

Who guards the guards?

The legal responsibility
of Frontex in the Aegean Sea
under EU law

Dr. Omer Shatz, Adv.
Iftach Cohen, Adv.
Sarah Easy, Adv.

Imprint



Heinrich Böll Foundation, Thessaloniki Office
Aristotelous 3, 546 24 Thessaloniki
E: info@gr.boell.org
W: gr.boell.org
T: +30 2310 282829

ISBN: 978-618-5580-45-2

Responsible: Neda Noraie-Kia, Head of Migration Policy Europe
Heinrich Böll Foundation, Thessaloniki Office
E: neda.noraie-kia@gr.boell.org

Authors: Dr. Omer Shatz, Adv., Iftach Cohen, Adv., Sarah Easy, Adv.



Place of publication: Thessaloniki, Greece
Release date: November 2023
Editing and proofreading: Chris Meikle, Brussels
Layout: Katerina Triantafyllopoulou, Athens

Licence: Creative Commons Attribution - Non-Commercial Use -
Share Alike 4.0 International (CC BY-NC-SA 4.0)

The opinions expressed in this publication are those of the authors and do not necessarily reflect the views of the Heinrich Böll Foundation, Thessaloniki

CONTENTS

FOREWORD	4
EXECUTIVE SUMMARY	6
TABLE OF ABBREVIATIONS	8
1. FACTUAL BACKGROUND	9
1.1. The KYSEA Decision	9
1.2. Rapid Border Intervention Aegean	10
1.2.1. Frontex's involvement	11
2. EVIDENCE	13
3. APPLICABLE LAW	16
3.1. Charter of Fundamental Rights	16
3.2. EBCG Regulation	17
4. AVAILABLE PROCEDURES	18
4.1. Admissibility: actions for failure to act and annulment	19
4.2. 1st Procedure: failure to act	22
4.2.1. Failure to take a decision or adopt a measure	22
4.2.1.1. Violations of fundamental rights	23
4.2.1.2. Related to Frontex's activity	23
4.2.1.3. Serious or likely to persist	24
4.2.1.4. Incapability of acting in accordance with Art. 46(4)	24
4.2.2. Duty to act	25
4.2.3. Call to act	27
4.2.4. Failure to define position	27
4.3. 2nd Procedure: annulment	28
4.3.1. Frontex acted	29
4.3.2. The act was binding	29
4.3.3. Unlawful act – grounds for annulment	30
4.3.3.1. Infringement of essential procedural requirement	30
4.3.3.2. Infringement of Union law	30
4.4. 3rd Procedure: damages	31
4.4.1. Breach	32
4.4.2. Actual damage	34
4.4.3. Causal link	35
5. STATUS OF FRONT-LEX CASES VS FRONTEX	37
5.1. Case T-282/21	37
5.2. Case T-600/22	38
5.3. Case T-136/22	38
6. STRATEGY MOVING FORWARD	39

FOREWORD

The European Border and Coast Guard Agency, Frontex, is the EU's fastest growing agency. Ever since its establishment, it has gone through dramatic expansions with regard to several aspects: the scope of its mandate, by taking over more tasks, and even operating in third countries outside the EU; its budget, which has grown from €6 million in 2005 to €845.4 million in 2023; and its number of personnel, with a plan to build a 10,000-strong standing corps of border guards by 2027. With great power comes great responsibility; yet, in recent years, Frontex was involved in incidents revealing a severe lack of accountability, respect for human rights and transparency within the agency.

When Hans Leijtens took over the role as Executive Director of Frontex in March 2023, he promised to restore trust in the agency. His predecessor had to step down due to severe misconduct, corruption and the agency's involvement in illegal pushbacks, as uncovered by investigative journalists and confirmed by the EU Anti-Fraud Office (OLAF). In theory, Frontex is obliged to terminate activities in cases of 'violations of fundamental rights or international protection obligations that are of a serious nature or are likely to persist',¹ and several mechanisms to prevent such breaches have been put in place in the agency's regulation. However, the dramatic shipwreck of Pylos in June 2023, which led to the death of more than 600 people, raised, yet again, serious doubts regarding the application of this rule. Both the Hellenic Coastguard and Frontex were informed about the distress of the vessel in the Ionian Sea more than 13 hours before the boat capsized. According to testimonies from survivors, the Hellenic Coastguard towed the vessel and thereby caused it to drown. Four months later, national investigations into the case are still ongoing. The EU Ombudsman Emily O'Reilly has started an investigation looking at the role of Frontex in this context. Fundamental Rights Officer Jonas Grimheden has reportedly advocated for a suspension of the agency's activities in Greece,² but, so far, no such decision has been taken.

1. Regulation (EU) 2019/1896.

2. However, prior to that, Grimheden had publicly proposed an even stronger presence of Frontex in Greece, despite reports of abuse against asylum seekers; see: <https://euobserver.com/migration/156742>

The organisation *front-LEX* is a Netherlands-based non-profit organisation challenging EU migration policy. It uses strategic litigation before the Court of Justice of the European Union (CJEU) as part of its Rule-of-Law campaign, in order to hold Frontex to account for breaching its obligations under EU Law. In light of all concerns regarding the application of the rule of law at the EU's external borders, we at Heinrich Böll Foundation have asked *front-LEX* for a legal opinion concerning the accountability of Frontex under EU law for ongoing violations of the fundamental rights of asylum seekers, committed in relation to its activities in Greek waters. Thereby, we seek to show legal ways forward against the current state of impunity with regard to border violence against people on the move. With this legal opinion, we aim at contributing to an informed debate among legal practitioners, civil society and policymakers. Ultimately, we hope for a policy change: an end to the brutal practices at the EU borders endangering lives, and a border policy in line with the states' fundamental rights obligations, to prevent a catastrophe like the Pylos shipwreck from ever happening again.

Thessaloniki, November 2023

Neda Noraie-Kia

Head of Migration Policy Europe
Heinrich Böll Foundation

EXECUTIVE SUMMARY

This Legal Opinion establishes the liability of the EU Border and Coast Guard Agency ('Frontex' or the 'Agency') under EU law for ongoing violations of the fundamental rights of asylum seekers, committed in relation to its activities in the Aegean Sea Region (ASR). Other forms of liability, such as *individual* criminal responsibility of EU and Greek agents under International Criminal Law, state responsibility of Greece under European Law, or *corporate* responsibility in connection with the allegedly unlawful policy, exceed the scope of the present Opinion.

The Opinion provides a brief overview of EU and Greek migration policy (**Part 1**), focussing on the Rapid Border Intervention (RBI) launched by Frontex in the ASR in 2020, after Greece had temporarily suspended its asylum policy and introduced new 'preventative measures' concerning arrivals at sea. The factual background further sets out Frontex's involvement in the systematic collective expulsions or 'push-backs' of asylum seekers in the ASR, through the detection, surveillance, monitoring, active interception or other assistance rendered by Frontex assets or personnel. Such assistance occurs as part of a Joint Operational Plan co-drafted, co-financed, coordinated and monitored by the Agency.

The occurrence of these collective expulsions is substantiated by probative evidence (**Part 2**), which includes reports from reputable media outlets, UN bodies, the European Union's Anti-Fraud Office and Frontex's own Fundamental Rights Officer (FRO).

The legal analysis of Frontex's fundamental rights and international protection obligations under the Charter of Fundamental Rights of the European Union (CFR or 'the Charter') and European Border Coast Guard (EBCG) Regulation 2019/1896 (**Part 3**) establishes that Frontex incurs *organisational* responsibility under EU law for serious and persistent violations of *inter alia*: the fundamental right to life, the right to asylum, the prohibition of torture, the prohibition of *refoulement* and the prohibition of collective expulsions committed in relation to its activities in the ASR.

The Opinion then assesses the legal procedures available to enforce these violations at the CJEU (**Part 4**), which are limited to an action for failure to act, an action for annulment and an action for damages. The Opinion highlights the most significant challenges to succeeding in these actions, including establishing the

standing of asylum seekers, as well as proving causation in an action for damages when both the actions of Frontex and the Member State (MS) are determinant causes of the harm suffered by the asylee. In response, the Opinion offers potential counterarguments and concludes that while the Agency is likely to evade liability under an action for failure to act, there remains reasonable prospects of success in an action for annulment or damages. In discussing the available procedures, the Opinion outlines the way in which *front-LEX*'s strategic litigation has concretely used these various proceedings, for the first time in the Court's jurisprudential history, in seeking to hold Frontex to account for breaching its obligations under EU Law (**Part 5**).

Finally, the Opinion embeds the various proceedings in the broader strategy of *front-LEX* to discuss the way forward in bringing about policy change, to provide remedies for victims of fundamental rights violations and to hold those responsible to account (**Part 6**).

