

Fundamental Rights Monitoring of EU Funds in Germany

Final Report

to the

European Union Agency for Fundamental Rights (FRA)

Country Report (Federal Republic of Germany) within the framework of the international comparative research project

'Providing technical assistance to national bodies with a human rights remit involved in assessing EU Charter & CRPD compliance of EU funds – national level research'

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Contractor's name: German Institute for Human Rights (GIHR)

Authors' name: Dr Jonathan Philip Aus

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1. Introduction and overview of the research project

This report deals with the fundamental rights monitoring of European Union (EU) funds in the Federal Republic of Germany. More specifically, it discusses challenges and opportunities for national bodies with a human rights remit (including but not limited to Germany's National Human Rights Institution) in the context of their possible or actual involvement in the monitoring of EU funds.¹

The main legal point of reference is the new Common Provisions Regulation (CPR) for the EU budget 2021-2027.² Article 8 paragraph 1c of the CPR prescribes the inclusion of civil society actors, listing amongst them 'bodies responsible for promoting [...] fundamental rights, rights of persons with disabilities, gender equality and non-discrimination' in the framework of so-called Partnership Agreements on the national level. Furthermore, the CPR specifies fundamental rights-related horizontal principles (Article 9), enabling conditions (Article 15) and mandatory reporting arrangements (Annex III) in connection with the Charter of Fundamental Rights of the European Union and the United Nations Convention on the rights of persons with disabilities (UN-CRPD).

The research on which this country report is based was carried out within the framework of the international comparative project 'Providing technical assistance to national bodies with a human rights remit involved in assessing EU Charter & CRPD compliance of EU funds – national level research' between March and October 2022 under contract by the European Union Agency for Fundamental Rights (FRA).

A special feature of this report is that it partly draws on self-referential observations. The reason for this is that the National Human Rights Institution of the Federal Republic of Germany, the German Institute for Human Rights (GIHR), in this case not only functions as the contractor for the relevant FRA service request (in its capacity as a member of FRANET, the research network of the European Union Agency for Fundamental Rights), but also as the object of empirical social research.

¹ For guidance on the fundamental rights monitoring of EU funds, see European Network of National Human Rights Institutions (ENNHRI) (2022), '[European Commission and FRA support essential for NHRIs' fundamental rights monitoring of EU funds](#)', press release of 16 May 2022; and European Network of National Human Rights Institutions (ENNHRI) (2022), '[Monitoring Fundamental Rights Compliance Of EU Funds – Potential Role, Opportunities and Limits for NHRIs](#)', May 2022.

² 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, [OJ 2021 L 231](#) (*Common Provisions Regulation*).

1.1 Stages of the research process: Desk research, semi-structured interviews, and the national roundtable on fundamental rights and the EU funding cycle

This final report builds on numerous reports previously submitted to the Agency, namely a) the desk research report Germany of 1 April 2022, b) a total number of ten (10) reports on semi-structured interviews with key interlocutors carried out between 1 May and 21 June 2022, and c) the report on the roundtable on 'fundamental rights and the EU funding cycle' held in Berlin on 2 September 2022.

a) The **desk research report** inter alia reviewed the existing literature on Human Rights Budgeting. It became clear that this literature, with its focus on budgetary allocations and the justiciability of social and economic rights, lends strong support to political demands like the one voiced by the European Network of National Human Rights Institutions (ENNHRI) in 2020 that 'the EU must put economic and social rights at the heart of its economic response to COVID-19', and related comments by GIHR deputy director Michael Windfuhr.³ Relevant publications on the global level like the paper 'Realizing Human Rights Through Government Budgets' issued by the Office of the United Nations High Commissioner for Human Rights (OHCHR) in 2017, conceptual work on Human Rights Budgeting by internationally renowned scholars like Ann Blyberg, and empirically informed national or regional level contributions like the ones from Scotland and Northern Ireland arguably constitute suitable background material for both the European Union Agency for Fundamental Rights (FRA) and national bodies with a human rights remit while devising strategies for their possible or actual involvement in the fundamental rights monitoring of EU funds.⁴

³ European Network of National Human Rights Institutions (ENNHRI) (2020), [The EU must put economic and social rights at the heart of its economic response to COVID-19](#), 6 May 2020; German Institute for Human Rights (GIHR) (2020), [Wiederaufbau in der EU an den wirtschaftlichen und sozialen Menschenrechten ausrichten](#), Pressemitteilung vom 06.05.2020 zur Stellungnahme der Nationalen Menschenrechtsinstitutionen Europas, Berlin. See also European Network of National Human Rights Institutions (ENNHRI), Office of the United Nations High Commissioner for Human Rights (OHCHR) (2022), [A human rights-based approach to COVID-19 economic response and recovery](#), March 2022.

⁴ Cf. inter alia Office of the United Nations High Commissioner for Human Rights (OHCHR) (2017), [Realizing Human Rights Through Government Budgets](#), New York and Geneva; Blyberg, A. (2009), 'The Case of the Mislaid Allocation: Economic and Social Rights and Budget Work', *sur – International Journal of Human Rights*, Vol. 6, No. 11, pp. 123-138; German Institute for Human Rights (GIHR), Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) (2009), [Human Rights Budgeting](#), E-info tool, Berlin and Eschborn; Nolan, A., O'Connell, R. and Harvey, C. (2013), *Human Rights and Public Finance. Budgets and the Promotion of Economic and Social Rights*, Oxford and Portland, OR: Hart; O'Connell, R., Nolan, A., Harvey, C., Dutschke, M. and Rooney, E. (2014), *Applying an International Human Rights Framework to State Budget Allocations. Rights and Resources*, Abingdon and New York, NY: Routledge; Scottish Human Rights Commission (2019), [Human Rights Budget Work: What, Why, How? Briefing Paper 1: Human Rights Budget Work](#), September 2019; Manion, M., Ralston, R., Matthews, T., Allen, I. (2017), 'Practice Note: Budget Analysis as a Tool to Monitor Economic and Social Rights: Where the Rubber of International Commitment Meets the Road of Government Policy', *Journal of Human Rights Practice*, Vol. 9, pp. 146–158; and Haque, M. E. (2021),

However, it also became clear that the EU budget, as a share of total public spending in Germany, is significantly lower than 2%, whereas Germany's state quota currently stands at approximately 52% of public expenditures in percent of gross national income.⁵ Germany primarily finances social and employment-related expenditures with its comparatively large national budget, whereas the most significant part of the relatively small EU budget finances the common European agricultural policy.⁶ Against this background, the desk research report concluded that it would be highly relevant in conceptual and methodological terms to focus not only on financed items, but also on the things that are *not* being financed by the EU, or only marginally so from a comparative perspective.

b) This final report also draws on ten (10) **semi-structured interviews** conducted between May and June 2022 both online/via telephone and in person with key interlocutors covering three categories: National fund managers/government officials (NFM), national bodies with a human rights remit (NHRB), and civil society organisations (CSO).

All interviewees were selected in close cooperation with the European Union Agency for Fundamental Rights (FRA), and in line with the relevant project guidelines calling inter alia for gender balance and the inclusion of organisations representing people with disabilities.

One of the interviews in the CSO-category was conducted with a postdoctoral researcher affiliated with a European Research Council-funded research project in the domain of security. Other interviews in the category CSO included an interview with a representative of the German human rights organisation PRO ASYL, a representative of Caritas Behindertenhilfe und Psychiatrie e.V. (CBP) lobbying for the rights of persons with disabilities, and a representative of the International Alliance of Women (IAW).

NHRB-level interviews were conducted with a representative of the German Institute for Human Rights (GIHR), a representative of the Monitoring-Centre UN-CRPD at GIHR, and with a representative of the gender equality-related foundation Bundesstiftung Gleichstellung.

NFM-level interviews were carried out with a representative of the Managing Authority AMIF (Asylum, Migration and Integration Fund) in Germany at the Federal Office for Migration and Refugees (BAMF), a representative of the Managing Authority ISF (Internal

⁴ 'Justiciability of Economic, Social and Cultural Rights under International Human Rights Law', *Dhaka University Law Journal*, Vol. 32, No. 1, pp. 39-53.

⁵ Figures for 2020 and 2021, respectively. Sources: European Parliament (2022), [Economic and Budgetary Outlook for the European Union 2022](#), European Parliamentary Research Service, Study PE 698.897, January 2022, p. 19; and Bundesfinanzministerium (2021), 'Staatsquoten im internationalen Vergleich', [BMF-Monatsbericht Februar 2021](#).

⁶ Cf. Bundesregierung (2019), [Bundeshaushalt 2020: Weichen stellen für kommende Jahrzehnte](#); and Bundesfinanzministerium (2019), [Einigung zum EU-Haushalt 2020](#), 20 November 2019.

Security Fund) in Germany at the Federal Criminal Police Office (BKA), and with a private sector trustee and entrusted company for the management of the European Social Fund (ESF) in the State of Berlin.

