

# **Migrant Rights: a Practical Guide on Options for Litigation and Administrative Action at the EU Level**

Dr. Melanie Fink, Prof. Dr. Jasper Krommendijk and  
Dr. Kris van der Pas

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## Foreword

The EU legal system has a strong legal framework for substantive fundamental rights protection. Since 2009, the Charter of Fundamental Rights of the EU ('the Charter') has become legally binding and has the status of primary EU law. The European Convention on Human Rights (ECHR), although as such non-binding in the EU legal order, takes effect through Article 6(3) Treaty on European Union (TEU) and Article 52(3) of the Charter. The case law of the European Court of Human Rights serves as inspiration for the Court of Justice of the European Union (CJEU).<sup>1</sup> Substantive protection is especially strong in the field of asylum due to the 'Europeanization' of rules under the Common European Asylum System, including many secondary EU legal sources.<sup>2</sup>

This guide takes stock of the mechanisms that asylum seekers, (irregular) migrants, and NGOs representing them can use in order to vindicate these rights against European Union (EU) institutions and bodies. It does so by presenting the avenues for strategic litigation and administrative action to challenge the decisions and policies of EU institutions and bodies, with a particular focus on those affecting asylum and migration in the EU. The guide is divided into two parts.

Part 1 focuses on judicial avenues, in particular procedures before the CJEU. This includes the three mechanisms through which private parties can initiate proceedings themselves: the action for annulment (Section 1.1), the action for failure to act (Section 1.2), and the action for damages (Section 1.3). It also addresses two indirect forms of challenging EU law: the reference for a preliminary ruling initiated by national courts (Section 1.4) and the possibility for third party intervention in CJEU proceedings (Section 1.5).

Given the limits for private parties to challenge EU law in the context of judicial proceedings, Part 2 focuses on administrative, extralegal, and informal avenues. These include a broad range of mechanisms of varying degrees of formality. It covers the possibilities of raising an issue with the EU institutions, such as the petition to the European Parliament (Section 2.1) and the complaint to the Commission (Section 2.2). Private parties can also use formally established administrative complaints mechanisms, such as those before the European Ombudsman (Section 2.3) and the Fundamental Rights Officer of Frontex and the EU Asylum Agency respectively (Section 2.4). Finally, there are the possibilities of a European Citizens' Initiative (Section 2.5) or other forms of informal involvement (Section 2.6).

Where useful examples from the migration and asylum law field are available, we include them in the discussion of the mechanisms. Where particularly relevant examples exist, they are showcased in more depth at the end of the sections.

A broad look at the remedies system outlined in this guide suggests a nuanced picture. On paper, direct judicial mechanisms are the strongest due to the authority of the judge and

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<sup>1</sup> Explanations Relation to the Charter of Fundamental Rights (2007/C 303/02) – Explanation on Article 52.

<sup>2</sup> E. Guild (2006), 'The Europeanisation of Europe's Asylum Policy', *International Journal of Refugee Law* 18(3-4), p. 630-651.

the binding outcomes. However, the direct judicial procedures available can be characterized as rather ‘closed’. There are limited possibilities for litigation and/or there is a high standard for the procedural requirements to be fulfilled. These remedies are, in practice, often not available or accessible. This has become particularly evident in several recent judgments of the General Court in the field of asylum and migration.<sup>3</sup> It remains to be seen whether the Court of Justice follows the General Court in appeal.

In contrast, mechanisms that look weaker on paper seem to hold far greater promise. One of the most important procedures in the EU legal system, the preliminary reference procedure (Article 267 TFEU) is not directly available to private parties, but if there is a judge willing to raise issues with the CJEU, the procedure is a lot more flexible and less restrictive than the direct judicial mechanisms available. Administrative mechanisms also tend to be more flexible and accessible than judicial ones so that it is worth exploring those more fully, even though they ultimately do not result in binding outcomes and thus may require greater post-procedure effort to see them implemented.

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<sup>3</sup> Case T-600/21, *WS and Others v Frontex*, ECLI:EU:T:2023:492 (6 September 2023); Case T-600/22, *ST v Frontex*, ECLI:EU:T:2023:776; (28 November 2023); Case T-136/22, *Hamoudi v Frontex*, ECLI:EU:T:2023:821 (13 December 2023).

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# 1. Judicial Avenues

## 2.1 Action for Annulment under Article 263 TFEU

While so-called privileged applicants (Member States and EU institutions) have immediate access to the CJEU, the chances for a natural or legal person are more limited.

The best-known direct action before the CJEU that exists to challenge the validity of EU law is the action for annulment, detailed in Article 263 of the Treaty on the Functioning of the European Union (TFEU) as follows:

The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

***Purpose of the action?***

- ⇒ To challenge the validity of acts of EU institutions intended to produce legal effects

***Who can initiate proceedings?***

- ⇒ Natural and legal persons (of any nationality) when they satisfy the (strict) locus standi requirements

***When should proceedings be initiated?***

- ⇒ Two months after publication in the Official Journal

***What are the limitations of this action?***

- ⇒ Strict *locus standi* requirements for natural or legal persons;
- ⇒ Only 'reviewable' acts can be challenged, i.e. acts that produce legal effects and are adopted by EU bodies;
- ⇒ Short time limit

***What opportunities does this action present?***

- ⇒ Using the action in conjunction with Article 265 TFEU (action for failure to act)

## 2.1.1. Procedural Overview

The most obvious and direct route to challenge the decisions and policies of EU institutions is the action for annulment. This action gives the CJEU jurisdiction to review the legality of legally binding acts and declare them void if they were adopted without the EU having the competence to do so, if they infringe substantive EU law (including fundamental rights), if they infringe essential procedural requirements, such as the obligation to give reasons, or if powers are misused (*détournement de pouvoir*).<sup>4</sup>

Only particular acts can be challenged. Article 263(1) TFEU makes clear that an act is reviewable when it satisfies two criteria: (1) when it is 'intended to produce legal effects vis-à-vis third parties' and (2) when it was adopted by an EU body.

### 1.1.1.1. Challenging Acts Intended to Produce Legal Effects

An act is 'intended to produce legal effects vis-à-vis third parties' and thus open to review only if it is 'a measure definitively laying down the position' of the EU institution or Agency. It cannot be a provisional measure intended to pave the way for the final decision.<sup>5</sup> A migration law example can be used to illustrate this: reports written by

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<sup>4</sup> For a clear and concise discussion of these four grounds, see [https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/642282/EPRS\\_BRI\(2019\)642282\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/642282/EPRS_BRI(2019)642282_EN.pdf), pp. 6-7.

<sup>5</sup> Case 60/81, *IBM*, ECLI:EU:C:1981:264, para. 10.

Frontex' Fundamental Rights Officers in relation to individual complaints are most probably not challengeable acts when they (merely) invite the Agency's Executive Director and the Chair of the Management Board to consider particular proposals. Such internal reports do not definitively lay down the position of the Agency on the conclusion of the internal procedure.<sup>6</sup> Nevertheless, a decision contained in a letter to a complainant ('an act addressed to that person') whereby the Fundamental Rights Officer closes the complaint and concludes the internal administrative procedure—most probably<sup>7</sup>—amounts to a reviewable act.

#### 1.1.1.2. Challenging Acts Adopted by an EU Body

Acts are only reviewable if they were adopted by the EU institutions and agencies listed in Article 263(1) TFEU. An action on the basis of Article 263 TFEU in relation to the EU-Turkey deal dedicated to deepening Turkey-EU relations as well as addressing the migration crisis failed, because the General Court concluded in *NG* that it does not have jurisdiction to rule on the lawfulness of an international agreement concluded by the (Heads of State or Government) Member States.<sup>8</sup> In other words, the Court considered that the deal, i.e. a statement between 'the Members of the European Council' and 'their Turkish counterpart', was not an act of (one of) the EU institutions listed in Article 263(1) TFEU but an international agreement concluded by the Member States of the EU.

#### 1.1.1.3. The Prescribed Time Limit and Its Circumvention

The time limit is generally quite short: only two months after publication in the Official Journal (see Article 263(6) TFEU). Failure to satisfy this deadline not only means that an action for annulment can no longer be brought, but also has implications for the possibility to use other procedures.

First, the CJEU has rejected to consider requests for a preliminary ruling (Article 267 TFEU) about the validity of decisions of EU institutions on the merits if the affected person 'could have challenged that decision' on the basis of Article 263 TFEU.<sup>9</sup> The CJEU declares such requests inadmissible, but only when it is 'self-evident' that an

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<sup>6</sup> Ibid. See also e.g. Case C-16/16 P, *Belgium v Commission*, ECLI:EU:C:2018:79, par. 27; see also the Opinion of AG Bobek in the same case, par. 76-79.

<sup>7</sup> In the non-contractual liability case against Frontex, the General Court noted the option of using Article 263 TFEU to challenge the letter: 'In those circumstances and irrespective of whether the letter of 6 October 2020, together with the final report, constitutes a challengeable act for the purposes of Article 263 TFEU...' *WS and Others v Frontex*, ECLI:EU:T:2023:492, para. 28.

<sup>8</sup> Case T-193/16, *NG v European Council*, ECLI:EU:T:2017:129.

<sup>9</sup> Cf. Case C-188/92, *TWD*, ECLI:EU:C:1994:90, para. 17.

action would have been admissible because the person ‘undoubtedly’ has standing (for a further discussion, see Section 1.4).<sup>10</sup>

Second, an action in relation to non-contractual liability is considered inadmissible when it is merely used by way of circumvention, as a substitute, when the two months’ time-limit for initiating an action for annulment has expired and the applicant would clearly have had standing (for a further discussion, see Section 1.3).

## 2.1.2. Main Challenge: Strict Standing Requirements

The major obstacle to utilizing the action for annulment is the *locus standi* criteria formulated in Article 263(4) TFEU. It has proven difficult for natural or legal persons to gain direct access to the CJEU via Article 263 TFEU.<sup>11</sup> There are three possibilities for such persons:

- an act is addressed to the person(s) (a good example are decisions of EU institutions addressed to the respective applicant(s));
- an act which is of direct and individual concern to the person(s); and
- a regulatory (non-legislative) act which is of direct concern to them and does not entail implementing measures.

Note that the CJEU has in some cases examined -prior to an assessment of standing- whether the applicant has a ‘vested and present’ personal interest in the annulment of the contested measure. In *ST v Frontex*, the anonymous applicant challenged the refusal of Frontex to suspend or terminate its activities in the Aegean Sea after reported fundamental rights violations in the region. The General Court held that a successful outcome in the case would not help the individual applicant since it would not give rise to a possibility to lodge an application for international protection or to enter the territory of an EU Member State lawfully (see Section 1.2 for a further discussion).<sup>12</sup>

### 1.1.2.1. Direct Concern

Two cumulative criteria must be met for an act to be considered of ‘direct concern’ to the applicant. First, the contested measure must directly affect the legal situation of that person. Second, it must leave no discretion to its addressees who are entrusted with the

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<sup>10</sup> E.g. Cases C-346/03 and C-529/03, *Atzeni and Others*, ECLI:EU:C:2006:130, paras. 31-34; Case C-135/16, *Georgsmarienhütte and Others*, ECLI:EU:C:2018:582, para. 18.

<sup>11</sup> L. Krämer (2019), ‘Climate change, human rights and access to justice’, *Journal for European Environmental & Planning Law* 16, p. 21-34; G. Winter (2020), ‘Armando Carvalho and others v. EU: Invoking human rights and the Paris Agreement for better climate protection legislation’, *Transnational Environmental Law* 9(1), p. 137-164; J. Darpö (2018), ‘Pulling the trigger. ENGO standing rights and the enforcement of environmental obligations in EU law’ in S. Bogojević & R. Rayfuse (ed.), *Environmental rights in Europe and beyond*, Hart Publishing, p. 253-281.

