Responsibility for fundamental rights breaches in return operations: shades and lights on the first action for damages against Frontex

di Alessio Laconi

Title: Responsabilità per violazioni dei diritti fondamentali nelle operazioni di rimpatrio: ombre e luci sulla prima azione per risarcimento danni contro Frontex

Keywords: return operations; Frontex; fundamental rights.

1. – On the 6th of September 2023 the General Court of the Court of Justice of the European Union delivered its first judgement on an action for damages against the European Border and Coast Guard Agency (hereinafter: Frontex/Agency). The case represents the first opportunity for the Court to rule on the real involvement of Frontex in the return operations it coordinates thus consenting to shade lights on the powers it concretely exercises and on how to control its activities. Not many legal actions have been brought against Frontex since its establishment in 2004, and most of them concerned employment conditions and public procurement rules (out of 37 proceedings undertaken against Frontex only 3 ask the Court to assess Agency's responsibility for alleged illegal activities during the management of the external borders of the EU). Therefore, each case the Court is asked to decide in this regard constitutes a vital chance to fill the gap with the lack of judicial accountability that characterises the performance of the activities for the management of the borders.

2. – The case under examination concerns an action for damages lodged by a Syrian family against Frontex for the damages they allege to have suffered following their expulsion from Greece during a return operation carried out by the Agency and the Greek authorities in 2016. For instance, the applicants ask for the compensation of the material and non-material damages incurred after their deportation to Turkey and their voluntary travel to Iraq where they resided ever since. In terms of legal claims, the applicants argue that Frontex did not comply with its obligations, deriving mainly from breaches of articles 16, 22, 26, 28, 34 and 72 of Regulation 2016/1624 and from the Charter of Fundamental Rights of the European Union (Charter), to respect fundamental rights during a return operation. The applicants presented eight pleases in law for underpinning their action and the claimed violations can be categorised in three groups: 1) violation of obligations to adopt measure before the launching of the return operation, namely a risk assessment, means to mitigate serious risks to fundamental rights and a sufficiently detailed

operational plan providing for guarantees to fundamental rights; 2) violations of fundamental rights during the operation, namely the conduction of the return operation in a way that fundamental rights violations could not be noted, nor signalled, the failure to adopt measures in response to visible violations of the Charter and the failure to adopt an effective monitoring of the joint return operation; 3) violation of the duty to evaluate the return operation after its termination and failure to duly take into consideration the applicants' complaint under the individual complaints mechanism established within the Agency. In this regard, before referring to the Court of Justice of the European Union, the applicants submitted a complaint, according to article 72 of Regulation 2016/1624, against their deportation to Turkey from Greece on 20 October 2016 and the Fundamental Rights Officer (FRO) deemed it admissible and forwarded it to Agency's Executive Director and to the competent national authority so as to proceed with its evaluation. Remarkably, attached to the complaint, the applicants asked the FRO to grant them full access to the operation plan of the activity and to return them to Greece. The complaint was handled slowly by the authorities which did not even provide access to the information because they were classified as confidential, and the applicants submitted a second complaint denouncing the violation of the principle to good administration with regards their case and the FRO considered also the second admissible. The complaints were closed on 6 October 2020 without evidence of fundamental rights violation. The Court thus proceeded assessing the admissibility of the action based on articles 268 and 340, paragraph 2, of the Treaty on the Functioning of the European Union (TFEU) which concern the non-contractual liability of the European Union and permit to seek compensation for the damages suffered. In this regard, article 340, paragraph 2, TFEU provides that the Union should make good *inter alia* the damages caused by its institutions or servant in the performance of their duties. Since Frontex is an agency of the Union, articles 268 and 340, paragraph 2, TFEU apply to the former. The question examined by the Court regards Agency's claim to declare the action inadmissible and thus to reject it. Frontex submitted that the applicants wrongfully proposed an action for damages since they had to propose an action for annulment under article 263 TFEU for seeking the annulment of FRO's letter of the 6 October 2020 where he communicated the negative evaluation of their complaints. Moreover, the Agency alleged that the term for proposing an action for annulment expired and that the applicants lodged an action for damages for circumventing the time limit and seeking the annulment of the act. From settled case-law, the Court found that an action for damages should be declared inadmissible when it is aimed at securing the withdrawal of a decision that became definitive and that, in case upheld, has the effect of nullifying the legal effect of that decision (Court of Justice of the European Union, order 24 May 2011, *Power-One Italy* v *Commission*, T-489/08, paragraph 43 and case-law cited). Yet, in case the action for damages is successful, the mere result of annulling act in question does not preclude its admissibility (Court of Justice of the European Union, order 24 May 2011, *Power-One Italy* v *Commission*, T-489/08, paragraph 43 and case-law cited). However, the Court reasoned that the damages the applicants claim to have suffered are not consequence of FRO's letter and they would persist in case they brough a successful action of annulment thus demonstrating the action for damages does not have the same purpose or effect of an action of annulment against that letter (Court of Justice of the European Union, judgment 6 September 2023, *WS and other* v *Frontex*, T-600/21, paragraph 29). Before assessing the merit of the cause, the Court declared inadmissible the attachment of some documents produced by the applicant because presented out of time and without justification. It must be noted that these documents included the operation plan of the return mission during which the applicant were transferred, thus the Court did not have the chance to review an

