With Great Power Comes Great Responsibility

Why W.S. et al and Hamoudi vs Frontex Mark a Turning Point

Catharina Ziebritzki

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18 December 2025 was an important day for the rule of law in Europe. In the cases of *W.S. et al.* and *Hamoudi*, both decided on appeal, the Court of Justice strengthened the right to an effective remedy as granted by Art. 47 of the Charter vis-à-vis Frontex. The court held that Frontex can, in principle, be held responsible for fundamental rights violations via EU liability law. The judgements confirm that the action for damages under Art. 340 para 2 TFEU, which is *de facto* the only judicial remedy available against Frontex, must be interpreted and applied in a manner that actually allows individuals whose fundamental rights are violated to claim compensation. At least potentially, the decisions herald the end of Frontex's structural irresponsibility.

Frontex's Structural Irresponsibility - Challenged by W.S. et al and Hamoudi

The judgements in *W.S. et al* and *Hamoudi* set the foundation for an emerging system of judicial review against Frontex. Until now, Frontex has fully escaped judicial review. Accurate descriptions of the *status quo* refer to "the EU's human rights responsibility gap", "a blind spot" in international responsibility, "successful blame shifting", or even "lawless borders". Against this background, the idea to make use of Art. 340 para 2 TFEU as a "makeshift fundamental rights remedy" has been put forward several times (including here and here). *W.S. et al* and *Hamoudi* now put this approach to the test. W.S. et al concerns a deportation from Greece to Turkey (para 26 to 35) and *Hamoudi* a pushback in the same place (para 27). In both cases, the applicants seek compensation from Frontex for damages resulting from fundamental rights violations.

The General Court's decisions, although not as bad as they seemed, were a disappointment. They cemented Frontex's structural irresponsibility and the idea that Frontex can do whatever without ever being held responsible in Luxembourg, "because it only supports". In *W.S. et al,* the Court argued that even when Frontex organises and coordinates a return operation, all checks related to return decisions fall within the exclusive responsibility of member states (para 64 to 68). This led it to conclude that only member states can incur liability for fundamental rights violations occurring during or due to a deportation. In *Hamoudi*, it argued that the evidence produced by the applicant was insufficient to prove his being subject to the pushback operation in question and refused to conduct further investigations to uncover the facts (para 25 to 62). In sum, it applied the standard of proof under Art. 340 para 2 TFEU in a manner that made it virtually impossible to obtain compensation for damages resulting from a pushback.

Back on Track - A Union Based on the Rule of Law

Now, all bets were on the Court of Justice. And indeed, the Grand Chamber lived up to the hopes that were placed in it. It based its decisions on Art. 2 TEU and Art. 47 of the Charter and argued convincingly that Frontex must not be able to evade the complete system of remedies. Acknowledging that the action for damages under Art. 340 para 2 TFEU is *de facto* the only possibility to hold Frontex responsible before a court, it found that the doctrine on EU liability must be interpreted and applied in a manner that enables concerned individuals to claim compensation from Frontex.

In concrete terms, the second-instance decisions can be summed up into two central findings. *First*, Frontex is obliged to verify whether a national return decision has been issued in each individual case (W.S. et al, para 102). A failure to do so can result in Fron-

tex's liability. *Second*, in the specific context of a push-back operation, *prima facie* evidence provided by the applicant is sufficient to reverse the burden of proof (*Hamoudi*, para 106). In such a case, the Court must conduct its own investigations to uncover the facts. As the General Court erred in law on these central points, the Court of Justice largely quashed the first-instance judgements and referred the cases back to the General Court, whose decisions remain to be awaited.

W.S. et al - Frontex's Obligations in the Context of Deportations

Both decisions are key for the emerging system of judicial review against Frontex and concern the fundamentals of the EU constitutional order. They hence deserve a closer look.

In *W.S. et al*, the Court extensively set out Frontex's obligation to ensure that all its activities, including 'return operations', comply with EU law and, in particular, with the Charter and relevant international law (para 2 to 10, 90 to 113). On this basis, it concluded that Frontex is obliged to verify whether a written and enforceable national return decision exists for each individual (para 96 to para 102). Contrary to what the General Court assumed, this is compliant with the exclusive competence of member states to examine the merits of return decisions (para 103). The argument that a member state is responsible for the fundamental rights violation in question does not absolve Frontex from its own responsibility. A failure by Frontex to verify the existence of return decisions can be the cause for fundamental rights violations and thus result in Frontex's liability.

Yet the Court of Justice left open whether Frontex's failure to verify the existence of a return decision in the concrete case was causally linked to the fundamental rights violation in question. While it stressed that causation cannot be ruled out *a priori* (para 127 to 133), it did not take issue with the General Court's approach to assess the causal link of a certain action before having defined that action (para 55 to 62, criticism here) and explicitly left it for the General Court to examine the existence of the causal link (para 111 and 112).

Moreover, the court made important findings regarding the consequences of asylum seekers being in a particularly vulnerable situation. With regard to causation, it held that choices related to onward flight, here the applicant's choice to adapt their flight to Türkiye's practice of deporting Syrians to their home country, cannot generally be said to be that party's "own choice" and, as such, break the chain of causation. Instead, it depends on whether, from the perspective of an asylum seeker in this particularly vulnerable situation, the decision was "reasonable" (para 151 to 162). Similarly, the costs of consulting a lawyer at the stage of an administrative remedy, here Frontex's internal complaint mechanism, cannot generally be said to arise due to the concerned person's "own choice". Again, it depends on the concrete circumstances of the case, taking into account the particular vulnerability, whether hiring a lawyer at this stage constitutes part of the damage in the sense of Art. 340 para 2 TFEU (para 166 – 174).