Whenever the interviews were audio-recorded and subsequently transcribed (i.e., in 8 out of 10 cases), Article 8 of the EU Charter of Fundamental Rights (protection of personal data) and the Union's General Data Protection Regulation were strictly adhered to. In consultation with the Federal Ministry of the Interior and Community (BMI), the representatives of both the Managing Authority AMIF and the Managing Authority ISF had 'opted out' of having the interviews recorded. Those two reports were therefore prepared on the basis of handwritten notes.

c) A total number of thirteen (13) people participated in the **national roundtable** (Federal Republic of Germany) on 'fundamental rights and the EU funding cycle' held on 2 September 2022 on the premises of the German Institute for Human Rights (GIHR). Participants included the representative of the European Commission in Germany. A representative of the European Union Agency for Fundamental Rights (FRA) also took part in the meeting. Approximately one-third of the roundtable participants were previous interviewees, including the representatives of PRO ASYL, IAW, and the company managing the ESF in the State of Berlin. Other roundtable participants were a representative of an AMIF Managing Authority, an academic affiliated with the Berlin School of Economics and Law (HWR Berlin), several representatives of GIHR (including but not limited to the Monitoring-Centre UNCRPD at GIHR), and a representative of the UNCRPD-related association Bundesvereinigung Lebenshilfe.

After the event, a roundtable report was drafted and disseminated for possible comments and/or amendments. A revised roundtable report (in German) was compiled and made available to all participants. The final roundtable report was translated into English and submitted to the European Union Agency for Fundamental Rights (FRA) on 28 September 2022.

1.2 EU funds covered by the Common Provisions Regulation and case selection

The legal framework for the multi-level governance of EU funds during the funding period 2021-2027 consists first and foremost of the so-called Common Provisions Regulation (CPR), i.e. of Regulation (EU) 2021/1060.⁷ In addition, area-specific rules were laid down

⁷ 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,

by the EU legislator. Depending on the case at hand, the 548 page-long CPR must therefore be read in conjunction with the AMIF Regulation,⁸ the ISF Regulation,⁹ the ESF+ Regulation,¹⁰ or other, area-specific legal acts.

As Regulations, the CPR and the area-specific legal acts are binding in their entirety and directly applicable in all Member States, including the Federal Republic of Germany (cf. Article 288 of the Treaty on the Functioning of the European Union). According to the Court of Justice of the European Union, 'the effect of a Regulation [like the CPR] is to prevent the implementation of any legislative measure, even if it is enacted subsequently, which is incompatible with its provisions'.¹¹ Against this background, the report refrains from discussing national rules and procedures at this point; it shall return to the theme of national adaptations in section 3 of this paper.

Figure 1 below shows the eight (8) EU funds covered by the Common Provisions Regulation.

the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, [OJ 2021 L 231](#) (*Common Provisions Regulation*).

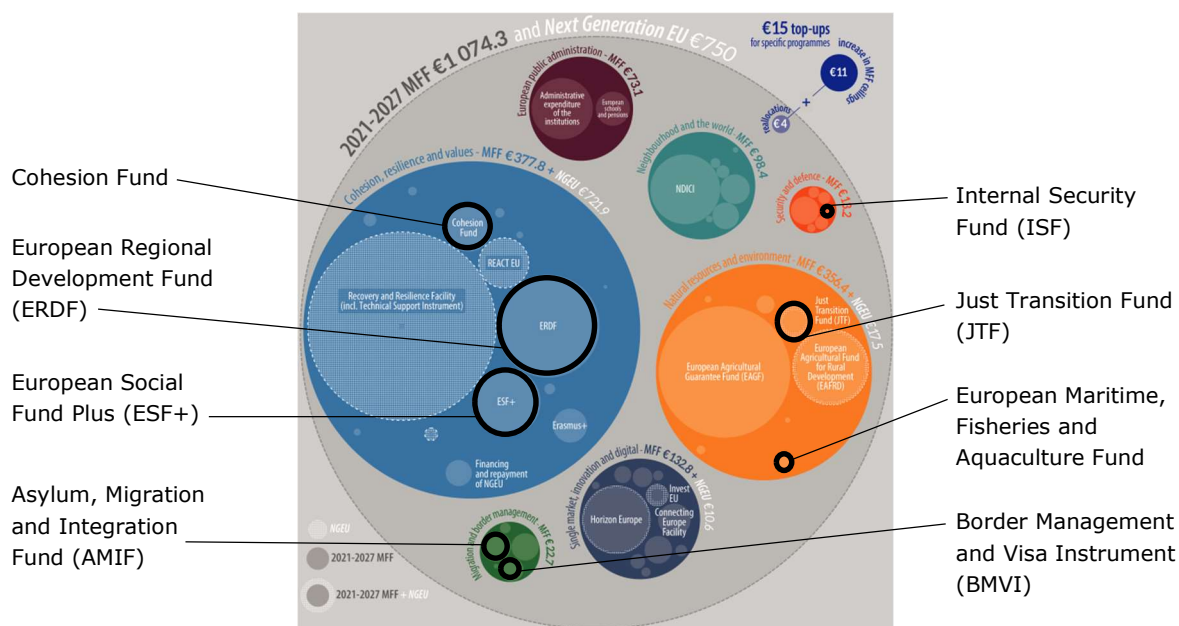
⁸ Regulation (EU) 2021/1147 of the European Parliament and of the Council of 7 July 2021 establishing the Asylum, Migration and Integration Fund, [OJ 2021 L 251](#) (*AMIF Regulation*).

⁹ Regulation (EU) 2021/1149 of the European Parliament and of the Council of 7 July 2021 establishing the Internal Security Fund, [OJ 2021 L 251](#) (*ISF Regulation*).

¹⁰ Regulation (EU) 2021/1057 of the European Parliament and of the Council of 24 June 2021 establishing the European Social Fund Plus (ESF+) and repealing Regulation (EU) No 1296/2013, [OJ 2021 L 231](#) (*ESF+ Regulation*).

¹¹ Court of Justice of the European Union (CJEU), [C-43/71](#), *Politi s.a.s. v Ministry for Finance of the Italian Republic*, 14 December 1971. It should be noted that references to the CJEU and decisions made prior to the entry into force of the Treaty of Lisbon on 1 December 2009 as employed in this paper include cases dealt with by the former European Court of Justice (ECJ).

Figure 1: The EU's multiannual budget (2021-2027)¹² and CPR coverage



In combination with the coronavirus-related stimulus package NextGenerationEU (NGEU), the Union's 2021-2027 long-term budget has a total volume of approximately € 1,8 trillion (in 2018 prices). The Recovery and Resilience Facility, however, is not covered by the CPR. Nor does the CPR cover EU funds like the Neighbourhood, Development and International Cooperation Instrument (NDICI).

During EU budget negotiations, EU funds were clustered along so-called headings, i.e. spending categories or policy areas, e.g. 'migration and border management'. The size of the circles displayed in figure 1 above increases/decreases with the relative budgetary importance of the relevant EU fund. The comparatively small financial envelope for the Internal Security Fund (ISF), e.g., is € 1,7 billion (in 2018 prices). The financial envelope for the considerably larger Asylum, Migration and Integration Fund (AMIF), on the other hand, is around € 8,7 billion (at 2018 prices). The financial weight of the largest EU fund covered by the CPR, namely the European Regional Development Fund (ERDF), is approximately € 200 billion (in 2018 prices) – and therefore about 117 times greater than that of the ISF.¹³

¹² Source of this image: European Parliamentary Research Service (2021), [Multiannual Financial Framework for the years 2021-2027 and the New Own Resources](#), updated 12 July 2021. The agreed long-term EU budget (MFF) amounts to € 1,074.3 billion in 2018 prices. CPR-related comments by the author.

¹³ See the European Parliamentary Research Service's website for details: <https://epthinktank.eu/2018/09/24/post-2020-multiannual-financial-framework/>

Nevertheless, the Internal Security Fund (ISF), for qualitative reasons (see below) and in consultation with the European Union Agency for Fundamental Rights (FRA), was selected for case-study analysis during the desk research phase – in addition to the European Social Fund Plus (ESF+) and the Asylum, Migration and Integration Fund (AMIF).

1. The **Asylum, Migration and Integration Fund (AMIF)** was selected against the background of the nearly full-fledged ‘Communitisation’ of asylum policy in Europe since the entry into force of the Treaty of Amsterdam, Articles 18 (right to asylum) and 19 (protection in the event of removal, expulsion or extradition) of the EU Charter of Fundamental Rights, and an explicit legal obligation for the active involvement of, amongst other authorities and organisations, National Human Rights Institutions such as GIHR in the relevant partnership agreements on national level (see Article 4 of the AMIF Regulation). Previous research carried out by Rachel Westerby on behalf of the United Nations Refugee Agency (UNHCR) and the European Council on Refugees and Exiles (ECRE), as well as by Estela Casajuana and Alaia Moreno of Profundo at the request of ENNHRI, also seemed to suggest an empirical focus on the AMIF.¹⁴ Last but not least, the European Union Agency for Fundamental Rights (FRA) itself had previously identified ‘key issues of EU law (such as asylum and migration, data protection and criminal justice) in which NHRI monitoring of the application of the Charter in the Member States could be reinforced’.¹⁵

2. The **Internal Security Fund (ISF)** was chosen because the policy area of European internal security and counter-terrorism attracts considerable attention by the European Network of National Human Rights Institutions (ENNHRI), transnational non-governmental organisations like Statewatch and The Transnational Institute, and supranational parliamentarians.¹⁶ The fundamental rights relevance of ISF-funded activities is also

¹⁴ UNHCR – The UN Refugee Agency, ecre – European Council on Refugees and Exiles (2018), [‘Follow th€ Money’. Assessing the use of EU Asylum, Migration and Integration Fund \(AMIF\) funding at the national level](#), Brussels, January 2018; UNHCR – The UN Refugee Agency, ecre – European Council on Refugees and Exiles (2019), [‘Follow th€ Money II’. Assessing the use of EU Asylum, Migration and Integration Fund \(AMIF\) funding at the national level 2014-2018](#), Brussels, January 2019; UNHCR – The UN Refugee Agency, ECRE – European Council on Refugees and Exiles (2020), [‘Follow the Money III’. Solidarity: The use of AMIF funds to incentivise resettlement and relocation in the EU](#), Brussels, March 2020; European Network of National Human Rights Institutions (ENNHRI), Profundo – Research & Advice (2021), [Human Rights scrutiny of public funds for migration and asylum. Role, opportunities and challenges for NHRIs](#), July 2021.

