



INSIGHT

# THE GAPS IN JUDICIAL ACCOUNTABILITY OF EASO IN THE PROCESSING OF ASYLUM REQUESTS IN HOTSPOTS

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**ABSTRACT:** This *Insight* explores the interaction between the European Asylum Support Office (EASO) and the national authorities in the EU border and asylum regulatory framework of the 'hotspot approach'. Although the mandate of EASO foresees that the agency is merely to provide support and assistance to the competent authorities in relation to the processing of asylum requests, the actual operational activities of EASO show otherwise. The insight argues that, with this *de facto* expansion of the activities of the EU agency, the asylum decision-making process in hotspots does no longer qualify as a national procedure, but rather as a form of shared administration, where several EU agencies together with the national authorities are involved in the decision-making process. The current accountability arrangements, however, do not reflect the new role of EASO in the process and exhibit a number of gaps. The purpose of the insight is to highlight the various shortcomings in the system of judicial accountability of EASO in the processing of asylum requests and discuss their implications for the asylum seekers hosted in the hotspots.

**KEYWORDS:** EU asylum policy – EU agencies – hotspots – refugee crisis – European Asylum Support Office – shared administration.

## I. INTRODUCTION

Presented by the European Commission in the European Agenda on Migration in May 2015 as one of the EU's main tools to tackle the migration crisis in the Mediterranean, the hotspot approach consists of a common platform for EU agencies to assist Member States facing exceptional migratory flows at their external borders.<sup>1</sup> By bringing together agencies with different mandates and competences, this regulatory framework aims

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<sup>1</sup> Communication COM(2017) 558 final of 27 September 2017 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Delivery of the European Agenda on Migration, p. 6.

to ensure more effective and swifter processing of new arrivals and reduce the migratory pressure to normal levels.<sup>2</sup>

The hotspot approach is a system whereby three different EU agencies deploy officers to assist the national authorities. On the one hand, the European Asylum Support Office (EASO) and Frontex provide operational cooperation in the processing of new arrivals in the hotspots; on the other hand, Europol offers support relating to cross-border crime and terrorism.<sup>3</sup> As pointed out in earlier research, in such situations, the number of actors continuously and simultaneously involved in the process may pose problems in the context of judicial accountability, because it may be difficult to identify the actors involved in the decision-making and to allocate responsibility for the final decisions.<sup>4</sup>

The purpose of this *Insight* is to examine the gaps of accountability, if any, arising from the processing of asylum requests in the hotspot approach, with a specific focus on EASO. The analysis explores how EASO can be held responsible for its contribution and participation in the national output decisions made in the hotspots (i.e. decisions on the admissibility of asylum claims), and how it can face consequences before national and European courts in case of unlawfulness of its conduct.<sup>5</sup> The central argument is that the current accountability arrangements do not reflect the *de facto* extension of the scope of the activities of EASO, which have moved from simple assistance towards a form of shared decision-making. This discrepancy, in turn, leads to gaps in judicial accountability. After an overview of the functioning of the hotspot approach and what the mandates of the EU agencies mention concerning their role of assistance and support in the processing of new arrivals, the judicial accountability gaps with respect to EASO's activities are identified and discussed, and a conclusion is reached.

## II. THE FUNCTIONING OF THE HOTSPOT APPROACH

The allocation of judicial accountability depends on a clear definition of functions and tasks of the actors involved, especially where there are numerous actors simultaneously

<sup>2</sup> State Watch, *Explanatory note on the "Hotspot" approach*, 15 July 2015, [www.statewatch.org](http://www.statewatch.org), p. 6.

<sup>3</sup> Communication COM(2017) 558, p. 6.

<sup>4</sup> See e.g. M. ELIANTONIO, *Judicial Review in an Integrated Administration: the Case of 'Composite Procedures*, in *Review of European Administrative Law*, 2015, p. 65 *et seq.*; specifically with regard to EU agencies in multi-level administration, see M. SCHOLTEN, M. LUCHTMAN (eds), *Law Enforcement by EU Authorities - Implications for Political and Judicial Accountability*, Cheltenham: Edward Elgar, 2017.

