



ON THE AGENDA: THE REFUGEE CRISIS AND EUROPEAN INTEGRATION

BOTTOM-UP SALVATION? FROM PRACTICAL COOPERATION TOWARDS JOINT IMPLEMENTATION THROUGH THE EUROPEAN ASYLUM SUPPORT OFFICE

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ABSTRACT: This article assesses the role of the European Asylum Support Office (EASO) in the European asylum policy and the shifts that are taking place in the policy’s administration modes. EASO is tasked with coordinating practical cooperation efforts so as to achieve harmonisation “bottom-up”, namely through the harmonisation of practices. Tasked with supporting Member States “subject to particular pressure”, the agency has been called to play a key operational role in the running of the “hotspots”. I focus in particular on the agency’s operational activities, commenting on the agency’s level of interaction with national administrations. I evaluate the extent which the agency’s working unsettles pre-existing assumptions about the balance of powers between the EU institutions and the Member States regarding the implementation of the asylum policy. In light of the Commission proposal on reform of this agency, I comment on initiatives that could be envisaged in the future under the agency’s mandate and what these would mean for the administrative governance of the EU asylum policy.

KEYWORDS: European Asylum Support Office – EU asylum policy – practical cooperation – administrative governance – integrated european administration – agencification.

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I. INTRODUCTION

Not so long ago, in 2014, EU institutions and Member States heralded the dawn of the age of implementation in the EU asylum policy.¹ Further legislative harmonisation or amendments in the design of the policy were not under consideration. Nonetheless, a mere two years later the EU finds itself in the midst of a “refugee crisis”,² and unable to effectively handle the increased arrivals of asylum seekers, many of whom are fleeing the armed conflict in Syria. A number of recent contributions argue that the increased arrivals were not the main source of the crisis; they merely exacerbated the limitations inherent in the conceptualisation of EU’s asylum policy, including lack of fair responsibility-sharing.³ Therefore, rather than a refugee crisis, we are dealing with a governance crisis. In a way, the crisis has laid bare the inadequacies of the EU asylum policy.

In this article I deal more specifically with the aspect of institutionalisation of practical cooperation. In the initial policy design, practical cooperation between Member States was to support the implementation of the European asylum policy. It basically consisted in information exchange through administrative networks and *ad hoc* projects. These collaborative efforts soon met their limits in boosting Member States’ capacity to implement the asylum policy. Their inadequacy to live up to the implementation challenges led to an institutionalisation push. Institutionalisation of practical cooperation efforts in the asylum policy came to fruition in 2010 through the adoption of the European Asylum Support Office (EASO) founding regulation.⁴

This article explores a particular aspect of the agency’s mandate: operational support. I first outline key elements of the agency’s mandate through the relevant provisions of the founding regulation. Next, I focus on “EASO in action”, analysing how the agency has implemented in particular the operational aspect of its mandate to date, and commenting on whether the legal limits are being observed. I also note trends in the implementation of the asylum policy portrayed most vividly through operations in hotspots. Finally, I comment on aspects of the May 2016 Commission proposal that

¹ See European Council conclusions of 26-27 June 2014 and for a commentary see P. DE BRUYCKER, *The Missed Opportunity of the ‘Ypres Guidelines’ of the European Council Regarding Immigration and Asylum*, in *Migration Policy Centre Blog*, 29 July 2014, blogs.eui.eu.

² See Refugee Crisis: European Commission takes decisive action, in European Commission Press Release IP/15/5596 of 9 September 2015.

³ See E. TSOURDI, *Intra-EU solidarity and the implementation of the EU asylum policy: a refugee or governance “crisis”?*, in Odysseus Academic Network (ed.), *Searching for Solidarity in EU Asylum and Border Policies*, p. 5 *et seq.*, odysseus-network.eu; D. THYM, *The “Refugee Crisis” as a Challenge of Legal Design and Institutional Legitimacy*, in *Common Market Law Review*, 2016, p. 1 *et seq.*; T. SPIJKERBOER, *Minimalist Reflections on Europe, Refugees and Law*, in *European Papers*, 2016, www.europeanpapers.eu, p. 533 *et seq.*; M. DEN HEIJER, J. RIJMA, T. SPIJKERBOER, *Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System*, in *Common Market Law Review*, 2016, p. 607 *et seq.*

⁴ Regulation (EU) 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office (hereafter: EASO Regulation).

aims to revamp EASO into a “European Union Agency on Asylum”.⁵ I ascertain what the envisaged mandate would consist of in terms of operational support and outline the persistent legal and political limits to joint implementation in this area.

II. “SUPPORT IS OUR MISSION”: A CRITICAL ASSESSMENT OF EASO’S MANDATE AND RESOURCES

A few months after EASO became operational in Malta, its first Executive Director, Robert Visser, coined the motto “support is our mission”.⁶ Thus, the self-projected image of the agency’s main task is one of assistance, and more precisely assistance towards Member States through operational activities, in order for them to be able to implement their obligations under the asylum *acquis*. The aim of this section is to explore the agency’s mandate, as envisaged by the EASO Regulation. I comment on the nature of the agency’s powers and their stated limitations (section II.1.). A following subsection explores which resources (financial and human) the agency has at its disposal in order to fulfil its mandate and whether they respond to the level of ambition surrounding it (section II.2.).

II.1. EASO’S MANDATE: AREAS OF INVOLVEMENT AND LIMITATIONS

EASO was created on the basis of Arts 74 and 78, paras 1 and 2, TFEU, therefore it was conceptualised as a “measure to ensure administrative co-operation” in view of attaining the goal of establishing a Common European Asylum System (CEAS). The Commission considered different options regarding the institutional form that the “office” would take, as well as its tasks and powers.⁷ The alternative options that were under more careful consideration, namely strengthening the Asylum Unit at the European Commission, creating an “executive agency” (meaning delegating powers from the Commission to a body), or creating a coordinating Network, were excluded respectively for political, budgetary and efficiency reasons.⁸ The preferred option was: *a*) the creation of an agency; that *b*) does not possess decision-making power; and *c*) has to fulfil a number of tasks (operational, information-exchange etc). The next paragraphs substantiate this statement.

⁵ See Commission Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, COM(2016) 271 (hereafter: EUAA proposal).

⁶ This motto still features in the EASO website. See www.easo.europa.eu.

⁷ See European Commission, *Impact Assessment: Accompanying Document to the Proposal for a Regulation of the European Parliament and of the Council establishing an European Asylum Support Office*, SEC(2009) 153, pp. 23-29.

⁸ See F. COMTE, *A New Agency Is Born in the European Union: The European Asylum Support Office*, in *European Journal of Migration and Law*, 2010, pp. 380-383.

a) EASO: an EU agency.

EU law lacks a precise definition of the notion of agency. The Commission offered its understanding in documents released in 2002 and 2005. In 2002 it noted that existing agencies had certain formal characteristics in common: “they were created by regulation in order to perform tasks clearly specified in their constituent acts, all have legal personality and all have a certain degree of organisational and financial autonomy”.⁹ However, it went on to state that their differences far outweigh their similarities and proposed a differentiation between executive and regulatory agencies.¹⁰ While “executive” agencies were responsible for purely managerial tasks and subject to strict supervision by the Commission, “regulatory” agencies were required to be actively involved in the executive function by enacting instruments which help to regulate a specific sector.¹¹ However, the Commission then distinguishes between two categories of “regulatory agencies” the first being “regulatory/decision-making” agencies and the second being “regulatory/executive agencies”.¹² Academic commentators such as Craig¹³ and Majone,¹⁴ have rightly castigated the latter labelling as confusing.

In 2005, the Commission specified further the category of regulatory agencies: “the term ‘European regulatory agency’ (hereinafter referred to as ‘agency’) shall mean any autonomous legal entity set up by the legislative authority in order to help regulate a particular sector at European level and help implement a Community policy. The agency shall be invested with a public service role. It shall help to improve the way in which Community legislation is implemented and applied throughout the EU”.¹⁵

This definition has been characterised as a “step back in precision”¹⁶ compared to the 2002 Commission Communication.

Over time, agencies were entrusted with distinct functions, and leading authors proceeded to their classification on this basis.¹⁷ There is no unison in the categorisa-

⁹ Communication COM(2002) 718 final of 11 December 2002 from the Commission on the operating framework for the European Regulatory Agencies, p. 3.

¹⁰ *Ibid.*

¹¹ *Ivi*, pp. 3-4.

¹² *Ivi*, p. 8.

¹³ See P. CRAIG, *EU Administrative Law*, Oxford: Oxford University Press, 2012, p. 149.

¹⁴ See G. MAJONE, *Strategy of Regulatory Reform*, in G. DELLA CANANEA (ed.), *European Regulatory Agencies*, Paris: ISUPE Press, 2004, p. 54.

¹⁵ Commission, *Draft Interinstitutional Agreement on the Operating Framework for the European Regulatory Agencies*, COM(2005) 59 final, p. 11.

¹⁶ M. CHAMON, *EU Agencies Legal and Political Limits to the Transformation of the EU Administration*, Oxford: Oxford University Press, 2016, p. 6.

¹⁷ See E. VOS, *Agencies and the European Union*, in L. VERHEY, T. ZWART (eds), *Agencies in European and comparative perspective*, Antwerp, New York: Intersentia, 2003, pp. 119-121; R. VAN OOIK, *The Growing Importance of Agencies in the EU: Shifting Governance and the Institutional Balance in Good governance and the European Union: reflections on concepts, institutions and substance*, Antwerp, New York: Intersentia, 2005, pp. 139-145; D. GERADIN, N. PETIT, *The Development of Agencies at EU and National Levels: Conceptual*

tions adopted by the different authors, and often one agency may be classified under more than one category due to the multitude of functions it is called to fulfil.¹⁸ The heterogeneity of categories put forth reflects the wealth of functions taken up by agencies, including information collection and sharing, application of EU rules in specific cases, assistance functions, operational co-operation and decision-making. Another type of agency classification adopted for example by Paul Craig,¹⁹ or Stefan Griller and Andreas Orator,²⁰ rests on whether agencies hold decision-making powers or not.

Recently, Chamon has proposed a definition on which bodies should be understood as “EU agencies”, when they possess the following four elements: “[they are] permanent bodies, under EU public law, established by the institutions through secondary legislation and endowed with their own personality”.²¹ He then advances that the most pertinent categorisation is that of *agencies’ powers*, rather than of *agencies* themselves, distinguishing between powers around decision-making; non-decision-making powers and operational tasks.²² I adopt this categorisation for this study. The definition is clear-cut, and the categorisation better responds to the challenge of analysing the workings of a body that is called to take up a multitude of functions. The research explores next the exact nature of EASO and the precise tasks it is called to fulfil.

Does EASO fulfil the elements of the agency definition described right above? EASO was established as a permanent body. It is a body under EU public law, as it was not adopted outside the framework of EU law, i.e. by the Member States acting on the basis of public international law.²³ The third element is also fulfilled since EASO was established through secondary legislation, a Regulation of the Council and the European Parliament. Finally, EASO is explicitly endowed with its own legal personality²⁴ and “should be independent in technical matters and should enjoy legal, administrative and financial autonomy”.²⁵ Hence, EASO is an EU agency, despite its denomination in the EASO Regulation as an “office”.