¹⁵ European Union Agency for Fundamental Rights (FRA) (2020), [Strong and effective national human rights institutions. Challenges, promising practices and opportunities](#), Vienna, p. 13.

¹⁶ See, for example, European Network of National Human Rights Institutions (ENNHRI) (2022), [Counter-terrorism measures in the EU need a human rights-based approach](#), 25 May 2022; Statewatch and The Transnational Institute (TNI) (2017), [Market Forces. The Development of the EU Security-Industrial Complex](#), London and Amsterdam; Statewatch and The Transnational Institute (TNI) (2022), [At What Cost? Funding the EU’s security, defence, and border policies, 2021-2027. A guide for civil society on how EU budgets work](#), London and Amsterdam; and Bricmont, S., Van Sparrentak, K., Tineke Strik, T. (2022), [Question for written answer E-000309/2022 to the Commission, Subject: EU funding of a biometric surveillance programme in Greece](#), 15 January 2022.

evident in the context of the jurisprudence of the Court of Justice of the European Union, as its judgment of 21 June 2022 in the Case C-817/19 (*Ligue des droits humains ASBL v Conseil des ministres*) may illustrate. In this case, the Court ruled that Article 7 (respect for private and family life), Article 8 (protection of personal data) and Article 45 (freedom of movement and of residence) of the EU Charter of Fundamental Rights may be violated by counter-terrorist measures relating to the collection and processing of so-called Passenger Name Records (PNR).¹⁷ Interestingly, PNR-related activities by the German Federal Criminal Police Office (BKA) received comparatively generous funding by the ISF during the 2014-2020 funding period.¹⁸

3. The **European Social Fund** (ESF) was selected in light of the literature on judiciable social and economic rights, including (but not limited to) the social and economic rights contained in the EU Charter of Fundamental Rights.¹⁹ Relevant case law in this area includes the cases of *Bauer* and *Max-Planck* before the Court of Justice of the European Union, with substantive links to Article 31 of the EU Charter (fair and just working conditions),²⁰ as well as the German Federal Constitutional Court's ruling of 2019 on the essential requirements for the design of basic welfare benefits in connection with Article 1 of the Basic Law (human dignity); cf. Article 1 of the EU Charter of Fundamental Rights.²¹

Beyond that and in consultation with the European Union Agency for Fundamental Rights (FRA), the ESF was chosen because of the privatisation or outsourcing of European Social Fund-related fund management in German States like the *Land Berlin*. Little is known about the monitoring of fundamental rights-related conditionalities by private sector entities.

¹⁷ Court of Justice of the European Union (CJEU), case [C-817/19](#), *Ligue des droits humains*, 21 June 2022. Cf. inter alia Aden, H. / Töpfer, E. (2020), 'Problematische Interoperabilität von EU-Polizei- und Migrationsdatenbanken', *Grundrechte-Report 2020. Zur Lage der Bürger- und Menschenrechte in Deutschland*, Frankfurt am Main: Fischer, pp. 39-43; Casagran, C. B. (2021), 'Fundamental Rights Implications of Interconnecting Migration and Policing Databases in the EU', *Human Rights Law Review*, Vol. 21, pp. 433-457.

¹⁸ Cf. Bundeskriminalamt (2020), [Übersicht über die geförderten Projekte im Rahmen des Inneren Sicherheitsfonds \(ISF Sicherheit\) in der Förderperiode 2014 bis 2020](#), 1 August 2020.

¹⁹ Cf. inter alia Pillay, N. (2021), 'The Promise of the EU Charter of Fundamental Rights (and Brexit) on the Implementation of Economic and Social Rights among EU Member States', *Laws*, Vol. 10, No. 31, pp. 1-18; O'Cinneide, C. (2020), 'The European System', Dugard, J., Porter, B., Ikawa, D., Chenwi, L. (eds.), *Research Handbook on Economic, Social and Cultural Rights as Human Rights*, Cheltenham and Northampton, MA: Edward Elgar, pp. 48-66; and De Schutter, O. (2019), 'The CFREU and its Specific Role to Protect Fundamental Social Rights', Dorssemont, F. et al. (eds.), *The Charter of Fundamental Rights of the European Union and the Employment Relation*, Oxford: Hart, cited here as the pre-print of July 2018, [The Charter of Fundamental Rights as a Social Rights Charter](#), UCLouvain: Institute for Interdisciplinary Research in Legal Sciences, Centre for Philosophy of Law, Working Paper 2018/4.

²⁰ Court of Justice of the European Union (CJEU), joined cases [C-569/16 and C-570/16](#), *Bauer*, 6 November 2018; Court of Justice of the European Union (CJEU), case [C-684/16](#), *Max-Planck*, 6 November 2018.

²¹ Germany, Federal Constitutional Court (Bundesverfassungsgericht), [1 BvL 7/16](#), Karlsruhe, 5 November 2019.

* * *

Before entering into a detailed discussion of the case-based evidence in connection with the AMIF (1.), the ISF (2.) and the ESF (3.), let us briefly review the five remaining EU funds (4.–8.) covered by the Common Provisions Regulation, but not selected for case-study analysis, regarding their potential or actual fundamental rights relevance.

4. Human rights violations at the Union's external borders constitute very serious problems.²² In a piece on suitable monitoring arrangements at the external borders, Elspeth Guild, for example, recently underlined the '[shocking] extent of violence perpetrated by border police against migrants at EU external borders, including Frontex tolerated pushbacks of (presumed) asylum seekers from Greece to Turkey'.²³ The **Border Management and Visa Instrument (BMVI)** thus clearly deserves the attention of national human rights monitoring bodies.²⁴ However, and notwithstanding temporarily reintroduced border controls inter alia at the German-Austrian border and apparently problematic 'pre-Dublin transit procedures' or bilateral agreements for the automatic removal of third country nationals from German territory based on the legal fiction of non-entry, the issue of external border management in the landlocked Federal Republic of Germany is primarily relevant in the context of airports and sea borders.²⁵ While it thus seems clear that 'in every Member State, independent monitoring of border police activities by a relevant independent state body is necessary',²⁶ one would need to adapt BMVI-related monitoring activities to the German setting.

²² See inter alia Costello, C., Mann, I. (2020), 'Border Justice: Migration and Accountability for Human Rights Violations', *German Law Journal*, Vol. 21, pp. 311–334; Amnesty International (2021), [EU: New evidence of systematic unlawful pushbacks and violence at borders](#), news item, 6 October 2021; and European Union Agency for Fundamental Rights (FRA) (2020), [Migration: Fundamental Rights Issues at Land Borders](#), report, 4 December 2020.

²³ Guild, E. (2022), 'What Monitoring for Fundamental Rights at EU Borders? Frontex and Rule of Law', [Verfassungsblog](#), 7 September 2022, p. 1. On Frontex and its readily apparent failure to address and follow-up on these human rights violations, see Del Monte, M., Luyten, K. (2022), [European Parliament scrutiny of Frontex](#), European Parliamentary Research Service, Briefing, September 2022.

²⁴ Cf. European Network of National Human Rights Institutions (ENNHRI) (2022), [Strengthening Human Rights Accountability at Borders](#), Report, July 2022; Jaeger, M., Fotiadis, A., Guild, E., Vidović, L. (2022), [Feasibility Study on the setting up of a robust and independent human rights monitoring mechanism at the external borders of the European Union](#), funded inter alia by the Council of Europe's Directorate General of Human Rights and Rule of Law, and Pro Asyl Foundation Germany, 4 May 2022; and European Union Agency for Fundamental Rights (FRA) (2022), [Establishing national independent mechanisms to monitor fundamental rights compliance at EU external borders](#), practical guidance, 14 October 2022.

²⁵ Cf. inter alia Hruschka, C. (2022), 'Hyperactive and Incoherent Legislation and Policy: Germany's Fragmented Migration Management Within the European Framework', Foblets, M.-C., Carlier, J.-Y. (eds), *Law and Migration in a Changing World*, Cham, CH: Springer, pp. 369–407; and European Center for Constitutional and Human Rights (ECCHR) (2020), [H.T. v. Germany and Greece. Joint Third Party Intervention \(ECCHR, Pro Asyl and RSA\)](#), Berlin, October 2020.

²⁶ Guild, E. (2022), 'What Monitoring for Fundamental Rights at EU Borders? Frontex and Rule of Law', [Verfassungsblog](#), 7 September 2022, p. 3.

