, however, a member state has either explicitly stressed its unwillingness to respect EU asylum law in a certain situation[46]

44 Daniel Kelemen, Tommaso Pavone, „Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union" (fn. 35), p. 4–7 with counterarguments to the theories quoted in fn. 42 to 43, p. 11–29 with quantative and qualitative emprical evidence for the theory of forbearance.

45 ECRE, Weekly Bulletin of 21 January 2022, https://us1.campaign-archive.com/?u=8e3ebd297b1510becc6d6d690&id=d9e4b1cb08, Editorial by Catherine Woollard, Asylum Mini-Package: Derogations Through the Backdoor, with further references.

46 For the example of Poland, Lithuania and Latvia in the context of the Belarus crisis see ECRE, 8 October 2021, EU Eastern Borders: Poland Ignores Commission Pressure for Frontex Deployment, Eastern States Move to 'Legalise' Pushbacks, Belarus Suspends Return Agreement, https://ecre.org/eu-eastern-borders-poland-ignores-co

or if a member state has such weak national administration that it is barely able to enforce its own national legislation,[47] an infringement procedure would be de facto vain. In short, the less functional the national administration is, the less willing the Commission seems to adopt a confrontational approach.[48]

The third factor in the Commission's decision-making process arguably is the aim to avoid self-indictment. The Commission seems to shy away from infringement proceedings when these would result in the CJEU looking into alleged misconduct of the agencies or the Commission itself. Obviously, making use of Art. 258 TFEU against Greece would mean that light is shed on the fact that the Commission and the agencies themselves contribute to the systemic violation of EU law, including fundamental rights. The Commission's willingness to initiate infringement proceedings thus appears to decrease to the degree that either itself or EU agencies are actively involved in the concerned member state's administration. In sum, the Commission seems to focus either on cooperative or confrontational enforcement strategies and to resort to the infringement procedure only in the latter cases.

Against this background, it becomes evident that the Commission's practice is problematic in the context of the broader constitutional architecture. For when the Commission acts as a central administrative and also political actor, its own interests come into conflict with its role as guardian of the Treaties. Ultimately, this conflictual role results in a weakening of the effectiveness, or even the normative force, of EU law.

The Commission's dual role and the conflicts inherent therein are particularly pronounced in the case of EU hotspots. As set out above, the Commission is a central actor at the administrative and political level. At the same time, it is supposed to function as the guardian of EU law, i.e., as an external supervisor, similar to an independent prosecutor.[49] Interestingly

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mmission-pressure-for-frontex-deployment-eastern-states-move-to-legalise-pushbacks-belarus-suspends-return-agreement/.

47 For the example of Greece see 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. 476–49, p. 485–492.

48 This is not empirically proven, but very plausible, based on the most relevant cases in the context of the asylum system.

49 Remarkably, the Commission itself partially describes its work as similar to that of a 'prosecutor', see Daniel Kelemen, Tommaso Pavone, „Where Have the Guardians

enough, both roles are ultimately based on Art. 17 TEU. And yet, the dual role obviously leads to major conflicts of interest. When asked how to react to systemic violations of fundamental rights in EU hotspots, Commission representatives had no clear answer. On the one hand, they focused on the Commission's role as an administrative actor and emphasised their attempt to encourage or persuade the member state to comply with EU law at the administrative level, for instance, within the EURTF or the Steering Committees.[50] On the other hand, they did mention the option of initiating infringement proceedings; however, only to relativise in the same breath that this remained a 'rather theoretical' option due to 'political sensitivities' of asylum and migration matters and that a confrontation before the CJEU could jeopardise the cooperative approach on which the Commission has relied so far.[51]

This is problematic because it destabilises the constitutional architecture. When the Commission does not live up to its role as guardian, this creates an enforcement vacuum which cannot adequately be compensated by any other actor. While the European Parliament tries to fill the void,[52] it obvi-

Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union" (fn. 35), p. 19, 60, 76.

50 See chapter 2, 2.

51 Interview with Commission representative 4, conducted on 16 February 2021 (introduction, fn. 102): 'the Commission could initiate an infringement procedure (…). But the truth is that (…) this is an option that we use with parsimony. But basically, the mechanism is there: We ask, the member state answers. If we are not satisfied, we ultimately have the option to bring them to court. This is the normal procedure. But, as I said, with the specificity here that we are dealing with migration that is a politically very sensitive issue.'.

52 European Parliament, Resolution of 7 February 2024 on the rule of law and media freedom in Greece (fn. 26); European Parliament, Report on the Commission's 21st and 22nd Annual reports on monitoring the application of Community law (2003 and 2004), A6–0089/2006, para 13 calling on the Commission to place the principle of the rule of law and citizens' experience above purely economic criteria and evaluations, urging the Commission to monitor carefully the respect of the fundamental freedoms and general principles of the Treaty as well as the respect of regulations and framework directives, and inviting the Commission to use secondary legislation as a criterion for determining whether there has been an infringement of fundamental freedoms. On the role of the European Parliament in the case of media freedom (fn. 36) see European Parliament, Resolution of 10 March 2011 on media law in Hungary, P7_TA(2011)0094. On the European Parliament's role in the case of the asylum system more generally see Ariadna Ripoll Servent, „Failing under the 'shadow of hierarchy': explaining the role of the European Parliament in the EU's 'asylum crisis' ", in Edoardo Bressanelli, Nicola Chelotti (ed.), *The European Parliament in the Contested Union. Power and Influence Post-Lisbon*, Routledge 2020, p. 29-47.

ously lacks the competence to effectively enforce EU law. If anyone had the competence to act as guardian of the Treaties, it would be member states themselves, as they could initiate infringement proceedings under Art. 259 TFEU. But this possibility remains rather theoretical, too. Member states generally avoid enforcing EU law against each other, and given the current political constellations in the asylum system, it seems utterly unrealistic for member states to confront each other before the CJEU.[53] The Commission's negligence in its role as guardian of the Treaties thus results not only in its own involvement in systemic deficiencies but also weakens the effectiveness of EU law.[54] As a result, the rule of law in the asylum system is severely jeopardised already today.

2.2 Failure of Indirect Enforcement From Below (Art. 267 TFEU)

Given that enforcement from above largely fails, the focus necessarily is on enforcement from below. The first procedure that comes into consideration here is the infringement procedure as the central – albeit indirect – means of enforcement from below. The preliminary reference procedure constitutes a cornerstone of the EU legal protection system and is pivotal to ensuring the *effet utile* of EU law.[55] In addition, and unlike enforcement from above, it also ensures the right to an effective remedy under Art. 47 ChFR.[56] Yet, and this is the key point of this section, the preliminary reference procedure is inappropriate to address the EU's conduct in the

53 This being said, it seems worth to explore whether the argument for a revival of Art. 259 TFEU in the context of the rule of law crisis, as put forward by Dimitry Kochenov, „Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool", *Hague Journal on the Rule of Law* 7 (2015), p. 153-174.

54 The Council of Europe has been called upon to assist the Commission in the rule of law crisis, see Jörg Polakiewicz, Julia Katharina Kirchmayr, „Sounding the Alarm: The Council of Europe As the Guardian of the Rule of Law in Contemporary Europe", in Armin von Bogdandy, Piotr Bogdanowic, Iris Canor, Christoph Grabenwarter, Maciej Taborowski, Matthias Schmidt (ed.), *Defending Checks and Balances in EU Member States*, Springer 2021, p. 361-382, but obviously cannot replace it in its role as guardian of EU law.

55 CJEU, Court, judgement of 5 February 1963, Van Gend & Loos, 26/62, p. 12 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 176.

56 On the – belated – recognition of the legal protection function in scholarship see Jürgen Bast, „Handlungsformen und Rechtsschutz", in Armin von Bogdandy, Jürgen

context at hand because it is based on the assumption that national courts cooperate. When, however, national courts refuse to refer the relevant questions, individuals have no means to access judicial protection before the CJEU.

Assessing the potential of the preliminary reference procedure in the context at hand again requires clarifying whether this procedure is suitable at all to address administrative misconduct by the EU itself.[57] Certainly, the idea underlying Art. 267 TFEU is that individuals may invoke before national courts the rights that are granted to them by EU law but denied by the national administration. The question, hence, is whether the mechanism also works when rights granted by EU law are denied by administrative bodies of the EU itself. This, in turn, depends on whether individuals can challenge unlawful administrative conduct by EU bodies before national courts. In this regard, it is argued here that – the jurisdiction rule of Art. 274 TFEU notwithstanding[58] – the preliminary reference procedure offers the possibility of incidental review. For instance, a national administrative court could be confronted with a claim to annul an administrative decision that was issued by a national authority, but the content of which has de facto been determined by an EU body. Such a claim would be directed against the national administration, but the public conduct of the EU would incidentally be subject to the dispute pending before the national court, which could hence refer the matters relating to EU law under Art. 267 TFEU.[59] In this manner, the preliminary reference procedure would even allow for the challenge of non-formally binding administrative

Bast (ed.), *Europäisches Verfassungsrecht. Theoretische und dogmatische Grundzüge*, Springer 2009, p. 489-557, p. 497–501.

57 For the reviewability of EU soft law and non-formally binding administrative conduct via Art. 267 TFEU see Giulia Gentile, „Ensuring Effective Judicial Review of EU Soft Law via the Action for Annulment before the EU Courts: a Plea for a Liberal-Constitutional Approach", *European Constitutional Law Review* (2020), p. 466–492, p. 484–486 with reference, inter alia, to Court (Grand Chamber), judgement of 16 June 2015, Peter Gauweiler and others v Deutscher Bundestag, para 23, in which the CJEU reviewed the legality of a Press Release in great detail, thereby dismissing the argument submitted by several member states that the procedure would be inadmissible because a Press Release is not a legal measure. For the limits and shortcomings of review of soft law via Art. 267 TFEU see ibid, p. 486–487.

58 See Catharina Ziebritzki, *The EU's Responsibility in the Asylum Administration. Administrative Integration, Judicial Protection and the Case of the EU Hotspots*, Dissertation at Frankfurt University, Law Department January 2024, p. 232 et seq.

59 Taking the example of an action for annulment, the national court would inter alia have to assess whether it is competent to annul an administrative decision although

conduct such as operational plans, non-binding recommendations or similar conduct of EU bodies.[60]

a *Greek Courts' Failure to Refer Relevant Questions to the CJEU*

The functioning of the preliminary reference procedure as an indirect or incidental way to challenge the EU's administrative conduct before the CJEU obviously depends on cooperation on the part of national courts.[61] Art. 267 TFEU is entirely built on the idea of judicial dialogue, and presumes loyalty and institutional cooperation between national and EU courts.[62]

In the context of the asylum system more broadly, the cooperative mechanism of Art. 267 TFEU works rather well. The courts of most member states make regular use of the preliminary reference procedure. The CJEU's most important judgements on the EU asylum acquis, including fundamental rights, have been brought about by asylum seekers claiming their rights before national courts.[63]

When it comes to vertical cooperation between national administrations and EU bodies, however, judicial cooperation appears to fail. Although several EU agencies and the Commission have been operating in the European asylum administration for almost two decades, and although fundamental rights in this context have been meticulously documented,

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that decision was de facto determined by the EU, or whether Art. 274 TFEU must be interpreted so as to preclude its jurisdiction.

60 Elspeth Guild, Sergio Carrera, Leonhard Den Hertog, Joanna Parkin, *Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies. Frontex, Europol and the European Asylum Support Office. Study for the LIBE Committee*, European Parliament 2011, p. 82–84; 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. 10.

61 Eric Stein, „Lawyers, Judges, and the Making of a Transnational Constitution", *American Journal of International Law* 75 (1981), p. 1-27, p. 1.

62 This holds true especially in the context of fundamental rights, see Marta Cartabia, „Europe and Rights: Taking Dialogue Seriously", *European Constitutional Law Review* 5 (2009), p. 5-31, p. 23–31.

63 See only 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; Court (Grand Chamber), judgement of 19 March 2019, Abubacarr Jawo v Bundesrepublik Deutschland, C-163/17.

national courts have not referred a single question on that issue to the CJEU.[64] This is especially striking in the case of Greece, where vertical administrative cooperation is most advanced, and at the same time raises numerous fundamental questions concerning EU primary and secondary law.[65]

b *The Illegality of the Non-Referral Practice under Art. 267 para 3 TFEU*

The most prominent case in this context is certainly the decision of the Council of State – Greece's highest administrative court – of September 2017 to not refer a question on the interpretation of the safe third country concept in the context of the EU-Türkiye Statement.[66] The Council justified its decision with the *acte claire* doctrine. This doctrine, however, cannot provide a valid justification, as indicated already by the fact that only a slight majority of 13 out of 25 judges voted against a referral to the CJEU.[67] Yet, the Council of State has since then in all major cases failed to identify and refer complex questions of EU law, including in cases concerning

64 As noted also by Herbert Rosenfeldt, *Frontex im Zentrum der Europäischen Grenz- und Küstenwache* (fn. 8), p. 326.

65 It can be left open here whether the failure of Greek courts to refer relevant questions to the CJEU is connected to structural weaknesses in terms of the rule of law more generally. This connection, however, seems likely, see Michael Ioannidis, „Weak Members and the Enforcement of EU Law" (fn. 47); Evangelia (Lilian) Tsourdi, Cathryn Costello, „'Systemic Violations' in EU Asylum Law: Cover or Catalyst?", *German Law Journal* 24 (2023), p. 982–994, p. 990 et seq.

66 Greek Council of State, judgement of 22 September 2017, 2347/2017 and 2348/2017, para 63: 'the Court ruled, with a majority 13/12, that, in view of the above, there is no reasonable doubt on the meaning of Art. 38 of the APD or the validity or interpretation of acts of organs of the EU and, thus, there is no reason to submit an application for a preliminary ruling to the CJEU according to Art. 267 TFEU'; non-official abbreviated English translation available at: https://www.refworld.org/cases,GRC_CS,5b1935024.html.

67 Angeliki Tsiliou, „When Greek judges decide whether Türkiye is a Safe Third Country without caring too much for EU law", eumigrationlawblog of 29/05/2018. The so-called *CILFIT* criteria were clearly not met. As the ongoing scholarly discussion on how to interpret the safe country concept clearly shows, the correct application of EU law was anything but obvious: According to CJEU, judgement of 6 October 1982, CILFIT v Ministry of Health et al, 283/81, para 16–20, the *acte claire* doctrine requires, inter alia, that 'the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved.'.

cooperation of national authorities with EASO, concerning restrictions on freedom of movement in the EU hotspots,[68] and more recently in pilot proceedings on judicial review in asylum procedures[69] as well as in proceedings challenging the anti-NGO campaigns.[70]

In sum, it appears that the Greek judiciary undermines the central mechanism of the EU legal protection system in the area of the integrated asylum administration simply by refraining from making use of it. Insofar as the Council of State is concerned, this practice constitutes a violation of Art. 267 para 3 TFEU. However, individuals cannot challenge this denial of access to the CJEU before national courts because the Greek system does not provide for a remedy of this kind.[71]

2.3 Failure of Direct Enforcement From Below via Annulment (Art. 263, 265 TFEU)

As the central mechanisms of Art. 258 TFEU and Art. 267 TFEU largely fail, one must turn towards direct remedies before the CJEU. Direct remedies are construed precisely to review the conduct of EU bodies and are therefore from the outset much better suited to ensuring judicial review of the administrative activities of Frontex, the EUAA and the European Commission.

In fact, the main discussion today revolves around whether the action for annulment under Art. 263 TFEU[72] or rather the action for damages

68 For instance, Council of State, judgement of 17 April 2018, 805/2018, which raised intricate questions concerning Art. 6 and Art. 45 para 2 ChFR and concerning the Reception Conditions Directive. See further Catharina Ziebritzki, Robert Nestler, „Implementation of the EU-Turkey Statement: EU Hotspots and restriction of asylum seekers' freedom of movement", eumigrationlawblog of 22/06/2018 with a non-official abbreviated English translation of the judgement by Evita Armouti.

69 These questions were essentially determined by an interpretation of Art. 47 ChFR and the Asylum Procedures Directive. For the relevant procedures Refugee Support Aegean, The Council of State pilot procedure on judicial review in the asylum procedure, 1 February 2021, available at: https://rsaegean.org/en/the-council-of-state-pilot-procedure-on-judicial-review-in-the-asylum-procedure/.

70 These questions raised questions related to Art. 12, 16, 21 para 2 and 41 ChFR as well as to the interpretation of relevant secondary law. For the relevant procedure see Equal Rights Beyond Borders, 4 December 2022, NGO Law at the Greek Council of State, https://www.equal-rights.org/articles/87.

71 To the best knowledge of the author.Corrections are very welcome.

72 Respectively the action for failure to act under Art. 265 TFEU.

under Art. 340 TFEU are better suited in this context.[73] While earlier scholarship advocates for the former approach, more recent contributions tend to favor the latter.[74] Here, it will be argued that, although Art. 263 and Art 265 TFEU are capable of providing access to the CJEU in some specific case constellations, their overall relevance in the context of the integrated asylum administration necessarily remains limited. Again, this is because the core assumption of the legislative conception is not fulfilled. While Art. 263 and Art. 265 TFEU are based on the assumption that the EU acts in formally-binding manner, and thus provide protection only against formal administrative acts or the omission thereof, the EU's conduct in the asylum system is characterised by informality.

To make this point clear, it must first be recalled that the criteria for admissibility under Art. 263, 265 TFEU – as has been criticised many times – are extremely narrow.[75] The 'admissibility bottleneck' is due to two criteria. First, the act in question must be a legislative act or an act intended to produce legal effects vis-à-vis third parties. Second, the act must have a certain link to the concerned person which, since the Lisbon Treaty, can take three different forms: either the act is addressed to the concerned person, or it is of direct and individual concern to them, or it is a regulatory act which is of direct concern to them and does not entail implementing measures.[76]

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73 On the respondent in the context of Art. 263 TFEU see Herbert Rosenfeldt, *Frontex im Zentrum der Europäischen Grenz- und Küstenwache* (fn. 8), p. 318 with further references; on the respondent in the context of Art. 340 para 2 TFEU see below 4.3. On Art. 277 TFEU see Giulia Gentile, „Ensuring Effective Judicial Review of EU Soft Law via the Action for Annulment before the EU Courts: a Plea for a Liberal-Constitutional Approach" (fn. 57), p. 484; Alexander H. Türk, „Liability and Accountability for Policies Announced to the Public and for Press Releases", *ECB Legal Conference 2017. Shaping a new legal order for Europe: a tale of crises and opportunities,* https://www.ecb.europa.eu/pub/pdf/other/ecblegalconferenceproceedings201712.en.pdf, p. 53.

74 See only Melanie Fink, *Frontex and Human Rights* (fn. 1); Melanie Fink, „The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable", *German Law Journal* 21 (2020), p. 532–548.

75 See only Paul Craig, „Standing, Rights, and the Structure of Legal Argument", *European Public Law* 9 (2003), p. 493-508.

76 Based on CJEU, Court, judgement of 15 July 1963, Plaumann & Co. v Commission of the European Economic Community, 25/62. In more detail Steve Peers, Marios Costa, „Judicial Review of EU Acts after the Treaty of Lisbon; Order of 6 September 2011, Case T-18/10 *InuitTapiriit Kanatami and Others v. Commission* & Judgment of 25 October 2011, Case T-262/10 *Microban v. Commission*", *European Constitutional Law Review* 8 (2012), p. 82-104.

a *The Very Limited Potential of the Annulment Procedure and the Action for Failure to Act*

Still, there are three case constellations in which Art. 263, 265 TFEU could provide access to the CJEU. The first is when individuals seek to challenge a formally-binding decision of an agency-internal complaints mechanism.[77] In such cases, the criteria of formal bindingness and of the direct link in the sense of Art. 263 TFEU are fulfilled so that the admissibility bottleneck would not pose an obstacle.[78] Yet, the possibility to appeal a decision of an internal complaints mechanism via Art. 263 para 1, 4 TFEU cannot significantly enhance judicial protection against Frontex or the EUAA. As the internal complaints mechanisms as such are dysfunctional, they are rarely used in practice – and in any case, cannot function as a quasi-pre-judicial procedure.

The second constellation in which Art. 263 para 1, 4 TFEU or Art. 265 TFEU could work are the rare cases when the agencies act through formally-binding decisions. The most important example in this regard is probably a decision of Frontex's Executive Director to withdraw agency support under Art. 46 para 3 Frontex Regulation. In fact, one of the first actions that have been filed against Frontex sought to challenge its failure to withdraw from an operation via Art. 265 TFEU.[79] While it had seemed that the main doctrinal issue in this case concerned the criterion of the direct link,[80] the CJEU dismissed the action as inadmissible on another ground. Frontex had, upon invitation of the applicants under Art. 265 para 2 TFEU, reaffirmed and provided reasons for its position to not withdraw its support. The CJEU hence concluded that an action for failure to act was

77 Jürgen Bast, Frederik von Harbou, Janna Wessels, *Human Rights Challenges to European Migration Policy. The REMAP Study* (fn. 2), p. 139–142; Herbert Rosenfeldt, *Frontex im Zentrum der Europäischen Grenz- und Küstenwache* (fn. 8), p. 322–323; Mariana Gkliati, Herbert Rosenfeldt, „Accountability of the European Border and Coast Guard Agency: Recent developments, legal standards and existing mechanisms" (fn. 60), p. 11–12.

78 In detail Catharina Ziebritzki, *The EU's Responsibility in the Asylum Administration* (fn. 58), p. 240 et seq.

79 CJEU, order of 7 April 2022, SS and ST v European Border and Coast Guard Agency, T-282/21. For the argument of the applicants see https://www.front-lex.eu/court-case-frontex.

80 Herbert Rosenfeldt, *Frontex im Zentrum der Europäischen Grenz- und Küstenwache* (fn. 8), p. 321 therefore sceptical as to the success of that action which was still pending at the time of his writing.

no longer the appropriate remedy because Art. 265 TFEU 'concerns failure to act by failing to take a decision or to define a position'. Instead, the CJEU argued, the applicants should have submitted an action for annulment under Art. 263 TFEU, which they had not done.[81] The doubts as to the consistency of the CJEU's interpretation of Art. 265 TFEU notwithstanding,[82] an action under Art. 263 TFEU also meets a number of hurdles. The main problem in this regard is the admissibility bottleneck, which applies in the context of Art. 265 TFEU, too,[83] and would be extremely difficult to fulfil here.[84] In the case concerning a decision to withdraw agency support, for instance, the required link between the act and the applicant is typically very difficult or even impossible to establish.[85] This is not a coincidence, but results from the very structure of the integrated administration. After all, the agency's tasks are structurally limited to assisting and supporting, while the relevant decisions towards individuals are always issued by the member states.[86]

The third possibility to challenge formally-binding conduct of EU bodies via Art. 263 TFEU would be to rely on its second paragraph, i.e. an application by so-called privileged applicants. In this case, the criterion of

81 CJEU, order of 7 April 2022, SS and ST v European Border and Coast Guard Agency, T-282/21 (fn. 79), para 21–33, in particular para 32.