Analysis and Proposals for Reform, in *Yearbook of European Law*, 2005, pp. 177-180; E. CHITI, *An Important Part of the EU’s Institutional Machinery: Features, Problems and Perspectives of European Agencies*, in *Common Market Law Review*, 2009, pp. 1403-1404; M. BUSUIOC, *European Agencies: Law and Practices of Accountability*, Oxford: Oxford University Press, 2013, pp. 26-27.

¹⁸ Chamon has depicted in a graph the resulting categorisation of specific agencies according to the writings of the above-mentioned authors, illustrating how the same agency might be found to fit different categories. M. CHAMON, *EU Agencies: Legal and Political Limits*, cit., p. 22.

¹⁹ See P. CRAIG, *EU Administrative Law*, cit., pp. 150-152.

²⁰ See S. GRILLER, A. ORATOR, *Everything Under Control? The “Way Forward” for European Agencies in the Footsteps of the Meroni Doctrine*, in *European Law Review*, 2010, p. 1 *et seq.*

²¹ M. CHAMON, *EU Agencies: Legal and Political Limits*, cit., p. 14.

²² *Ivi*, pp. 29-44.

²³ See also EASO Regulation, Art. 40, para. 1, referring to it as a “body of the Union”.

²⁴ *Ibid.*

²⁵ EASO Regulation, eighth recital.

b) Exclusion of decision-making powers.

EASO Regulation explicitly excludes individual decision-making powers: “[t]he Support Office should have no direct or indirect powers in relation to the taking of decisions by Member States’ asylum authorities on individual applications for international protection”.²⁶ This formulation is quite far-reaching since it even excludes *indirect* powers. It reflects Member States’ initial political unease. They wanted to ensure that the agency would not challenge their competence to process asylum claims, as foreseen through EU primary law.²⁷ Art. 78, para. 2, let. e), TFEU notably states that one of the measures comprising the CEAS is: “criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection”. This wording clarifies that ultimately “a Member State” should be responsible for the examination of a particular claim. It therefore becomes apparent that the current legal basis in the TFEU excludes centralised assessment of claims, for example through an EU agency.

The agency also holds no powers to adopt general rules.²⁸ EASO Regulation foresees the possibility for EASO to adopt “technical documents on the implementation of the asylum instruments of the Union”.²⁹ However, it also clarifies that those documents “shall not purport to give instructions to Member States about the grant or refusal of applications for international protection”.³⁰ It is thus clear that these documents are not legally binding.

c) EASO’s current mandate.

Three main areas of activity are envisaged for the agency. First, EASO should facilitate, coordinate and strengthen practical cooperation among EU Member States.³¹ This includes the gathering and exchange of country of origin information (COI) and the adoption of a common COI methodology, as well as the provision of training for asylum officials on the basis of the European Asylum Curriculum (EAC). The second area of activity is support towards EU States under particular pressure, drawing upon all useful resources at EASO’s disposal, which may include coordinating resources provided by Member States.³² This area is intrinsically linked with the element of enhanced solidarity between the Member States. The final area of involvement is the contribution to the

²⁶ EASO Regulation, fourteenth recital. This is reiterated in EASO Regulation, Art. 2, para. 6.

²⁷ I am referring to Art. 78, para. 2, let. e), stating that “a Member State” should be responsible for the examination of an application.

²⁸ More broadly, legal commentators note that on the basis of the EU Treaties agencies could formally not possess the power to adopt normative acts; see, for example, P. CRAIG, *EU Administrative Law*, cit., p. 151 and M. CHAMON, *EU Agencies: Legal and Political Limits*, cit., p. 40.

²⁹ EASO Regulation, Art. 12, para. 2.

³⁰ *Ibid.*

³¹ See EASO Regulation, Art. 2, para. 1 and Section I.

³² See EASO Regulation, Art. 2, para. 2 and Section II.

development of a CEAS.³³ It includes an annual report on the situation on asylum, and the possibility to adopt guidelines and operating manuals.

More broadly the Regulation states that the purpose of the agency is also to “provide scientific and technical assistance in regard to the policy and legislation of the Union in all areas having a direct or indirect impact on asylum”, as well as to become “an independent source of information on all issues in those areas”.³⁴ The Regulation clarifies that this serves the purpose of the agency being able to carry out its duties effectively and lending its full support on asylum.³⁵

The focus of this contribution is the operational support the agency offers to Member States, a function which makes it particularly akin to an instrument of solidarity. According to EASO Regulation, EASO has a mandate to support Member States subject to particular pressure which places exceptionally heavy and urgent demands on their reception facilities and asylum systems.³⁶ On the one hand, EASO is called to systematically identify, collect, and analyse information regarding various aspects of national asylum systems under particular pressure.³⁷ This information relates, for example, to the structures and staff available, as well as information on assistance in the handling and management of asylum cases.³⁸ When large numbers of third country nationals suddenly arrive, EASO is to ensure the rapid exchange of relevant information amongst Member States and the Commission.³⁹ In this task, EASO is to make use of existing early warning systems and, if necessary, set up its own.⁴⁰

The Regulation 604/2013 (hereinafter: recast Dublin Regulation)⁴¹ also foresees the creation of a mechanism for early warning, preparedness and crisis management that includes a role for EASO.⁴² This mechanism could be triggered either at the request of a Member State, or by the Commission, on the basis of information gathered by EASO. Once triggered, a two-fold set of measures is to be adopted. First, a preventive action plan is to be drawn up in cooperation with the Commission. If, on the basis of EASO’s analysis, the implementation of the preventive action plan has not remedied the deficiencies identified, or where there is a serious risk that the asylum situation in that

³³ See EASO Regulation, Section III.

³⁴ *Ivi*, Art. 2, para. 3.

³⁵ *Ibid.*

³⁶ *Ivi*, Art. 8.

³⁷ *Ivi*, Art. 9.

³⁸ *Ivi*, Art. 9, para. 2.

³⁹ *Ivi*, Art. 9, para. 3.

⁴⁰ *Ibid.*

⁴¹ *Id est* Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

⁴² See recast Dublin Regulation, Art. 33.

Member State develops into a crisis, a crisis-management action plan is to be set up. This is a more structured mechanism than the preventive action plan as it involves close monitoring, follow-up, and review every three months. Invocation of any of the two systems will also mean that appropriate solidarity measures at EU level might be established. This mechanism has never been operationalised to date.

Apart from data collection and exchange, the legislator foresaw that EASO will, at the request of the Member State concerned, coordinate actions on the ground.⁴³ The requesting Member State should provide a description of the situation; indicate the objectives of the request for deployment; and estimate the deployment requirements.⁴⁴ In response, EASO is to coordinate the necessary technical and operational assistance.⁴⁵ Three main types of action were outlined: actions to facilitate an initial analysis of asylum applications under examination by the competent national authorities; actions designed to ensure that appropriate reception facilities, including emergency reception can be made available; and the deployment of Asylum Support Teams (ASTs).⁴⁶

ASTs are made up of seconded national experts, including interpreters, participating in the Asylum Intervention Pool.⁴⁷ Member States contribute to this Pool by proposing experts that correspond to the required profiles.⁴⁸ They retain autonomy regarding the selection of the number and profiles of deployed experts, as well as the duration of their deployment.⁴⁹ While the Regulation clarifies that they should make those experts available for deployment at EASO's request, it also foresees an exception.⁵⁰ Member States can refuse the deployment if "they are faced with a situation substantially affecting the discharge of national duties, such as one resulting in insufficient staffing for the performing of procedures to determine the status of persons applying for international protection".⁵¹ This wording weakens the "solidarity potential" of this provision, qualifying the availability of the "pledged" experts.

An Operating Plan agreed between the Executive Director and the Member State requesting assistance measures regulates deployment.⁵² This plan includes elements such as the description of the situation; the geographical area of responsibility in the requesting Member State; the forecast duration of the teams' deployment; tasks and special instructions for the teams; and their composition.⁵³ A further organisational el-

⁴³ See EASO Regulation, Arts 10 and 13.

⁴⁴ *Ivi*, Art. 13, para. 1.

⁴⁵ *Ivi*, Art. 13, para. 2.

⁴⁶ *Ivi*, Art. 10, let. a)-c).

⁴⁷ *Ivi*, Art. 15.

⁴⁸ *Ivi*, Art. 15, para. 2.

⁴⁹ *Ivi*, Art. 16, para. 1.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ivi*, Art. 18, para. 1.

⁵³ *Ivi*, Art. 18, para. 1, let. a)-e).

ement is the designation of a national contact point in each Member State that is to communicate with EASO.⁵⁴ In addition, the Executive Director is to designate a “Union contact point”, meaning one or more Support Office experts, to act on behalf of EASO in all aspects regarding the deployment of ASTs.⁵⁵ They undertake a central coordinating function. They are to act as interface between the Member States and EASO, as well as between EASO and ASTs; to monitor the correct implementation of the operating plan; and to report to EASO on all aspects of the deployment.⁵⁶

Finally, the Regulation contains specific provisions on civil and criminal liability of the seconded experts that make up the ASTs during their deployment. The host Member State is liable for any damage caused during the operations of ASTs.⁵⁷ However, where damage is caused by gross negligence or wilful misconduct, the host Member State may approach the home Member State (the State of the deployed expert) to have any sums it has paid reimbursed.⁵⁸ During their deployment, members of an AST are treated in the same way as officials of the host State with regard to any criminal offence committed by or against them.⁵⁹

II.2. EASO’S RESOURCES: A PAPER TIGER?

Despite the fact that EASO does not hold decision-making powers, its mandate is broad. Member States and the EU institutions placed great expectations on it. A characteristic example is the following passage from the Communication COM(2014) 154 on making an open and secure Europe “happen”: “[t]he European Asylum Support Office (EASO) will play an important role in this endeavor [i.e. consolidating CEAS], helping to improve the quality of asylum assessments and harmonising practices across the EU, also by monitoring the quality of asylum decisions and pooling Member States’ Country of Origin Information (COI)”.⁶⁰

The Council conclusions of 8 March 2012 on implementing solidarity included similar ambitious declarations mentioning EASO no fewer than 25 times in an 8 page document.⁶¹ EASO was broadly viewed as the panacea that would solve the EU asylum policy’s implementation problems, without breaching the confines of executive federalism.

⁵⁴ Ivi, Art. 19.

⁵⁵ Ivi, Art. 20, paras 1-2.

⁵⁶ Ivi, Art. 20, para. 2, let. a)-d).

⁵⁷ Ivi, Art. 21, para. 1.

⁵⁸ Ivi, Art. 21, para. 2. See also paras 3-5 for further details.

⁵⁹ Ivi, Art. 22.

⁶⁰ See Communication COM(2014) 154 final of 11 March 2014 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *An open and secure Europe: making it happen*, p. 6.

⁶¹ Council conclusions of 8 March 2012 on a Common Framework for genuine and practical solidarity towards Member States facing particular pressures on their asylum systems, including through mixed migration flows Council of the European Union.

This was in addition expected to happen without the EU, or the Member States, digging deep in their pockets for money either.