TABLE OF ABBREVIATIONS

ASR	Aegean Sea Region
CED	UN Committee on Enforced Disappearances
CFR or the Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CO	Coordinating Officer
EBCG Regulation	European Border Coast Guard Regulation
ECtHR	European Court of Human Rights
ED	Executive Director (of Frontex)
FOCC	Frontex Operational Coordination Centre
FRO	Fundamental Rights Officer (of Frontex)
Frontex or the Agency	EU Border and Coast Guard Agency
HCG	Hellenic Coast Guard
JO	Joint Operation
LIBE	European Parliament's Committee on Civil Liberties, Justice and Home Affairs
MS	Member State
OLAF	European Anti-Fraud Office
OP	Operational Plan
RBI	Rapid Border Intervention
SIR	Serious Incident Report
TFEU	Treaty on the Functioning of the European Union
WG	Working Group on Fundamental Rights and Legal and Operational Aspects of Operations

1. FACTUAL BACKGROUND

Frontex has operated in the ASR since 2006, as part of its Joint Operation (JO) Poseidon conducted with Greece.³ Since then, asylum seekers, human rights groups and media outlets continue to report countless violations of the prohibition of *refoulement* along the Greek-Turkish border.⁴ In parallel, the Greek government has enacted increasingly restrictive migration policies: facilitating deportations and obstructing access to asylum, legal representation and an effective remedy, in flagrant disregard for EU law.⁵

1.1. The KYSEA Decision

On 1 March 2020, the Greek National Security Council decided to unilaterally and unlawfully suspend the right to seek asylum in Greece for a one-month period ('KYSEA Decision'),⁶ and systematically press criminal charges against asylum seekers for "illegal entry" into the country.⁷ New arrivals were summarily and arbitrarily detained across the Aegean Islands in ports, overcrowded buses and ships, or on beaches with-

- 3 Frontex, *'Beyond the Frontiers, Frontex: The First Five Years'* (2010, Warsaw), available online at: https://www.frontex.europa.eu/assets/Publications/General/Beyond_the_Frontiers.pdf, at 37 and 84.
- 4 See, for example: Amnesty International, 'FRONTIER EUROPE: Human Rights abuses on Greece's border with Turkey', July 2013, available at: <https://www.amnesty.org/en/documents/eur25/008/2013/el/>; ProAsyl, 'Pushed back: systematic human rights violations against refugees in the Aegean sea and the Greek-Turkish land border', November 2013, available at: <https://www.proasyl.de/en/material/pushed-back-systematic-human-rights-violations-against-refugees-in-the-aegean-sea-and-the-greek-turkish-land-border/>; Human Rights Watch, 'Greece: Attacks on Boats Risk Migrant Lives', 22 October 2015, available at: <https://www.hrw.org/news/2015/10/22/greece-attacks-boats-risk-migrant-lives>; Human Rights Watch, 'Greece: Violent Pushbacks at Turkey Border – Summary Returns, Unchecked Violence', 18 December 2018, available at: <https://www.hrw.org/news/2018/12/18/greece-violent-pushbacks-turkey-border>; New York Times, 'Greece Says It Doesn't Ditch Migrants at Sea. It Was Caught in the Act', May 2023, available at: <https://www.nytimes.com/2023/05/19/world/europe/greece-migrants-abandoned.html>.
- 5 See, for example: AIDA, 'Country Report: Greece', 2020, available at: https://asylumineurope.org/wp-content/uploads/2021/06/AIDA-GR_2020update.pdf, at p. 37; ECRE, 'Concerning the lawfulness of Greek legislation regulating the registration of non-governmental organisations (NGOs) on the Registry of NGOs working with refugees and migrants in Greece', December 2021, available at: <https://ecre.org/wp-content/uploads/2021/12/Expert-opinion-NGO-Registry-final.pdf>.
- 6 See, for example: Human Rights Watch, 'Greece Restarts Suspended Asylum Procedure', 5 June 2020, available at: <https://www.hrw.org/news/2020/06/05/greece-restarts-suspended-asylum-procedure#:~:text=Greece's%20month%2Dlong%20suspension%20of,19%2C%20but%20is%20now%20operating.>
- 7 In violation of Article 31 of the Refugee Convention; See HIAS Greece, 'Greece: Criminal charges pressed against the asylum seekers who arrived in Lesbos in March 2020', 8 July 2020, available at: https://hias.org/wp-content/uploads/greece-eng_criminal_charges_against_all_arrivals_of_march_final.pdf.

out shelter, and were denied access to sanitation facilities, medical care and asylum procedures.⁸

The KYSEA Decision formulated an entirely new policy in the ASR, introducing ‘preventive measures’ concerning arrivals at sea. During a meeting of the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE) in July 2020, the Greek Minister of Migration and Asylum corroborated this policy change, announcing that: *‘...a series of decisions have been taken...focusing on the early detection of migrants prior to their entry to the EU waters, to prevent an unauthorised border crossing.’*⁹ During that same meeting, Greek MP Georgios Koumoutsakos confirmed that, as of March 2020, *‘nothing is the same in the overall management of the migration pressure’*.¹⁰

In December 2020, Frontex’s Executive Director (ED), Fabrice Joël Roger Leggeri, partly disclosed details of this new Greek policy in the ASR to the European Parliament, stating: *‘[W]e identified... some notions, like “prevention of departure”, the common factor in all these not closed, let’s say, incidents, reports, which are not SIR [‘Serious Incident Report(s)’ – OS] but are daily reports... description of prevention of departure, and that there are interceptions... and then there’s a possibility ... to legally invite the boat ... not to stay or enter in the national waters... this situation... that we cannot qualify, and we don’t know how to qualify them legally.’*¹¹

1.2. Rapid Border Intervention Aegean

On the very same day that Greece internally suspended its asylum procedures in accordance with the KYSEA Decision, it simultaneously requested Frontex to launch a Rapid Border Intervention in the ASR (RBI Aegean).¹²

Despite the critical human rights situation that was widely reported at the time, ED Leggeri approved the launch of the RBI on 2 March 2020, just *one day* after receiving

⁸ Legal Centre Lesvos (LCL), ‘No-man’s land for Europe’s “undesirables”’, 13 March 2020, available at: <http://legalcentrelesvos.org/2020/03/13/no-mans-lands-for-europes-undesirables/>.

⁹ European Parliament, ‘LIBE Committee meeting’, 6 July 2020, 17:03:18–17:04:00.

¹⁰ Ibid, 17:08:30–17:08:58.

¹¹ European Parliament, ‘Committee on Civil Liberties, Justice and Home Affairs’, 1 December 2020, 14:08:15–14:10:40.

¹² Frontex, ‘Rapid border intervention requested by Greece on March 2020’, (29 September 2022), available online at: <https://prd.frontex.europa.eu/document/rapid-border-intervention-requested-by-greece-on-march-2020/>.

the request.¹³ Importantly, Leggeri failed to consult Frontex's FRO prior to launching the operation, in infringement of Art. 46(5) of the EBCG Regulation.¹⁴ Retroactively, the FRO criticised the decision to launch the RBI, expressing that: '... the FRO is deeply concerned about the intended suspension for the period of one month the applications for provision of asylum requests... as well as return without registration of the irregular migrants... [which] risks to compromise the Agency ability to comply with Article 80(1) of the EBCG Regulation 2019/1896 according to which the Agency shall guarantee the protection of fundamental rights... There is a high risk that unlawful procedures may negatively affect persons in need of international protection and other vulnerable groups.'¹⁵

1.2.1. Frontex's involvement

Frontex's level of involvement in the planning and execution of the 2020 RBI and ongoing JO Poseidon in the ASR is significant and indispensable. Firstly, Frontex's ED is responsible for approving or denying the launch of such activities,¹⁶ and drafting the governing Operational Plans (OP), together with the MS.¹⁷

Secondly, the operations are co-financed by the Agency, who deploys the standing corps and relevant technical equipment in accordance with Art. 36(3) of the EBCG Regulation. In the last publicly available Frontex Evaluation Report on JO Poseidon, the Agency reported deploying 87 assets and 3,902 officers to the ASR in the year 2018, contributing a total of EUR 43,369,589 to the operation.¹⁸ In 2019, the Agency further

¹³ Frontex, 'Frontex to launch rapid border intervention at Greece's external borders', 2 March 2020, available at: <https://frontex.europa.eu/media-centre/news/news-release/frontex-to-launch-rapid-border-intervention-at-greece-s-external-borders-NL8HaC>.

¹⁴ 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, Art. 46(5) provides: 'The executive director shall, after consulting the fundamental rights officer, decide not to launch any activity by the Agency where he or she considers that there would already be serious reasons at the beginning of the activity to suspend or terminate it because it could lead to violations of fundamental rights or international protection obligations of a serious nature...' (hereafter EBCG Regulation).

¹⁵ Fundamental Rights Officer, 'RAPID BORDER INTERVENTION AEGEAN 2020 FRO Observations' (Warsaw, 4 March 2020), available online at: <https://fragdenstaat.de/dokumente/9690-fro-observations-to-draft-oplan-rapid-border-intervention-aegean-2020/> at 1.

¹⁶ EBCG Regulation, Art. 37(3).

¹⁷ Ibid. Art. 38(2) and 39(8).

¹⁸ Frontex, 'Frontex Evaluation Report, JO Poseidon 2018 Operational Response Division Field Deployment Unit', (Warsaw, 2019), available online at: https://www.frontex.europa.eu/assets/Key_Documents/Frontex_Evaluations_Reports/Sea/FER_JO_Poseidon_2018_-_PUBLIC.pdf at 5.

specified that it had deployed ‘13 vessels, two helicopters, 43 cars and 618 officers’ as part of operation Poseidon in Greece.¹⁹

Thirdly, Frontex maintains a coordinating role in the operations by deploying a Coordinating Officer (CO) on the ground.²⁰ The CO monitors the correct implementation of the OP, including compliance with the Agency’s fundamental rights obligations.²¹ Additionally, the OP for RBI Aegean specifies that the Frontex Operational Coordination Centre (FOCC) is integrated in the overall coordination of all operational activities and the Frontex Liaison Officer in Greece acts as the manager of the premises.²²

Crucially, under the new policy introduced by the KYSEA Decision and implemented through RBI Aegean, Frontex is tasked with the detection, interception and handing over of ‘migrants’ to the Hellenic Coast Guard (HCG).²³ The HCG then completes the collective expulsion operation by either removing the engine and fuel of the unseaworthy boat of ‘migrants’ and towing the vessel outside of EU/Greek territorial waters, or forcibly transferring the ‘migrants’ to rafts with no means of navigation, communication, food, water and, at times, life vests, before abandoning them at sea. During all of the collective expulsions (or ‘push-backs’, as they are often termed) set out below, Frontex assets or agents were, at the very minimum, present at the scene.