82 The argument is formalistic: As the applicants challenged the failure to withdraw, reinforcing the position to not withdraw still appears as a failure to act, and thus an omission.

83 Although the wording of that provision differs from that of Art. 263 para 4 TFEU, the CJEU held that the admissibility criteria correspond, see CJEU, General Court (Fourth Chamber), order of 17 November 2010, Fernando Marcelino Victoria Sánchez v European Parliament and European Commission, T-61/10, para 28; CJEU, General Court (Sixth Chamber), order of 27 November 2012, H-Holding AG v European Parliament, T-672/11, para 16. However, it is not yet clear whether this also applies to the third variant of Art. 263 para 4 TFEU, see Oliver Dörr, „Art. 263 AEUV", in Eberhard Grabitz, Meinhard Hilf, Martin Nettesheim (ed.), *Das Recht der Europäischen Union*, C.H. Beck 2023, para 19.

84 As this applies regardless of the quality of the concerned team members, and hence also to statutory staff (see on the different kinds of staff see chapter 2, I.2), addressing misconduct by the latter via Art. 263 TFEU is not as simple as Herbert Rosenfeldt, *Frontex im Zentrum der Europäischen Grenz- und Küstenwache* (fn. 8), p. 359 suggests.

85 Herbert Rosenfeldt, *Frontex im Zentrum der Europäischen Grenz- und Küstenwache* (fn. 8), p. 320–321.

86 Elspeth Guild, Sergio Carrera, Leonhard Den Hertog, Joanna Parkin, *Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies* (fn. 60), p. 83–84.

the link between the act and the applicant is not required. The practical relevance of this option, however, is limited from the outset because privileged applicants cannot challenge non-formally binding conduct either, so that the vast majority of acts in the asylum administration fall outside the scope of Art. 263 para 2 TFEU. In addition, one should keep in mind that Art. 263 para 2 TFEU is an instrument of enforcement from above, and can hence ensure the *effet utile* of EU law but not the fundamental right to an effective remedy. As individuals have no rights under Art. 263 para 2 TFEU, they entirely depend on political discretion of privileged applicants.[87] These limitations notwithstanding, it has been proposed that individuals or NGOs could submit formal complaints to the Commission, the Parliament, the Council or a member state which could then decide to pursue the case.[88] Theoretically, this construction is conceivable. In practice, however, it seems rather unlikely that privileged applicants would be willing to bring alleged misconduct of Frontex, the EUAA or even the Commission before the CJEU. Given the political sensitivities and complex disputes in the context of the asylum system, neither member states, including those governed by leftist parties, nor the Council seem to have any political interest in addressing systemic misconduct at the EU's external borders. Obviously, the Commission itself does not have such interest either, as its unwillingness to initiate infringement proceedings clearly shows. Not even the Parliament, which is at least partially acting as if it were the guardian of the Treaties in the context of the asylum system,[89] has so far shown any sign of considering an action under Art. 263 para 2 TFEU.

87 Mariana Gkliati, Herbert Rosenfeldt, „Accountability of the European Border and Coast Guard Agency: Recent developments, legal standards and existing mechanisms" (fn. 60), p. 10 noting that an individual could 'lobby' before an EU institution to lodge an action under Art. 263 para 4 TFEU.

88 In fact, the Parliament has already in 2011 been called upon to make use of Art. 263 para 2 TFEU, see Liora Lazarus, Cathryn Costello, Nazila Ghanea, Katja S. Ziegler, „The Evolution of Fundamental Rights Charters and Case Law. Report for the European Parliament Directorate-General for Internal Policies", *SSRN* (2011), https://ssrn.com/abstract=2210448, p. 82.

89 On the role of the European Parliament see 2.1.b.

b *Challenging Non-Formally Binding Conduct via Art. 263, 265 TFEU?*

As challenging formally-binding conduct is of very limited practical relevance,[90] the central point of discussion is whether Art. 263, 265 TFEU – despite their wording and established doctrine – allow to challenge non-formally binding conduct. Taking into account that the EU increasingly acts in a non-formally binding manner,[91] and based on the argument that Art. 47 ChFR requires individual legal protection against all forms of EU conduct, some scholarly contributions indeed seek to broaden the interpretation of Art. 263, 265 TFEU in this respect. While the core idea always is to re-interpret the notions of 'legislative acts' and 'acts intended to produce legal effects vis-à-vis third parties',[92] three specific doctrinal approaches can be distinguished.

The first approach is to develop the notion of a 'tacit decision'.[93] The second is to broaden the notion of the reviewable act in the sense of Art. 263, 265 TFEU. In essence, the argument is that the CJEU has by now adopted an 'substance over form' approach.[94] A closer look at the jurisprudence that is cited in support, however, shows that these proposals cannot convince, especially not in the specific context of the EU hotspot administration.[95]

A third proposal is to abandon the bindingness-requirement under Art. 263 TFEU altogether. This proposal would require for the CJEU to give up its doctrine insofar as it presupposes 'legally binding effects' in the formal sense of the term.[96] Advocacy in this direction stresses that the EU's increasing reliance on soft law and factual administrative conduct makes this step necessary.[97] Quite apart from the doubts as to whether it would be possible to overcome the bindingness-criterion in that manner, such reform

90 Melanie Fink, *Frontex and Human Rights* (fn. 1), p. 8.
91 See chapter 1, 4.
92 As laid down in Art. 263 para 1 TFEU.
93 On the first and the second approach see Herwig Hofmann, Morgane Tidghi, „Rights and Remedies in Implementation of EU Policies by Multi-Jurisdictional Networks", *European Public Law* (2014), p. 147–164, p. 155.
94 Notion borrowed from Giulia Gentile, „Ensuring Effective Judicial Review of EU Soft Law via the Action for Annulment before the EU Courts: a Plea for a Liberal-Constitutional Approach" (fn. 57), p. 477.
95 In detail Catharina Ziebritzki, *The EU's Responsibility in the Asylum Administration* (fn. 58), p. 245 et seq.
96 A similar result could be achieved via secondary law reform.
97 In this direction Oliver Dörr, „Art. 263 AEUV" (fn. 83), para 114, noting that it would be possible to broaden the admissibility criteria of the action for annulment with

seems currently highly unlikely. In any case, further scholarly advocacy calling on the CJEU to broaden the admissibility criteria of Art. 263, 265 TFEU seems a rather futile – at least if the aim is to enable those affected by systemically unlawful conduct of EU bodies to obtain legal protection as soon as possible.

For the purpose of this study, pragmatic considerations hence speak against further pursuing the third approach. In light of ongoing systemic fundamental rights violations, advocacy for a reform of the CJEU's doctrine – albeit conceptually appealing – is simply not sufficient. The crucial point is that, so far, there are no signs whatsoever that the scholarly calls for reform are being heard by the CJEU. On the contrary, rather than relaxing or even abandoning the bindingness-criterion, more recent case law points to a development in the opposite direction.[98] To date, the CJEU is apparently entirely unwilling to broaden its interpretation of Art. 263, 265 TFEU so as to allow for review of non-formally binding acts.[99]

Furthermore, it must be taken into account that even if the CJEU did broaden its interpretation of the bindingness-criterion, the problem of the admissibility bottleneck would still persist. For, even if non-formally binding conduct by EU bodies was, in principle, open to review via Art. 263, 265 TFEU, the relevant non-formally conduct such as e.g. opinions by Frontex, the EUAA or the Commission, would still be addressed to national authorities, and not to the concerned individuals. In the vast majority of cases, the inadmissibility hurdles related to the criterion of the direct link would hence persist. In order for Art. 263, 265 TFEU to function as an effective remedy in the asylum administration, it would thus be required for the CJEU to broaden not only its understanding of the bindingness-criterion but also of the direct link.[100] The CJEU's recent case law on the direct link,

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regard to specific agencies because Art. 263 para 5 TFEU allows to deviate from its para 1.

98 This is well illustrated with the CJEU's more recent jurisprudence which sets a particularly high threshold for the bindingnes-criterion Departing from earlier jurisprudence. This is also pointed out also by Giulia Gentile, „Ensuring Effective Judicial Review of EU Soft Law via the Action for Annulment before the EU Courts: a Plea for a Liberal-Constitutional Approach" (fn. 57), p. 479–483, however, using this as an argument for the need to reform the doctrine.

99 In detail Catharina Ziebritzki, *The EU's Responsibility in the Asylum Administration* (fn. 58), p. 249 et seq.

100 Elspeth Guild, Sergio Carrera, Leonhard Den Hertog, Joanna Parkin, *Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies* (fn. 60), p. 83.

however, also points to the opposite direction. After the CJEU had stressed, in its earlier case law, that the criterion of the direct link must be interpreted in light of the rule of law,[101] and after this critique was incorporated with the Lisbon reform of Art. 263 para 4 TFEU, the CJEU has recently become increasingly reluctant to further broaden the interpretation of the direct link.[102]

3 Potential of the Action for Damages (Art. 340 para 2 TFEU)

It is against this background that this study argues for exploring the potential of the action for damages instead. As has become clear already, this choice is mainly justified by pragmatic considerations. Scholarly proposals to reconceptualise Art. 263, 265 TFEU, to introduce a specialised procedure that allows judicial review of agency acts, or even an EU fundamental rights complaint,[103] of course have their merits. The aim of this study, however, is to contribute to addressing systemic deficiencies in the asylum administration. Given the persistence and severity of these violations, and taking into account the current political climate, the approach here is to make use of EU law as it currently stands.

More precisely, and building on recent scholarship,[104] it is argued that the action for damages functions as a 'makeshift fundamental rights reme-

101 CJEU, Court of First Instance (Eighth Chamber), judgement of 8 October 2008, Sogelma v AER, T-411/06, para 37, arguing that 'it cannot be acceptable, in a community based on the rule of law, that such acts escape judicial review'.

102 Michael Rhimes, „The EU Courts Stand Their Ground: Why Are the Standing Rules for Direct Actions Still so Restrictive?", *European Journal of Legal Studies* (2016), p. 103-172.

103 In this direction Christoph-David Munding, *Das Grundrecht auf effektiven Rechtsschutz im Rechtssystem der Europäischen Union*, Duncker & Humblot 2010, p. 562–571. Critical Christina Last, *Garantie wirksamen Rechtsschutzes gegen Maßnahmen der Europäischen Union. Zum Verhältnis von Art. 47 Abs. 1, 2 GRCh und Art. 263 ff. AEUV*, Mohr Siebeck 2008, p. 274–279 with further references to literature.

104 In particular, Melanie Fink, *Frontex and Human Rights* (fn. 1), p. 180–316; Melanie Fink, „EU Liability for Contributions to Member States' Breaches of EU Law", *Common Market Law Review* 56 (2019), p. 1227–1264; Timo Rademacher, *Realakte im Rechtsschutzsystem der Europäischen Union* (fn. 1), p. 260–303, 373–386. Similarly, Mariana Gkliati, Herbert Rosenfeldt, „Accountability of the European Border and Coast Guard Agency: Recent developments, legal standards and existing mechanisms" (fn. 60), p. 13 evaluating the action for damages, despite its difficulties, as 'the most appropriate litigation route'; Herwig Hofmann, Morgane Tidghi, „Rights and

dy'. This notion makes clear that making use of the action for damages in the context of the asylum administration is a double-edged sword. On the one hand, it has great potential insofar as it allows to hold the EU responsible for fundamental rights violations, even when the EU's conduct is 'only' factual in nature. On the other hand, it comes with certain pitfalls because the action for damages was not conceptualised as a fundamental rights remedy, but as an action for monetary compensation, which results in in-built doctrinal shortcomings. In other words, the action for damages is today the best of many bad options to ensure judicial review in the integrated asylum administration – but that is already quite a lot.[105]

Remarkably, the CJEU itself has recently confirmed the potential of the action for damages as a fundamental rights remedy with its judgement in *WS et al. v Frontex*.[106] Contrary to what is often assumed,[107] the judgement

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Remedies in Implementation of EU Policies by Multi-Jurisdictional Networks" (fn. 93), p. 156 noting that 'currently, the only way to review the legality of factual conduct is (…) the action for damages'. Remarkably, even Giulia Gentile, „Ensuring Effective Judicial Review of EU Soft Law via the Action for Annulment before the EU Courts: a Plea for a Liberal-Constitutional Approach" (fn. 57), p. 483 concedes that the action for damage offers the possibility to claim compensation for damages caused by EU soft law. Differently, however, Herbert Rosenfeldt, *Frontex im Zentrum der Europäischen Grenz- und Küstenwache* (fn. 8), p. 326 and 327. It is worth noting here that the scholarly trend to focus on Art. 340 para 2 TFEU is endorsed also by EU institutions: The European Parliament has proposed in 2015 already to make use of the action for damages to hold Frontex to account, see European Parliament, Resolution on the special report of the European Ombudsman in own-initiative inquiry O1/5/2012/BEH-MHZ concerning Frontex, 2014/2215(INI), 2 December 2015, para C: 'whereas even today Frontex coordination activity cannot in practice be dissociated from the member state activity carried out under its coordination, so that Frontex (and thereby the EU through it) could also have a direct or indirect impact on individuals' rights and trigger, at the very least, the EU's extra-contractual responsibility (see Court of Justice Judgement T-341/07, Sison III).' Similarly, the European Commission has noted that in its submissions in the context of CJEU, opinion of 18 December 2014, 2/13 (fn. 55) that in case of acts that do not produce binding legal effects, the only remedy available is the action for damages, see ibid, para 99.

105 Considering that, according to Winston Churchill '(…) democracy is the worst form of Government except for all those other forms that have been tried from time to time.' Quote of 11 November 1947, https://winstonchurchill.org/resources/quotes/the-worst-form-of-government/.

106 CJEU, General Court (Sixth Chamber), judgement of 6 September 2023, WS et al v Frontex, T-600/21.

107 For instance, Christopher Paskowski, „Verwaltung ohne Verantwortung. Zur Abweisung der ersten Schadensersatzklage gegen Frontex durch das EuG", Verfassungs-

constitutes as a milestone towards fundamental rights protection.[108] The ruling concerned one of the first actions for damages against Frontex in which applicants claimed compensation for damages suffered due to unlawful deportation.[109] In 2016, WS and several other Syrian nationals had arrived in Greece and expressed their intention to apply for international protection. Only eleven days after their arrival, their deportation to Türkiye was carried out in a joint return operation by Greek authorities together with Frontex. With their complaint, the deported applicants sought compensation for their rights under Art. 18, 19, 4, Art. 24, and Art. 41, 47 ChFR. Now, the crucial point is that the General Court found the applicants' complaint under Art. 340 para 2 TFEU to be admissible. This in itself is a great success. Even though the applicants lost the case in first instance and even though the General Court has fallen for a standard sham argument in the context of causation,[110] the judgment represents an important step towards the protection of fundamental rights. As the General Court leaves no doubt that the action for damages is a suitable way to address factual misconduct by Frontex before the CJEU, *WS et al.* has paved the way for similar claims to be pursued via the action for damages.[111]

3.1 Preconditions, Potentials and Pitfalls

Art. 340 para 2 TFEU provides that 'in the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.' That provision must be read in connection with the almost identical Art. 41 para 3 ChFR

blog of 27/09/2023; Joyce De Coninck, „Shielding Frontex. On the EU General Court's "WS and others v Frontex"", Verfassungsblog of 09/09/2023.

108 The following 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.

109 Prakken d'Oliveira, News of 2021, 'EU agency Frontex charged with illegal pushbacks', https://www.prakkendoliveira.nl/en/news/news-2021/eu-agency-frontex-charged-with-illegal-pushbacks; Front-Lex, Press Release of March 2022, 'For the First Time: Syrian Refugee Who Was a Victim of 'Pushback' Sues Frontex For Half a Million Euro', https://www.front-lex.eu/alaa-hamoudi.

110 In detail on this criticism see chapter 5, 1.2.

111 As Mariana Gliakti has put it in der Spiegel, 9 September 2023, Syrische Geflüchtete scheitern mit Klage gegen Grenzschutzagentur Frontex, the main success of this case is that it has paved the way for further proceedings of its kind.

according to which 'every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.'

Liability under Art. 340 para 2 TFEU arises under the same conditions as under Art. 41 para 3 ChFR.[112] Since both provisions refer to the general principles common to the laws of the member states, the concrete preconditions for Union liability are established by the CJEU's case law.[113] The CJEU's interpretative approach can be described as a combination of evaluative comparison and autonomous interpretation.[114] The CJEU primarily bases its interpretation on an evaluative comparison of the member states' laws on state liability,[115] and complements this with considerations relating to the particularities of the Union's legal and administrative structure.[116]

Based on this method, the CJEU has established in consolidated jurisprudence that the EU incurs public liability when unlawful conduct of its bodies, qualifying as a sufficiently serious breach of a rule conferring rights on individuals, has caused a damage. EU liability hence arises upon three main conditions: first, a qualified unlawful conduct of the Union, second a damage, and third a causal link between the unlawful conduct and the damage. Crucially, the first element is qualified in two respects: the

112 Paul Craig, „Article 41", in Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward (ed.), *The EU Charter of Fundamental Rights. A Commentary*, Nomos 2021, p. 1125-1152, 1130–1131.

113 As the predecessors of Art 340 para 2 TFEU were phrased in the same manner, see Art. 215 para 2 EC Treaty (Maastricht Treaty, consolidated version) and Art. 288 para 2 EC Treaty (Nice Treaty, consolidated version), the CJEU's earlier jurisprudence still applies.

114 Philipp Dann, „Thoughts on a Methodology of European Constitutional Law", *German Law Journal* 6 (2005), p. 1453-1474, p. 1446 with reference to Art. 288 para 2 EC: 'Hence, it is not a simple transfer of national rules onto European law, but the development of common European standards.'.

115 Kathleen Gutman, „The Evolution of the Action for Damages Against the European Union and Its Place in the System of Judicial Protection", *Common Market Law Review* 48 (2011), p. 695-750, p. 709–710, and in more detail on the CJEU's 'comparative role' p. 738–749.

116 Ton Heukels, Alison McDonnell, „The Action for Damages in a Community Law Perspective: Introduction", in Ton Heukels, Alison McDonnell (ed.), *The Action for Damages in Community Law*, Wolters Kluwer 1997, p. 3.

unlawful conduct must consist, firstly, in a sufficiently serious breach of a rule that, secondly, confers rights upon individuals.[117]

As explained already, the potential of the action for damages mainly lies in the fact that EU liability does not presuppose formal-bindingness of the conduct at stake.[118] As the CJEU put it in *Bourdouvali*, 'in the system of legal remedies established by the FEU Treaty, actions for non-contractual liability pursue a compensatory purpose, intended in particular to guarantee effective judicial protection to an individual also against acts and conduct of the institutions of the European Union (…) which cannot be subject of an action for annulment under Article 263 TFEU.'[119] Today, it is thus consolidated jurisprudence that, in principle, *any* form of administrative conduct, be it formally-binding or factual, be it inter-administrative or directed towards individuals, can incur liability.[120] As a result, the action for damages today is – in the vast majority of cases – the only way to exercise the right to an effective remedy vis-à-vis the EU's conduct in the integrated asylum administration.[121]

At the same time, however, the action for damages comes with several pitfalls. The main problem is that – due to the twofold qualification of the criterion unlawfulness, i.e. the requirement of a sufficiently serious breach of a rule conferring rights upon individuals – the threshold for liability is rather high. This is obviously problematic insofar as the action for damages has become the sole remedy available. As the CJEU has also consistently held, Art. 47 ChFR in principle requires a remedy for each and every breach of EU law.[122] While the criterion of individual rights can arguably

117 See only 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, para 64–65.

118 For detailed argument see chapter 5.

119 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, para 105–110, in particular 107.

120 See only Alexander Türk, *Judicial Review in EU Law*, Edward Elgar 2009, p. 241; Timo Rademacher, *Realakte im Rechtsschutzsystem der Europäischen Union* (fn. 1), p. 264. See in more detail chapter 5.

121 Similarly, Melanie Fink, „EU Liability for Contributions to Member States' Breaches of EU Law" (fn. 104), concluding at p. 1231: 'Hence, the action for damages is often the only action available to a private party to challenge EU contributions to Member State breaches of EU law.'.

122 Herwig Ch Hofmann, Liisa Holopainen, Elina Paunio, Laurent Pech, Clara Rauchegger, Debbie Sayers, Angela Ward, „Article 47", in Steve Peers, Tamara

be justified with reference to procedural efficiency or the exclusion of an actio popularis,[123] the criterion of a sufficiently serious breach is extremely difficult to uphold in light of Art. 47 ChFR.[124] From the perspective of the concerned individual who has no other remedy available than an action for damages, it cannot make a difference whether EU law is breached in a sufficiently serious manner or whether it is simply breached.[125] In practice, this problem is further aggravated by the lack of doctrinal clarity on when a breach is sufficiently serious,[126] which in turn entails a lack of predictability for the applicant, as well as the particularly high standard of proof.[127]

To fully unlock the potential of the action for damages as a remedy against factual conduct, it is hence key to realise that its pitfalls are mainly due to historical origins. The original idea was to differentiate between two levels of legal protection: individuals should be able to seek, at a first level, annulment of an unlawful act via Art. 263 TFEU, and at a second level, monetary compensation for damages resulting from unlawful acts via Art. 340 para 2 TFEU.[128] The action for damages was originally conceived as a subsidiary remedy, meaning that an individual would first have to lodge another action to establish the illegality of a certain measure before then lodging an action for damages.[129] Based on the assumption that all relevant conduct was formally-binding and could hence be addressed at the first level, it seemed consequential to limit the possibility to claim

Hervey, Jeff Kenner, Angela Ward (ed.), *The EU Charter of Fundamental Rights. A Commentary*, Nomos 2022, p. 1268.