The agency's financial resources have been steadily growing, but for the first five years of its operations were not commensurate to its tasks and the policy rhetoric surrounding the agency. Its budget started from a modest euro 8 million in 2011,⁶² was raised to euro 10 million in 2012⁶³ and again raised in 2013 to reach euro 12 million.⁶⁴ The next increase happened in 2014 when the budget jumped to around euro 15,6 million⁶⁵ and remained at about the same level in 2015.⁶⁶

To bring a sense of measure to the agency's budget during these first five years, it is interesting to compare it with that of FRONTEX for the same period. In 2011 the FRONTEX budget was already as high as euro 86,3 million.⁶⁷ It slightly decreased in 2012,⁶⁸ but then augmented the two following years respectively to euro 93,9 million in 2013⁶⁹ and euro 97,9 million in 2014.⁷⁰ The increase during 2015 was impressive, with three consecutive amendments adopted during that calendar year and a final budget of euro 143 million.⁷¹ Further revealing conclusions can be drawn when studying the precise allocation per area of activity. Although I do not undertake this analytical exercise in detail, I evoke some trends. I leave aside the first two years of the agency's functioning when we could consider that it was still in the early stages of recruiting personnel and setting up its activities. In 2013, the small overall budget meant, for example, that a mere euro 150'000 were available for activities on resettlement and the entire area of third country support.⁷² In 2014, no more than euro 250'000 were budgeted for actions related to early warning and data analysis.⁷³ The agency's external evaluation covering the years 2011-2014 nevertheless concluded that "EASO's budget reflects the agency's stage of development", essentially treating it as a start-up agency.⁷⁴

⁶² See EASO, *Etat des recettes et des dépenses du Bureau européen d'appui en matière d'asile (EASO) pour l'exercice 2012*, doc. 2012/C 000/12.

⁶³ *Ibid.*

⁶⁴ EASO, *Budget 2013*, www.easo.europa.eu, p. 8.

⁶⁵ This final amount is included in: EASO, *EASO Statement of Revenues and Expenditures 2014: Amendment 2/2014*, www.easo.europa.eu, p. 9.

⁶⁶ The budget was amended twice in 2015. The final amount was euro 15.9 million. See EASO, *EASO Statement of Revenues and Expenditures 2015: Amendment 2/2015*, www.easo.europa.eu, p. 1.

⁶⁷ See FRONTEX, *Budget 2011*, frontex.europa.eu, p. 5.

⁶⁸ It decreased to the amount of euro 84.9 millions. See FRONTEX, *Budget 2012*, frontex.europa.eu, p. 5.

⁶⁹ See FRONTEX, *Budget 2013*, 4 November 2013, frontex.europa.eu, p. 3.

⁷⁰ FRONTEX, *Budget 2014*, frontex.europa.eu, p. 2.

⁷¹ See FRONTEX, *Amended Budget 2015 N3*, 6 November 2015, frontex.europa.eu, p. 1.

⁷² See EASO, *EASO Work Program 2013*, www.easo.europa.eu, p. 10.

⁷³ See EASO, *EASO Work Program 2014*, www.easo.europa.eu, p. 11.

⁷⁴ See Ernst and Young, *European Asylum Support Office: Independent External Evaluation of EASO's Activities Covering the Period from February 2011 to June 2014*, 2015, p. 81 (hereafter: EASO External Evaluation).

It was not until 2016 that the EU and its Member States significantly augmented EASO's budget. Already amended three times, the agency's budget reached euro 56,9 million.⁷⁵ This means that the budget quadrupled in the course of a single year and attests to the increasingly operational role that the agency has to play. Indeed, one third of its budget (i.e. close to euro 20 million) is geared towards the implementation of the EU-Turkey agreement.⁷⁶ This confirms trends highlighted by the agency's external evaluator, i.e. that over the course of the first five years, operational expenditures have been gaining more and more weight both in absolute and relative terms.⁷⁷ This enhanced amount is still a far cry from the resources available to FRONTEX for the current year that have augmented to euro 254 million, i.e. around five times more than the augmented EASO budget.

III. OPERATIONAL SUPPORT: FROM EXPERT CONSULTANTS TOWARDS AN INTEGRATED EU ADMINISTRATION?

Operational support constituted one of the first tasks the agency was called upon to fulfil, with the Greek Government requesting the deployment of asylum support teams in February 2011. The following sections provide an insight into operational support, highlighting how it has evolved during the five years of the agency's operations. They note areas where the operationalisation of the mandate stretches, or even exceeds, legal limits, meaning either EASO Regulation, or more broadly the confines of executive federalism as enshrined in the EU Treaties.

The type of operational activities that deployed experts undertake has evolved from expert consultancy towards forms of joint implementation in the "hotspots". The 2015 "refugee crisis" marked a new departure in terms of both the overall volume of the agency-coordinated deployments, as well as the nature of activities undertaken by deployed experts.

The agency has further refined the types of operational activities to four, without an official basis in EASO Regulation. It distinguishes between "special support";⁷⁸ "emergency support";⁷⁹ "joint processing activities";⁸⁰ and the "hotspot approach". These cate-

⁷⁵ See EASO, *EASO Statement of Revenues and Expenditures 2016: Amendment n. 3*, 20 September 2016, www.easo.europa.eu, p. 2.

⁷⁶ *Ibid.*

⁷⁷ Ernst and Young, *EASO External Evaluation*, cit., pp. 83-85.

⁷⁸ This according to EASO refers to "tailor-made assistance in order to improve the implementation of the CEAS: capacity building, facilitation and coordination of relocation, specific support and special quality control tools". See EASO, *Types of operations*, www.easo.europa.eu.

⁷⁹ This refers to "organising solidarity for Member States subject to particular pressures by providing temporary support and assistance to repair or rebuild asylum and reception systems". See *ibid.*

⁸⁰ These refer to "Member States who are in need of external help in the management of their specific case-load can request from EASO the deployment of Joint Processing Support Teams. The joint

gories offer little conceptual clarity. Relocation is classified under “special support”, whereas it is clear that under current practice it constitutes an emergency measure. The term “joint processing support teams” is nowhere in EASO Regulation. As the agency explains: “joint processing activities are not limited to emergency situations. In fact, as part of a broader sense of contingency planning and response, Member States are encouraged to enhance their cooperation in this new field based on e.g. geographical proximity, or language similarities”.⁸¹

On its website, the agency mentions deployments also in these cases, and mentions concepts such as “terms of reference” and agreement for the “main criteria for deployment”. This would point to a new category of deployment, using parts of the framework of the Asylum Support Teams. Nonetheless, the latter according to EASO Regulation are reserved for situations of particular pressure.

A patchwork of practices has thus sprung up and their exact relation to the legal mandate is not absolutely clear. While some flexibility and “hands on approach” is necessary, it seems that reality has rendered the predefined legal categories somewhat obsolete. This is more so in the case of operations at hotspots. Given the special character that operational support under the “hotspot approach” presents and its unique characteristics, I distinguish between EASO operational support outside the hotspot framework, and the hotspot approach.

III.1. EASO OPERATIONAL SUPPORT OUTSIDE THE HOTSPOT APPROACH

The limits between “emergency support” and “special support” are fluid. As the next sections reveal, in practice Special Support Plans often succeed Operating Plans under emergency support, whereas the situation continues to be one of particular pressure. Hence, I examine these two types of operations together (subsection *a*). A different exercise were the pilot projects in joint processing that took place during 2014 and 2015. These pilots were not linked with emergency, or a particular need for support (subsection *b*). Finally, EASO’s involvement in the external dimension that started sluggishly but has been growing in intensity is also part of its operations (subsection *c*).

a) Emergency and special support: concepts and operations without borders?

The Asylum Intervention Pool from which EASO can draw Member States’ experts for deployment in Asylum Support Teams was reportedly made of about 500 experts grouped under 18 profiles in 2015.⁸² EASO provided operational assistance to six Member States between 2011 and the summer of 2016: Bulgaria; Cyprus; Greece; Italy; Lux-

processing activities are launched by EASO and the respective hosting Member State, after the Terms of reference, including the main criteria of deployment of the joint processing teams, have been agreed upon”. See *ibid*.

⁸¹ See EASO, *Operational support*, www.easo.europa.eu.

⁸² EASO, *Five Years of EASO: Results and Perspectives*, 2015, www.easo.europa.eu, p. 13.

embourg; Sweden. Even excluding the specific case of hotspots, the operations in these Member States present differences.

Operational support in Luxembourg and Sweden was small scale and short term. In Sweden, targeted support was provided in the form of training members of the Swedish Migration Board in specific modules so that they could later train colleagues.⁸³ Luxembourg was a similar case; due to an increase in asylum applications the national authority hired simultaneously a new group of five decision-makers who had to be swiftly trained.⁸⁴ Activities revolved around training in specific modules and interviewing techniques.⁸⁵ While the number of additional decision-makers might not seem impressive *in abstracto*, *in concreto* it posed a challenge given that Luxembourg's Refugee Unit numbered a total of eight until that point. This illustrates that EASO has adopted a flexible understanding of pressure and emergency, and that it assesses this in relative, rather than absolute terms.

Deployments in Cyprus could be clustered under a different category. The needs were structural, rather than isolated in a specific area, such as training, and spanned wider in time.⁸⁶ However, the overall numbers of asylum seekers in Cyprus are modest in an absolute scale. This shows that small deployments of ASTs can have a greater impact. Measures in Cyprus included workshops on enhancing collection of COI and analytical capacity; training; vulnerability identification, including age assessment; study visits of Cypriot authorities; and finally, support in reception in the sense of enhancing the capacity of the Cypriot Asylum Service in managing and developing improved reception facilities.⁸⁷

The other three Member States that EASO assisted, Bulgaria, Greece, and Italy, present different characteristics. Even before the 2015 "crisis", they faced arrivals of mixed flows that were significant not only in relative, but also in absolute terms, and their asylum systems were underdeveloped, lacking the financial and human resources necessary to meet the implementation challenges. Thus operational assistance has been a constant element in these three Member States.

EASO began operations in Greece in May 2011 under a two-year Operating Plan agreed with the Government.⁸⁸ It has steadily continued to offer assistance through a

⁸³ See EASO, *Special Support Plan Swedish Migration Board*, 21 December 2012, www.easo.europa.eu.

⁸⁴ See EASO, *Operating Plan for the Deployment of Asylum Support Teams to Luxembourg*, 26 January 2012, www.easo.europa.eu, p. 4.

⁸⁵ *Ivi*, p. 8.

⁸⁶ The Operating Plan for Cyprus, originally adopted in 2014, has been extended twice, from July 2015 – February 2016 from April 2016 – February 2017. See the original Operating Plan for Cyprus which provided for support from October 2013 to September 2014; EASO, *EASO Special Support Plan to Cyprus*, 5 June 2014, www.easo.europa.eu.

⁸⁷ *Ibid.*

⁸⁸ See EASO Ares(2012)249732 of 1 April 2014, *Operating Plan for the Deployment of Asylum Support Teams to Greece*.

second phase plan,⁸⁹ and later a special support plan.⁹⁰ More recently, deployments concern operations at hotspots, an issue that I explore in the next section. Under the two phases of the Operating Plan, Asylum Support Teams assisted Greek Ministries as well as the new services, i.e. the Asylum Service responsible for the examination of asylum claims, and the First Reception Service responsible for the identification and referral of the newly arrived migrants, to build up capacity.