DPCE online
ISSN: 2037-6677

important act where the division of competences and responsibilities among the operation's actors is established (see article 16, Regulation 2016/1624). Since it is in question the non-contractual liability of the Union, the liability regime applies when the conduct is unlawful, an actual damage has been suffered and there must be a causal link between the alleged conduct and the damage pleaded. These conditions are cumulative, thus if one is not fulfilled the action should be dismissed (Court of Justice of the European Union, judgment 17 February 2017, *Novar* v *EUIPO*, T-726/14, paragraph 26 and the case-law cited). The applicants alleged that Frontex violated its obligation to protect fundamental rights, in particular they claimed that if the Agency did not breach the principle of non-refoulement, the right to asylum, the prohibition of collective expulsion, the rights of the child, the prohibition of degrading treatment and the right to good administration and to an effective remedy, they would not have been transferred to Turkey and suffered the damages incurred, because they were entitled to international protection due to their Syrian nationality and the situation Syria was at the time of facts. Damages asserted are both of material and non-material nature, noticeably the applicants accused the feelings of anguish, particularly on the part of the children, caused by the return flight to Turkey, on account of their separation during that flight and being prohibited from speaking and the presence of uniformed escort officers and police officers and a feeling of fear and suffering linked to an extremely difficult and dangerous journey to Iraq because of the fear of being returned to Syria by the Turkish authorities. The Court began its examination by assessing the existence of a causal link between the conduct and the dagames occurred and evaluated whether the damages alleged constituted a sufficient direct consequence of Frontex's conduct, namely the violation of its duty to protect fundamental rights. Considering that the applicant substantially claimed that they were entitled to international protection due to their nationality, and thus they were unlawfully transferred to Turkey, the Court identified in issuing the return decision, following the handling of the international protection request by Greek authorities, the conduct generating the material damages alleged. Correctly the Court noted that, according to article 4 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, the Member States alone are competent to evaluate applications for international protection and thus issuing a decision in that regard. Moreover, the Court also found that Frontex's Regulation 2016/1624 states at article 28(1) that while providing assistance and ensuring the coordination or the organisation of return operations the Agency can't enter into the merit of the return decision issued by a Member State. Consequently, the Court considered that, since Frontex has no competence either as regards the assessment of the merits of the return decisions or as regards applications for international protection, the direct causal link between the damage allegedly suffered and the conduct cannot be established. Finally, it also stated that as regards the non-material damages occurred during the deportation, Frontex could not be found liable in accordance with article 42 of the regulation which states the Member States are the sole responsible. Since the cumulative fulfilment of the conditions for establishing the non-contractual liability of the EU had not been realised, the Court dismissed the action and did not proceed to assess the other two thresholds.

3. – The judgment *WS and others* v *Frontex* represents the first action for damages against Frontex decided by the Court of Justice (there is another pending case concerning an action for damages against Frontex waiting for a decision, Court of Justice of the European Union, action brought on 10 March 2022, *Hamoudi* v *Frontex*, T-136/22). The case regards the alleged violation of fundamental rights during a return operation coordinated by Frontex and carried out with the Greek