123 As here Timo Rademacher, *Realakte im Rechtsschutzsystem der Europäischen Union* (fn. 1), p. 382–383.

124 Herwig Hofmann, Morgane Tidghi, „Rights and Remedies in Implementation of EU Policies by Multi-Jurisdictional Networks" (fn. 93), p. 156 with reference to the relevant case law.

125 Timo Rademacher, *Realakte im Rechtsschutzsystem der Europäischen Union* (fn. 1), p. 383.

126 Kathleen Gutman, „The Evolution of the Action for Damages Against the European Union and Its Place in the System of Judicial Protection" (fn. 115), p. 723 with further references.

127 Isabel Rooms, Ariti Skarpa, „An Insurmountably High Standard for Damage Claims against the EU? Case T-834/17, UPS v Commission", *Journal of European Competition Law & Practice* 13 (2022), p. 487–489.

128 On the gradual development of the action or damages into a self-standing remedy see Catharina Ziebritzki, *The EU's Responsibility in the Asylum Administration* (fn. 58), p. 2576 et seq.

129 CJEU, judgement of 15 July 1963, Plaumann, 25/62 (fn. 76), p. 108.

monetary compensation to cases of particularly severe misconduct.[130] The high threshold for liability seemed legitimate because it was considered to strike a fair balance between the interests of the concerned individual, the interests of taxpayer and the effective functioning of the administration. Limiting monetary compensation seemed necessary to avoid a situation in which every single misconduct burdens the EU's budget,[131] and to avoid paralyzing administrative action due to the concern of being required to pay compensation even for minor errors.[132]

Against this background, it becomes clear that the high threshold for liability is legitimate only because – and thus only as long as – the action for damages functions, first, as a subsidiary remedy and, second, allows for monetary compensation alone.[133] The key question that will guide the following analysis thus is whether this conceptualisation is still convincing, and if not, which doctrinal consequences this entails.

As regards the first aspect, i.e. the subsidiarity, the answer is rather straightforward. With the judgements in *Lütticke* and *Schöppenstedt* of 1971, already, the idea of subsidiarity has been overcome. Departing from earlier doctrine, the CJEU reconceived the action for damages as an autonomous form of action that is no longer conditional upon a prior action for annulment or action for failure to act.[134] Since then, the CJEU has consistently confirmed that the action for functions as a self-standing or 'independent'

130 See only Marc Jacob, Matthias Kottmann, „Art. 340 AEUV", in Eberhard Grabitz, Meinhard Hilf, Martin Nettesheim (ed.), *Das Recht der Europäischen Union* C.H. Beck 2023, para 94 with further references also to comparative analysis.

131 Ibid., para 17–18.

132 Timo Rademacher, *Realakte im Rechtsschutzsystem der Europäischen Union* (fn. 1), p. 383 with further references; very clear also CJEU, General Court (First Chamber), judgement of 25 November 2014, Safa Nicu Sepahan Co. v Council of the European Union (Safa Nicu I), T-384/11, para 51.

133 The 'and' is cumulative, not alternative.

134 CJEU, Court, judgement of 28 April 1971, Alfons Lütticke GmbH v Commission of the European Communities, 4/69, para 6; CJEU, Court, judgement of 2 December 1971, Aktien-Zuckerfabrik Schöppenstedt v Council of the European Communities, 5/71, para 3. Interestingly, the CJEU's departure from the subsidiarity doctrine is a return to the Founding Treaties, which included the then principle of Community liability to ensure that the transfer of powers to the Community level would not lead to reducing the individual's right to individual legal protection, see Francette Fines, „A General Analytical Perspective on Community Liability", in Ton Heukels, Alison McDonnell (ed.), *The Action for Damages in Community Law*, Wolters Kluwer 1997, p. 24.

legal remedy.[135] The relation between Art. 340 para 2 TFEU and Art. 263, 265 TFEU is hence clear: applicants are not required to lodge the latter as a precondition to the former.[136]

The second aspect, i.e. the focus on monetary compensation, requires more discussion. To begin with, it must be established that a situation in which Art. 340 para 2 TFEU is the only remedy available but at the same time allows for monetary compensation alone, falls short of Art. 47 ChFR. Unlike the ECtHR,[137] the EU legal order considers legal protection as effective only if it allows to annul the relevant act, or at least to declare the relevant act as unlawful. This follows from four considerations.[138] First, the CJEU requires member states' courts to grant primary legal protection,[139] and Art. 47 ChFR does not allow for double standards, in the sense that the same standard must also apply to the Union. Second, the CJEU's jurisprudence on legal protection before the CJEU itself increasingly stresses the need for primary remedies – at least in those cases where the nature of the breach is such that is has led to irreversible immaterial damage.[140] Third,

135 See only CJEU, Court of First Instance, judgement of 4 October 2006, Hans-Martin Tillack v Commission of the European Communities, T-193/04, para 97, 117; Court (Full Court), judgement of 23 March 2004, European Ombudsman v Frank Lamberts, C-234/02 P, para 59; CJEU, judgement of 13 July 2018, Bourdouvali, T-786/14 (fn. 119), para 105 with further references.

136 Timo Rademacher, *Realakte im Rechtsschutzsystem der Europäischen Union* (fn. 1), p. 274. For exceptions to this rule in case of an 'abuse' of the action for damages see Kathleen Gutman, „The Evolution of the Action for Damages Against the European Union and Its Place in the System of Judicial Protection" (fn. 115), p. 703–708.

137 On the ECtHR's doctrine of 'acquiesce and liquidate' see Sacha Prechal, Rob Widdershoven, „Redefining the Relationship between 'Rewe-effectiveness' and Effective Judicial Protection", *Review of European Administrative Law* 4 (2011), p. 31-50, p. 49; Nasiya Daminova, „'Access to Justice' and the Development of the Van Gend en Loos Doctrine: The Role of Courts and of the Individual in EU Law", *Baltic Journal of Law & Politics* 10 (2017), p. 133-153, p. 139 with references to the relevant case law.

138 This paragraph draws extensively on the work of Timo Rademacher. In more detail on the first three Timo Rademacher, *Realakte im Rechtsschutzsystem der Europäischen Union* (fn. 1), p. 185–208.

139 Ibid., p. 188–191 with further references to the relevant case law and literature.

140 Ibid., p. 191–194. Note that the CJEU's case law is not entirely unequivocal on this point. In some cases, such as CJEU, Court of First Instance (Second Chamber), judgement of 15 January 2003, Philip Morris International et al v Commission of the European Communities, Joined Cases T-377/100 et al, para 123, the CJEU argues that secondary protection is sufficient where the Treaties do not foresee more. In other cases, such as CJEU, General Court (Second Chamber), judgement of 12 November 2013, Deutsche Post AG v European Commission, T-570/08 RENV, para 60; CJEU, Court (Fifth Chamber), judgement of 23 September 1986, AKZO Chemie

the fact that Art. 41 para 3 ChFR regulates the action for damages separately from Art. 47 ChFR shows that the Charter conceives secondary protection as complementary to effective protection, which accordingly must mean primary protection.[141] Fourth, it must be taken into consideration that the CJEU, in its seminal judgements *Les Verts* and *Union de Pequenos Agricultores*, considered the 'complete system of remedies' to consist of the annulment procedure, the preliminary reference procedure and the collateral review procedure,[142] thereby implying that the action for damages – notably in its original form as a secondary remedy – does not constitute an equivalent full element of the system of remedies. It follows from this understanding that a remedy which at its maximum results in monetary compensation must, at least in principle, be considered to fall short of the constitutional standard.[143]

On this basis, the remainder of this chapter will show that the original doctrine on the action for damages has undergone considerable development, and that the CJEU's current interpretation brings it closer to a primary remedy in the sense of Art. 47 ChFR – namely by conceptualising it more and more as a form of declaratory relief. Moreover, it will be argued that Art. 340 para 2 TFEU – due to its decidedly open wording – holds potential for further doctrinal development in this direction.

3.2 Interpreting in Light of the Constitutional Standard

To better understand the function of the action for damages within the EU legal protection system, this section briefly assesses its doctrine in light of the two relevant constitutional standards: the fundamental right to an effective remedy and the doctrine of vigilant individuals.

BV and AKZO Chemie UK Ltd v Commission of the European Communities, 5/85, para 29, the CJEU stressed that secondary remedies do not meet the standard of the right to an effective remedy.

141 Timo Rademacher, *Realakte im Rechtsschutzsystem der Europäischen Union* (fn. 1), p. 195–196.

142 Now Art. 277 TFEU.

143 For detailed argument with references to the relevant case law see Timo Rademacher, *Realakte im Rechtsschutzsystem der Europäischen Union* (fn. 1), p. 185–198. Note that this does not deny that for damages is 'indispensable to uphold the (…) right to an effective remedy', as argued by Herwig Ch Hofmann, Liisa Holopainen, Elina Paunio, Laurent Pech, Clara Rauchegger, Debbie Sayers, Angela Ward, „Article 47" (fn. 122), p. 1316.

a *The Legal Protection Gap Argument: A Broad Reading of Art. 340 para 2 TFEU*

The fundamental right to an effective remedy constitutes both yardstick and inspiration for the interpretation of Art. 340 para 2 TFEU.[144] On the one hand, Art. 47 ChFR establishes a constitutional standard in which the action for damages in its current form appears deficient.[145] On the other hand, Art. 47 ChFR also strongly influences the doctrine on the action for damages in the sense that the action for damages strives towards the constitutional standard. The CJEU, in fact, interprets the action for damages in light of Art. 47 ChFR – precisely in order to make it an effective remedy.[146]

The argument that Art. 340 para 2 TFEU must be interpreted broadly in order to avoid gaps in the EU legal protection system is referred to here as the 'legal protection gap argument'. It is a concrete expression of the CJEU's general approach to interpreting the procedures laid down in primary law in light of the requirements of Art. 47 ChFR.[147] Ever since *Les Verts*, the CJEU has consistently justified broad interpretations of the procedures laid down in primary law with reference to the rule of law and the right to an effective remedy.[148] This holds true for both admissibility and substantial criteria.[149]

144 Hans Jarass, „Art. 47 Recht auf einen wirksamen Rechtsbehelf und ein unparteiisches Gericht", *Charta der Grundrechte der EU*, C.H. Beck 2021, para 31–33.

145 On the pitfalls see above 3.1.

146 Kathleen Gutman, „The Evolution of the Action for Damages Against the European Union and Its Place in the System of Judicial Protection" (fn. 115), p. 750; Hans Jarass, „Art. 47 Recht auf einen wirksamen Rechtsbehelf und ein unparteiisches Gericht" (fn. 144), para 4, 32–33.

147 See only CJEU, Court (Fourth Chamber), judgment of 6 June 2013, MA, BT and DA v Secretary of State for the Home Department, C-548/11, para 50; CJEU, Court (Fourth Chamber), judgement of 29 January 2009, Migrationsverket v Edgar Petrosian and Others, C-19/08, para 34.

148 Mariana Gkliati, Herbert Rosenfeldt, „Accountability of the European Border and Coast Guard Agency: Recent developments, legal standards and existing mechanisms" (fn. 60), p. 9.

149 As the reconstruction of the CJEU's argument by Giacomo Rugge, „The Euro Group's informality and *locus standi* before the European Court of Justice: *Council v. K. Chrysostomides & Co. and Others*", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (Heidelberg Journal of International Law)* (2021), p. 917-936, p. 923 shows, both General Court and Court agree that the lack of access to legal protection is an argument in favour of attribution to the Union if, otherwise, the applicants would be deprived of legal protection altogether.

The validity of this argument can be called into question with two basic objections. First, one could contend that Art. 19 TEU requires member states to fill gaps in the EU legal protection system, so that it would not be necessary for Art. 340 para 2 TFEU to function as gap-filler.[150] This argument, however cannot persist because member states are not capable to provide judicial protection against the EU's own administrative conduct.[151]

Another objection might be that the legal protection gap argument must apply equally to all procedures enshrined in primary law and not only to Art. 340 para 2 TFEU. In this regard, it is, of course, true that the standard of Art. 47 ChFR applies to all remedies and has, inter alia, led to a broadening of annulment procedure. Yet, it is argued here that the legal protection gap argument is of a particular quality and salience in the context of Art. 340 para 2 TFEU. This is because the action for damages functions as *the* gap filler in the EU legal protection system.[152] Unlike Art. 263, 265 TFEU, the wording of Art. 340 para 2 TFEU is sufficiently open and flexible to function as a fall-back option when no other remedy is available.[153] Further, Art. 41 para 3 TFEU grants a fundamental right to claim compensation from the Union and thus speaks in favour of a broad interpretation of the action for damages.[154] For if an individual was denied legal protection under Art. 340 para 2 TFEU that would violate not only Art. 47 ChFR but also Art. 41 para 3 ChFR.

The understanding of Art. 340 para 2 TFEU as the gap-filler in the EU legal protection system is reflected in the CJEU's jurisprudence.[155] In the case of *Lesieur*, for instance, the CJEU held that an action for damages

150 As mentioned above, some argue that Art. 19 TEU prescribes that gaps in the EU legal protection system must be filled by member states, so that Art. 47 ChFR cannot justify a broad interpretation of Art. 340 para 2 TFEU, see only Hans Jarass, „Art. 47 Recht auf einen wirksamen Rechtsbehelf und ein unparteiisches Gericht" (fn. 144), para 32.

151 As here Herwig Hofmann, Morgane Tidghi, „Rights and Remedies in Implementation of EU Policies by Multi-Jurisdictional Networks" (fn. 93), p. 156.

152 As here, Timo Rademacher, *Realakte im Rechtsschutzsystem der Europäischen Union* (fn. 1), p. 373–387.

153 Uwe Säuberlich, *Die außervertragliche Haftung im Gemeinschaftsrecht. Eine Untersuchung der Mehrpersonenverhaltnisse*, Springer 2005, p. 56–59.

154 Similarly, Melanie Fink, „The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable" (fn. 74), p. 536.

155 On the advances of the Treaty of Lisbon in this regard see Kathleen Gutman, „The Evolution of the Action for Damages Against the European Union and Its Place in the System of Judicial Protection" (fn. 115), p. 701.

is to be considered admissible if, otherwise, no legal protection would be granted because it was not possible for the applicants to lodge their claims before national courts.[156] In Bank Refah Kargaran, the court even expanded the scope of the application of Art. 340 para 2 TFEU to the area of the CFSP 'in order to avoid a lacuna in the judicial protection of the natural or legal persons concerned'.[157]

Taking this idea one step further, it is argued here that an action for damages is admissible when legal protection at the member state level is systemically excluded.[158] The reason for this is well illustrated in the case of the EU hotspots. When individuals staying in EU hotspots do not have access to an effective remedy against the national administration, it is either due to extreme delays in national procedures, which amount to a violation of Art. 47 ChFR, or because national courts systemically refuse to refer the relevant questions to the CJEU – the action for damages against the Union becomes the only remedy available to review compatibility with EU law, and for this reason alone, must be considered as admissible. In other words, where both a member state and the Union are involved in a specific administrative misconduct, and where the member state systemically fails to grant Art. 47 ChFR, the Union must fill in that gap and allow for judicial review. As no other remedy comes into consideration, the action for damages must function as a gap-filler in this regard.

The CJEU's approach to interpreting the action for damages broadly in light of Art. 47 ChFR is particularly well illustrated with the jurisprudential turn brought about in the cases of *Brasserie* and *Bergaderm*.[159] With the *Schöppenstedt* doctrine of 1971, the CJEU had established quite narrow criteria for EU liability: it required a breach of a superior rule of law and made a strict distinction between legislative and administrative action, and it had

156 CJEU, Court, judgement of 17 March 1976, Lesieur Cotelle et Associés SA and others v Commission of the European Communities, Joined cases 67/75 et al, para 14–16.

157 CJEU, Court (Grand Chamber), judgement of 6 October 2020, Bank Refah Kargaran v Council of the European Union, C-134/19 P, para 39. Critical of the interpretation defended here Giacomo Rugge, „The Euro Group's informality and *locus standi* before the European Court of Justice" (fn. 149), p. 933.

158 Even further Giacomo Rugge, ibid., p. 929 who argues in favour of a general presumption of admissibility.

159 CJEU, judgement of 5 March 1996, Brasserie du Pêcheur SA v Federal Republic of Germany et al and the Queen v Secretary of State for Transport, C-46/93 and C-48/93; CJEU, Court, judgement of 4 July 2000, Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission of the European Communities, C-352/98 P, para 40–45.

then, over the years, interpreted these criteria in an increasingly narrow manner.[160] In the 1990s, this narrowing of the action for damages led to fierce criticism from scholars,[161] and even judges of the CJEU themselves noted that it had become practically almost impossible to hold the Union liable.[162] The prevailing opinion back then was that the criteria were too strict and that the action for damages failed to live up to its promise to protect individual rights.[163]

Eventually, the CJEU reacted and loosened the criteria for Union liability. This doctrinal change was brought about in two steps. The first was taken with the judgement in *Brasserie du Pêcheur* of 1996, a case concerning member state liability, where the Court stated that the criteria for EU liability and member state liability 'in the absence of particular justification' should not be different.[164] The second step was taken with the *Bergaderm* decision of 2000, in which the CJEU applied its new approach to EU liability: it ruled that EU liability would arise under the same conditions as those established in *Brasserie du Pêcheur* and thereby departed explicitly from its previous narrow *Schöppenstedt* approach.[165] Since then, EU liability no longer presupposes a breach of a superior rule of law but instead only a sufficiently serious breach of a rule of law conferring rights upon individuals.

Obviously, the argument underlying this jurisprudential turn is that the right to an effective remedy establishes a yardstick with which the EU legal protection system should comply and that the action for damages functions as a gap-filler in this regard. Further, it seems no coincidence that the

160 See only CJEU, Court, judgement of 13 March 1992, Industrie-en Handelsonderneming Vreugdenhil BV v Commission of the European Communities, C-282/90.

161 See only Francette Fines, „A General Analytical Perspective on Community Liability" (fn. 134), p. 21–24; Ian Ward, *A Critical Introduction to European Law*, LexisNexis Buttersworths 1996, p. 64.

162 For instance judge at the CJEU Federico Mancini, *Democracy and Constitutionalism in the European Union*, Hart Publishing 2000, p. 46–48 noted that there were to areas in which 'the Court of Justice has let the individual down', naming the action for damages against the Union and access to the action for annulment.

163 See Pekka Aalto, *Public Liability in EU Law. Brasserie, Bergaderm and Beyond*, Hart Publishing 2011, p. 86–87, noting that 'The case law was there to support the institutions, not the individuals.'.

164 CJEU, judgement of 5 March 1996, Brasserie du Pêcheur, C-46/93 (fn. 159), para 42; in the same direction CJEU, judgement of 8 October 1996, Dillenkofer et al v Federal Republic of Germany, C-178/94 et al, para 25.

165 CJEU, judgement of 4 July 2000, Bergaderm, C-352/98 P (fn. 159), para 40–45.

turn occurred in the context of the adoption of the ChFR, which renewed the emphasis on individual rights and fundamental-right-ized the action for damages.[166] In fact, the CJEU's main argument for departing from its earlier doctrine was based on the function of the action for damages as a means of individual legal protection. It namely argued that the 'protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage.'[167] At the same time, the CJEU introduced the criterion of a sufficiently serious breach,[168] thereby recalibrating the balance between individual rights and the effective functioning of the administration in favour of the former.[169] At the latest since this 2000 *Brasserie-Bergaderm*-turn,[170] it is hence unequivocally clear that the CJEU conceives the action for damages as a means to ensure the right to an effective remedy and is, at least in principle, willing to adjust its doctrine on Art. 340 para 2 TFEU accordingly.

b *The Action for Damages as a Mechanism for Vigilant Individuals*

As to the second element of the constitutional standard, namely the idea of vigilant individuals, it is argued here that Art. 340 para 2 TFEU, just as any other remedy, functions as a mechanism of enforcement from below. The argument essentially builds on case law in which the CJEU has held that member-state liability serves the principle of effective judicial protection.[171] After the CJEU had, in its very early case law, ruled that member state liability only has a subjective dimension,[172] it has since the 1990s held that

166 On the importance of Art. 41 para 3 ChFR see Kathleen Gutman, „The Evolution of the Action for Damages Against the European Union and Its Place in the System of Judicial Protection" (fn. 115), p. 702–703.

167 CJEU, judgement of 5 March 1996, Brasserie du Pêcheur, C-46/93 (fn. 159), para 42.

168 Ibid., para 55–57.

169 See in more detail Pekka Aalto, *Public Liability in EU Law* (fn. 163), p. 91–96 tracing this argument in several opinions of Advocates Generals from 1976 to 2000.

170 For a detailed account of the *Brasserie-Bergaderm*-turn see Pekka Aalto, ibid.

171 See only Court, judgement of 30 September 2003, Gerhard Köbler, C-244/01, para 34; and further Sacha Prechal, Rob Widdershoven, „Redefining the Relationship between 'Rewe-effectiveness' and Effective Judicial Protection" (fn. 137), p. 36.

172 CJEU, judgement of 24 October 1973, Merkur v Commission, 43/72, para 4: 'The action for damages seeks (…) satisfaction solely for the benefit of the applicant.'.

member state liability has both a subjective and an objective dimension.[173] In *Frankovich,* for instance, the CJEU stated explicitly that the action for damages against member states serves both to ensure 'the full effectiveness of Community rules' and to 'protect the rights which they confer on individuals'.[174] As the action for damages against the Union builds upon and thus has the same telos as the action for damages against member states, it follows that Art. 340 para 2 TFEU also serves both subjective and objective legal protection.[175]

Some, however, dispute this reading and argue that the rhetoric of *Frankovich* notwithstanding, member state liability, in fact, does no more than compensate private parties.[176] To support this understanding, reference is made, in particular, to the statistically relatively low success rate and to the requirement that the rule in breach must confer rights upon individuals. On this basis, it is then concluded that member state liability is only a subjective dimension and that the same must, hence, be true for Union liability.[177]

Whereas the dispute concerning member state liability need not be decided here, the arguments allegedly refuting the objective dimension, in any case, do not apply to EU liability. First, as regards the relatively low financial compensation, it must be noted that this, as such, is not an argument against an objective dimension. In fact, even those who contest the dual purpose concede that the action for damages might serve general prevention,[178] which cannot be clearly distinguished from objective legal protection.[179] Second, the political impact of a CJEU decision should not be underestimated. Even though Art. 340 para 2 TFEU does not allow for

173 As follow from CJEU, judgement of 5 March 1996, Brasserie du Pêcheur, C-46/93 (fn. 159), para 72–74. Futher Marek Safjan, Dominik Düsterhaus, „A Union of Effective Judicial Protection: Addressing a Multi-level Challenge through the Lens of Article 47 CFREU", *Yearbook of European Law* 33 (2014), p. 3–40, p. 37.