Actions included planning a strategy to increase and sustain reception capacity for prioritised categories of asylum-seekers; developing a reception management system; writing a training action plan for reception centres' staff; training activities, some with the involvement of the United Nations High Commissioner for Refugees (UNHCR), for all members of the appeal committees, interviewers and decision-makers, and the staff of the new asylum services.⁹¹ The Special Support Plan included actions such as training, setting up a system of guardianship of minors, and better managing EU funding.⁹² 70 experts were deployed under the first plan (2011-2013) and 73 experts under the second plan (2013-2014), while training sessions (regarding mainly inclusion, interview techniques, evidence assessment and COI) were organised for 524 officials, and 55 trainers were accredited until July 2014.⁹³

Assistance to Bulgaria also started under an Operating Plan,⁹⁴ succeeded by a Support Plan running from October 2014 to June 2016, and extended again until June 2017.⁹⁵ Under the Operating Plan, ASTs in Bulgaria took up more hands on tasks, such as support with identification and pre-registration and support with the preparation of the asylum file. However, the scale of the deployment under the first plan was modest, for example for the first task eight experts were deployed, but apart from one who stayed for 90 days, the rest had small missions between 3-12 calendar days each.⁹⁶ The Special Support Plans that succeeded the Operating Plan contain activities of a different nature, mainly focusing on training, assistance in statistics and data analysis, or capacity building in the area of quality tools.⁹⁷

⁸⁹ See EASO, *Operating Plan-Phase II for the Deployment of Asylum Support Teams to Greece*, 07 March 2013, www.easo.europa.eu.

⁹⁰ EASO EASO/COS/2015/379 of 13 May 2015, *EASO Special Support Plan to Greece*.

⁹¹ See for analysis P. MCDONOUGH, E. TSOURDI, *Asylum and EU Solidarity: The "Other" Greek Crisis*, in *Refugee Survey Quarterly*, 2012, pp. 80-96.

⁹² See EASO, *EASO Special Support Plan to Greece*, cit.

⁹³ See, EASO, *EASO Operating Plan for Greece: Interim Assessment of Implementation*, 28 July 2014, www.easo.europa.eu. For an assessment of the impact of ASTs in Greece see also P. MCDONOUGH, E. TSOURDI, *The "Other" Greek Crisis: Asylum and EU Solidarity*, cit., p. 67 *et seq.*

⁹⁴ See EASO, EASO/COS/2013/336 of 17 October 2013, *EASO Operating Plan to Bulgaria*.

⁹⁵ See respectively, EASO, EASO/COS/2014/975 of 5 December 2014, *EASO Special Support Plan to Bulgaria* and EASO, EASO/2016/COS/924 of 10 June 2016, *EASO Special Support Plan to Bulgaria - Amendment No 1*.

⁹⁶ See EASO, *Operating Plan to Bulgaria*, cit., p. 6.

⁹⁷ See EASO, *EASO Special Support Plan to Bulgaria - Amendment No 1*, cit., pp. 2-9.

Prior to the hotspot operations, Italy had signed a Special Support Plan that ran from June 2013 until the end of 2014,⁹⁸ extended in March 2015.⁹⁹ The activities under the first plan included support in data collection and analysis (through expert advice such as dedicated training and organising workshops); training in interview techniques; and study visits for senior management. The second phase of the support plan, while including similar activities, also involved elements of joint processing. Deployed experts conducted preparatory acts, such as initial registration of claims and case prioritisation, COI checks, and vulnerability assessment.¹⁰⁰ They were also involved in jointly processing incoming and outgoing Dublin requests.¹⁰¹ These actions are the first signs of crossing the bridge between support activities and joint implementation.

b) Joint processing: from concept to reality.

The idea of joint processing of asylum applications has been lingering in the policy agenda, however a feasibility study for the Commission was only concluded in 2013.¹⁰² The content of the term joint processing is yet to be clarified. It allows for the development of various practices. For the purpose of the above-mentioned study, the Commission retained a broad definition:

“[a]n arrangement under which the processing of asylum applications is jointly conducted by two or more Member States, or by the European Asylum Support Office (EASO), with the potential participation of the UNHCR, within the territory of the EU, and which includes the definition of clear responsibilities during the asylum procedure and possibly also for dealing with the person whose application was jointly processed immediately after a decision on his/her case was taken”.¹⁰³

Ramboll and Eurasyllum then contemplated different options (feasibility assessment technique) ranging from assistance in emergency scenarios through agency deployments, to a completely harmonised approach, meaning centralised processing.¹⁰⁴

Cognisant of the legal limitation included in the EASO Regulation, I distinguish here between three scenarios: assisted processing; common processing; and EU-level processing. I understand assisted processing to refer to the examination of asylum applications by officials of the competent Member State with the support of officials of one or another Member State, possibly coordinated through EASO. This would mean in practice either that national officials are active at every procedural stage and are merely assisted

⁹⁸ See EASO, *EASO Special Support Plan to Italy*, 4 June 2013, www.easo.europa.eu.

⁹⁹ See EASO, *EASO Special Support Plan to Italy-Phase II*, 11 March 2015, www.easo.europa.eu.

¹⁰⁰ Ivi, p. 6.

¹⁰¹ Ivi, pp. 7-8.

¹⁰² See Ramboll and Eurasyllum, *Study on the Feasibility and legal and practical implications of establishing a mechanism for the joint processing of asylum applications on the territory of the EU*, 13 February 2013, ec.europa.eu.

¹⁰³ Ivi, p. 2.

¹⁰⁴ Ivi, pp. 2-4.

by the EU (coordinated) level, or that deployed experts are conducting independently exclusively preparatory acts and not undertaking actions or adopting decisions that involve administrative discretion. Common processing essentially refers to “mixed”, or “composite” administrative proceedings.¹⁰⁵ Broadly speaking: “they ensure that input into single administrative procedures can be given from authorities from various jurisdictions. Irrespective of whether a final decision will be taken by a Member State or an EU authority, both levels can thus be directly involved in a single administrative procedure”.¹⁰⁶

Their “mixed”, or “composite” character refers to the variety of jurisdictions involved in a single administrative procedure. Namely, they concern asylum-related decision-making. They occur when the EU (coordinated) level would be exclusively responsible for one or more parts of the procedure that involve taking decisions involving administrative discretion (such as responsibility determination under Dublin, or proposing a decision on the basis of an interview). The final scenario is then EU-level processing, where the joint elements disappear, as the decision is taken entirely by an EU authority instead of the Member States. This third scenario is legally impossible under the TFEU, which envisages that “a Member State” is ultimately responsible for the examination of an application.¹⁰⁷ The second scenario is also beyond the limits of the current mandate of EASO that excludes direct or indirect powers in relation to the taking of decisions by Member States' asylum authorities on individual applications for international protection.¹⁰⁸ Only the first scenario is within EASO's mandate.

A number of pilot joint processing exercises took place between June 2014 and June 2015. EASO stated that 22 experts took part in the joint processing pilot projects conducted by EASO in nine Member States in 2014 and 18 experts from 15 Member States were involved in three EASO pilot projects in 2015.¹⁰⁹ These were one off, short-term exercises to test the feasibility (in practice) of these activities. Activities the deployed experts undertook fell both under the first and second scenarios contemplated above. Two examples illustrate this point.

¹⁰⁵ On mixed or composite administrative proceedings in EU law more broadly see characteristically: G. DELLA CANANEA, *The European Union's Mixed Administrative Proceedings*, in *Law and Contemporary Problems*, 2004, p. 197 *et seq.*; M.P. CHITI, *Forms of European Administrative Action*, in *Law and Contemporary Problems*, 2004, p. 37 *et seq.*; H.C. HOFMAN, *Composite Decision-Making Procedures in EU Administrative Law*, in H.C. HOFMAN, A. TÜRK (eds), *Legal Challenges in EU Administrative Law: Towards an Integrated Administration*, Cheltenham: Edward Elgar, 2009, p. 136.

¹⁰⁶ D.U. GALETTA *et al.*, *The Context and Legal Elements of a Proposal for a Regulation on the Administrative Procedure of the European Union's Institutions, Bodies, Offices and Agencies*, European Parliament, December 2015, p. 17.

¹⁰⁷ See TFEU, Art. 78, para. 2, let. e), and above subsection II.1.c.

¹⁰⁸ See above subsection II.1.b.

¹⁰⁹ EASO, *Five Years of EASO*, cit., p.14.

A pilot implemented in Poland from 19 January to 11 February 2015 deployed twelve experts from eight countries in three locations.¹¹⁰ Two teams performed joint registration and identification of applicants together with the Polish Border Guards.¹¹¹ This involvement falls under the first scenario, that of assisted processing, since EASO stressed that they were continuously “under the supervision of the Polish Border Guards”. Another team jointly processed Dublin cases within the Dublin Unit. Regarding that part of the deployment: “[d]ue to the existing high level of harmonization (common templates, DubliNet, English as working language) they were operational within two days and performed their tasks independently. They were able to register and archive their own cases in the Polish national database”.¹¹²

In this case, whether we are in the first or second scenario depends on the extent of administrative discretion involved in “registering and archiving”. If the deployed experts actually made the decision on which Member State was responsible for processing the application as part of their tasks, then this concerned a form of common, rather than assisted processing, as this decision involves elements of administrative discretion. If they were merely typing in and archiving the decisions taken by the Polish Authorities, this was assisted processing.

Another “Asylum Determination Pilot”, involving Belgian and Swedish officials, was implemented in the Netherlands between 23 February and 13 March.¹¹³ This operation practically consisted of the following: “[t]heir task was to perform in-merit personal interviews and based on the results, prepare the draft decisions. The Belgian members of the Processing Support Team performed their tasks in Dutch, while the Swedish expert used the English language (including recording the minutes of the interview)”.¹¹⁴

These experts were not merely assisting the Dutch authorities; “each expert started working independently on their assigned cases within the first days of the exercise”.¹¹⁵ This is arguably the second scenario, common processing, which raises distinct legal questions. These pilots prepared the ground for operations in hotspots. I explore the legal implications of the trend towards joint implementation and the questions that (*de facto*) mixed administrative proceedings raise below.

c) Operational support in third countries: new frontiers?

Activities in this area only properly started in 2013 with the adoption of the “External Action Strategy” in November 2013. This is a mainly descriptive document listing the possible priorities, actions, funding schemes and partners, rather than a strategy.¹¹⁶

¹¹⁰ See EASO, *Newsletter*, March 2015, www.easo.europa.eu, p. 6.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Ivi*, p. 10.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ See EASO, *EASO External Action Strategy*, 2013, www.easo.europa.eu.

The main message it conveys is that supporting capacity-building in third countries by helping them to improve their asylum and reception capacities is the primary aim of the external action of the EASO.¹¹⁷ The most concrete initiative taken up to date was a 28 months project during the period 2014-2016. It aimed at familiarising Jordan, Morocco and Tunisia with the mandate, tools, and instruments of EASO and FRONTEX and was funded by the European Neighbourhood Policy Instrument.¹¹⁸ Activities in this framework mainly revolved around study visits of officials from the third countries in question to Member States' administrations, their participation in EASO training sessions, and needs assessment visits of EASO officials to the third countries in question.¹¹⁹ The agency envisages implementation of similar type of support activities in the framework of Regional Development and Protection Programs, in particular with respect to North Africa, as well as the Western Balkans and Turkey.¹²⁰

EASO has paid little attention to resettlement as part of its external action. Most activities at EU level in this field took place through the Resettlement and Relocation Forum. This Forum met upon the initiative of the European Commission, and through the European Resettlement Network.¹²¹ The latter is an initiative aiming at supporting the development of resettlement in Europe that was launched in May 2012 with the financial support of the EU and coordinated by the International Organisation for Migration (IOM), the United Nations High Commissioner for Refugees (UNHCR) and the International Catholic Migration Commission (ICMC). The situation is not likely to change as EASO allocated only Euro 90,000 in 2016 for resettlement, with one full time person working in this activity.¹²² Its role continues to be limited, with the main activities planned, being for it to constitute a "clearing house" in exchanging information, developing relevant methodologies and tools, and organising a practical cooperation meeting on resettlement.¹²³ Finally, apart from the specific case of Schengen associated countries, EASO has concluded no working arrangements with third country authorities competent in technical aspects of the areas covered by its founding regulation. This is one more element reflecting the weakness of the external action of the agency due to the negligible means it can allocate up to date to this area in the scope of its limited budget.