<sup>5</sup> This *Insight* follows the definition of accountability developed by Mark Bovens, who defined the concept of accountability as "a relationship between an actor and a forum, in which the actor has an obligation to explain and justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences" (see M. BOVENS, *Analysing and Assessing Accountability: A Conceptual Framework*, in *European Law Journal*, 2007, p. 450).

working on the field, such as in hotspots.<sup>6</sup> Finding a clear definition of who does what in the hotspot approach is problematic, because its functioning is not regulated by a single legal instrument but rather by a bundle of guidance documents and communications issued at the EU level by the European Commission.<sup>7</sup> Amongst the numerous non-binding documents, there is only one binding instrument that delimits to some extent the functioning of hotspots, the Frontex Regulation, which describes in a concise manner the operational tasks of the EU agencies as regards migration management in those areas.<sup>8</sup> An additional binding instrument, aimed at providing an official framework for the operational tasks to be carried out by the successor of EASO, the European Union Agency for Asylum, is now the object of debate before the EU legislator.<sup>9</sup>

This bundle of guidance documents and legally binding instruments offers a template of the standard operating procedures in the hotspot areas. It identifies six main stages: 1) initial reception and identification, (2) debriefing (3) provision of information, including on asylum, (4) fingerprinting and registration of the fingerprints to the EURODAC database, (5) assessment on the admissibility of the asylum claim, and, finally, (6) launch of the appropriate follow-up procedure, which can be the formalisation of the asylum claim, the return to the country of origin or the launch of the voluntary relocation procedure (where applicable).<sup>10</sup> Different EU agencies are involved in different steps of the procedure.

<sup>6</sup> See H. HOFMANN, *European Administration: Nature and Developments of a Legal and Political Space*, in C. HARLOW, P. LEINO, G. DELLA CANANEA (eds), *Research Handbook on European Administrative Law*, Cheltenham: Edward Elgar, 2017, p. 40.

<sup>7</sup> The guidelines and documents referred to are the following: Communication COM(2015) 240 final of 13 May 2015 from the Commission on A European Agenda on Migration; European Commission, *Explanatory note on the "Hotspot" approach*; European Asylum Support Office, *EASO Hotspot Operating Plan to Greece 2015*, 30 September 2015; European Asylum Support Office, *EASO Hotspot-Relocation Operating Plan to Italy 2015*, 15 December 2015; European Asylum Support Office, *EASO Operating Plan to Greece 2019*, 19 December 2018; European Asylum Support Office, *EASO Operating Plan to Italy 2019*, 19 December 2018; Communication COM(2016) 416 final of 15 June 2016 from the Commission, Fourth Report on Relocation and Resettlement; Commission Staff Working Document SWD(2017) 372 final of 15 November 2017 on the best practices on the implementation of the hotspot approach.

<sup>8</sup> Art. 18 Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/339 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC (Frontex Regulation).

<sup>9</sup> For more in depth information, see Communication COM(2016) 271 final of 4 May 2016 from the 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; Communication COM(2018) 633 final of 12 September 2018 from the Commission, Amended 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.

<sup>10</sup> Commission Staff Working Document (2017) 372, cit., p. 6.

<i>Stages of the procedure</i>	<i>EU agency(-s) involved</i>
1. Initial reception and identification	Frontex
2. Debriefing	Europol, Frontex
3. Provision of information, including on asylum	EASO, Frontex
4. Fingerprinting	Europol
5. Assessment of the asylum request	EASO
6. Launch of the follow-up procedure	
a) formalisation of the asylum claim	EASO
b) return	Frontex
c) relocation	EASO

TABLE 1<sup>11</sup>

The officials of the competent Member State are active in each stage of the procedure while the competent EU agencies are in principle limited to providing support and assistance.<sup>12</sup> The scope of the assistance varies according to the agency in question.

The support of EASO focuses on three aspects: (1) providing relevant information to potential applicants for international protection related to its procedure; (2) channelling the asylum seekers to the procedure of asylum or relocation; and (3) assisting the competent national authorities with the registration and initial examination of asylum applications, the preparation of the files and the processing of requests (e.g. supporting the detection of possible document fraud).<sup>13</sup>

The mission of Frontex in hotspots is also threefold: (1) providing assistance in the identification, fingerprinting, debriefing and registration of newly arrived migrants;<sup>14</sup> (2) informing asylum seekers on the asylum application procedure;<sup>15</sup> and (3) offering tech-

<sup>11</sup> The main stages of the standard operating procedure in the hotspots and the EU agencies involved.

<sup>12</sup> Art. 2, para. 2, of 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); Art. 3, para. 1, of Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/986/JHA; Art. 18, para. 4, of Regulation (EU) 2016/1624.

<sup>13</sup> European Asylum Support Office, *EASO Hotspot Operating Plan to Greece 2015*, p. 5-7; European Asylum Support Office, *EASO Hotspot-Relocation Operating Plan to Italy 2015*, p. 7-11. See also European Asylum Support Office, *EASO Hotspot Operating Plan Agreed by EASO and Greece 2019*, p. 2; European Asylum Support Office, *EASO Hotspot Operating Plan Agreed by EASO and Italy 2019*, p. 9.