174 CJEU, Court, judgement of 19 November 1991, Andrea Frankovich et al v Italy, C-6/90 and C-9/90, para 32–33.

175 Marc Jacob, Matthias Kottmann, „Art. 340 AEUV" (fn. 130), para 13.

176 Tobias Lock, „Is Private Enforcement of EU Law Through State Liability a Myth? An Assessment 20 Years After Frankovich", *Common Market Law Review* 49 (2012), p. 1675-1702.

177 Ibid., p. 1702 referring to Art 340 TFEU as a procedure 'the chief purpose of which is the protection of individual rights', without further justifying this understanding.

178 Ibid., p. 1700.

179 Uwe Säuberlich, *Die außervertragliche Haftung im Gemeinschaftsrecht* (fn. 153), p. 50–56.

erga omnes judgments, cases such as *Ledra* show that it can reasonably be expected that a CJEU decision stating that the EU is liable for fundamental rights violations has effects beyond the individual case.[180] Third, lower financial compensation could also indicate that the action for damages evolves towards declaratory relief. Seen from this perspective, less compensation speaks in favour, not against, a function of the action for damages as a mechanism for enforcement from below.

3.3 A Makeshift Fundamental Rights Remedy

Since the action for damages serves both individual legal protection and the *effet utile* of EU law, it is obviously of particular importance when fundamental rights are at stake.[181] Yet, the claim that the action for damages functions as a proper fundamental rights remedy requires further argument. For the claim to hold on the basis of the law as it currently stands, it must be shown that, in case of a fundamental rights violation, the high threshold for liability is met. Specifically, it must be argued that fundamental rights qualify as individual rights,[182] that breaches of fundamental rights as such qualify as sufficiently serious, and that fundamental rights violations as such constitute immaterial damage.

To avoid misunderstandings, the claim made here is not that the action for damages is the only procedure which functions as a fundamental rights remedy. Certainly, other procedures, such as the action for annulment, can also serve to address fundamental rights violations. Due to its gap-filling function, however, the action for damages holds a special place within the range of procedural options, as Art. 41 para 3 ChFR confirms. In fact, a large part of severe fundamental rights violations are brought about

180 Although the CJEU's judgement in Ledra (fn. 117) concerned one specific austerity measure, it was largely understood as setting a general standard for the legality of austerity measures under EU law.

181 Melanie Fink, „The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable" (fn. 74), p. 534–536; Angela Ward, „Damages under the EU Charter of Fundamental Rights", *ERA Forum* 12 (2012), p. 589–611, p. 590–593; Nina Półtorak, „Action for Damages in the Case of Infringement of Fundamental Rights by the European Union", in Ewa Bagińska (ed.), *Damages for violations of human rights. A comparative study of domestic legal systems*, Springer 2016, p. 427–441, p. 427–441, p. 434–436.

182 The argument here is limited those fundamental rights that are most relevant in the context of the EU hotspot administration.

through factual or inter-administrative conduct and hence escape the scope of the action for annulment. Even before the entry into force of the ChFR, individuals thus mainly relied on the action for damages in case of fundamental rights violations.[183]

a *The Relevant Fundamental Rights as Individual Rights*

The first matter, i.e. the qualification of fundamental rights as individual rights, concerns the relation between 'rights and freedoms guaranteed by the law of the Union' in the sense of Art. 47 ChFR and 'rules conferring rights upon individuals in the sense of Art. 340 para 2 TFEU. Generally, the CJEU interprets the individual rights criterion in the context of Art. 340 para 2 TFEU rather broadly and applies a purpose test. According to this test, it is not required that the provision in question has a direct effect or that it grants subjective rights. Instead, it is sufficient that the provision *inter alia* serves to protect the individual.[184]

183 CJEU, Court of First Instance (Fifth Chamber), AFCon Management Consultants, Patrick Mc Mullin and Seamus O'Grady v Commission of the European Communities, judgment of 17 March 2005, T-160/3; CJEU, Court of First Instance (Fourth Chamber), judgement of 11 July 2007, Schneider Electric SA v Commission of the European Communities (Schneider I), T-351/03; CJEU, Court (Second Chamber), judgement of 4 July 1989, Benito Francesconi and others v Commission of the European Communities, 326/86 and 66/88, in particular para 4–5; CJEU, Court, judgement of 30 September 1988, Portuguese Republic v Council of the European Union (Coldiretti), T-149/96, in particular para 67–79. See further Nina Półtorak, „Action for Damages in the Case of Infringement of Fundamental Rights by the European Union" (fn. 181), p. 434; Angela Ward, „Damages under the EU Charter of Fundamental Rights" (fn. 181), p. 596–597; for the context of the Eurozone see 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.

184 Pekka Aalto, *Public Liability in EU Law* (fn. 163), p. 111–132, 158–176; Melanie Fink, „EU Liability for Contributions to Member States' Breaches of EU Law" (fn. 104), note 100 with further reference to the relevant case law. Note that the CJEU, General Court (Second Chamber) in its judgement of 23 November 2011, Jose Maria Sison v Council of the European Union (Sison III), T-341/07, para 33 explicitly clarified that the different expressions used in the jurisprudence, such as a rule of law 'intended to confer rights on individuals', a rule of law 'for the protection of the individual' or a rule of law 'intended to protect individuals' are 'mere variations of a single legal concept'.

When applying this purpose test to fundamental rights, two considerations are of particular importance. The first concerns the interpretative method. Generally, the CJEU's doctrine on how to determine the purpose of a particular rule remains rather thin. The CJEU usually refers to contextual interpretation, and its conclusions then seem to be based on jurisprudential intuition.[185] However, regarding the interpretation of the Charter, Art. 52 para 3 and para 4 ChFR provide some more concrete guidance by establishing that both the constitutional traditions of the member states and the ECtHR's jurisprudence must be taken into account.[186] In particular, Art. 52 para 4 ChFR provides the basis for the argument that those rights which have been interpreted as absolute by the ECtHR also qualify as conferring rights upon individuals. This follows from the notion of absolute rights. Contrary to conventional wisdom, the ECtHR does not conceive all absolute rights as non-derogable in a strict sense: the prohibition of non-refoulement, for instance, is considered 'less absolute' than the prohibition of torture, although both are enshrined in Art. 3 ECHR.[187] This is strongly criticized, and rightly so.[188] Yet, it must be acknowledged here that the ECtHR apparently determines the quality of a right as absolute according to whether it is judged as particularly important, in the sense that it protects goods and interests that are so central to the life and living of individuals that infringements can be justified, if at all, only with very important arguments and only in very exceptional circumstances.[189] Consequentially, these rights, *per definition,* qualify as rights that serve the interest of the individual.

185 Angela Ward, „Damages under the EU Charter of Fundamental Rights" (fn. 181), p. 594.

186 Ibid., p. 599.

187 Hemme Battjes, „In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulement under Article 3 ECHR Reassessed", *Leiden Journal of International Law* 22 (2009), p. 583-621, in particular p. 595–599; Steven Greer, „Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law?", *Human Rights Law Review* 15 (2015), p. 101-137, p. 118.

188 Natasa Mavronicola, Francesco Messineo, „Relatively Absolute? The Undermining of Article 3 ECHR in Ahmad v UK", *The Modern Law Review* 76 (2013), p. 589-619; Natasa Mavronicola, „Is the Prohibition Against Torture and Cruel, Inhuman and Degrading Treatment Absolute in International Human Rights Law? A Reply to Steven Geer", *Human Rights Law Review* 17 (2017), p. 479-498.

189 Similarly Hemme Battjes, „In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulement under Article 3 ECHR Reassessed" (fn. 187), p. 618–619.

The second consideration concerns the distinction made in the Charter between rights and principles. As follows from Art. 51 para 1, Art. 52 para 1, 2, 5 ChFR, principles are distinct from rights in that principles do not grant subjective rights.[190] This does not mean, however, that principles cannot, at least amongst other things, serve to protect individual rights in the sense of Art. 340 para 2 TFEU. This is well illustrated with Art. 25 ChFR: although this norm is generally qualified as a principle, it can hardly be denied that it serves, at least inter alia, to protect the rights of elderly people.[191] Whether or not a principle serves to protect individual rights cannot, therefore, be answered in general terms but can only be determined by interpreting the provision in question. This is different in the case of rights. Since rights are defined as provisions conferring subjective rights, they qualify per se as rules that serve to protect individual rights within the meaning of Art. 340 para 2 TFEU.[192]

Based on these considerations, the purpose test can be applied to those fundamental rights that are at stake in the context of the integrated EU hotspot administration. As established above, these are, in particular, the prohibition of refoulement granted by Art. 4, 18, 19 ChFR, the right to good administration enshrined in Art. 41 ChFR, the specific procedural guarantees for children granted by Art. 24 and 41 ChFR, the prohibition of inhuman and degrading treatment enshrined in Art. 4 ChFR, and the right to liberty under Art. 6 ChFR.[193]

190 On the distinction between rights and principles see Hans Jarass, „Art. 52 Tragweite und Auslegung der Rechte und Grundsätze", *Charta der Grundrechte der EU*, C.H. Beck 2021, para 69a, 72 arguing that the qualification depends on contextual interpretation; slightly differently Thorsten Kingreen, „Artikel 52 EU-GRCharta", in Christian Calliess, Matthias Ruffert (ed.), *EUV/AEUV. Kommentar*, C.H. Beck 2022, para 16 arguing that all those provisions which are directed only to the Union qualify as principles.

191 As here for instance Hans Jarass, „Art. 25 Rechte älterer Menschen", *Charta der Grundrechte der EU*, C.H. Beck 2021, para 3; differently Thorsten Kingreen, „Artikel 25 EU-GRCharta", in: Christian Calliess, Matthias Ruffert (ed.), *EUV/AEUV. Kommentar*, C.H. Beck 2022, para 1.

192 Explanations relating to the Charter of Fundamental Rights, OJ 2007 C 303/30 of 14 December 2007 (hereinafter: Charter Explanations), p. 17–35, Article 52 para 1 ChFR.

193 Further, the right to personal data as now enshrined in Art 8 ChFR and the right to private life as now enshrined in Art 7 ChFR. See Angela Ward, „Damages under the EU Charter of Fundamental Rights" (fn. 181), p. 596–599.

Art. 4, 6, 41 and 24 ChFR qualify as rights in the sense of Art. 51, 52 ChFR,[194] and thus also as norms conferring rights upon individuals in the sense of Art. 340 para 2 TFEU. The same holds true for the absolute rights enshrined in Art. 4 ChFR. Concerning Art. 41 ChFR, the CJEU has explicitly pronounced itself on its qualification in the context of EU liability. Whereas earlier case law concluded that a breach of the obligation to give reasons could not incur liability,[195] more recent judgements establish that the principle of sound administration confers rights upon individuals where it constitutes the expression of specific rights such as the right to have affairs handled impartially, fairly and within reasonable time, the right to be heard, the right to have access to files, or the obligation to give reasons for decisions.[196] Concerning the right to asylum, the CJEU has not explicitly pronounced itself yet, and scholarship remains divided over the question of whether Art. 18 ChFR qualifies as right or principle, with the prevailing opinion arguing for the latter.[197] For the question at stake, however, that dispute is largely irrelevant. This is because the right to asylum as granted by Art. 18 ChFR consists of several components, and the component corresponding to the protection granted by Art. 3 ECHR is certainly absolute and must hence be understood as conferring individual rights.[198] This is even confirmed by the prevailing opinion which accepts that the non-refoulement principle as granted under the ChFR is subjective

194 See Charter Explanations (fn. 192), Explanations on the cited articles.

195 See for instance CJEU, Court of First Instance (Third Chamber), judgement of 6 December 2001, Emesa Sugar (Free Zone) NV v Council of the European Union, T-43/98.

196 CJEU, judgement of 4 October 2006, Tillack, T-193/04 (fn. 135), in particular para 127; CJEU, judgement of 23 November 2011, Sison III, T-341/07 (fn. 184); CJEU, Court (Grand Chamber), order of 9 June 2010, European Commission v Schneider Electric SA (Schneider II), C-440/07 P. As here Angela Ward, „Damages under the EU Charter of Fundamental Rights" (fn. 181), p. 596–597; in more detail on the contradictions in the CJEU's case law see Pekka Aalto, *Public Liability in EU Law* (fn. 163), p. 121–125.

197 For the minority opinion see María-Teresa Gil-Bazo, „The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law", *Refugee Survey Quarterly* 27 (2015), p. 33-52.

198 This is ultimately a technical question of doctrinal reconstruction: In the alternative, one could also argue that the individual-rights-granting component is enshrined exclusively in Art. 19 para 2 and Art. 4 ChFR.

in nature,[199] thereby implying that Art. 18 ChFR qualifies as subjective right insofar as it prohibits non-refoulement.

To conclude, the purpose-test leads to the conclusion that all relevant fundamental rights fulfil the individual-rights criterion in the sense of Art. 340 para 2 TFEU.

b *A Fundamental Rights Violation as a Sufficiently Serious Breach*

The second question is whether violations of fundamental rights per se qualify as sufficiently serious breaches. When discussing this, it should be kept in mind that the sufficiently-serious-breach criterion is often decisive for whether or not the Union is liable.[200] This is because the balancing of private interests with the effective functioning of the administration, which lies at the heart of public liability law, is mainly carried out in the context of this criterion.[201] At the same time, the criterion is particularly problematic because it not only sets quite a high threshold but also lacks legal certainty – notably to such an extent that some have argued that the effectiveness of legal protection is endangered.[202]

This being said, the CJEU's test on whether a breach is sufficiently serious can be described as an evaluation of the relevant breach in light of several factors, which in sum amounts to a comprehensive due-dili-

199 See, for instance, Daniel Thym, „Legal Framework for EU Asylum Policy", in Daniel Thym, Kay Hailbronner (ed.), *EU Immigration and Asylum Law. Article-by-Article Commentary*, C.H. Beck, Hart Publishing and Nomos 2022, para 55a and b, para 60.

200 In more detail on the CJEU's doctrine on the 'sufficiently serious breach' see Kathleen Gutman, „The Evolution of the Action for Damages Against the European Union and Its Place in the System of Judicial Protection" (fn. 115), p. 712–724; Melanie Fink, „EU Liability for Contributions to Member States' Breaches of EU Law" (fn. 104), p. 1253–1257.

201 CJEU, judgement of 23 November 2011, Sison III, T-341/07 (fn. 184), para 34: 'This requirement of a sufficiently serious breach (…) is intended (…) to avoid the risk of having to bear the losses claimed by the persons concerned obstructing the institution's ability to exercise to the full its power in the general interest (…) without however thereby leaving individuals to bear the consequences of flagrant and inexcusable misconduct'.

202 Jill Wakefield, *Judicial Protection through the Use of Article 288(2) EC*, Wolters Kluwer 2002, p. 147.

gence-test.[203] The decisive question, according to the CJEU, is whether the relevant breach would also have occurred had the competent authority exercised due diligence and care; if that is not the case, the breach qualifies as sufficiently serious. As the CJEU formulated in *Sison III*, 'only the finding of an irregularity that an administrative authority, exercising ordinary care and diligence, would not have committed in similar circumstances, can render the Community liable'.[204]

In applying this test, discretion remains a central factor.[205] In concrete terms, where the 'institution in question has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach.'[206] When there is more than none or narrow discretion, a breach is sufficiently serious if Union bodies 'manifestly and gravely disregard the limits on their discretion'.[207] This being said, the determination of the degree of discretion, of course, requires an interpretation of the specific provision rather than general considerations about the degree of discretion enjoyed in a particular policy area.[208]

203 The sufficiently-serious-breach criterion thus partly overlaps with the individual-rights criterion, Angela Ward, „Damages under the EU Charter of Fundamental Rights" (fn. 181), p. 600–601.

204 CJEU, judgement of 23 November 2011, Sison III, T-341/07 (fn. 184), para 39.

205 In its earlier case law, the CJEU distinguished between administrative acts where Union bodies must exercise 'ordinary care' and legislative acts where liability would only arise if the Union bodies 'manifestly and gravely disregarded the limits on the exercise of its powers' see CJEU, judgement of 25 May 1978, Bayerische HNL, Joined cases 83 and 94/76, 4, 15 and 40/77, para 6. Since the *Bergaderm* turn, the decisive criterion is no longer the legislative or administrative nature of the act in question but rather the margin of available discretion. This '*Bergaderm* approach' is often described as the 'new', the 'discretion-centred' approach, see in more detail Chris Hilson, „The Role of Discretion in EC Law on Non-Contractual Liability", *Common Market Law Review* 42 (2005), p. 681 – 685.

206 CJEU, judgement of 4 July 2000, Bergaderm, C-352/98 P (fn. 159), para 40–46.

207 See only CJEU, judgement of 12 July 2005, CEVA Santé Animale SA, C-198/03 P, para 65; CJEU, judgement of 19 April 2007, Holcim (Deutschland) v COM, C-282/05, para 47.

208 Opinion of Advocate General Stix-Hackl, 28 November 2002, Fresh Marine, C-472/00 P, para 78; CJEU, 10 July 2003, Fresh Marine, C-472/00 P, para 26; CJEU, judgement of 10 December 2002, C-312/00 P, COM v Camar and Tico, para 58.

In addition, several further factors are taken into consideration.[209] Among these are the severity[210] and the reprehensibility of the violation, i.e. whether the breach was intentional or inexcusable.[211] Further, the complexity of the situation and difficulties or uncertainties in the interpretation of the legislation must be taken into account.[212] In this context, it is decisive whether there are authoritative assessments of a certain conduct as unlawful. If jurisprudence or other reliable legal sources have already established that specific conduct is unlawful, the relevant authority cannot excuse its behaviour with reference to situational complexity or interpretational uncertainty; instead, the breach must then be considered as sufficiently serious.[213] The CJEU has made this argument with regard to its own judgements[214] to legal opinions expressed by the Fundamental Rights Agency, the European Parliament, the European Commission,[215] or UN bodies.[216] The same applies to ECtHR judgements: for once the ECtHR has found

209 Kathleen Gutman, „The Evolution of the Action for Damages Against the European Union and Its Place in the System of Judicial Protection" (fn. 115), p. 716; Angela Ward, „Damages under the EU Charter of Fundamental Rights" (fn. 181), p. 600; Nina Półtorak, „Action for Damages in the Case of Infringement of Fundamental Rights by the European Union" (fn. 181), p. 427–441, 433.

210 This is so already because the purpose of the criterion is balancing public and private interests, see Advocate General Lagrange, Opinion of 7 June 1961, Meroni, Joined cases 14, 16, 17, 20, 24, 26 and 27–60 and 1–61, p. 174: 'On the other hand it is true that the required degree of seriousness varies according to the nature of the service, the extent of the difficulty encountered in guaranteeing it, and, on the other hand, to the extent of the protection which the interests which have suffered damage deserve. In each case a balance must be struck between the public interest and private interest'. Note that Chris Hilson, „The Role of Discretion in EC Law on Non-Contractual Liability" (fn. 205), p. 694 criticises the Bergaderm formula for not making this explicit.

211 CJEU, judgement of 23 November 2011, Sison III, T-341/07 (fn. 184), para 37 to 39, 40, 58. Johannes Saurer, *Der Einzelne im europäischen Verwaltungsrecht*, Mohr Siebeck 2014, p. 173 hence understands the sufficiently-serious-breach criterion as equivalent to the reprehensibility-criterion as required under German public liability law.

212 CJEU, judgement of 4 July 2000, Bergaderm, C-352/98 P (fn. 159), para 43;; CJEU, judgement of 19 April 2007, Holcim (Deutschland) v COM, C-282/05 (fn. 207), para 50; CJEU, 10 July 2003, Fresh Marine, C-472/00 P (fn. 208), para 24.

213 Angela Ward, „Damages under the EU Charter of Fundamental Rights" (fn. 181), p. 602.

214 CJEU, judgement of 23 November 2011, Sison III, T-341/07 (fn. 184), para 37–40, 58.

215 Angela Ward, „Damages under the EU Charter of Fundamental Rights" (fn. 181), p. 602.

216 CJEU, judgement of 23 November 2011, Sison III, T-341/07 (fn. 184), para 60–77; CJEU, judgement of 3 September 2008, Yassin Abdullah Kadi and Al Barakaat

that a particular conduct violates human rights, an administrative authority exercising ordinary care would henceforth refrain from performing that conduct.

On this basis, it is argued here that fundamental rights violations qualify as sufficiently serious – at least when the violations are systemic in nature, or when there is authoritative opinion evaluating the situation as violating fundamental rights.[217] This holds true all the more when it comes to the rights that constitute basic elements of the rule of law such as those granted by Art. 4, 6, 18, 19, 24 and 41 ChFR.[218]

This understanding is convincing already at a conceptual level because fundamental rights hold a special place in the EU legal order, as made clear by Art. 2 TEU, and breaches thereof, let alone systemic breaches, should not remain unaddressed.[219] In addition, the fact that the determination of the violation of a fundamental right as such requires a balancing exercise speaks in favour of omitting another balancing exercise to determine the sufficient seriousness of the breach.[220]

Further, this understanding reconciles two strands of case law, namely judgements in cases such as *Staelen,*[221] *Ledra Advertising*[222] or *Bocchi*,[223] in which it was held that fundamental rights violations were per se sufficiently serious breaches, on the one hand,[224] and judgements in cases such as *Sison*

International Foundation v Council and Commission, C-402/05 P and C-415/05 P, para 361–363.

217 These two conditions depend on each other because: For if the invoked fundamental rights violation affects a large number of individuals in the same situation, it is more likely that authoritative assessments of the situation exist.

218 Similarly, Melanie Fink, *Frontex and Human Rights* (fn. 1), p. 226–227 who focuses on 'core' fundamental rights; similarly, also Angela Ward, „Damages under the EU Charter of Fundamental Rights" (fn. 181), p. 601.

219 Thus, where Art. 340 para 2 TFEU is the only remedy available, this as such speaks in favour of the qualification of the relevant breach as sufficiently serious, see Melanie Fink, *Frontex and Human Rights* (fn. 1), p. 226.