EASO's reticence is linked with the trend noted by the external evaluator of the agency's work that found no consensus on third-country support amongst Member

¹¹⁷ See P. DE BRUYCKER, E. TSOURDI, *Building the Common European Asylum System beyond Legislative Harmonisation: Practical Cooperation, Solidarity and External Dimension*, in V. CHETAIL, P. DE BRUYCKER, F. MAIANI (eds), *Reforming the Common European Asylum System: The New European Refugee Law*, Leiden, Boston: Brill/Nijhoff, 2016, p. 491.

¹¹⁸ See information on this project at the EASO website www.easo.europa.eu.

¹¹⁹ *Ibid.*

¹²⁰ See EASO, *EASO Work Program 2016*, 2015, www.easo.europa.eu, p. 32.

¹²¹ See information on the European Resettlement Network through its website www.resettlement.eu.

¹²² See EASO, *EASO Work Program 2016*, 2015, cit. p. 35.

¹²³ *Ivi*, pp. 34-35.

States.¹²⁴ This was due to both divergence in terms of prioritising which countries should be supported first, and to reluctance to allocate part of EASO's already limited budget to third country support.¹²⁵ Where there seemed to be more agreement was on EASO stepping up its role on resettlement.¹²⁶

III.2. HOTSPOTS AS THE BREEDING GROUND FOR AN INTEGRATED EUROPEAN ADMINISTRATION

The final type of EASO operational support is framed under the “hotspot approach” to migration management. The meaning of this term is not self-evident. In fact, there is no precise legal definition, nor a concerted legal framework regulating this concept that has flooded the EU policy debate. After being evoked in a feasibility study conducted at the Commission's behest,¹²⁷ the “hotspot approach” emerged in an EU policy document through the Commission's EU Agenda on Migration:

“the Commission will set up a new 'Hotspot' approach, where the European Asylum Support Office, Frontex and Europol will work on the ground with frontline Member States to swiftly identify, register and fingerprint incoming migrants. The work of the agencies will be complementary to one another. Those claiming asylum will be immediately channelled into an asylum procedure where EASO support teams will help to process asylum cases as quickly as possible. For those not in need of protection, Frontex will help Member States by coordinating the return of irregular migrants. Europol and Eurojust will assist the host Member State with investigations to dismantle the smuggling and trafficking networks”.¹²⁸

The hotspot approach concerns inter-agency collaboration, where deployed national experts under the coordination of a specific agency operationally assist national administrations. This approach is novel: although the respective agency regulations foresaw deployments,¹²⁹ the element of interagency collaboration in what in essence would be a single operational framework was never before so clearly articulated. Moreover, although deployed experts under FRONTEX have an intense operational role, the study analysed how the majority of tasks that earlier EASO deployments undertook could be

¹²⁴ Ernst and Young, *EASO External Evaluation*, cit., p. 58.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ See Unisys, *Study on the Feasibility of the Creation of a European System of Border Guards to Control the External Borders of the Union ESBG*, 2014, pp. 24-27, ec.europa.eu.

¹²⁸ Communication COM(2015) 240 final of 13 May 2015 from the Commission on *A European Agenda on Migration*, p. 6.

¹²⁹ At the time of their development, the following legal rules applied to deployments of experts for the two agencies that mainly relate to asylum-relevant tasks: Regulation (EU) 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, Arts 8-8h and EASO Regulation, Ch. 3.

more accurately described as expert consulting. This section explores both the policy framing and the operationalisation of the hotspot approach that has led to an unprecedented integration between the EU and national levels.

a) The hotspot approach and Migration Management Support Team: definitional unpacking.

The notion of hotspot itself was developed in an informal explanatory note circulated by Commissioner Avramopoulos in July 2015 to the Justice and Home Affairs Council,¹³⁰ which stated:

“[a] ‘Hotspot’ is characterized by specific and disproportionate migratory pressure, consisting of mixed migratory flows, which are largely linked to the smuggling of migrants, and where the Member State concerned might request support and assistance to better cope with the migratory pressure. [...] In principle, an external border section should be considered to be a ‘Hotspot’ for the limited period of time during which the emergency or crisis situation subsists and during which the support of the ‘Hotspot’ approach is necessary”.¹³¹

In the meantime, the new Regulation on a European Border and Coast Guard includes a precise definition:¹³² “‘hotspot area’ means an area in which the host Member State, the Commission, relevant Union agencies and participating Member States cooperate, with the aim of managing an existing or potential disproportionate migratory challenge characterised by a significant increase in the number of migrants arriving at the external borders”.¹³³

Therefore, a “hotspot” is in essence an EU external border section facing high numbers of arrivals of third country nationals. Most often in practice, it consists of arrivals of individuals who have international protection needs, for example, fleeing persecution or generalised violence, together with individuals who do not present these needs.

The “hotspot approach” was more precisely elaborated in an annex to the September 2015 Commission Communication on managing the refugee crisis.¹³⁴ Therein, the Commission clarified that: “[t]he approach is an operational concept to maximize the added value of this support through Migration Management Support Teams. This is an operational framework for the Agencies to concentrate their support on the spot where

¹³⁰ The note, accompanying as an annex a letter dated 15 July 2015 of Commissioner Avramopoulos, is accessible through Statewatch; see Statewatch, *Explanatory note on the “Hotspot” approach*, www.statewatch.org.

¹³¹ *Ibid.*

¹³² See Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard (hereafter: EBCG Regulation). For analysis see P. DE BRUYCKER, *The European Border and Coast Guard: A New Model Built on an Old Logic*, in *European Papers*, 2016, www.europeanpapers.eu, p. 559 *et seq.*

¹³³ See EBCG Regulation, Art. 2, para. 10.

¹³⁴ See Communication COM(2015) 490 final of 23 September 2015 of the Commission, *Annex II to the Communication on Managing the Refugees Crisis: Immediate Operational, Budgetary and Legal Measures under the European Agenda on Migration*.

it is most needed, to coordinate their interventions and to cooperate closely with the authorities of the host Member State".¹³⁵

Interagency cooperation therefore finds its expression through the Migration Management Support Teams. This term was initially only included in policy documents. More recently, it has been defined in the new EBCG Regulation as: "a team of experts which provide technical and operational reinforcement to Member States at hotspot areas and which is composed of experts deployed from Member States by the European Border and Coast Guard Agency and by the European Asylum Support Office, and from the European Border and Coast Guard Agency, Europol or other relevant Union agencies".¹³⁶

As I analyse below, the proposed Regulation on a European Union Agency for Asylum also includes provisions related to Migration Management Support Teams and types of operational and technical reinforcement they would provide.¹³⁷

It becomes apparent that there is no over-arching legal framework regulating the hotspots or the deployment of Migration Management Support Teams. What exists is a patchwork of policy documents and guidelines and disparate provisions in the existing or upcoming foundational regulations of the EU agencies. Further provisions contained in the two emergency relocation decisions refer indirectly to hotspots.¹³⁸ Although such an approach is flexible, it also presents challenges for the legality of actions that are currently undertaken in the framework of hotspots. The detailed examination of all processes taking place in a hotspot extends beyond the object of this contribution.¹³⁹ I will focus instead on two issues of interest: how the operation of hotspots relates to the relocation mechanisms; and how the operation of hotspots, and consequent deployment of national experts, leads to increasing integration between the EU and national levels in conducting asylum procedures.

b) Hotspots and relocation mechanisms: a necessary complement?

Hotspots are intrinsically linked with the emergency relocation mechanisms.¹⁴⁰ Although the two Council Decisions do not mention these terms explicitly, the provisions pertaining to "operational support to Italy and Greece"¹⁴¹ refer to the hotspot approach

¹³⁵ Ivi, p. 2.

¹³⁶ EBCG Regulation, Art. 2, para. 9.

¹³⁷ See EUAA proposal, in particular twentieth recital and Art. 21.

¹³⁸ The study analyses this issue in the next subsection.

¹³⁹ For a detailed outlining of the tasks to be performed at hotspots by different agencies see: D. NEVILLE, S. SY, A. RIGON, *On the Frontline: The Hotspot Approach to Managing Migration*, European Parliament, 2016, pp. 27-29.

¹⁴⁰ See Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece (hereafter: 1st Emergency Relocation Decision) and Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (hereafter: 2nd Emergency Relocation Decision).

¹⁴¹ See 1st Emergency Relocation Decision, Art. 7 and 2nd Emergency Relocation Decision, Art. 7.

in all but name. The decisions create an obligation for the other Member States to “increase their operational support in cooperation with Italy and Greece in the area of international protection through relevant activities coordinated by EASO, Frontex and other relevant Agencies, in particular by providing, as appropriate, national experts”.¹⁴² This reference to interagency cooperation is central to the hotspot notion. The two decisions specifically foresee the following activities:

- the screening of the third-country nationals arriving in Italy and Greece, including their clear identification, fingerprinting and registration, and, where applicable, the registration of their application for international protection and, upon request by Italy or Greece, their initial processing;
- the provision to applicants or potential applicants that could be subject to relocation pursuant to this Decision of information and specific assistance that they may need;
- the preparation and organisation of return operations for third-country nationals who either did not apply for international protection or whose right to remain on the territory has ceased.¹⁴³

Finally, the decisions state that “for the purpose of facilitating the implementation of all steps of the relocation procedure, specific support shall be provided as appropriate to Italy and to Greece through relevant activities coordinated by EASO, Frontex and other relevant Agencies”.¹⁴⁴

The activities outlined above, although they encompass the relocation procedure, extend far beyond it. Essentially, they start from the identification and fingerprinting of arriving migrants and end with their potential relocation, return, or channelling to the national asylum procedure. Therefore, although according to the title of the instruments the provisional measures are supposed to concentrate on the “area of international protection”, in reality the Council has anchored therein migration-management assistance measures.

This approach is understandable on several counts. First, there was no other legal instrument covering this collaborative interagency approach. Second, this does not go beyond the competence established by Art. 78, para. 3, TFEU that allows for provisional measures, for the benefit of Member States faced “with an emergency situation characterised by a sudden inflow of nationals of third countries”. The sudden inflow generates needs not only related to the processing of asylum claims, but also related to the initial reception, identification and referral of arriving individuals, and extends to the phase of potential return. Finally, the approach reveals that the provisional people-sharing is accompanied with an obligation to “put one’s house in order”.

¹⁴² See 1st Emergency Relocation Decision, Art. 7, para. 1 and 2nd Emergency Relocation Decision, Art. 7, para. 1.

