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The (im)possible mission of holding Frontex accountable - An analysis of the different direct fundamental rights accountability mechanisms.

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Abstract:

Border protection and control is a human rights sensitive field and Frontex, the European Border and Coast Guard Agency, is working in it. Thus, there is a need to give a possibility to hold Frontex accountability if it breaches fundamental rights. After all, as stated by Article 47 of the Charter, "[everyone] whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal". Although the importance of accountability is undisputable, holding Frontex accountable is easier said than done. This is due to the Agency only coordinating and organising with Member States and supporting them. Besides the option to hold the Agency directly accountable before the Court of Justice, there is only one internal mechanism allowing victims to complain directly to the Agency, but all of these possibilities have one thing in common, namely that their effectiveness is disputed. This includes criticisms on the access to the mechanisms, them not considering the vulnerable position of the refugees and their impartiality, which makes it relevant to raise the question:

How can the external and internal direct accountability mechanisms of the European Border and Coast Guard Agency be evaluated in light of the way they operate and the challenges they face in ensuring accountability for fundamental rights violations?

In order to answer this question, the essay will first have a closer look at the external accountability through CJEU Actions and then discuss internal accountability through the Individual Complaint Mechanism. In their respective chapters, the accountability mechanisms will be described, analysed and tested against the research question. The analysis will make it possible to conclude on the question posed and to offer recommendations for the improvement of the mechanisms.

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Introduction

European Union (EU) Citizens currently live in a shared area that seemingly has no internal borders. Border and passport controls are a thing of the past. Free movement is one of the core aims of the Union.[1] Yet, external borders still exist and there is an EU agency dealing with them. This thesis will focus on this external dimension.

The European Border and Coast Guard Agency (hereinafter, 'Frontex' or 'the Agency') is the agency that is entrusted with the task to ensure European integrated border management.[2] To achieve this, they mainly support Member States. This is done *inter alia* by coordinating and organising joint operations,[3] participating in search and rescue operations,[4] assisting in the return process,[5] carrying out risk and vulnerability assessments,[6] and monitoring migratory flows, [7] operational needs, [8] external border management, [9] and fundamental rights compliance,[10] which is especially relevant for this essay. In the fulfilment of its tasks, the Agency is not limited to the territory of the EU, but can also cooperate with third countries and deploy staff there.[11] This vast amount of tasks is the result of three major extensions of the Agencies powers since its foundation in 2004.[12] Due to these amendments, with the newest regulation being Regulation 2019/1896 (hereinafter, 'the Regulation'), it will reach a number

[1] Consolidated Version of the Treaty on European Union [2012] OJ C326/13, Art 3(2).
[2] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L295/1, Art 1.
[3] Ibid, Art 10(1)(g).
[4] Ibid, Art 10(1)(i).
[5] Ibid, Art 10(1)(n)(o)(p).
[6] Ibid, Art 10(1)(a)(c).
[7] Ibid, Art 10(1)(a).
[8] Ibid, Art 10(1)(b).
[9] Ibid, Art 10(1)(d).
[10] Ibid, Art 10(1)(e).
[11] Ibid, Art 10(1)(u).
[12] Council Regulation (EC) 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L349/1; Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2011] OJ L304/1; Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC [2016] OJ L251/1; Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L295/1.

of 10.000 operational staff in 2027,[13] with a budget of 922 million Euros in 2024.[14] Currently, President von der Leyen plans to increase the number of operational staff to 30.000.[15]

The political will to massively extend the powers of Frontex shows how important the topic of migration has become during the last two decades, making it important to closely explore the impact of migration. This should not only be done with a view on EU citizens, but also on the refugees themselves, since they are the very subjects of migration and border controls. This makes it relevant to shed light on the influence of these actions on refugees. Doing so is even more relevant when considering their vulnerability, since border protection is a human rights sensitive field.[16] There are multiple rights at stake when it comes to this specific area, for example the rights to life and asylum, the prohibition of torture and inhuman or degrading treatment or punishment, or the principle of non-refoulement. All of these rights are to be found in the Charter of Fundamental Rights of the European Union (the Charter), which means that they are binding on the European Union, including its institutions and bodies,[17] thus also on Frontex.

As the Agency is operating in a human rights sensitive field with many Charter rights at stake, there is a need for accountability. After all, as stated by Article 47 of the Charter, "[everyone] whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal". Moreover, the Regulation itself is clear when it comes to its will to stick to fundamental rights with the respect for fundamental rights being mentioned multiple times as core aim of the Agency, including in the first Articles of the Preamble and the Regulation itself. This has not always been the case, as there has not been any fundamental rights mechanism until 2011, with each of the Regulations before only having one reference to the Charter in their Preamble.

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[13] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L295/1, Art 5(1) and Annex 1.
[14] Frontex, 'Report on Budgetary and Financial Management in 2024' (Frontex 2024), 3.
[15] Ursula von der Leyen, 'Statement at the European Parliament Plenary by President Ursula von der Leyen, candidate for a second mandate 2024-2029' (Directorate-General for Neighbourhood and Enlargement Negotiations 2024) <https://enlargement.ec.europa.eu/news/statement-european-parliament-plenary-president-ursula-von-der-leyen-candidate-second-mandate-2024-2024-07-18_en> accessed 19 March 2025.
[16] Constantin Hruschka, 'Frontex and the Duty to Respect and Protect Human Rights' [2020] Verfassungsblog <https://verfassungsblog.de/frontex-and-the-duty-to-respect-and-protect-human-rights/> accessed 18 March 2025; Anna Kosinska, 'The Need to Establish an EU Ombudsman for Migrants as a Consequence of Administrative Decentralisation' (2023) 15 Internal Security 123, 128.
[17] Charter of Fundamental Rights of the European Union [2000] OJ C364/1, Art 51(1).

Although it is undisputable that accountability is important to be able to enforce the rights refugees hold, it is easier said than done in the situation of Frontex. This is due to the Agency only coordinating and organising with Member States and supporting them, which makes it hard for an alleged victim to hold it directly responsible, as it will be examined more closely. Besides the option to hold the Agency directly accountable before the Court of Justice, there is only one internal mechanism allowing victims to complain directly to the Agency, but all of these possibilities have one thing in common, namely that their effectiveness is disputed. This includes criticisms on the access to the mechanisms, them not considering the vulnerable position of the refugees and their impartiality.

This leaves the question behind:

How can the external and internal direct accountability mechanisms of the European Border and Coast Guard Agency be evaluated in light of the way they operate and the challenges they face in ensuring accountability for fundamental rights violations?

In order to answer this question, the essay will make use of the doctrinal research methodology, relying on the review of the relevant legislation, case law, and literature concerned with them. It will first have a closer look at the external accountability through CJEU Actions. The next chapter will discuss internal accountability through the Individual Complaint Mechanism. In their respective chapters, the accountability mechanisms will be described, analysed and tested against the research question. The analysis will make it possible to conclude on the question posed and to offer recommendations for the improvement of the mechanisms.

1. External Accountability through the CJEU

When discussing accountability in the field of law, the first thing that comes to mind is judicial accountability. With regard to Frontex, the competent court is the CJEU. This is the only court able to hold Frontex directly and judicially accountable, since the Member States do not have the required jurisdiction over an EU institution.[18] At first glance, this should not pose an issue, as, according to the Court, "the treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures

[18] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L295/1, Art 97-98.

adopted".[19] The remedies in question are the Action for Annulment, Action for Failure to Act, and Action for Damages. With these remedies, the Union should be able to commit to its fundamental rights obligations. These notably include the principle of effective judicial protection, which is a fundamental right linked to the rule of law.[20] This was developed in the *Johnston* case as general principle of EU law,[21] and is now enshrined in Article 47 of the Charter via the right to an effective remedy and a fair trial.[22] That these rights must not be theoretical or illusory, but practical and effective, and that this must primarily be achieved through judicial remedies was also stressed by the European Court of Human Rights (ECtHR).[23] Furthermore, for the question at hand, the right to have made good any damage must also be considered.[24] The CJEU's case law will be evaluated in light of these fundamental rights and principles.

1.1 The Action for Failure to Act

The first case brought against Frontex in the area of fundamental rights was an Action for Failure to Act, pursuant to Article 265 of the Treaty on the Functioning of the European Union (TFEU), in the *SS and ST* case.[25]

Article 265 TFEU stipulates that the Action can be brought before the CJEU if the agency "concerned has first been called upon to act" and not defined its position within two months, with the applicants having two months to bring the Action.