authorities. The legal framework governing at the time the performance of a return operation was Regulation 2016/1624 which established the European Border and Coast Guard (EBCG) composed by the authorities of the Member States involved in border management and the European Border and Coast Guard Agency (see article 3, Regulation 2016/1624). The regulation aimed at creating an integrated border management (IBM) system where the performance of the activities provided therein fall within the shared responsibility of the Member States and of the Agency. Return operations are part of the European integrated border management (see article 4, 3692et. H), regulation 2016/1624) and foresees the participation of both the States and the Agency thus resulting in a multi-actor activity. The Member States are competent in issuing the return decisions addressing third-country national and are called to inform monthly the Agency on the indicative number of returnees to deport while the Agency, without entering the merit of the decisions and according to information provided by the States, coordinates, organises and promotes return operations and provides for technical and operational assistance to the participating Member State. Remarkably, Regulation 2016/1624 attributed larger competences to the Agency compared to previous provisions, for instance the possibility to organise return operations on its own initiative (see articles 18 and 19, Regulation 2016/1624) and the possibility of Agency's officers to actively take part in the operation. In this regard, the regulation established three different categories of pools of agents involved in return operations: the pool of forced-return monitors who oversee the correct implementation of the operation, including the respect of fundamental rights (see article 29, Regulation 2016/1624); the pool of forced-return escorts who escort returnees during the deportation and act in behalf of the Agency (see article 30, Regulation 2016/1624) and the pool of return specialists who are allowed to carry out specific executive tasks such as dentification of third-country nationals, the acquisition of travel documents and facilitation of consular cooperation (see article 31, regulation 2016/1624). The increased involvement of the Agency in return operations has been balanced by stricter duties to safeguard fundamental rights during the performance of the activity. The regulation provided Frontex with tasks, powers, obligations, and a proper administrative machinery devoted to the protection of fundamental rights during EBCG's activities thus giving the Agency the function to protect fundamental rights (about the concept of function in EU law see B.G. Mattarella, *Le funzioni*, in M.P Chiti (Ed.), *Diritto amministrativo europeo*, Milano, 2018, 145). The Agency has the general competence to contribute to the continuous and uniform application of Union law, including the Union *acquis* on fundamental rights (see article 6, par. 3, Regulation 2016/1624). In this regard, article 34 states that the Agency should develop a fundamental rights strategy, which guarantees the protection of these rights in the performance of any EBCG's activity, including an effective mechanism to monitor the respect for fundamental rights. Article 35(3) further provides that the Agency should adopt a Code of Conduct for return operations, thus applicable to those involved in the activity, which should pay attention *inter alia* to the fundamental rights strategy. In addition to establishing procedural safeguards, the Agency is also required to provide training courses on fundamental rights matters to border guards and members of EBCG's staff and should take the necessary initiatives to ensure training for staff involved in return-related tasks (see article 36(4), Regulation 2016/1624). As mentioned above, a member of the pool of forced-return monitors should monitor the correct implementation of the return operation, including the respect of fundamental rights at every stage. Not only the officer on the field, but also Agency's Executive Director has the power to withdraw the financing, to suspend or terminate any operation if he or she considers that there are violations of fundamental rights or international protection obligations that are of a serious

DPCE online
ISSN: 2037-6677

nature or are likely to persist (see article 25(4), Regulation 2016/1624). These provisions seem demonstrating that Agency's role, other than coordinating the operation, is that of safeguarding fundamental rights during EBCG's activities and the former has specific tasks, powers and officers devoted to the goal. At the operational level, during a return activity the participating Member State and the Agency shall ensure the respect of fundamental rights, of the principle of non-refoulement, and of the proportionate use of means of constraints (see article 28(3), Regulation 2016/1624). Moreover, the whole EBCG is bounded by the duty to ensure that no person is disembarked in, forced to enter, conducted to, handed over or returned to, the authorities of a country in contravention of the principle of non-refoulement, or from which there is a risk of expulsion or return to another country in contravention of that principle (see article 34(2), Regulation 2016/1624). This is the case of the applicants who were transferred to Turkey with the risk of being returned to Syria since the Turkish authorities issued them with a travel permit valid only for two weeks (see Court of Justice of the European Union, judgment 6 September 2023, *WS and other* v *Frontex*, T-600/21, paragraph 5). According to these reflections, considering the judgment delivered by the Court, some questions should be addressed. Namely, is the Court's reasoning to link the damages occurred only with the issuing of the return decision a correct manner to decide a very complex case which sees the overlap of different sources of law in a multi-actor operation? What other relevant aspects of the return operation remain unsolved due to the reasoning followed by the judges? Is there room for assessing Frontex's liability for the violation of fundamental rights occurred?