¹⁴³ *Ibid.*

¹⁴⁴ See 1st Emergency Relocation Decision, Art. 7, para. 2 and 2nd Emergency Relocation Decision, Art. 7, para. 2.

A different provision in the decisions, which calls for “complementary measures to be taken by Italy and Greece”, illustrates this point.¹⁴⁵ These include the adoption of a roadmap which “shall include adequate measures in the area of asylum, first reception and return, enhancing the capacity, quality and efficiency of their systems in these areas, as well as measures to ensure appropriate implementation of this Decision”.¹⁴⁶ Considering these obligations, Francesco Maiani has critically observed: “[o]n the whole, notwithstanding the ‘assistance’ rhetoric, hotspots are clearly designed to shift back on frontline states all the responsibilities they (theoretically) shoulder under current EU legislation: to identify migrants, to provide first reception, to identify and return those who do not claim protection, and to channel those who do so towards asylum procedures in the responsible state – in most cases, none other than the frontline state itself”.¹⁴⁷

Therefore, emergency relocation inscribed in this framework is meant to establish a renewed impetus for Member States at the external borders to implement their obligations. Hotspots and emergency relocation are complementary; in fact, emergency relocation is meant to somewhat offset the increased obligations that Member States at the external border incur under the current rules. Another provision that foresees a new type of sanction for non-implementation of the above obligations evidences this logic. Namely, the Commission may decide, “having given the State concerned the opportunity to present its views”, to suspend the applicability of emergency relocation mechanisms for three months; a period that could be extended once.¹⁴⁸

As a result, parallel to the rolling out of the emergency relocation procedure, Italy¹⁴⁹ and Greece¹⁵⁰ have each adopted a roadmap containing an array of measures that they would implement, including setting up initial registration and identification centres, that have ended up also being referred to as “hotspots”.¹⁵¹ Italy committed to set up six

¹⁴⁵ See 1st Emergency Relocation Decision, Art. 8 and 2nd Emergency Relocation Decision, Art. 8.

¹⁴⁶ See 1st Emergency Relocation Decision, Art. 8, para. 1 and 2nd Emergency Relocation Decision, Art. 8, para. 1.

¹⁴⁷ See F. MAIANI, *Hotspots and Relocation Schemes: the Right Therapy for the Common European Asylum System?*, in *EU Immigration and Asylum Law and Policy*, 3 February 2016, eumigrationlawblog.eu.

¹⁴⁸ See 1st Emergency Relocation Decision, Art. 8, para. 2 and 2nd Emergency Relocation Decision, Art. 8, para. 2.

¹⁴⁹ An annotated, unofficial English translation of the Italian roadmap is available through Statewatch; see Y. MACCANICO, *The Italian Roadmap 2015: Hotspots, Readmissions, Asylum Procedures and the Re-opening of Detention Centres*, November 2015, www.statewatch.org. The full reference for the official text in Italian is Ministero dell'Interno, *Roadmap Italiana*, 28 September 2015, www.statewatch.org.

¹⁵⁰ Greece presented its roadmap to the Council on 1 October 2015; see Communication COM(2016) 165 final of 16 March 2016 from the Commission, *First Report on Relocation and Resettlement* (hereafter: *First Report on Relocation*), p. 2.

¹⁵¹ Although, as analysed above, a “hotspot” is the entire border area that is facing high numbers of arrivals of mixed migration flows, in practice the term “hotspot” is also used by policy-makers and the press when referring to specific centres of identification and registration in these border areas.

hotspots: five in Sicily and one in Apulia,¹⁵² while Greece committed to setting up five on islands in the Aegean Sea.¹⁵³ Moreover, it is foreseen that an EU Regional Taskforce (EU RTF), headquartered in each of the two Member States would coordinate operational support. This is in effect an operational hub that pools officers from FRONTEX, EASO and Europol, as well as from the host Member State.¹⁵⁴ Representatives from EUROJUST and other EU agencies may be deployed as well in the EU RTF, while it is also charged with liaising with other organisations.¹⁵⁵ Initially, there was foot-dragging by the two Member States regarding the hotspot component, with the Commission continuously following-up on and publicly reporting on the slow progress achieved.¹⁵⁶

By mid-June 2016 all five hotspots on the Greek territory were operational,¹⁵⁷ while by mid-July 2016 four of the six hotspots were operational in Italy, and since arrivals took place also in different locations, the European Commission and Italian authorities had agreed to set up mobile hotspots.¹⁵⁸ The EU Regional Task Forces are also operational, based in Pireaus (Athens) and Catania (Sicily). The Commission has started to report publicly in the same document about the progress by the two Member States in building up asylum capacity and implementing their roadmaps, and the progress of the other Member States in offering relocation places and making available experts for deployment. Therefore, the “naming and shaming” goes in all directions and the *quid pro quo* of assistance in exchange for implementation of the original obligations is becoming more evident. The ultimate goal is to return to the “normal” running of the Dublin system, including returns to those two frontline Member States of applicants who have conducted secondary movements outside the relocation framework.¹⁵⁹ The next subsection of this re-

¹⁵² See European Commission, *First Report on Relocation*, cit., p. 2.

¹⁵³ Ivi, p. 5.

¹⁵⁴ See D. NEVILLE, S. SY, A. RIGON, *On the Frontline: The Hotspot Approach*, cit., p. 27.

¹⁵⁵ *Ibid.*

¹⁵⁶ See Communication COM(2015) 510 final of 14 October 2015 from the Commission on managing the refugee crisis: State of play of the implementation of the priority actions under the European Agenda on Migration; Communication COM(2015) 678 final of 15 December 2015 from the Commission, *Progress Report on the Implementation of the hotspots in Greece*; Communication COM(2016) 85 final of 10 February 2016 from the Commission on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration; Commission, *Progress Report on the Implementation of the Hotspots Approach in Greece*, COM(2016) 141 final.

¹⁵⁷ See Communication COM(2016) 416 final of 15 June 2016 from the Commission, *Fourth Report on Relocation and Resettlement*, p. 5.

¹⁵⁸ Ivi, p. 7.

¹⁵⁹ Dublin returns to Italy are continuing, although there is jurisprudence of asylum seekers contesting their transfer to Italy, mainly on the basis of deficiencies in the reception conditions in that Member State. See European Court of Human Rights, judgment of 4 November 2011, no. 29217/12, *Tarakhel v. Switzerland*. Regarding Greece, there is currently a *de facto* halt of returns under the Dublin system as a result of the European Court of Human Rights and CJEU case-law. The Commission has repeated that the aim is the resumption of the Dublin system, notably the resumption of returns of asylum seekers to Greece. See Commission Recommendation C(2016) 871 of 10 February 2016

search comments on the sustainability of this approach. I first analyse the practical effects and dynamics resulting from the collaborative processes between the EU and national administrations in this new setting of hotspots, and ascertain what trends they reveal.

c) Hotspots and agency-coordinated operational activities: is the increasing integration between the EU and national levels stretching or exceeding the current legal limits?

The deployed experts in hotspots are to be operational, conducting a variety of tasks (such as identification, registration, etc.) alongside national administrations. Agency-coordinated deployments in Greece are currently much more extensive than those in Italy.¹⁶⁰ This has to do with the fact that arrivals of irregular migrants during the early months of 2016 through the sea borders, where the hotspots are situated in Greece, continued to be high.¹⁶¹ Moreover, a trend that was critically observed earlier in 2016 in the study for the European Parliament by Neville, Sy and Rigon on hotspots¹⁶² continues. Namely, FRONTEX deployments greatly outnumber those of other agencies. FRONTEX has currently deployed in hotspots on Greek soil 474 seconded national officers, compared to 121 EASO-deployed national experts; while in Italy there are 89 FRONTEX-deployed seconded officers, compared to 19 EASO-deployed national experts.¹⁶³

The numbers lead to concerns over the potential disproportionate emphasis placed in hotspots on preventing irregular migration and effecting return, rather than on granting immediate humanitarian assistance and asylum processing.¹⁶⁴ Prior to the operation of the hotspots this emphasis on border control and return was not as present in Italy or Greece; in reality it is the EU level involvement that has brought it about. Increased capacity came with a particular focus. The clear turn to the objective of implementing return through hotspots in Greece after the operationalisation of the EU-Turkey deal compounds

addressed to the Hellenic Republic on the urgent measures to be taken by Greece in view of the resumption of transfers under Regulation (EU) No. 604/2013; European Commission, *Back to Schengen - A Roadmap*, COM(2016) 120 final and Commission Recommendation C(2016) 3805 of 15 March 2016 addressed to the Hellenic Republic on the urgent measures to be taken by Greece in view of the resumption of transfers under Regulation (EU) No. 604/2013; and, more recently, Commission Recommendation C(2016) 6311 of 28 February 2016 addressed to the Hellenic Republic on the urgent measures to be taken by Greece in view of the resumption of transfers under Regulation (EU) No. 604/2013.

¹⁶⁰ See European Commission, *Hotspot State of Play*, 11 November 2016, ec.europa.eu.

¹⁶¹ Statistics to that extent are available (in Greek) from the Hellenic Police and report the apprehension of 155,679 migrants by the Greek Coast Guard in the Greek-Turkish sea borders during the first six months of 2016. See Hellenic Police, *Statistics on Irregular Entry at the Greek Turkish Border for the First Six Months of 2016* (author's own translation), www.astynomia.gr.

¹⁶² See D. NEVILLE, S. SY, A. RIGON, *On the Frontline: The Hotspot Approach*, cit., in particular pp. 34-35, 38-39 and 42.

¹⁶³ Author's own calculations on the basis of the Commission official data.

¹⁶⁴ Frances Webber has expressed this concern as a potential outcome before the hotspots had even begun functioning: "EU's relocation package could turn out to be a fig leaf for a quiet but massive removal operation against, rather than a protection operation for, those arriving on Europe's shores". See F. WEBBER, *"Hotspots" for Asylum Applications: Some Things We Urgently Need to Know*, in *EU Law Analysis*, 29 September 2015, eulawanalysis.blogspot.be.

these concerns. Aspects of this deepening of administrative integration are also at the fringes, if not outside, the current legal framework at EU or national levels. I substantiate these points in greater detail below focusing on the case of Greece.

In Greece, national administrative law caught up with the deepening of integration between the EU and national levels.¹⁶⁵ Notably, a law adopted in April 2016 and amended in June 2016, transposing among other elements the recast Asylum Procedures Directive, establishes an accelerated border asylum procedure, addressing also the situation at hotspots.¹⁶⁶ It states that in case of large number of arriving third country nationals or stateless persons who seek asylum at border areas, in transit zones, or in centres of reception and identification (which is the name given under Greek legislation to hotspots), an exceptional procedure applies.¹⁶⁷ Its main elements are: *a*) asylum claims may be recorded by personnel of the Greek Police or the Greek Armed Forces; *b*) interviews with applicants for international protection may be conducted by personnel made available by EASO; *c*) extremely truncated deadlines for asylum processing, notably a deadline of one day for applicants to prepare for the first-instance interview, and a maximum of three days for deciding on appeals.¹⁶⁸

This exceptional procedure may not be applied to individuals belonging to vulnerable groups, or to persons falling within the family provisions of the recast Dublin Regulation.¹⁶⁹ The national law also contains provisions on finding an application inadmissible, which include protection in a safe third country and first country of asylum.¹⁷⁰ This guarantees that there is an actual admissibility procedure, anchored within the asylum framework. Nevertheless, this does not mean the legislation and ensuing practice is beyond reproach.