5. The fundamental rights relevance of the **Just Transition Fund (JTF)** is also readily apparent – at least from a German constitutional law perspective. In fact, the German Federal Constitutional Court (the Bundesverfassungsgericht) recently underlined the need to actually deliver on climate action and the European Green Deal by stating that Article 20a of the Basic Law (protection of the natural foundations of life and animals) is ‘a justiciable legal provision designed to commit the political process to a favouring of ecological interests, partly with a view to future generations’.²⁷ The Bundesverfassungsgericht’s innovative concept of fundamental rights as intertemporal guarantees of freedom has attracted considerable attention in Germany and Europe, including the European network of NHRIs.²⁸

6. The **European Maritime, Fisheries and Aquaculture Fund** may contribute to delivering on the European Green Deal. Its immediate fundamental rights relevance, however, seems less obvious considering the absence of any references to this fund in the relevant literature.

7. The **Cohesion Fund** does not directly concern the Federal Republic of Germany since this EU fund only provides support to Member States with a gross national income per capita below 90% of the EU-27 average.²⁹

8. The **European Regional Development Fund (ERDF)** does not, at first sight, appear as an obvious candidate for fundamental rights scrutiny either. Upon closer inspection, however, it becomes clear that this quantitatively very significant EU fund has strong fundamental rights implications. Firstly, one of its stated aims is to contribute to the ‘transitioning towards a net zero carbon economy’.³⁰ Secondly, the ERDF is arguably highly relevant in regard to the prohibition of discrimination on the basis of disability (cf. Article 21 of the EU Charter of Fundamental Rights), the integration of persons with disabilities (in line with Article 26 of the EU Charter), and the UN-CRPD.³¹ In fact, both the Head of the Monitoring-Centre UN-CRPD at GIHR interviewed in the framework of this project and a civil society representative at the national roundtable pointed out that the withholding of

²⁷ Germany, Bundesverfassungsgericht (2021), *Order of the First Senate of 24 March 2021*, [1 BvR 2656/18](#), headnote 2.e.

²⁸ Cf. inter alia European Network of National Human Rights Institutions (ENNHR) (2021), [Climate Change and Human Rights in the European Context](#), 6 May 2021; and Winter, G. (2022), ‘The Intergenerational Effect of Fundamental Rights: A Contribution of the German Federal Constitutional Court to Climate Protection’, [Journal of Environmental Law](#), Vol. 34, pp. 209–221.

²⁹ Cf. European Commission (2022), [Cohesion Fund](#), accessed 4 October 2022.

³⁰ Cf. European Commission (2022), [European Regional Development Fund](#), accessed 4 October 2022.

³¹ Cf. Ferri, D. (2020), ‘The Unorthodox Relationship between the Charter of Fundamental Rights, the UN Convention on the Rights of Persons with Disabilities and Secondary Rights in the Court of Justice Case Law on Disability Discrimination’, [European Constitutional Law Review](#), Vol. 16, pp. 1–31.

so-called reasonable accommodation or the failure to comply with accessibility standards would constitute human rights violations. The danger of excluding people with disabilities would be particularly high in the context of far-reaching decisions regarding new infrastructures.³² These empirical observations correspond to the stated objective of the relevant Regulation that 'when financing infrastructure, [the ERDF] should ensure accessibility for persons with disabilities'³³, and relevant reports on (in light of Article 19 UN-CRPD highly criticized) ERDF funding for the institutionalisation of people with disabilities in Member States like Poland, Romania and Estonia.³⁴

3. Fundamental rights monitoring of EU funds in Germany: conceptual issues and empirical observations

3.1 Methodological caveats

Case studies may generate working hypotheses and/or facilitate learning on the part of researchers and their readers, for example regarding the fundamental rights monitoring of EU funds by national bodies with a human rights remit. However, case study research does not necessarily produce generalisable findings. In fact, 'the danger of error in drawing general conclusions from a small number of cases must not be underestimated'.³⁵ Our limited empirical focus on the AMIF, the ISF and the ESF ($n = 3$ out of 8 EU funds covered by the Common Provisions Regulation) should therefore be kept in mind while interpreting the findings presented below.

Beyond that, it should be noted that this project has generated interaction effects. As a result of the interview with the ISF Managing Authority as well as the interview with the AMIF Managing Authority, GIHR was offered membership in both respective Monitoring Committees.

³² Cf. German Institute for Human Rights (2022), *National roundtable (Federal Republic of Germany) on fundamental rights and the EU funding cycle*, Berlin, 2 September 2022, Report to the European Union Agency for Fundamental Rights (FRA), pp. 3-4.

³³ Regulation (EU) 2021/1058 of the European Parliament and of the Council of 24 June 2021 on the European Regional Development Fund and on the Cohesion Fund, [OJ 2021 L 231](#), p. 61.

³⁴ Cf. European Network on Independent Living (ENIL) (2022), [Shadow report on the implementation of the UN Convention on the Rights of Persons with Disabilities in the European Union](#), Brussels, February 2022, p. 13, 34.

³⁵ Gomm, R., Hammersley, M., Foster, P. (2000), *Case Study Method: Key Issues, Key Texts*, Sage, p. 98.

3.2 Human rights knowledge vs. other types of knowledge

Knowledge concerning Human Rights Budgeting, fundamental rights-related indicators, etc. may be contrasted with merely 'technical' knowledge and/or knowledge of domination (DE: *Herrschaftswissen*) serving the purpose of stabilising pre-existing power structures.

An empirical approximation of this ideal-typical construction was provided by the academic interlocutor (currently involved in a European Research Council-funded project) during the interview phase. In fact, the interviewee had previously investigated EU-funded 'techno-solutions that create new breaches of fundamental rights', focusing in particular on the 'technologization of security and border management'. The researcher reported that EU-funded technologies, machines, and devices would almost exclusively 'target vulnerable people'. The academic concluded that 'in the end, it's the question of expertise [which is most relevant here]'.³⁶

In the context of EU funds covered by the CPR, the interviewee's observations are most relevant vis-à-vis the Border Management and Visa Instrument (BMVI) and the Internal Security Fund (ISF). The BMVI and the ISF, however, should not be analysed in isolation, but in conjunction with other EU funds, including (but not limited to) Horizon Europe.

In fact, the interviewee's own empirical research on EU funds strongly suggests that it is precisely the interface between the so-called Home Affairs funds, EU investments in research and development (R&D), and external security-related EU funds (including the European Defence Fund and the so-called European Peace Facility) that is of primary fundamental rights relevance. Germany's National Programme for the ISF during the funding period 2014-2020, for example, described the interface between the development of prototypes in the Horizon 2020 context, on the one hand, and the co-financing of practical applications via the ISF, on the other, as follows:

The borderline between the ISF and European research programmes is at the interface of prototype development and practical application. While the long-term development processes of innovative prototypes are covered by the classic funding area of European security research, the practical implementation of the research result can be co-financed via the ISF.³⁷

According to the academic interlocutor, however, national bodies with a human rights remit are generally not involved in the relevant governance arrangements or consortia. Instead, decision-making processes in the domain of European security would be dominated by

³⁶ Interview report EUF_DE_CSO/2, pp. 2, 3 and 8, respectively.

³⁷ Interview report EUF_DE_CSO/2, p. 3, based on Germany (2017), [Nationales Programm ISF 2014-2020](#), Berlin, Bundeskriminalamt, Zuständige Behörde ISF, p. 36 (translation by the author).

'industries, military industries, security industries or different public ministries, but not NGOs or scholars'.³⁸

The relevant point on the epistemological level is that institutions are carriers of different types of knowledge or expertise. Involving national bodies with a human rights remit in decision-making processes previously dominated by law enforcement agencies and security industries would arguably alter the rationale of budgetary allocations in the domain of EU Justice and Home Affairs.

3.3 The Matthew effect (of EU funding)

In theory, EU funds shall contribute to protecting or enabling the exercise of fundamental rights such as non-discrimination (Article 21 of the EU Charter of Fundamental Rights), equality between women and men (Article 23), or social security and social assistance (Article 34).³⁹ In practice, however, EU funds may contribute to inequality and the consolidation of discriminatory structures.

Social scientists have described the process by which 'the rich get richer' as the Matthew effect of accumulated advantage.⁴⁰ The biblical motif, 'For to every one who has will more be given' (the Gospel According to St. Matthew 25:29) is arguably highly relevant in the domain of EU funding.

In fact, a roundtable participant stated that the Matthew effect would generally apply to all areas of funding (EU and otherwise), because this type of funding allocation would be very efficient for donors. With a view to 'small players', one should think about 're-granting'.⁴¹

³⁸ Interview report EUF_DE_CS0/2, p. 1. Cf. inter alia Jones, C. (2017), [Market Forces. The Development of the EU Security-Industrial Complex – Executive Summary](#), London and Amsterdam, Statewatch and The Transnational Institute; Martins, B. O., Mawdsley, J. (2021), 'Sociotechnical Imaginaries of EU Defence: The Past and the Future in the European Defence Fund', *Journal of Common Market Studies*, Vol. 59, No. 6, pp. 1458-1474; Martin-Mazé, M., Perret, S. (2021), 'Designs of borders: Security, critique, and the machines', *European Journal of International Security*, Vol. 6, No. 3, pp. 278-300; Transparency International (2020), [Defence industry influence in Germany: Analysing defence industry influence on the German Policy Agenda](#), London, Transparency International Defence & Security, October 2020; and Aus, J. P. (2006), 'Eurodac: A Solution Looking for a Problem?', [European Integration online Papers \(EIoP\)](#), Vol. 10, No. 6.

