

EUROPEAN UNION LAW

Recalibrating causation and operational responsibility in EU Agency Law: Case C-679/23 *P WS and Others v Frontex*

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Introduction

The operational transformation of EU agencies has altered European administrative governance significantly. Agencies such as Frontex are no longer limited to technical coordination between national authorities; they now participate directly in border surveillance, joint return operations and the broader externalisation of migration control.¹ Yet while operational integration has deepened, the Union's non-contractual liability regime under Article 340(2) TFEU has remained demanding.² Actions for damages require proof of unlawful conduct, actual damage and a sufficiently direct causal link;³ and in practice, the causal requirement has often proved decisive.⁴

In *WS and Others v Frontex*,⁵ the Grand Chamber confronted this issue. The case arose from a joint return operation coordinated by Frontex in which the applicants alleged that their fundamental EU rights were infringed. Although the Court ultimately did not impose liability, it recalibrated how causation must be assessed in composite operational settings involving both EU and Member State actors. By rejecting a strict exclusivity requirement and confirming that meaningful operational contribution can be enough, the judgment represents an important step in strengthening the accountability of EU agencies.⁶

The Legal and Factual Context

Under Article 340(2) TFEU, the Union must make good any damage caused by its institutions or servants in the performance of their duties.⁷ In *Bergaderm*,⁸ the Court brought institutional liability in line with the *Francovich* approach, ruling that liability arises only where there has been a sufficiently serious breach of a rule intended to confer rights on individuals. As a result, EU liability is contingent on three cumulative conditions being met: an unlawful act, actual damage and a direct causal link between the two.⁹

Causation has, historically, been interpreted strictly. In *Dumortier*,¹⁰ the Court held that damage must be the direct consequence of the unlawful conduct. Later cases such as *Trubowest* and *Gascogne Sack* emphasised that independently operative conduct may break the causal chain.¹¹

¹ Paul Craig, *EU Administrative Law* (OUP 2012) Ch 6.

² Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 art 340(2)

³ Case C-352/98 P *Bergaderm* EU:C:2000:361 para 42.

⁴ Phedon Nicolaides, 'Non-contractual liability of the EU: Need for a 'diligent' administrator test' (2024) 31 *Maastricht Journal of European and Comparative Law* 3.

⁵ Case C-679/23 P *WS and Others v Frontex* [2025] ECLI:EU:C:2025:976.

⁶ *Ibid* paras 150-153.

⁷ Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 art 340(2).

⁸ Case C-352/98 P *Bergaderm* [2000] ECLI:EU:C:2000:361; Joined Cases C-6/90 and C-9/90 *Francovich* [1991] ECLI:EU:C:1991:428.

⁹ Case C-352/98 P *Bergaderm* [2000] ECLI:EU:C:2000:361 para 42.

¹⁰ Case 64/76 *Dumortier v Council* [1979] ECLI:EU:C:1979:223 para 21.

¹¹ Case C-419/08 P *Trubowest Handel* [2010] ECLI:EU:C:2010:147 paras 61-63; Case C-138/17 P *European Union v Gascogne Sack Deutschland* [2018] ECLI:EU:C:2018:1013.

Even in *Ledra Advertising*, decided in the sensitive context of the euro-crisis, the Court maintained a restrictive approach to institutional liability.¹²

This doctrinal framework encountered difficulty in the context of Frontex operations. Regulation 2016/1624 established the European Border and Coast Guard and expanded the Agency's operational functions.¹³ Whilst Member States retain formal responsibility for adopting return decisions, Frontex coordinates operations, participates in planning, deploys officers and operates under a binding fundamental rights framework.¹⁴ Regulation 2019/1896 further strengthened these functions and introduced, in Article 46, a mechanism enabling the suspension or termination of operations in cases of serious fundamental rights violations.¹⁵

The litigation in *WS* arose from a joint return operation coordinated by Frontex; the applicants sought damages before the General Court (Case T-600/21), alleging that fundamental rights violations occurred during the return, and that Frontex failed to comply with its monitoring and coordination obligations under Regulations 2016/1624.¹⁶ They argued that the Agency's omissions contributed causally to the harm suffered by them.