¹⁹ Frontex, ‘European Border and Coast Guard Agency (Frontex) involved in search and rescue operation off Lesbos’, 11 June 2019, available online at: <https://prd.frontex.europa.eu/document/european-border-and-coast-guard-agency-frontex-involved-in-search-and-rescue-operation-off-lesvos/>.

²⁰ EBCG Regulation. Art. 44(2).

²¹ Ibid. Art. 44(3).

²² Frontex, Operational Plan (Main part) Amendment No. 3 RAPID BORDER INTERVENTION AEGEAN 2020), (2020), available online at: <https://fragdenstaat.de/dokumente/236643-imported-pad-2022-00022-documents2/?page=1>, at 18 and 24.

²³ European Parliament Frontex Scrutiny Group meeting on 4 March 2021, available at: https://multimedia.europarl.europa.eu/en/webstreaming/committee-on-civil-liberties-justice-and-home-affairs_20210304-1215-COMMITTEE-LIBE, at 13:17:23–13:17:53 During a meeting of the European Parliament Frontex Scrutiny Group, ED Leggeri confirmed that ‘... Frontex has never towed boats to Turkish waters, the role of Frontex in this particular case in Greece, in Poseidon, is to contribute to boarder surveillance, to inform HCG about detected, interceptions, and Greece wants to be in frontline...’.

2. EVIDENCE

Incidents of ‘pushbacks’ or collective expulsions are established, inter alia, by the following compelling evidence, which corroborates Frontex’s involvement via detection, surveillance, monitoring, active interception and/or the financing of the vessels involved:

- i. The Bellingcat investigation of October 2020, which documents extensively six boat pushbacks in the ASR via video footage and first-hand testimony.²⁴
- ii. Visual evidence (60 GB) of countless pushbacks provided to the European Parliament by Turkey.²⁵
- iii. Statement by the UN High Commissioner for Refugees Filippo Grandi on 21 February 2022, declaring ‘at least three people are reported to have died in such incidents since September 2021 in the Aegean Sea including one most recently in January’. According to the High Commissioner, ‘UNHCR has recorded almost 540 reported incidents of informal returns by Greece since the beginning of 2020’.²⁶

²⁴ Frontex at Fault: European Border Force Complicit in ‘Illegal’ Pushbacks, Bellingcat, 23 October 2020, available at: <https://www.bellingcat.com/news/2020/10/23/frontex-at-fault-european-border-force-complicit-in-illegal-pushbacks/#:~:text=Vessels%20from%20the%20European%20Border>. In particular, the incident of 28–29 April 2020 is one of the most precisely documented pushbacks of its kind. The investigators verified three videos and gathered the accounts of two witnesses who were themselves pushed back, as well as the account of a relative of one of the victims. They confirmed that the people we see across three separate videos, including footage of these refugees on the Greek island of Samos, are the same. They cross-referenced this with local radio broadcasts reporting their arrival and social media posts by islanders who saw them. They have located this visual evidence in time and space and found that it corroborates the accompanying witness accounts the investigators were able to collect. In this case, they were able to establish contact with two asylum seekers who were part of the group pushed back, as well as the husband of one of the women in the videos. The asylum seekers all confirmed the group made it onto the island, and that the members were detained and almost immediately pushed back.

²⁵ Access to the materials is granted upon request from the European Parliament (LIBE Committee).

²⁶ UNHCR ‘UN Refugee Agency warns of increasing violence and human rights violations at European borders’, 21 February 2022, available at: <https://www.unhcr.org/news/news-releases/news-comment-unhcr-warns-increasing-violence-and-human-rights-violations>.

- iv. Statement by the Greek Minister of Shipping and Island Policy, Ioannis Plakiotakis, dated 25 December 2021, that the HCG had “saved” 29,000 refugees and migrants in 2021, yet only 3,900 arrivals were registered that year.²⁷
- v. Nineteen interim measures issued by the European Court of Human Rights (ECtHR) concerning allegations of collective expulsions related to the activities of the Agency in the ASR and the Evros River.²⁸
- vi. Observation of the UN Committee on Enforced Disappearances (CED) on Greece, dated 12 April 2022, wherein the CED expressed its concerns regarding the ‘high number of migrants who have disappeared in Greek waters of the Mediterranean and the Evros River attempting to reach Greece’, the ‘obstacles family members of disappeared migrants face in order to search for and locate their loved ones’, and the **‘high number of unaccompanied migrant children that have disappeared upon their arrival’** to Greece.²⁹
- vii. Documents produced by the German Ministry of Interior and sent to the German Bundestag reporting the involvement of Frontex in 132 so-called ‘interception operations’.³⁰

²⁷ “Coast Guard has saved this year 29,000 refugees and migrants [...] But only 3,900 arrivals of refugees and immigrants were recorded this year”, Efsyn, ‘25 000 people rescued in the Aegean sea and lost and lost at sea’ Dimitris Angelidis, 25 December 2021. A similar discrepancy of circa 18,000 individuals between those ‘rescued’ at sea and those registered on shore also exists in 2020.

²⁸ App. no.13624/22, A.A. and others v. Greece; App. no. 18341/22, B.M. and Others v. Greece; App. no. 18940/22, A.D. and Others v. Greece; App. no. 18941/22, H.A. and Others v. Greece; App. no. 19419/22, K.M.I. and Others v. Greece; App. no. 21131/22, A.A. and Others v. Greece; App. no. 21039/22, S.S. and Others v. Greece; App. no. 23128/22, F.R. and Others v. Greece; Application regarding five Turkish refugees, interim measures granted on 27/5/2022; Application regarding seven Turkish refugees, interim measures granted on 27/5/2022; App. no. 25806/22 - H.M. and Others v. Greece and 15 other applications; App. no. 26558/22, H. M. v. Greece and six other applications; App. no. 29655/22 - M.A. and Others v. Greece and 13 other cases; Application regarding five Turkish refugees, interim measures granted on 5/7/2022; Application regarding eleven Turkish refugees, interim measures granted on 8/7/2022; Application no. 35090/22 -K.A. and Others v. Greece, interim measures granted on 20 July 2022; Application no. 35490/22 - M.J. and Others v. Greece, interim measures granted on 22/7/2022; Application regarding four Turkish refugees, interim measures granted on 4/8/2022; Application no. 38444/22 - B.S. and Others v. Greece, interim measures granted on 9/8/2022.

²⁹ Committee of Enforced Appearances ‘Concluding observations on the report submitted by Greece under article 29, paragraph 1, of the Convention’, Dated 12.4.2022, CED/C/GRC/CO/1.

³⁰ Letter from the German Bundestag to the German Federal Government dated 19 March 2021 and Letter from the German Federal Government to the German Bundestag dated 28 March 2021. On file with front-LEX.

- viii. The leaked 2021 Final Report of OLAF, which concludes: ‘OLAF considers the repeated misconduct of the persons concerned to be in breach of the Staff Regulation of Officials of the EU, of the FRONTEX Code of Conduct and of the legal framework stipulated by the FRONTEX Regulations (Regulation (EU) 2016/1624 and Regulation (EU) 2019/1896) in particular in relation to the protection and respect of fundamental rights, as enshrined in the Charter of Fundamental Rights of the European Union, in the performance of the Agency’s tasks’, among other incriminating findings.³¹
- ix. Video evidence from the New York Times dated 11 April 2023, showing the HCG rounding up a group of 12 asylum seekers in Lesbos, including young children and a baby, forcibly taking them out into Aegean waters in a speedboat, transferring them onto HCG vessel 617,³² pushing the asylum seekers onto an engineless raft and setting them adrift as they reach Turkish territorial waters.³³

Additionally, based on the numerous SIRs concerning alleged violations of fundamental rights relating to JO Poseidon, the FRO issued a recommendation on 1 September 2022 to suspend or terminate the Agency’s activities in Greece.³⁴ This recommendation was, however, dismissed by a Working Group established by the Agency itself to facilitate the ED’s decision concerning suspension or termination under Art. 46 of the EBCG Regulation.³⁵ Again, on 20–21 June 2023, during a Management Board meeting of the Agency, the FRO recommended to suspend Frontex’s activities in Greece.³⁶

³¹ DER SPIEGEL, ‘Why DER SPIEGEL Is Publishing the EU Investigative Report on Pushbacks’, October 2022, available at: <https://www.spiegel.de/international/europe/why-der-spiegel-is-publishing-the-eu-investigative-report-on-pushbacks-a-5218398a-5c1e-414e-a477-b26515353fce>. Importantly, OLAF’s report establishes the involvement of Frontex in at least six cases similar to the one of 18–19 April 2020, which were either never examined by Frontex’s Management Board Working Group, or were ‘clarified’, left ‘unclarified’ and eventually ‘clarified’ by ‘someone’ within the Agency.

³² ‘Which was mostly paid for with E.U. funds,’ the NYT article reads.

³³ New York Times, above n 1.

³⁴ Jonas Grimheden, ‘Opinion by the Frontex Fundamental Rights Officer of 1 September 2022’, Ares (2022) 6063023. See also: Frontex, ‘Annual report on the implementation of Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex’ (Warsaw, 2022) available online at: <https://www.frontex.europa.eu/fundamental-rights/fundamental-rights-at-frontex/fundamental-rights-office/> at 18.