³⁹ Cf. Article 9 CPR.

⁴⁰ Merton, R. K. (1968), 'The Matthew Effect in Science', *Science*, Vol. 159, No. 3810, pp. 56-63.

⁴¹ Roundtable report Germany, p. 2. Cf. inter alia the possibilities for human rights-related re-granting in connection with the [European Instrument for Democracy and Human Rights \(EIDHR\)](#) during the 2014-2020 funding period. This EU fund, which is one of the predecessors of today's Neighbourhood, Development and International Cooperation Instrument (NDICI), was managed by the European Commission (Directorate-General for International Cooperation and Development – DG DEVCO).

Likewise, a representative of civil society underlined the resource-related imbalance of the different actors and used the image of the 'different hurdle race'. Large funding recipients would not have to make much of an effort to receive EU funding, while small entities would have to jump much higher. In the area of asylum, for example, the Asylum, Migration and Integration Fund (AMIF) would provide for federal co-financing of 10 to 25% of the total eligible expenditure, which would exclusively benefit major German welfare associations. Migrant self-organisations and other small entities, on the other hand, would not be eligible to receive these co-financing grants.⁴²

Similar points were raised during the interview phase. A representative of a national body for gender equality with extensive knowledge and professional experience in the domain of Gender Budgeting, for example, reported that the European Social Fund (ESF) in Germany had been 'captured' by already powerful welfare and church associations. Equally qualified but considerably smaller and less organised bodies with a human rights remit, on the other hand, would not have had the chance to receive EU funding via the ESF.⁴³

3.4 Violation monitoring vs. enabling monitoring

Several roundtable participants underlined the vital importance of distinguishing between violation monitoring and enabling monitoring in the context of EU funding.

According to a civil society representative, for example, violation monitoring in line with the *do no harm* principle is necessary and appropriate inter alia regarding the unlawful practice of pushbacks at the external borders.⁴⁴ Effective violation monitoring vis-à-vis the Home Affairs funds (AMIF, ISF and BMVI), for example, would ensure that 'Member States who perform pushbacks will not receive this funding', as Jorrit Rijpma and Apostolis Fotiadis concluded in a recently published study and with a view to the mid-term evaluation of the Home Affairs funds by the European Commission in March 2024.⁴⁵

Enabling monitoring, on the other hand, places a particular emphasis on the potential of EU funds. 'Many billions of euros', as the representative of the European Union Agency for

⁴² Roundtable report Germany, p. 2.

⁴³ Cf. Interview report EUF_DE_NHRB/3, p. 8.

⁴⁴ Roundtable report Germany, p. 3. On the unlawfulness of pushbacks, for example from Hungary to Serbia, see inter alia Court of Justice of the European Union (CJEU), [C-808/18](#), *Commission v Hungary (Reception of Applicants for International Protection)*, 17 December 2020; and Radjenovic, A. (2021), [Pushbacks at the EU's external borders](#), European Parliamentary Research Service, Briefing, March 2021.

⁴⁵ Rijpma, J., Fotiadis, A. (2022), [Addressing the Violation of Fundamental Rights at the External Borders of the European Union. Infringement Proceedings and Conditionality in EU Funding Instruments](#), Study on behalf of the Greens/EFA in the European Parliament, Brussels, 30 June 2022.

Fundamental Rights (FRA) stated on the occasion of the national roundtable, would be available to Member States like Germany within the framework of the so-called shared management of the Union's budget allocated to the Funds, and 'it would indeed pay off' to deal with this topic.⁴⁶

Likewise, the academic stated that one should think about the purpose of fundamental rights monitoring. It would depend on these purposes or functions whether one 'only' had to establish a violation monitoring or 'also' an enabling monitoring allowing for the coverage of the entire spectrum of rights contained in the Charter of Fundamental Rights of the EU and the UN Convention on the Rights of Persons with Disabilities.⁴⁷

A representative of GIHR reiterated this point by stating that the concept of human rights monitoring should be sharpened, and that one should distinguish 'violation monitoring' from 'enabling monitoring'.⁴⁸

The statements and views summarised above resonate well with the literature on Human Rights Budgeting analysed during the desk research phase and briefly reviewed in section 1.1 of this paper. It must suffice to note at this point that human rights budget work may encompass such diverse activities as efforts to 'improving maternal mortality ratios (and thus realizing women's right to health) ... [or] the implementation of a school supplementary feeding program ... intended to help guarantee the right to food'.⁴⁹

During the interview phase, a representative of GIHR explained that the Human Rights Budgeting approach would primarily focus on economic and social rights, but should not be limited to the latter. The point would rather be that violation monitoring in the context of civil and political rights would require a different set of tools:

One just has to work differently when it comes to civil and political rights. Because one needs to ask different questions: What is being funded? What is not being funded? What is actually the mandate of a particular budget? And what should not be funded on that basis? ⁵⁰

3.5 Gender budgeting

Gender budgeting may be viewed as the most advanced form of Human Rights Budgeting.

⁴⁶ Roundtable report Germany, p. 8.

⁴⁷ Roundtable report Germany, p. 5.

⁴⁸ Roundtable report Germany, p. 6.

⁴⁹ Blyberg, A. (2009), 'The Case of the Mislaid Allocation: Economic and Social Rights and Budget Work', *sur – International Journal of Human Rights*, Vol. 6, No. 11, pp. 123-138, here: p. 128.

⁵⁰ Interview report EUF_DE_NHRB/1, p. 7.

One of the interviewees underlined that 'Human Rights Budgeting is always also Gender Budgeting'.⁵¹ She also explained that both Gender Budgeting and Gender Mainstreaming were established on a normative and conceptual level in the United Nations context, and travelled from there to the European Union.

A representative of a national body for gender equality and expert on Gender Budgeting interviewed in the framework of this project described the main features of Gender Budgeting in the context of the European Social Fund as follows:

Gender Budgeting is a strategy. One can call it a strategy on the policy-level. On the level of the individual funds, on the other hand, one could call it an instrument. ... The normative aims of the ESF, at any rate, must be controlled and monitored. And the instrument of gender budgeting is, in my view, a suitable one for identifying certain things. Namely how are these means distributed – and to draw certain conclusions on this basis, perhaps by redistributing money, or by placing new emphases in the next funding period, or other things.⁵²

One of the interviews was conducted with a civil society representative having long-term experience in the field of Gender Budgeting, also at the European level. She also contributed to institutionalising Gender Budgeting in the State of Berlin. Based on her extensive professional experience, the interviewee concluded that one should focus on the operationalisation of Gender Budgeting. The current system of 'box-ticking' fundamental rights compliance would not be sufficient for achieving gender equality. The development of measurable indicators based on an operationalisation of the rights and/or legal claims stemming from the EU Charter of Fundamental Rights and other human rights instruments, on the other hand, would be the way forward.⁵³

The qualitative interview data complement policy recommendations and observations derived from the literature on Gender Budgeting. A renowned expert on gender mainstreaming and gender responsive budgeting, for example, summarised the conditions under which Gender Budgeting can make a real difference as follows:

Where gender budgeting has had the most impact, this has been due in part to the coexistence of civil society working 'outside' government and an 'inside' set of government players. In many situations there has been close cooperation between the two sets of players, with exchange of expertise and experience; in other instances the outside civil society group has encouraged the work inside the administration while maintaining its independence as a monitor and critic.

Academics [also] have a significant role to play, both as members of civil society groups and as individual experts. They contribute to the development of tools and

⁵¹ Interview report EUF_DE_CS0/4, p. 9.

⁵² Interview report EUF_DE_NHRB/3, p. 8.

⁵³ Cf. interview report EUF_DE_CS0/4, p. 3. Cf. inter alia Office of the United Nations High Commissioner for Human Rights (OHCHR) (2012), [Human Rights Indicators. A Guide to Measurement and Implementation](#), New York and Geneva.

methodologies, to the elaboration and deepening of the conceptual framework and to research in the relevant fields.⁵⁴

3.6 Disability budgeting

The main conclusion one can draw from this project in the context of UN-CRPD compliance of EU funds in Germany is that relevant fundamental rights monitoring arrangements and/or practices are currently not in place.

A representative of the National CRPD Monitoring Body at GIHR mentioned limited resources in terms of personnel and money as principal reasons for this (unsatisfactory) state of affairs. Asked about the Monitoring-Body's possible involvement in the monitoring of EU funds in the funding period 2014-2020, he stated the following:

During all these years, we simply didn't have the capacities to deal with this. Unfortunately, we just didn't have the people to monitor these things on a continuous basis.

He added that one would need at least one full-time position to fulfil the role envisioned by the CPR in relation to the monitoring of EU funds:

It would be good to have someone on a permanent basis. One would have to figure out how many position-percentages that would require. But at least one extra person in addition to those we already have. Because it is safe to say that this can not be done on the basis of the means currently available to us.⁵⁵

This overall assessment was shared by a civil society representative interviewed during the fieldwork phase. The interviewee stated that 'our organisation does not use such programmes at all', that she had never heard of Monitoring Committees for EU funds, and that she had no insights whatsoever in terms of the European Union funding cycle.⁵⁶

The report has already touched upon the European Regional Development Fund's political objective to ensure accessibility for persons with disabilities in the context of EU funding for new infrastructures (cf. section 2 above). It must therefore suffice to note the extraordinary financial potential of Disability Budgeting in the context of the Union's structural funds. This point was also made by an expert on Gender Budgeting during the interview phase. In fact, the interviewee used this opportunity to underline her concern for

⁵⁴ Quinn, S. (2013), 'Equality Proofing the Budget: Lessons from the Experiences of Gender Budgeting?', Nolan, A., O'Connell, R., Harvey, C. (eds.), *Human Rights and Public Finance. Budgets and the Promotion of Economic and Social Rights*, Oxford and Portland, OR: Hart, pp. 163-192, here: p. 188. Cf. inter alia Quinn, S. (2009), [Gender budgeting: practical implementation. Handbook](#), Strasbourg, Council of Europe, Directorate General of Human Rights and Legal Affairs, April 2009.