In *SS and ST*, the applicants were a Burundian and a Congolese national claiming to have been victims of a pushback from Greek to Turkey in the Aegean Sea. They were supported by two NGOs.[26] This constitutes a rare example of legal mobilisation and strategic litigation by migrant rights organisations in a direct action before the Court, as it is rather difficult for them

[19] Case 294/83 *Parti écologiste "Les Verts" v European Parliament* [1986] ECLI:EU:C:1986:166, para 23.
[20] Matteo Bonelli, 'Effective Judicial Protection in EU Law: An Evolving Principle of a Constitutional Nature' (2019) 12 Review of European Administrative Law 35, 43.
[21] Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECLI:EU:C:1986:206, para 18.
[22] Charter of Fundamental Rights of the European Union [2000] OJ C364/1, Art 47.
[23] *Prince Hans-Adam II of Lichtenstein v Germany* [GC] (2001) 42527/98, para 45; *Scordino v Italy (No 1)* [GC] (2006) 36813/97, para 192.
[24] Charter of Fundamental Rights of the European Union [2000] OJ C364/1, Art 41(3).
[25] Case T-282/21 *SS and ST v European Border and Coast Guard Agency* [2022] OJ C289.
[26] Ibid, para 2.

to rely on the other CJEU Actions due to their admissibility requirements, which shows the difficulty of holding an EU agency accountable.[27]

The claimants sent a letter to the Executive Director of the Agency (ED), demanding the suspension or termination of the activities in the Aegean Sea pursuant to Article 46(4) of the Regulation.[28] This was based on allegations that the Agency contributed to fundamental rights violations, including physical violence, detention, collective expulsions and pushbacks.[29] This was not done and the ED declared that the referred incidents did not "substantiate fundamental rights violations".[30] According to the applicants, this response did "not explicitly, clearly, or sufficiently constitute a definition of position", calling it "perplexing, irrelevant, and abstract".[31]

In its decision, the Court interpreted failure to act in a very formal way and as failure to define its position. Following from that interpretation of the Action, the Court held that the Agency had acted, as it had adopted its position.[32] The interpretation and the resulting decision were in themselves not surprising as this follows established case law.[33] However, the existence of established case law supporting a particular interpretation must not be confused with the unavoidability of that interpretation. After all, this interpretation is often considered to make this Action almost irrelevant,[34] and ineffective.[35] Furthermore, the Court has considered less formalistic interpretations in earlier cases.[36] These where mostly inter-institutional cases where

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[27] Virginia Passalacqua, 'Who Mobilizes the Court? Migrant Rights Defenders Before the Court of Justice of the EU' (2022) 15 Law and Development Review 381, 387; Salvatore Nicolosi, 'The European Border and Coast Guard Agency (FRONTEX) and the limits to effective judicial protection in European Union law' (2024) 30 European Law Journal 149, 157.
[28] Case T-282/21 *SS and ST v European Border and Coast Guard Agency* [2022] OJ C289, para 2.
[29] Front-Lex, 'First Ever Case vs. Frontex: Terminate Operation in Greece' (Front-Lex 2021) <https://www.front-lex.eu/court-case-frontex> accessed 03 December 2024; Salvatore Nicolosi, 'Frontex and Migrants' Access to Justice-Drifting Effective Judicial Protection?' [2022] Verfassungsblog <https://verfassungsblog.de/frontex-and-migrants-access-to-justice/> accessed 03 December 2024.
[30] Front-Lex, 'Case Application' (Front-Lex 2021), 47.
[31] Ibid, 46.
[32] Case T-282/21 *SS and ST v European Border and Coast Guard Agency* [2022] OJ C289, para 31.
[33] Case C-44/00 P *Société de distribution mécanique et d'automobiles v Commission of the European Communities* [2000] ECLI:EU:C:2000:686, para 83; Case 377/87 European Parliament v Council of the European Communities [1988] ECLI:EU:C:1988:387, para 9-10; Case 383/87 *Commission of the European Communities* v *Council of the European Communities* [1988] ECLI:EU:C:1988:264, para 9-10; Joined Cases C-15/91 and C-108/91 *Buckl & Söhne and Others* v *Commission of the European Communities* [1992] ECLI:EU:C:1992:302, para 17; for a comprehensive overview of the criteria of Article 265 TFEU, see the chapter 'The Action for Failure to Act' in Koen Lenarts and others, *EU Procedural Law* (2nd edn, OUP 2024).
[34] Alexander Thiele, 'Action for Failure to Act: Court of Justice of the European Union (CJEU)' (Max Planck Encyclopaedias of International Law 2021) <https://opil.ouplaw.com/display/10.1093/law-mpeipro/e2741.013.2741/law-mpeipro-e2741> accessed 03 December 2024.
[35] Inga Dauksiene and Arvydas Budnikas, 'Has the Action for Failure to Act in the European Union Lost Its Purpose?' (2014) 7 Baltic Journal of Law & Politics 209, 220.
[36] Sebastian Platon, 'Bringing a Knife to a Gunfight-The European Parliament, the Rule of Law Conditionality, and the action for failure to act' [2021] Verfassungsblog <https://verfassungsblog.de/bringing-a-knife-to-a-

a less formal definition of a failure to act was necessary due to the lack of power of an institution to bring other Actions.[37] The most famous example is the *Comitology* case, where the Court allowed the Parliament to bring the Action although the Council had defined its position, and thus showed a flexible approach.[38] This approach could just as well also be extended to this case law, protecting the fundamental rights of refugees, especially when the situation is similar in the sense of there being no other Action available.

Because of the considerations above, the CJEU cannot, at first glance, be criticised for its approach. It is only submitted that if it is found that no other Action is available, one could expect the same flexibility that it showed in the past for inter-institutional cases in order to uphold the right to an effective remedy and hold Frontex accountable under that Action when no other Action is available.

1.2 The Action for Annulment

The aforementioned critique would not be applicable if the Court provided another remedy that is capable of challenging the acts of Frontex. In *SS and ST*, it first seemed that the Court was doing so as it specifically referred to the Action for Annulment as the remedy on which the claimants would have been able to "bring proceedings against that decision".[39]

Article 263 TFEU, which is the legal basis for this Action, gives the admissibility criteria and prescribes that the act in question must be either addressed to the plaintiff or of direct and individual concern to them. This is a high threshold, as direct concern means that the plaintiff's legal situation must be directly affected by an act,[40] and individual concern that the applicant is part of a closed group affected by the act.[41] Due to these admissibility criteria, the Action is not known for its practical effectiveness,[42] but the Court's case law is consistent regarding these

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gunfight/> accessed 03 December 2024; Salvatore Nicolosi, 'The European Border and Coast Guard Agency (FRONTEX) and the limits to effective judicial protection in European Union law' (2024) 30 European Law Journal 149, 158.

[37] Ole Due, 'Legal Remedies for the Failure of European Community Institutions to Act in Conformity with EEC Treaty Provisions' (1990) 14(2) Fordham International Law Journal 341, 355-356.

[38] Case 302/87 *European Parliament v Council of the European Communities* [1988] ECLI:EU:C:1988:461, para 17.

[39] Case T-282/21 *SS and ST v European Border and Coast Guard Agency* [2022] OJ C289, para 33.

[40] Case C-348/20 P *Nord Stream 2 AG v European Parliament and Council of the European Union* [2022] ECLI:EU:C:2022:548, para 64-65.

[41] Case 25-62 *Plaumann & Co. v Commission of the European Economic Community* [1963] ECLI:EU:C:1963:17, 107.

[42] Virginia Passalacqua, 'Who Mobilizes the Court? Migrant Rights Defenders Before the Court of Justice of the EU' (2022) 15 Law and Development Review 381, 386.

criteria, and it was made clear that only a treaty change will lead to a change of approach.[43] This has been widely criticised as it leaves certain gaps,[44] and is hostile towards collective actions.[45]

In the follow-up case, *ST v Frontex*, which concerned the same set of facts and one of the applicants of *SS and ST*,[46] the applicant sought the annulment of the decision by Frontex to refuse the requested suspension of operations. It was declared inadmissible as the applicant failed to demonstrate that there would be a direct effect on his legal situation, rather than merely a practical effect.[47] The appeal was dismissed "as being, in part, manifestly inadmissible and, in part, manifestly unfounded".[48] This already demonstrates the issue that the admissibility criteria may pose, but also shows another problem. Border management is dominated not by legal, but mostly by factual action, such as informal communication between Frontex and national staff.[49] This conflicts with the definition of a reviewable act under Article 263, as these only cover any "measure the legal effects of which are binding on, and capable of affecting the interests of the applicant by bringing about a change in his legal position".[50] This does not take into account that border actions can be blurry in the factual-legal dichotomy, posing the risk for both state and Agency to avoid responsibility, particularly as the division of responsibilities is often highly ambiguous,[51] and not transparent.[52] Especially in the case of Frontex, this can be important as it often puts forward risk assessments, which can lead to the Agency being formally only an advising body, but in practice the decision-maker.[53]

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[43] Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECLI:EU:C:2002:462; and C-263/02 P *Commission of the European Communities v Jégo-Quéré & Cie SA* [2004] ECLI:EU:C:2004:210.
[44] Tom Boekstein, 'Plaumann and the Rule of Law' [2021] Verfassungsblog <https://verfassungsblog.de/plaumann-and-the-rule-of-law/> accessed 08 December 2024.
[45] Virginia Passalacqua, 'Who Mobilizes the Court? Migrant Rights Defenders Before the Court of Justice of the EU' (2022) 15 Law and Development Review 381, 387.
[46] Case T-600/22 *ST v European Border and Coast Guard Agency* [2023] ECLI:EU:T:2023:776 , para 2-4.
[47] Ibid, para 29 and 39.
[48] Case C-62/24 P *ST v European Border and Coast Guard Agency* [2024] ECLI:EU:C:2024:882, para 52
[49] Napoleon Xanthoulis, 'Administrative Factual Conduct: Legal Effects and Judicial Control in EU Law' (2019) 12 Review of European Administrative Law 39, 44.
[50] Case 60/81 *International Business Machines Corporation v Commission of the European Communities* [1981] ECLI:EU:C:1981:264, para 9
[51] Christian Freudlsperger and others, 'Opening Pandora's Box? Joint Sovereignty and the Rise of EU Agencies with Operational Tasks' (2022) 55 Comparative Political Studies 1983, 1999; Barbara Grabowska-Morez and Joelle Grogan (eds), 'Rule of Law beyond the EU Member State-Assessing the Union's Performance' (CEU Democratic Institute Rule of Law Clinic 2024), 19.
[52] Sarah Tas, 'Frontex actions: out of control?' (TARN Working Paper 2020), 4-6.
[53] Madalina Busuioc, *European Agencies: Law and Practices of Accountabilities* (OUP 2013), 192.