³⁵ Frontex, Decision of the Executive Director No R-ED-2022-160 establishing a Working Group in order to facilitate the decision-making process under Article 46 of the European Border and Coast Guard Regulation of 27/09/2022.

³⁶ Politico, ‘Frontex considers suspending activities in Greece: Report’, June 2023, available at: <https://www.politico.eu/article/greece-migrant-tragedy-frontex-considers-suspending-activities/>.

3. APPLICABLE LAW

Whilst the occurrence of violations of fundamental rights in the ASR in relation to Frontex and Greece's Joint Operations are well documented and widely reported, it must be determined what level of responsibility for these violations, if any, can be assigned to Frontex under EU law (as opposed to Greece under European and EU law).

3.1. Charter of Fundamental Rights

On the face of it, each of the above-mentioned, well-documented 'pushbacks' in the ASR constitutes violations of the following rights enshrined by the Charter, which confers protection upon asylum seekers within the jurisdiction of EU organs:

- i. The right to life (Art. 2).
- ii. The right to asylum (Art. 18).
- iii. The prohibition of torture and inhuman or degrading treatment (Art. 4).
- iv. The prohibition of refoulement (Art. 19(2)).
- v. The prohibition of collective expulsions (Art. 19(1)).³⁷

As an EU agency, Frontex is bound by EU fundamental rights law, including the Charter. As such, Frontex is obliged to comply, by action or omission, with its negative obligations under the CFR to respect fundamental rights. Additionally, Frontex is obliged to comply with its positive obligations under the Charter, namely to prevent fundamental rights violations and protect individuals from violations of which it *knows or should know about*, including at the hands of its counterparts to its Joint Operations, i.e. Greece and other participating Member States, by taking all reasonable measures.³⁸

³⁷ Arts. 2, 18, 4, 19(1) and 19(2) of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (Treaty of Lisbon): <http://data.europa.eu/eli/treaty/lis/sign>.

³⁸ Art. 53(3) CFR requires EU law to guarantee the same level of protection as the ECHR, which in turn imposes positive obligations.

3.2. EBCG Regulation

Frontex is further, and more specifically, bound by a series of positive obligations to guarantee the protection of fundamental rights in the performance of its activities contained in its founding EBCG Regulation.³⁹

Frontex's founding Regulation mandates the monitoring and reporting of the proper implementation of the OP, including in relation to the protection of fundamental rights.⁴⁰

It further contains specific reporting obligations – mainly through the Coordinating Officer – where instructions issued by the host MS are not in compliance with the OP, particularly regarding fundamental rights.⁴¹

The EBCG Regulation also creates an obligation upon the ED to refrain from launching any activity that could lead to violations of fundamental rights or international protection obligations of a serious nature.⁴²

Finally, Art. 46(4) of the EBCG Regulation is the cornerstone of the Agency's positive obligations relating to the protection of fundamental rights: *'The executive director shall, after consulting the fundamental rights officer and informing the Member State concerned, withdraw the financing for any activity by the Agency, or suspend or terminate any activity by the Agency, in whole or in part, if he or she considers that there are violations of fundamental rights or international protection obligations related to the activity concerned that are of a serious nature or are likely to persist.'*⁴³

³⁹ Art. 80(1) of the EBCG Regulation, which provides 'The European Border and Coast Guard shall guarantee the protection of fundamental rights in the performance of its tasks under this Regulation in accordance with relevant Union law, in particular the Charter, and relevant international law, including the 1951 Convention relating to the Status of Refugees, the 1967 Protocol thereto, the Convention on the Rights of the Child and obligations related to access to international protection, in particular the principle of non-refoulement'.

⁴⁰ Art. 44(3)(b) of the EBCG Regulation for the fulfilment of the abovementioned monitoring and reporting obligations, the Coordinating Officer shall cooperate with the fundamental rights monitors, who according to Art. 110 (6) were required to be recruited by 5 December 2020. However, the Agency has failed to comply with that requirement and the fundamental rights monitors are not yet fully operative, which inherently hamper the Agency's capability to observe this and other fundamental rights obligations.

⁴¹ Art. 44(3)(d).

⁴² Ibid, Art. 46(5).

⁴³ EBCG Regulation, Art. 46(4).

The awareness of Frontex to the existence of such violations, *irrespective* of the direct or indirect involvement of Frontex personnel, is the *only* determinative factor in the assessment of the Agency's compliance with its positive obligations.

4. AVAILABLE PROCEDURES

The CJEU has exclusive jurisdiction to review the legality of acts and omissions committed by EU agencies. Specifically, the Treaty on the Functioning of the European Union (TFEU) provides protection to individuals ('natural persons') against unlawful acts or omissions of EU institutions.

Only three legal procedures are available to asylum seekers in order to seek judicial oversight over the allegedly unlawful conduct of Frontex, to secure an effective remedy for victims of this conduct and to hold Frontex accountable for breaching its obligations under EU law in connection with the alleged unlawful conduct:

- i. Action for failure to act under Art. 265 of the TFEU.
- ii. Action for annulment under Art. 263 of the TFEU.
- iii. Action for damages under Art. 340 of the TFEU.⁴⁴

The first two of these actions, failure to act and annulment, are *prospective*, meaning that the Court must assess whether the applicant is at risk of suffering harm as a result of the challenged measure. This means that the asylum seeker wishing to challenge Frontex's conduct need not be a victim of a 'pushback' operation; they need only be on the verge of boarding a boat in pursuit of safe haven. By contrast, an action for damages is a *retrospective* procedure, inquiring into whether the asylum seeker has already been victimised by Frontex's conduct.

⁴⁴ European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 26 October 2012, OJ L. 326/47-326/390; 26/10/2012 (hereafter 'TFEU'), Arts. 265, 263 and 340.

Importantly, actions for failure to act and annulment *directly* challenge the legality of Frontex's policy through a declaration from the Court that the Agency acted outside of its powers or failed to do something it was legally obliged to do. By contrast, an action for damages may only do so *indirectly*. This is because, in order to award compensation for damages, the Court must necessarily find that the conduct causing the damage was unlawful.

Finally, the prospective nature of actions for failure to act and annulment may allow for a quicker reaction from the Court in ordering interim measures which suspend the illegal policy if the applicant is able to show, among other requirements, that they are likely to suffer 'serious and irreparable damage' while awaiting the outcome of the main proceedings.⁴⁵

4.1. Admissibility: actions for failure to act and annulment

At the heart of the system of judicial protection of the European Union is the core principle of upholding the rule of law upon which the Union is founded.⁴⁶

However, in practice, burdensome admissibility requirements for bringing prospective actions, namely failure to act and annulment, significantly restrict the ability of individuals to challenge the unlawful conduct of EU agencies, have the CJEU review the challenged conduct and attain an effective remedy. Admissibility requirements are the rules that govern who is allowed to bring a case before court and under what conditions to prevent 'opening the floodgates' to lots of litigation. In order for an individual to be able to bring an action for failure to act or annulment, the act challenged by the applicants must either be: (i) addressed to them; or (ii) concern them directly and individually.⁴⁷ A third possibility exists where the contested act is a regulatory measure. In this case, the individual need only show direct concern.

Regarding the first possibility, for an act to be 'addressed' to an individual, that individual must be the holder of the rights that the act intended to confer. For instance, where the Commission decides to impose a fine on an association who has infringed

⁴⁵ See Order of the General Court of 14 January 2016, *AGC Glass Europe and Others v Commission*, Case C-517/15, paragraph 27.

⁴⁶ Art. 2 TEU.

⁴⁷ Order of the Court of Justice of 1994, *Codorniu v Council*, Case C-309 / 89, paragraph 19. Unless the act is a regulatory act and then it need only concern the applicant directly.

the TFEU, that association is clearly the addressee of the Commission's decision.⁴⁸ An individual may be explicitly named as the 'addressee' of an act, such as in a contract or fine, or it may be implied from the purpose of the challenged act.

The organisation *front-LEX* argues that asylum seekers are the addressees of the desired measure under Art. 46(4) of the ECBG, to suspend or terminate the Agency's activities where violations of fundamental rights or international protection obligations exist.⁴⁹ Whilst Art. 46(4) does not specify who is the addressee of this measure, it is evident that asylum seekers are the holders of the fundamental rights which the article seeks to protect.

However, during the litigation detailed in Part 6, Frontex argued that a decision to suspend or terminate its activities upon fundamental rights grounds is not addressed to asylum seekers, given that the decision is taken in the context of a Joint Operational agreement between Frontex and the relevant MS. Although the Agency refrained from positively specifying who is (as opposed to who is not) the addressee of the desired measure under Art. 46(4), Frontex seems to imply that the MS, in this case Greece, is the addressee of the decision.

However, as *front-LEX* argued in Court, nothing in the text of Art. 46(4) confers upon the MS the right to be heard before Frontex suspends or terminates its activities, as would be the case if the MS were the addressee of the decision. Furthermore, it would be illogical if a measure designed to safeguard the fundamental rights of asylum seekers were addressed to the very MS who had violated those rights in the first place. For these reasons, it is unlikely that the MS is the addressee of the desired measure under Art. 46(4).

If the Court did decide that an asylum seeker was not the addressee of Art. 46(4), they would then need to establish that they are nonetheless directly and individually concerned by the contested measure. For instance, even though a decision by the EU Commission regulating state aid may not intend to affect any one economic operator as the addressee of the decision, it may do so directly and individually by placing the operator in an unfavourable competitive decision.⁵⁰

⁴⁸ Judgment of the General Court of 29 March 2012, *Spain v Commission*, Case T-398 / 07 *Spain v Commission*, not reported.