This research comments first on the collaboration between the Greek Asylum Service (the administrative body responsible for first-instance decision-making) and EASO-coordinated experts. The provisions in national law on EASO involvement were amended in June 2016. Notably, the original April 2016 version of Law 4375/2016 stated that interpreters, as well as seconded personnel made available by EASO, may assist the Greek Asylum Service in recording the claim; the interview; and any other process. The

¹⁶⁵ I am referring to Law no. 4375 of 3 April 2016. The amendments to the law were published on the 22nd June 2016, Official Gazette of the Greek Government, Series A, Issue No. 117. I comment on the law on the basis of the original Greek version. For some information on the legislative framework in English see ECRE, *Greece urgently adopts controversial law to implement EU-Turkey deal*, 8 April 2016, www.ecre.org and ECRE, *Greece: Asylum Reform in the Wake of the EU-Turkey Deal*, 4 April 2016, www.asylumineurope.org, and for the amendments of June 2016 see ECRE, *Greece: Appeal Rules Amended After Rebuttal of Turkey's Safety*, 16 June 2016, www.asylumineurope.org.

¹⁶⁶ See Law 4375/2016, Art. 60, para. 4.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ See Law 4375/2016, Art. 54.

prior version of the Greek law was compatible with the limitations upon EASO according to its mandate, notably that it “shall have no powers in relation to the taking of decisions by Member States’ asylum authorities on individual applications for international protection”.¹⁷¹ That version of the law stated that the Greek Asylum Service can be assisted (μπορεί να επικουρείται) by EASO experts and interpreters. However, it did not reflect the administrative reality on the ground. Hence, the law was amended in June 2016 to state that deployed experts can conduct asylum interviews.

EASO-deployed experts at hotspots in Greece are independently conducting a part of the asylum process that entails discretion. They conduct the asylum admissibility interviews on behalf of the Greek Asylum Service, at least in the majority of cases, then submit their findings, on the basis of which the Service issues the final admissibility decision.¹⁷² Inherent parts of this process are assessing the credibility of the applicants, detecting vulnerability, and making a finding on the safety of third countries; all of these entail elements of discretion. The level of involvement of deployed experts is also discernible through EASO’s Operating Plan in Greece.¹⁷³ An amendment to that plan added a new measure entitled “support with the implementation of the admissibility procedure”.¹⁷⁴ The objective of that action is described as “[a]pplications for international protection processed on a case-by-case basis and their admissibility assessed”.¹⁷⁵

¹⁷¹ See EASO Regulation, Art. 2, para. 6.

¹⁷² See Gisti, *Accord UE-Turquie, la grande Imposture: Rapport des Mission dans le Hotspots grecs de Lesbos et Chios*, 2016, p. 13, where it is stated on the basis of a mission in Lesbos and Chios: “les agents de l’EASO conduisent l’entretien initial prévu par la procédure accélérée et veillent au préalable à ce qu’il soit procédé à l’identification des causes éventuelles de vulnérabilité et aux examens utiles. Ils soumettent leur avis aux services grecs de l’immigration et de l’asile, qui statuent ensuite sur la recevabilité de la demande d’asile”. See also C. ZIEBRITZKI, *Chaos in Chios: Legal Questions Regarding the Administrative Procedure in the Greek Hotspots*, in *EU Immigration and Asylum Law and Policy/Odysseus Blog*, 26 June 2016, eumigrationlawblog.eu. That author, a researcher at the Max Planck Institute conducting on-site research in Chios, reports regarding the hotspot on that island: “[a]t least in the majority of cases, EASO staff conduct the admissibility interview. The decision on admissibility is then issued by the Asylum Service”. See, finally, Human Rights Watch, *Greece: Refugee “Hotspots” Unsafe, Unsanitary*, 19 May 2016, where based on visits of that NGO at the hotspots of Samos, Lesbos, and Chios in mid-May 2016 it is reported that: “[t]he hotspots, officially called ‘Reception and Identification Centers’ are nominally administered by the Greek government’s First Reception Service, under the Migration Policy Ministry. Two EU agencies are a more visible presence: Frontex, the EU’s external borders agency, which conducts the initial registration, nationality screening interviews, and fingerprinting in collaboration with the Greek police, and the European Asylum Support Office (EASO), which conducts admissibility interviews and makes recommendations on admissibility to the asylum procedure to the Greek Asylum Service”.

¹⁷³ See EASO, EASO/COS/2016/391 of 1st April 2016, *EASO Hotspot Operating Plan to Greece: Amendment No. 2*, pp. 3-4.

¹⁷⁴ *Ivi*, p. 3.

¹⁷⁵ *Ivi*, p. 4.

Among the deliverables feature “[a]dmissibility interviews conducted, decisions recommended and applicants notified”.¹⁷⁶

The administrative reality is that this moves beyond assisted processing, to the realm of common processing. In terms of EU administrative law then, there is already an emergence of a variant of procedures that could be understood as *de facto* composite, or mixed, administrative procedures. Namely, although the asylum decision-maker at first instance according to both EU and national law is the Greek Asylum Service, *de facto* this decision is based on a recommendation from, and facts ascertained during, an interview conducted by experts deployed by an EU agency. Hence, this is morphing *de facto* into a composite process.

These operations at hotspots arguably give “powers in relation to the taking of decisions on individual applications”, in the very least indirect powers.¹⁷⁷ In this sense they exceed the legal limits under the EASO regulation. There is no CJEU case-law on what a direct or an indirect power is in relation to the taking of a decision on an individual application for international protection. However, emitting an opinion, even a non-binding one, on an individual case, on the basis of an independently conducted interview arguably qualifies at least as an “indirect power”. The Commission’s proposal seeks to address this disjuncture as analysed in the next section.

Nevertheless, this administrative reality does not exceed the legal limitations placed by EU primary law, i.e. Art. 78, para. 2, let. e), TFEU which foresees that “a Member State” is to be responsible for the examination of an application. The deployed experts are only formulating an opinion, which is not binding on the Greek Asylum Service according to law. It is the Greek Asylum Service that formally adopts the admissibility decision, and it has the power to adopt a decision that goes against the proposal of the deployed experts. While formally this does not go against the EU Treaties, in practice, given that overloaded Greek administrators are not present during what seems to be at least the majority of admissibility interviews, it is reasonable to assume that their role could amount to rubberstamping a decision whose merits were decided by the deployed experts.

This operational involvement of the EU also poses subsequent procedural questions. Notably, what rights do applicants enjoy during this interview with deployed experts, which is a crucial part of the asylum procedure? Normally, this process being a part of the asylum procedure, applicants should enjoy the full array of rights foreseen by the recast Asylum Procedures Directive and the Greek national law no matter who is conducting the interview; the fact that the EU level is operational should not lead to a

¹⁷⁶ *Ibid.*

¹⁷⁷ See EASO Regulation, fourteenth recital and Art. 2, para. 6.

diminution of procedural rights. However, on the ground there is uncertainty as to the procedural rights available.¹⁷⁸

Finally, another issue is the quality of decision-making that ensues from the involvement of the EU level, meaning the quality of the reasoning as evidenced in the motivation of the individual acts. Initial practice reveals cause for concern. Notably, this processing at hotspots, based on the recommendations of EASO-deployed experts, led to several decisions of inadmissibility issued by the Greek Asylum Service on the basis that Turkey constituted a safe third country. These were later overturned at appeal level. As many as 70 rulings of the Appeals Committees rebutted this presumption and overturned the related first instance decisions of the Asylum Service, while only two upheld the first instance inadmissibility decisions.¹⁷⁹

Thereafter, the Greek asylum law was modified to restructure the synthesis and procedures before the Appeals Committees.¹⁸⁰ They previously comprised one representative of the Ministry of Interior, one UNHCR representative and one representative appointed from a list of human rights experts compiled by the National Commission on Human Rights. The Committees are now made up of two administrative judges, appointed by the “General Commissioner of the Administrative Courts”, and one UNHCR representative. Experts proposed by the National Commission of Human Rights may only take part in the Committees if UNHCR is not in a position to appoint a member. The procedures themselves were amended to remove a provision which allowed the appellant to request a personal hearing before the Appeals Committees at least two days before the appeal.¹⁸¹ The Greek Government ostensibly undertook this move to address the “disjunction” between the decisions at first instance that authorised return

¹⁷⁸ See Greek Council for Refugees (GCR), *Παρατηρήσεις του Ελληνικού Συμβουλίου για τους Πρόσφυγες επί του Νόμου 4375/2016* (Observations of the Greek Council for Refugees on Law 4375/2016), 8 April 2016, www.gcr.gr; C. ZIEBRITZKI, *Chaos in Chios*, cit.

¹⁷⁹ See ECRE, *Greece: Appeal Rules Amended*, cit.

¹⁸⁰ This modification took place as part of the same June 2016 package that clarified that EASO deployed experts can conduct interviews at hotspots. See Law 4375/2016, Art. 5, para. 2. The modification seems to have been supported by the European Commission. A trace of this can be discerned in the Commission’s Second Report on the progress made in implementing the EU-Turkey statement. After noting that the pace of returns had been slower than expected, and that the great majority of initial inadmissibility decisions had been overturned by the Appeals Committees, the Commission notes the legal steps that Greece and Turkey have undertaken to achieve further progress, stating: “[t]o ensure full respect of EU and international law, Greece and Turkey have both taken a number of legislative and administrative steps. The Greek authorities have agreed to further amend their legislation to set up the new Appeal Authority and the new Appeal Committees responsible for the judicial review of decisions on applications for international protection taken by the Greek Asylum Service”. See European Commission, *Second Report on the progress made in the implementation of the EU-Turkey Statement*, COM(2016) 349, p. 4.

¹⁸¹ Namely, Art. 62, para. 1, let. e), of Law 4375/2016 was removed.

of applicants to Turkey on the basis that it constitutes a safe third country, and the extremely high rate of reversal on appeal.¹⁸²

IV. THE RISE OF A “EUROPEAN UNION AGENCY FOR ASYLUM”: INGRAINING COMMON PROCESSING?

The Commission proposal on a European Union Agency on Asylum¹⁸³ came as part of a first package of legislative measures to reform the CEAS, alongside proposals to reform the Dublin system. Overall, it enhances the agency’s mandate and resources, renaming it a European Union Agency on Asylum (EUAA). Strangely, the Commission refers to the EUAA as a “fully-fledged agency”.¹⁸⁴ Despite its prior denomination as an “office”, EASO already presented all characteristics of an EU agency,¹⁸⁵ therefore this rhetoric should be understood more a matter of political emphasis, rather than presenting legal significance.

The EUAA is based on Arts 78, paras 1 and 2, TFEU that establish a common policy on asylum and the goal of a CEAS. Art. 74 TFEU no longer features as part of the legal basis, therefore the EUAA is not just a means to achieve administrative co-operation between national administrations. This reflects the Commission’s statement in April 2016 that EASO is an integral part of CEAS, as well as part of the agency’s proposed new mandate that arguably goes beyond the scope of the concept of “administrative cooperation”, such as its envisaged monitoring functions. Despite various policy declarations on the importance of EASO as an instrument of realising solidarity, Art. 80 TFEU on the principle of solidarity and fair-sharing does not feature as an additional legal basis. The Commission remains equivocal regarding its legal understanding, never having positioned itself clearly on the matter, other than stating that its endorsement on final compromises between the Parliament and the Council regarding the legal basis do not prejudice its future position. Not invoking Art. 80 TFEU is a sign that the Commission retains a cautious approach on this topic.