It is accepted that these acts can in limited circumstances fall under the scope of the Action for Annulment.[54] Nevertheless, even in these cases the Action can only annul an act that is not in compliance with the legal framework and not improve the act, which gives Frontex considerable flexibility in cases of a possible annulment. For example, if *ST* had won and the act been annulled, Frontex would simply have to give a new opinion with improved argumentation, rather than suspend or terminate the operation in question.

The one example of a partly successful Action for Annulment against Frontex cannot be used to show its feasibility in human rights cases, as the case was only dealing with the denial of information disclosure.[55] It is acknowledged that this is relevant for accountability in a wider sense, as publicly available information can give victims a better chance to seek redress,[56] but it is not relevant for direct accountability. Furthermore, admissibility was not an issue, as the act was addressed to the plaintiff and thus automatically admissible.

Thus, there has not been an example of an admissible Action for Annulment for the purposes of this essay, and it is doubtful whether this Action will hold more future potential. This leaves the question of whether there is another action capable of providing an effective remedy for asylum seekers against breaches of fundamental rights by Frontex.

1.3 The Action for Damages

The Action for Damages is established by Article 340(2) TFEU. It obliges the Union to "make good any damage caused by its institutions or by its servants in the performance in of their duties". This is mirrored in the Regulation.[57]

These Articles reflect the fundamental rights obligations of the Union under the Charter, namely the right to damages, which is part of the right to good administration under Article 41. That it is important for fundamental rights protection is also visible in the fact that the other Actions cannot make good any damage obtained, but only annul an unlawful act and force an

[54] As put forward in Maria Gliaki, 'Frontex before the judge' [2023] EU Responsibility in the International Legal Order 121, 127 and then supported by Salvatore Nicolosi, 'The European Border and Coast Guard Agency (FRONTEX) and the limits to effective judicial protection in European Union law' (2024) 30 European Law Journal 149, 158-159.
[55] Case T-205/22 *Marie Naass and Sea-Watch eV v European Border and Coast Guard Agency* [2024] ECLI:EU:T:2024:266.
[56] Lorenzo Gasbarri, 'Eurocentrism and Frontex Accountability for Human Rights Violations' [2024] ADiM 1, 4.
[57] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L295/1, Recital 55 and Art 97.

institution to act. Both, as analysed for the area at hand, rather ineffectively, enhancing the need for a useful Action for Damages enabling an effective fundamental rights protection and precluding any allegation that the CJEU is shielding Frontex.

Before discussing the cases that reached the General Court it is important to clarify the criteria for liability under Article 340(2) TFEU. These are unlawful conduct, actual damage suffered, and causal link between conduct and damage.[58] These conditions are partly seen as strict,[59] but one should not overlook that the Action was seen as promising for refugee rights protection.[60] Most clearly, this was visible in Melanie Fink's 2020 paper where she pointed out the three advantages of the Action for Damages.[61] Firstly, it is available to individuals. Here, one must note that it does not come with strict admissibility requirements such as Article 263, which considerably widens the scope of the Action. Secondly, it is a legally binding decision by an impartial body. This is in itself not different from the Action for Annulment, but the nature of the binding decision is different. While the Action for Annulment would make it possible for Frontex to comply with a judgement by using an adjusted line of argumentation, this is not the case for the Action for Damages. Thirdly, during the proceedings, answers and justifications of the institution can be demanded, making it a useful tool for accountability. This goes hand in hand with the attribution function, allowing to attribute liability to multiple entities.[62] Nevertheless, it has always been clear that a fundamental rights friendly approach in line with ECtHR case law is needed for the Action to have the desired effects.[63] Notably, this would be a lot easier for this Action than for the other Actions, as the Court would not have to extensively adapt or change its prior case law.

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[58] Case T-600/21 *WS and others v European Border and Coast Guard Agency* [2023] ECLI:EU:T:2023:492, para 53.
[59] Salvatore Nicolosi, 'The European Border and Coast Guard Agency (FRONTEX) and the limits to effective judicial protection in European Union law' (2024) 30 European Law Journal 149, 160.
[60] For example: Ziebritki C, 'Refugee Camps at EU External Borders, the Question of the Union's Responsibility, and the Potential of EU Public Liability Law' [2020] Verfassungsblog <https://verfassungsblog.de/refugee-camps-at-eu-external-borders-the-question-of-the-unions-responsibility-and-the-potential-of-eu-public-liability-law/> accessed 13 December 2024; Timo Rademacher, *Realakte im Rechtschutzsystem der Europäischen Union* (Jus Internationale et Europaeum 2024); Melanie Fink, *Frontex and human rights : responsibility in 'multi-actor situations' under the ECHR and EU public liability law* (Universiteit Leiden 2017).
[61] Melanie Fink, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable' (2020) 21 German Law Journal 532, 535-536.
[62] Ziebritki C, 'Refugee Camps at EU External Borders, the Question of the Union's Responsibility, and the Potential of EU Public Liability Law' [2020] Verfassungsblog <https://verfassungsblog.de/refugee-camps-at-eu-external-borders-the-question-of-the-unions-responsibility-and-the-potential-of-eu-public-liability-law/> accessed 13 December 2024.
[63] Melanie Fink, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable' (2020) 21 German Law Journal 532, 547.

The first Action for Damages brought against Frontex was the *WS* case.[64] The case concerned Syrian nationals arriving in Greece and declaring to wish to apply for protection in the EU. Then they were deported to Turkey in a joint operation of Frontex and the Greek authorities. The applicants complained of multiple breaches of EU law, most notably of the right to asylum and the prohibition of refoulement. The case was lost in front of the General Court, and the reactions that were given to the ruling in academia were almost all very critical of the self-restrictive and formalistic approach of the Court.[65] The Court held that there was no causal link between Frontex's conduct and the resulting damage.[66] This reflects a strict focus on the formal delineation of competences, which constitutes a difference to the standards that are set by international law.[67] Additionally, the judgement did not include a specific analysis of the misconduct, but immediately analysed attribution.[68] This begs the question of how misconduct can be attributed if the nature of that conduct was not analysed. Moreover, the Court did not even consider that the damage obtained can have multiple causes. Still, it precluded that Frontex's action can be a cause on the basis that it has not been the only cause,[69] which is a rather obvious fallacy. Furthermore, positive obligations held by Frontex were not addressed at all.[70]

This was criticised, but also seen as a partial success as it showed that the Action for Damages could at least potentially be used to hold Frontex accountable,[71] as it brings

[64] Case T-600/21 *WS and others v European Border and Coast Guard Agency* [2023] ECLI:EU:T:2023:492.
[65] An overview of the reactions can be found in Mariana Gkliati, 'Shaping the Joint Liability Landscape?' (2024) 9 European Papers 69, 76-78.
[66] Case T-600/21 *WS and others v European Border and Coast Guard Agency* [2023] ECLI:EU:T:2023:492, para 71.
[67] Lorenzo Gasbarri, 'Eurocentrism and Frontex Accountability for Human Rights Violations' [2024] ADiM 1, 3; Christopher Paskowski, 'Verwaltung ohne Verantwortung' [2023] Verfassungsblog <https://verfassungsblog.de/verwaltung-ohne-verantwortung/> accessed 13 December 2024.
[68] Case T-600/21 *WS and others v European Border and Coast Guard Agency* [2023] ECLI:EU:T:2023:492, para 55; Catharina Ziebritki, 'A Hidden Success' [2023] Verfassungsblog <https://verfassungsblog.de/a-hidden-success/> accessed 13 December 2024; Christopher Paskowski, 'Verwaltung ohne Verantwortung' [2023] Verfassungsblog <https://verfassungsblog.de/verwaltung-ohne-verantwortung/> accessed 13 December 2024.
[69] Case T-600/21 *WS and others v European Border and Coast Guard Agency* [2023] ECLI:EU:T:2023:492, para 62-66; Catharina Ziebritki, 'A Hidden Success' [2023] Verfassungsblog <https://verfassungsblog.de/a-hidden-success/> accessed 13 December 2024; Joyce De Coninck, 'Shielding Frontex' [2023] Verfassungsblog <https://verfassungsblog.de/shielding-frontex/> accessed 13 December 2024; the implied consequences of this holding was analysed in Mariana Gkliati, 'Shaping the Joint Liability Landscape?' (2024) 9 European Papers 69.
[70] Mariana Gkliati, 'Shaping the Joint Liability Landscape?' (2024) 9 European Papers 69, 78-79
[71] Mariana Gkliati in Spiegel, 'Syrische Geflüchtete scheitern mit Klage gegen Grenzschutzagentur Frontex' (Spiegel 2023) <https://www.spiegel.de/ausland/eu-gericht-gefluechtete-scheitern-mit-klage-gegen-grenzschutzagentur-frontex-a-429529f0-0c41-4cd0-b638-95eb2749a41e> accessed 13 December 2024.

fundamental rights protection within the scope of the Action.[72] There was only very limited support for the decision, which specifically did not consider the resulting accountability gaps.[73]

The second case that reached the Court was *Hamoudi*.[74] While it was argued by some scholars that the Court would use this as a possibility to clarify on the standards used in *WS* and address some of the issues with improved argumentation,[75] it cannot be said to have fulfilled these expectations as the Court only dealt with the question of whether there has been actual damage obtained.[76] The applicants stated to have been the victims of a pushback tracked by a Frontex operated airplane and claimed damages for the damage obtained during and after the pushback. They alleged that they had arrived on Greek territory on a boat, but were then directly placed into a raft and dragged into Turkish waters after being found by the Greek authorities.[77]

The burden of proof was set very high as "it is for the applicant to adduce conclusive proof as to the existence and extent of the damage it alleges".[78] Here, the condition set by the Court is rather difficult to fulfil, when being victim of something that would be an illegal covert operation in the middle of the night, while being on a rubber raft. The applicant moreover claimed that the authorities confiscated his phone,[79] which naturally makes it even harder to produce evidence. One must keep in mind that evidence collection is notoriously difficult in cases of pushbacks as states often do anything to keep covert operations covert, including destroying or confiscating phones and avoiding any useful cooperation in evidence collection.[80] Furthermore, witness statements were dismissed as manifestly insufficient,[81] and photos were