⁴⁹ As set out *supra* at para 4.8.

⁵⁰ Judgment of 6 November 2018, *Scuola Elementare Maria Montessori v Commission*, *Commission v Scuola Elementare Maria Montessori* and *Commission v Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 43.

According to the CJEU case-law, an individual must satisfy two cumulative criteria in order to establish *direct concern*: i) the contested measure must directly affect their legal situation; and ii) leave no discretion in its implementation.⁵¹ This means that an asylum seeker would have to firstly show that failing to suspend or terminate Frontex's activities in the ASR would have a direct impact upon their fundamental rights. This is arguable given that Frontex's continued funding of, and involvement in, 'pushback' operations occurring in the context of its Joint Operation in the Aegean negatively impacts the right to seek asylum and to non-refoulement, among other rights held by asylum seekers.

Secondly, the directness of this impact is established by the fact that once Frontex decides to suspend or terminate the Joint Operation, there is no discretion left to the MS to continue the Joint Operation unilaterally. In other words, there is no implementing measure required for Frontex's decision to take effect.

Additionally, *individual concern* requires that the act 'affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed'.⁵²

Accordingly, should the Court determine that Art. 46(4) is not addressed to the victimised asylum seekers but, for example, to the MS with whom Frontex conducts the JO, an asylum seeker would need to be concerned by the decision in the same manner as the host MS in order to establish individual concern.

This requirement, known in jurisprudence as the *Plaumann* test, is a practically unattainable requirement.⁵³ Yet, when fundamental rights and values such as the rule of law are at stake, the Union's primary law arguably compels the Court to make a less restrictive interpretation.⁵⁴ It is therefore open to argue that asylum seekers are individually concerned by reason of their unique circumstances as *adversaries* to the ad-

⁵¹ Judgment of 5 May 1998, *Dreyfus v Commission*, C-386/96 P, EU:C:1998:193, paragraph 43; Judgment of 13 March 2008, *Commission v Infront WM*, C-125/06 P, EU:C:2008:159, paragraph 47 Judgment of 5 May 1998, *Glencore Grain v Commission*, C-404/96 P, EU:C:1998:196, paragraph 41; 6 November 2018, *Scuola Elementare Maria Montessori v Commission*, *Commission v Scuola Elementare Maria Montessori and Commission v Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 42.

⁵² Judgment of the Court of 15 July 1963, *Plaumann v Commission*, Case 25-62, page 107, last paragraph.

⁵³ Judgment of the Court of 15 July 1963, *Plaumann v Commission*, Case 25-62, page 107, last paragraph.

⁵⁴ Opinion of Mr Advocate General Jacobs in *UPA*, paragraphs 59–60, 102(4).

dressees (supposedly Member States) of the decision to suspend or terminate Frontex's activities, whose fundamental rights are negatively impacted by this decision. Ultimately, asylum seekers' access to an effective remedy under the TFEU will largely depend on how the Court continues to interpret these rules surrounding admissibility, and the battle over the interpretation of these rules are at the core of *front-LEX*'s strategic litigation campaign.

4.2. 1st Procedure: failure to act

The purpose of initiating an action for failure to act is to obtain a declaration from the Court that Frontex has acted unlawfully. Article 265 of the TFEU provides that: *'... should bodies, offices and agencies of the Union fail to act, in infringement of the Treaties, any natural or legal person may bring an action before the CJEU to have the infringement established. The action shall only be admissible if the agency has first been called upon to act and, after a period of two months, has failed to define its position in response.'*

Accordingly, for an action for failure to act against Frontex to succeed, the following basic elements must be satisfied:

- i. Frontex failed to act by failing to take a decision or adopt a measure.
- ii. At the time of the omission, Frontex was under a duty to act.
- iii. Frontex was called upon by the asylum seeker to act.
- iv. Frontex failed to define its position in relation to the asylum seeker's request, or otherwise failed to act.

4.2.1. Failure to take a decision or adopt a measure

The requirement that Frontex failed to act entails a failure to take a decision or to adopt a given measure.⁵⁵ The facts indicate that Frontex failed to act by not suspending or terminating its activities in the ASR, as per Art. 46(4) of the EBCG Regulation, which states: *'The executive director shall, after consulting the fundamental rights offi-*

⁵⁵ Order of the Court of Justice of 1971, *Komponistenverband v Commission*, Case 8/71, 705, paragraph 2 ('failure to take a decision or to define a position').

cer and informing the Member State concerned, withdraw the financing for any activity by the Agency, or suspend or terminate any activity by the Agency, in whole or in part, if he or she considers that there are **violations of fundamental rights or international protection obligations related to the activity concerned** that are of a **serious nature** or are **likely to persist**.⁵⁶

Case-law further requires that the contested act must be capable of having legal effects. For proceedings concerning individuals, this means the Agency must have failed to address to that person ‘any act other than an opinion or recommendation’.⁵⁷

In the present case, the relevant act is the suspension or termination of Frontex’s activities in the ASR, which produces legal effects vis-à-vis asylum seekers by affecting their above-mentioned fundamental rights.

4.2.1.1. Violations of fundamental rights

The evidence described in Part 3 substantiates the existence of countless ‘pushbacks’ carried out under RBI Aegean. This practice constitutes violations of fundamental rights and international protection obligations, namely: the right to life, the right to asylum, the prohibition of torture and inhuman or degrading treatment, and the prohibition of collective expulsions.⁵⁸

4.2.1.2. Related to Frontex’s activity

In order to trigger the application of Art. 46(4), such violations of fundamental rights need only be *related* to Frontex’s activities and not caused by them. This low threshold is satisfied by the fact that in all the collective expulsions documented by the above-mentioned sources, assets or agents of Frontex were involved, either by means of detection, surveillance, monitoring, active interception or other assistance of forces. All incidents occurred while assets or agents of Frontex were at least present where a collective expulsion and abandonment at sea was unfolding.

⁵⁶ EBCG Regulation, Art. 46(4).

⁵⁷ See, for example, Order of the Court of Justice of 1988, *European Parliament v Council*, Case 377/87, 4017, paragraph 30.

⁵⁸ Articles 2, 18, 4, 19(1) and 19(2) of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (Treaty of Lisbon): <http://data.europa.eu/eli/treaty/lis/sign>.

However, even in the event of a pushback operation executed by the HCG in the ASR where Frontex's assets are not directly or indirectly involved, this violation of fundamental rights would be nonetheless *related* to Frontex's activities in the ASR, given that: a) it is committed in the same region where the RBI Aegean applies; b) it is conducted as part of a *joint* operation executing an OP that is drafted, coordinated and monitored by the Agency; and c) it is in part funded by the Agency.

4.2.1.3. *Serious or likely to persist*

Under Art. 46(4), for Frontex to suspend or terminate its activities, the relevant violations must either be serious or likely to persist.

The seriousness of the violations described above is evident by the nature of the infringed right and in the significant number of victims harmed, as well as the grave harm inflicted, including, but not limited to, loss of life. Furthermore, the principle of *non-refoulement* has the status of *jus cogens*, being a peremptory norm of international customary and treaty law, from which no derogation is permitted.

The evidence provided above demonstrates the alleged violations are not only serious but also likely to persist, as they have already spanned over years, have victimised tens of thousands of asylum seekers, and have been committed pursuant to, and as a matter of, state (Greece) and organisational (Frontex) policy.

Finally, Frontex's unwillingness to acknowledge the existence of past and present violations related to its activities in the Aegean – when investigated and reported by highly credible media outlets, when alleged in *front-LEX* CJEU Cases, when established by the EU Anti-Fraud Agency OLAF, when reported by the UN and other International Governmental Organisations, and even when highlighted by its own FRO – constitutes in itself compelling evidence that these violations are 'likely to persist'.

4.2.1.4. *Incapacity of acting in accordance with Art. 46(4)*

Furthermore, the facts evidence structural and cultural failures in the way in which the Agency monitors and reports serious violations of fundamental rights, which hamper the ED's ability to comply with Art. 46(4) of the EBCG. Such failures were recognised by the Final Report of Frontex's own Working Group, which stated that: '*The deficits and the need for improvement of the reporting and monitoring system have already been*

*described in the preliminary report. These shortcomings lead (inter alia) to the outcome that the Working Group was not able to clarify completely the five further examined incidents.*⁵⁹

These structural failures are reinforced by a culture of non-reporting, as identified by MEP Bettina Vollath, who stated that the Agency seems to ‘deliberately refrain from preparing such Serious Incident Report and there would even be pressure within the Agency on officials not to do so...’.⁶⁰ The same culture of non-reporting emerges from the FRO’s mission report, which notes: ‘...[d]ifficulty to evidence pushback practices remain despite collected testimonies by different international organisations and national NGOs, reports in open sources... lack of safeguards/protection for a victim as well as person submitting SIR in order to prevent possible retaliation measures.’⁶¹

As such, the low number of SIRs issued by agents of Frontex witnessing violations of fundamental rights cannot be attributed to confusion as to how to categorise the incidents, or their non-existence in the face of extensive media reporting to the contrary, but to the culture of the organisation itself. Accordingly, when making a decision under Art. 46(4), the ED has been, and is likely to be, misguided by the Agency’s misleading internal findings. This has been the case even when the FRO himself has recommended the suspension or termination of activities in the ASR.⁶² For these reasons, the Agency is *a priori* incapable of identifying the violations of fundamental human rights and thus acting in accordance with the subsequent measures mandated by Art. 46(4).

