

Bouncers beyond Borders

On the (il)legality of EU funding for the Libyan coast guard

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Over the past two years, the EU has spent almost 100 million Euro to improve the Libyan coast guard's ability to implement a "Search and Rescue Zone" in the Mediterranean. This financial cooperation is now the object of a [legal complaint](#), filed by a coalition of NGOs led by the [Global Legal Action Network](#). The complaint alleges that financial support for the Libyan coast guard violates European and international law. The complaint was addressed to the European Court of Auditors and has drawn international [media](#) attention. We have supported this finding in an underlying legal opinion and summarize the main legal arguments in this blogpost. The case illustrates that outsourcing migration control to third countries – the "bouncers" beyond Europe's borders – is not only subject to human rights constraints, but also has limits in EU budgetary law and its law of development cooperation.

Illegality of the Libya Action

The projects in support of the Libyan coast guards are arguably illegal in their current form because they do not meet the applicable requirements imposed by EU law on funding external actions. The [projects](#) are financed from the "EU Trust Fund for Africa", which is in turn funded primarily by the European Development Fund (EDF). The regulation which establishes the current EDF limits the objectives and purposes for which resources from the EDF can be spent to poverty reduction and development in the recipient country. The Libya projects focus on border management and enhancing the capacity of the Libyan coast guard, e.g. through training or the delivery of new vessels. None of these activities contributes to poverty reduction or development in Libya. In particular, developing the capacity of an enforcement institution like the Libyan coast guard is insufficient to count as a contribution to good governance.

This reading is supported by the case law of the Court of Justice of the EU: In the [leading case](#) on the matter, brought by the European Parliament (EP) against the Commission, the Court annulled a Commission decision on funding border management in the Philippines because it did not comply with the funding objectives established in applicable legislation. The Court held that the strengthening of institutional capacity of border management was insufficient because it was not in "direct connection with its aim of strengthening investment and development."

The Courts judgement emphasizes the constitutional dimension behind the seemingly technical issue of funding objectives: Enforcing compliance with the

funding objectives enshrined in legislation ultimately protects parliamentary control and budgetary authority, both at EU and member state level. Inconsistency with funding objectives is thus not a technical issue but a problem of institutional balance and democratic principle within the European multilevel constitutional order. Similar considerations apply to other funding instruments, and this general rationale cannot be circumvented by channeling development resources through a trust fund.

Inadequacy of the legal framework

At a more general level, the entire legal framework applicable to the Libya projects is inadequate from the perspective of EU financial regulations and primary constitutional law. The EU Trust Fund for Africa, which funds the projects, circumvents legal requirements that ensure sound financial management and parliamentary control, and it does not contain adequate safeguards for the protection of human rights of migrants affected by the Libya action.

The Trust Fund was established as an emergency fund under the EU Financial Regulations of 2012 but does not meet the legal requirements for establishing such new emergency instruments. If the main objective of the Trust Fund is to address “root causes” of migration, as it claims, it largely duplicates existing funding instruments that already address these causes and its added value is doubtful. If the main objective of the Trust Fund is to address a short-term migration crisis, it cannot be funded from the EDF, which has long-term developmental objectives. Again, this is not just a technical issue but a matter of parliamentary budgetary authority and institutional balance.

Deficient human rights safeguards

The legal framework applicable to the Libya projects is also deficient because it does not establish adequate safeguards for the protection of the human rights of persons affected by the actions it funds. More specifically, it lacks a transparent and binding framework for human rights due diligence that assess and monitors risks for affected individuals and vulnerable groups, especially migrants returned to Libya by the Libyan coast guard.

The EU has legal obligations to protect human rights in its external actions, including in actions funded through its general budget and trust funds. These obligations legally require the EU to integrate a human rights due diligence framework in funding instruments like the EU Trust Fund for Africa. While the primary responsibility to respect and protect human rights of refugees and migrants in Libya lies with Libyan authorities, the EU must ensure that its funding decisions and their implementation do not contribute to human rights violations by Libyan authorities.

Extraterritorial duty to protect

The EU Charter of fundamental rights specifically protects against the type of violations faced by migrants returned by the Libyan coast guard to Libya, namely torture (Art. 4), slavery (Art. 5.1.) and refoulement (Arts. 18, 19). Protection against such violations is not limited to the territory of the member states. The Charter has

no jurisdictional clause similar to Art. 1 ECHR or Art. 2 ICCPR, and Art. 3 (5) and Art. 21 (1) and (3) TEU explicitly establish that the EU is bound to respect international law and required to ensure that EU policies do not negatively affect human rights in third countries.

The Charter also establishes a duty to protect against human rights violations committed by third parties. This implies, *a maiore ad minus*, an obligation not to aid and abet such violations by third parties, especially through financial assistance. In situations like the Libya action, the extraterritorial duty to protect will largely depend on procedural safeguards. There is increasing agreement in legal scholarship and practice that a minimum requirement for external action with possible human rights impacts is the conduct of human rights due diligence, and in particular human rights impact assessments. The EU already conducts human rights impact assessments in the context of trade agreements and other-trade related measures, and the European Courts have recognized a legal obligation to do so in cases where a trade agreement may even indirectly encourage the violation of fundamental rights (see especially [here](#) paras. 231, 241 et seq). If the risk of indirect encouragement through trade is sufficient to trigger an obligation for human rights due diligence, then direct financial support triggers this requirement *a fortiori*.

This primary law reasoning is confirmed by applicable secondary law instruments, which oblige the EU to abide by human rights in its external financing action. The EDF regulation, among others, requires that the Union “shall promote [...] a rights-based approach encompassing all human rights, whether civil and political, economic, social and cultural, in order to integrate human rights principles in the implementation of this Regulation [...]” and comply with the values of “liberty, democracy, the universality and indivisibility of, and respect for, human rights and fundamental freedoms, and the principles of equality and the rule of law”.

Mandatory human rights impact assessments in external financing

To ensure compliance with the requirements of due diligence, funding decisions must be preceded by a human rights impact assessment. This assessment must objectively evaluate human rights risks and include measures to avoid and mitigate these risks. Project implementation must be accompanied by a system that continuously monitors and evaluates human rights impacts on the ground. Where there are heightened human rights risks, as in the context of the Libya action, the assessment must be conducted independently and transparently, and its outcomes must be made available to the public.

The EU Trust Fund for Africa does not have the framework for human rights due diligence required by EU primary and secondary law. It does not foresee an independent evaluation of human rights risk, remains intransparent and does not publish assessment results. The deficiencies of the EUTFA framework become particularly apparent when compared with the safeguard mechanisms of other donor institutions, especially the World Bank’s [Environmental and Social Framework](#).

Conclusion

The EU's framework for external financing needs a fundamental overhaul from the perspective of budgetary law and human rights. Enforcing such changes in EU courts is made difficult by the restrictive standing rules that limit direct actions against the EU. In the absence of references from national courts, the EU's Court of Auditors is thus the first port of call for financial accountability at the EU level through scrutiny of the Commission's use of the EU. The auditors cannot annul actions in question, but they can make expert findings that draw attention to the deficient legal frameworks and practices. Ensuring that EU external financing complies with requirements of institutional balance and human rights is ultimately the task of the EU legislative organs, the European Parliament and the European Commission, and national parliaments. Until such compliance is ensured, they must stop funding Europe's bouncers beyond borders.

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