

EMPLOYMENT & IMMIGRATION - INSTITUTIONAL LAW - JUSTICE & LITIGATION

JANUARY 5, 2026

Op-Ed: “Addressing the Accountability Gap? The Court of Justice’s Judgements in Hamoudi (C-136/24 P) and WS and Others v Frontex (C-679/23 P)”

Maria Ana Lourenço

Introduction

On 18th December, the Court of Justice (‘CJEU’ or the ‘Court’) delivered its judgements in *Hamoudi* ([C-136/24 P](#)) and *WS and Others* ([C-679/23 P](#)). These judgments are of significant importance, since several investigations, including by [OLAF](#), have reported Frontex’s involvement in pushbacks and collective expulsions, and amid criticism that EU Courts have ‘[shielded Frontex from responsibility](#), contributing to the creation of an ‘accountability gap’ in the EU’s so-called ‘[complete system of remedies](#).’

Facts and the Actions Before the General Court

Both cases are actions for damages against Frontex, dismissed by the General Court (‘GC’) (Case [T-136/22](#) and [T-600/21](#)) for failure to meet the conditions for EU liability.

In *Hamoudi*, the applicant arrived in Greece, alongside others, seeking asylum. The individuals were intercepted, deprived of their phones, and returned to Turkey without the opportunity to seek asylum. The applicant claimed he saw a Frontex-operated aircraft flying overhead without reporting the pushback. He sought compensation for non-material damage. The GC, however, held that the evidence was ‘manifestly insufficient’ to prove the applicant’s presence in the pushback (para. 39) despite his witness statement, a Bellingcat article which covered the pushback, and four pictures from it. The appeal

before the Court of Justice focused on whether the rules on the burden of proof should be adapted in pushback cases.

In *WS and Others*, the applicants were a Syrian Kurdish family who arrived in Greece to seek asylum. They were soon returned to Turkey in a Frontex-Hellenic Republic operation without a return decision covering them. Fearing their return to Syria, they fled to Iraq. They sought compensation for material and non-material damage from settling in Turkey, fleeing and settling in Iraq for fear of refoulement, and for the legal aid costs related to the complaints against Frontex.

The GC found no causal link between the alleged damages and Frontex's conduct, holding that Frontex has no competence to assess the merits of return decisions (para. 66) and that the causal link was broken by the appellants' freely made decision to incur costs in Turkey and Iraq (para. 67). The appeal before the Court of Justice focused on Frontex's obligations under EU law (particularly, whether it must ensure that a return decision exists for persons included in a return operation), and the assessment of causation.

Appeals Before the Court of Justice

The GC's judgements were criticised for disregarding the principle of effective judicial protection, granting Frontex impunity for fundamental rights violations. The appeals were expected, giving rise to the hope that the Court of Justice would address the emerging accountability gap in the EU's system remedies.

In its judgments, the Court of Justice rightly recognised the importance of the action for damages in holding Frontex liable in the light of its increasing powers (*Hamoudi*, paras 91 and 103). In contrast with the GC, the Court stressed the need to adapt the conditions establishing EU liability to applicants in order to comply with the principle of effective judicial protection, and clarified Frontex's fundamental rights obligations under EU law.

Adaptation of the Conditions Establishing EU Liability (Article 47 of the Charter)

The Court stressed that not adapting the conditions establishing EU liability could result in a violation of the principle of effective judicial

protection, since respect for that principle depends on a case-by-case, rather than an abstract analysis (*Hamoudi*, para. 78).

In *Hamoudi*, this was particularly relevant to the question of whether the burden of proof for applicants should be adapted, due to their ‘significant vulnerability’ and difficulty in collecting evidence (para. 88) – in contrast with *Frontex* which is, in principle, likely to possess relevant information (para. 96).