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[72] Catharina Ziebritki, 'A Hidden Success' [2023] Verfassungsblog <https://verfassungsblog.de/a-hidden-success/> accessed 13 December 2024.
[73] For example: Winfried Kluth, 'EuGH zur Haftung von Frontex im Rahmen von Rückführungsmaßnahmen' [2023] ZAR 341.
[74] Case T-136/22 *Hamoudi v European Border and Coast Guard Agency* [2023] ECLI:EU:T:2023:821.
[75] Salvatore Nicolosi, 'The European Border and Coast Guard Agency (FRONTEX) and the limits to effective judicial protection in European Union law' (2024) 30 European Law Journal 149; Christopher Paskowski, 'Verwaltung ohne Verantwortung' [2023] Verfassungsblog <https://verfassungsblog.de/verwaltung-ohne-verantwortung/> accessed 13 December 2024; Joyce De Coninck, 'Shielding Frontex 2.0' [2024] Verfassungsblog <https://verfassungsblog.de/shielding-frontex-2-0/> accessed 13 December 2024.
[76] Antonio Goncalves, '*Hamoudi v. Frontex* case: Can EU Migration law truly hold Frontex accountable for human rights violations?' [2024] NOVA <https://novarefugeelegalclinic.novalaw.unl.pt/?blog_post=hamoudi-v-frontex-case-can-eu-migration-law-truly-hold-frontex-accountable-for-fundamental-rights-violations> accessed 23 January 2025.
[77] Case T-136/22 *Hamoudi v European Border and Coast Guard Agency* [2023] ECLI:EU:T:2023:821, para 2.
[78] Ibid, para 29.
[79] Ibid, para 2.
[80] Hundreds of occasions where phones were taken away or destroyed were collected in Hope Barker and Milena Zajovic (eds), *The Black Book of Pushbacks Volume 1* (Border Violence Monitoring Network 2020) and Hope Barker and Milena Zajovic (eds), *The Black Book of Pushbacks Volume 2* (Border Violence Monitoring Network 2020); also pointed out in Sarah Ganty and others, 'EU Lawlessness Law at the EU-Belarusian Border: Torture and Dehumanisation Excused by 'Instrumentalisation'' [2024] Hague Journal on the Rule of Law, 749.
[81] Case T-136/22 *Hamoudi v European Border and Coast Guard Agency* [2023] ECLI:EU:T:2023:821, para 41-42 and 57.

not accepted as the claimant could not be clearly seen in them.[82] Therefore, the case was dismissed.

Interestingly, this approach to evidence seems in open contradiction to the ECtHR's approach. This can be argued to be sharing or even reversing the burden of proof in refoulment cases.[83] Especially the case of *N.D. and N.T. v. Spain*[84] could have served as focal point for the CJEU, as that case was dealing with applicants claiming to be part of a refoulment and only relied upon a video in which they were able to recognise themselves irregularly entering Spain as proof that they have actually entered Spain and were part of the refoulment.[85] This is a comparable situation to *Hamoudi*, who was also relying on photos in which he was not clearly visible. The ECtHR accepted the video as *prima facie* evidence, which means that it was enough to shift the burden of proof to the Spanish Government.[86] Also, while the ECtHR does not per se shift the burden of proof in cases of systematic patterns of violation,[87] it does seem to take that aspect into account in order to connect the delineation of the burden to the specific facts, nature of allegations, and rights at stake.[88] This is also supported by other case law.[89] The fact that the ECtHR takes into account systematic patterns is relevant for the case at hand as pushbacks are proven to be systematic and a standard practice for the Greek authorities. This was recently pointed out by the ECtHR in *A.R.E. v. Greece* and *G.R.J. v. Greece*.[90]

Nevertheless, it must be said that the burden was not reliably shifted in every case and applicants who were in an almost identical situation to the applicants in *N.D. and N.T.* did not enjoy the same benefit.[91] Also, there is criticism in academia and by some of the ECtHR judges themselves that what the court declares to be *prima facie* evidence is actually substantial evidence.[92] If this were true, it would mean that the Court is not effectively shifting the burden

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[82] Case T-136/22 *Hamoudi v European Border and Coast Guard Agency* [2023] ECLI:EU:T:2023:821, para 48 and 57.
[83] Joyce De Coninck, 'Shielding Frontex 2.0' [2024] Verfassungsblog <https://verfassungsblog.de/shielding-frontex-2-0/> accessed 13 December 2024.
[84] *N.D. and N.T. v. Spain* (2020) 8675/15 and 8697/15.
[85] Ibid, para 81.
[86] Ibid, para 88.
[87] Grazyna Baranowska, 'Exposing Covert Border Enforcement: Why Failing to Shift the Burden of Proof in Pushback Cases is Wrong' (2023) 4 European Convention on Human Rights Law Review 473, 480.
[88] *El Masri v. the former Yugoslav Republic of Macedonia* (2012) 39630/09, para 151.
[89] *M.K. and Others v. Poland* (2020) 40503/17, 42902/17 and 43643/17, para 174; *D.A. and Others v. Poland* (2021) 51246/17, para 60; *M.H. and Others v. Croatia* (2021) 15670/18 and 43115/18, para 273.
[90] *G.R.J. v. Greece* (2024) 15067/21, para 225; *A.R.E. v. Greece* (2025) 15783/21, para 228.
[91] *Doumbe Nnabuchi v. Spain* (2021) 19420/15, para 28–29; Emilie McDonnell, 'Challenging Externalisation Through the Lens of the Human Right to Leave' (2024) 71 Netherlands International Law Review 119, 128.
[92] *M.H. and Others v. Croatia* (2021) 15670/18 and 43115/18, Partly Dissenting and Partly Concurring Opinion of Judge Wojtyczek para 2.5; Grazyna Baranowska, 'Exposing Covert Border Enforcement: Why Failing to Shift the Burden of Proof in Pushback Cases is Wrong' (2023) 4 European Convention on Human Rights Law Review 473, 487.

of proof. While that is valid criticism that this essay does not want to undermine, it is important to realise that the CJEU would still not be upholding the same standards as the ECtHR, even if the criticism directed towards the ECtHR was correct.

This would result in the conclusion that the CJEU has no regard for Article 52(3) of the Charter that connects the Charter and the European Convention on Human Rights. This is the case as the ECtHR is at least constantly and actively considering the option of shifting the burden of proof, while the CJEU is not doing so. In addition, the CJEU is not even accepting types of evidence that were actively relied on by the ECtHR. Thus, to respect Article 52(3) of the Charter, the CJEU should revise its case law by taking the ECtHR's judgements into account.

Another relevant consideration is that the ECtHR is constantly stressing the difficult situation for states.[93] This can be seen as a form of moral justification not to hold states accountable,[94] and cannot be applied in the same way to Frontex. A state confronted with a massive migratory crisis is in an extraordinary situation, as its systems were not designed to withstand such an inflow of refugees. Frontex, on the other hand, is an EU agency specifically designed to assist in these kinds of situations,[95] and most importantly, to ensure fundamental rights compliance.[96] Thus, even if lower standards should apply for States in times of a migratory crisis, this is not the same for Frontex, which should always be held accountable to the fullest extent, as they are an expert body that is not in a state of crisis.

Currently, both *WS* and *Hamoudi* are subject to appeal before the Grand Chamber, and some argue that in the appeal, the Court will take the chance to clarify its position as administrative activities by an agency are only technical and not very political.[97] This is rather questionable, as it was widely held that the judgements themselves reflect a political motivation,[98] supported by the fact that not a single attempt to hold Frontex accountable for a fundamental rights violation has been successful. Nevertheless, it can be seen that the Grand Chamber is aware of the importance of its upcoming decisions and at least considers using the

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[93] *Khlaifia and Others v. Italy* (2016) 16483/12, para 179; *Ilias and Ahmed v. Hungary* (2019) 47287/15, para 155; *R.R. and Others v. Hungary* (2021) 36037/17, para 88; *M.H. and Others v. Croatia* (2021) 15670/18 and 43115/18, Partly Dissenting and Partly Concurring Opinion of Judge Wojtyczek para 3.
[94] Anuscheh Farahat, 'Human Rights and the Political: Assessing the Allegation of Human Rights Overreach in Migration Matters' (2022) 40(2) Netherlands Quarterly of Human Rights 180, 194.
[95] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L295/1, Preamble 13.
[96] Ibid, Art 10(1)(e).
[97] Catharina Ziebritki, 'A Hidden Success' [2023] Verfassungsblog <https://verfassungsblog.de/a-hidden-success/> accessed 13 December 2024.
[98] Mariana Gkliati, 'Shaping the Joint Liability Landscape?' (2024) 9 European Papers 69, 77.