4.2.2. Duty to act

The omission will only be considered unlawful where the defendant was bound by a duty to act contained in any rule of Union law.⁶³

⁵⁹ The Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea, Final Report of the Frontex Management Board Working Group’, 1 March 2020, page 5.

⁶⁰ EP Frontex Scrutiny Group (FSWG) meeting of 15 March 2021, 14:23:30 – 14:24:16, available at: https://multimedia.europarl.europa.eu/en/webstreaming/libe-working-group-on-frontex-scrutiny_20210315-1345-COMMITTEE-LIBE.

⁶¹ FRO’s mission report – Evros, 5 February 2019, available at: <https://fragdenstaat.de/dokumente/2703/>.

⁶² See discussion of FRO’s Opinions under Part 3: Evidence.

⁶³ Order of the Court of Justice of 1969, ‘Eridania’ Zuccherifici Nationali and Others v Commission, Joined Cases 10 and 18/68, paragraph 16.

Importantly, the operative terms ‘fundamental rights’ and ‘international protection obligations’ of Art. 46(4) are legal terms which refer to the rights and obligations set out by the Charter and other sources of EU law.⁶⁴

The occurrence of a violation of such rights is thus a question of law and not a question of the ED’s subjective assessment, as typically alleged by the Agency in *front-LEX*’s cases.

Accordingly, where serious violations of such rights in relation to Frontex’s activities factually exist, the ED cannot maintain that he or she simply does not ‘consider’ this to be the case. Such a determination would constitute a manifest error of assessment.

This is reinforced by the fact that Art. 46(6) mandates that a decision under Art. 46(4) shall be based on ‘duly justified grounds’ and shall take into account relevant information such as ‘the number and substance of registered complaints that have not been resolved by a national competent authority, reports of serious incidents, reports from COs, relevant international organisations and Union institutions, bodies, offices and agencies in the areas covered by this Regulation’.⁶⁵

Accordingly, insofar as the occurrence of serious or persisting violations of fundamental rights or international protection obligations that are related to the activities of Frontex is established, the ED is obliged (‘shall’) to adopt at least one of the proportionate measures provided for in Art. 46(4) of the EBCG Regulation.

To conclude, the ED has no discretion *whether* to take a measure or not once the pre-conditions for the application of Art. 46 are fulfilled, namely when either a serious violation of a fundamental right or international protection obligation occurs, or a non-serious violation but one that is likely to persist is taking place. The discretion of the Executive Director of Frontex is limited to deciding *which* measure to adopt among the number of gradual measures provided in Art. 46 (i.e. withdrawal of financing, temporary suspension or definitive termination) as well as the *extent* of the chosen measure (‘whole or in part’).

⁶⁴ This is confirmed by Art. 80(1) of the EBCG Regulation, which provides: ‘The European Border and Coast Guard shall guarantee the protection of fundamental rights in the performance of its tasks under this Regulation in accordance with relevant Union law, in particular the Charter, and relevant international law, including the 1951 Convention relating to the Status of Refugees, the 1967 Protocol thereto, the Convention on the Rights of the Child and obligations related to access to international protection, in particular the principle of non-refoulement.’

⁶⁵ EBCG Regulation, Art. 46(6).

A failure to suspend or terminate Frontex's activities under these conditions thus constitutes a failure to act within the meaning of Art. 265 of the TFEU.

4.2.3. *Call to act*

Prior to commencing proceedings, Art. 265 of the TFEU requires that the applicant issue a letter of formal notice calling upon the Defendant to act. The agency must be called within a reasonable time of the applicant discovering the failure.⁶⁶

4.2.4. *Failure to define position*

If, within two months of receiving the formal notice, Frontex fails to define their position in relation to the request to act, the applicant may then commence court proceedings.⁶⁷

Importantly, in order to terminate the failure to act, Frontex is merely required to *explain* its stance in response to the requested measure. This means that even if the response to the request is in the negative, the applicants *cannot* further challenge the decision on the basis that Frontex's stance is different from what they requested or considered necessary.⁶⁸

On top of the restrictive admissibility criteria mentioned above, this element of the procedure has negative implications upon the availability of an effective remedy as it permits the Agency to escape scrutiny and potentially liability, by merely defining its position. In other words, once Frontex has answered the request to act, irrespective of the content of this answer, the victim has *no access*, and she cannot bring her case to Court.

In the present case, for example, the Agency can contend that the conditions for suspending or terminating its activities in the ASR under Art. 46(4) have not been met, without engaging in the substance of the arguments raised by the applicants or address the above-mentioned alleged serious and persistent violations. Although Fron-

⁶⁶ Order of the Court of Justice of 1979, *Netherlands v Commission*, Case 59/70, paragraphs 12–24.

⁶⁷ Art. 265 TFEU.

⁶⁸ Order of the Court of First Instance of 26 February 2003, *CEVA et al. v Commission*, Joined Cases T-344/00 and T-345/00, paragraph 83.

tex rejected the applicants' request, the legality of this rejection – an act of the executive branch of the EU – could not have been reviewed by the judiciary of the EU.⁶⁹

To conclude, if Frontex adopts a stance, *no matter its content*, the agency is no longer considered to be failing to act. Even if the applicant's request is rejected, the applicant has no access to judicial oversight over the Agency's position.

4.3. 2nd Procedure: annulment

To bridge the substantial accountability gap characterising the procedure under failure to act, front-LEX successfully argued before the CJEU that, given the difficulties associated with bringing an action under this procedure, Frontex's decision not to act in accordance with a request to suspend or terminate its activities in the ASR in accordance with Art. 46(4) should be regarded as a 'new' policy decision.⁷⁰

This new policy decision effectively restarts the 2-month limitation period that would have restricted the possibility to bring an action for annulment under Article 263(6).⁷¹

The object of an action for annulment is to obtain from the Court a declaration that an act of an EU body is void pursuant to Art. 264 of the TFEU.⁷²

Actions for annulment of acts, and actions for failure to act, are essentially two sides of the same coin, in that the Agency cannot escape liability for an unlawful omission by claiming it has acted, just as it cannot escape liability for an unlawful act by claiming it never acted.

Article 263 of the TFEU provides: '*The CJEU shall review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties...*

⁶⁹ Order of the General Court of 1 April 2022, *SS and ST v Frontex*, Case T-282/21.

⁷⁰ Order of the General Court of 7 April 2022, *SS and ST v Frontex*, Case T-282/21, para 33; the Court confirmed that 'irrespective of whether the applicants' plea is well founded – their complaint that Frontex's position lacks clarity, is not sufficiently detailed and does not provide duly substantiated reasons, could, where appropriate, have formed the basis of an action for annulment under Article 263 TFEU.'

⁷¹ Art 263(6) of the TFEU provides: 'The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.'

⁷² Art. 264 of the TFEU provides: 'If the action is well founded, the Court of Justice of the European Union shall declare the act concerned to be void. However, the Court shall, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive.'

*Any natural or legal person may institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.*⁷³

Accordingly, for an action for failure to act against Frontex to succeed, the following basic elements must be satisfied:

- i. Frontex acted by taking a decision or adopting a measure.
- ii. The act was binding.
- iii. The act was unlawful.

4.3.1. Frontex acted

As mentioned above, the relevant act for the purposes of this action would be Frontex's decision not to suspend or terminate its activities in the ASR in accordance with Art. 46(4).

4.3.2. The act was binding

Binding acts are the outcome of 'the exercise, upon the conclusion of an internal procedure laid down by law, of a power provided or by law which is intended to produce legal effects'.⁷⁴

In the case of individuals, this means that the act must be capable of bringing about a distinct change in their legal position or restricting their rights.⁷⁵ As per Art. 288(4) of the TFEU, a decision of a Union agency is binding in its entirety.

⁷³ TFEU, Art. 263.

⁷⁴ Order of the Court of Justice of 1982, *Gauff v Commission*, Case 182/80, paragraph 18.

⁷⁵ Order of the Court of Justice of 2010, *Internationaler Hilfsfonds v Commission*, Case C-362/08, paragraph 51.

4.3.3. Unlawful act – grounds for annulment

According to Art. 263 of the TFEU, the grounds for annulment include: lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or any rule of law relating to their application, or misuse of power.

4.3.3.1. Infringement of essential procedural requirement

Firstly, the ED's decision not to terminate or suspend Frontex's activities in the ASR infringed an essential procedural requirement of Art. 46(4) in that the ED did not consult the FRO prior to taking that decision.⁷⁶ An essential requirement is a procedural rule intended to ensure that measures are formulated with due care, compliance with which may influence the content of the measure.⁷⁷ The requirement to consult constitutes an essential procedural requirement because consultation may affect the substance of the measure adopted.⁷⁸

4.3.3.2. Infringement of Union law

Secondly, the ED's decision constitutes an infringement of Art. 46(4) of the EBCG Regulation in that, in determining the factual basis upon which the application of Art. 46(4) is founded, the ED committed a manifest error of assessment: the ED erred in considering that no serious or persisting violations of fundamental rights or international protection obligations had occurred in relation to Frontex's activities in the ASR, by not taking into account relevant information within the meaning of Art. 46(6).

Frontex continues to base this assessment on its own Final Report of the Working Group on Fundamental Rights and Legal and Operational Aspects of Operations (WG), without considering the findings of UNHCR, OLAF and other relevant sources including its own FRO.