4. – As seen above, the judgment concerns an action for damages lodged against an EU body thus triggering the discipline of the non-contractual liability of the European Union for damages caused by one of its institutions. It should be first highlighted that this judgment fits within a recent theoretical framework which identifies in the action for damages a possible mechanism for enhancing Frontex's legal accountability over its (unlawful) conducts which eventually led to the violation of fundamental rights (see in this regard M. Fink, *The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable*, in *German Law Journal* 21(3), 2020, 532; from the same author M. Fink, *Frontex: Human Rights Responsibility and Access to Justice*, in *eumigrationlawblog.eu*, 30 April 2020; contrary to Fink's opinion see D. Vitiello, *Poteri operativi, accountability e accesso alla giustizia nella gestione integrata delle frontiere esterne dell'Unione europea. Una prospettiva sistemica*, in AA. VV, *Quaderni Aisdue*, Napoli, 2023, 459; for a general overview of the legal action see K. Gutman, *The evolution of the action for damages against the European Union and its place in the system of judicial protection*, in *Common Market Law Review* 48(3), 2011, 695). With regard to the action for damages, correctly the Court applied a three-conditions test according to which liability arises when the conduct is unlawful, have caused a damage and exists a link between the damage and the conduct (for more references on the test see A. Biondi, M. Farley, *Damages in EU Law*, in R. Schütze, T. Tridimas (Eds.) Ox*ford Principles of European Union Law*, Oxford, 2018, 1054). Remarkably the Court focused its reasoning only on the third condition, namely the link between the conduct and the damages occurred. The judges identified the return decision issued by the Greek authorities as the cause of applicants' damages, for instance the travel costs incurred following their return to Turkey and the feelings of anguish and fear suffered during the deportation. Since Frontex is not competent to assess the merit of a return decision apparently its conducts could not cause any damage related to the issuing of the act. In delivering its reasoning the Court applied a consolidated jurisprudence which establishes that the judges are not obliged to examine the action for damages' conditions following

the order above, thus being allowed to begin from the link between the conduct and the damages (see Court of Justice of the European Union, judgment 10 January 2017, *Gascoigne* v *European Union*, T-577/14, paragraph 53 and case-law cited). However, while this might grant the speed of the process in case no direct link of causation is found by the judiciary, it should not result in a diminution of judicial protection. What is questionable of Court's reasoning is that focusing only on the link between the return decision and the damages is based on a partial reading of Regulation 2016/1624 and ignores the complexity of a return operation, perhaps agreeing with an old-style logic according to which Frontex, as a coordination Agency, can't breach fundamental rights with its conducts (see I. Laitinen, *Frontex. An Inside view*, in *Eipascope* 3, 2008, 31). It should be first highlighted the restricted reading operated by the Court with regard to the causation link between the conduct and the damages. As mentioned, a return operation coordinated by Frontex constitutes a multi-actor activity which provides *per se* some difficulties for the enhancement of legal accountability over the conducts of the players, mostly due to the nature of the tasks performed (see Y. Papadopoulos, *Accountability and Multi-Level Governance*, in M. Bovens and others (Eds.), *The Oxford Handbook of Public Accountability*, Oxford, 2014, 273). By focusing only on the return decision as cause of the damages occurred, the Court arguably disregarded the performance of the operation which constitutes the implementation of the act issued by the State and that sees the participation of both the Agency and the national authorities. It might well happen that a deportation does not violate the principle of non-refoulment, but that its implementation is operated without ensuring a proportionate use of means of constraint thus causing some damages. It is thus necessary to distinguish two different moments regarding the return of the applicants and the damages they allege to have suffered, namely the issuing of the act and its implementation. As reported also by the Court (see Court of Justice of the European Union, judgment 6 September 2023, *WS and other* v *Frontex*, T-600/21, paragraph 59), among the non-material damages the applicants included the feelings of fear deriving from the separation, during the deportation, of the minors from their parents and the prohibition to speak. The damages in question can't be considered a result of the return decision issued by the Greek authorities, but instead a consequence of the way the return decision is implemented, namely how the return operation is conducted. It is true that the Agency can't enter into the merit of the act, yet it plays a role in implementing it and its conducts can well breach an obligation if this is provided by the legal framework. Above it has been highlighted that Frontex obtained more powers following the adoption of the regulation, for instance regulatory powers for the protection of fundamental rights and operative ones during return operations, thus having obligations that the Court disregarded. Court's assumption according to which Frontex's conducts does not have a direct link to the damages alleged is based on the lack of competence of the Agency on issuing the return decision, underpinned by the interpretation of article 42 of the regulation which attributes civil liability for damages caused by the member of the operation team to the host Member State. Basically, the Court stated that the return decision constitutes the cause of the material damages linked to the deportation of the applicants and that the non-material ones can't be ascribed to Frontex because the regulation provides so at article 42(1). The latter disposal is not the only one governing liability regime within the regulation, also article 60 does and it specifically concerns Agency's liability by providing at paragraph 3 that the Agency should make good any damage caused by its staff in the performance of its duties. The discrimen between the two disposals regards what kind of task the member of the team performed. During an operation the members of the staff operate under the instruction of the host Member State (see article 40(3) of Regulation 2016/1624) thus if an Agency's officer is asked to perform a task that normally is