<sup>12</sup> Case T-600/22, *ST v Frontex*, paras. 36-37.

task of implementing it, such implementation being purely automatic and resulting from EU rules alone without the application of other intermediate rules.<sup>13</sup>

### 1.1.2.2. Individual Concern

It is even more difficult for persons to meet the requirement of individual concern as defined by the CJEU in its 1963 *Plaumann* judgment.<sup>14</sup> The persons must show that ‘the contested act affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed’.<sup>15</sup> In subsequent cases, the CJEU added that the fact that the contested acts infringe fundamental rights is not sufficient in itself to establish such individual concern.<sup>16</sup>

The CJEU has consistently resisted reconsidering its case law on individual concern, especially with a reference to the entire system of EU remedies and the possibilities for individuals to indirectly access the CJEU via the preliminary reference procedure (Article 267 TFEU). It famously held: ‘To that end, the FEU Treaty has established, by Articles 263 and 277, on the one hand, and Article 267, on the other, a complete system of legal remedies and procedures designed to ensure judicial review of the legality of European Union acts and has entrusted such review to the Courts of the European Union’.<sup>17</sup>

Note that it is easier to challenge regulatory acts (i.e. non-legislative acts) that do not entail further implementing measures: for such acts no individual concern is required, but ‘only’ direct concern.

## 2.1.3. Opportunities

In light of the above challenges, the action for annulment has not been used frequently in the area of migration law. There are two avenues to work around the strict standing requirements.

### 1.1.3.1. Urging Privileged Applicants to Initiate an Action

First, when natural or legal persons are unlikely to obtain standing themselves, they could pressure privileged applicants, such as the European Parliament or particular Member States, to initiate an action for annulment.

While we do not have concrete examples of privileged applicants being pressured to initiate an action for annulment, we note that privileged applicants have used the action in

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<sup>13</sup> E.g. Case C-348/20 P, *Nord Stream 2*, ECLI:EU:C:2022:548, para. 43.

<sup>14</sup> Case 25/62, *Plaumann v Commission*, ECLI:EU:C:1963:17.

<sup>15</sup> Case C-565/19 P, *Carvalho and Others v Parliament and Council*, ECLI:EU:C:2021:252, para.46.

<sup>16</sup> *Ibid.*, para. 48.

<sup>17</sup> Case C-583/11 P, *Inuit*, ECLI:EU:C:2013:625, para 92.

relation to the migration law area. In particular, the European Parliament contested the adoption of the Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by Frontex.<sup>18</sup>

### 1.1.3.2. The Plea of Illegality under Article 277 TFEU

The second avenue is Article 277 TFEU, the ‘plea of illegality’, which allows the parties to proceedings before the CJEU to invoke the invalidity of a generally applicable EU act relevant to the proceedings. A plea of illegality can be raised without any time limit in the context of any direct action before the CJEU. It is available to private parties that do not have standing to bring an independent action for annulment against the (legislative) act in question.<sup>19</sup> The most important requirement is that the general act in question is (directly or indirectly) applicable to the issue with which the action is concerned.<sup>20</sup> A successful plea of illegality results in the general act in question being declared inapplicable (only) to the proceedings.<sup>21</sup> It is thus not annulled and, legally speaking, continues to exist within the EU legal order. Whether or not the EU body that originally adopted the act is under an obligation to withdraw or change the act to remove the illegality is unclear, but there may in any case be a political or moral need to do so.<sup>22</sup>

Importantly, the plea of illegality is not an independent action and can only be brought in light of an ongoing direct action before the CJEU.<sup>23</sup> Typically, it is raised in actions for annulment under Article 263 TFEU to challenge the legality of an act on which the act that forms the subject matter of the action for annulment is based. However, it can also be brought in actions for damages under Article 340 TFEU. While a successful plea in those actions cannot affect the outcome of the action for damages in the sense of awarding compensation for the consequences of the general act declared unlawful, it can trigger a broader need for the EU body in question to address the illegality. For instance, in an action for damages against a push-back that involves Frontex, an applicant might be able

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<sup>18</sup> The Grand Chamber annulled the Council decision -adopted on the basis of implementing powers- in its entirety because only the EU legislature was entitled to adopt such a far-ranging decision. Case C-355/10, *EP v Council*, ECLI:EU:C:2012:516.

<sup>19</sup> Case 92/78, *Simmenthal v Commission*, ECLI:EU:C:1979:53, para. 39.

<sup>20</sup> Case C-119/19 P and C-126/19 P, *Commission and Council v Carreras Sequeros and Others*, EU:C:2020:676, para 68; Case 32/65, *Italy v Council and Commission*, ECLI:EU:C:1966:42, at p. 409.

<sup>21</sup> Case C-434/98 P, *Council of the European Union v Silvio Busacca and Others and Court of Auditors*, ECLI:EU:C:2000:546, para. 26.

<sup>22</sup> Opinion of Advocate-General M. Lagrange in Case 14/59, *Société des Fonderies de Pont-à-Mousson v High Authority*, ECLI:EU:C:1959:23, at p. 242; See also M. Eliantonio & M. van Wolferen (2022), ‘The plea of illegality in European Union law: The missing piece in the puzzle of a ‘complete system of remedies’?’, in M. Eliantonio & D. Dragos, *Indirect Judicial Review in Administrative Law: Legality vs Legal Certainty in Europe*, Routledge, p. 219, 226.

<sup>23</sup> Case 33/80, *Renator Albini v Council and Commission*, ECLI:EU:C:1980:138.

to raise a plea of illegality against the Operational Plan that formed the basis of the operation in question.

However, a recent empirical study exposed the limited use and success of the plea of illegality in practice, with only 24 pleas being brought between 2009 and 2021 of which only 1 was successful.<sup>24</sup>

## 2.2 Action for Failure to Act under Article 265 TFEU

The action for failure to act allows applicants to challenge the unlawful inactivity of EU bodies. However, it does not serve to ensure that the action they take is lawful.

Article 265 of the TFEU details actions for failure to act as follows:

Should the European Parliament, the European Council, the Council, the Commission or the European Central Bank, in infringement of the Treaties, fail to act, the Member States and the other institutions of the Union may bring an action before the Court of Justice of the European Union to have the infringement established. This Article shall apply, under the same conditions, to bodies, offices and agencies of the Union which fail to act.

The action shall be admissible only if the institution, body, office or agency concerned has first been called upon to act. If, within two months of being so called upon, the institution, body, office or agency concerned has not defined its position, the action may be brought within a further period of two months.

Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion.

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<sup>24</sup> M Eliantonio and M van Wolferen, 'The Plea of Illegality in EU Law: the missing piece in the puzzle of a "complete system of remedies"?' in M Eliantonio and D Dragos (eds), *Indirect Judicial Review in Administrative Law: Legality vs Legal Certainty in Europe* (Routledge 2022).

***Purpose of the action?***

- ⇒ To challenge the inaction of EU institutions

***Who can initiate proceedings?***

- ⇒ Natural and legal persons when they satisfy strict *locus standi* requirements
- ⇒ EU institutions
- ⇒ Member States

***When should proceedings be initiated?***

- ⇒ Two months after the expiry of the two month period that starts running the moment the applicant calls upon the EU body to act

***What are the limitations of this action?***

- ⇒ Private parties can only challenge failures to adopt legally binding acts;
- ⇒ Aim is to make EU bodies act, rather than to ensure that the action they take is lawful

***What opportunities does this action present?***

- ⇒ Possibly untapped potential as a first step to enforce positive obligations under fundamental rights law

## 2.2.1. Procedural Overview

The action for failure to act is the counterpart of the action for annulment. EU bodies could easily avoid review of their acts under the action for annulment by simply not adopting any. The action for failure to act closes this gap by providing a tool to challenge the inactivity of an EU body. The outcome of a successful complaint is a declaration of the Court that the EU body's lack of action was unlawful. The Court cannot tell the EU body in question what action to take.<sup>25</sup>

For a successful complaint, two basic conditions must be fulfilled. First, the applicant must have invited the EU body to act, but the latter failed to act within two months of having been called upon to do so. Practically, this is often a letter sent by the applicant to the EU body in which the desired action is clearly outlined and reference is made to Article 265 TFEU. Failing to follow this 'pre-litigation procedure' renders the action for failure to act *inadmissible*.<sup>26</sup>

Second, the EU body must have been under a duty to act.<sup>27</sup> This is broadly understood and obligations to act may be found in the EU Treaties, the EU Charter of Fundamental

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<sup>25</sup> Case T-395/04, *Air One v Commission*, ECLI:EU:T:2006:123, para. 24.

<sup>26</sup> Case T-832/14, *Nutria v Commission*, ECLI:EU:T:2016:428, para. 43.

<sup>27</sup> See for instance Case T-95/96, *Gestevisión Telecinco v Commission*, ECLI:EU:T:1998:206, para. 71.

Rights, or EU secondary law (such as regulations or directives). What is important is that the relevant provision sets out an obligation to act in a legally binding manner, rather than giving the EU body concerned a mere choice to act. That is why, for instance, a failure of the Commission to bring infringement proceedings against a Member State cannot be challenged under Article 265 TFEU because the Commission *may* bring proceedings, but is under *no duty* to do so.<sup>28</sup> For similar reasons, an attempt by the European Parliament to force the Commission to adopt an act in the area of visa policy failed.<sup>29</sup>

An action for failure to act is time-barred two months after the expiry of the two months period that starts running the moment the applicant called upon the EU body to act.

In addition to EU institutions and Member States, private parties also have standing to bring an action for failure to act. Similar to the action for annulment, to have standing, private parties have to show that they are *directly and individually concerned* by the act which the EU body failed to adopt, even though the wording of Article 265 TFEU suggests a stricter approach.<sup>30</sup> The limits noted in this respect above in relation to the action for annulment therefore also apply here (see Section 1.1 above for the requirements that need to be fulfilled for applicants to prove that an act concerns them *individually* and/or *directly*).

## 2.2.2. Main Challenges

Other than the limited standing for private parties, there are two main challenges in relation to the action for failure to act.

### 1.2.2.1. Limit to the Types of Unlawful Inactivity that may be Challenged

Not all types of unlawful inactivity can be challenged. As the counterpart to the action for annulment, a ‘failure to act’ is only the non-adoption of an act that is capable of producing legal effects vis-a-vis third parties (for a definition of what this requires see Section 1.1 above). What exactly this means differs depending on who brings the case. For private parties, actions for failure to act are admissible only if they concern a failure of an EU body to adopt a binding act.<sup>31</sup> If the action is brought by a Member State or a Union institution, also the failure to take non-binding acts that have legal effect can be challenged, for instance in the context of the legislative process.<sup>32</sup>

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<sup>28</sup> Case 247/87, *Star Fruit v Commission*, ECLI:EU:C:1989:58, paras. 10–14.

<sup>29</sup> Case C-137/21, *European Parliament v European Commission*, ECLI:EU:C:2023:625.

<sup>30</sup> Case T-212/99, *Intervet International v Commission*, ECLI:EU:T:2002:63 ; Case T-395/04, *Air One v Commission*, ECLI:EU:T:2006:123.

<sup>31</sup> Case 15/70, *Chevalley v Commission*, ECLI:EU:C:1970:95.

<sup>32</sup> Case 13/83, *European Parliament v Council*, ECLI:EU:C:1985:220.