Material deficiencies in the working methods and composition of the WG render its report incapable of informing the ED of the existence of serious violations of funda-

⁷⁶ Art 46(4) provides that: 'The executive director shall, after consulting the fundamental rights officer and informing the Member State concerned, withdraw the financing for any activity by the Agency...'.
⁷⁷ Order of the Court of Justice of 1956, *Netherlands v High Authority*, Case 6/54, at 111–112.
⁷⁸ Order of the Court of Justice, Case 1 / 54 *France v High Authority* [1954 to 1956] E. C. R. 1, at 15 ; ECJ, Case 2 / 54 *Italy v High Authority* [1954 to 1956] E. C. R. 37, at 52.

mental rights for the purposes of acting in accordance with Article 46(4). Firstly, the WG was composed of ‘alternate’ members of the Management Board, consisting of representatives from the HCG and other MS police forces involved in the incidents under investigation, compromising its impartiality.

Furthermore, the Final Report reveals: an unwillingness on Frontex’s part to examine documented ‘pushback’ operations revealed during parliamentary hearings or reported by the Bellingcat investigation; its incapability to obtain relevant information and gather evidence; its reluctance to take a position regarding contradicting versions of events, even when Greece’s statements were found to be ‘inconsistent’;⁷⁹ and its use of evidentiary standards pertaining to criminal proceedings when conducting an administrative procedure, among other serious issues.

For these reasons, should an asylum seeker establish standing to bring an action for annulment against Frontex concerning its decision not to suspend or terminate its activities in the ASR in accordance with Art. 46(4), such an action would have reasonable prospects of succeeding.

4.4. 3rd Procedure: damages

The restrictive admissibility requirements applicable to actions for failure to act and annulment (see Part 5.1.) do not apply to actions for damages which do not directly challenge EU policy, but rather provide compensation.

The object of an action for damages is to oblige Frontex to provide financial compensation to asylum seekers for the harm they have suffered as a result of the Agency’s JO in the ASR. However, an action for damages may at the same time *indirectly* challenge Frontex’s policies through a determination that the conduct causing the damages is unlawful. As shown below, such a determination is one of three conditions a claim for damages must fulfil in order to prevail in Court.

Article 268 of the TFEU confers exclusive jurisdiction upon the CJEU in disputes relating to damages for non-contractual liability. Article 340 provides: ‘*In the case of non-contractual liability, the Union shall, in accordance with the general principles common to*

⁷⁹ ‘The Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea, Preliminary Report of the Frontex Management Board Working Group’, 19 January 2021, page 5, available at: <https://t.co/ZcwV6CiwsY?amp=1>.

*the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.*⁸⁰

Three conditions must be satisfied in order for an action for damages to succeed against Frontex:

- i. Frontex committed a sufficiently serious breach of a rule of law which is intended to confer rights on asylum seekers.
- ii. Actual damage occurred.
- iii. There exists a direct causal link between the unlawful act or conduct on the part of Frontex and the damage sustained by the injured party.⁸¹

4.4.1. Breach

It is likely that Frontex breached Art. 46(5) of the EBCG Regulation by approving the launch of RBI Aegean, despite the objective existence of ongoing violations of fundamental rights in the ASR, thus constituting a manifest error of assessment, failure to act with due diligence and failure to observe the principle of sound administration. Article 46(5) provides: *‘The executive director shall, after consulting the fundamental rights officer, decide not to launch any activity by the Agency where he or she considers that there would already be serious reasons at the beginning of the activity to suspend or terminate it because it could lead to violations of fundamental rights or international protection obligations of a serious nature. The executive director shall inform the Member State concerned of that decision.’*⁸²

Accordingly, a decision whether to launch an activity entails a legal obligation upon the ED to conduct a preliminary assessment of the international protection and fundamental rights situation related to the requested activity.

The facts indicate that ED Leggeri’s decision to launch RBI Aegean did not involve an examination of the applicability of Art. 46(5) given that: (1) the FRO was not consulted prior to the decision; (2) the decision was taken in an extremely short time frame

⁸⁰ TFEU, Art. 268.

⁸¹ Order of the Court of Justice, *Commission v Schneider Electric*, Case 440/07, paragraph 160.

⁸² EBCG Regulation, Art. 46(5).

(within one day of receiving the request); and (3) the ED was aware of the manifest unlawfulness of the KYSEA Decision in suspending the fundamental right to asylum which preceded the request to launch the activity.⁸³

In the alternative, in the event Frontex could establish that the ED did examine the applicability of Art. 46(5) before taking the decision to launch the RBI, the same factual basis presented above suggests that by failing to consult the FRO, the ED infringed Art. 46(5) and, at any rate, he committed a manifest error of assessment in considering that the suspension of the national asylum system could not lead to violations within the meaning of that provision.

On 2 March 2020, for example, the very same day that the ED approved the request to launch RBI Aegean, there was a failed attempt to collectively expel 33 asylum seekers present on board a Frontex vessel in the ASR, who were then deprived of their right to asylum in Greece.⁸⁴

Art. 46(5) of the EBCG Regulation is a rule of law ‘intended to confer rights upon individuals’, being asylum seekers, who are the holders of the fundamental rights Art. 46(5) is designed to protect, such as the right to asylum under Art. 18 of the Charter. It is well established that fundamental rights enshrined in the Charter confer rights upon individuals, despite their general application.⁸⁵

The decisive factor for determining whether this breach was ‘sufficiently serious’ is whether the ED ‘manifestly and gravely’ disregarded the limits of his discretion.⁸⁶ Where the institution has no discretion, mere infringement may be sufficient to establish a serious breach.⁸⁷

In the present case, the ED had no choice regarding whether to take into account the

⁸³ Leggeri stated these ‘tactics’ amount to ‘optimal use’ of EU law, admitting Frontex ‘don’t know how to qualify them, legally’.

⁸⁴ EU Observer, Nikolaj Nielsen, ‘Revealed: Official Greek order to illegally pushback migrants’, 18 November 2020, <https://euobserver.com/migration/150099>.

⁸⁵ Judgment of the Court of First Instance of 2008, *Franchet and Byk v Commission*, Case T-48/05, paragraph 209 (concerning the right of freedom of the press); Judgment of the Court of First Instance of, *Sison v Council*, Case T-47/03, paragraph 213 (concerning the right to a fair trial).

⁸⁶ See, to this effect, case C-312/00 P, *Commission v Camar and Tico*, 10 December 2002, EU:C:2002:736, para 54; Joined cases T-198/95, T 171/96, T-230/97, T-174/98 and T-225/99, *Comafrika and Dole Fresh Fruit Europe v Commission*, 12 July 2001, EU:T:2001:184, para 134.

⁸⁷ Order of the Court of Justice of 2000, *Bergaderm and Goupil v Commission*, Case 352/98, paragraphs 43–44.

fundamental rights considerations provided by Art. 46(5) of the EBCG Regulation as a factor pertinent to their refusal or acceptance of the request to launch RBI Aegean. As such, the ED's disregard of 46(5) is sufficient to establish a serious breach.

Additionally, in establishing the seriousness of the breach, the Court may also consider potential justifications on the part of Frontex, including the 'complexity of the situation to be regulated and the difficulties in applying or interpreting the legislation'.⁸⁸

In this case, however, the ED's attempts to retroactively obtain the opinion of the FRO and blur the timeline of the making of the decision illustrates that his obligation under Art. 46(5) was sufficiently clear and precise, and that he simply acted in bad faith. In this way, the breach was intentional in that an administrative authority exercising ordinary care and diligence would not have failed to act in accordance with Art. 46(5) in the circumstances stated above.⁸⁹ Consequently, the Agency's failure to act constitutes a sufficiently serious breach within the meaning of standing case-law.

In the alternative, if Frontex established it had exercised its discretionary powers in relation to Art. 46(5), the ED's failure to consult the FRO constitutes a sufficiently serious breach of Art. 46(5), given that the obligation to consult the FRO leaves no margin of discretion and is clear and precise in its wording.

4.4.2. Actual damage

For asylum seekers to receive compensation from Frontex, they must further demonstrate that the damage they suffered was 'actual and certain'.⁹⁰ This means that the damage to be remedied does not extend to hypothetical consequences of the collective expulsion that may occur in the future. The kind of actual damage asylum seekers are likely to suffer includes the infringement of their fundamental rights, and further damage to their human dignity and integrity.⁹¹

⁸⁸ Case T-384/11, *Safa Nicu Sepahan v Council*, 25 November 2014, ECLI:EU:T:2014:986, para 53.

⁸⁹ Judgment of the Court of First Instance of, *Sison v Council*, Case T-47/03, paragraph 40.

⁹⁰ Judgment of the Court of Justice of 2006, *Agraz and Others v Commission*, Case C-243/05, paragraph 27.

⁹¹ The fundamental rights breach itself is the very source of the immaterial damage. The damage is inherent in the breach. Fink (2018), *Frontex and human rights: responsibility in 'multi-actor situations' under the ECHR and EU public liability law*, OUP, page 231.

