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The implications of the 2023 Frontex judgment on the EU agencies and the legal credibility of the Court

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In September 2023, the General Court of the Court of Justice of the EU ruled that Frontex did not incur non-contractual liability for deporting a Syrian family from Greece to Turkey whose asylum claims were not examined by the Greek authorities. With its [2023 Frontex judgment](#), the Court has opened the door not only to criticism on its own legal reasoning and the protection of fundamental rights, but also on the *raison d'être* of EU agencies in general.

This contribution has three aims. First, we question the Court's legal credibility due to its erroneous reasoning on what is a non-contested, relatively easy, unobscured element of legal doctrine. The law on non-contractual liability is straightforward and does not require highly specialized legal expertise. The Court's misapplication of the law on non-contractual liability is far from an understandable misstep in a highly complex and technical legal field. We, thus, not only second the critique already raised by other commentators, but we add that the Court's reasoning is of such poor legal quality that it affects its credibility as a court of law(yers).

Second, we want to reiterate [our earlier concerns](#) about the operational powers of Frontex and individual legal protection. Finally, we argue that shielding Frontex from meaningful responsibility is not only harmful for victims of fundamental right violations committed by Frontex. Going beyond this evident point in case, we will argue in this contribution that it also compromises the institutional framework of EU agencies, ultimately undermining the *raison d'être* of Frontex and EU agencies in general. We conclude, however, on a positive note: if the applicants launch an appeal against the judgment, the Court has an opportunity to regain its legal credibility by simply re-applying existing law.

The case brought before the Court

Since the facts of the 2023 Frontex judgment and the legal framework on Frontex' operations have been discussed extensively elsewhere, we will abstain from reiteration and refer to [Davies' blog post on this website](#). Legal commentators, such as [Cornelisse](#), [Fink and Rijpma](#), [De Coninck](#), Davies, and [Partipilo](#), have correctly criticized the Court for misapplying the law on non-contractual liability. The Court overlooked the possibility of joint liability: the fact that the Greek authorities bear responsibility does not preclude that Frontex may also be responsible. This relates to the problem of many hands, as discussed by [Gkliati](#), as well as the diffused distribution of authorship between the EU and the Member States, as we have identified previously [here](#). Moreover, because the Court found – albeit wrongly – no causation, it did not examine the first condition for non-contractual liability, namely wrongful conduct. But commentators correctly point out that Frontex' conduct was wrong because by deporting the family without examining the asylum application, Frontex clearly violated its positive and negative obligations under the EU Regulation 2016/399, the EU Charter, the ECHR and international law (see [Molnár](#)), including the principle of non-refoulement. Additionally, Cornelisse and De Coninck have voiced concern about how the ruling shields Frontex from any meaningful responsibility. Lastly, Cornelisse suggested that in these types of cases the Court should adopt a presumption of non-material damage and develop a remedy more tailored to the factual nature of Frontex operations.

Legal credibility of the Court

After finding the applicants' claim to be admissible – for the first time ever [since applicants have attempted to bring Frontex before the Court](#) – the Court found that there was no 'sufficient direct causal link' between the execution of the return operation by Frontex, which was carried out jointly with the Greek authorities, and the material and immaterial damages claimed by the family. According to the Court, the direct cause of the acclaimed damages was the fact that a forced return operation was ordered without a proper examination of the asylum application. Since organizing an asylum procedure, granting international protection, and ordering the forced return fall under the exclusive competences of the Greek authorities, not Frontex', the Court found the damages suffered by the family are 'the sole responsibility of the host Member State', i.e. Greece.

Joint liability of Frontex and Greece

It remains unclear why the Court overlooked the concept of joint liability, as already noted by Davies and [Rijpma and Fink](#). Surely, the answer must not be that the non-contractual liability of Frontex is a completely *sui generis* legal arrangement. The non-contractual liability of Frontex must be established in accordance with 'the general principles common to the laws of the Member States' (Art. 60 of Regulation 2016/399). Joint liability is such a basic legal arrangement [common to the laws of the Member States](#).