### 1.2.2.2. State of Inactivity may be Easily Changed

The action for failure to act is aimed at making EU bodies act, rather than ensuring the action they take is lawful. If the EU body ‘defines its position’ within the two months period after having been called upon to act, it is not ‘inactive’ anymore within the meaning of Article 265 TFEU and the action is inadmissible. Two aspects are important in this respect.

First, while the ‘invitation to act’ may take any form, it must be sufficiently clear and precise to enable the EU body to know exactly what action it is being asked to take. If that is not the case, it does not even trigger the obligation for the EU body to ‘define its position’.<sup>33</sup> For instance, in *SS and ST v Frontex*, the applicants sought to challenge Frontex’s failure to suspend or terminate its activities in the Aegean Sea according to its obligations under Article 46(4) Regulation 2019/1896 after reported fundamental rights violations in the region. It would not have been sufficient to, for example, simply send Frontex a letter noting the fundamental rights violations taking place in the region without also explicitly mentioning what they thought this would require Frontex to do (as the applicants did in this case).<sup>34</sup>

Second, the CJEU is rather lenient when it comes to the question of what may qualify as a ‘definition of a position’. A ‘definition of a position’ may be anything that explains the EU body’s stance. So, a letter sent in response to the invitation to act which states that the EU body does not think it is obliged to take the desired action, supported by explanations why it takes that view, is sufficient to bring the failure to act to an end, rendering the action for failure to act inadmissible.<sup>35</sup> This is also what rendered the application in *SS and ST v Frontex* inadmissible. In a letter to the applicants, Frontex had explicitly refused to act and explained in detail the reasons why it did not consider the situation to require suspension or termination of its activities in application of Article 46(4). That was sufficient to bring the failure to take action to an end.<sup>36</sup>

Importantly, it is irrelevant in this respect whether the content of the ‘definition of the position’ is legally correct. The idea is that the refusal to act itself constitutes an act open to challenge under Article 263 TFEU.<sup>37</sup> While this indicates that such refusals are considered as ‘reviewable acts’ (for the requirements of what constitutes a ‘reviewable act’ see Section 1.1 above),<sup>38</sup> the Court does not seem to be prepared to relax the standing requirements in this respect, such that applicants challenging a refusal to act under Article

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<sup>33</sup> Case T-832/14, *Nutria v Commission*, ECLI:EU:T:2016:428, para. 43.

<sup>34</sup> Case T-282/21, *SS and ST v Frontex*, ECLI:EU:T:2022:235, para. 24. See below for more details on the case.

<sup>35</sup> Case T-715/19, *Wagenknecht v European Council*, ECLI:EU:T:2020:340, paras. 31-32.

<sup>36</sup> Case T-282/21, *SS and ST v Frontex*, ECLI:EU:T:2022:235, paras 23-31.

<sup>37</sup> Case T-715/19, *Wagenknecht v European Council*, ECLI:EU:T:2020:340, para. 31.

<sup>38</sup> See for instance in judgment C-97/86, 99/86, 193/86 and 215/86, *Asteris and Others v Commission*, ECLI:EU:C:1988:199, paras. 32-33.

263 TFEU will still have to show that the refusal concerns them *directly* or even *directly and individually*.<sup>39</sup>

### 2.2.3. Opportunities

The action for failure to act is used very rarely by private parties, certainly when it comes to the specific context of EU migration and asylum law. It might be worth exploring whether it has untapped potential as a first step in the enforcement of positive obligations under fundamental rights law.

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<sup>39</sup> Case T-715/19, *Wagenknecht v European Council*, ECLI:EU:T:2020:340, para. 36.

## 2.2.4. Practical Example

### Case T-282/21, *SS and ST v Frontex* & T-600/22, *ST v Frontex*

The applicants in *SS and ST v Frontex* are two third-country nationals, supported by two NGOs, Front-Lex and Legal Centre Lesvos. They sought to challenge Frontex's failure to trigger Article 46(4) Regulation 2019/1896, which they argue would have required Frontex to suspend or terminate its activities in the Aegean Sea after reported fundamental rights violations in the region.

The Court declared the action inadmissible. The two NGOs had sent a letter to Frontex, as required under Article 265 TFEU, to invite it to take the desired action. Frontex responded in a letter to the applicants, in which it explained the reasons why it did not consider the situation to require the application of Article 46(4). This qualified as a 'definition of its position' within the meaning of Article 265 TFEU, meaning Frontex was not 'inactive' and the action was inadmissible.

The applicants' substantive arguments regarding Frontex's position, the Court added, could only be assessed in the context of an action for annulment, in which Frontex's letter expressing the refusal to act would be challenged, provided the applicants fulfil the requirements to lodge that action.

Learning from the lessons in *SS and ST v Frontex*, the applicants brought a similar complaint, but this time lodging both an action for failure to act and an action for annulment together (Case T-600/22, *ST v Frontex*). However, the Court held both actions inadmissible. As for the action for failure to act, the main problem was that the invitation to act letter was sent to Frontex not by the applicant or in the applicant's name, but by the NGO. The Court held the action for failure to act inadmissible because the condition that it must be brought by the same person who has previously called upon the institution was not met. According to the Court, 'The fact that the NGO which signed the invitation to act is the same as that which brought the present action is irrelevant, since it does not prove that the invitation to act came from the applicant and does not, therefore, satisfy that essential procedural requirement.' (para. 16). In any case, the Court emphasised, even if this condition had been met, the case would have been declared inadmissible because, just like in *SS and ST v Frontex*, Frontex had defined its position.

Even though the Court had suggested in *SS and ST v Frontex* that a refusal to act (Frontex's response letter) could be challenged via an action for annulment, this was also dismissed in *ST v Frontex* because the applicant could not show that he had a 'vested and present interest' in the annulment (for more detail see Section 1.1 above).

## 2.3 Action for Damages under Articles 268 and 340 TFEU

The action for damages is a mechanism to hold the EU legally responsible for violations of EU law. If successful, the EU has to pay compensation for the damage its illegal conduct caused. In EU law, this is referred to as ‘non-contractual liability’. The procedure is easily accessible, even for private parties, but the conditions for an award of compensation are strict, making successful actions rare.

Article 340 of the TFEU details actions for damages as follows:

In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

### ***Purpose of the action?***

- ⇒ Compensation for damages inflicted by the EU

### ***Who can initiate proceedings?***

- ⇒ Natural and legal persons

### ***When should proceedings be initiated?***

- ⇒ Up to five years after the event that gave rise to the damage

### ***What are the limitations of this action?***

- ⇒ Liability arises only for ‘sufficiently serious’ breaches of EU law;
- ⇒ Joint liability between the EU and a Member State is difficult to implement

### ***What opportunities does this action present?***

- ⇒ Low admissibility threshold
- ⇒ Strict substantive conditions not defined by the Treaties, making it (relatively) easier to achieve change

### 2.3.1. Procedural Overview

The aim of the action for damages is to hold the EU liable to compensate damage it caused. It is open to any natural or legal person, regardless of their nationality or relationship with the EU and without there being any additional standing requirements that would have to be fulfilled. A successful action results in an award of (monetary)

compensation to the applicant. The action has to be brought within five years after the event that gave rise to the damage.<sup>40</sup>

EU liability is subject to three cumulative conditions: the unlawfulness of the conduct complained of, the occurrence of damage on the part of the victim, and a causal relationship between the unlawful conduct and the damage.<sup>41</sup> The condition of unlawfulness is qualified in two ways: the rule infringed must be intended to confer rights on individuals, and the breach thereof must be sufficiently serious.<sup>42</sup>

## 2.3.2. Main Challenges

### 1.3.2.1. Only Sufficiently Serious Breaches Incur Liability

The core obstacle encountered by individuals in lodging a successful action for damages concerns the requirement that the breach complained of was ‘sufficiently serious’. In essence, it means that some unlawful conduct is not considered ‘unlawful enough’ for liability to arise. The decisive criterion in this respect is whether the Union body concerned has ‘manifestly and gravely disregarded the limits on its discretion’.<sup>43</sup> In practice, applicants thus have to show not only that there was a breach of EU law, but also that that breach was obvious and reprehensible.

### 1.3.2.2. Difficulty in Implementing Joint Liability

The second major obstacle concerns the limits to the establishment and enforcement of joint liability. Joint conduct of the EU and one or more of its Member States does not *ipso facto* translate into joint liability. There are two concrete challenges in this respect. On the one hand, it might be unclear to whom the unlawful conduct is attributable (that is, who is considered the ‘author’ of a violation). Sometimes the CJEU explicitly deals with this question, listing ‘attribution’ as a fourth condition for a successful claim.<sup>44</sup> However, there is no coherent approach to the concrete requirements that would have to be fulfilled for conduct to be considered attributable to an EU body. Often, unlawful

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<sup>40</sup> If the applicant only becomes aware of the event that gave rise to the damage later, the limitation period only starts to run from that moment, see case C-145/82, *Stanley George Adams v. Commission*, ECLI:EU:C:1985:448, para 50.

<sup>41</sup> Case C-4/69, *Lütticke v. Commission*, ECLI:EU:C:1971:40, para 10.

<sup>42</sup> Case C-352/98 P, *Bergaderm and Goupil v Commission*, ECLI:EU:C:2000:361, para 42.

<sup>43</sup> Case C-352/98 P, *Bergaderm and Goupil v Commission*, ECLI:EU:C:2000:361, para 43.

<sup>44</sup> For instance: Case T-317/12, *Holcim (Romania) v Commission*, ECLI:EU:T:2014:782, para 86. Case T-250/02, *Autosalone Ispra v EAEC*, ECLI:EU:T:2005:432, paras 42, 68–98.

conduct is attributed to the authority that is legally competent to act or decide, with little margin to take into account other forms of influence, power, or pressure.<sup>45</sup>

On the other hand, the CJEU applies a very strict causation test. A causal link exists when an infringement of the law was a necessary and sufficiently direct condition for damage to occur. A breach is too ‘remote’ or ‘indirect’, though, if an intervening event ‘breaks’ the chain of causation. This may be the occurrence of exceptional or unforeseeable events, or imprudent conduct by the applicant, but also imprudent conduct, for instance, by a national authority that cooperates with the EU, if that proves to be the determinant cause of the damage.<sup>46</sup> The limits of this strict approach were very clear in *WS and Others v Frontex*, in which a Syrian family sought compensation for Frontex’s role in the violation of their right to *non-refoulement*. The Court dismissed the action for lack of a sufficiently direct causal link between Frontex’s conduct and the harm complained of because the competence to interfere with the return decision or grant international protection rests with the Member States, not Frontex.<sup>47</sup> It was not open to engaging with the question whether Frontex can incur liability jointly with the Member State in question.

Joint liability—while theoretically possible—remains the exception to the rule. This sits uneasily with the fact that due to the EU’s multi-level administration, safeguarding fundamental rights is in many situations a joint responsibility between the EU and its Member States.<sup>48</sup>

### 1.3.2.1. Liability Cannot be Used to Circumvent the Action for Annulment

An action in relation to non-contractual liability is considered inadmissible when it is merely used by way of circumvention, as a substitute, when the two months’ time-limit for initiating an action for annulment (Article 263 TFEU) has expired and the applicant would clearly have had standing (akin to a *détournement de pouvoir*). The action will

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<sup>45</sup> For more detail on this topic see M. Fink (2020), ‘The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable’, *German Law Journal* 21(3), p. 532-548; J. de Coninck (2020), ‘Catch-22 in the Law of Responsibility of International Organizations: Systemic Deficiencies in the EU Responsibility Paradigm for Unlawful Human Rights Conduct in Integrated Border Management’, PhD Thesis, Ghent University; M. Fink (2018), *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law*, Oxford University Press.