DPCE online
ISSN: 2037-6677

competence of the national authority, and that conduct causes a damage, article 42 should apply. For example, article 40(3) provides that the host Member State may authorize a member of the team to operate on its behalf. If that member causes a damage the host Member State should be found liable, notwithstanding the disciplinary measures applicable to the officer. On the other hand, if the duty is specific responsibility of Agency's officer, so as ensuring the monitoring and respect of fundamental rights during a return operation, that behavior can't be attributed to the Member State according to article 42, but article 60(3) should be applied. It is true that the applicants did not mention article 60(3) of the regulation in their pleadings, but the Court was not either totally precise in referring only to article 42 when assessing the implementation of the return decision. It could have read the two provisions on liability conjunctly without limiting its reasoning only on who issued the decision which was not the cause of how the operation was conducted. Since article 60(3) refers to damages caused by Agency's staff in the performance of their tasks, it should be considered whether during the return operation they have any task assigned to perform. Article 28(3) of Regulation 2016/1624 provides that during a return operation a member of the forced-return monitor pool should participate to the deportation so as to monitor over the protection of fundamental rights and the proportionate use of means of constraints, with due attention to children's needs since three were involved during the operation.

Therefore, Court's choice to refer only to article 42 does not seem very precise in the case at stake since it ignores that the conduct of the Agency is the performance of a task during an operation and that it could well determine damages on the applicants and thus determining Frontex's liability for a violation of fundamental rights. The reasoning delivered by the Court is thus based on a strict reading of the regulation and the solution it provided does not fully address applicants' question who asked to find Frontex's liable according to several disposals of the Regulation which have not been analysed in the proceeding, including article 28. If the link between Frontex's conduct and the damages occurred exists, the Court should have moved to assess the other conditions of the action for damages in order to pronounce of Agency's liability, for instance assessing whether the conduct causes a serious breach of an individual's right. A pronouncement of the Court on this aspect would constitute a milestone for the studies regarding the liability of Frontex since the Agency seems escaping, either for the nature of its powers or for the nature of the tasks it performs, judicial accountability over its conduct which became more relevant during an operation. However, it is not scope of this analysis replacing Court's judgement, instead proposing a comprehensive reading of Regulation 2016/1624 and of Frontex's role during the performance of an operation so as to suggest a different approach on Agency's involvement in EBCG's activities. by dismissing the action due to the lack of a direct link between the conduct and damages occurred, the Court did not only miss the chance to rule over the possible liability of the Agency for the violation of article 28, but also of another important disposal which lies at the very core of the rationale behind the establishment of Frontex, namely article 34 of Regulation 2016/1624. As seen above, paragraph 2 of the article prohibits the whole EBCG to, *inter alia*, return persons to the authorities of a country from which there is a risk of expulsion or return to another country in contravention of the principle of non-refoulement. Since return operations fall within the IBM which is a shared responsibility of both States and the Agency, and since the EBCG is composed by authorities of the States operating in border management and by the Agency, it can be inferred that the obligation provided for by article 34(2) bounds also the Agency although it is not competent to enter the merit of a return decision nor to issue it. Launching a return operation is a power that the regulation attributed also to the Agency, thus the ED could well refrain from undertaking the deportation if he