220 Melanie Fink, *ibid.,* p. 227.

221 General Court (Fourth Chamber), judgement of 29 April 2015, Claire Staelen v European Ombudsman (Staelen I), T-217/11, para 86.

222 CJEU, judgement of 20 September 2016, Ledra, C-8/15 P et al (fn. 117), para 69–70. See further chapter 5, 4.2.

223 CJEU, Court of First Instance (Fifth Chamber), judgement of 20 March 2001, Bocchi Food Trade International GmbH v Commission of the European Communities, T-30/99, para 80.

224 Melanie Fink, *Frontex and Human Rights* (fn. 1), p. 224–225 with reference to further similar case law in note 248 and 249.

III,[225] *Schneider*[226] and *Safa Nicu*,[227] in which it was held that fundamental rights violations were sufficiently serious due to the complexity of the situation and interpretational uncertainty, on the other hand. Stressing that the latter strand implies that 'simple' violations of fundamental rights are not sufficiently serious, some have interpreted the two lines of jurisprudence as contradicting each other.[228] For the purpose of this study, however, the crucial point is that both strands concur insofar as those breaches qualify as sufficiently serious which are systemic, authoritatively documented, or concern fundamental rights that are 'core' to the rule of law. If one or several of these criteria are met, the CJEU concludes that fundamental rights violations qualify as sufficiently serious breaches.[229]

This is consequential because – and this is the most important argument in favour of the understanding proposed here – it follows from the due-diligence test as set out above. Violations of fundamental rights are always especially severe and always inexcusable. An exemplary authority exercising ordinary care might make a mistake and might perhaps even fail to prevent the violation of fundamental rights in exceptional and isolated cases. However, such authority would certainly not systemically and continuously violate fundamental rights, let alone core fundamental rights, in a situation

225 CJEU, judgement of 23 November 2011, Sison III, T-341/07 (fn. 184), para 75–82.

226 CJEU, Court of First Instance (Fourth Chamber), judgement of 11 July 2007, Schneider I, T-351/03 (fn. 183), para 154–156; CJEU, order of 9 June 2010, Schneider II, C-440/07 P (fn. 196), para 173.

227 CJEU, judgement of 25 November 2014, Safa Nicu I, T-384/11 (fn. 132), para 32–36, 60–67.

228 Melanie Fink, *Frontex and Human Rights* (fn. 1), p. 224–226.

229 On the one hand, in CJEU, judgement of 29 April 2015, Staelen I, T-217/11 (fn. 221) the fundamental right concerned was the right to good administration, i.e. a right that is 'core' to the rule of law; in CJEU, judgement of 20 September 2016, Ledra, C-8/15 P et al (fn. 117), the breach was systemic insofar as the measures at stake led a large number of similar fundamental rights violations; in CJEU, judgement of 20 March 2001, Bocchi, T-30/99 (fn. 223) none of the three conditions is met, but the CJEU still found the breach to be sufficiently serious, which confirms the conclusion because the list of conditions is not exhaustive. On the other hand, in CJEU, judgement of 23 November 2011, Sison III, T-341/07 (fn. 184), para 41, the fundamental rights concerned are the right to respect for private life and for property and the CJEU found the breach to be not sufficiently serious; in CJEU, order of 9 June 2010, Schneider II, C-440/07 P (fn. 196), the concerned fundamental rights were the rights of defence; in CJEU, judgement of 25 November 2014, Safa Nicu I, T-384/11 (fn. 132), para 59–69, the fundamental right at stake was the right to effective judicial protection.

which has already been evaluated by authoritative opinion as breaching the Charter.[230]

c *A Fundamental Rights Violation as a Damage*

The third issue concerns the notion of damage,[231] specifically the question of whether the violation of a fundamental right as such constitutes damage.[232]

To begin with, it must be recalled that the CJEU defines the notion of damage in a broad manner. In principle, any impairment of a legally protected good or interest constitutes damage.[233] Provided that the damage is actual and certain,[234] it can be material or non-material.[235] The notion of non-material harm in itself is quite broad and has been interpreted by the CJEU as encompassing pain or physical suffering,[236] harm to emotional well-being or career,[237] reputational harm,[238] similar harm to personality

230 Angela Ward, „Damages under the EU Charter of Fundamental Rights" (fn. 181), p. 601.

231 See on this question also Melanie Fink, *Frontex and Human Rights* (fn. 1), p. 228–231.

232 On the question at which relevant point in time a damage must be manifest, see Catharina Ziebritzki, *The EU's Responsibility in the Asylum Administration* (fn. 58), p. 269 et seq.

233 See only Katri Havu, „Damages Liability for Non-Material Harm in EU Case Law", *European Law Review* 44 (2019), p. 492-514, p. 492–514, 492, 495 with extensive reference to the relevant case law; Timo Rademacher, *Realakte im Rechtsschutzsystem der Europäischen Union* (fn. 1), p. 288–289.

234 Kathleen Gutman, „The Evolution of the Action for Damages Against the European Union and Its Place in the System of Judicial Protection" (fn. 115), p. 735.

235 Paul Craig, *EU Administrative Law*, Oxford University Press 2018, p. 248.

236 CJEU, judgement of 3 March 2004, François Vainker and Brenda Vainker v European Parliament, T-48/01, para 178; CJEU, judgement of 27 March 1990, Alfredo Grifoni v European Atomic Energy Community, C-308/87, para 2, 7.

237 CJEU, General Court (Sixth Chamber), judgement of 16 December 2015, Randa Chart v European External Action Service, T-138/14, para 149–150; CJEU, Court (Grand Chamber), judgement of 4 April 2017, European Ombudsman v Claire Staelen, C-337/15 P (Staelen II), para 129.

238 See only CJEU, General Court (Fourth Chamber), judgement of 6 April 2006, Manel Camós Grau v European Commission, T-309/03, para 162. See on the distinction of reputational harm and material economic damage Katri Havu, „Damages Liability for Non-Material Harm in EU Case Law" (fn. 233), p. 508–513.

rights,[239] or even discomfort created by a prolonged state of uncertainty.[240] The most important limit to the notion of non-material harm is that 'normal inconvenience' does not constitute damage.[241] For instance, the CJEU has considered damage the psychological harm experienced because of the way in which the European Ombudsman dealt with a complaint.[242] Typical cases of reputational harm are staff cases and so-called sanctions list cases, and typical cases of prolonged state of uncertainty are cases concerning excessive duration of court or administrative proceedings in competition matters.[243] The broadness of the notion of immaterial harm is particularly well illustrated with the case of *Camós Grau,* in which the CJEU qualified as immaterial damage the impairment of the applicant's 'honour and professional reputation' and 'difficulties in his living conditions' resulting from a publication of a report by OLAF.[244]

Based on this jurisprudence, it follows that any fundamental rights violation entails immaterial damage in the sense of Art 340 para 2 TFEU. There are two alternative lines of argument to support this conclusion. One is that any violation of fundamental rights as such constitutes immaterial damage.[245] This understanding might be surprising from the perspective of legal systems such as the German one, which make a strict distinction between the breach of a right and the ensuing damage, but is firmly rooted in the French legal tradition.[246]

239 See only CJEU, Court, judgement of 7 March 1995, Fiona Shevill et al v Press Alliance SA, C-68/93, para 23; CJEU, Court of First Instance (Fourth Chamber), judgement of 9 July 1999, New Europe Consulting, T-231/97, para 53–54.

240 Both of natural persons and of companies, see only CJEU, Court (Third Chamber), judgement of 23 April 2002, Anna Maria Campogrande v European Commission, C-62/01 P, para 21; CJEU, Court (Sixth Chamber), judgement of 14 May 1998, Council of the European Union v Lieve de Nil and Christiane Impens, C-259/96 P, para 25.

241 CJEU, Court (Second Chamber), judgment of 25 March 2010, Sviluppo Italia Basilicata SpA v European Commission, C-414/08 P, para 139–142; CJEU, judgement of 4 April 2017, Staelen II, C-337/15 P (fn. 237), para 91–95; CJEU, General Cort (First Chamber), order of 13 January 2017, Idromacchine Srl et al v European Commission, T-88/09 DEP, para 91–93.

242 CJEU, judgement of 4 April 2017, Staelen II, C-337/15 P (fn. 237), para 129.

243 See Katri Havu, „Damages Liability for Non-Material Harm in EU Case Law" (fn. 233), p. 496–499.

244 CJEU, judgement of 6 April 2006, Camós Grau, T-309/03 (fn. 238), para 162–163.

245 Melanie Fink, *Frontex and Human Rights* (fn. 1), p. 228–232; Herbert Rosenfeldt, *Frontex im Zentrum der Europäischen Grenz- und Küstenwache* (fn. 8), p. 285.

246 Timo Rademacher, *Realakte im Rechtsschutzsystem der Europäischen Union* (fn. 1), p. 377–378 with further references.

An alternative line of argument is that the violation of fundamental rights qualifies as damage because a it per definitiom goes beyond normal inconvenience and necessarily amounts to immaterial harm. According to this reasoning, the immaterial damage i.e. the physical or psychological suffering is inherent in the fundamental rights violation.[247] This is well illustrated with the fundamental rights identified as particularly relevant to the asylum administration. A violation of Art. 4 ChFR, for instance, presupposes[248] and thus necessarily entails severe psychological and physical suffering. The same is true concerning violations of Art. 41 ChFR: a failure to conduct a hearing in private circumstances, a failure to conduct a correct age assessment, or delays in the asylum procedure, for instance, typically cause severe psychological distress or even disease, harm to personality rights, and feelings of anxiety due to a prolonged state of uncertainty.[249] Similar considerations apply to violations of Art. 6 ChFR, Art. 18, 19 ChFR and the procedural dimension of Art. 24 ChFR. As all these fundamental rights protect interests that are fundamental for psychological and physical wellbeing of human beings, it follows in reverse that a violation of these rights necessarily constitutes immaterial damage.

3.4 Towards Declaratory Relief

This last section addresses the conceptual weaknesses of Art. 340 para 2 TFEU identified above, namely that it is traditionally conceived as a means for monetary compensation with a particularly high threshold for liability. The problem with this understanding is that, while the action for damages by now occupies a central place in the EU legal protection system and even functions as fundamental rights remedy in critical areas of EU law, monetary compensation alone is not sufficient to meet the standard of Art. 47 ChFR, and the precondition of a sufficiently serious breach is difficult to reconcile with the requirement that each and every breach of EU law requires judicial redress. Hence, the question to be discussed is whether

247 Melanie Fink, *Frontex and Human Rights* (fn. 1), p. 228–231.

248 ECtHR, judgement of 21 January 2011, M.S.S. v Belgium and Greece, Application No 30696/09; CJEU, judgment of 21 December 2011, N.S. et al, C-411/10 et al (fn. 63), para 106; CJEU, judgement of 19 March 2019, Jawo, C-163/17 (fn. 63), para 85.

249 This holds true all the more in situations in which the concerned person is exposed to living conditions violating Art. 4 ChFR during the entire procedure.

Art. 47 ChFR allows, or even requires, to interpret Art. 340 para 2 TFEU as a primary remedy.

The CJEU has recognised the issue and, in cases of immaterial harm, indeed attaches less and less importance to monetary compensation. Instead, it increasingly grants restitution in kind under Art. 340 para 2 TFEU, and in some cases even considers the recognition of the unlawfulness as such as appropriate compensation. The function of the action for damages is thus shifting towards a form of declaratory relief. This, in turn, argues for a lowering of the threshold for liability. Once Art. 340 para 2 TFEU functions as declaratory relief, it would be conceptually consequential to lower the threshold to a simple breach of EU law.[250] The CJEU, however, has so far stuck to its traditional sufficiently-serious-breach criterion – thereby creating a remedy that unjustifiably makes the mere finding of illegality dependent on a particular gravity of the violation.

a *Towards Restitution in Kind and Recognition of Unlawfulness*

For long, the action for damages has been conceived exclusively as a means for monetary compensation.[251] When it comes to immaterial damage, the CJEU thus traditionally quantifies that damage and then awards material compensation.[252] Concerning the amount of monetary compensation, the CJEU conducts an evaluation on a case-by-case basis, referring to a 'fair evaluation ex aequo et bono' or fixing an amount 'on an equitable basis'.[253] In some cases, mainly concerning reputational harm, the CJEU has indeed granted quite considerable sums.[254] In *Camós Grau* of 2006, for instance,

250 The action for damages would then no longer be 'makeshift' but instead a fully-fledged primary remedy in its own right.

251 As becomes clear from the doctrine on Art. 340 para 2 TFEU (see above 3.1), this is not due to the wording of the provision but rather due to a certain concept of state liability in the law of most member states.

252 See only Melanie Fink, *Frontex and Human Rights* (fn. 1), p. 228–229 with further references to the case law.

253 In detail Katri Havu, „Damages Liability for Non-Material Harm in EU Case Law" (fn. 233), p. 506–511 with further references.

254 CJEU, Court (Grand Chamber), judgement of 30 May 2017, Safa Nicu Sepahan Co. v Council of the European Union (Safa Nicu II), C-45/15 P, para 47–53, 86–92, 101–107; CJEU, Court of First Instance (Eighth Chamber) judgement of 24 September 2008, M v Ombudsman, T-412/05, para 146, granting compensation of 10,000 Euro for reputational harm; CJEU, General Court (First Chamber), judgement of 10

the CJEU considered that the applicant had 'his honour and professional reputation impaired' and 'suffered difficulties in his living conditions' due to the publication of a report by the EU agency OLAF and thus ordered the Union to pay 10,000 Euro as compensation.[255] Another example is the judgement in *Safa Nicu* of 2017 in which 50,000 Euro were granted as compensation for reputational harm.[256]

Yet, compensation under Art. 340 para 2 TFEU is not necessarily limited to monetary compensation. In fact, the CJEU goes beyond monetary compensation in two respects. First, monetary compensation is often replaced with restitution in kind; and second, the amount of monetary compensation is often reduced with the argument that the recognition of the unlawfulness as such constitutes appropriate compensation.

The first reasoning is based on the understanding that 'making good damage' in the sense of Art. 340 para 2 TFEU means to put the concerned person in the situation they would have been in if the unlawful conduct had not been committed.[257] In *Galileo,* and similarly also in *Systran*, for instance, the CJEU has argued that nothing in the Treaties precludes the grant of compensation in kind, and that therefore, it has the 'power to impose on the Community any form of reparation that accords with the general principles of non-contractual liability common to the laws of the Member States, including, if it accords with those principles, compensation in kind, if necessary in the form of an injunction to do or not to do something'.[258] Consequently, where monetary compensation is insufficient to fully rectify the damage, the CJEU tends to grant restitution in kind, and to prevent the occurrence of any further damages.[259]

June 2004, Jean-Paul François v European Commission, T-307/01, para 111, granting compensation of 8,000 Euro.

255 CJEU, judgement of 6 April 2006, Camós Grau, T-309/03 (fn. 238), para 162–163.

256 CJEU, judgement of 25 November 2014, Safa Nicu I, T-384/11 (fn. 132), para 78 to 92.

257 Paul Craig, *EU Administrative Law* (fn. 235), p. 748 with reference to the relevant case law in note 138.

258 CJEU, General Court (Second Chamber), judgement of 10 May 2006, Galileo International Technology LLC and Others v European Commission, T-279/03, para 62–73, in particular para 63. Similarly, CJEU, General Court (Third Chamber), judgement of 16 December 2010, Systran SA et al v European Commission, para 120–123. Further on preventive judicial protection via Art. 340 para 2 TFEU see Timo Rademacher, *Realakte im Rechtsschutzsystem der Europäischen Union* (fn. 1), p. 384–386.

259 Timo Rademacher, *ibid.,* p. 191–194.

In the context of the integrated asylum administration, this doctrine raises difficulties because the EU might, in some cases, not have the competence to do what is required to grant restitution in kind. For instance, if unlawful conduct of Frontex had resulted in a person being refouled to Türkiye, the CJEU would not be able to oblige the EU to bring back that person to EU territory because competences to issue the relevant administrative decisions to allow re-entry lie with member states.[260] In these cases, granting restitution in kind would hence mean to oblige the EU to do everything – within its competences – to make sure that the person is put in the situation in which it would have been had the mistake not occurred; which would include exerting influence on the responsible national authorities.[261]

The second argument with which the CJEU goes beyond monetary compensation is to understand it as superfluous where the declaration of illegality as such constitutes appropriate compensation. This reasoning is closely connected to the first one: for if unlawful conduct as such constitutes the damage, the declaration of illegality as such constitutes a form of restitution in kind.

This argument is firmly anchored in established doctrine. Generally, when considering what is 'adequate' monetary compensation for immaterial harm, the CJEU takes into account whether, and if so to what extent, the declaration of illegality as such provides relief.[262] It is hence only consequential to considerably reduce the amount of monetary compensation, sometimes even to a symbolic i.e. a negligible amount, where the recognition of the unlawfulness of the contested act as such constitutes adequate relief.[263] In the 1990 judgement of *Culin*, for instance, the CJEU applied this reasoning and accordingly granted a symbolic amount of only one

260 In detail on the EU's administrative competences Catharina Ziebritzki, *The EU's Responsibility in the Asylum Administration* (fn. 58), p. 114 et seq.

261 The verdict could be formulated similarly to those of German administrative courts which obliged German authorities to do everything they can, within their competence, to ensure that authorities of other member states would accept their take-charge requests under the Dublin III Regulation, see fn. 39. This is consequential because it would transfer the jurisprudence on horizontal administrative cooperation to vertical administrative cooperation.

262 Similarly, Katri Havu, „Damages Liability for Non-Material Harm in EU Case Law" (fn. 233), p. 503.

263 CJEU, Court (Grand Chamber), judgment of 28 May 2013, Abdulbasit Abdulrahim v Council of the European Union and European Commission, C-239/12 P, para 71–72; CJEU, judgement of 25 November 2014, Safa Nicu I, T-384/11 (fn. 132), para

Franc.[264] In *Abdulrahim* and *Safa Nicu* of 2013, however, the CJEU also found that the recognition of the unlawfulness of the contested measure as such could constitute 'a form of reparation for the non-material harm', and still granted considerable sums of compensation.[265] In sum, the CJEU seems to consider the declaration of illegality as sufficient only in some cases of immaterial harm, and in others complements the declaration of illegality with monetary compensation.

b *From the Function of Compensation to Declaratory Relief*

These ambiguities notwithstanding, the CJEU's case law clearly shows that the action for damages increasingly functions as a form of declaratory relief.[266] This argument also concerns the relation between Art. 340 para 2 TFEU and Art. 263 TFEU because conceptualising the former as declaratory relief approximates its effects to the latter.

In fact, the aim of applicants lodging an action for damages is often not exclusively, and not even primarily, to receive monetary compensation. This holds true not only in cases where the applicants state from the outset that their main interest is to have the EU's conduct declared unlawful, but also in those cases where the applicants seek monetary compensation in addition to, or as a confirmation of the unlawfulness of the relevant conduct. Arguably, the quest for the recognition of unlawfulness becomes particularly salient in those cases where EU bodies systemically violate EU law and where fundamental rights are at stake. This is well illustrated with *Ledra* and similar cases emerging from the context of the Eurozone. The applicants had sought to have the EU's conduct scrutinised via Art. 263 TFEU and via Art. 340 para 2 TFEU, and once the former was dismissed as inadmissible, the latter de facto became the procedure in which the legality

86. Further Katri Havu, „Damages Liability for Non-Material Harm in EU Case Law" (fn. 233), p. 501.

264 CJEU, Court (Fourth Chamber), judgement of 7 February 1990, Annibale Culin v Commission of the European Communities, C-343/87, para 26–29.

265 CJEU, judgment of 28 May 2013, Abdulbasit Abdulrahim, C-239/12 P (fn. 263), para 71–72.

266 As here Herbert Rosenfeldt, *Frontex im Zentrum der Europäischen Grenz- und Küstenwache* (fn. 8), p. 285; in more detail Timo Rademacher, *Realakte im Rechtsschutzsystem der Europäischen Union* (fn. 1), p. 295–304; similarly Herwig Hofmann, Morgane Tidghi, „Rights and Remedies in Implementation of EU Policies by Multi-Jurisdictional Networks" (fn. 93), p. 156.

of the EU's conduct in the Eurozone crisis more generally was discussed.[267] The function of the action for damages hence clearly goes beyond individual monetary compensation and instead focuses on the recognition of the illegality as such.

The most important objection to this understanding concerns the remaining difference to the action for annulment. Certainly, the use of the action for damages as a declaratory relief must not become a way of circumventing the narrow admissibility requirements of the action for annulment. Upon closer inspection, however, it becomes clear that there is not risk of undermining Art. 263 TFEU at all, for Art. 340 para 2 TFEU does not lead to an annulment of the act erga omnes, but only establishes the unlawfulness of the act with effect vis-à-vis the applicant. To the contrary, the wording and context of Art. 340 para 2 TFEU speak in favour of understanding it as a form of declaratory relief. The open formulation of obliging the Union to 'make good damages' clearly allows for restitution in kind and declaratory relief.[268] In fact, the widespread understanding of Art. 340 para 2 FEU as focused on monetary compensation simply stems from the fact that the law on state liability of most member states traditionally only provided for 'acquiesce and liquidate'. If one were to hold on to this understanding, however, one would overlook that, by now, most national state liability laws have been modernised and allow for declaratory judgements.[269]

This reasoning is clearly confirmed by the General Court's judgment in *WS et al.*[270] Concerning the admissibility of the claims of WS et al., Frontex had argued that the applicants should have lodged an action for annulment against the latest response letter of the agency's Fundamental Rights Office within the relevant time limit, and that therefore, their later action for damages was inadmissible. The General Court took the occasion to recall and specify the relation between Art. 263 TFEU and Art. 340 para 2 TFEU. Although the action for damages is a self-standing form of action in the EU system of remedies, it must be declared inadmissible 'where

267 CJEU, judgement of 20 September 2016, Ledra, C-8/15 P et al (fn. 117).

268 Similarly, Herwig Hofmann, Morgane Tidghi, „Rights and Remedies in Implementation of EU Policies by Multi-Jurisdictional Networks" (fn. 93), p. 156 who come to the same conclusion based on the principle of 'qui peut le plus, peut le moins'.