Sufficiently direct causal link

The Court's deployment of the 'sufficiently direct causal link' doctrine is an equally worrisome perversion of the basic rules on causation under the laws of liability. Under the rules of causation, the wrongful act must be a *conditio sine qua non* for the damages suffered. But a strict or literal application of the *conditio sine qua non* may lead to an almost infinite regress of prior causes, e.g. the knife wound is ultimately caused by the steel manufacturer that supplied the steel of which the knife is made. To mitigate the unreasonable effects of the *conditio sine qua non* the cause must be sufficiently direct, as in: proximate ([see Section 11.59 with reference to relevant case law of the ECJ](#)). The Court completely reverses the logic of the direct causal link doctrine. In the case at hand, the operation by Frontex is the most proximate and direct cause of the damages suffered by the family. The material and immaterial damage materialized only because of the physical execution of the return order. In fact, we find that the return order and Greece's failure to examine the asylum applications, which the Court frames as the direct causes of the alleged damage, are from a legal technical perspective more remote causes than the physical deportation.

Similarly to our previous argument on joint liability, the direct causal link doctrine as explained above (and not the Court's reversal of the doctrine) is another basic legal arrangement common to the laws of the Member States. This raises doubts about the legal credibility of the Court. How can litigants still have faith in a court, if the judges are not aware of even the most basic legal arrangements? Or worse, what if the judges are aware of such basic legal conceptions, but deliberately ignore them? Legal credibility is compromised whenever litigants cannot rely on a court fulfilling its most basic task, namely upholding and applying existing law. To be sure, sometimes courts may contribute to legal change, and conduct an evolutive interpretation of the law. But in the case at hand, the Court clearly did not intend to make a new interpretation of the law on non-contractual liability. The Court simply misapplied the law.

Either the Court is not aware of these basic legal constructions or it deliberately ignores them. Both answers are problematic from a rule of law perspective.

Presumption of immaterial damage and the absolute character of non-refoulement

The large majority of non-contractual liability cases under domestic law consists of a private actor seeking compensation for pecuniary losses caused by wrongful conduct of another private actor. In standard non-contractual liability cases, a claimant must, apart from the wrongful conduct, also prove that he suffered damage: in ordinary liability cases, there is no presumption of damage. The Court seems to have treated the case at hand as

such a standard non-contractual liability case, completely missing the distinctive aspects of the case.

First, the facts of the case do not point to your average kind of carelessness or non-compliance with mandatory law. The Frontex operation, jointly executed with the Greek authorities, has all the hallmarks of a violation of the principle of non-refoulement, amounting to a serious fundamental rights violation, as noted by Cornelisse. Second, the fundamental right violation by Frontex are not caused by legal but by factual acts. [Elsewhere](#), we have argued that the EU judicial system and legal thought are relatively well-equipped to address the arbitrary exercise of legal powers, but have little to no experience with constraining factual power. Following this reasoning, we argue that the Court should not have construed the family's application as a purely patrimonial claim for pecuniary compensation. Non-contractual liability, too, serves a [function](#) of retribution, enforcement and prevention.

To this end, the Court should have applied the presumption of immaterial damage. In effect, in the event of serious fundamental right violations the presumption exists that the victim suffered immaterial damage. Sufficiently serious fundamental right violations engender in and of themselves moral injury to their victim, because some infringements go at the heart of human dignity, personal security and personal freedom. This is standing case law of the [Court of Justice](#) and the [ECtHR](#). Moreover, it relates to the character of the principle of non-refoulement, laid down in Article 4 of the EU Charter of Fundamental Rights, corresponding to Article 3 of the European Convention on Human Rights. This concerns an [absolute and non-derogable](#) right, entailing that no interference is allowed under no circumstances. This is in line with the Court's standing case law on fundamental rights in general and fundamental rights of asylum seekers in particular. By physically deporting the family Frontex materialized and made irreversible the denial of an asylum procedure. This in and of itself is likely to cause a well-founded fear of inhuman or degrading treatment, resulting in *refoulement*. This fear was well-founded since the risk of inhuman or degrading treatment was never examined and verified by an adequate asylum procedure and independent judicial review.