The General Court dismissed the action, emphasising that the return decisions had been adopted by national authorities, and concluded that there was no sufficiently direct causal link between Frontex's conduct and the alleged damage.¹⁷ The Court also relied on intervening acts in the chain of events and excluded certain travel costs from recoverable damage.¹⁸ Its reasoning reflected a formal distinction between national competence and EU coordination, effectively insulating the Agency from liability in composite settings.¹⁹

The Grand Chamber Judgment

On appeal, the Grand Chamber set aside part of the General Court's reasoning.²⁰ While it did not ultimately establish liability, it clarified the legal test for causation under Article 340 TFEU.

First, the Court rejected the suggestion that the unlawful conduct must be the exclusive cause of the damage. Nor, in the Court's view, must it be immediate in a strictly temporal sense; instead, the appropriate question is whether it played a decisive role in bringing about the harm.²¹ This clarification is doctrinally significant because it makes it clear that shared operational responsibility does not – by itself – negate the existence of a causal link.

Second, the Court addressed the role of intervening acts. Although earlier case law suggested that independently operating conduct could sever the chain of causation,²² the Grand Chamber emphasised that such acts cannot be assessed in the abstract and must instead be evaluated in their specific factual and legal context.²³ Thus, the involvement of Member State authorities does not automatically sever the link between an EU agency's conduct and the damage suffered.

¹² Case C-8/15 P *Ledra Advertising v Commission* [2016] ECLI:EU:C: 2016:701.

¹³ Regulation (EU) 2016/1624 [2016] OJ L251/1.

¹⁴ *Ibid.*

¹⁵ Regulation (EU) 2019/1896 [2019] OJ L295/1 art 46.

¹⁶ Case T-600/21 *WS and Others v Frontex* [2023] ECLI:EU:T:2023:492.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Stanisław Kusiak, 'Non-Contractual Liability: WS and Others as a Blockade to Keeping Frontex Accountable' (EuroProspects, 8 March 2025) <<https://europrospects.eu/non-contractual-liability-ws-and-others-as-a-blockade-to-keeping-frontex-accountable/>> accessed 23rd February 2026.

²⁰ Case C-679/23 P *WS and Others v Frontex* [2025] ECLI:EU:C:2025:976.

²¹ *Ibid* paras 150-153.

²² Case C-419/08 P *Trubowest Handel*, n11, paras 61–63; Case C-138/17 P *European Union v Gascogne Sack Deutschland*, n11.

²³ n16.

Consequently, in coercive return contexts, applicants' actions cannot be treated mechanically as freely chosen interruptions of causation.²⁴

Third, the Court examined the nature of Frontex's obligations under Regulation 2016/1624. It confirmed that the Agency's monitoring and coordination responsibilities are legally binding.²⁵ These obligations are not merely political or programmatic commitments; if sufficiently serious breaches of those duties occur, they may satisfy the unlawfulness requirement under *Bergaderm*.²⁶ By recognising the binding character of these operational duties, the Court opened the possibility that omissions in monitoring or coordination could contribute causally to damage.

Importantly, the Court's reasoning reflects an understanding of composite administration where EU and national authorities act jointly within integrated procedures.²⁷ In such settings, a purely formal focus on who adopted the final decision risks obscuring the functional contribution of coordinating actors. The Court's approach reframes causation as a normative assessment of operational contribution rather than a mechanical tracing of formal competences.²⁸

Constitutional and structural significance of the case

The broader significance of *WS* lies in its response to the accountability challenges generated by externalised migration control. The European Court of Human Rights has addressed similar issues in *Hirsi Jamaa v Italy*, where Italy was held responsible for maritime pushbacks conducted beyond its territory on the basis of effective control.²⁹ Further, in *MSS v Belgium and Greece*,³⁰ the Court emphasised effective protection against refoulement in cooperative arrangements.

