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Analysis: “(Don’t) trust the Process: procedural Rules for Appeal, Obligations and Shared Responsibility between EU Agencies and Member States. Three Questions raised in the Hearing *WS et al v. Frontex* (C-679/23 P)”

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On 4th February 2025, the Grand Chamber heard the appeal in the case *WS and Others v. Frontex* ([C-679/23 P](#)) against the General Court’s dismissal of Syrian migrants’ damages claim against Frontex ([T-600/21](#)).

This case allows the Court to rule on legal remedies against unlawful actions by an EU agency, particularly in joint operations and shared responsibilities between Frontex and Member States, notably concerning the principle of *non-refoulement*.

The hearing and the debate offered a glimpse into what the judges considered to be the most pressing decisive issues: the line between factual and legal elements of a return decision in the framework of a limited review on appeal; the extent of Frontex’s obligations in the context of sincere cooperation and shared responsibilities; and the causal link in damage actions.

A Tale of Many ‘Processes’

In October 2016, the applicants, a Kurdish-Syrian family, arrived in Milos, Greece. Soon after, they were involved in a return operation to Türkiye, despite wanting to seek asylum and without return decisions. Concerned by their status in Türkiye, they fled to Iraq. The applicants filed two ‘concentric’ complaints at Frontex. Neither of them was successful.

In the first instance, the General Court focused on the three-layer test for Frontex's non-contractual liability (Article 340 TFEU). The applicants claimed to have been involved in the return operation without Frontex having verified the activity they were co-hosting. The judges prioritised the third limb of the (cumulative) liability test, the causal link, setting aside the first two: unlawful conduct and the actual damages suffered.

The General Court stated that unlawful conduct *per se* is insufficient to establish a causal link. They found that the damage resulted from the applicants' choices, not Frontex's actions. By fleeing to Iraq, they broke the causal link.

In the appeal, the applicants argue that the General Court erred in law in considering their action a challenge to the refusal of international protection, in holding that Frontex had no obligation to verify the correct unfolding of a return operation, and in judging that no causal link could be established.

1. What Can the Court Review on Appeal? Between Factual and Legal Determinations of a Return Decision

The hearing featured authoritative voices: most of the questions came from the Juge-Rapporteur, the President of the Court and the Advocate General. On the other side of the bench, Eleanor Sharpston, barrister and former Advocate General, led the applicants' team, while Bertrand Wägenbaur defended Frontex.

The case raised several procedural issues regarding the admissibility (of the action, appeal, and evidence) and the limits of what the Court can review on appeal.

The first matter concerned the continuing interest in bringing an action, as the applicants and the Hellenic Republic had reached a friendly settlement. Frontex argued that Greece had already repaired the damage: Frontex cannot complement Member States' liability. Conversely, the appellants claimed that the damages were not yet fully satisfied and that, in any case, Frontex should be held accountable for violating its own duties.

However, the key issue was whether a return decision regarding the applicants existed, as the Court has no jurisdiction to review facts on

appeal. Therefore, the judges shed light on such a decision and whether it could be contested. Wägenbaur argued that the applicants' claim contradicts the findings of the General Court about the existence of a return decision, which the Court cannot review. Sharpston had to explain in detail, and under questioning from several judges, that the appeal does not challenge the merits or legality of the return decision but rather the General Court's underlying assumption that they intended to challenge the return decision. This qualifies as a legal, rather than a factual, assumption.

2. Sincere or Blind Cooperation? Frontex's Obligations in Shared Responsibilities

The discussion about the unaddressed existence of a return decision is linked to Frontex's obligations during joint operations with Member States. The applicant emphasised that Frontex has duties 'before, during and after' each mission to ensure lawful conduct. Sharpston argued that they should not have reviewed the asylum application, which is a national prerogative. However, they should have verified that all the people set for transfer were subject to a return decision. In this case, the list of the people involved in the return flight was not a list of 'returnees'. It was essential to double-check. Such a failure potentially violated EU fundamental rights (including Article 19 of the Charter and ECtHR case law on collective expulsions).

Frontex relied on Article 4(2) TFEU (the principle of sincere cooperation) and Article 5 of the Frontex Regulation [2016/1624](#) and affirmed that the Member States have primary responsibility while Frontex only plays a supportive role. Frontex had no choice but to rely on the list shared by the Greek authorities because both Member States and Frontex are under a duty of sincere cooperation. A presumption of legality covers such documents. Concerns can only arise in cases of manifest mistakes and anomalies. While it cannot be denied that Frontex holds some responsibility (Article 60 of the Frontex Regulation), it is lesser than that of the Member States, and there were no indicators to question the list's correctness in this case.

Such arguments raised some questions on the part of the judges. What is the boundary between a purely 'formalistic' overview (to adopt the word of the Advocate General) and a manifest error? Why did Frontex

not raise doubts about the fact that a family had just arrived through a maritime migration route and did not ask for asylum? The answer highlighted a lack of detailed information in Frontex's knowledge: Frontex does not have access to migrants' backgrounds and status as asylum seekers or returnees.

What also became relevant is that in the meantime, Frontex has updated its policy and requires the Member States to fill out an online form to confirm that each person involved had asked for protection and/or had been the addressee of an individual return decision. Does this reveal that sincere cooperation does not mean blind cooperation with the Member States and that Frontex should not always 'trust the (national) process'?

3. From Shared Responsibilities to Shared Liability? Unlawfulness and the Causal Link

The debate over shared responsibilities between Frontex and the Member States impacts the determination of liability for both parties involved. A crucial question in this context is whether shared responsibility makes Frontex liable for unlawful conduct during joint operations, and how: shared or individual liability?

The parties' positions were based on different interpretations of (not only Article 5 but also) Articles 42 and 60(3) of the Frontex Regulation. The former deals with the civil liability of the members of the teams operating in a host Member State. The latter covers the agency's non-contractual liability.

Frontex argued that the abovementioned articles do not establish joint liability between the agency and the Member States. Article 60(3) provides that Frontex can be liable for damages. However, its responsibility is minimal. Moreover, the Court's *Kočner* case law ([C-755/21 P](#)) about Europol does not allow for joint liability unless provided for by legislation (i.e. the Europol Regulation).

In the appellants' view, *Kočner* does not automatically exclude liability for Frontex. Instead, the combination of Articles 5, 42 and 60 of the Frontex Regulation should be interpreted alongside Article 34 of the same act, stating that Frontex is called upon to guarantee the respect of fundamental rights in performing its tasks.

Toward the end of the hearing, the Advocate General and the judges focused their questions on the crucial issue of the causal link. The General Court decided that Frontex's unlawful action was a necessary condition but not sufficient to establish a causal link (para. 67). Eleanor Sharpston challenged this conclusion. Frontex's failure to oversee the list of people involved is not only a *condicio sine qua non* but also sufficient to establish a direct link.

The key question became assessing whether such a causal link is 'sufficiently direct'. The appellants claimed that the migrants had expressed their intent to seek asylum. Therefore, whatever happened after the unlawful return is a direct consequence of it. Moving a Kurdish family to Türkiye, where they would not have felt safe, made fleeing to Iraq foreseeable. However, Frontex argued that Türkiye was considered a safe country in 2016, and thus, it was not responsible for the subsequent actions taken by the migrants, who had alternatives. The information available to Frontex was not enough to raise doubts about the legality of Hellenic documents.

The Court will now address the dilemma of how shared responsibility limits Frontex's obligation to uphold fundamental rights during its operations. The defendant's bottom line seems to be that Frontex's power is very limited in the joint operations, and therefore, with little power comes little responsibility. Nevertheless, is it possible that with little responsibility comes some liability?



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