<sup>46</sup> Case C-419/08 P, *Trubowest*, ECLI:EU:C:2010:147, paras 59, 60–61; Joined Cases 64 & 113/76, *Dumortier v Council*, ECLI:EU:C:1979:223, para 21.

<sup>47</sup> Case T-600/21, *WS and Others v Frontex*, ECLI:EU:T:2023:492. See below for more detail on the case.

<sup>48</sup> M. Fink, C. Rauegger, and J. De Coninck, ‘The Action for Damages as a Fundamental Rights Remedy’ in Melanie Fink (ed), *Redressing Fundamental Rights Violations by the EU: The Promise of the ‘Complete System of Remedies’* (Cambridge University Press, forthcoming 2024).

also be rejected if the reparation sought coincides with the benefit the applicant would have obtained from the annulment of the contested act. This means that only genuine claims for damages are admissible and not actions that are ‘actually aimed at securing withdrawal of an individual decision which has become definitive and would, if upheld, have the effect of nullifying the legal effects of that decision’.<sup>49</sup>

### 2.3.3. Opportunities: Low Admissibility Threshold and Flexibility

The action for damages has two main advantages. First, especially when compared to the actions for annulment or failure to act (see above), the admissibility threshold is very low. Obtaining a verdict on substance requires neither a particular form of EU conduct, such as a legally binding act, nor proof of a specific interest on the part of the applicant to have the EU measure assessed as to its legality.<sup>50</sup> Second, at the substantive level, the action for damages is exceptionally flexible. Article 340 TFEU merely states that the EU is to make good damage it causes ‘in accordance with the general principles common to the laws of the Member States’, without specifying the precise conditions. This provides room for the CJEU to develop a liability regime suitable for the EU, including in relation to its commitments under fundamental rights law.<sup>51</sup> While the Court does not currently seem to use that room, this may change in the future. Articles 41 and 47 of the Charter and the approaches adopted in national liability laws could be relied on to this end.

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<sup>49</sup> Case C-175/84, *Krohn*, ECLI:EU:C:1987:8 paras. 32-33.

<sup>50</sup> See also: D. Hanf (2018), ‘EU Liability Actions’ in R. Schütze & T. Tridimas (eds), *Oxford Principles Of European Union Law: The European Union Legal Order: Volume I*, Oxford University Press, p. 914–918.

<sup>51</sup> T. Rademacher (2017), ‘Factual Administrative Conduct and Judicial Review in EU Law’, *European Review of Public Law* 29(2), p. 430–435.

### 2.3.4. Practical Example

#### **Case T-600/21, *WS and Others v Frontex***

The applicants in this case were a Syrian refugee family escaping Aleppo at the height of the war in 2016. They were returned to Turkey just days after their arrival in a joint return operation between Greece and Frontex. They argued that this constituted a violation of the principle of non-refoulement and that the return was carried out in a manner that breached their right not to be subjected to inhuman or degrading treatment. They lodged an action for damages under Articles 268 and 340 TFEU with the General Court to seek compensation from Frontex for its role in these violations.

Their action for damages was dismissed. Without dealing with the question whether the return of the applicants and their treatment during the return procedure constituted a violation of EU law, the General Court went straight to the causation requirement. The Court denied the existence of a sufficiently direct causal link between Frontex's conduct and the harm complained of because Frontex lacks the competence to take or interfere with the return decision or grant international protection. In other words, whatever Frontex may or may not have done did not, in the Court's view, change the fact that the applicants would have been returned, leaving the responsibility with Greece, the competent Member State.

This shows just how restrictively the causation threshold is interpreted by the Court, making joint liability between Frontex and a Member State hosting an operation very difficult to implement. After the judgment came out, there was some speculation that joint border control operations (as opposed to joint return operations) would be treated more leniently by the Court, because of the absence of the element of the return decision. Great hope was put in the then still pending Case T-136/22 *Hamoudi v Frontex* to clarify this matter. However, *Hamoudi v Frontex* was decided on 13 December 2023, with the Court dismissing the application because the applicant could not sufficiently prove to have been present and involved in the alleged incident.

An appeal in *WS and Others v Frontex* is currently pending under C-679/23 P. It remains to be seen whether the Court of Justice takes a more lenient stance.

## 2.4 Reference for a Preliminary Ruling under Article 267 TFEU

The preliminary ruling procedure in Article 267 TFEU is the ‘keystone’ of the judicial system in the EU, according to the CJEU itself.<sup>52</sup> This procedure enables all national courts in the EU to submit questions to the CJEU on the interpretation and validity of EU law.

Article 267 of the TFEU details references for preliminary ruling as follows:

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;
- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

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<sup>52</sup> Opinion 2/13, ECLI:EU:C:2014:2454, para. 176.

***Purpose of the action?***

- ⇒ To obtain an interpretation or determination on the validity of EU law

***Who can initiate proceedings?***

- ⇒ National courts, specifically a “court or tribunal of a Member State” that fulfils the six conditions developed by the CJEU

***When should proceedings be initiated?***

- ⇒ No time limit, although the possibilities for the Court to answer the questions sometimes depends on the extent to which the applicants had started a direct action for annulment or liability (see Section 1.1)

***What are the limitations of this action?***

- ⇒ The decision to refer depends on the national court and is not an individual remedy

***What opportunities does this action present?***

- ⇒ All national courts or tribunals may make a preliminary reference. National courts are responsive to well-substantiated request of the parties to refer and there are (growing) possibilities to challenge a national court’s decision not to refer

## 2.4.1. Procedural Overview

All national courts or tribunals have the possibility of making a reference to the CJEU in a case in which EU law is applicable. Important is also that an answer from the CJEU on questions of the interpretation and the validity of EU law ‘are necessary to enable it to give judgment’. The latter is, for example, not the case if the case can be decided on the basis of national law, or if the particular facts of the case are such that they do not require a reference. The CJEU will also declare requests inadmissible if the questions are too general or hypothetical because the issues have, for instance, not materialized (yet).<sup>53</sup>

### 1.4.1.1. Obligation for Highest Courts to Refer

Article 267 TFEU requires national courts or tribunals to refer to the CJEU if a question is raised about the interpretation or validity of EU law when ‘there is no judicial remedy under national law’, provided that ‘a decision on the question is necessary to enable it to give judgment’. The latter is crucial because courts are not obliged to refer if they can decide the case on the basis of national law, or if the particular facts of the case are such that they do not require a reference. This obligation applies to the highest court or courts in Member States—a supreme (administrative) court and/or a constitutional court. However, it could happen that a ‘lower’ court is obliged to refer in a particular case in which there is no remedy, even though it enjoys discretion in most other cases.

There are two exceptions to the obligation of the highest courts, which are commonly referred to as the *CILFIT* exceptions. The highest courts are not obliged to refer where the CJEU has ‘already dealt with the point of law in question’ (*acte éclairé*), or where ‘the correct application of [EU] law may be so obvious as to leave no scope for any reasonable doubt’ (*acte clair*).<sup>54</sup> The CJEU presented quite a strict framework for national courts in relation to *acte clair* in its *CILFIT* judgment. National courts ‘must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice’.<sup>55</sup>

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<sup>53</sup> Case 244/80, *Foglia*, ECLI:EU:C:1981:302, para. 18.

<sup>54</sup> Note that there can be an *acte éclairé* even though the questions ‘are not strictly identical’. Case 283/81, *CILFIT*, ECLI:EU:C:1982:335, paras. 14 and 16.

<sup>55</sup> Before reaching that conclusion, they must consider the characteristic features of EU law and compare, among other things, different language versions of the provision(s) of EU law. Note that the CJEU has somehow alleviated this burden in C-561/19, *Consorzio Italian Management e Catania Multiservizi*, ECLI:EU:C:2021:799.

### 1.4.1.2. Challenging the Validity of EU Law: *Foto-Frost* Obligation

The preliminary reference procedure can also be used to “challenge” the validity of EU law. All courts, including lower courts, are obliged to refer if they have doubts about the validity of EU law.<sup>56</sup>

One example of a validity reference in the field of migration law is the case of *J.N.* In the case, the highest Dutch administrative court asked whether Article 8(3) of Directive 2013/33 is valid in the light of Article 6 of the Charter and the case law of the ECtHR.<sup>57</sup> The Grand Chamber found no factor affecting the validity of that provision.

Note, however, that the natural or legal persons cannot call into question the legality of EU law before national courts if they failed to initiate an action for annulment (Article 263 TFEU) on time and ‘undoubtedly’ had standing.<sup>58</sup> This issue played a role in a [reference](#) by the Dutch Council of State about the validity of a Council Implementing Regulation maintaining the Liberation Tigers of Tamil Eelam on the list of those whose funds are to be frozen. The applicants (A, B, C and D) did not challenge the Implementing Regulation directly on the basis of Article 263 TFEU within the prescribed two months period.<sup>59</sup> They, nonetheless, challenged the designation orders of the Dutch Minister of Foreign Affairs before a Dutch court, encouraging the national court to make a reference. The CJEU held that it is not obvious that an action for annulment would have been admissible considering the standing requirement of individual concern. It hence accepted the Article 267 request and answered the questions (finding no factors affecting the validity of the Regulation).<sup>60</sup>

## 2.4.2. Main Challenge: No Individual Remedy

It should be emphasized that the request for a preliminary ruling is not an individual remedy. The CJEU construes the procedure as a mechanism of inter-judicial cooperation. The CJEU famously ruled in *CILFIT* that Article 267 TFEU ‘does not constitute a means

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<sup>56</sup> The coherence of the EU legal system and the uniformity of EU law require that the power to declare an EU act invalid be reserved to the CJEU. Case 314/85, *Foto-Frost*, ECLI:EU:C:1987:452.

<sup>57</sup> Case C-601/15 PPU, *J.N.*, ECLI:EU:C:2016:84.

<sup>58</sup> Case C-188/92, *TWD*, ECLI:EU:C:1994:90, para. 16: ‘It follows from the same requirements of legal certainty that it is not possible for a recipient of aid, forming the subject-matter of a Commission decision..., who could have challenged that decision and who allowed the mandatory time-limit ... to expire, to call in question the lawfulness of that decision before the national courts in an action brought against the measures taken by the national authorities for implementing that decision.’

<sup>59</sup> Note, however, that the LTTE did challenge the Implementing Regulation. C-599/14 P, *Council v LTTE*, ECLI:EU:C:2017:583.

<sup>60</sup> Case C-158/14, *A, B, C, D*, ECLI:EU:C:2017:202.

of redress available to the parties to a case'.<sup>61</sup> Article 267 is a court-to-court procedure, which is 'completely independent of any initiative by the parties'.<sup>62</sup> National courts, even those against whose decisions there is no judicial remedy, are not obliged to automatically refer a matter to the CJEU when a party contends that there is a question concerning the interpretation or validity of EU law.<sup>63</sup> Individuals have nothing to say over whether questions are posed to the CJEU or how the questions are actually formulated.<sup>64</sup> National courts thus enjoy the 'widest discretion' and have a 'monopoly' to determine the need for a preliminary ruling and the relevance of the questions.<sup>65</sup>

### 2.4.3. Opportunities

#### 1.4.3.1. Requesting Courts to Refer

Empirical research shows that (lower) national courts are generally quite responsive to the arguments of the parties, including possible requests to refer.<sup>66</sup>

For instance, in The Netherlands, the Strategic Litigation Committee was established in 2014 by the Dutch Council for Refugees. The Committee consists of academics and asylum lawyers and actively looks for cases which can be brought before the CJEU (or the ECtHR).<sup>67</sup> The District Court Haarlem referred questions, partly as a result of a 13-page analysis, on the starting date of the temporary asylum permit in the light of Article 6 of the Procedural Directive.<sup>68</sup>

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<sup>61</sup> Case 283/81, *CILFIT*, ECLI:EU:C:1982:335, para 9.