4.4.3. Causal link

Finally, a causal link needs to exist between Frontex's breach of Art. 46(5) and the harm suffered by the collectively expelled asylum seeker. This link is established where such harm is a 'sufficiently direct consequence' of Frontex's unlawful conduct.⁹²

In this regard, Greece's successful execution of the KYSEA Decision and its new 'preventive tactics', including systematic interception and collective expulsion, were *directly dependent* on Frontex launching the requested RBI Aegean, thus providing the essential financing and resources for its operation. Both operationally and politically, Greece was incapable of executing the far-reaching, costly and both legally and politically illegitimate KYSEA Decision without Frontex.⁹³

However, according to the CJEU's case-law, if Greece could have breached the rights of asylees in the absence of Frontex's direct or indirect involvement, there may be no causal relationship between the unlawful conduct of Frontex and the damage suffered by the victims.⁹⁴ The recent case of T-600/21⁹⁵ affirms this unreasonably high threshold for causation and casts into doubt the availability of a legal action for damages in the context of serious human rights violations committed by Frontex, in the current political climate. In T-600/21, the Court declined to establish a causal link between the harm suffered by a Syrian refugee family who were *refouled* from Greece to Turkey in the context of a Joint Operation by Greek and Frontex officials, on the basis that a return decision is the exclusive responsibility of the Member State under Art. 28 of Regulation 2016/124. However, among other errors, the Court based its findings on a *hypothetical assessment* of a return decision in supposed accordance with Art. 28, instead of reviewing the facts at hand to determine whether such a decision was even taken by Greek of-

⁹² Joined cases T-440/03, T-121/04, T-171/04, T-208/04, T-365/04 and T-484/04, *Arizmendi and Others v Council and Commission*, 18 December 2009, EU:T:2009:530, para 85.

⁹³ Greece's request for additional funding of EUR 15.83 million from the EC to enable it to execute its new 'tactics' further evidences it could not have implemented these tactics by itself. *Der Spiegel*, 'EU-Kommission blockiert Zahlungen an griechische Küstenwache', 29 August 2021: <https://www.spiegel.de/ausland/pushbacks-von-fluechtlingen-eu-kommission-kuerzt-griechischer-kuestenwache-das-geld-a-028e8f42-cb75-41b9-97dd-bc28add93967>.

⁹⁴ This restrictive standard of 'exclusive' causation was recently affirmed in *Kočner v EUROPOL*, which is currently under appeal (Arrêt du tribunal de 29 septembre 2021, *Kočner v EUROPOL*, l'affaire T528/20). However, the Court has, in other cases, been willing to accept that an additional determining cause of the relevant damage does not preclude a finding of liability (see: Judgment of the European Civil Service Tribunal of 12 May 2011, *Missir Mamachi di Lusignano v European Commission*, Case F50/09).

⁹⁵ Judgment of the Court of 6 September 2023, *WS v European Border and Coast Guard Agency (Frontex)*, Case T600/21.

officials under the Regulation in the first place. It further failed to separate Frontex's role in *implementing* return decisions, which is subject to the prohibition of *refoulement* and other fundamental rights obligations under the Charter and the EBCG Regulation.

To counter this undeveloped perception of shared responsibility in the jurisprudence, *front-LEX* argued in Court that even if Greece would have acted in the same manner without Frontex involvement, there is still one head of non-material damage that is necessarily and by definition caused by Frontex: the disillusionment of asylum seekers from their belief in the liberal ethos of the Union, based on which they sought safe haven in the EU to begin with. This *sui generis* damage, caused by the infringement of their right to dignity, can never be attributed to Greece and can only be imputed to Frontex.

As such, it is arguable that an action for damages against Frontex at the CJEU pursuant to Arts. 268 and 340 would have reasonable prospects of succeeding. Even if a damages case is rejected, for example, on the basis of lack of causality, a determination of the Court that the conduct that arguably caused the damage is unlawful would still achieve the strategic objective of the litigation, namely to declare the challenged policy unlawful.

5. STATUS OF FRONT-LEX CASES VS FRONTEX

To date, in its legal campaign against Frontex, *front-LEX* has instituted proceedings using *all three* CJEU procedures that are available for individual victims: (1) an action for failure to act (Case T-282/21); (2) a second action for failure to act, or in the alternative, action for annulment (Case T-600/22); and (3) an action for damages (Case T-136/22).

5.1. Case T-282/21

Case T-282/21 was brought by *front-LEX* on behalf of two asylum seekers from Burundi and the Democratic Republic of the Congo, who arrived in Turkey in 2019. The Applicants were victims of *four* collective expulsion operations, occurring between May 2020 and February 2021, when each attempted to seek asylum in Greece by crossing the Aegean Sea from Turkey. On 15 February 2021, the Applicants sent a formal notice to Frontex ED Leggeri calling upon him to suspend or terminate Frontex’s Joint Operation in the ASR, in line with Art. 46(4) of the EBCG Regulation (the ‘Preliminary Request’).

After receiving a response from Leggeri on 23 March 2021, which did not consider the evidence the Applicants had provided of serious violations of fundamental rights in the ASR, *front-LEX* launched an action for failure to act pursuant to Art. 265 of the TFEU.

The Applicants sought a declaration from the Court that Frontex unlawfully failed to act by: (a) refraining from taking the decision to withdraw the financing of all or part of its activities in the ASR, to suspend those activities or to terminate them in whole or in part, in accordance with Art. 46(4); (b) not providing duly justified grounds for failing to implement the relevant measure; and (c) not taking a view in response to the Applicant’s Preliminary Request.

Frontex refused to engage with the substance of the application and instead entered a plea of inadmissibility on 27 December 2021. On 7 April 2022, the Court dismissed the Application. As *front-LEX* expected, the Court procedurally rejected the case on the grounds that the ED’s letter of 23 March 2021 constituted a definition of Frontex’s position wherein the ED explained why he did not intend to take any measures provided for by Art. 46(4).⁹⁶

⁹⁶ See Part 5.2.4. for explanation.

As mentioned above, the Court accepted, however, the position of *front-LEX* and determined that such ‘negative’ definition of position can be exposed to a legal action for annulment of the challenged policy, and by doing so, it significantly expanded the access of individual victims to the Court.

This important ruling enabled *front-LEX* to file another legal action against the Agency for failure to act, which, in case of another negative definition of position by Frontex, could now be challenged as an action for annulment (case T-600/22).

5.2. Case T-600/22

The second case by *front-LEX* involves the same Applicant from the Democratic Republic of the Congo, who is still stranded in Turkey and has been subject to further collective expulsions. On 26 September 2022, relying upon new evidence, most pertinently the OLAF report, the Applicant initiated a second action for failure to act in accordance with Art. 46(4) of the EBCG Regulation and, in the alternative, and based on the previous Court ruling, an action for annulment, pursuant to Arts. 265 and 263 of the TFEU respectively.

The parties have largely completed the written procedures with the Defendant submitting their observations on the evidence on 21 June 2023. During the proceedings, *front-LEX* submitted numerous motions related to new evidence on Frontex policy in the ASR, which further corroborates *front-LEX*’s argument. On 26 June 2023, for example, the Applicant further requested the Defendant to produce the recommendation of its FRO to suspend Frontex’s activities in Greece, issued during the Defendant’s Management Board meeting on 20–21 June 2023, as reported by Politico.⁹⁷

5.3. Case T-136/22

Front-LEX’s third case is brought on behalf of a Syrian asylum seeker, who was the victim of a collective expulsion operation in the ASR in April 2020. On 10 March 2022, *front-LEX* initiated an application for damages against Frontex for the non-material loss suffered by the Applicant as a result of the Agency launching RBI Aegean under Art. 46(5) of the EBCG Regulation. On 8 November 2022, the written part of procedure closed, after which the Applicant lodged a request for a hearing.

⁹⁷ Politico, ‘Frontex considers suspending activities in Greece: Report’, June 2023, available at: <https://www.politico.eu/article/greece-migrant-tragedy-frontex-considers-suspending-activities/>.

6. STRATEGY MOVING FORWARD

The strategic litigation initiated by *front-LEX* before the CJEU forms part of its Rule-of-Law campaign, the object of which is to invigorate the EU judiciary as an actor for keeping in check the executive branch of the EU.

Front-LEX seeks to transform the CJEU, the *only* Court competent to regulate the conduct of EU agencies, to become the equivalent of what the European Court of Human Rights is for European states.

As such, *front-LEX* is developing, from scratch, migration-related jurisprudence on organisational responsibility and is currently, and unfortunately, the only NGO to have filed migration-related human rights cases against Frontex (and potentially other EU organs, such as the EU Commission) before the CJEU.⁹⁸ Accordingly, there remains considerable opportunities and unexplored possibilities for other legal advocates and civil society actors to concentrate their efforts on holding Frontex to account and addressing human rights violations at the EU level.

To date, strategic litigation focussing solely on the responsibility of frontline Member States, such as Italy, Greece and Hungary, at the ECtHR has been ineffective in securing greater legal protections for asylum seekers. The success of the ECtHR landmark case *Hirsi v. Italy* in widening state obligations to uphold fundamental rights, for example, only resulted in Italy adopting even more inhumane tactics to circumvent its responsibility, and the deaths and abuse of thousands more asylum seekers.

Bridging the accountability gap for EU organs is therefore crucial in the context of border control, as Frontex typically operates jointly with, and through, host Member States (Joint Operations). This *modus operandi* currently enables Frontex and the ‘participating’ Member States deploying assets and agents to the Agency to completely avoid judicial scrutiny and the enforcement of their fundamental rights obligations.

In the wake of the *Pylos* shipwreck, the need to close this accountability gap has never been greater.

⁹⁸ Note, however, that other NGOs have brought actions against Frontex regarding infringement of freedom of information. See, for example, Judgment of the General Court of 27 November 2019, *Izuzquiza and Semsrott v European Border and Coast Guard Agency (Frontex)*, Case T-31/18; See also, pending case *Naass and Sea Watch v Frontex* (Case T-205/22) before the Court of Justice of the EU, focusing on public access to Multipurpose Aircraft Surveillance data in relation to a specific interception carried out by the Libyan Coast Guard with the alleged support of a Frontex drone inside the Maltese rescue zone.