ECtHR's case law on the burden of proof.[99] Also, the recent opinion of the Advocate General in *Hamoudi* specifically discussed the shifting of the burden of proof and criticised the General Court's approach,[100] but also tried to distinguish the privileged access to evidence of a Member State from that of Frontex.[101] This is in spite of the fact that under the Regulation, the exclusive responsibility for protecting fundamental rights lies with the Agency, and thus the evidence is linked to its core responsibilities.[102] Furthermore, the Advocate General implies that the Grand Chamber should refer the question on the reversal of the burden of proof back to the General Court as it did not discuss Frontex's role in the events that gave rise to the case,[103] while that question was the very centre of the pleadings before the Grand Chamber.[104] Also the Advocate General's Opinion in *WS* suggests to refer the case back to the General Court,[105] but shows itself overall more open to give responsibility not only to Member States, but also to Frontex.[106] Here, the Advocate General directly argues for joint and several liability[107] and clearly states that the General Court's analysis of the causal link between unlawful conduct and damage suffered is "legally flawed".[108] Also, the Opinion underlines the obligations of Frontex[109] and is clear in its willingness to explore the possibilities of using the Action for Damages against Frontex.[110]

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[99] Antje Kunst and Steve Peers, 'Hamoudi v Frontex, an EU Courts pushback case: Shifting the burden of proof and a duty to assist the Court (a duty of candour?)' [2025] EU Law Analysis <http://eulawanalysis.blogspot.com/2025/02/hamoudi-v-frontex-eu-courts-pushback.html> accessed 19 March 2025; Antje Kunst and Steve Peers, 'WS and Others v Frontex before the Grand Chamber: Ensuring Meaningful Protection of Fundamental Rights in Forced Returns by an EU Agency acting as a Safety-Net' [2025] EU Law Analysis <http://eulawanalysis.blogspot.com/2025/02/ws-and-others-v-frontex-before-grand.html> accessed 19 March 2025; the hearings can be found under CJEU, 'Hearing C-679/23 P' (Curia 2025) <https://curia.connectedviews.eu/embed/meeting/949d4cfc-fafa-49d7-7205-08dd2bfacae7> accessed 20 March 2025 and CJEU, 'Hearing C-136/24 P' (Curia 2025) <https://curia.connectedviews.eu/embed/meeting/1fc39d05-61da-401d-b75d-ab55297f4101> accessed 20 March 2025.

[100] Case T-136/24P *Opinion of Advocate General Norkus* [2025] ECLI:EU:C:2025:257, para 65.

[101] Ibid, para 62.

[102] For this and further analysis of the Opinion, see Antje Kunst and Steve Peers, 'Hamoudi v Frontex: Advocate General Norkus' Opinion - Reversing the Burden of Proof and the Presumption of Frontex's Privileged Access to Evidence' [2025] EU Law Analysis <http://eulawanalysis.blogspot.com/2025/04/hamoudi-v-frontex-advocate-general.html#:~:text=It%20found%20that%20Mr.,April%202020'%20(see%20paras> accessed 27 April 2025; and Agostina Pirrello, 'Tilting the Scales' [2025] Verfassungsblog <https://verfassungsblog.de/tilting-the-scales/> accessed 16 May 2025.

[103] Case T-136/24P *Opinion of Advocate General Norkus* [2025] ECLI:EU:C:2025:257, para 63.

[104] CJEU, 'Hearing C-136/24 P' (Curia 2025) <https://curia.connectedviews.eu/embed/meeting/1fc39d05-61da-401d-b75d-ab55297f4101> accessed 20 March 2025.

[105] Case C-679/23P *Opinion of Advocate General Ćapeta* [2025] ECLI:EU:C:2025:427, para 140.

[106] For this and further analysis of the Opinion, see Antje Kunst and Steve Peers, 'Advocate General Ćapeta's Opinion in WS and Others v Frontex before the Grand Chamber: The End of Frontex's Shielding? Joint Liability of Frontex and Member States in Return Operations' [2025] EU Law Analysis <http://eulawanalysis.blogspot.com/2025/06/the-advocate-general-capetas-opinion-in.html> accessed 26 June 2025.

[107] Case C-679/23P *Opinion of Advocate General Ćapeta* [2025] ECLI:EU:C:2025:427, para 92.

[108] Ibid, para 96.

[109] Ibid, para 83.

[110] Antje Kunst and Steve Peers, 'Advocate General Ćapeta's Opinion in WS and Others v Frontex before the Grand Chamber: The End of Frontex's Shielding? Joint Liability of Frontex and Member States in Return

Because of all the considerations above, it has to be said that so far Frontex has been shielded by the CJEU. The approaches in the Action for Failure to Act and Annulment are in itself not necessarily problematic, and their ineffectiveness could have been at least partially remedied by a clear, open, and fundamental rights-friendly approach to the Action for Damages, in particular as it offers some advantages to the claimants compared to the other Actions. Nevertheless, this has so far not been the case. The Court has chosen the opposite approach and was not interested in showing future applicants a potential path to hold Frontex accountable, relying on a strict view on competences and practically impossible burdens of proof.

Importantly, while the cases at hand show situations where Frontex supporting a Member State leads to accountability gaps, as there is no possibility of joint proceedings against a Member State and Frontex,[111] one must also consider situations where Frontex is supporting third states.[112] In these cases, it is highly doubtful that domestic human rights protection is always on the same level as the European standard, which would leave the EU Charter as the only reliable human rights document.[113] It should also be noted that Frontex's Human Rights Impact Assessments with regard to third states lack in their application and transparency.[114] In light of that situation, the problem of accountability is becoming even larger, especially considering a trend of externalisation and "out of sight out of mind approaches" by the EU.[115] These considerations add to the accountability problems that were discussed in this section and contribute to the reasons why the system is partially called "Blame-Shifting by Design".[116]

Operations' [2025] EU Law Analysis <http://eulawanalysis.blogspot.com/2025/06/the-advocate-general-capetas-opinion-in.html> accessed 26 June 2025; Melanie Fink, 'AG Ćapeta Opinion in WS and Others v Frontex: Academic Research on Frontex' Liability Reaches the CJEU's Grand Chamber' [2025] Universiteit Leiden <https://www.universiteitleiden.nl/en/news/2025/06/ag-capeta-opinion-in-ws-and-others-v-frontex-academic-research-on-frontex-liability-reaches-the-cjeus-grand-chamber> accessed 26 June 2025.

[111] Lorenzo Gasbarri, 'Eurocentrism and Frontex Accountability for Human Rights Violations' [2024] ADiM 1, 3.

[112] Florin Coman-Kund, 'The Territorial Expansion of Frontex Operations to Third Countries: On the Recently Concluded Status Agreements in the Western Balkans and Beyond…' [2020] Verfassungsblog <https://verfassungsblog.de/the-territorial-expansion-of-frontex-operations-to-third-countries-on-the-recently-concluded-status-agreements-in-the-western-balkans-and-beyond/> accessed 18 March 2025.

[113] Sergio Carrera Nunez and others, *Global Asylum Governance and the European Union's Role* (International Perspectives on Migration, Volume 18, Springer 2024) 291-292.

[114] European Ombudsman, 'Decision on how the European Border and Coast Guard Agency (Frontex) assessed the human rights impact before providing assistance to non-EU countries for developing surveillance capabilities (case 1473/2022/MHZ)' (1473/2022/MHZ 2023), para 21-24.

[115] Catharina Ziebritki, 'Refugee Camps at EU External Borders, the Question of the Union's Responsibility, and the Potential of EU Public Liability Law' [2020] Verfassungsblog <https://verfassungsblog.de/refugee-camps-at-eu-external-borders-the-question-of-the-unions-responsibility-and-the-potential-of-eu-public-liability-law/> accessed 13 December 2024.

[116] Melanie Fink, 'Why it is so Hard to Hold Frontex Accountable: On Blame-Shifting and an Outdated Remedies System' [2020] EJIL Talk <https://www.ejiltalk.org/why-it-is-so-hard-to-hold-frontex-accountable-on-blame-shifting-and-an-outdated-remedies-system/> accessed 13 December 2024.

2. Internal accountability through the Individual Complaint Mechanism

2.1 An internal mechanism useful for ensuring accountability

The prior sections have shown that individuals who fell victim to alleged fundamental rights violations by Frontex are not able to rely on the CJEU in order to get justice. The approach chosen by the Court is undoubtedly unfortunate, but it only highlights the importance of internal mechanisms to serve justice. In fact, Frontex is an ever-growing agency working in a fundamental rights-sensitive field. These factors alone would make it important to allow for a strong mechanism that enables individuals and third parties to directly complain to the Agency itself, both to seek a remedy, and to make the Agency aware of rights violations.[117] But how should such a mechanism be designed in order to be useful in ensuring accountability?

The precondition for any accountability mechanism is its accessibility.[118] This importantly includes visibility. A mechanism that is unknown to the people that should profit from it and is thus not used by them, is necessarily ineffective. In the context of migration management, this means that refugees must be informed of the existence of the possibility to complain in a language that they understand, especially as refugees mostly only had limited access to education in their country of origin, making it unlikely that they would consider filing a complaint without being informed about the possibility. Also important is the practical usability of the mechanism. Being aware of the possibility to use it, but not able to make use of it would also render a mechanism inaccessible. Measures, such as allowing for oral and written complaints to be filed, or offering forms in many languages, can make a mechanism usable and thus accessible. Moreover, accessibility should also be extended to third parties that complain in the public interest, rather than on the basis of a specific right violation they have suffered themselves.[119] If these conditions are fulfilled, then a general advantage of internal administrative proceedings comes into play, making a complaint mechanism even more accessible than court proceedings. Namely, they are connected with lower costs for both

[117] Maria Cordeil de Donato, 'Access to Protection: Bridges not Walls' (European Programme for Integration and Migration 2014), 61-63.
[118] Statewatch, 'Frontex: the ongoing failure to implement human rights safeguards' [2022] Statewatch <https://www.statewatch.org/analyses/2022/frontex-the-ongoing-failure-to-implement-human-rights-safeguards/> accessed 28 January 2024.
[119] European Ombudsman, 'Decision of the European Ombudsman closing own-initiative inquiry OI/5/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex)' (OI/5/2012/BEH-MHZ 2013), para 83.

applicant and agency.[120] This means that there is a lower threshold for filing a complaint than for going to court. Thus, issues that may not be considered worth taking to court can be dealt with in such a procedure.[121] Furthermore, there is a potentially lower threshold for Frontex to make right the wrong caused by it or its employees, as a well working internal mechanism can enhance the reputation of an agency.[122] Moreover, if an agency adopts a human rights-friendly approach, then it could act more flexible than a court as it does not need to take into account doctrine or case law to the same extent. This is especially useful when dealing with the complex question of responsibility.[123] Frontex would not have to follow stringent admissibility criteria and thus could leave more room for justice,[124] making it again likelier for victims to complain as they see a chance of something being actually achieved.