⁵⁵ Interview report EUF_DE_NHRB/2, p. 6.

⁵⁶ Cf. interview report EUF_DE_CSO/3, p. 6.

intersectionality, and that different human rights-relevant categories relating to disability, gender, social status, migration background, age, etc. should not be played out against each other.⁵⁷

Beyond that, both civil society representatives and members of GIHR underlined the procedural requirement of self-representation and the possible use of quotas in the context of the participation of people with disabilities in relevant monitoring activities.⁵⁸

3.7 Monitoring Committees

Article 8 CPR defines that national bodies with a human rights remit must be involved 'throughout the preparation, implementation and evaluation of programmes, including through participation in monitoring committees'. There can be no doubt about the mandatory nature of Article 8 CPR ('Member States shall involve...'). Nevertheless, such national bodies may influence how their 'participation in monitoring committees' should play out in practice.

The European Network of National Human Rights Institutions (ENNHRI) paper of May 2022 addresses this issue and recommends that 'NHRIs can take part of monitoring committees of EU funded programmes in an *advisory* capacity'.⁵⁹ ENNHRI justifies its 'conditional yes' with the need to strike a balance between the potential advantage of gaining access to valuable information (concerning, among other things, structural reforms otherwise not on the agenda of NHRIs) and possibly influencing important decision-making processes, on the one hand, and the limitations imposed by the Paris Principles' independence requirements, on the other:

In line with their independence, it is inappropriate for NHRIs to take up a decision-making or voting position in the context of the CPR, nor to issue 'fundamental [rights] compliance certificates' to state authorities in advance of the EU funded projects being implemented.⁶⁰

⁵⁷ Cf. interview report EUF_DE_NHRB/3, p. 10.

⁵⁸ Cf. roundtable report, p. 4.

⁵⁹ European Network of National Human Rights Institutions (ENNHRI) (2022), [Monitoring Fundamental Rights Compliance Of EU Funds – Potential Role, Opportunities and Limits for NHRIs](#), May 2022, p. 1 (emphasis in the original).

⁶⁰ European Network of National Human Rights Institutions (ENNHRI) (2022), [Monitoring Fundamental Rights Compliance Of EU Funds – Potential Role, Opportunities and Limits for NHRIs](#), May 2022, p. 2. On the Paris Principles adopted by the United Nations (UN) General Assembly on 20 December 1993 setting out minimum standards for NHRIs and providing the international benchmarks against which they can be accredited, see Office of the High Commissioner for Human Rights (2022), [Principles relating to the Status of National Institutions \(The Paris Principles\)](#), Geneva; and European Union Agency for Fundamental Rights (FRA) (2021), [Strong and effective national human rights institutions. Challenges, promising practices and opportunities](#), Vienna.

The latter point was also raised by a representative of GIHR both in the interview phase and during the national roundtable. In the course of the interview, the representative stated that GIHR's future role in the monitoring of EU funds should not consist in awarding 'blue angels' to Managing Authorities.⁶¹ The interviewee expanded on this issue during the national roundtable by stating that it would be 'more sensible to capacitate the administration' than to get involved in the examination of individual project proposals as a National Human Rights Institution.⁶²

Other than that, the representative stated that GIHR was currently not involved in the monitoring of EU funds whatsoever and would thus also not participate in any EU funds-related Monitoring Committee. Next to the above-mentioned concerns regarding independence, she stated a lack of resources (including but not limited to administrative capacity) as the principal reason.⁶³ These observations were confirmed by the representative of the Monitoring-Centre UN-CRPD at GIHR. The representative stated that the national framework to ensure implementation of the UN-CRPD in Germany as defined by Annex III CPR was generally not involved in the EU funding cycle. The interviewee pointed at human resources-related constraints in this context.⁶⁴

It may also be noted that participation in an advisory capacity in the AMIF Monitoring Committee was defined as the appropriate role for the European Commission, the European Union Agency for Asylum (EUAA), and the Research Centre Migration, Integration and Asylum of the Federal Office for Migration and Refugees (BAMF) by Germany's National Programme for the AMIF during the 2021-2027 funding period.⁶⁵

Selected human rights organisations play a formally more active role in the monitoring of EU funds. Based on his practical experience as a full member (with voting rights) of the AMIF Monitoring Committee, for example, a civil society representative recommended the following course of action to national bodies with a human rights remit:

One would especially need to strive for seats in these Monitoring Committees. In order to be firmly anchored as a *spiritus rector* as far as fundamental rights are concerned. Because that opens up all options for checking in which area it is currently important to do something. I need to sit at the counter, so to speak. I need to know what is happening. And then I can decide where I can perhaps tackle certain things. This, in my view, seems to be the only way to make this manageable.⁶⁶

⁶¹ Interview report EUF_DE_NHRB/1, p. 5.

⁶² Roundtable report, p. 6.

⁶³ Cf. interview report EUF_DE_NHRB/1, p. 1.

⁶⁴ See interview report EUF_DE_NHRB/2, p. 2.

⁶⁵ Cf. Germany (2022), *(Nationales) Programm Deutschland des AMIF 2021-2027*, Nuremberg, Bundesamt für Migration und Flüchtlinge, Asyl-, Migrations- und Integrationsfonds, Verwaltungsbehörde, approved by the European Commission on 24 July 2022, p. 62.

⁶⁶ Interview report EUF_DE_CSO/1, p. 9.

Likewise, the representative of the national body for gender equality interviewed in the context of the ESF stated that

participation in the Monitoring Committee would be the first precondition [for playing an active role in the EU funding cycle], because all relevant information flows towards the Monitoring Committee. So, that would be really important.⁶⁷

The civil society representative mentioned earlier reiterated that the Monitoring Committee would be 'very important' in practice.⁶⁸

3.8 Democratic governance

Several roundtable participants expressed the view that monitoring arrangements vis-à-vis EU funds should not only be effective, but also legitimate and democratic in the sense of Article 8 of the Common Provisions Regulation. The latter calls for a 'bottom-up approach' to partnership inter alia with 'bodies responsible for promoting ... fundamental rights [and] rights of persons with disabilities'.

The academic participant of the roundtable, for example, stated that 'the EU can no longer afford alibi procedures', underlined that NHRIs could make an important contribution to the democratic control inter alia of internal security policies in Germany and Europe, and argued that parliaments should accompany relevant monitoring activities, since a democratic deficit would otherwise arise.⁶⁹

Likewise, a civil society representative stated that investing in the process would be 'investing in freedom' and strengthening democracy.

Another civil society representative emphasised that there should be 'no debate only in small circles' as far as the activities of Monitoring Committees for EU funds are concerned. (On transparency, cf. inter alia Article 42 of the EU Charter of Fundamental Rights concerning the right of access to documents.)

Several roundtable participants spoke in favour of making EU money available for simple language, and for enabling the participation of persons with disabilities in relevant monitoring activities.⁷⁰

⁶⁷ Interview report EUF_DE_NHRB/3, p. 9.

⁶⁸ Roundtable report, p. 5.

⁶⁹ Roundtable report, pp. 4, 5, and 8, respectively.

⁷⁰ Roundtable report, pp. 4 and 7, respectively.

The statements and views of roundtable participants reproduced above are arguably relevant in the context of the legal fact that ‘the Union ... is based on the principles of democracy and the rule of law’, as it is stated in the preamble of the Charter of Fundamental Rights of the European Union. Likewise, Article 2 of the Treaty on European Union defines the Union’s values, including democracy, the rule of law and respect for human rights, whereas Title II of the Treaty on European Union determines the Union’s democratic principles.

In the context of the shared management of EU funds by Member States like the Federal Republic of Germany, ‘democratic ideals [can] provide a yardstick for assessing how various societies are governed and criteria for justifying and criticizing existing forms of government and proposals for social reforms’.⁷¹ In light of the judgments of the Court of Justice of the European Union of 16 February 2022 concerning the now legally possible suspension of EU funding for Member States demonstrably undermining the Union’s foundations, i.e. the lawfulness of [Regulation \(EU, Euratom\) 2020/2092](#) on a general regime of conditionality for the protection of the Union budget or the so-called rule of law conditionality for EU funds, one could reasonably argue that democratic governance is a justiciable prerequisite for EU funding in the Federal Republic of Germany and elsewhere. This, at least, would logically flow from the Court’s observation that ‘there can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa’.⁷²

3.9 Bureaucratic overload, privatisation and uncalled funds

A realistic assessment of the possible future role of national bodies with a human rights remit in the EU funding cycle must take the phenomenon of bureaucratic overload into account.