In this context, the Court of Justice aligned its case law with that of the European Court of Human Rights on the burden of proof in pushback/collective expulsion cases. It did so on the basis of Article 52(3) EU Charter, which establishes that the rights protected by the EU Charter that correspond to those contained in the European Convention on Human Rights (‘ECHR’) must, at a minimum, provide the level of protection guaranteed by the latter (*Hamoudi*, para. 108). More concretely, the Court of Justice reasoned that Article 47 EU Charter cannot safeguard a level of protection that falls below Articles 6(1) and 13 ECHR, and therefore held that the applicant is not required to submit conclusive, but only *prima facie* evidence that *Frontex*’s operation occurred, and that they were present in it (*Hamoudi*, para. 106). This requires that the applicant provide individual evidence in support of his version of the events in a ‘detailed, specific and consistent’ manner (*Hamoudi*, para. 109).

Unlike Advocate General (‘AG’) Norkus, whose [Opinion](#) suggested that the conditions for the partial shift be more demanding (Opinion, paras 59-60), the Court found the applicant’s own witness statement to have fulfilled those criteria (paras 118-119). The Court also clarified that the GC’s discretion in exercising its powers (through measures of organisation of procedure) is limited by Article 47 of the Charter, which requires, in certain circumstances, that the GC intervenes to supplement information and remove any factual uncertainty (*Hamoudi*, paras 79-81).

In *WS and Others*, the vulnerability of the applicants was likewise central to the Court’s reasoning. While reiterating the GC’s finding that causality may be broken by an adversely affected person’s interfering decision (paras 151-153), the Court of Justice, following AG Čapeta (para. 116 of her [Opinion](#)), held that, in the appellants’ circumstances,

their decisions (namely to flee and settle in Iraq) were 'a reasonable response' (para. 157), meaning that the causal link remained unbroken. The Court went further than AG Ćapeta by also weighing the appellants' situation when assessing causality between Frontex's conduct and the legal costs they incurred when lodging a complaint in Frontex's complaint mechanism (para. 171).

Clarification of Frontex's Fundamental Rights Obligations under EU Law

In *WS and Others*, the GC found that Frontex cannot be held liable since it plays a 'merely supportive role' *vis-à-vis* the Member States (para. 64).

By contrast, the Court of Justice underscored that Frontex must ensure compliance with fundamental rights in all its tasks (*Hamoudi*, para. 93; and *WS and Others*, paras. 130 and 132) and that it must respect EU and international law, in particular the principle of non-refoulement (*Hamoudi*, para. 94). On that basis, the Court held that Frontex must ensure that a return decision exists for every person whom a Member State includes in a return operation coordinated by Frontex (*WS and Others*, para. 102). Since Frontex did not verify the existence of such a decision for the appellants, the Court held that it had committed an unlawful act, thereby overturning the GC's finding.

However, the judgment leaves open the question of whether Frontex may rely on a presumption of legality when faced with a Member State's return decision, absent sufficiently objective and explicit circumstances indicating that it may be incorrect (paras 76 and 109). If such a presumption exists, it could contribute to obscuring the identification of the author of the unlawful act for applicants in similar situations. This is particularly concerning given that the joint responsibility regime established in *Kočner* ([C-755/21 P](#)) remains exceptional under EU law. In the context of the Frontex Regulation, the Court only highlighted that Frontex can be held liable alongside a Member State for fundamental rights violations (*WS and Others*, para. 126): the fact that a conduct is imputable to a Member State does not automatically exclude Frontex's liability. Though important, this is far from establishing a similar regime to the one in *Kočner*. Finally, the

presumption would also leave unresolved when, and on what basis, it can be rebutted.

Lastly, echoing the appellant’s argument in *Hamoudi*, the Court confirmed that Frontex has a duty to cooperate in investigations or proceedings involving fundamental rights violations (paras 102 and 133). This aligns with adapting the allocation of the burden of proof, and it means that, in future cases, it can be expected that Frontex will be required to cooperate in establishing the facts underlying the disputes at stake.

Conclusion

The developments highlighted by the Court’s judgments in *Hamoudi* and *WS and Others* are a welcome first step towards addressing the accountability gap that resulted from the GC’s approach, to which the cases have now been returned. The Court of Justice has clarified that effective judicial protection cannot be guaranteed in the abstract, and that power entails responsibility. But the road ahead is long. Important questions remain unanswered, and it is likely that they will re-emerge. It is to be hoped that the Court of Justice will address them mindful of these considerations.

Maria Ana Lourenço is a doctoral researcher at the Luxembourg Centre for European Law (University of Luxembourg).