Connected to accessibility is impartiality. This can be described as factual and institutional independence with no hierarchical links between the people responsible for the alleged rights violation and the body entrusted with deciding on the complaint.[125] It is connected to the pre-condition as the impartiality has to be communicated to the refugees for them to feel safe to report an incident. Nevertheless, anonymous complaints should also be permitted.[126] Impartiality is important, as it prevents the alleged perpetrators from having influence over the outcome of the complaint. To ensure that a system is not only formally, but also actually independent, transparency should be promoted, and the findings of the complaints should be published.[127] Furthermore, there should be no broad margin of appreciation on the side of the people deciding on the complaint,[128] also to prevent undue influence on the outcome.

Assuming that the body responsible for dealing with the complaint is independent, it also has to be able to work effectively. This includes being able to promptly investigate the

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[120] Mariolina Eliantonio, 'Organisation of Judicial Review in Administrative Matters and Intra-Administrative Objection Procedure' in Chris Backes and Mariolina Eliantonio (eds), *Judicial Review of Administrative Action* (Hart 2019), 104; European Ombudsman, 'Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex' (OI/5/2012/BEH-MHZ 2013), para 41.
[121] European Ombudsman, 'Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex' (OI/5/2012/BEH-MHZ 2013), para 41.
[122] Ibid, para 44.
[123] Mikael Cederbratt, 'Frontex: human rights responsibilities' (Document 13161, PACE 2013), 13.
[124] European Ombudsman, 'Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex' (OI/5/2012/BEH-MHZ 2013), para 41.
[125] Sergio Carrera and Marco Stefan, '*Complaint Mechanisms in Border Management and Expulsion Operations in Europe*' (Centre for European Policy Studies 2018), 5 and 11.
[126] Ibid, 25.
[127] LIBE Committee on Civil Liberties, Justice and Home Affairs, 'Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations' (European Parliament 2021), 15.
[128] European Ombudsman, 'Decision of the European Ombudsman closing own-initiative inquiry OI/5/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex)' (OI/5/2012/BEH-MHZ 2013, para 78.

complaint. A sufficient budget and staff number to do so is an implied condition for that capability.[129] A small team with a limited budget might not be able to investigate all complaints, resulting in either unjustifiably rejecting some complaints or not investigating any complaint properly. Furthermore, the investigations have to be able to lead to a remedy.[130] Otherwise, it would be unable to offer a final resolution for the victim. In the same regard, a right to appeal should be offered.[131] If a mechanism functions this way, then it could also be able to offer a solution in a timelier manner than a court.[132] This could lead to faster justice and help in actively preventing future wrongs from happening.

It is submitted that if a complaint mechanism fulfils these conditions, it can be considered as effective for the purposes of this essay. Nevertheless, it is important to realise that they should never completely replace court proceedings,[133] or create additional hurdles to accessing judicial remedies.[134] To assess whether the Internal Complaint Mechanism of Frontex fulfils the expectations set in this chapter, it must first be discussed how it functions.

2.2 The mechanism in practice

The Individual Complaint Mechanism of the Agency is defined in Article 111 of the Regulation and further defined by the respective Management Board Decision.[135] The first paragraph reads as follows:

> The Agency shall, in cooperation with the fundamental rights officer, take the necessary measures to set up and further develop an independent and effective complaints

[129] David Fernandez-Rojo, 'The Introduction of an Individual Complaint Mechanism within Frontex: Two Steps Forward, One Step Back' (2016) 4(5) Tijdschrift voor Bestuurswetenschappen en Publiekrecht 225, 232-233.
[130] Sergio Carrera and Marco Stefan, '*Complaint Mechanisms in Border Management and Expulsion Operations in Europe*' (Centre for European Policy Studies 2018), 26.
[131] Chris Jones and others, 'Deportation Union: Rights, accountability, and the EU's push to increased forced removals' (Statewatch 2020), 53.
[132] Mariolina Eliantonio and Augustina Pirrello, 'A board of appeals for Frontex: panacea for violations or another patch in the incomplete system of accountability?' (2024) 49(1) European Law Review 51, 61; European Ombudsman, 'Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex' (OI/5/2012/BEH-MHZ 2013), para 43.
[133] Madalina Busuioc, *European Agencies: Law and Practices of Accountability* (OUP 2013), 263.
[134] Mariolina Eliantonio and Augustina Pirrello, 'A board of appeals for Frontex: panacea for violations or another patch in the incomplete system of accountability?' (2024) 49(1) European Law Review 51, 63-64.
[135] Management Board, 'Management Board Decision 19/2022 of 16 March 2022 adopting the Agency's rules on the complaints mechanism' (Frontex 2022).

mechanism in accordance with this Article to monitor and ensure respect for fundamental rights in all the activities of the Agency.[136]

In order for a complaint to be admissible, it has to fall within the scope of the mechanism. The personal scope is limited to individuals who are directly affected by an action or inaction of Frontex,[137] with the exception of complaints concerning the misuse of force.[138] This also includes lawyers or other representatives of the people affected.[139] Additionally, it is not possible to submit an anonymous complaint.[140] The temporal scope is one year from the date on which the violation allegedly took place.[141] The substantive scope covers action and inaction in a number of different types of activities in which Frontex staff is active, like joint operations or rapid border interventions.[142] There is no limitation with regards to the territorial scope, which means that also Frontex activities in third countries can be addressed. Furthermore, complaints have to be substantiated and deal with concrete fundamental rights violations.[143] In practice, the complaint is filed via a standardised form.[144] This form must be available on the website of Frontex as well as in a hard copy version in every place where the Agency is active.[145] Nevertheless, complaints that are not filed using the standardised form are also considered,[146] as long as they are submitted in writing.[147]

After a complaint is issued, the Fundamental Rights Officer (FRO) handles it.[148] They are a Frontex staff member responsible for the Agency's fundamental rights compliance,

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[136] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L295/1, Art 111(1).
[137] Ibid, Art 111(2).
[138] Management Board, 'Management Board Decision 19/2022 of 16 March 2022 adopting the Agency's rules on the complaints mechanism' (Frontex 2022), Art 14.
[139] Ibid, Art 3(3).
[140] Ibid, Art 5(3)(h).
[141] Ibid, Art 5(3)(f).
[142] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L295/1, Art 111(2).
[143] Ibid, Art 111(3).
[144] To be found in Frontex, 'Submit complaint' (frontex.europa.eu) <https://microsite.frontex.europa.eu/en/Complaints> accessed 29 January 2025.
[145] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L295/1, Art 111(10).
[146] Ibid.
[147] Management Board, 'Management Board Decision 19/2022 of 16 March 2022 adopting the Agency's rules on the complaints mechanism' (Frontex 2022), Art 3(4).
[148] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L295/1, Art 111(4).

appointed by the Management Board,[149] which is the governing body of the Agency.[150] The FRO then reviews the admissibility of the complaint.[151] This will usually be done within 30 days.[152] If it is found to be inadmissible, then the complainant is going to be informed about that and possible other ways to address the issue.[153] There no appeal possible, only a reassessment in case of newly submitted evidence.[154]

Admissible complaints are registered by the FRO and the complainant is informed.[155] If the complaint concerns a team member of the host state or another participating Member State, then it will be submitted to the Executive Director of the Agency and to the state concerned.[156] Then the state is responsible for an appropriate follow-up.[157] If the complaint concerns a Frontex staff member, then it will only be forwarded to the ED.[158] The FRO also recommends a follow-up, but the ED is then responsible for it. In both cases the complaint can still be declared to be unfounded. Also here, there is no right to appeal, but new evidence can be submitted within a year.[159]

2.3 An evaluation of the mechanism

An attentive reader might have already noticed that there is a significant gap between the mechanism in place and the mechanism that should be in place, as established priorly. This section aims to explore this gap and discuss its implications on accountability.

As a starting point, the precondition for a well-functioning mechanism, its accessibility, must be discussed. In doing so, not only the rules and practices in place, but also the statistics surrounding the mechanism must be considered. The most recent available numbers suggest

[149] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L295/1, Art 109(1).
[150] Ibid, Art 100.
[151] Ibid, Art 111(4).
[152] Management Board, 'Management Board Decision 19/2022 of 16 March 2022 adopting the Agency's rules on the complaints mechanism' (Frontex 2022), Art 5(5).
[153] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L295/1, Art 111(5).
[154] Ibid.
[155] Ibid.
[156] Ibid, Art 111(4).
[157] Ibid, Art 111 (7).
[158] Ibid, Art 111(4).
[159] Management Board, 'Management Board Decision 19/2022 of 16 March 2022 adopting the Agency's rules on the complaints mechanism' (Frontex 2022), Art 8(4) and 10(5).

that 64 complaints were filed in 2023, which is a slight decrease from 2022, but overall, a considerable increase to the years prior.[160] For reference, the highest number before 2022 was 2021 with 27 complaints.[161] The prior numbers were seen as very low, also by FRO,[162] but from that alone it cannot be concluded that an increase in complaints is a necessary sign of accessibility. It could also just show an increase in violations. This possibility is not improbable, given that not just the number of complaints increased significantly, but also the number of operational staff,[163] and of returns.[164] This does not mean that there is a causal relationship, as the statistical data available and the information about the individual complaints are simply insufficient to come to that conclusion.[165] Nevertheless, it is important to consider that there is a correlation between the numbers.