Hamoudi - Prima Facie Evidence in the Context of Pushbacks

Closely connected, the findings in *Hamoudi* also concern the consequences of the particular vulnerability of asylum seekers – more precisely, of persons who find themselves in the extreme situation of a push-back.

The Court of Justice's argument in *Hamoudi* is truly powerful. It starts with the very basic – yet urgently needed – clarification that "Frontex is an agency of the European Union" and that, although Frontex and national authorities have a "shared responsibility", "Frontex is fully responsible and accountable for any decision it takes" (para 66). It then recalls that "the EU judicature must guarantee the effective judicial protection of individuals" (para 72), that "it follows from Art. 2 TEU that the European Union is founded, inter alia, on the values of equality and the rule of law" to which "the very existence of effective judicial review (…) is inherent" (para 74), and that Art. 47 of the Charter constitutes a specific expression thereof (para 75).

Considering that the action for damages may be the only judicial remedy to hold Frontex responsible (para 103), the Court observes that "the application by the General Court of the rules relating to the burden of proof and the taking of evidence cannot undermine (*sic*) the effectiveness of judicial protection' and 'may also not lead to the imposition on a party of a burden of proof which is excessive if not impossible to discharge (*probatio diabolica*) or to the calling into question of the principle of equality of arms" (para 77). The Court of Justice goes so far as to remind the General Court that the latter was established to "improve the judicial protection of individual interests" (para 76) and "must ensure full respect for the right to an effective remedy" (para 78).

Instead, the particular nature of a pushback operation necessitates adapting the rules on the burden of proof. Persons subject to a pushback are "in a position which makes it very difficult for them to collect evidence (…) or even excludes any possibility of their doing so at all, in particular when the national authorities have confiscated their phones" (para 88). Art. 47 of the Charter hence requires "that it be sufficient for those persons to present *prima facie* evidence that that operation, in which Frontex participated, occurred and that they were present during it" (para 106). If *prima facie* evidence is produced, the General Court must exercise its powers to investigate the facts of the case. *Prima facie* evidence hence leads to a reversal of the burden of proof: if it is not rebutted, the circumstance must be deemed proved (para 132). This conclusion is supported by brief reference to the case law of the ECtHR on which the applicants had relied in their appeal (para 107 to 109). On this basis, the Court of Justice assessed the evidence in the concrete case, which included the applicant's own witness statement, an article by an independent research collective, a video and pictures published by the latter, and concluded that they were sufficient to constitute *prima facie* evidence (para 113 to 128). It then explained in detail what the General Court should do to "investigate the case before it in order to assess the truth" (para 132). This includes, among other things, obliging Frontex or OLAF to give access to the internal documents that were requested by the applicants, conducting a personal hearing to identify the applicant and verify his personal claims, and giving probative weight to the applicant's own witness statement (para 79 to 83, para 129 to 152).

A Statement of the Obvious - And a Great Success

Celebrating success is important, no doubt. Especially when the success was achieved through years of hard work by strategic litigators, including high-level practitioners and scholars, combined with a truly tenacious and very patient search for justice on the part of the applicants. Still, it is worth taking some distance and thinking twice about what we are actually celebrating here.

The great success is that the Grand Chamber of the Court of Justice did not allow the EU agency with the most far-reaching powers to get away with structural irresponsibility. At the same time, the fact that these judgments are widely perceived as a major success is, in itself, revealing. From an EU constitutional point of view, there is really nothing surprising about the judgments. The Court did not expand the law in any radical sense, it rather reaffirmed what should be self-evident: Art. 2 TEU and Ar.t 47 of the Charter apply in the context of asylum and border management, too; the action for damages, because it is the only judicial remedy available, must not be deprived of its substance; and that the concrete circumstances of the individual case must be taken into account when assessing causation and standard of proof.

What the reaction to the judgements in *W.S. et al* and *Hamoudi* shows, with alarming clarity, is the scale of the rule of law problem in the asylum system. Despite decades of verified and independent reports documenting Frontex's involvement in systemic violations of fundamental rights, these are the first such cases to reach the Court of Justice. It took several years, along with dedicated strategic litigation, to bring the issue this far. Disturbingly, the General Court shied away from upholding very basic principles of the rule of law in the context of asylum and borders. And apparently, nobody was certain whether one could still

count on the Court of Justice: experts ranging from the representatives in both cases to scholarly and journalistic commentators were awaiting the judgment with great suspense. It seems that over the past decades, the rule of law has been eroded to such an extent in the asylum system that no one was sure anymore whether the Grand Chamber of the Court of Justice would take Art. 2 TEU seriously. Luckily, it did: it reminded us that great power comes with great responsibility, and put, at least potentially, an end to Frontex's structural irresponsibility. Considering the state of affairs, this indeed is a reason to celebrate.

ABOUT THE AUTHOR

Catharina Ziebritzki

Catharina Ziebritzki is a postdoctoral researcher with a focus on European law and migration law. She currently teaches at Humboldt University Berlin and Hochschule RheinMain. She is co-founder and board member at the NGO Equal Rights Beyond Borders.

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