<sup>62</sup> C-210/06, *Cartesio*, ECLI:EU:C:2008:723, para 90; C-561/19, *Conorzio Italian Management e Catania Multiservizi*, ECLI:EU:C:2021:799, para 28. The CJEU has primarily stressed the importance of ensuring the uniform interpretation and application of EU law and the *effective cooperation between the Court of Justice and national courts as the two main objectives of the preliminary ruling procedure*. C-210/06, *Cartesio*, ECLI:EU:C:2008:723, para 91.

<sup>63</sup> Case C-314/85, *Foto-Frost*, ECLI:EU:C:1987:452, para 14.

<sup>64</sup> In *Hessische Knappschaft*, the CJEU held: 'The parties may not change their tenor or have them declared to be without purpose'. Case C-44/65, *Hessische Knappschaft v. Singer et Fils*, ECLI:EU:C:1965:122.

<sup>65</sup> Case C-173/09, *Elchinov*, ECLI:EU:C:2010:581, para 25; Case C-416/10, *Križan and others*, ECLI:EU:C:2013:8, para 64. Case C-379/98, *PreussenElektra*, ECLI:EU:C:2001:160, para 38. Joined Cases C-72/14 and C-197/14, *X. and T.A. van Dijk*, ECLI:EU:C: 2015:564, para 58.

<sup>66</sup> E.g. J. Krommendijk, *National Courts and Preliminary References to the Court of Justice*, Edward Elgar 2021.

<sup>67</sup> J. Krommendijk, '[The preliminary reference dance between the CJEU and Dutch courts in the field of migration](#)', *European Journal of Legal Studies* (2018) 10, 101-154..

<sup>68</sup> ECLI:NL:RBDHA:2023:15961, <https://www.linkedin.com/feed/update/urn:li:activity:7123387206919970816?updateEntityUrn>

Another recent example of a reference that was (partly) the result of strategic litigation is the Grand Chamber judgement deciding that national courts are required to ascertain of their own motion whether detention of an illegally staying foreign national or asylum seeker is lawful.<sup>69</sup> An expert opinion was written by the VU Migration Law Clinic at the request of the applicants' lawyer, while a prominent academic expert on immigration detention appeared before the Council in support of the third-country nationals.<sup>70</sup> The Hungarian Helsinki Committee (HHC) has also been successful in compelling Hungarian lower courts to refer cases in which the CJEU subsequently concluded that national laws and policies breached EU law. One successful example is *LH* (see below). Another example is *FMS*, a case about detention of asylum-seeking families in the transit zone at the Hungarian-Serbian border.<sup>71</sup> The CJEU again ruled largely in line with the HHC finding inconsistencies with EU law.

#### 1.4.3.2. Duty for National Courts to Provide Reasons

The position of the parties has been strengthened on the basis of the case law of the ECtHR. There is an abundant body of ECtHR case law on the duty to state reasons for decisions of the highest national courts not to refer a case for a preliminary ruling to the CJEU.<sup>72</sup> To date, the ECtHR found a violation of Article 6 ECHR in seven cases where the highest national court—despite a sufficiently clear and substantiated request by one of the parties in the proceedings—failed to make a preliminary reference without indicating which one of the *CILFIT* exceptions applies.<sup>73</sup> The CJEU has also recently underscored this duty in its so-called *CILFIT* 2.0 judgment: *Conorzio Italian Management*.<sup>74</sup> Aside from the possibility to complain in Strasbourg, individual applicants can use another remedy in relation to national courts' failures to refer, namely state liability on the basis

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[=urn%3Ali%3Afs\\_feedUpdate%3A%28V%2Curn%3Ali%3Aactivity%3A7123387206919970816%29](https://www.oxfordjournals.org/doi/full/10.1093/ajph/112.11.1997)

<sup>69</sup> Joined Cases C-704/20 and C-39/21, *CBX*, ECLI:EU:C:2022:858.

<sup>70</sup> J. Krommendijk and T. Hendriks, 'Picking Primacy over Procedural Autonomy', <https://verfassungsblog.de/picking-primacy-over-procedural-autonomy/>, 17 November 2022.

<sup>71</sup> Joined Cases C-924/19 PPU and C-925/19 PPU, <https://helsinki.hu/en/hungary-unlawfully-detains-people-in-the-transit-zone/>.

<sup>72</sup> See e.g. EHRM 8 april 2014, ECLI:CE:ECHR:2014:0408JUD001712009, (*Dhahbi/Italië*)

<sup>73</sup> ECtHR 8 April 2014, ECLI:CE:ECHR:2014:0408, (*Dhahbi/Italy*); ECtHR 21 July 2015 ECLI:CE:ECHR:2015:0721; (*Schipani/Italy*); ECtHR 16 April 2019, ECLI:CE:ECHR:2019:0416 (*Baltic Master/Lithuania*); ECtHR 13 February 2020, ECLI:CE:ECHR:2020:0213 (*Sanofi Pasteur/France*); ECtHR 13 July 2021, ECLI:CE:ECHR:2021:0713 (*Affaire Bio Farmland/Romania*); ECtHR 15 December 2022, ECLI:CE:ECHR:2022:1215 (*Rutar and Rutar Marketing D.O.O./Slovenia*); ECtHR 14 March 2023, ECLI:CE:ECHR:2023:0314 (*Georgiou/Greece*).

<sup>74</sup> Case C-561/19, *Conorzio Italian Management e Catania Multiservizi*, ECLI:EU:C:2021:799.

of *Köbler*, albeit the chances of success are quite slim.<sup>75</sup> An indirect “remedy” consists of a complaint to the European Commission with a view of initiating an infringement procedure (see Section 2.2 below).<sup>76</sup>

#### 2.4.4. Practical Example

##### Case C-564/18, *LH*

LH is a Syrian national of Kurdish ethnicity, who arrived in Hungary in a transit zone and made an application for international protection. The Immigration and Asylum Office rejected the application as inadmissible without examining the substance of the application and issued a return decision. LH challenged that decision before the Budapest Administrative and Labour Court. The HHC provided legal representation to LH and drew the attention of the court to the apparent contradiction between domestic and EU legislation. The CJEU ruled that EU precludes the introduction of an inadmissibility criteria whereby the application of asylum-seekers is automatically rejected without an in-merit examination when they arrived via a ‘safe’ transit.

## 2.5 Third-Party Intervention under Article 40 CJEU Statute

Third-party intervention could be an alternative to direct actions. Intervention allows persons to submit their views to the CJEU (it mirrors what some refer to as *amicus curiae*). The possibilities are, however, quite limited, procedurally and substantively. There is also a difference between intervention in direction actions (e.g. Article 263 and 265 TFEU) and preliminary references (Article 267 TFEU).

Article 40 of the CJEU Statute details the conditions for third-party intervention as follows:

Member States and institutions of the Union may intervene in cases before the Court of Justice.

The same right shall be open to the bodies, offices and agencies of the Union and to any other person which can establish an interest in the result of a case submitted to the Court. Natural or legal persons shall not

<sup>75</sup> Case C-224/01, *Köbler*, ECLI:EU:C:2003:513.

<sup>76</sup> In the 2018 case of *Commission v France*, for the first time ever, the CJEU determined that there was a violation of Article 267 TFEU due to the failure of the French Council of State to refer in an infringement procedure. Case C-416/17, *Commission v France*, ECLI:EU:C:2018:811. See also recently Opinion of AG Emilou in Case C-516/22, *Commission v United Kingdom*, ECLI:EU:C:2023:857.

intervene in cases between Member States, between institutions of the Union or between Member States and institutions of the Union.

Without prejudice to the second paragraph, the States, other than the Member States, which are parties to the Agreement on the European Economic Area, and also the EFTA Surveillance Authority referred to in that Agreement, may intervene in cases before the Court where one of the fields of application of that Agreement is concerned.

An application to intervene shall be limited to supporting the form of order sought by one of the parties.

### **INTERVENTION IN DIRECT ACTIONS (E.g. Articles 263, 265 TFEU)**

#### ***Purpose of the action?***

- ⇒ Supporting the grounds of one of the parties

#### ***Who can initiate proceedings?***

- ⇒ Natural and legal persons when they can establish an interest in particular direct actions

#### ***When should proceedings be initiated?***

- ⇒ Within six weeks of the publication of the notice under Article 130(1), Rules of Procedure

#### ***What are the limitations of this action?***

- ⇒ The number of direct actions in the migration law field is limited. Parties must have an interest in the case and accept the case as they find it

### **INTERVENTIONS IN PRELIMINARY REFERENCES (Article 267 TFEU)**

#### ***Purpose of the action?***

- ⇒ Supporting the grounds of one of the parties

#### ***Who can initiate proceedings?***

- ⇒ Natural and legal persons when they are an intervening party in the national case in which a reference is made under Article 267 TFEU

#### ***When should proceedings be initiated?***

- ⇒ Before the national court makes the reference to the CJEU

#### ***What are the limitations of this action?***

- ⇒ Dependency on national procedural rules in relation to intervention in the national procedure

#### ***What opportunities does this action present?***

- ⇒ Early interventions before national courts, possibly together with other actors such as academics and NGOs, can be productive

## 2.5.1. Procedural Overview

### 1.5.1.1. Intervention in ‘Cases’ Only

Article 40 of the Statute allows for intervention of natural or legal persons, including NGOs in cases before the Court of Justice.<sup>77</sup> This includes only particular direct actions, such as the action for annulment on the basis of Article 263 TFEU, involving another natural or legal person and not the cases between Member States and EU institutions mentioned in Article 40(2) of the Statute. Article 40 does not allow for intervention in the context of the preliminary ruling procedure (Article 267 TFEU) when the questions are pending before the CJEU.<sup>78</sup> Intervention in preliminary references is only possible if the applicants had intervened before the national (referring) court *before* the decision to refer.<sup>79</sup> The possibility to intervene thus depends on national procedural rules and the ‘willingness’ of the national court to abide by requests to intervene in the national proceedings. UK procedural rules are rather welcoming in relation to third-party intervention, as illustrated by the examples below.

### 1.5.1.2. Substantive Limitations to Intervention: Supporting the Grounds

Intervention is also substantively limited to supporting the grounds already put forward, according to Article 40(4) of the Statute. Article 97 of the Rules of Procedures provides that the (intervening) party ‘must accept the case as he finds it’. This means that no new grounds can be submitted.

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<sup>77</sup> This includes all cases on the basis of Articles 258 and 259 as well as some actions for annulment on the basis of Article 263 TFEU.

<sup>78</sup> Such proceedings are thus, contrary to direct actions, not contentious or facts-based. This can also be derived from the substantive limitation in Article 40 limiting intervention ‘to supporting the form of order sought by one of the parties’. This presupposes contentious proceedings designed to resolve a dispute. S. Carrera et al., *The Court of Justice of the European Union as a fundamental rights tribunal. Challenges for the effective delivery of fundamental rights in the Area of Freedom, Security and Justice*, CEPS, 2012, at 1, 15 E.g. Case C-73/07, *Tietosuojavaltuutettu v. Satakunnan*, ECLI:EU:C:2008:727, para. 8.