Besides the question of correlation or causation, the reasons given for the still relatively low number of complaints have to be considered. Firstly, the FRO pointed out that the mechanism was not well known in the beginning,[166] and assuming that the increased number of complaints is not just a sign of an increased number of violations, there was an improvement in accessibility. At least on the side of the FRO, there were efforts to increase the mechanism's visibility and usability by increasing awareness of Frontex personnel,[167] and other attempts to utilise the existing structures for providing information, as well as hardcopy complaint forms, to refugees.[168] Nevertheless, there are consistent problems in communication with refugees, mostly due to a language barrier.[169] This can severely hinder effective awareness campaigns and calls into question the sufficiency of the staff member's training. On the other side, there was a significant improvement in the mobile accessibility of the complaint form,[170] and the

[160] Fundamental Rights Officer Jonas Grimheden, '2023 Annual Report of the Fundamental Rights Officer of Frontex' (Frontex 2024), 29.
[161] Ibid.
[162] European Ombudsman, 'Report on the meeting of the European Ombudsman's inquiry team with FRONTEX representatives' (OI/5/2020/MHZ 2022), para 1.
[163] Frontex, 'Why us' (frontex.europa.eu 2024) <https://www.frontex.europa.eu/careers/who-we-are/why-us/#:~:text=We%20employ%20over%202500%20people,European%20law%20enforcement%20uniformed%20service.> accessed 30 January 2025.
[164] Frontex, '2023 in brief' (Frontex 2024).
[165] There is no data on the specific complaints, but only a grouping in very broad categories in Fundamental Rights Officer Jonas Grimheden, '2023 Annual Report of the Fundamental Rights Officer of Frontex' (Frontex 2024), 29.
[166] European Ombudsman, 'Report on the meeting of the European Ombudsman's inquiry team with FRONTEX representatives' (OI/5/2020/MHZ 2022), para 1.
[167] Ibid, para 4-5.
[168] Ibid, para 7-8.
[169] Ibid, para 6.
[170] The document can be found in 25 languages and the complete list can be found under Frontex, 'Submit complaint' (frontex.europa.eu) <https://microsite.frontex.europa.eu/en/Complaints> accessed 30 January 2025.

complaint itself can be filed in any language.[171] Nevertheless, the website leading to the complaint form itself is only available in English,[172] and it is still relatively difficult to find the form's mobile version.[173]

Secondly, the FRO gave the reason that refugees might fear retaliation if they complain about a fundamental rights violation.[174] The attempts of them to make refugees and staff members aware of the mechanism and its opportunities are surely helping in that regard, but there are still issues that make it impossible for that problem to be completely resolved. With regard to complaints issued in hardcopy form, there is no system that allows for the complaint to be registered on the spot, and it has to be first sent to the FRO's office.[175] This gives, at least in theory, the possibility for staff members to let complaints disappear and even if this never happens, one could not blame a refugee who fell victim to a violation by a staff member to trust another staff member to forward the complaint. This well-founded fear might be a reason why some victims do not submit a complaint. In the same vein, complaints cannot be anonymous,[176] although it is well established that victims might fear retaliation if anonymity is not possible. This may be an objectively unfounded fear, but it is also easy to understand why this fear exists. Moreover, it is still not possible to submit an oral complaint,[177] which shows that the practical problems that an irregular refugee might face were not fully considered.[178]

Thirdly, even the FRO is of the opinion that the scope is limited.[179] Being directly affected is a high threshold, which specifically does not allow for public interest complaints. Here, it should be considered that the mechanism does not just have a redress function, but a twofold function of redress and monitoring.[180] While the personal scope is not limiting the first

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[171] Management Board, 'Management Board Decision 19/2022 of 16 March 2022 adopting the Agency's rules on the complaints mechanism' (Frontex 2022), Art 3(6).
[172] See, Frontex, 'Submit complaint' (frontex.europa.eu) <https://microsite.frontex.europa.eu/en/Complaints> accessed 30 January 2025.
[173] The hyperlink to the forms on the mobile version of the Complaints mechanism side (Frontex, 'Complaints mechanism' (frontex.europa.eu) <https://www.frontex.europa.eu/fundamental-rights/complaints-mechanism/> accessed 30 January 2025) is very small and can be hard to find, especially as the automated translation of the page is lacking.
[174] European Ombudsman, 'Report on the meeting of the European Ombudsman's inquiry team with FRONTEX representatives' (OI/5/2020/MHZ 2022), para 1.
[175] Ibid, para 9.
[176] Management Board, 'Management Board Decision 19/2022 of 16 March 2022 adopting the Agency's rules on the complaints mechanism' (Frontex 2022), Art 3(1).
[177] Ibid, Art 3(4).
[178] Chris Jones and others, 'Deportation Union: Rights, accountability, and the EU's push to increased forced removals' (Statewatch 2020), 53.
[179] European Ombudsman, 'Report on the meeting of the European Ombudsman's inquiry team with FRONTEX representatives' (OI/5/2020/MHZ 2022), para 1.
[180] ECRE, 'ECRE Comments on the Commission Proposal for a Regulation on the European Border and Coast Guard' (ECRE 2018), 21.

function, it does hinder the monitoring function. The question is, why should it be important for a monitoring mechanism whether a substantiated complaint, especially regarding a systematic issue, comes from a directly affected individual, or from an NGO. Also, it could fill the gap of incidents that were not complained about because of the refugees not considering filing a complaint due to fear or their socio-economic conditions. Confronted with that issue, the FRO claimed they can issue an Expression of Concern to the respective state, the ED, or the Management Board, when they come across an inadmissible complaint that raises an important issue.[181] While this is true, it does not give the FRO the option to investigate as they only have the option to do so with admissible complaints. This largely renders that procedure pointless. The importance of allowing for non-directly affected parties to issue a complaint was even highlighted by the European Ombudsman as early as 2013.[182]

Because of all the reasons considered above, it is certain that some improvements were made, but also that the mechanism is still highly lacking in accessibility and that even the current numbers of complaints are still very low.

Even though the accessibility is not ideal, one must still consider the other aspects relevant for a working complaint mechanism, as they are still of relevance for the complaints submitted. Thus, it has to be assessed whether the mechanism allows for impartial assessment. The FRO is responsible for registering a complaint and assessing its admissibility. They have no hierarchical link with anyone who could be responsible for a violation of fundamental rights.[183] Furthermore, as seen above, there are attempts in communicating to the refugees how the mechanism works.[184] This makes the mechanism impartial up until the admissibility stage is completed. The next step, which is the assessment of the merits, is not done by the FRO, but by the ED or the respective state.[185] With regards to the ED, the staff members are under their instruction,[186] which means that either their staff or they themselves, if the violation resulted

[181] European Ombudsman, 'Report on the meeting of the European Ombudsman's inquiry team with FRONTEX representatives' (OI/5/2020/MHZ 2022), para 25.
[182] European Ombudsman, 'Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex' (OI/5/2012/BEH-MHZ 2013), para 25.
[183] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L295/1, Art 109.
[184] A leaflet explaining the rights can be found under Frontex, 'Complaints mechanism' (frontex.europa.eu) <https://www.frontex.europa.eu/fundamental-rights/complaints-mechanism/> accessed 30 January 2025.
[185] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L295/1, Art 111(6) and (7).
[186] ECRE, 'ECRE Comments on the Commission Proposal for a Regulation on the European Border and Coast Guard' (ECRE 2018), 23.

from an ED's order, is responsible for the violation. There is a direct hierarchical link and no institutional independence. After all, this is the same person that, when confronted with systematic fundamental rights violations, gave an answer that could be considered "perplexing, irrelevant, and abstract".[187] Nevertheless, the FRO recommends an appropriate follow.[188] This does reduce the margin of appreciation of the ED,[189] but it is still considerable, which stands in direct contrast to the recommendations of the European Ombudsman.[190]

In other areas, the advice of the FRO was often ignored by ED and Management Board,[191] the cooperation was limited,[192] and the ED does not even have an ultimate time limit to reply to the FRO.[193] Regarding complaints forwarded to states, the FRO has no possibility to recommend.[194] This means that the impartiality is largely dependent on the individual state. Inter alia, states like Greece, where pushbacks are proven to be systematic and a standard practice for the authorities.[195]

> This is a rather limited mandate for an agency whose task it is to
>
> ensure European integrated border management at the external borders with a view to managing those borders efficiently in full compliance with fundamental rights and to increasing the efficiency of the Union return policy.[196]

[187] Front-Lex, 'Case Application' (Front-Lex 2021), 46.
[188] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L295/1, Art 111(6).
[189] Chris Jones and others, 'Deportation Union: Rights, accountability, and the EU's push to increased forced removals' (Statewatch 2020), 53.
[190] European Ombudsman, 'Decision of the European Ombudsman closing own-initiative inquiry OI/5/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex)' (OI/5/2012/BEH-MHZ 2013), para 78.
[191] Statewatch, 'Frontex: the ongoing failure to implement human rights safeguards' [2022] Statewatch <https://www.statewatch.org/analyses/2022/frontex-the-ongoing-failure-to-implement-human-rights-safeguards/> accessed 28 January 2024.
[192] European Ombudsman, 'Decision in OI/5/2020/MHZ 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' (OI/5/2020/MHZ 2021), para 17.
[193] Chris Jones and others, 'Deportation Union: Rights, accountability, and the EU's push to increased forced removals' (Statewatch 2020), 53.
[194] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L295/1, Art 111 (7).
[195] *G.R.J. v. Greece* (2024) 15067/21, para 225; *A.R.E. v. Greece* (2025) 15783/21, para 228.
[196] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L295/1, Art 1.