In addition to the procedural and material violations of the principle of non-refoulement that seem to lay before us, the factual elements of the deportation – in and of itself – also point towards a violation of Article 4 of the Charter. Indeed, the return operation seemed of a coercive nature, including the presence of uniformed escort officers and police officers, and the separation of family members during flight and the prohibition to speak – facts that were not contested by Frontex. These elements of the return operation are more than likely to cause humiliation, distress and anxiety to the deportees. The [Court of Justice](#) has previously accepted that Dublin transfers to EU Member States may cause a violation of Article 4 Charter in case of the significant aggravation of, for example, the

mental health of the deportees. In the 2023 Frontex judgment, the Court completely ignores the European case law on non-material damages, including its own. Again, this raises questions about the Court's legal credibility.

EU agencies

In addition to the above-discussed threats to the Court's legal credibility, we argue here that the Court's reasoning puts the functioning of Frontex at risk. If this judgment becomes standing case law, indeed, Frontex will be shielded from any meaningful legal responsibility. This is obviously [problematic](#) for the effective human rights protection of individuals seeking protection in Europe. Additionally, we believe it may also influence the functioning of [EU agencies](#).

In order to execute certain public tasks, secondary EU law bestows legal competences and resources upon an agency. Situations may occur in which an agency uses these powers inadequately or acts contrary to the law, regardless of whether or not this is done intentionally. Indeed, with the power to act, inevitably comes the possibility to act wrongfully. As a result, an agency must be able to assume responsibility for its failures, just as it must be able to take credit for its successes. In effect, by claiming responsibility for its acts an institution actually signals that it deserves to have the power to act. It is a sign that the institution can bear the responsibility that comes with the power to act. More generally speaking, competences and responsibility go hand in hand.

This raises the question of how Frontex can take credit for its alleged successes, if it is not responsible for its failures. Whenever Frontex screws up, the Court effectively puts the responsibility for human rights violations on the Member States exclusively. Why should the other EU institutions and the Member States continue to give political and financial support to an EU agency, if responsibility ultimately lies with the Member States anyway? Moreover, it is unclear what such a responsibility would look like and how applicants would be able to claim before the national courts that a Member State should be held responsible for factual acts carried out in Greece by Frontex staff. Eventually, this would place the burden of border management yet again on Greece, that, due to its geographical location, would be held responsible for any and all mistakes made at the external borders of Europe. This stands in stark contrast with the fact that the 'management' of the external borders is an endeavor much pursued by all Member States, as proven by the existence of Frontex.

Paradoxically, by shielding Frontex from any meaningful responsibility and accountability for its actions, the Court undermines the very reasons why Frontex received its competences to act in the first place. Rather than doing Frontex a favor, it actually undermines its *raison d'être*, and by extension the logic of EU agencies in general. In an almost Kantian way, the Court should give Frontex the opportunity to assume

responsibility for Frontex' own sake. Similarly, we identify a potential threat to the *raison d'être* of all EU agencies [with factual power](#), such as the European Medicines Agency, Eurojust, or the European Aviation Safety Agency. If a similar reasoning as in the 2023 Frontex judgment would be applied to other agencies, this would entail a transfer of an agency's obligations and responsibilities under EU law to the Member States. This would not only negate the situation on the ground, it would ultimately undermine an agency's own competences and power to act.

Next procedural steps

As promised, this contribution ends on a positive note regarding the appeal possibilities of WS and others. As an appeal court, the ECJ will only look at points of law. However, we believe that this offers the opportunity to restore the Court's legal credibility, since any errors committed by the Sixth Chamber are precisely on points of law. Indeed, the facts of the case are not contested by the parties. As clarified above, we believe that the legal commentaries on the 2023 Frontex judgment should point the court in the direction of accepting the joint liability of Frontex and Greece, finding a sufficiently direct causal link, and accepting a presumption of immaterial damage, taking into account the absolute character of the principle of non-refoulement. In other words, based on the facts of the case and the existing law, the Court should establish the non-contractual liability of Frontex for the unlawful deportation of the family. By contrast, if the Court continues to prevent Frontex from taking responsibility for its operations, it may ultimately undermine Frontex' very reason of existence and place all responsibility with one Member State.