Academics have identified a structural accountability gap in EU border governance, in which operational control is dispersed across multiple actors while legal responsibility remains difficult to attribute.³¹ Frontex's embeddedness within composite administrative structures has been criticised for limiting effective judicial protection.³²

The Grand Chamber's recalibration does not abandon the cumulative structure of Union liability. For example, it does not impose strict liability on agencies, nor does it dilute the requirement of a sufficiently serious breach. However, by rejecting exclusivity and immediacy and by focusing on determining contribution grounded in binding operational obligations, the Court has moved away from rigid competence formalism.³³ This approach remains anchored in EU constitutional principles, including effective judicial protection under Article 47 of the Charter,³⁴ and the broader logic of Charter applicability articulated in *Åkerberg Fransson*.³⁵ At the same time, it

²⁴ Antje Kunst, 'Advocate General Ćapeta's Opinion in *WS and Others v Frontex* before the Grand Chamber: The End of Frontex's Shielding?' Joint Liability of Frontex and Member States in Return Operations' (EU Law Analysis, 2025) < <http://eulawanalysis.blogspot.com/2025/06/the-advocate-general-capetas-opinion-in.html> > accessed 23rd February 2026.

²⁵ n13.

²⁶ n9.

²⁷ Herwig CH Hofmann, Gerard C Rowe and Alexander H Türk, 'The Present and Future Condition of European Union Administrative Law' in Hofmann, Rowe and Türk (eds), *Administrative Law and Policy of the European Union* (OUP 2011) Ch 26.

²⁸ Antje Kunst, 'Frontex before the EU Courts: Damage, Causation, and Liability under Article 340(2) TFEU' (EU Law Analysis, 2026) < <http://eulawanalysis.blogspot.com/2026/01/frontex-before-eu-courts-damage.html> > accessed 23rd February 2026.

²⁹ *Hirsi Jamaa and Others v Italy* (2012) 55 EHRR 21 paras 73–82.

³⁰ *MSS v Belgium and Greece* (2011) 53 EHRR 2 paras 342–359.

³¹ Cathryn Costello and Itamar Mann, 'Border Justice' (2020) 21(3) *German Law Journal* 459.

³² Salvatore Nicolosi, 'The European Border and Coast Guard Agency (Frontex) and the limits to effective judicial protection' (2024) 30 *European Law Journal* 149.

³³ Mariana Gkliati, 'Shaping the Joint Liability Landscape? The Broader Consequences of *WS v Frontex* for EU Law' (2024) 9 *European Papers* 69.

³⁴ Charter of Fundamental Rights of the European Union [2012] OJ C326/391 art 47.

³⁵ Case C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2013:105.

resonates functionally with Strasbourg's emphasis on effective control without collapsing the autonomy of EU law.

Conclusions

WS and Others v Frontex represents a measured but meaningful development in EU agency liability. The Court did not find Frontex liable, yet it clarified that causation under Article 340 TFEU does not require exclusivity, nor is it defeated automatically by shared operational responsibility within composite administration.³⁶ By recognising that binding operational obligations may constitute a determining cause of damage, the Grand Chamber thus narrowed the structural accountability gaps.³⁷

Whether this recalibrated framework will lead to successful actions for damages in future cases remains unclear. Nonetheless, the judgment marks an important step in aligning EU liability doctrines with the operational realities of contemporary European border governance.

³⁶ Elmin Omičević and Salvatore Nicolosi, 'Righting Wrongs at Home: The Potential of Domestic Judicial Remedies in Determining and Allocating Responsibility for Human Rights Violations in European Integrated Border Management' (2025) 21(4) *European Constitutional Law Review* 555.

³⁷ Stanisław Kusiak, 'Non-Contractual Liability: WS and Others as a Blockade to Keeping Frontex Accountable' (EuroProspects, 8 March 2025) < <https://europrospects.eu/non-contractual-liability-ws-and-others-as-a-blockade-to-keeping-frontex-accountable/> > accessed 23rd February 2026.