The limitations to the mechanism make it impossible for the Agency to fulfil that task as it is forced to give the control to the states that allegedly violated fundamental rights and can only examine its own staff.[197]

Furthermore, it was established that ensuring that a system is not only formally, but also actually independent, means that transparency should be promoted, and the findings of the complaints published.[198] This is technically the case for Frontex, as information on the follow-ups is published.[199] Nevertheless, the information provided is rather vague, relying on grouping the cases into broad categories rather than giving specific information on the individual cases.

Therefore, it is apparent that the mechanism at hand is not impartial as there are significant hierarchical relationships between the people that allegedly committed the violations and the people handling the complaints, with no institutional independence. This makes the system very prone to abuse.

The last question remaining is whether the FRO, and to some extend also the ED, can at least work effectively in safeguarding fundamental rights compliance in the narrow margin given to them.

It is clear that sufficient resources have to be provided to ensure efficiency. In the case of the FRO's office the most recent source states that there are only two people responsible for complaint handling and there is no indication that any staff members were added since then or that there are any other people supporting them.[200] This could also explain why the number of admissible complaints stayed relatively consistent, although the total number of complaints increased. For example, there were 5 admissible complaints out of 15 in total in 2017 and 4 admissible complaints out of 64 in total in 2023.[201] That the numbers are that stagnant is remarkable and not reflective of any trend in migration management. It raises the question of whether the FRO's office simply does not have the capacity to process more admissible complaints. Moreover, there is no specific information on the individual inadmissible

[197] ECRE, 'ECRE Comments on the Commission Proposal for a Regulation on the European Border and Coast Guard' (ECRE 2018), 21.
[198] LIBE Committee on Civil Liberties, Justice and Home Affairs, 'Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations' (European Parliament 2021), 15.
[199] Fundamental Rights Officer Jonas Grimheden, '2023 Annual Report of the Fundamental Rights Officer of Frontex' (Frontex 2024), 48.
[200] European Ombudsman, 'Report on the meeting of the European Ombudsman's inquiry team with FRONTEX representatives' (OI/5/2020/MHZ 2022), para 20.
[201] Fundamental Rights Officer Jonas Grimheden, '2023 Annual Report of the Fundamental Rights Officer of Frontex' (Frontex 2024), 29.

complaints, but only a chart where the inadmissible complaints are grouped into vague categories according to the reason for their inadmissibility.[202] This does not allow for a proper analysis of the inadmissible complaints, again showing a problem with transparency.

Furthermore, the FRO has virtually no control over the states that ultimately receive the complaints.[203] This is most apparent in the fact that the communication between FRO and state authorities is difficult and that, even upon request, some authorities refuse to transmit valuable evidence.[204] Also, the FRO openly admits that they are forced to close complaints when only an inconclusive reply or no reply is received from a state, and no better one can be expected.[205] In fact, no national team member was ever removed due to a complaint,[206] nor does Frontex have the power to even temporarily suspend a national team member,[207] and Frontex is notorious for not suspending or terminating activities in Member States committing serious violations.[208]

To conclude on the effectiveness of the mechanism, one must also have a look at all of the published conclusions to the complaints. From 2019 to 2022, there were 138 complaints, of which 30 were admissible.[209] From these 30, only four were partly successful, three of them only because the ECtHR was involved.[210] Also, as established, there is no right to appeal. All of this shows that the mechanism is not effective and does not offer a significant improvement in fundamental rights accountability. This implies that there is not a single reliable way for an individual whose fundamental rights were violated by Frontex to hold the Agency accountable. All possibilities, including external and internal mechanisms, have proven to be ineffective.

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[202] Fundamental Rights Officer Jonas Grimheden, '2023 Annual Report of the Fundamental Rights Officer of Frontex' (Frontex 2024), 29.
[203] Consultative Forum on Fundamental Rights, 'Eleventh Annual Report' (Frontex 2024), 82-83.
[204] Ibid, para 22; in the four annual reports available, there were two conclusions on complaints where this issue was specifically addressed: CMP-2020-00019 in Fundamental Rights Officer Jonas Grimheden, 'Annual Report Fundamental Rights Officer 2020' (Frontex 2021), 20; and 2020-00018 in Fundamental Rights Officer Jonas Grimheden, 'The Fundamental Rights Officer Annual Report 2021' (Frontex 2022), 27.
[205] European Ombudsman, 'Report on the meeting of the European Ombudsman's inquiry team with FRONTEX representatives' (OI/5/2020/MHZ 2022), para 33.
[206] Ibid, para 30.
[207] ECRE, 'ECRE Comments on the Commission Proposal for a Regulation on the European Border and Coast Guard' (ECRE 2018), 23.
[208] European Ombudsman, 'Decision on how the European Border and Coast Guard Agency (Frontex) complies with its fundamental rights obligations with regard to search and rescue in the context of its maritime surveillance activities, in particular the Adriana shipwreck (OI/3/2023/MHZ)' (OI/3/2023/MHZ 2024), 19.
[209] Fundamental Rights Officer Jonas Grimheden, '2023 Annual Report of the Fundamental Rights Officer of Frontex' (Frontex 2024), 29.
[210] CMP-2020-00013 in Fundamental Rights Officer Jonas Grimheden, 'Annual Report Fundamental Rights Officer 2020' (Frontex 2021), 20; and 2020-00003, 2020-00005 & 00006 in Fundamental Rights Officer Jonas Grimheden, 'The Fundamental Rights Officer Annual Report 2021' (Frontex 2022), 27.

Recommendations and Conclusions

The prior analysis shows some clear shortcomings in the different types of direct accountability, and it is submitted that without a well-functioning method to hold Frontex accountable, the human rights of refugees are threatened. To overcome this, the following recommendations should be considered.

Recommendations with regard to external accountability

While the other Actions should not be completely dismissed and could be revised in the future, the only Action that seems to currently hold potential in holding Frontex accountable is the Action for Damages. This clearly shows the importance of the two upcoming cases to be decided by the CJEU in keeping that option open and using the advantages that the Action brings for fundamental rights accountability. The CJEU seems to be aware of the importance of its decisions, which is welcomed, but it is important for it to take certain aspects into account, no matter whether the Grand Chamber will decide over the cases itself or refer them back to the General Court.

First, while the criteria for the Action are cumulative, the Court should analyse all of them and not solely rely on the question of whether there was a direct link or actual damage suffered, as the General Court has first done. This would be a clear sign that future attempts to use the Action will be considered, no matter the outcome of the present cases. Also, even if the Court dismisses both of the pending cases, it would be a clear signal if it finds there to be an unlawful action committed by Frontex in at least one of these cases. This would again show a willingness to engage with Frontex's accountability.

Second, it should be acknowledged that in situations of an alleged violation of the principle of non-refoulment, it is hard for the victim to gather evidence. This should be considered in deciding the cases, especially *Hamoudi*. In doing so, the ECtHR's approach of reversing the burden of proof when the applicant has *prima facie* evidence should be used. This does not mean that the Court should necessarily shift the burden of proof, but that it should be clear and signal in which cases it is willing to do so. This would lead to further clarity in the CJEU's approach and give relevant guidance for future action.

Recommendations with regard to internal accountability

As shown by the prior considerations, the current Individual Complaint Mechanism is not an example of a well working internal fundamental rights accountability mechanism. Nevertheless, it is to be acknowledged that the debate on another enlargement of Frontex and the resulting need for a new Frontex Regulation represents an opportunity for the mechanism to be improved, but for an improvement of the mechanism, some considerations are necessary.

First, while the recent steps on that issue are welcome, the accessibility must be improved. This should be carried out by improving the complaint forms for mobile devices and the staff language training. In addition, complaints should be able to be registered on the spot to avoid the potential fear of retaliation by the staff members, and oral complaints should be permitted. Also, it is important for the scope to be changed. The current system only allows for directly affected persons to complain, but to improve the monitoring function of the mechanism, this should be extended to non-directly affected persons, especially NGOs.

Second, a new mechanism should be more impartial than the current one. In particular, the handling of the complaints regarding Frontex staff members should not be left to the ED but to the FRO. This would avoid conflicts of interest and improve impartiality. Also, more information on the specific complaints should be made publicly accessible.

Third, the current mechanism already does not allow for an efficient handling of complaints within the narrow margins given by the Regulation. This is due to low staff numbers and a weak grip on Member States with regard to complaints about national staff. The first issue would be even greater if the number of tasks and operational staff were to newly increase, enhancing the necessity for additional staff members in the FRO's office. This would be especially relevant if the prior recommendations are implemented, due to the resulting increase in workload. To address the second issue, Frontex should have at least the option to temporarily suspend a member of the national staff if the FRO deems that to be necessary. Also, suspending or terminating operations in case of a Member State not cooperating in human rights protection, especially with regard to the Individual Complaint Mechanism, should be considered.

Final comments

For the considerations raised in this essay, it is to be said that the current mechanisms do not function well in protecting fundamental rights and do not work effectively towards achieving a rights-respecting European Union. They make it almost impossible to hold Frontex accountable for fundamental rights violations and have thus shown to be without any practical effect. Nevertheless, one must not confuse the current situation with a state of hopelessness. As the former Advocate General Sharpston pleaded in the *WS* case, the Frontex Regulation constitutes a "safety net that preserves […] the honour of the European Union as an entity that values and respects both the rule of law and fundamental rights",[211] and one must conclude that if the Union and its organs embrace this, Frontex does have the chance to not just be held accountable, but to keep up with its promise and act as a guarantor of fundamental rights.

[211] Eleanor Sharpston in CJEU, 'Hearing C-679/23 P' (Curia 2025) <https://curia.connectedviews.eu/embed/meeting/949d4cfc-fafa-49d7-7205-08dd2bfacae7> accessed 20 March 2025.

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