<sup>79</sup> E.g. In the 2009 case *The Football Association Premier League*, the CJEU denied intervention of the Union of European Football Associations (UEFA) and four broadcasting associations. The CJEU noted that ‘the applications have been made only with a view to participating in the proceedings before the Court and that the applicants do not intend to play an active part in the proceedings before the national court after delivery of the judgment giving a preliminary ruling’. Joined Cases C-403/08 & C-429/08, *The Football Association Premier League Ltd and Others v. QC Leisure*, ECLI:EU:C:2011:631, para. 9. See, however, Case C-266/16, *Western Sahara Campaign UK v. HM Revenue and Customs*, ECLI:EU:C:2018:118.

## 2.5.2. Early Interventions in National Migration Cases

Actual third-party interventions that have occurred in migration cases before the CJEU are limited and restricted to early interventions in cases before a national court.<sup>80</sup> As an alternative, NGOs have also tried to become involved more informally before the CJEU (see Section 2.6 below).

The UNHCR joined as intervener before UK courts and intervened formally at the CJEU level: *Manjit Kaur* (1999), *N.S. and M.E.* (2010), *El Kott* (2011) and *X, Y, and Z* (2012).<sup>81</sup> The specialist legal charity *AIRE Centre* (Advice on Individual Rights in Europe) has also intervened extensively before UK courts and consequently the CJEU. A recent example is the Supreme Court's case *SM* about a child's guardianship under the Algerian kafala system.<sup>82</sup>

## 2.5.3. Practical Example

### **Joined cases C-411/10 and C-493/10, *N.S. and M.E.***

This case is a good illustration of successful third-party intervention before the UK Court of Appeal and the Irish High Court. The joined cases involve several applicants from Afghanistan, Iran and Algeria who had travelled via Greece and were arrested there for illegal entry. They travelled to the UK (N.S.) and Ireland (M.E. and four others) where they unsuccessfully claimed asylum. The applicants resisted to be transferred to Greece as the Member State responsible for examining the asylum claim on the basis of the Dublin Regulation. They argued that the procedures and reception conditions for asylum seekers in Greece are inadequate. Amnesty International, the AIRE Centre and the UNHCR intervened before both the UK and Irish court and subsequently also in Luxembourg before the CJEU. This reflects a coordinated effort of these NGOs in a high-profile issue that they had already on their radar at an early stage. The NGOs had formulated a clear EU law strategy in advance and supported the initiation of cases at the national level, while also persuading the UK and Irish courts to refer. This case thus illustrates that NGOs should ensure that they get involved early on in the national proceedings so as to be able to intervene before the CJEU.

<sup>80</sup> For further analysis, see J. Krommendijk & K. van der Pas (2022), 'To intervene or not to intervene: intervention before the court of justice of the european union in environmental and migration law', *The International Journal of Human Rights*, 26(8), p. 1394-1417.

<sup>81</sup> See <https://www.unhcr.org/publications/unhcr-interventions-court-justice-eu>.

<sup>82</sup> Case C-129/18, *SM v. Entry Clearance Officer*, ECLI:EU:C:2019:248.

## 2. Administrative, Extralegal and Informal Avenues

### 2.1 Petition to the European Parliament under Article 227 TFEU

This instrument is a way for any citizen and natural/legal person in the EU to bring a matter to the attention of the European Parliament. The European Parliament is a co-legislator within the EU and is capable of bringing procedures to the CJEU (see ‘Action for annulment’).

Article 227 of the TFEU provides the following on petitions to the European Parliament:

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have the right to address, individually or in association with other citizens or persons, a petition to the European Parliament on a matter which comes within the Union's fields of activity and which affects him, her or it directly.

***What does the action consist of?***

- ⇒ Making a complaint or request on any private or public matter relating to EU action via a petition

***Who can initiate petitions?***

- ⇒ Any citizen of the EU
- ⇒ Any natural or legal person residing in the EU or having a registered office in an EU Member State

***Under what conditions should petitions be initiated?***

- ⇒ Only if the matter affects the citizen or natural/legal person directly, on a broad interpretation

***What are the limitations of this action?***

- ⇒ No control after the petition is presented to the European Parliament and no certainty about follow-up action

***What opportunities does this action present?***

- ⇒ Potential broad scope of the petition
- ⇒ No strict procedural requirements

### 2.1.1. Procedural Overview

A petition to the European Parliament is a tool for EU citizens and natural/legal persons residing in the EU to raise awareness for certain EU-related matters with one of the main EU institutions, the European Parliament.<sup>83</sup> The right to petition is considered a fundamental right of all EU citizens and residents.<sup>84</sup> The petition is sent to the Committee on Petitions of the European Parliament (PETI Committee). In order to be admissible, the petition has to relate to one of the EU's fields of activity and it has to affect the petitioner directly. The latter condition is, according to the European Parliament, interpreted broadly.<sup>85</sup> The PETI Committee will first assess whether a petition (that meets the formal requirements) is admissible. Thereafter, if admissible, the Committee has several options in terms of follow-up actions:<sup>86</sup>

- ⇒ Asking the European Commission to conduct an investigation on the matter raised in the petition
- ⇒ Asking the European Commission for information regarding compliance with EU law
- ⇒ Referring the petition to other European Parliament Committees for information or further action
- ⇒ Contacting relevant institutions or authorities to settle the matter raised in the petition (if it concerns a specific case)
- ⇒ Responding to the petition and/or taking any other action to resolve the matter
- ⇒ Placing the petition on the PETI Committee meeting agenda (petitioner, Commission and Member State representatives are invited to this meeting)
- ⇒ Holding a hearing or workshop, conducting a fact-finding visit to a country or region, and preparing a report
- ⇒ If the petition reveals an incorrect implementation or application of EU law, it could lead to the European Commission starting infringement proceedings against a Member State
- ⇒ Starting proceedings before the CJEU

### 2.1.2. Main Challenges

The difficulty that comes with this procedure is the petitioners' lack of control over the procedure once the petition is submitted to the European Parliament. There is no

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<sup>83</sup> See also on this: H. de Waele (2023), 'The Right to Petition, EU Citizens and the European Parliament: Rise of the Triad?', in D. Jancic (ed.), *The Changing Role of Citizens in EU Democratic Governance*, Bloomsbury Publishing, p. 71-88.

<sup>84</sup> Article 44 Charter of Fundamental Rights of the European Union.

<sup>85</sup> See <https://www.europarl.europa.eu/factsheets/en/sheet/148/le-droit-de-petition>.

<sup>86</sup> Partially retrieved from: <https://www.europarl.europa.eu/factsheets/en/sheet/148/le-droit-de-petition>.

guarantee as to whether the European Parliament will act upon the petition, let alone any control over *how* the European Parliament will act. Thus, the only action that can be taken is submitting the petition with accompanying information.

### 2.1.3. Opportunities

There does not appear to be much to gain from such a petition, other than raising awareness for a specific issue. As the example below shows, a petition is a way to gain information, if the European Parliament decides to follow up on the information it has been given.

### 2.1.4. Practical Examples

- ⇨ In 2020, a petition to the EP was submitted by several NGOs (Associazione Ricreativa e Culturale Italiana (ARCI), Associazione per gli Studi Giuridici sull'Immigrazione (ASGI), Global Legal Action Network (GLAN), whose work has been taken over by de:border)<sup>87</sup> on the misuse and mismanagement of EU funds by the European Commission's EU Emergency Trust Fund for Africa (EUTF) programme 'Support to Integrated border and migration management in Libya'.<sup>88</sup> The European Commission was required to respond to the allegations made in the petition, as requested by the European Parliament.<sup>89</sup> This petition was connected to the complaint submitted to the European Court of Auditors in 2017 (see 'Informal involvement').<sup>90</sup> It is unclear what the outcome of this petition was. It was put on the agenda of the PETI Committee, but the minutes of that meeting cannot be retrieved.<sup>91</sup> No traceable results could be found.
- ⇒ Many other petitions on asylum can be found in the petitions portal, such as this example on the situation of refugees in Europe.<sup>92</sup>

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<sup>87</sup> <https://debordercollective.org/interventions/financialised-migration-control/>.

<sup>88</sup> <https://www.europarl.europa.eu/petitions/en/petition/content/0655%252F2020/html/missinglink#useful-links>; <https://www.europarl.europa.eu/petitions-content/docs/petitions/petition-0655-2020-en.pdf>.

<sup>89</sup> [https://www.europarl.europa.eu/doceo/document/PETI-CM-663059\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/PETI-CM-663059_EN.pdf).

<sup>90</sup> <https://debordercollective.org/interventions/financialised-migration-control/>

<sup>91</sup> The links on the website (<https://www.europarl.europa.eu/petitions/en/petition/content/0655%252F2020/html/missinglink#useful-links>) are no longer available.

<sup>92</sup> <https://www.europarl.europa.eu/petitions/en/show-petitions>.

## 2.2 Complaint to the European Commission under Article 258 TFEU

The European Commission is the guardian of the EU Treaties and has the power to start infringement proceedings against EU Member States, which can result in a legal procedure before the CJEU. The Commission can start infringement proceedings on its own motion, but it can also act based upon a complaint.

Article 258 of the TFEU provides the following on complaints to the European Commission:

If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

***What does the action consist of?***

⇒ Complaint to the European Commission

***Who can initiate complaints?***

⇒ Anyone

***Under what conditions should complaints be initiated?***

⇒ If a breach of EU law has occurred

***What are the limitations of this action?***

⇒ No obligation for the Commission to follow up

***What opportunities does this action present?***

⇒ Low costs and effort

⇒ One of the most powerful EU actors can take action

### 2.2.1. Procedural Overview

A complaint can be submitted to the European Commission via the [complaint form](#). The complaint has to concern ‘any measure (law, regulation or administrative action), absence of measure or practice’ by an EU Member State that the complainant considers a breach

of EU law.<sup>93</sup> The Commission can only initiate infringement proceedings if the complaint is about (in)action of public authorities, as infringement proceedings can be initiated against EU Member States only. Complaints about private entities have to be solved at the national level.

Once a complaint has been submitted, it is up to the discretion of the Commission to act or not act upon the complaint. The Commission is not obliged to open formal infringement proceedings, even if a breach of EU law has occurred.<sup>94</sup> Moreover, it is unclear whether the Commission formally responds to every complaint that is made.

If infringement proceedings are started by the Commission, the complainant does not have any additional rights in the procedure that follows. Infringement proceedings are bilateral between the EU Member State in question and the Commission, and the latter can initiate legal action before the CJEU to ensure the EU Member State acts in line with EU law.

### **2.2.2. Main Challenges**

The main disadvantage of the complaint to the Commission is that the complainant does not have any control over follow-up action. The Commission is under no obligation to start infringement proceedings and not much can be done other than submitting the complaint with as much information as possible. An additional difficulty is that research has shown a decrease in infringement proceedings by the Commission.<sup>95</sup> A final small downside is that the complaint can only concern public EU Member State entities, and no private bodies or EU bodies.

### **2.2.3. Opportunities**

There are several alternatives or opportunities for civil society actors to influence action of the European Commission:

- ⇒ The Commission can be provided with input for their annual Rule of Law Report.<sup>96</sup> In the procedure leading up to this report, the Commission consults with stakeholders (including civil society actors).<sup>97</sup>

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<sup>93</sup> See [https://commission.europa.eu/about-european-commission/contact/problems-and-complaints/complaints-about-breaches-eu-law-member-states/how-make-complaint-eu-level\\_en](https://commission.europa.eu/about-european-commission/contact/problems-and-complaints/complaints-about-breaches-eu-law-member-states/how-make-complaint-eu-level_en).

<sup>94</sup> Case 247/87, *Star Fruit v Commission*, ECLI:EU:C:1989:58, para. 11.

<sup>95</sup> See <https://www.politico.eu/article/curious-case-eu-disappearing-infringements/>.