269 Timo Rademacher, *Realakte im Rechtsschutzsystem der Europäischen Union* (fn. 1), p. 220–237, 376.

270 CJEU, judgement of 6 September 2023, WS et al v Frontex, T-600/21 (fn. 106). The following paragraph is based on Catharina Ziebritzki, „A Hidden Success" (fn. 108).

it is actually aimed at securing withdrawal of an individual decision'.[271] Nonetheless, the General Court then continued, 'it would be contrary to the autonomy of an action for damages, and to the effectiveness of the system of remedies' to consider an action for damages inadmissible 'on the sole ground that it might lead to a result comparable to the results of an action for annulment'.[272] Therefore, the General Court held, 'an action for damages may also be able to nullify the legal effects of a decision which has become final where the applicant seeks greater benefit, but including that which it could obtain from an annulling judgement'.[273] Remarkably, the General Court did not even object to the applicants not only seeking compensation for their material and immaterial damage but also requesting the Court to 'find that Frontex engaged in improper conduct with regard to them'.[274] Dedicating only a few paragraphs to this issue, it considered it 'clear' that the present action for damages 'does not have the same purpose or the same effect as an action for annulment' as the maximum effect of an action for annulment would have been a fresh examination by Frontex's Fundamental Rights Office and, on this basis, deemed the action for damages admissible.[275]

c *Lowering the Threshold for Liability: A Project De Lege Ferenda*

The understanding of the action for damages as declaratory relief has the consequence that the main justification for the high threshold of liability is no longer valid. As explained above, the high threshold is justified only because, and hence only as long as, the action for damages primarily serves to grant monetary compensation. The fact that the action for damages functions as declaratory relief hence speaks in favour of lowering the threshold for liability.

Several proposals have been made on how this could be achieved. Some, for instance, have argued that the threshold for liability should be lowered at least where the action for damages is the only remedy available and

271 CJEU, judgement of 6 September 2023, WS et al v Frontex, T-600/21 (fn. 106), para 24.
272 Ibid., para 25.
273 Ibid., para 26.
274 Ibid., para 17.
275 Ibid., para 27 to 29.

where fundamental rights are at stake. More specifically, this argument goes, the CJEU should not require a sufficiently serious breach in these cases.[276] Others, instead, have proposed to adapt the criteria for liability in relation to the applicant's request.[277] According to this proposal, the application of the individual-rights criterion and the sufficiently-serious-breach criterion should depend on whether the applicant primarily seeks monetary compensation or the recognition of the unlawfulness of the contested act. Clearly, such scaled interpretation would be compatible with the wording of Art. 340 para 2 TFEU, and has the advantage that it allows to flexibly adapt the doctrine of the action for damages. At the same time, however, this proposal might lead to legal uncertainty and comes with the difficulty that it is not always clear from the outset – and sometimes not even for the applicants themselves – whether the declaration of illegality is the primary or only a complementary aim of the action.

For the purpose of this study, this discussion on which proposal would be preferably *de lege ferenda* need not be decided, because the approach here is to determine the EU's responsibility on the basis of EU law as it currently stands. And *de lege lata*, the CJEU applies the high threshold – regardless of what is the subjective aim as defined by the applicants, and regardless of what the CJEU decides in the operative part of its judgement. When it comes to assessing whether the EU is liable for fundamental rights violations under Art. 340 para 2 TFEU as it currently stands, one must hence operate with the high threshold for pragmatic reasons, be it conceptually convincing, or not.[278]

4 The Action for Damages and the EU Hotspot Administration

On this basis, the remainder of this study analyses whether the EU or its bodies incur liability for their administrative misconduct in the specific context of EU hotspots. This requires to clarify three preliminary points.

276 See for instance Angela Ward, „Damages under the EU Charter of Fundamental Rights" (fn. 181), p. 607–609.

277 This scaled system was proposed by Timo Rademacher, *Realakte im Rechtsschutzsystem der Europäischen Union* (fn. 1), p. 383–384.

278 See chapter 5.

4.1 Defining the Potential Trigger for EU Liability

First, the potential trigger for EU liability for must be defined more precisely. In doing so, two points must be kept in mind: first, the relevant misconduct as identified in the second chapter,[279] and second, that EU liability can be triggered only by a sufficiently serious breach of a rule conferring rights upon individuals.[280] The specific problems differ between the agencies on the one hand and the Commission on the other.

In the case of the agencies, the main question concerns which of several instances of misconduct are defined as liability trigger. This issue arises because the agencies' misconduct results from failures at several hierarchical levels. Case 1 illustrates the point.

> *Case 1 – Sara Esmaili – Deficient vulnerability assessment (EUAA's misconduct at two levels)*
> In the case of Ms Esmaili, the EUAA staff in charge failed to identify and recognise her special needs and thus wrongly registered her as non-vulnerable, thereby breaching her obligations under the EUAA Regulation and the ChFR. Considering, however, that this is not an isolated case, but a general malpractice, the instance can also be reconstructed as a failure of the responsible EUAA coordinating officer to adequately supervise their staff, i.e. as a violation of their supervisory obligations under the EUAA Regulation. Further, the instance could also be understood as a failure of the EUAA's Executive Director to address systemic malpractices at a structural level and to ensure that the practices of its agency generally comply with EU secondary and primary law, i.e. as a violation of their supervisory obligations.[281]

This issue arises in all cases concerning the agencies. At the lowest hierarchical level, the responsible staff fail to adequately conduct a vulnerability assessment, or an interview, or to adequately react to the information that a deportation is unlawful. The crucial point, however, is that these malpractices occur systemically, and should therefore have been addressed at a higher hierarchical level. Each failure at the lower hierarchical level thus corresponds to a failure at a higher hierarchical level. In concrete terms, the responsible coordinating officers fail to issue adequate instructions to

279 See chapter 2, 4.
280 See above 3.1, 3.3.
281 On the EUAA's internal supervisory obligations see chapter 4, 3.

the team members, and the respective Executive Director fails to ensure through internal guidelines that fundamental rights are not systemically violated, or to withdraw from an operation that systemically exceeds the agency's competences or violates fundamental rights.[282]

Consequently, there are two different ways to construct the agency's liability. One could consider either the misconduct at the lower or at the higher hierarchical level as potential trigger for liability.[283] Doctrinally, both approaches are equally convincing. If one focuses on the lower hierarchical level, the sufficiently serious breach of a rule conferring rights upon individuals is clearly established because the responsible caseworker or expert disregard fundamental rights.[284] If one focuses on the higher hierarchical level, the same holds true: First, the provisions obliging the coordinating officers and the Executive Director qualify as rules conferring rights upon individuals because they primarily serve to ensure compliance with fundamental rights, and because they serve to ensure, in an area interfering with the exercise of fundamental rights, that the agency acts within the limits of its competences.[285] Second, the breach of internal supervisory obligations must be considered as sufficiently serious when it consists in a failure to prevent systemic and authoritatively documented breaches of 'core' fundamental rights.

From a practical perspective, however, it appears more promising to focus on the agency's misconduct at the lower hierarchical level. From the outset, it is more difficult to establish a breach of internal supervisory obligations at a higher hierarchical level because the content and scope of

282 On the supervision structure of the Migration Management Support Teams (MMSTs) see chapter 2, 1.2.

283 In the direction of the latter Sergio Carrera, Leonhard Den Hertog, Joanna Parkin, „The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability versus Autonomy?", *European Journal of Migration and Law* 15 (2013), p. 337–358, p. 344; Andreas Fischer-Lescano, Timo Tohidipur, „Europäisches Grenzkontrollregime. Rechtsrahmen der europäischen Grenzschutzagentur Frontex", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 67 (2007), p. 1219-1276, p. 1266.

284 At least in the cases concerning inherent violations; on the questions arising in cases concerning resulting violations see chapter 5.

285 Regardless of whether fundamental rights are violated in a specific case, the very fact that interference is only permissible under certain conditions is sufficient to qualify the provisions on competence limits as conferring rights upon individuals, see CJEU, judgement of 23 November 2011, Sison III, T-341/07 (fn. 184), para 50. Insofar as the agencies systemically overstep their competence limits, they interfere with fundamental rights without legal basis.

these obligations is not yet fully clarified.[286] Further, and more importantly, it would be quite difficult, for a concerned asylum seeker as potential applicant under Art. 340 para 2 TFEU, to prove that the agency has violated its internal supervisory obligations. Making this argument would require access to the agency's internal procedures and meetings, including the minutes of personal instructions and informal supervisory rounds – which is almost impossible in practice. Therefore, the agency's liability is construed here on the basis of the agency's misconduct at the lower hierarchical level.[287]

In the case of the Commission, determining the relevant trigger for EU liability comes with another difficulty. Here, the main question concerns the precise definition of the Commission's failure to supervise, i.e. of its omission to act. The issue is well illustrated with case 1, too.

Case 1 – Sara Esmaili – Failure to provide humane reception conditions (Commission's omission to act)

As stressed several times, the case of Ms Esmaili and her daughter is a typical case. Insofar as the breach of Art. 4 ChFR by providing inhumane reception conditions is concerned, this violation concerns – at least – all those asylum seekers who qualify as vulnerable.[288] However, and despite extensive, authoritative and publicly available reports, the Commission apparently failed to prevent these systemic deficiencies, thereby failing to comply with its supervisory obligations under Art. 40 para 3 Frontex Regulation, Art. 21 para 2 EUAA Regulation, Art. 17 TEU. But the crux of the matter now lies in the detail: from the perspective of potential applicants under Art. 340 para 2 TFEU, it will be almost impossible to determine what exactly the Commission failed to do, i.e. whether it failed to provide the necessary support, or to adequately coordinate its cooperation with the host member state, or to effectively address the issue within the relevant supervisory fora such as the EURTF and the Steering Committee, or to take any other measure that would have ensured com-

286 In more detail see Evangelia (Lilian) Tsourdi, „Monitoring and Steering through FRONTEX and EASO 2.0: The Rise of a New Model of AFSJ agencies?", eumigrationlawblog of 29/01/2018.

287 This being said, it should be kept in mind that defining the misconduct at the lower hierarchical level as trigger for liability does not mean that the misconduct at the higher level becomes irrelevant. As will be shown below, the failure to adequately exercise internal supervisory obligations remains decisive in the context of attribution, see chapter 4.

288 On the standards of Art. 4 ChFR for reception conditions see chapter 2, 3.

pliance with Art. 4 ChFR, such as e.g. concluding a Memorandum of Understanding with the concerned host member state.

In principle, the CJEU requires applicants under Art. 340 para 2 TFEU to clearly define the defendant's omission.[289] In the case at hand, however, this would most likely not be feasible for concerned applicants because the Commission has a vast range of measures at its disposal, some of which are not even publicly known.[290] Moreover, the minutes of the meetings in the relevant supervisory fora are not publicly available. In sum, it will be almost impossible for applicants to determine in concrete terms what the Commission has done, what it has not done, and what it could and should have done to prevent a specific fundamental rights violation.

But this problem is only apparent, as the CJEU has already recognised it and provided a solution. Considering that this advance in knowledge on the part of the Commission is relevant in many policy areas, the CJEU's approach in such cases is rather generous towards the applicants. In fact, it is sufficient for them to state a bundle of measures, or acts and omissions as a whole, that have allegedly caused damage. In *Bourdouvali*, for instance, the applicants simply invoked 'various forms of conduct' and, even more generally, unlawful 'conduct related to the adoption' of the Memorandum of Understanding in question.[291] Therefore, an action for damages would arguably be sufficiently substantiated already if it firstly sets out, in a general manner, the measures which the Commission has as its disposal and secondly, shows that the EU hotspot administration has been systemically deficient since 2015, and that the Commission has been informed about the deficiencies ever since, which indicates that the Commission has not sufficiently made use of its options in terms of policy making, funding and operational assistance to remedy that situation.

289 As the burden of proof lies with the applicant, see only CJEU, Court, judgement of 4 March 1980, Richard Pool v Council of the European Communities, 49/79; CJEU, Court of First Instance (Fifth Chamber), judgement of 1 February 2001, T. Port GmbH & Co. KG v Commission of the European Communities, T-1/99, para 55 with further references.

290 In more detail on the Commission's options see chapter 2, 2.

291 CJEU, judgement of 13 July 2018, Bourdouvali, T-786/14 (fn. 119), para 200; similarly, CJEU, Court of First Instance (Third Chamber), judgement of 24 October 2000, Fresh Marine Company AS v Commission of the European Communities, T-178/98, para 55: 'The applicant submits that the Commission's decision (…) must be regarded (…) as a bundle of administrative acts (…).'.

4.2 A Sufficiently Serious Breach and Individual Rights

For the defined misconduct to trigger EU liability under Art. 340 para 2 TFEU, it must qualify as a sufficiently serious breach of a rule of law conferring rights upon individuals. With a view to the six typical cases at hand, two questions must be differentiated here.

The first is whether the fundamental rights violations at stake – i.e. the violations of Art. 4, 6, 18, 19, 24, 41 ChFR – qualify as sufficiently serious breach of a rule of law conferring rights upon individuals. Based on what was said above on the function of the action for damages as a fundamental rights remedy, this question is easily answered. As established above, all mentioned fundamental rights qualify as rules conferring rights upon individuals. As also established above, fundamental rights violations qualify as sufficiently serious breaches at least when 'core' fundamental rights are at stake, when the fundamental rights violations are systemic in nature, or when the fundamental rights violations have been authoritatively documented in publicly available reports.[292] Further, and closely related to the latter point, knowledge on the part of the supervisor about the violation of individual rights is decisive in determining the sufficient seriousness of the breach.[293] On this basis, and taking into account the circumstances as described in the six typical cases, the relevant fundamental rights violations qualify as sufficiently serious breaches in the sense of Art. 340 para 2 TFEU.

The second question is more specific and requires more discussion: it concerns the qualification of the Commission's misconduct as a sufficiently serious breach of a rule of law conferring rights upon individuals within the meaning of Art. 340 para 2 TFEU. Since the Commission's misconduct consists in a failure to adequately exercise its supervisory obligation, two rules come into consideration: either the supervisory obligation as such, i.e. Art. 40 para 3 Frontex Regulation, Art. 21 para 2 EUAA Regulation, Art. 17 TEU, or the relevant fundamental right, i.e. Art. 4, 6, 18, 19 24 and 41 ChFR. As the latter constitutes the supervisory standard compliance with

292 See above 3.3.

293 See, for instance, CJEU, Court, judgement of 4 July 1989, Francesconi, 326/86 and 66/88 (fn. 183), para 23–24, where the court stressed that at the relevant point in time, the Commission 'had insufficient facts at its disposal' to require a review of the Italian monitoring measures; CJEU, Court, judgement of 30 September 1998, Coldiretti, T-149/96 (fn. 183), para 84, where the Commission refers to reports issued by the World Health Organisation to support its claim that its supervision was sufficient.

which must be ensured, the question can be formulated as to whether the relevant breach in the sense of the Art. 340 para 2 TFEU is the breach of the supervisory obligation or that of the supervisory standard.[294]

As will be shown in more detail below, the CJEU's approach to this matter has shifted over time. Whereas in its earlier case law, the CJEU considered the breach of the supervisory obligation as trigger for liability, its more recent case law rather focuses on the breach of the supervisory standard.[295]

Yet, the choice is irrelevant here if both the supervisory obligation and the supervisory standard fulfil the individual-rights criterion and the sufficiently-serious-beach-criterion. As regards the supervisory standard, it has been shown already that this is the case, because the standard consists in fundamental rights. As regards the supervisory obligation, more comprehensive argumentation is required. Concerning, first, the individual-rights criterion, it is argued here that a rule establishing supervisory obligations fulfils that criterion if the purpose of the supervision is, at least inter alia, to ensure compliance with individual rights.[296] This follows from the CJEU's general doctrine as set out above. As regards supervisory obligations more specifically, further case law supports this conclusion: Whereas the CJEU's 1992 decision in *Cato* could be read to suggest that the Commission's supervisory obligations as such must be understood as serving solely member states' compliance with EU law,[297] the 1992 judgement in *Vreugdenhil* and the 2012 decision in *Artegodon* clarify that this argumentation applies only to rules that are primarily intended to ensure the division of competences.[298] As regards supervision in the context of the integrated administration, the CJEU has consistently held that a super-

294 This is due to the structure of supervisory obligations. Assume A has a supervisory obligation x to ensure that B's conduct complies with the standard y. A's obligation can be formulated as x, y. Imagine A fails to adequately supervise B which results in B breaching y. The failure of A can be formulated either as breach of the obligation to supervise x or as a breach of the supervisory standard y.

295 See chapter 5, 3.

296 In detail on that matter see Uwe Säuberlich, *Die außervertragliche Haftung im Gemeinschaftsrecht* (fn. 153), p. 208–232.

297 CJEU, Court, judgment of 8 April 1992, James Joseph Cato v Commission of the European Communities, C-55/90, para 23.

298 CJEU, judgement of 13 March 1992, Industrie- en Handelsonderneming Vreugdenhil BV v Commission of the European Communities, C-282/90, para 20 to 22; CJEU, judgement of 19 April 2012, Artegodan GmbH v European Commission, C-221/10 P, para 81–82, 96.

visory obligation confers rights upon individual rights if the supervisory standard serves, at least inter alia, to protect individuals.[299] Since its 1967 judgement in *Kampffmeyer*, the CJEU has interpreted supervisory obligations established by secondary law in light of the objective of the relevant Regulation or Directive, and has considered the individual-rights criterion as fulfilled if the Regulation or Directive as such serves to protect, at least inter alia, the applicant's interests.[300] Moreover, the CJEU has established in its 2011 judgement in *Sison III* that provisions on the division of competences must be considered as conferring rights upon individuals if the EU's conduct at stake amounts to an interference with the exercise of the fundamental rights of the persons concerned.[301] It therefrom follows, a fortiori, that the same must be true for supervisory obligations in the context of the integrated administration,[302] in particular where the relevant administrative conduct interferes with the exercise of fundamental rights, as in the area of freedom, security and justice. Applying this test to Art. 40 para 3 Frontex Regulation, Art. 21 para 2 EUAA Regulation, Art. 17 TEU leads to the conclusion that these qualify as rules conferring rights upon individuals. The relevant administrative activity interferes with the exercise of fundamental rights; the relevant recitals in the Frontex and the EUAA Regulation explicitly stress that Commission must ensure that activities in the EU hotspots comply with relevant Union law and fundamental rights; and the Commission itself, in defining its supervisory obligation, puts a particular emphasis on fundamental rights compliance.[303]

299 Notably regardless of whether the supervisory obligation at the same time regulates the division of competences, and regardless of whether the interests protected by the supervisory standard are of general nature.

300 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, p. 262–263. This case is particularly remarkably because the court considered the very fact that the secondary law establishing the single market serves the interests of producers in the member states as sufficient to consider the Commission's supervisory obligations as conferring rights upon individuals, explicitly regardless of the fact that these interests are of a general nature.

301 CJEU, judgement of 23 November 2011, Sison III, T-341/07 (fn. 184), para 49–52.

302 The provisions establishing the integrated administration regulate both the relation of the administrative actors among each other and the relation of these to the concerned individuals. The legality of the administration is hence not an end in itself. Rather, administrative supervision, in principle, serves to ensure the legality of the integrated administration, precisely because this is necessary to protect the rights of the concerned individuals.

303 See chapter 2, 2.

Concerning, second, the sufficiently-serious-breach criterion, it is argued here that a breach of a supervisory obligation qualifies as sufficiently serious if it results in systemic fundamental rights violations and if the obligation has the purpose of ensuring compliance precisely with those fundamental rights that are systemically violated. Again, this already follows from the CJEU's general doctrine. To briefly recall: According to the CJEU, a breach is sufficiently serious if the relevant breach would also have occurred had the competent authority exercised due diligence and care. Inter alia, the CJEU takes into account the severity of the individual rights violation, the reprehensibility of the breach, and whether there have been authoritative assessments of a situation as unlawful. Discretion on the part of the supervisor must be taken into consideration but is reduced to 'how' to react in the case of systemic deficiencies.[304] Applying this test to the Commission's breach of its supervisory obligation under Art. 40 para 3 Frontex Regulation, Art. 17 TEU shows that the breach is sufficiently serious. As established above, the relevant fundamental rights violations are systemic in nature, authoritatively documented, and known to the Commission. The Commission's discretion is accordingly reduced to the choice of an appropriate measure. Further, Art. 40 para 3 Frontex Regulation, Art. 21 para 2 EUAA Regulation, and Art. 17 TEU serve precisely to ensure compliance with those fundamental rights that are violated.[305] In short, as an administrative authority exercising ordinary care and diligence would have exhausted all its possibilities to address the well-documented systemic fundamental rights violations,[306] the Commission's failure to do so qualifies as a sufficiently serious breach of its supervisory obligations.

Therefore, the dispute as to whether the supervisory obligation or the supervisory standard constitutes the relevant liability trigger need not be decided here. In any case, the Commission's failure to exercise its supervisory obligations, as described in the cases above, qualifies as a potential trigger for EU liability.

304 See chapter 2, 2.4.

305 See chapter 2, 2.

306 Note that in 2016 already, the European Ombudsman urged the Commission to carry out an appropriate human rights assessment, see European Ombudsman, 18 January 2017, Case 506/2016/MHZ (fn. 19).

4.3 Legal Basis in Case of the Agencies

Having defined the relevant triggers for EU liability, and having established that these fulfil the qualification-criterion, the remainder of this first section defines the legal basis for an action for damages more precisely. In the case of the Commission, it is clear that EU liability arises on the basis of Art. 340 para 2 TFEU, Art. 41 para 3 ChFR. In the case of the agencies, however, the relation between these general provisions and the specific provisions for non-contractual liability enshrined in the EUAA and the Frontex Regulation requires clarification. Three points must be made here.

First, there can be no doubt that the EU is liable for misconduct by its agencies under Art. 340 para 2 TFEU, Art. 41 para 3 ChFR. Both articles provide that the Union is liable for damages caused by 'its institutions'. That term must be interpreted broadly: it is not limited to institutions in the sense of Art. 13 TEU but instead includes all bodies established within the legal system of the Union.[307] As the CJEU has recently confirmed, this follows from the rule of law principle. If the term 'institutions' was interpreted narrowly, this would allow the Union to escape liability under primary law and thus avoid judicial review simply by establishing new bodies under secondary law.[308] Hence, there is a broad consensus that agencies qualify as institutions under Art. 340 para 2 TFEU, Art. 41 para 3 ChFR.[309]

307 See only CJEU, Court, judgement of 2 December 1992, SGEEM et al v European Investment Bank, C-370/98, para 16; Paul Craig, *EU Administrative Law* (fn. 235), p. 736–737.