<sup>14</sup> Art. 8, para. 1(i)(ii), and Art. 18, para. 4, let. A), of Regulation (EU) 2016/1624.

<sup>15</sup> *Ibid.*, Art. 8, para. 1(i)(ii), and Art. 18, para. 4, let. b).

nical and operational assistance to the Member States in the preparation and organisation of return operations.<sup>16</sup>

The third agency involved in hotspots is Europol, whose main tasks consist in verifying and collocating information in its databases, conducting operational and strategic analysis, and providing forensic support.<sup>17</sup>

As mentioned in the introduction, this *Insight* focuses on the judicial accountability for the national output decisions made in the hotspots, i.e. the decisions on the admissibility of asylum claims. The framework regulating the hotspot approach indicates that these are issued in the stage of the procedure where EASO is the sole EU agency that provides assistance (stage 5). Hence, any potential gaps of judicial accountability of the EU agencies in the hotspots will be examined solely with regard to the actions and the accountability arrangements set out for EASO. The detailed examination of the accountability arrangements for the activities carried out by the other EU agencies extends beyond the object of this contribution.

The decision on the admissibility of asylum claims is not to be mistaken with the decision granting international protection. Although the assessment of the asylum request takes place in the hotspots, the decision granting asylum status does not. That is because hotspots are only meant to be the entry point to the asylum system of the Member States.<sup>18</sup> As such, the officials of the competent Member State, with the support of EASO, merely undertake an initial assessment on the admissibility of the asylum request and channel those with an admissible claim (the 'real asylum seekers')<sup>19</sup> into the national asylum procedure, where the competent national authorities take the decision granting asylum protection; on the other hand, those who do not have an admissible claim (i.e. those coming from 'safe' countries) are returned to their country of origin.<sup>20</sup>

The mandate of EASO does not specify which activities the agency needs to carry out in order to support and assist the national authorities in the assessment on the admissibility of asylum claims. In fact, from the EASO Regulation, it is unclear what the terms 'support' and 'assistance' entail in this stage of the procedure. Art. 10, let. a) of the EASO Regulation indicates solely that EASO shall coordinate the "action to help Member States subject to particular pressure to *facilitate* an initial analysis of asylum applications under examination by the competent national authorities."<sup>21</sup> The proposal for the EU Agency for Asylum clarifies the scope of this obligation by explicitly stating the possibil-

<sup>16</sup> *Ibid.*, Art. 18, para. 4, let. c), and Art. 27, para. 1, let. b).

<sup>17</sup> Europol, *General Report on Europol Activities 2015*, 2016, p. 11; Europol, *Standard Operating Procedures Applicable to Italian Hotspots*, 2016, p. 21-22.

<sup>18</sup> A. D'ANGELO, *Italy: the 'illegality factor'? Theory and practice of refugees' reception in Sicily*, in *Journal of Ethnic and Migration Studies*, 2019, p. 2220.

<sup>19</sup> *Ibid.*, p. 2221.

<sup>20</sup> Commission Staff Working Document (2017) 372, cit., p. 6.

<sup>21</sup> Emphasis added.

ity for EASO officials to prepare the decision and carry out in part or in its entirety the procedure for international protection.<sup>22</sup> However, as this proposal yet to be adopted, the extent of EASO in the asylum decision-making process is not currently strictly defined as regards hotspots. This lack of clarity on the definition of functions and tasks of EASO may be problematic to establish judicial accountability, which is the subject matter of the next section.

### III. ACCOUNTABILITY GAPS IN RELATION TO THE CURRENT LEGISLATIVE SETUP

#### III.1. THE CURRENT ACCOUNTABILITY ARRANGEMENTS

The decision on the admissibility of the asylum claims requires a clear allocation of accountability to the actors involved, especially considering the great impact of the decision on the individuals concerned.<sup>23</sup> Given the absence of a stand-alone legal instrument laying down the accountability arrangements for the hotspot approach, the possibility of judicial accountability depends on whether and to what extent the EU agencies, and, in this particular case EASO, can be held responsible for their activities.<sup>24</sup>

The role of EASO as support and assistance provider is reflected in its accountability arrangements set out in the EASO Regulation.<sup>25</sup> Since EASO was created with the aim to provide assistance to national authorities in an area of exclusive competence of the Member States as laid down in Art. 78, para. 2, TFEU, the EASO Regulation expressly excludes any decision-making powers, including indirect powers, in relation to the taking of decisions by Member States' asylum authorities on individual applications for international protection.<sup>26</sup> This means that the Member State officials are the sole decision-makers in the procedure determining the admissibility of the asylum claims put forward by the migrants arriving in the hotspots, and that EASO may assist in the procedure, but does not have the competence to adopt decisions or undertake actions that involve the exercise of discretionary powers that would justify the attribution of accountability to the EU agency.<sup>27</sup> By being limited to provide assistance and not participate actively in the decision-making process, EASO cannot formally be held accountable for any activity