<sup>96</sup> See [https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2023-rule-law-report\\_en#input-from-member-states](https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2023-rule-law-report_en#input-from-member-states).

<sup>97</sup> See [https://commission.europa.eu/document/72ff8a72-5d69-49ba-8cb6-4300859ee175\\_en](https://commission.europa.eu/document/72ff8a72-5d69-49ba-8cb6-4300859ee175_en).

- A complaint on a topic related to the rule of law can also be sent under the EU's Conditionality Regulation.<sup>98</sup>
- ⇒ An (anonymous) complaint can be made to the European Anti-Fraud Office (OLAF), which investigates allegations of: (i) fraud or other serious irregularities with a potentially negative impact for EU public funds, whether EU revenue, expenditure or assets held by the EU institutions; and (ii) serious misconduct by Members or staff of EU Institutions and bodies.<sup>99</sup>
  - This procedure is confidential, and it is unclear how OLAF assesses complaints and what follow-up is conducted by the agency.
- ⇒ The EU Fundamental Rights Agency can be contacted (although there is no official procedure before this body).<sup>100</sup>

The first two alternatives can be tailored towards the field of asylum, for example by misuse of the Asylum, Migration and Integration Fund,<sup>101</sup> established under the Common Provisions Regulation.<sup>102</sup> OLAF has previously published an internal report on Frontex based on an investigation out of own motion which was leaked.

## 2.2.4. Practical Examples

Complaints to the European Commission are not publicly available, but an NGO can choose to come forward with their complaint.<sup>103</sup>

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<sup>98</sup> [https://commission.europa.eu/strategy-and-policy/eu-budget/protection-eu-budget/rule-law-conditionality-regulation\\_en#:~:text=Under%20the%20conditionality%20regulation%2C%20the,threaten%20the%20EU%20financial%20interests.](https://commission.europa.eu/strategy-and-policy/eu-budget/protection-eu-budget/rule-law-conditionality-regulation_en#:~:text=Under%20the%20conditionality%20regulation%2C%20the,threaten%20the%20EU%20financial%20interests.)

<sup>99</sup> See [https://anti-fraud.ec.europa.eu/olaf-and-you/report-fraud\\_en](https://anti-fraud.ec.europa.eu/olaf-and-you/report-fraud_en).

<sup>100</sup> See <https://fra.europa.eu/en/contact>.

<sup>101</sup> Regulation (EU) 2021/1147 of the European Parliament and of the Council of 7 July 2021 establishing the Asylum, Migration and Integration Fund.

<sup>102</sup> Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy.

<sup>103</sup> See for example <https://interwencjaprawna.pl/en/complaint-to-the-ec-extremely-low-amount-of-financial-allowances-for-asylum-seekers/>.

## 2.3 Complaint to the EU Ombudsman under Article 228 TFEU

Similar to the petition that can be presented to the European Parliament, any EU citizen or natural/legal person residing in the EU can submit a complaint to the European Ombudsman. This complaint should concern maladministration by one of the EU institutions, bodies, offices or agencies.

Article 228 of the TFEU provides for complaints to the EU Ombudsman as follows:

1. A European Ombudsman, elected by the European Parliament, shall be empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Union institutions, bodies, offices or agencies, with the exception of the Court of Justice of the European Union acting in its judicial role. He or she shall examine such complaints and report on them.

In accordance with his duties, the Ombudsman shall conduct inquiries for which he finds grounds, either on his own initiative or on the basis of complaints submitted to him direct or through a Member of the European Parliament, except where the alleged facts are or have been the subject of legal proceedings. Where the Ombudsman establishes an instance of maladministration, he shall refer the matter to the institution, body, office or agency concerned, which shall have a period of three months in which to inform him of its views. The Ombudsman shall then forward a report to the European Parliament and the institution, body, office or agency concerned. The person lodging the complaint shall be informed of the outcome of such inquiries.

The Ombudsman shall submit an annual report to the European Parliament on the outcome of his inquiries.

***What does the action consist of?***

- ⇒ Complaint concerning maladministration in the activities of the EU institutions, bodies, offices and agencies

***Who can initiate complaints?***

- ⇒ Any citizen of the EU and any natural or legal person residing in the EU or having a registered office in an EU Member State

***Under what conditions should complaints be initiated?***

- ⇒ If an EU body fails to act in accordance with the law, principles of good administration, or violates human rights

***What are the limitations of this action?***

- ⇒ No control over the procedure
- ⇒ No binding decision by the EU Ombudsman if maladministration is found

***What opportunities does this action present?***

- ⇒ Low costs after the complaint is made
- ⇒ The matter is dealt with by a respectable, high-level EU body

### 2.3.1. Procedural Overview<sup>104</sup>

Similar to the petition to the European Parliament, the complaint to the EU Ombudsman is a fundamental right of all EU citizens and those residing or having registered office in an EU Member State.<sup>105</sup> The complaint has to concern maladministration by one of the EU institutions, bodies, offices or agencies. Maladministration occurs when there are instances of ‘administrative irregularities, unfairness, discrimination or the abuse of power, for example in the managing of EU funds, procurement or recruitment policies. It also includes the failure to reply, or the refusal or unnecessary delay in granting access to information in the public interest.’<sup>106</sup> Importantly in the context of the field of migration and asylum, maladministration includes fundamental rights violations by EU bodies. Even more so, one of the areas of work of the EU Ombudsman is ‘fundamental rights’.

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<sup>104</sup> Partially retrieved from: <https://www.ombudsman.europa.eu/en/make-a-complaint>.

<sup>105</sup> Article 44 Charter of Fundamental Rights of the European Union.

<sup>106</sup> See <https://www.ombudsman.europa.eu/en/make-a-complaint>. Maladministration is not defined further in CJEU case law. Some examples of maladministration are mentioned in a fact sheet, available at <https://www.europarl.europa.eu/factsheets/en/sheet/18/the-european-ombudsman#:~:text=The%20European%20Ombudsman%20may%20find,The%20principles%20of%20good%20administration>.

The complaint with the Ombudsman has to be made within two years of the date when the complainant has become aware of the facts of the maladministration. The complaint cannot concern a matter that is subject to legal proceedings already. In practice, this means that no parallel strategic litigation procedure can be started with a complaint to the Ombudsman. Once the complaint is submitted, the Ombudsman has a discretionary competence to open an inquiry or not. If an inquiry is opened, there are three possibilities for the Ombudsman:

- ⇒ Ask the institution/body concerned to provide information on the subject-matter of the complaint
- ⇒ Arrange a meeting or carry out an inspection with the EU institution/body
- ⇒ Ask the complainant for more information or comments

Accordingly, three outcomes are possible after this inquiry. The first is that the complaint is resolved. In this scenario, the Ombudsman proposes a solution to the EU body which is accepted. The second is that the Ombudsman finds that there is no maladministration by the EU body. The last possibility is that the Ombudsman concludes that there has indeed been maladministration. In the latter scenario, the Ombudsman can make recommendations, after which the EU body has to give its opinion within three months. Moreover, the complainant is able to submit comments. Finally, the Ombudsman provides a closing decision with definitive findings. This decision is not binding upon the EU body.

### 2.3.2. Main Challenges

The main limitation with this type of action is that there is no control over the procedure once the complaint is submitted to the EU Ombudsman, similar to the petition to the European Parliament. It is up to the Ombudsman to decide what to do in terms of follow-up, and only if an inquiry is opened and recommendations are made, the complainant can submit comments.

A second limitation is that the decisions of the Ombudsman are non-binding.<sup>107</sup> Thus, the EU institution is under no legal obligation to abide by the decision and the decision cannot be challenged in a procedure before the CJEU.

### 2.3.3. Opportunities

The complaint is a way to raise awareness for a certain issue or topic, without necessarily having a follow-up inquiry by the EU Ombudsman, similar to the petition to the European Parliament. Moreover, the complaint can be a way of gaining access to information from EU bodies via the Ombudsman. Access to documents is one of the main areas of work of the Ombudsman and this information can inform future (strategic litigation) action. Additionally, there is an obligation for EU institutions to respond to requests for information from the Ombudsman.

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<sup>107</sup> The European Ombudsman's guide to complaints: A publication for staff of the EU institutions, bodies, offices, and agencies, p. 8.

As the examples below show, Frontex and topics related to asylum are high on the Ombudsman's agenda. This provides an opportunity for using this type of action.

### 2.3.4. Practical Examples

- ⇒ A journalist submitted a complaint on access to documents from the European Commission in relation to the monitoring of EU activities in Libya (notably in relation to the EU's 'do no harm' policy).<sup>108</sup> The Commission refused access to several (parts of) these documents, arguing that disclosure could undermine the protection of public security. This inquiry is still ongoing.
- ⇒ Out of own initiative, the EU Ombudsman has started an inquiry as to how Frontex ensures respect for fundamental rights in the context of search and rescue missions.<sup>109</sup> Several civil society organizations have provided input in the context of this inquiry (such as Amnesty International and Sea-Watch), and early November 2023 Frontex has responded to the inquiry. The Ombudsman now wants to organize a meeting with Frontex representatives.
  - Moreover, the Ombudsman has asked the Commission for information on fundamental rights compliance of EU external action, such as the EU-Turkey statement on migration and the EU agreement with Tunisia.<sup>110</sup> The Commission has been asked to reply by 13 December 2023, but there are no updates so far.
- ⇒ Out of own initiative, the EU Ombudsman started an inquiry assessing how the Commission ensures respect for EU-funded migration management facilities in Greece.<sup>111</sup> This inquiry is closed. The Ombudsman met with the Commission and consulted civil society organizations in the context of the inquiry. Eventually, the Ombudsman made several suggestions to the Commission (such as a fundamental rights impact assessment).

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<sup>108</sup> See <https://www.ombudsman.europa.eu/en/case/en/65141>.

<sup>109</sup> See <https://www.ombudsman.europa.eu/en/case/en/63451>.

<sup>110</sup> See <https://www.ombudsman.europa.eu/en/press-release/en/75136>;  
<https://www.ombudsman.europa.eu/en/news-document/en/175203>.

<sup>111</sup> See <https://www.ombudsman.europa.eu/en/case/en/62000>.

## 2.4 Internal (Administrative) Review – Complaints Mechanism Frontex/EUAA

Several EU bodies have internal review mechanisms. Examples include ‘Boards of Appeal’ of the EU Intellectual Property Office and the European Chemicals Agency.<sup>112</sup> More specifically for the field of migration and asylum, two EU agencies have a ‘Fundamental Rights Officer’ (FRO) dealing with complaints against these agencies. These agencies are Frontex and the European Union Agency for Asylum (EUAA). These agencies are discussed here.

Article 111 of Frontex Regulation 2019/1896 provides for the FRO as follows:

1. The Agency shall, in cooperation with the fundamental rights officer, take the necessary measures to set up and further develop an independent and effective complaints mechanism in accordance with this Article to monitor and ensure respect for fundamental rights in all the activities of the Agency.
2. Any person who is directly affected by the actions or failure to act on the part of staff involved in a joint operation, pilot project, rapid border intervention, migration management support team deployment, return operation, return intervention or an operational activity of the Agency in a third country, and who considers himself or herself to have been the subject of a breach of his or her fundamental rights due to those actions or that failure to act, or any party representing such a person, may submit a complaint in writing to the Agency.

(...)

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<sup>112</sup> See for an overview M. Schramm (2024 forthcoming), ‘Complementarity, Structure, and Ambivalence: Review Bodies’ Role in Protecting Fundamental Rights’, in M. Fink (ed.), *Mechanisms to Redress Human Rights Violations by the EU*, Cambridge University Press.