In this section I provide a critical overview of the envisaged EUAA mandate in terms of operational support. Given the preceding analysis, I focus on new elements, or additions to the agency’s current mandate. I highlight new trends in the implementation modes of the CEAS to ascertain to what extent the emergency-driven responses have been internalised. The first article of the new Regulation sets the ambitious tone of the proposal: “[t]he European Union Agency for Asylum (the Agency) shall ensure the efficient and uniform application of Union asylum law in Member States. It shall facilitate

¹⁸² See press coverage of the first decisions rendered by the modified committees; P. KINGSLEY, *Reformed Greek Appeals Panel Upholds Syrian Refugee’s Deportation*, in *The Guardian*, 12 September 2016, www.theguardian.com.

¹⁸³ EUAA proposal, cit.

¹⁸⁴ See EUAA proposal, *Explanatory Memorandum*, p. 2.

¹⁸⁵ See analysis above, subsection II.1.a).

the implementation and improve the functioning of the Common European Asylum System (CEAS), and it shall be responsible for enabling convergence in the assessment of applications for international protection across the Union".¹⁸⁶

These elements go far beyond support, or administrative cooperation. Rather, it seems the EUAA will be the vessel through which the implementation challenges of the asylum policy will be overcome. Should this proposal be adopted, the agency's functions would evolve to include processes that include directly steering implementation, as well as a monitoring function. In addition, elements of not only assisted, but also common processing would be ingrained in the mandate. The next paragraphs substantiate this point.

One final point is that the Commission envisages a significant boost in the agency's resources. It raises the perspective of assigning euro 363.9 million to the agency for 2017-2020.¹⁸⁷ This would be accompanied by a significant augmentation in its staff, with 275 temporary agents and 82 contract agents joining its ranks during 2017-2020, bringing the total number of agency staff to 500 by 2020.¹⁸⁸ This would be coupled with enhanced obligations on the part of Member States to make available deployed experts, a point that I discuss below.

The proposal better reflects the reality of the work that EASO has already started undertaking, which is that operational assistance is not only offered in situations of disproportionate pressure. Rather than stretching the notion of pressure, or employing the constructive ambiguity of "operating plans" and "special support plans", the proposal clarifies that operational assistance may be requested by Member States in implementing their obligations with regard to asylum "*in particular* when their asylum and reception systems are subject to disproportionate pressure".¹⁸⁹ This means that assistance through deployments of ASTs could be envisaged in a broader context, however "for a limited period of time".¹⁹⁰ The consequence is that, at least theoretically, the agency cannot take up operational support in the long run for the implementation of the *acquis* through deployments, and that eventually Member States have to become operationally independent. In practice, previous analysis in this chapter revealed that some Member States, such as Greece, have continuously benefited from one or another type of EASO deployment since the agency's establishment, thus their needs are structural.

The envisaged measures are variegated. They include preparatory acts of the asylum procedure that do not entail administrative discretion, and thus fall under the umbrella of what I termed assisted processing. These are, for example, assistance with the identification and registration of third country nationals; assistance with the provision

¹⁸⁶ See EUAA proposal, Art. 1, para. 1.

¹⁸⁷ See EUAA proposal, *Explanatory Memorandum*, p. 5.

¹⁸⁸ *Ivi*, pp. 5-6.

¹⁸⁹ See EUAA proposal, Art. 16, para. 1.

¹⁹⁰ *Ivi*, Art. 16, para. 3.

of information on the international protection procedure, or provision of interpretation services.¹⁹¹ Such measures do not pose a problem regarding the current implementation mode arrangements, and do not breach, *de jure* or *de facto*, the limits posed by administration modes reflecting executive federalism as reflected in the TFEU.

Another type of envisaged actions arguably fall under the category I defined as common processing, since they foresee that deployed experts would conduct actions that entail administrative discretion. The Regulation refers first to “facilitat[ing] the examination of applications for international protection that are under examination by the competent national authorities”.¹⁹² The next measure is “provid[ing] assistance to competent national authorities responsible for the examination of applications for international protection”.¹⁹³ The content of facilitation and assistance is not precise, it might indeed refer only to tasks that do not entail administrative discretion. However, a subsequent provision referring to the Operational plan includes the following reference: “regarding assistance with applications for international protection, including as regards the *examination* of such applications, specific information on the tasks that the asylum support teams or the experts from the asylum intervention pool may perform as well as reference to applicable national and Union law”.¹⁹⁴

Already there is a hint that assistance may involve the examination of applications, or some part of it. Indeed, as part of the pilots on what EASO called “joint processing”, I analysed how experts from Belgium and Sweden conducted asylum interviews on behalf of the Dutch Immigration Service, while the latter remained responsible for issuing the final decision.

Things are clear where it concerns the migration management teams deployed at hotspots.¹⁹⁵ The understanding for the migration management teams is the one retained in the EBCG Regulation. Among their tasks the following is stated: “the registration of applications for international protection and, where requested by Member States, the *examination* of such applications”.¹⁹⁶ This formulation leaves little doubt that what is contemplated here is the examination of the application itself, rather than assistance, or facilitation of examination. Should this proposal be adopted, it would address the current legal ambiguities regarding EASO’s mandate which excludes even indirect powers when it comes to the adoption of individual decisions.

What about the limitations under the TFEU regarding the vertical division of competences with “a Member State” being responsible for examining an asylum claim? This provision on the hotspot related deployments should be read together with the forty-

¹⁹¹ Ivi, Art. 16, para. 3, let. a), and para. 3, let. h).

¹⁹² Ivi, Art. 16, para. 3, let. b).

¹⁹³ Ivi, Art. 16, para. 3, let. c).

¹⁹⁴ Ivi, Art. 19, let. h).

¹⁹⁵ Ivi, Art. 16, para. 3, let. j).

¹⁹⁶ Ivi, Art. 21, para. 2, let. b) (emphasis added).

sixth recital of the proposed Regulation which states: “[t]he competence to take decisions by Member States’ asylum authorities on individual applications for international protection remains with Member States”.¹⁹⁷ Once again therefore *de jure* the Regulation raises no issues; even if deployed experts have examined an application, it will, at the very least, be rubberstamped by “a” national authority. This construct is becoming increasingly artificial, when *de facto* the reality would be that the merits of the case would have been assessed by EU staff or EU-coordinated deployed national experts.

This brings me to the last set of innovations regarding deployments in the proposal. Anticipating that the staff boost in human resources would become a reality, the Regulation foresees that deployees in the ASTs could include the agency’s own staff.¹⁹⁸ In addition, there is a restrictive framework in order to ensure the availability of experts. First, the deployment cannot be less than 30 days.¹⁹⁹ One must indeed read the statistics around current prior deployments with caution, since some of the national experts were made available for as little as two-three days, for example in order to deliver a specific training session. Second, deployments may or may not relate to a situation of pressure. Where they relate to situations of disproportionate pressure, Member States *must* make available the experts they have preliminarily placed in the Asylum Intervention Pool.²⁰⁰ Currently, they may raise the issue of facing an exceptional situation themselves. This would counter the situation observed today where Member States have not been forthcoming with making available their experts for deployment in Italy and Greece.

V. CONCLUSIONS

A macroscopic view into what was initially *ad hoc* practical cooperation activities reveals that developments have been rapid and far ranging in this area. The institutionalisation of practical cooperation through the establishment of an EU agency was a first decisive step into intensifying the EU-coordinated involvement in implementation, a stage initially designed to be predominantly operationalised by Member States, through their own resources. The activities of the agency have grown incrementally, from support activities with only an indirect steering potential, to the first signs of joint implementation, especially through the hotspot approach. The Commission proposal for a new European Union Agency on Asylum confirms these trends.

Overall, prior to the 2015 “refugee crisis”, the majority of EASO’s activities had an indirect steering potential and the agency was careful not to overstep its legal mandate. EASO’s activities were presented as an opportunity for Member States and they were more or less quick to engage with the agency. Even before the activities of assisted, or

¹⁹⁷ Ivi, forty-sixth recital.

¹⁹⁸ Ivi, Art. 17, para. 2.

¹⁹⁹ Ivi, Art. 31, para. 7.

²⁰⁰ Ivi, Art. 22, para. 3.

arguably common, processing the working methods of the agency led to greater integration between the EU level and national administrations. The agency, possessing but a small financial envelope and limited human resources, had recourse to Member States' experts in order to fulfil its mandate. A number of EASO outputs are jointly produced with Member States experts, such as COI reports and training modules.

Administrative integration is more visible in EASO operations through the asylum support teams which are made up predominantly of seconded national experts. The first such operations were launched shortly after the agency's establishment, and gradually they grew in number, as well as in scope. The agency adopted a flexible definition of what constitutes pressure and examined this in relative, rather than absolute terms. In the case of Luxembourg, the Operating Plan mentions that during 2011, the number of asylum seekers almost tripled compared to 2010,²⁰¹ while "a significant increase of 37 per cent from 2013 to 2014 is mentioned in the case of Cyprus."²⁰² However, if assessed on an absolute scale, the numbers affecting these smaller Member States are not impressive. This approach is correct since every Member State is called to implement its obligations mainly through its own financial and human resources. Deployments under ASTs during this first period were not operational in the same sense as the FRONTEX border guard teams which interacted with individual migrants at external borders. Most of the work consisted in expert advice provided to relevant ministry departments, or involved training and study visits of members of national administrations.

Gradually, the agency separated deployments from the situation of pressure altogether through the testing of joint processing pilots. These activities are not clearly anchored in the EASO Regulation. They started out involving tasks that did not entail administrative discretion, such as initial registration, or archiving of data. They evolved beyond that, including for example the assessment of the merits of individual cases through deployed experts that conducted the asylum interview as in the case of the Netherlands pilot. However, they were small scale and short term.

The next push came through the "refugee crisis". Previous deployments, although beneficial, could not deal with the structural weaknesses of national asylum systems, which were due to insufficient human and financial resources of Member States. EASO deployees began then to move away from expert consulting and undertake more hands-on tasks, such as providing information to arriving third country nationals, and assisting with the relocation process. As pressures increased, forms of common rather than assisted processing emerged in Greece, with deployed experts undertaking admissibility interviews and submitting opinions that, despite being advisory and non-binding on national authorities, entailed administrative discretion.

²⁰¹ EASO, *Operating Plan for Luxembourg*, cit.

²⁰² EASO, *Special Support Plan to Cyprus*, cit., p. 3.

This new role is ingrained in the May 2016 Commission proposal that envisages an agency with a boosted mandate unsettling the *status quo*. It potentially tasks deployments with the “examination of claims”, while repeating that the final decision remains the competence of Member States. These developments represent a move away from the original policy design that each Member State should process the applications of its “own asylum seekers” as assigned to it through the Dublin Regulation. It remains to be seen to what extent Member States will continue to endorse this trend, both *de facto*, as well as through their position regarding the proposed EUAA Regulation.