The ESF Managing Authority in Germany (federal level), for example, launched a so-called ‘lean fund management’ campaign calling for a significant reduction of the current level of administrative complexity in relation to the ESF in 2017. A position paper published by the Federal Ministry of Labour and Social Affairs (BMAS) following formal adoption by the German ESF Monitoring Committee accordingly noted that the time and effort required to implement ESF-related requirements would ‘no longer be proportionate’. If no changes would be made to the current system of over-bureaucratisation, the EU and its

⁷¹ March, J. G., Olsen, J. P. (1995), *Democratic governance*, New York and London, The Free Press, p. 2.

⁷² Court of Justice of the European Union (CJEU), [C-157/21](#), *Poland v Parliament and Council*, 16 February 2022, p. 11.

programmes – as good as they might be – would be perceived by the public as ‘a bureaucracy with no connection to the social reality of ordinary people’.⁷³

This study cannot assess whether the level of administrative complexity in relation to EU funds like the ESF has increased, remained constant or decreased in recent years. It is known for certain, however, that BMAS outsourced its ESF-related administrative activities to the Deutsche Rentenversicherung Knappschaft-Bahn-See (DRV BKS) in 2020.⁷⁴

Another development, namely privatisation, unfolded on *Länder* level. In the State of Berlin, for example, the responsible public authority situated within the Senate Department for Economics, Energy and Public Enterprises outsourced its ESF-related management (ranging from the publication of expressions of interest via the selection and implementation of projects to financial management and control) to companies like EFG GmbH and zgs consult GmbH. This type of outsourced and/or privatised management of European Social Funds is nothing new but has been taking place in the State of Berlin (including former East-Berlin, i.e. the capitol of the former German Democratic Republic) since the early 1990s.

Based on their legal status as trustees and entrusted companies, these enterprises operate, according to one of our interviewees, like public authorities with respect to their rights, but not necessarily when it comes to their powers of enforcement. They also act as the formally responsible authorities for receiving fundamental rights-related complaints (which would, however, never occur in practice). Asked about the likely reasons for this development, the corporate fund-manager stated the following:

I actually believe that if you outsource things like this, that [private] service providers can implement this more efficiently than the [public] administration as such. That may be due to different reasons, but it is probably the main reason for pursuing this course of action.⁷⁵

During the national roundtable, the same fund manager informed that the entrusted companies and/or trustees would merely carry out a general review of the so-called horizontal principles while managing ESF funds in the State of Berlin, meaning that the fulfilment of these requirements would not be scrutinised in any detail.⁷⁶ The horizontal principles laid down in Article 9 CPR refer to ‘respect for fundamental rights and compliance with the Charter of Fundamental Rights of the European Union’ (paragraph 1), ‘equality between men and women, gender mainstreaming and the integration of a gender

⁷³ Germany, ESF-Verwaltungsbehörde des Bundes (2016), [Positionspapier der ESF-Verwaltungsbehörde des Bundes zur Ausgestaltung des ESF ab 2021 – Für ein neues ‘Lean Fund Management’ \(LFM\)](#), 25 November 2016, p. 1 (translation by the author).

⁷⁴ Cf. Knappschaft Bahn See (2022), *Die Förderprogramme des ESF*, <https://www.kbs.de/DE/EHAP-ESF/node.html>.

⁷⁵ Interview report EUF_DE_NFM/3, p. 6.

⁷⁶ Roundtable report, p. 3.

perspective' (paragraph 2), 'discrimination based on gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation', with a particular emphasis on 'accessibility for persons with disabilities' (paragraph 3), and to 'the UN Sustainable Development Goals, the Paris Agreement and the "do no significant harm" principle' (paragraph 4). All of the above, in other words, only exists on paper in the context of the respective fund management.

In addition to discussing readily apparent problems connected with the outsourcing and privatisation of fund management in fundamental rights-sensitive areas like European social policy, one may reasonably assume that there is a correlation between increasing levels of administrative complexity and decreasing volumes of money being retrieved from EU funds. This, at least, is what relevant analyses reportedly carried out by the European Court of Auditors documenting so-called outstanding commitments or uncalled funds of more than € 300 billion in 2020 and more than € 340 billion in 2021 would seem to suggest.⁷⁷

If this hypothesised relationship would empirically hold, it would reinforce the Matthew effect of EU funding discussed in section 3.3 above.

4. Critical success factors and conclusions

a) Based on the secondary literature reviewed during the desk research phase, the primary sources (qualitative interview data) collected in the framework of this project, the proceedings of the national diagnostic roundtable, and the quantitative analyses presented in section 2 of this report, this study suggests focusing the future monitoring activities of national bodies with a human rights remit in relation to EU funds on the **Home Affairs funds** (AMIF, ISF, BMVI) and the **European Regional Development Fund** (ERDF). While the ERDF is the quantitatively most significant EU fund covered by the CPR, the Home Affairs funds are arguably especially important.

This qualitative assessment concerning the relative importance of the Home Affairs funds is, of course, debatable. However, in its landmark judgment on the Treaty of Lisbon, i.e. on the European Union's currently valid primary law foundations including the since then legally binding Charter of Fundamental Rights of the EU (cf. Article 6 of the Treaty on European Union as amended by the Treaty of Lisbon), the Bundesverfassungsgericht (Germany's Federal Constitutional Court) underlined 'the loss of statehood in the area of Justice and Home Affairs, an area central to the subject of fundamental rights'.⁷⁸ The

⁷⁷ See Tagesschau (2021), [EU-Rechnungshof: 300 Milliarden Euro Fördergelder nicht abgerufen](#), 23 October 2021; and European Court of Auditors (2022), [Speech by Tony Murphy, President of the European Court of Auditors](#), 13 October 2022, p. 7.

⁷⁸ Germany, Federal Constitutional Court (2009), [Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08](#), Karlsruhe, no. 319.

qualitative assessment vis-à-vis the relative importance of the Home Affairs funds thus resonates with the Bundesverfassungsgericht's concern for 'core areas of statehood' requiring a sufficiently high level of fundamental rights scrutiny.

The European Social Fund Plus (ESF+) and the Just Transition Fund (JTF) are also very important from a fundamental rights and German constitutional law perspective, as the Bundesverfassungsgericht's emphasis on 'political and social security, protected by fundamental rights' in the context of the EU, and its innovative concept of 'fundamental rights as intertemporal guarantees of freedom [affording] protection against greenhouse gas reduction burdens ... being unilaterally offloaded onto the future' strongly suggest.⁷⁹ Due to their very high degree of administrative complexity and/or interdisciplinary character requiring the cooperation of natural scientists, social scientists, and legal practitioners, however, both the European Social Fund (Plus) and the Just Transition Fund arguably cannot be engaged by GIHR and other German bodies with a human rights remit at this stage in an efficient and effective manner.

b) Based on the guidance provided by the European Network of National Human Rights Institutions (ENNHRI) reviewed in section 3.7, and the proposed focus on selected EU funds mentioned above, one may reasonably conclude that Germany's National Human Rights Institution, the German Institute for Human Rights (GIHR), could, as a possible first step towards the fundamental rights monitoring of EU funds in Germany, participate in the Monitoring Committees of the three Home Affairs funds (Asylum, Migration and Integration Fund – AMIF; Internal Security Fund – ISF; Border Management and Visa Instrument – BMVI) and the European Regional Development Fund (ERDF) in an advisory capacity. However, it remains to be discussed what 'advisory capacity' actually means. It became apparent during the interviews and the roundtable that there is considerable doubt regarding the compatibility of GIHR's independence (as founded in the Paris Principles relating to the status of National Human Rights Institutions) with an active role in such committees.⁸⁰

Beyond that, several roundtable participants recommended that GIHR should focus on establishing an **indicator-based monitoring of EU funds**.

⁷⁹ Germany, Federal Constitutional Court (2009), [Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08](#), Karlsruhe, headnote no. 4; and Germany, Federal Constitutional Court (2021), [Order of the First Senate of 24 March 2021 - 1 BvR 2656/18](#), Karlsruhe, headnote no. 4, respectively.

⁸⁰ See also: European Network of National Human Rights Institutions (ENNHRI) (2022), [Monitoring Fundamental Rights Compliance Of EU Funds – Potential Role, Opportunities and Limits for NHRIs](#), May 2022, p. 2. On the Paris Principles adopted by the United Nations (UN) General Assembly on 20 December 1993 setting out minimum standards for NHRIs and providing the international benchmarks against which they can be accredited, see Office of the High Commissioner for Human Rights (2022), [Principles relating to the Status of National Institutions \(The Paris Principles\)](#), Geneva; and European Union Agency for Fundamental Rights (FRA) (2021), [Strong and effective national human rights institutions. Challenges, promising practices and opportunities](#), Vienna.

The representative of the European Union Agency for Fundamental Rights (FRA), for example, highlighted the importance of indicators for the evaluation of processes and/or results in his concluding remarks on the national roundtable.⁸¹

Likewise, the academic participating in the event concluded (according to his many years of experience in the UN context) that 'indicators are of central importance' for achieving practical progress regarding a possible fundamental rights-related monitoring of supranational funds.⁸² Project carriers and administrative authorities should be entrusted with appropriate measurements (if necessary only of quantitative, ideally also of qualitative indicators). The results of these surveys should be analysed by GIHR and discussed in the framework of the respective Monitoring Committee.

These roundtable results lend support to a policy recommendation articulated by various study participants during the interview phase, namely that applied research (as carried out *inter alia* by the German Institute for Human Rights) should focus on the operationalisation of Human Rights Budgeting.