Article 51 of the EUAA Regulation 2021/2303 provides similarly.

***What does the action consist of?***

- ⇒ Complaint to the Fundamental Rights Officer of Frontex/EUAA

***Who can initiate review?***

- ⇒ Any person directly affected by Frontex/EUAA action, or someone acting on behalf of such a person

***Under what conditions should review be initiated?***

- ⇒ If there is a fundamental rights breach by Frontex/EUAA

***What are the limitations of this action?***

- ⇒ Many complaints declared inadmissible, with no transparent procedure or follow-up

***What opportunities does this action present?***

- ⇒ Relatively new mechanism (Frontex since 2016), with a rise in admissible complaints

### 2.4.1. Procedural Overview<sup>113</sup>

As the EUAA has only recently (May 2023) appointed a FRO,<sup>114</sup> the following information pertains to Frontex only as the Frontex FRO has published annual reports (with information on the complaint mechanism). Anyone who has been directly affected by actions of Frontex(/EUAA) can submit a complaint to the Fundamental Rights Officer of the respective agency, but a complaint can also be made on a potential victim's behalf. A complaint can also be submitted jointly by multiple complainants (if these refer to the same event). The FRO assesses first the admissibility of the complaint. Most complaints are declared inadmissible as the complaint allegedly falls outside the scope of the operational activity of Frontex, or the complaint does not concern a fundamental rights issue.<sup>115</sup> The most used inadmissibility ground is that the complaint falls outside the

<sup>113</sup> See for a simplified overview

[https://www.frontex.europa.eu/assets/Complaint\\_mechanism/Complaints\\_Mechanism\\_English.pdf](https://www.frontex.europa.eu/assets/Complaint_mechanism/Complaints_Mechanism_English.pdf).

<sup>114</sup> See [https://euaa.europa.eu/news-events/european-union-agency-asylum-appoints-its-first-fundamental-rights-](https://euaa.europa.eu/news-events/european-union-agency-asylum-appoints-its-first-fundamental-rights-officer#:~:text=The%20European%20Union%20Agency%20for%20Asylum%20(EUAA)%20is%20pleased%20to,Fundamental%20Rights%20Officer%20(FRO).)

[officer#:~:text=The%20European%20Union%20Agency%20for%20Asylum%20\(EUAA\)%20is%20pleased%20to,Fundamental%20Rights%20Officer%20\(FRO\).](https://euaa.europa.eu/news-events/european-union-agency-asylum-appoints-its-first-fundamental-rights-officer#:~:text=The%20European%20Union%20Agency%20for%20Asylum%20(EUAA)%20is%20pleased%20to,Fundamental%20Rights%20Officer%20(FRO).)

<sup>115</sup> [https://www.frontex.europa.eu/assets/fundamental/FRO\\_annual\\_report\\_2022.pdf](https://www.frontex.europa.eu/assets/fundamental/FRO_annual_report_2022.pdf). Other inadmissibility grounds are: the complainant is not directly affected and the complaint concerns working relations between Frontex and its staff.

scope of the operational activity, but it is unclear what criteria the FRO uses to assess this admissibility ground. Note that an inadmissibility decision can—most probably—be challenged directly by the addressee via Article 263 TFEU (see Section 1.1 above).<sup>116</sup> If the complaint is declared admissible, it is sent to the Frontex Executive Director and (if an EU Member State was involved) to the national authorities of an EU Member State. The complaint is then investigated further and, if considered necessary, measures are taken against those responsible.

### 2.4.2. Main Challenges

One of the limitations that comes with this procedure (that is similar to the limitations for the petition to the EP and the complaint to the EU Ombudsman) is the lack of control over the procedure once the complaint is made. For the Frontex/EUAA complaint mechanism this limitation is even more problematic, as the majority of the complaints is declared inadmissible (in 2022, only 9 out of 69 complaints were admissible).<sup>117</sup> The criteria applied by the FRO in this respect are unclear. While even the independence of the Frontex FRO has been called into question by civil society,<sup>118</sup> the main problem is that decisions on the merits that concern the Agency’s staff are taken by Frontex’s Executive Director, certainly not an independent body. In addition, admissible complaints that concern national staff are forwarded to Member State authorities for decision-making, with follow-up proving difficult to ensure.<sup>119</sup> The decisions on the complaints are not publicly available.

### 2.4.3. Alternatives

An alternative for a civil society organization to the complaint mechanism is influencing the Frontex Consultative Forum.<sup>120</sup> This forum consists of twelve organizations and EU bodies that consult Frontex on fundamental rights matters. Civil society representatives include UNHCR, Save the Children and the Red Cross EU Office.

It is, however, unclear how the composition of the Forum is established and whether influence can be exercised on the work of the Forum.

### 2.4.4. Practical Examples

As the review mechanism is internal, there is not much public information available on the complaints that have been filed. In the legal proceedings against Frontex (*WS and Others*) mentioned previously, complaints were made to the Frontex FRO first but there

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<sup>116</sup> The CJEU seems to hint at this in Case T-600/21, *WS and Others v Frontex*, ECLI:EU:T:2023:492, para 28.

<sup>117</sup> See [https://www.frontex.europa.eu/assets/fundamental/FRO\\_annual\\_report\\_2022.pdf/](https://www.frontex.europa.eu/assets/fundamental/FRO_annual_report_2022.pdf/).

<sup>118</sup> See <https://www.hrw.org/news/2021/06/23/frontex-failing-protect-people-cu-borders>.

<sup>119</sup> See also European Ombudsman, Case OI/5/2020/MHZ, 2021.

<sup>120</sup> See <https://www.frontex.europa.eu/fundamental-rights/consultative-forum/general/>.

was no ‘substantive response’ from the EU agency, meaning that the complaint was declared inadmissible.<sup>121</sup>

## 2.5 European Citizens’ Initiative under Article 24 TFEU

The European Citizens’ Initiative (ECI) is an EU mechanism created to enable EU citizens to participate in the democratic process by allowing them to call upon the Commission to initiate a legal act.

Article 24 of the TFEU provides the following on the European Citizens’ Initiative:

The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the provisions for the procedures and conditions required for a citizens' initiative within the meaning of Article 11 of the Treaty on European Union, including the minimum number of Member States from which such citizens must come.

(...)

***What does the action consist of?***

⇒ Request for EU legislation

***Who can take action?***

⇒ A group of at least one million citizens from seven EU Member States

***Under what conditions should action be taken?***

⇒ If legislation on the topic is within the competences of the EU

***What are the limitations of this action?***

⇒ Difficulty in gathering enough signatures

***What opportunities does this action present?***

⇒ Direct way of initiating legislation from the bottom up

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<sup>121</sup> See <https://www.prakkendoliveira.nl/en/news/news-2021/eu-agency-frontex-charged-with-illegal-pushbacks>.

### 2.5.1. Procedural Overview<sup>122</sup>

A first important step when initiating an ECI is establishing that the proposed legislation falls within the competences of the EU.<sup>123</sup> Secondly, a group of ‘organizers’ must be registered, which is a group of at least seven EU citizens from seven different EU Member States. After registering the ECI, signatures must be collected through a campaign. A total of one million signatures must be collected, with specific minimum numbers of signatories per EU Member State.<sup>124</sup> These signatures must be collected within a period of twelve months. Only EU nationals are allowed to sign the ECI. More practical aspects of launching an ECI can be found [here](#).

Once the initiative has received the required signatures and is submitted to the Commission, within one month a meeting with Commission representatives is arranged in which the issues raised in the initiative can be explained. Thereafter, within three months after submission, the initiative can be presented to the EP. Lastly, within six months after submission, the Commission will respond to the initiative as to what action will or will not be taken.

### 2.5.2. Main Challenges

The obvious challenge that comes with this type of action is the required number of signatories and the campaign that needs to accompany the ECI, in order to collect the necessary signatures. Additionally, it could be difficult to identify a specific type of legislation that is desired, especially in the field of migration and asylum, due to the high salience of existing rules (‘Europeanization’) on this topic.

### 2.5.3. Opportunities

The ECI is a way of attracting attention to a topic, even if the required signatures is not attained within one year. It could be part of a bigger public (strategic litigation) campaign.

### 2.5.4. Practical Examples

Several ‘success stories’ can be found on the [ECI forum](#). Most notable are the examples from the field of environmental law.

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<sup>122</sup> See [https://citizens-initiative.europa.eu/how-it-works\\_en](https://citizens-initiative.europa.eu/how-it-works_en).

<sup>123</sup> See arts. 3-6 of the Treaty on the Functioning of the European Union.

<sup>124</sup> See [https://citizens-initiative.europa.eu/how-it-works/regulatory-framework-european-citizens-initiative/thresholds\\_en](https://citizens-initiative.europa.eu/how-it-works/regulatory-framework-european-citizens-initiative/thresholds_en).

## 2.6 Informal Involvement

Civil society organizations are also informally involved in seeking change, i.e. not via an official legal or administrative route. We have mapped out some of these forms of informal involvement here, but it is likely that other possibilities (and examples) exist that we do not know of.

### 2.6.1. Involvement in CJEU Cases

Some civil society actors have been involved in an informal manner in proceedings before the CJEU. Most notably, UNHCR has published several public ‘statements’, which can be compared to third-party interventions/*amicus curiae*.<sup>125</sup> These statements are publicly available, but are not formally inserted into legal proceedings. UNHCR has sometimes managed to have its observations appended in the annex to the observations of the lawyer of the asylum seeker. Given the limits of formal third-party interventions described previously, this informal involvement has potential to influence CJEU case law. Nevertheless, the influence of such statements is difficult to assess, if there is influence at all. Seemingly, the CJEU takes UNHCR statements into account when it concerns matters related to the UNHCR handbook, such as grounds for international protection.

Another type of informal involvement before the CJEU is the practice of the aforementioned Committee Strategic Litigation (of the Dutch Council for Refugees). This Committee has never intervened formally before a Dutch court or the CJEU, but has supported litigation of individual applicants and their lawyers. An example is the recent case of LH.<sup>126</sup> This practice is possible as the Committee actively seeks out cases to support at the national level and drafts legal argumentation for certain legal bottlenecks prior to selecting a case.

### 2.6.2. Petition to the European Court of Auditors

Another example of an informal avenue taken by civil society actors is the complaint made to the European Court of Auditors (ECA).<sup>127</sup> This Court is tasked with overseeing the EU’s budget. It produces an annual report, special reports and it can give a formal opinion. There is no official way in which NGOs or individuals can get involved in these activities, but the aforementioned NGOs de:borde, ASGI and ARCI produced a comprehensive complaint that was presented to the ECA.<sup>128</sup> It is unclear in what manner

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<sup>125</sup> See <https://www.unhcr.org/publications/unhcr-interventions-court-justice-eu>.

<sup>126</sup> Even though this role is not explicated in the actual judgment, the Committee’s involvement was mentioned in a [blog](#).

<sup>127</sup> <https://www.eca.europa.eu/en>.

<sup>128</sup> <https://debordercollective.org/interventions/financialised-migration-control/eca-complaint-petition-orchestration-containment-libya/>.

and on what grounds the NGOs brought this complaint: there is no formal mechanism for this. The complaint concerned allegations of mismanagement of EU funds in relation to a migration management program in Libya. It was submitted in 2017, and in 2020 the ECA responded to the complaint, ‘stating that it will not initiate a special review of the programme at this time, due in part to limited resources’.<sup>129</sup> As follow-up action, the NGOs submitted their petition to the European Parliament (see above).

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<sup>129</sup> See <https://debordercollective.org/wp-content/uploads/2024/05/Petition-Parliament.pdf>.