308 CJEU, judgement of 13 July 2018, Bourdouvali, T-786/14 (fn. 119), para 110, remarkably with regard even to the Eurogroup: 'Any contrary solution would clash with the principle of the Union based on the rule of law, in so far as it would allow the establishment, within the legal system of the European Union itself, of entities whose acts and conduct could not result in the European Union incurring liability.'.

309 This conclusion is shared by most contributions, although the arguments in detail differ. See Timo Rademacher, *Realakte im Rechtsschutzsystem der Europäischen Union* (fn. 1), p. 244–245 for an argument, albeit in the context of Art. 263 TEU, based on CJEU, judgement of 8 October 2008, Sogelma v EAR, T-411/06, para 37; Merijn Chamon, *EU Agencies. Legal and Political Limits to the Transformation of the EU Administration*, Oxford University Press 2016, p. 355–357 for an argument based, inter alia, on CJEU, judgement of 12 July 1962, L Worms v High Authority of the European Coal and Steel Community, 18/60; Sergio Carrera, Leonhard Den Hertog, Joanna Parkin, „The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability versus Autonomy?" (fn. 283), p. 352 for an argument *e contrario* from Art 340 para 3 TFEU. For a different opinion see Alexander Türk, *Judicial Review in EU Law* (fn. 120), p. 243.

Second, it is also clear that the EUAA and Frontex each incur public liability for their own misconduct under conditions equivalent to those of Art. 340 para 2 TFEU. This follows from Art. 97 para 4 Frontex Regulation and Art. 66 para 3 EUAA Regulation, which regulate the non-contractual liability of the respective agency.[310] The wording of these provisions corresponds to Art. 340 para 2 TFEU, with the only difference being that, instead of the Union, now 'the Agency shall, in accordance with the general principles common to the laws of the member states, make good any damage caused by its departments or by its staff in the performance of their duties'. Both provisions must thus be understood to refer to the CJEU's established doctrine.[311] Crucially, staff in the sense of Art. 97 para 4 Frontex Regulation and Art. 66 para 3 EUAA Regulation includes statutory staff as well as seconded or deployed staff.[312]

This understanding is compatible with the provisions on civil liability of the agency's team members, namely Art. 84 Frontex Regulation and Art. 26 EUAA Regulation.[313] In this regard, it is crucial to distinguish between the non-contractual liability of the agency on the one hand and the liability of the agency's team members, which is then transferred to the host member state, the home member state or the agency, on the other hand. Keeping this in mind, it becomes clear that Art. 84 para 1 Frontex Regulation, and accordingly Art. 26 para 1 EUAA Regulation, establish that, as a rule, the host member state shall incur liability in accordance with its national law for any damage caused during agency operations. Para 2 of the cited provisions then provides for a transfer of liability in cases of gross negligence or wilful misconduct: if the concerned team member is seconded or deployed, the host member state may request reimbursement from the home member state; and if they are a statutory member of staff, reimbursement may be requested from the agency. Regarding the latter case, Art. 84 para 2 Frontex Regulation explicitly clarifies that this is without prejudice to Art. 98, which

310 Prior to the entry into force of the EUAA Regulation: Art 45 para 3 EASO Regulation.

311 For Frontex see Melanie Fink, *Frontex and Human Rights* (fn. 1), p. 184; Herbert Rosenfeldt, *Frontex im Zentrum der Europäischen Grenz- und Küstenwache* (fn. 8), p. 286.

312 The respective Regulations consistently refer to 'staff' as including seconded and deployed as well as statutory staff. Where the Regulations exclusively refer to statutory staff, this is always made explicit. This becomes particularly clear in Art. 95 Frontex Regulation and Art. 38 EASO Regulation.

313 Formerly Art. 21 EASO Regulation.

in turn refers to the agency's non-contractual liability under Art. 97 para 4 Frontex Regulation. This clearly shows that, as far as the agency's liability is concerned, Art. 84 is lex specialis to Art. 97 para 4, Art. 98 Frontex Regulation.[314] As regards the EUAA Regulation, the same argument applies.

Thus, Art. 97 para 4 Frontex Regulation and Art. 66 para 3 EASO Regulation are applicable to cases of misconduct during agency operations despite the applicability of Art. 84 Frontex Regulation and Art. 26 EUAA Regulation to these cases. Otherwise, the former provisions would be rendered void of purpose. Misconduct during operations is precisely the main case where agency liability becomes relevant, as the reference of Art. 84 para 2 to Art. 98 Frontex Regulation clearly confirms. As a matter of course, this does not mean that a person can claim compensation for one damage twice. This, however, is a question of procedural, not of substantial, concurrence between agency liability and member state liability.[315] Clearly, liability of the host member state under Art. 84 Frontex Regulation or Art. 26 EUAA Regulation does not exclude agency liability in terms of substance.[316] Otherwise, the fact that agency liability under Art. 97 para 4 Frontex Regulation and Art. 66 para 3 EUAA Regulation does not require guilt would be undermined: as the host member state is liable only in accordance with its national law, guilt on the part of the team members might be a precondition.

The third point concerns the relationship between Union liability under Art. 340 para 2 TFEU, on the one hand, and agency liability under Art. 97

314 Daniel Thym, *European Migration Law*, Oxford University Press 2023, p. 220, however, considers the relation between these provisions to remain uncertain.

315 In more detail on the complex questions of concurrence see only Peter Oliver, „Joint Liability of the Community and the Member States", in Ton Heukels, Alison McDonnell (ed.), *The Action for Damages in Community Law*, Wolters Kluwer 1997, p. 285–309; Maartje de Visser, „The Concept of Concurrent Liability and Its Relationship with the Principle of Effectiveness: A One-Way Ticket into Oblivion", *Maastricht Journal of European and Comparative Law* 11 (2004), p. 47-70. As procedural concurrence is not relevant to the question of whether the Union is liable in substance, this issue will not be dealt with here. Prima facie, it seems that the question is parallel to that of the relation between Union liability under Art. 340 para 2 TFEU and member state liability under the Frankovich doctrine. Therefrom, it would follow that, where a claim for compensation by a member state is pending or has been granted, a claim for compensation by the agency for that same damage must be inadmissible. Crucially, however, the concerned person is not prevented from approaching the agency first.

316 Even if one disagrees, the Union would be liable for the agency's conduct under Art. 340 para 2 TFEU anyways.

para 4 Frontex Regulation and Art. 66 para 3 EUAA Regulation, on the other hand. As will be argued, agency liability is subsidiary to Union liability – however, and this is crucial, only in procedural terms.

To begin with, agency liability is not lex specialis to Union liability in the sense that the applicability of Art. 97 para 4 Frontex Regulation and Art. 66 para 3 EUAA Regulation would generally preclude Union liability. Art. 340 para 2 TEU simply regulates a distinct matter. While Art. 340 para 2 TFEU regulates under which conditions the Union incurs liability for the misconduct of its agencies, Art. 97 para 4 Frontex Regulation and Art. 66 para 3 EUAA Regulation regulate under which conditions the agencies themselves incur liability for their own misconduct.[317]

However, it would obviously be contrary to the telos of public liability law if a person could claim compensation for one damage twice. This shows that the main issue is procedural in nature: the question is whether a claimant must approach the Union or the agency, or whether they are simply free to choose.

In this regard, it is argued here that Union liability is procedurally subsidiary to agency liability.[318] A claimant must, hence, first seek compensation from the concerned agency. The agency is closer to its own misconduct than the Union as such. Also, if a claimant was obliged to first approach the Union, Art. 97 para 4 Frontex Regulation and Art. 66 para 3 EUAA Regulation would become practically irrelevant. Hence, a claim under Art. 340 para 2 TFEU is inadmissible insofar as a claim under Art. 97 para 4 Frontex Regulation and Art. 66 para 3 EUAA Regulation is admissible. Obviously, this solution must not lead to a situation in which a claimant is left without compensation because the agency is not able to pay, for instance, because it is not solvent. In this case, the Union is thus obliged to pay compensation as a default guarantor for the agency, so to speak.[319]

317 See only Alexander Türk, *Judicial Review in EU Law* (fn. 120), p. 243.

318 As here Herbert Rosenfeldt, *Frontex im Zentrum der Europäischen Grenz- und Küstenwache* (fn. 8), p. 286.

319 And hence arguably on the basis of Art. 97 para 4 Frontex Regulation or Art. 66 para 3 EUAA Regulation. As here in substance but considering Art. 340 para 2 TFEU as the correct legal basis Ino Augsberg, „Art. 340 AEUV (ex-Artikel 288 EGV)", in Hans von der Groeben, Jürgen Schwarze, Armin Hatje (ed.), *Europäisches Unionsrecht. Vertrag über die Europäische Union, Vertrag über die Arbeitsweise der Europäischen Union, Charta der Grundrechte der Europäischen Union*, Nomos 2015, para 19; Merijn Chamon, *EU Agencies* (fn. 309), p. 355–357. This would, however, require the applicant to conduct another procedure. Taking into consideration the telos of Art. 47 para 3 ChFR, the solution proposed here appears preferable.

To conclude, the Union is liable for the misconduct of its agencies under Art. 340 para 2 TFEU, Art. 41 para 3 ChFR. At the same time, the EUAA and Frontex are themselves liable for their own misconduct under Art. 97 para 4, Art. 98 Frontex Regulation and Art. 66 para 3 EUAA Regulation, respectively. Union liability is procedurally subsidiary to agency liability unless the agency is insolvent. This being said, the following largely refers only to Art. 340 para 2 TFEU for the sake of simplicity. While this simplified form of citation is imprecise insofar as it does neither make explicit that the right to claim damages from the Union is a fundamental right nor that Art. 340 para 2 TFEU is procedurally subsidiary to Art. 97 para 4 Frontex Regulation and Art. 66 para 3 EUAA Regulation, it is still legally correct because agency liability does not materially exclude Union liability.

5 Doctrinal Approach

Having established the relevant liability trigger as well as the legal basis, this last part prepares the ground for the substantial analysis that will be conducted in the following chapters. The decisive doctrinal questions will arise in the context of attribution and causation.

5.1 Concepts of Attribution and Causation

The concepts of attribution and causation need clarification. The CJEU's approach in this regard is inconsistent. The court refers to attribution, causation and imputation interchangeably and discusses attribution and causation sometimes in the context of admissibility and sometimes in the context of the substance of the claim, apparently depending on the arguments of the parties in the individual case.[320]

Given the lack of conceptual clarity in the jurisprudence, legal scholarship has developed different definitions.[321] Based on these, attribution is defined here as denoting the link between a certain conduct and a certain

320 CJEU, judgement of 13 July 2018, Bourdouvali, T-786/14 (fn. 119), para 97: 'In the present case, in the light in particular of the parties' arguments (…), the Court considers that it is necessary to examine the question of attribution in the context of the examination of the Court's jurisdiction.'.

321 The following definition are based, in particular, on the work of Melanie Fink.

actor. It thus defines in whose name a certain administrative conduct is performed, or in other words, who is the author of a certain act.[322] For instance, when a German asylum service officer is seconded to the EUAA and is then deployed by the agency to an EU hotspot located in Greece, and if that officer then fails to respect the right to good administration as enshrined in Art. 41 ChFR, attribution gives an answer to the question of whether that misconduct shall be considered an act of Germany, of Greece, or of the agency.

Causation, by contrast, is defined here as denoting the link between conduct and certain damage and, hence, defines whether certain misconduct is to be considered as the fault that led to the damage.[323] For instance, when the European Commission fails to adequately exercise its obligation to supervise the EU hotspot administration, and when this then results in Greek authorities providing reception conditions which constitute inhumane treatment, causation gives an answer to the question of whether the violation of Art. 4 ChFR shall be considered as the result of Greece's or the Union's misconduct.

Obviously, the concepts of attribution and causation are closely connected. This is because both form part of the broader concept of imputation, which is the very basis of liability law.[324] If there was no imputation, every person would bear the full risk for all damages to their legally protected rights and interests, regardless of how or by whom the damage was brought about. Simply put, imputation serves to ensure that damages are borne by the actor who can be reproached for the occurrence of the damage. Consequentially, reprehensibility is the most important common feature of attribution and causation. Both the assessment of whether certain misconduct is to be attributed to a certain actor and of whether certain damage is to be considered as having been caused by certain misconduct ultimately depends on a balancing exercise, in the context of which the essential issue is always which entity shall be 'accused' for having brought about the

322 Melanie Fink, *Frontex and Human Rights* (fn. 1), p. 15–16. For the notion of the 'author' see CJEU, judgement of 13 July 2018, Bourdouvali, T-786/14 (fn. 119), para 79.

323 Melanie Fink, *Frontex and Human Rights* (fn. 1), p. 15–16; Martin Weitenberg, *Der Begriff der Kausalität in der haftungsrechtlichen Rechtsprechung der Unionsgerichte*, Nomos 2014, p. 317.

324 Francette Fines, „A General Analytical Perspective on Community Liability" (fn. 134), p. 16–18; Uwe Säuberlich, *Die außervertragliche Haftung im Gemeinschaftsrecht* (fn. 153), p. 31–33.

damage. Thus, although guilt is not a precondition for Union liability, the CJEU's interpretation of both attribution and causation is clearly shaped by considerations related to reprehensibility.[325]

5.2 Imputation and the 'Normative Bridge Function'

All questions of imputation – i.e. both attribution and causation – become particularly relevant and complicated where several actors are involved. For instance, in a case where the EU has provided non-formally binding support to a member state or where it has failed to adequately supervise a member state, and where this leads to the member state adopting a formally-binding decision which then results in damage, the concept of imputation serves to answer whether the damage must be reproached to the EU, despite the fact that it has acted only in non-formally binding form. In this sense, the concept of imputation has the function of 'normatively bridging' the factual gap between the conduct of one actor and the occurrence of the damage. As both causation and attribution are informed by reprehensibility considerations and only together flesh out the concept of imputation, the bridge function can be assigned to either criterion.

Consequently, the question of whether the damage that was ultimately brought about by an administrative decision of a member state will trigger liability of the Union can be reconstructed either as a question of attribution or as a question of causation.

As the CJEU's jurisprudence is not clear on this point either,[326] legal scholarship has developed different doctrinal approaches. The traditional approach assigns the bridge function mainly to the causation criterion.[327] The question of whether actor B, here the Union, incurs liability for the formally binding conduct of actor A, here the host member state, is thus mainly discussed in the context of causation. As a consequence, the concept of attribution is defined narrowly, i.e. to denote the link between the conduct and the actor, strictly speaking. Seen from this perspective, the central

325 As Francette Fines, ibid., p. 13 explains, the reason for this is that the doctrine of Art. 340 para 2 TFEU is influenced by French law, which differentiates between 'faute the service' and 'faute personnelle'.

326 See fn. 320.

327 See Paul Craig, *EU Administrative Law* (fn. 235), p. 746–748; Martin Weitenberg, *Der Begriff der Kausalität in der haftungsrechtlichen Rechtsprechung der Unionsgerichte* (fn. 323), passim, in particular p. 316.

questions at stake here – i.e. whether the fundamental rights violations that are ultimately brought about by the member state's formally-binding decisions must nonetheless be reproached to the EU because the EU has predetermined the decision through its non-formally binding recommendations or failure to supervise – appear as questions of causation. Only the question of whether the conduct of a certain staff member must be attributed to the host member state, to the home member state or to the Union appears as a question of attribution.

A recently proposed alternative approach, by contrast, assigns the bridge-function mainly to the attribution criterion.[328] The disputed question of whether or not actor B is liable on the basis of a formally binding act of A is accordingly discussed in the context of attribution. What is crucial about this alternative approach is that, from its specific perspective, the CJEU's doctrine appears to draw a distinction between primary and associated liability. Primary liability, in this sense, denotes the liability of A for its own administrative decision, while associated liability denotes the liability of B for its support to A or for its failure to adequately supervise A.[329] Certainly, this clear terminological distinction between the primary liability of A and the associated liability of B is appealing in terms of conceptual clarity.

Yet, the following builds on the traditional approach and assigns the bridge function to the concept of causation. There are several reasons for this. To begin with, a closer inspection shows that the alternative approach assigns the bridge function only partially to attribution. According to the alternative approach, B may still incur primary liability for the provision of non-formally binding support or the breach of supervisory obligations, and, to this extent, the disputed questions are still discussed as questions of causation. It is only insofar as the associated liability of B is concerned that the disputed questions are addressed as questions of attribution.[330] The gain in conceptual clarity is, therefore, not as significant as it seems at first glance.

328 Melanie Fink, *Frontex and Human Rights* (fn. 1), p. 233–237; Melanie Fink, „EU Liability for Contributions to Member States' Breaches of EU Law" (fn. 104), p. 1234–1239.

329 Melanie Fink, „EU Liability for Contributions to Member States' Breaches of EU Law" (fn. 104), further differentiates between two sub-approaches to establish associated liability: Associated liability can be established either as 'truly associated', i.e. based on the primary liability, or as 'associated light', i.e. based on the administrative support as such.

330 Melanie Fink, ibid.

Further, the political aim of the alternative approach can be achieved on the basis of the traditional approach, too. In fact, the alternative approach has been developed to account for the integration of the administration, and has the aim of increasing the possibility of holding actor B, here the Union, liable, despite the fact that the formally-binding administrative decision was ultimately issued by actor A, here the host member state. This result, however, can also be achieved in the framework of the traditional approach. As will be shown throughout this chapter, assigning the bridge function to causation also allows the Union to be held liable for the provision of administrative support or for a failure to adequately supervise the host member state.

Moreover, the innovative approach assimilates the doctrine of Union liability to the international rules on state liability as established by the Draft Rules on the Responsibility of States and International Organisations (DARS/DARIO).[331] This, however, is at odds with the understanding of the integrated administration as a structure that is genuinely characterised by EU law. The relations among the involved public actors, namely the member states and the Union, as well as between these and the concerned individuals, fundamentally differ from those relations under international law. As a consequence, attribution in the context of the integrated administration is not governed by DARS/DARIO, and there is, hence, no reason to assimilate the rules of EU public liability law to the rules applicable under international law.[332]

Lastly, and this is decisive here, pragmatic considerations speak in favour of the traditional approach. While the alternative approach develops a conceptually appealing reconstruction of the case law, the traditional approach stays closer to the CJEU's usual manner of argument. For instance, the CJEU itself does not distinguish between primary and associated liability. Therefore, and the conceptual strength of the alternative approach notwithstanding, it seems rather unlikely that the CJEU would adopt a claimant's argument that is based exclusively on the distinction between primary and associated liability. As the aim of this chapter is to develop an argument that could be used by potential applicants to enforce their fundamental rights before the CJEU on the basis of the law as it currently stands, the traditional

331 The concept of associated liability is similar to responsibility on the basis of 'aid or assistance' under Art. 16 DARS, Art. 14 DARIO (see introduction, fn. 44).

332 See below 5.4. For detailed analysis see Catharina Ziebritzki, *The EU's Responsibility in the Asylum Administration* (fn. 58), p. 37 et seq., p. 58 et seq.

approach is adopted here. Consequently, the bridge function is assigned here mainly to the concept of causation. The doctrinal challenges that arise in the context of attribution are hence limited to the definition of the link between certain conduct and the actor, strictly speaking.

5.3 Specific Doctrinal Questions

Having defined the meaning of attribution and causation eventually allows to precisely formulate the specific doctrinal questions that need to be discussed in the following. In this context, the distinction between inherent and resulting violations becomes central again.[333]

As this section will argue, a closer look leads to the following conclusions. First, concerning liability on the basis of the agencies' misconduct: as regards inherent violations, the main doctrinal problem lies at the level of attribution (*attribution*), whereas concerning resulting violations, attribution is also relevant, but the main doctrinal problem lies at the level of causation (*causation I*). Second, concerning liability on the basis of the Commission's misconduct, as regards both inherent and resulting violations, the main doctrinal issue lies at the level of causation, with the specific question differing from that in the case of the agencies (*causation II*). Yet, the distinction is relevant because inherent violations are mainly procedure-related, while resulting violations are mainly reception-related; and the Commission's procedure-related competences are narrower than its reception-related competences.[334] Therefore, the Commission's failure to supervise asylum procedures raises slightly different questions of causation (*causation IIa*) than its failure to supervise reception conditions (*causation IIb*).[335]

333 See chapter 2, 3.

334 See chapter 2, 2.3 and 3.

335 Based on this doctrinal framework, the question of attribution will be discussed in chapter 4, and the questions of causation I and II will be discussed in chapter 5.

		Operational Level		Supervisory Level
Misconduct	Damage	Formal Decision	Support	Coordination and Ensuring Legality
Conduct of Asylum Procedures	**Inherent Violations**	Host member state	EUAA Frontex *Question: Attribution*	Commission *Question: Causation IIa*
Provision of Reception Conditions	**Resulting Violations**	Host member state	EUAA Frontex *Question: Attribution and Causation I*	*Question: Causation IIb*

Table 1: Typical Misconduct of EU Bodies in the Integrated EU Hotspot Administration and the Respective Concrete Doctrinal Questions

a *The Agencies' Liability for Inherent Violations: A Question of Attribution*

As established above, the agencies' typical misconduct at the operational level consists in procedural mistakes. Hence, a first type of damage consists in the violation of procedural fundamental rights such as Art. 41 ChFR, the procedural dimension of Art. 24 ChFR, and the procedural dimension of Art. 4, 18, 19 ChFR.

Concerning these inherent damages, causation, i.e. the link between the conduct and the damage, is not difficult to establish because the fundamental rights violation as such constitutes the damage.[336] For instance, where an EUAA caseworker fails to comply with Art. 41 ChFR, it is clear that the procedural mistake as such constitutes the violation of fundamental rights and, hence, the damage. Similarly, where a Frontex officer fails to comply with the procedural dimension of Art. 24 ChFR, the damage is inherent in the misconduct.