considered that operating the return could breach the article in examination. This legal standing is supported by the wording of article 28(4) which stats that the ED and the Member States should agree on the operational plan of the return operation considering the possible fundamental rights implications of the operation as well as its risks. Even if undertaken, the Agency is bounded by the return operation's Code of Conduct which provides at article 4(3) that the return operation must be suspended if the ED considers that there are violations of a serious nature of fundamental rights or of international protection obligations likely to persist. Returning a Syrian family, including three minors, to Turkey presented the risk foreseen by article 34(2), namely that Turkish authorities could return applicants to Syria in contravention of the non-refoulment principle. Such risk was also perceived and alleged by the applicants in their pleading and its assessment finely fits in the *ex-ante* evaluation suggested by article 28(4). It is clear the different scope of the two disposals, namely the safeguard of fundamental rights that might be breached by a return operation. While article 28 specifically addresses the ways a return decision in implemented, article 34 aims at avoiding that fundamental rights, including the principle of non-refoulment, are violated prior the launching of the operation. It is true that the Agency can't enter the merit of a return decision but in cases like the one at stake the ED should undertake a prognostic assessment of whether implementing that decision could breach the principle abovementioned. The room where the ED can move in does not concern the merit of the act but rather the possible effects it could generate. Because of the delicacy of the case which embraces a fine division of competences between the actors involved both before and during a return operation, it is arguable that the Court did not pronounce itself on these aspects thus leaving great hopes for the appeal before the European Court of Justice.

5. – The analysis of the case tried to highlight the complexity of return operations carried out by Frontex and relevant national authorities. The implementation of an operation foresees the performance of different tasks divided among the actors and the overlapping of different sources of law, as also acknowledged by the Court. It is thus regrettable that the latter dismissed the action for damages with such a quick judgment, disregarding many relevant aspects that come at stake during a return operation and requires a proper judicial evaluation by the judiciary. The first answer expected by the Court in this decision was a pronouncement on Frontex's involvement in return operations, but on the one hand it focused only on the return decision issued by national authority and on the other it seemed closing to any possible responsibility of Frontex by applying article 42 of the regulation. Contrarily, the analysis showed that Frontex plays a central role in return operations carrying out specific tasks aimed, *inter alia*, at safeguarding fundamental rights of the returnees and its conducts may well breach individuals' rights. In addition to a possible pronouncement on what kind of role Frontex plays in operation, as flip side of the coin it would have been warmly welcomed by both scholars and civil society a ruling on the liability of the Agency for its conducts. It is in this regard that this analysis, by reading in a more comprehensive way the disposals of the legal framework, suggests considering article 60 instead of article 42 about the applicable liability regime and proposes to discern among the two disposals according to the nature of the tasks performed in the case at stake. Another crucial aspect which demanded the assessment of the Court is the possible violation of article 34 by the Agency, namely the prohibition to return people in contravention of the principle of non-refoulment. Even if the Court identified the return decision as origin of the damages alleged and thus did not find a link between the conduct which Frontex is not competent to perform and the damages, the judges were not limited by that to analyse the content of the obligation attributed

DPCE online
ISSN: 2037-6677

to the Agency by article 34 and its possible violation. As said above, since the Agency has no competence in entering the merit of a return decision, the *ex-ante* assessment that the ED should perform in application of article 34 would have deserved a ruling from the Court so as to draw the line where that action does not imply an evaluation of the merit thus framing the room of manoeuvre of the Agency. The lack of a ruling on these two points represents a missed opportunity by the Court to detangle the complexity of a return operation by clarifying what obligations the provisions attributes to a certain actor and what kind of liability regime should apply for a violation of these obligations. The high expectations underlying this case are justified by the fact that this ruling is the first action for damages proposed against Frontex and seemed having all the possibilities to let the Court penetrating into the nature of Frontex's involvement and role during a return operation. Court's ruling would have also answered to Professor Melanie Fink who proposed a theory where identified the action for damages as possible tool for enhancing legal accountability of the Agency in case of violation of fundamental rights. In this case it seems that the Court did not exploit the possibilities related to an action for damages, for instance declaring a conduct unlawful and identifying a link between that and a damage. If it did, it would have been relevant for setting aside once for all an old-style logic according to which Frontex can't breach fundamental rights by virtue of its nature as coordination agency. Therefore, it appears concretely correct the proposal by Professor Fink that the action for damages could allow a more penetrating investigation by the Court, at least better than any other legal action within the EU legal order. As last remark, it should be underlined that the European Union defines itself as based on the respect of the rule of law and human rights (see article 2, Treaty on European Union) but what we witness at the external borders regarding the management of migratory flows and the interaction with migrants is the exact opposite of what the European Union should be. Additionally, as apparent from the case at stake, Frontex risks to be allowed to operate on the margin of the principle of legality thus constantly challenging the rule of law principle with its operations and conducts. The EU can't afford these shortcomings of humanity in name of internal security because these fashioned fears create more insecurity than safety by letting our children, people and friends witness deaths at few kilometres from our shores.

Alessio Laconi
Università degli Studi di Firenze
alessio.laconi@unifi.it