The empirical findings suggest that Gender Budgeting is currently the most advanced form of Human Rights Budgeting in the Federal Republic of Germany. The State of Berlin, in turn, appears to be the frontrunner in terms of Gender Budgeting in the Federal Republic.⁸³

The envisioned establishment of a dedicated Gender Budgeting unit within the Berlin Senate Administration for Finances (SenFin) and related developments in Member States like Austria and Sweden seem to go hand in hand with the refinement of Gender Budgeting methodology. In fact, one of the interviewees was actively involved in operationalising women's rights and/or Gender Budgeting in terms of developing measurable indicators for achieving gender equality as required *inter alia* by Article 73 CPR. Against this background, she stated that she was very critical of the current system of 'box-ticking' fundamental rights compliance in the context of EU funds ('0, 1, 2 and that's it'), which would not be sufficient.⁸⁴ Instead, one should focus on the development of suitable indicators, collect the relevant data, compile the relevant statistics, and analyse what has (or has not) been achieved.

According to the interviewee, one should also allow for experience-based, cycle-oriented learning in the context of Human Rights Budgeting and EU funds. The cyclical nature of the EU budget would, in the long run, allow for the fine-tuning of budget lines in order to financially underpin fundamental rights guarantees like equality between women and men (Article 23 of the Charter of Fundamental Rights of the European Union):

⁸¹ Cf. roundtable report, p. 9.

⁸² Roundtable report, p. 7.

⁸³ Cf. interview report EUF_DE_NHRB/3, p. 10.

⁸⁴ Interview report EUF_DE_CSO/4, p. 10.

One realises that the *cycle* is important if one applies this to the budget. Everything else would be sporadically occurring, project-like work, and then one would easily forget what the results were. But the budget has this cycle, and that's why one can include this every one or two years, or every four or seven years, as the case may be, as a systematic process. And it returns again and again, until one can finally say, for example: 'We have now really managed to fine-tune this budget line! This one really works 100% for women's rights!' ⁸⁵

c) In 2020, the European Union Agency for Fundamental Rights (FRA) stated the following in the context of the (limited) resources available to National Human Rights Institutions (NHRIs) like the German Institute for Human Rights:

Special attention should be paid to ensuring that each explicit mandate and additional task of an NHRI is endowed with sufficient resources to be carried out effectively and without undermining existing work. The EU and its Member States must also ensure that additional mandates and additional tasks do not impinge on the effectiveness of the NHRI by disproportionately locking up capacity or indicating strategic choices.⁸⁶

FRA's opinion reproduced above is arguably a very suitable description of the challenges faced by NHRIs in the context of EU funds. After all, these institutions were generally (apart from NHRIs in Croatia, Cyprus and Sweden⁸⁷) not involved in the monitoring of EU funds during the previous funding cycle. Against this background, FRA concluded that

Member States will need to ensure that NHRIs involved in the implementation of EU-funded programmes have sufficient human resources and the necessary expertise and capacity. Such involvement should not undermine their capacity to carry out their core mandate and other functions.⁸⁸

A related study of 2021 financed by the European Network of National Human Rights Institutions (ENNHRI) arrived at the same conclusion. Estela Casajuana and Alaia Moreno of Profundo accordingly stated that National Human Rights Institutions now invited by Article 4 of the AMIF-Regulation to engage in the monitoring of the Asylum, Migration and Integration Fund on national level, for example, cannot simply 'expand on new areas of work' due to 'limited staff and not enough financial resources'.⁸⁹

The most pressing problem regarding the fundamental rights monitoring of EU funds in Germany and elsewhere thus seems to consist in finding ways and means to bridge the

⁸⁵ Interview report EUF_DE_CS0/4, p. 9.

⁸⁶ European Union Agency for Fundamental Rights (FRA) (2021), [Strong and effective national human rights institutions: challenges, promising practices and opportunities – Summary](#), Vienna, p. 18.

⁸⁷ ⁸⁷ European Union Agency for Fundamental Rights (FRA) (2020), [Strong and effective national human rights institutions: challenges, promising practices and opportunities](#), Vienna, p. 82.

⁸⁸ European Union Agency for Fundamental Rights (FRA) (2020), [Strong and effective national human rights institutions: challenges, promising practices and opportunities](#), Vienna, p. 82.

⁸⁹ Profundo – Research & Advice (2021), [Human rights scrutiny of public funds for migration and asylum. Role, opportunities and challenges for NHRIs](#), July 2021, p. 11.

'implementation gap between human rights commitments and reality' in the context of new CPR-related legal requirements.⁹⁰

Providing assistance to NHRIs such as GIHR seems all the more necessary and appropriate in cases of rapid organisational growth or dynamic fund development. The exponential growth of Frontex's budget and personnel is a case in point.⁹¹ Likewise, the statistical analyses presented by The Transnational Institute (Amsterdam) on <https://eubudgets.tni.org/> indicate a 131% increase for the Border Management and Visa Instrument (BMVI), a 90% increase for the Internal Security Fund (ISF), and a 43% increase for the Asylum, Migration and Integration Fund (AMIF), respectively, based on a comparison between the EU means available during the current funding period (2021-2027) and the previous funding period (2014-2020).

Asked about concrete ways and means to improve the standing of GIHR and other German bodies with a human rights remit in the context of the fundamental rights monitoring of EU funds, a fund manager participating in the national roundtable stated that the so-called technical assistance would offer itself here.⁹²

Likewise, a civil society representative referred in this context to the technical assistance and the so-called **operating support**. Both funding elements, which would be directly available to the Federal Office for Migration and Refugees (BAMF) in the framework of the Asylum, Migration and Integration Fund (AMIF), for example, could be used to finance research projects and other activities. In fact, there would be many possibilities under funding law (cf. inter alia Article 8 and Article 36 CPR). The decisive factor, however, would be the desire of the responsible Federal Ministry of the Interior and Community (BMI) to support a stronger role of national bodies with a human rights remit in the EU funding cycle.⁹³

During the interview phase, the same civil society representative expanded on the resource needs of national bodies with a human rights remit as follows:

Well, you need personnel. That's for sure. Meaning that you need money, that you need some sort of funding at this point. Which can *not* be project funding. One cannot make a project of fundamental rights! Meaning that one would need basic funding, there can be no doubt about that.

I would say that one would need to create personnel positions for the area of fundamental rights in the framework of technical assistance in this context. After all,

⁹⁰ Jensen, S., Lagoutte, S., Lorion, S. (2019), 'The Domestic Institutionalisation of Human Rights: An Introduction', *Nordic Journal of Human Rights*, Vol. 37, No. 3, pp. 165-176, here: p. 165.

⁹¹ Cf. Guild, E. (2022), 'What Monitoring for Fundamental Rights at EU Borders? Frontex and Rule of Law', *Verfassungsblog*, 7 September 2022.

⁹² Cf. roundtable report, p. 7.

⁹³ Cf. roundtable report, p. 7.

one pays numerous people for checking bus tickets. So why not finance the question of fundamental rights? ⁹⁴

The academic participating in the roundtable event also spoke in favour of anchoring 'human rights monitoring and evaluation as a fixed component of the funds'. This would be in line with the stated objectives of the European Union (cf. Article 22 paragraph 3 in conjunction with Article 8 paragraph 1 CPR on the 'monitoring and evaluation' of the programmes by 'bodies responsible for ... fundamental rights [and] rights of persons with disabilities ...'). As a standard rule, 10% of the total budget should be allocated to monitoring and evaluation.⁹⁵

Possible operating support made available to GIHR and other national bodies with a human rights remit via the EU funds themselves should, of course, be rolled out in accordance with the Paris Principles of the United Nations. These principles inter alia state that the purpose of providing 'adequate funding' to National Human Rights Institutions such as GIHR 'should be to enable [them] to have [their] own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect [their] independence'.⁹⁶

Establishing and subsequently maintaining financial autonomy in line with the Paris Principles may also be viewed as a prerequisite for being able to deal adequately with expectable situations where 'non-compliance is found with the EU CPR, [resulting in] negative impacts on state authorities' cooperation with actors involved in compliance-checks, including NHRIs'.⁹⁷

The financial underpinnings of long-term monitoring arrangements thus constitute a major challenge. According to one of the interviewees, however, it should be possible to solve these problems and to deal with the risk of being sanctioned by those whom GIHR and other national bodies with a human rights remit are supposed to monitor in the context of EU funds:

National Human Rights Institutions' entire way of being constitutes a risk because I am being financed by those whom I am supposed to control. That is the construction, and that is the charm. That would be the same in case of a stronger role in the monitoring

⁹⁴ Interview report, EUF_DE_CS0/1, p. 9.

⁹⁵ Roundtable report, p. 7.

⁹⁶ United Nations, Office of the High Commissioner for Human Rights (2022), [Principles relating to the Status of National Institutions \(The Paris Principles\)](#), Geneva, section on 'composition and guarantees of independence and pluralism', no. 2.

⁹⁷ European Network of National Human Rights Institutions (ENNHRI) (2022), [Monitoring Fundamental Rights Compliance Of EU Funds – Potential Role, Opportunities and Limits for NHRIs](#), May 2022, p. 3.

of EU funds. But one can solve this via good regulations with the relevant funder. Or can solve this to a large extent. But one would need to solve this.⁹⁸

⁹⁸ Interview report EUF_DE_NHRB/1, p. 8.