Instead, the main doctrinal question arises in the context of attribution. As explained above, attribution gives an answer to the question in whose name a certain act is performed. Usually, this is quite easy to answer. For in-

336 See above 3.3.c.

stance, if a staff member of a national authority performs unlawful conduct, that act is obviously attributed to the member state. If a statutory member of staff from an EU agency breaches EU law, the author of that conduct is obviously the Union. With respect to the cases at hand, where the relevant misconduct is performed by staff members of a migration management support team (MMST), things are less straightforward. As explained above, MMSTs consists of different kinds of staff: Statutory staff of the EUAA and Frontex, usually acting as coordinating staff; a few staff members permanently seconded by member states to the agency; and staff that are provided by member states to the agency for the purposes of short-term deployment. It is with regard to this latter category of staff that attribution is difficult. This is because the MMSTs work under a complex supervision structure. Whereas each staff member remains embedded in the internal structures of their respective agency, they also remain connected to their home member state, and daily instructions are issued by the host member state.[337] It is hence not obvious, from the outset, whether the relevant misconduct must be attributed to the respective agency, to the home member state, or to the host member state. This is well illustrated with cases 2 and 3.[338]

Case 2 – Magan Daud – Deficient asylum interview – Art. 41 ChFR (EUAA: question of attribution)
In the case of Mr Daud, it is clear that the deficient interview as such constitutes a violation of his rights under Art. 41 ChFR. It is also clear that the violation of fundamental rights as such constitutes damage in the sense of Art. 340 para 2 TFEU. What requires further discussion, however, is whether the misconduct of the EUAA caseworker must be considered as an act on the part of the host member state, the home member state, or the agency. This is because the caseworker has been deployed to the EUAA by the German asylum service and is now working as part of the MMST under a dual supervision structure, receiving instruction from both the EUAA and the Greek asylum service.

Case 3 – Daniat Kidane – Age assessment through visual inspection – Art. 41 ChFR (Frontex: question of attribution)
Similarly, in the case of Daniat Kidane, it is clear that the unlawful age assessment constitutes a violation of her procedural rights under

337 See chapter 1, 3.1 and chapter 2, 1.2.
338 These examples are not exhaustive. The question of attribution become relevant in all cases where MMST are involved, i.e. also in cases 1, 4 and 5.

Art. 24 and 41 ChFR and that this violation, as such, constitutes damage under Art. 340 para 2 TFEU. What is questionable, however, is whether the procedural misconduct performed by the Frontex officer is to be considered as an act on the part of Greece, Germany or Frontex. Again, this is because the Frontex officer has been deployed to Frontex by the German federal police and is now working as part of the MMST under a dual supervision structure, receiving instructions from both Frontex and from the Hellenic police.

This being said it must be stressed that the question of attribution only arises because the approach adopted here is to construct liability on the basis of the misconduct at the lower hierarchical level.[339] As explained, it is the particular legal position of deployed MMST members that raises the question of whether their conduct is attributable to the host member state, the home member state or the agency. If one chooses to construct liability on the basis of misconduct at the higher hierarchical level, the question of attribution will not arise because there is no doubt that the conduct of the coordinating officer or the Executive Director is attributable to the agency. This is important to keep in mind because it means that disagreement with the following argument on attribution does not, per se, exclude agency liability. If one were to disagree on that point, one would have to consider the higher hierarchical level and examine the concrete doctrinal question of whether a failure on the part of the coordinating officer or the Executive Director constitutes the cause of a concrete breach at the operational level. Without going into details here, it seems likely that the answer to this question will be positive, at least insofar as operational misconduct is systemic in nature, because the very purpose of internal supervision is to prevent systemic misconduct at the operational level.

b *The Agencies' Liability for Resulting Violations: A Question of Causation I*

As explained above, the procedural mistakes by the agencies typically result in further, usually substantial, fundamental rights violations. This is so because the administrative support provided by the agency is the basis for the administrative decision issued by the member state. Where the support is deficient, the decision is usually also deficient. For instance, where the

339 See above 4.1.

EUAA provides an unlawful recommendation to reject an asylum claim as inadmissible, the Greek asylum service usually adopts that recommendation and issues the decision rejecting the asylum claim to the asylum seeker.[340] In the same vein, where Frontex conducts an unlawful age assessment and concludes that the concerned applicant is an adult, the Greek first reception service usually follows Frontex's advice and registers the date of birth determined by Frontex, which means that the concerned applicant will hence not be exempt from the border procedure.[341] As a result, the concerned applicant will then be obliged to stay in the EU hotspot camp. This will, depending on the specific camp, typically result in the violation of their rights under Art. 4 ChFR or Art. 6 ChFR.[342]

As the relevant misconduct in these cases is also performed by MMST members, establishing the link between the conduct and the actor is as difficult as in the case of inherent violations. The question of attribution hence remains the same.

In addition, however, establishing the link between the conduct and the damage is difficult, too. For instance, it is not obvious whether the procedural mistakes made by the EUAA or Frontex can be considered as the cause of the violation of the resulting violations of Art. 4 or Art. 6 ChFR. In general terms, the decisive question here is under which conditions non-formally binding conduct by the agencies can be considered as causal, despite the fact that a later administrative decision issued by the member state is the last element in the sequence of events leading to the occurrence of the damage.

The question of causation is hence closely related to the fact that the EU's mode of operation is to determine without deciding. This is crucial because what has been said above on this mode of operation *prima facie* speaks in favour of causation. As argued above, the EU's choice to rely on non-formally binding conduct appears as a strategy to circumvent constitutional rules while at the same time making sure that it can steer and guide the course of the administration.[343] The point is clearly illustrated by the EUAA's recommendation. Although that recommendation is non-formally binding, it is usually followed by the Greek authorities. When the EUAA recommends rejecting an asylum claim, this will regularly result in

340 See chapter 2, 1 and 3.
341 See chapter 2, 1 and 3.
342 See chapter 2, 3.1.b.
343 See chapter 1, 1.

the person being subject to an expulsion procedure.[344] This suggests that the content of the EUAA's recommendation predetermines the resulting fundamental rights violation. Of course, such considerations cannot replace doctrinal analysis based on the CJEU's case law – which will be conducted in the following chapters. But, as doctrinal analysis is never free from considerations of equity, especially not in the context of EU public liability law, it is important to keep these arguments concerning the EU's mode of operation in mind.

The question of causation arises in all cases where the agencies determine at the preparatory level without issuing the binding decision. This is well illustrated with cases 1 and 3.[345]

Case 1 – Sara Esmaili – Deficient vulnerability assessment – Art. 4 ChFR (EUAA: question of causation I)
In the case of Ms Esmaili and her daughter Ayla, the EUAA caseworker failed to correctly conduct the vulnerability assessment and thus recommended qualifying them as non-vulnerable. As usual, the Greek Asylum Service rubber-stamped that opinion. As a result, Ms Esmaili and her daughter were obliged to remain in the EU hotspot camp during the entire asylum procedure, under reception conditions amounting to a violation of their rights under Art. 4 ChFR. The most difficult legal questions arise with regard to causation, as the link between the EUAA's unlawful recommendation and the violation of Art. 4 ChFR is not evident.

Case 3 – Daniat Kidane – Age assessment through visual inspection – Art. 4 ChFR (question of causation I)
In the case of Daniat Kidane, the Frontex officer estimated her age based on her physical appearance and came to the conclusion that she was an adult. As is usual practice, the Greek first reception service followed Frontex's opinion without any further inquiries, and registered Daniat Kidane as an adult. As a result, she was obliged to stay in the EU hotspot camp, where she was subject to reception conditions that violated her rights under Art. 4 ChFR. When discussing whether Frontex is liable for the violation of Art. 4 ChFR, further analysis is obviously required to determine whether the damage can be considered as having been caused by the unlawful age assessment.

344 As mentioned above, this is not always the case. Due to the halt of readmissions, the concerned persons usually remain in a legal limbo, see chapter 1, 2.1.c.
345 The question of causation I also arises in cases 2, 4 and 5.

Lastly, it must be stressed again that the concrete question of causation, as defined here, is a result of the approach to construct liability on the basis of the misconduct at the lower hierarchical level.[346] If one were to construct liability on the basis of misconduct at a higher hierarchical level, the decisive question in the context of causation would be whether the agency's failure to adequately supervise the member state's conduct is to be considered causal for the resulting fundamental rights violation. Given that the scope and content of the agencies' relatively new monitoring obligations is not yet entirely clear,[347] this would require further investigation.[348]

c *The Commission's Liability for Resulting Violations: A Question of Causation II*

Concerning the Commission's misconduct, attribution is easily established. As explained above, the Commission exercises its supervision mainly in the framework of the EURTF and different Steering Committees.[349] These fora are not institutionally consolidated to the extent that one could speak of misconduct on the part of the fora as such, and in any case, do not qualify as institutions in the sense of Art. 340 para 2 TFEU, because they are clearly not bodies established by the Treaties and do not have competences of their own.[350] Instead, the EURTF and the Steering Committees are regular meetings under the auspices of the Commission. There can thus be no doubt that the supervisory conduct on the part of the Commission's representatives, who act within the framework of the EURTF and the Steering Committee, is to be attributed to the Commission itself.

Establishing causation, however, is more difficult. As all damages for which individuals might claim compensation from the Commission are ultimately brought about by other actors, the link between the Commis-

346 See above 4.1.

347 See Evangelia (Lilian) Tsourdi, „Monitoring and Steering through FRONTEX and EASO 2.0: The Rise of a New Model of AFSJ agencies?" (fn. 286).

348 In this direction Andreas Fischer-Lescano, Timo Tohidipur, „Europäisches Grenzkontrollregime. Rechtsrahmen der europäischen Grenzschutzagentur Frontex" (fn. 283), p. 1266, however, without detailed doctrinal analysis.

349 See chapter 2, 2.6.

350 On these criteria see CJEU, Court, judgement of 16 December 2020, Council of the European Union v Dr. K. Chrysostomides and Co. LLC et al, Joined Cases C-597/18 P, para 78–90; and further Giacomo Rugge, „The Euro Group's informality and *locus standi* before the European Court of Justice" (fn. 149), p. 917–936.

sion's misconduct at the supervisory level and the damage requires further discussion. In general terms, the doctrinal question can be formulated as to whether, and if so, under what circumstances, the breach of a supervisory obligation is to be considered as the cause of a fundamental rights violation, where that violation ultimately results from a formally-binding decision by the supervisee.

In concrete terms, a distinction must be made between fundamental rights violations inherent in the agencies' procedural mistakes, in particular Art. 41 ChFR, and violations brought about by the host member state, in particular Art. 4 ChFR. As mentioned above, the reason for this is that the Commission's supervisory obligation under Art. 40 para 3 Frontex Regulation, Art. 21 para 2 EUAA Regulation, Art. 17 TEU is narrower concerning asylum procedures than concerning reception conditions. Whereas the Commission's procedure-related obligations are limited to due diligence, its reception-related obligations encompass the duty to ensure the legality of reception conditions, if necessary, by providing the required support.[351]

It therefrom follows that, concerning procedure-related damages, the decisive question is whether the Commission's failure to adequately supervise can be considered as causal despite the fact that the Commission only has the competence to urge the agencies in non-formally binding manner to comply with EU law. This question is well illustrated, for instance, with case 3.[352]

> *Case 3 – Daniat Kidane – Age assessment through visual inspection – Art. 41 ChFR (Commission: question of causation IIa)*
> The wrongful age assessment conducted in the case of Daniat Kidane represents systemic malpractice on the part of Frontex. The Commission must, therefore, have known about the issue and was obliged, under Art. 40 para 3 Frontex Regulation, Art. 21 para 2 EUAA Regulation, Art. 17 para 1 TEU to do everything it can to ensure that Frontex complies with EU law. Yet, it is not obvious that the Commission's failure to adequately supervise was causal for the breach of Art. 41 ChFR in the specific case of Daniat Kidane. The link between the Commission's misconduct at the supervisory level and the violation of the fundamental rights inherent in Frontex's conduct hence requires further discussion.

351 See chapter 2, 2.3.

352 The question of causation IIa arises in all cases where the agencies breach procedure-related obligations, i.e. also in cases 1, 2, 4.

Concerning reception-related damages, in turn, it must be taken into consideration that the Commission has the competence to provide administrative support itself and must do everything it can to ensure that the host member state accepts this support.[353] The doctrinal questions in this regard are well illustrated with case 1, 5 and 6.

Case 1 – Sara Esmaili – Art. 4 ChFR (Commission: question of causation IIb)
In the case of Sara Esmaili, which is representative of systemic malpractice, the Commission failed to comply with its supervisory obligation under Art. 40 para 3 Frontex Regulation, Art. 21 para 2 EUAA Regulation, Art. 17 TEU because it failed to ensure that the reception conditions generally comply with EU law. Yet, the individual administrative decision obliging Ms Esmaili and her daughter to stay in the camp where their right under Art. 4 ChFR was violated was issued by Greek authorities. The link between the Commission's failure at the supervisory level and the violation of Art. 4 ChFR thus requires further discussion.

Case 5 – Kareem Rashid – Art. 4 ChFR (Commission: question of causation IIb)
Similarly, the case of Mr Rashid reflects systemic misconduct. Here, the Commission failed to adapt the general operating procedures to the fact that Türkiye had halted the readmission policy since March 2020, thereby violating its supervisory obligation. Again, however, the individual administrative decision which rejected Mr Rashid's asylum claim and thus excluded him from access to any kind of state support was issued by Greek authorities. Thus, the main legal question is whether the link between the Commission's breach of its supervisory obligations under Art. 40 para 3 Frontex Regulation, Art. 21 para 2 EUAA Regulation, Art. 17 TEU and the violation of Art. 4 ChFR can be established in the concrete case.

Case 6 – Reem Saeed – Art. 6 ChFR (Commission: question of causation IIb)
In the case of Ms Saeed, the decision ordering her prolonged detention was issued by the host member state. At the same time, the Commission failed to exercise its competences at the supervisory level so as to prevent the systemic malpractice of the general detention of asylum seekers on

353 See chapter 2, 2 and in more detail Catharina Ziebritzki, *The EU's Responsibility in the Asylum Administration* (fn. 58), p. 117 et seq.

the island of Kos. With regard to Union liability on the basis of the Commission's misconduct, it thus requires further doctrinal analysis whether a causal link can be established between the Commission's failure to adequately supervise and the violation of Art. 6 ChFR in the concrete case of Ms Saeed.

As in the case of the agencies, these doctrinal questions of causation are closely related to the EU's mode of determining without deciding. Again, what has been said above on this mode of operation *prima facie* speaks in favour of causation. The point is well illustrated by the Commission's failure to adequately supervise the reception-related aspects of the EU hotspot administration. Although the Commission's instructions are non-formally binding, they are usually followed by the host member state.[354] The following doctrinal analysis notwithstanding, this suggests that the Commission's failure to issue the relevant instructions and provide the necessary support predetermines the resulting violations of fundamental rights.

Lastly, a pragmatic consideration must be taken into account. One might wonder whether there is a shortcut around the question of causation because the CJEU, in its more recent jurisprudence, considers the infringement of the supervisory standard as the relevant breach for the purposes of Art. 340 para 2 TFEU.[355] In adopting that approach, one might argue that if the violation of Art. 4 and Art. 6 ChFR is considered as the relevant breach, causation is easily established because the Commission's infringement as such constitutes the damage for which compensation is claimed under Art 340 para 2 TFEU. This argument, however, cannot be convincing. A closer look at the jurisprudence shows that the CJEU presupposes a breach of the supervisory obligation, and only then proceeds to examine whether the supervisory standard fulfils the individual-rights criterion and the sufficiently-serious-breach criterion. This means that, for the purposes of establishing causation, the breach of the supervisory obligation remains decisive. As will be explained in more detail below, the CJEU's more recent doctrine thus splits the rule of law into two aspects. While requiring that the supervisory standard meets the individual-rights criterion and the suf-

354 See chapter 2, 2; for detailed doctrinal argument see chapter 5, 5.2.
355 See chapter 5, 3.2.

ficiently-serious-breach criterion, it is still the breach of the supervisory obligation that must be the cause of the damage.[356]

5.4 Non-Applicability of DARS and DARIO

Before delving into the doctrinal intricacies of the CJEU's case law on attribution and causation eventually, it must be stressed that the international rules on attribution, i.e. the Draft Articles on State Responsibility and on the Responsibility of International Organisations (DARS and DARIO),[357] are not applicable to the case of EU hotspots, nor to any other case in the integrated asylum and border administration.[358] While the CJEU's jurisprudence is certainly inspired by those rules,[359] the CJEU has developed a genuine EU law doctrine on attribution and causation. This is consequential because the relation between the agencies and the involved member states is fundamentally distinct from that between an international organisation and its member states, and the relation between EU member states is fundamentally distinct from that among other states. In a nutshell, the

356 The question remains whether the supervisory standard must also fulfil the individual-rights criterion and the sufficiently-serious-breach criterion. While the CJEU's earlier approach rather seems to require this, its more recent approach leaves the question open because the breach of the supervisory standard was already denied. For the purposes of this study, though, the question must not be decided because, as demonstrated, both the supervisory standard and the supervisory obligation meet the individual-rights criterion and the sufficiently-serious-breach criterion.

357 See fn. 335.

358 For an application of DARS/DARIO to cooperation in the framework of Frontex, however, see Roberta Mungianu, *Frontex and Non-Refoulement. The International Responsibility of the EU*, Cambridge University Press 2016, p. 60; Mariana Gkliati, „The first steps of Frontex accountability: Implications for its Legal Responsibility for Fundamental Rights Violations", eumigrationlawblog of 13/08/2021; André Nollkaemper, Dov Jacobs, „Shared Responsibility in International Law: A Conceptual Framework", *Michigan Journal of International Law* 34 (2013), p. 359-438, p. 362 with further references in note 8. As here Melanie Fink (fn. 74); and also Andreas Fischer-Lescano, Timo Tohidipur, „Europäisches Grenzkontrollregime. Rechtsrahmen der europäischen Grenzschutzagentur Frontex" (fn. 283), p. 1250–1253, who apply DARS only with regard to the relation between member states and third states.

359 Note that Advocate General Juliane Kokott, Opinion delivered on 17 November 2005, A.G.M.-COS.MET, C-470/03, para 84–85, extensively referred to international law. The CJEU, however, refrained from referring to international law, although it adopted her conclusions.

structure of the integrated European administration is governed by EU law, not by international law.[360]

5.5 Case Law Relevant to the Doctrine on EU Liability

The doctrinal questions concerning attribution and causation can be answered only on the basis of the CJEU's jurisprudence. The case law, however, is extremely vast, concerns a wide range of constellations, and has developed considerably over the past decades. Analysing whether the Union is liable in a particular case hence requires determining which case law is relevant to the present analysis. Two points must be made in this regard.

The first is that case law concerning other areas of law is applicable to the context at hand. This is of particular relevance because the vast majority of jurisprudence concerns competition law,[361] agricultural subsidies,[362] and the Eurozone,[363] while there is no case law concerning the asylum system as yet. Certainly, most judgements refer to case law from the same policy area.[364] A closer look at the case law, however, shows that the doctrine of Union liability is consistent across different areas of law, and the CJEU's more recent judgments even explicitly rely on competition law cases to establish liability in the Eurozone.[365] This is consequential because the Treaties conceive Art. 340 para 2 TFEU as one general rule that is applicable to all areas of EU law.[366]

360 Catharina Ziebritzki, *The EU's Responsibility in the Asylum Administration* (fn. 58), p. 37 et seq., p. 58 et seq.

361 Francette Fines, „A General Analytical Perspective on Community Liability" (fn. 134), p. 29–30.

362 In the words of Pekka Aalto, *Public Liability in EU Law* (fn. 163), p. 112, it is all about 'milk quotas, bananas, maize grits, starch and cotton'.

363 Most prominently CJEU, judgement of 20 September 2016, Ledra, C-8/15 P et al (fn. 117).

364 Melanie Fink, „EU Liability for Contributions to Member States' Breaches of EU Law" (fn. 104), p. 1231.

365 For instance, CJEU, judgement of 13 July 2018, Bourdouvali, T-786/14 (fn. 119), para 80 relies on CJEU, Court, judgement of 26 February 1986, Krohn & Co. Import-Export v Commission of the European Communities, 175/84, insofar as the causal link is concerned.

366 Crucially, this does not ignore structural differences between the internal market and the area of freedom, security and justice. For instance, the fact that function of the action for damages as a fundamental rights remedy is of particular practical

The second point concerns the question of whether and to what extent the CJEU's earlier jurisprudence is still applicable. The decisive development here is the 2000 *Brasserie-Bergaderm*-turn, with which the CJEU lowered the preconditions for Union liability by aligning it to member state liability.[367] Thus, that matter is closely connected to the question of whether the case law on member state liability, as established with the Frankovich line,[368] is relevant to the interpretation of Art. 340 para 2 TFEU.

The crucial point here is that the convergence between Union liability and member-state liability is not complete. Two important differences remain. First, the convergence was limited from the outset to the individual-rights criterion and the sufficiently-serious-breach criterion. This is consequential because the purpose of the alignment was to address the criticism of the narrow definition of qualified unlawful conduct. The doctrine, hence, remains differentiated insofar as the notions of causation and damage are concerned.[369] Second, the convergence finds its limits where specific characteristics of the Union or the member states determine the respective liability doctrine. For instance, if the CJEU, in a case on member state liability, relies on national sovereignty as a main argument against liability, this argument cannot be transferred to a case on Union liability, or at least not without further justification. In the same vein, the specific characteristics of the Union and the function of the action for damages in the system of legal protection against the EU must be decisive considerations when interpreting Art. 340 para 2 TFEU.[370]

It thus follows that pre-*Bergaderm* case law on Union liability is relevant to the current doctrine on Union liability only insofar as the causation criterion and the damage criterion are concerned. Further, post-*Brasserie* case law on member state liability is relevant insofar as the individual-rights criterion and the sufficiently-serious-breach criterion are concerned, and

relevance in the area of freedom, security and justice can be taken into account within the framework of the established doctrine.

367 See fn. 159 et seq.

368 CJEU, judgement of 19 November 1991, Frankovich, C-6/90 (fn. 174).

369 Pekka Aalto, *Public Liability in EU Law* (fn. 163), p. 10–11; Uwe Säuberlich, *Die außervertragliche Haftung im Gemeinschaftsrecht* (fn. 153), p. 16–29.

370 Hence, the accession of the EU to the ECHR could lead to the convergent doctrine moving apart again because the ECHR requirements would then be decisive considerations for the interpretation of Art. 340 para 2 TFEU, see Advocate General Léger, Opinion of 8 April 2003, Köbler, C-224/01, para 94.

provided that the interpretation of Art. 340 para 2 TFEU takes into consideration the specificities of the Union's legal structure.