<sup>22</sup> Art. 16, para. 2, and Art. 16a Communication COM(2018) 633 final, cit.. On this see S. KATZ, *A More Acceptable Solution: The Proposed European Union Agency of Asylum and Refugees*, in *Case Western Reserve Journal of International Law*, 2017, p. 303 et seq.

<sup>23</sup> A. D'ANGELO, *Italy: the 'illegality factor'?*, cit., p. 2222.

<sup>24</sup> S. HORII, *Accountability, Dependency, and EU Agencies: The Hotspot Approach in the Refugee Crisis*, in *Refugee Survey Quarterly*, 2018, p. 204.

<sup>25</sup> S. SCHNEIDER, C. NIESWANDT, *EASO – Support Office or Asylum Authority? Boundary Disputes in the European Field of Asylum Administration*, in *Österreichische Zeitschrift für Soziologie*, 2018, p. 17.

<sup>26</sup> Art. 2, para. 6, and recital 14, of Regulation 439/2010.

<sup>27</sup> See European Asylum Support Office, *EASO Hotspot Operating Plan to Greece 2015*, p. 2; European Asylum Support Office, *EASO Hotspot-Relocation Operating Plan to Italy 2015*, p. 9.

that leads to the adoption of the decision on the admissibility of asylum claims. As a result, in each step of the procedure in which EASO is involved, the accountability formally rests with the Member State.

In light of the above, even though there is a number of actors continuously and simultaneously involved in the hotspot approach, the only actor that can be formally held responsible and face consequences for the unlawfulness of the output decisions is the Member State. Therefore, to challenge the inadmissibility of the application for international protection, the individual concerned can, in principle, only start a procedure against the Member State authorities, which formally bear the sole responsibility for the output decisions made in the hotspots.

### III.2. THE *DE FACTO* EXPANSION OF THE ACTIVITIES OF EASO IN HOTSPOTS

While assistance has always been the core of EASO's mission for the hotspot approach, the actual operational activities in Greece and Italy highlight the emergence of a different role for the EU agency. Indeed, due to the lack of a clear definition of its functions and tasks within the hotspots, EASO has struggled to interpret the terms 'assistance' and 'support' set out in its mandate. In its operational plans to Italy and Greece, EASO has indicated that the support to the national authorities with processing applications for international protection includes not only providing assistance in managing the workflow or providing information to potential applicants,<sup>28</sup> which would be in line with the mandate of EASO set out in the EASO Regulation. Rather, these also include the deliverable to conduct admissibility interviews, draft opinions, and recommend decisions regarding the grant of international protection,<sup>29</sup> with the operating plan agreed by EASO and Italy in 2019 going even further, charging EASO with preparing the applicant's dossier after the interview "to support the decision-making process".<sup>30</sup> This has resulted in a reversing of roles in the registration of the asylum applications in the hotspots "as if the Greek Asylum Service was assisting EASO",<sup>31</sup> and not the other way around as it had been initially envisaged in the mandate of EASO.

<sup>28</sup> European Asylum Support Office, *EASO Hotspot Operating Plan to Greece 2015*, pp. 5-6; European Asylum Support Office, *EASO Hotspot-Relocation Operating Plan to Italy 2015*, p. 7-10. For updated information, see also European Asylum Support Office, *EASO Operating Plan Agreed by EASO and Greece 2019*, pp. 14-15; European Asylum Support Office, *EASO Operating Plan Agreed by EASO and Italy 2019*, pp. 15-16.

<sup>29</sup> European Asylum Support Office, *EASO Special Operating Plan to Greece 2017*, p. 9; European Asylum Support Office, *EASO Operating Plan to Italy 2017*, p. 10. See also European Asylum Support Office, *EASO Operating Plan Agreed by EASO and Greece 2019*, p. 14-15.

<sup>30</sup> European Asylum Support Office, *EASO Operating Plan Agreed by EASO and Italy 2019*, p. 16.

<sup>31</sup> See S. MORDUE, *Keynote speech: Beyond 'Crisis'? The State of Immigration and Asylum Law and Policy in the EU*, Odysseus Annual Conference, 10 February 2017, [odysseus-network.eu](http://odysseus-network.eu), p. 3. Further on the expansion of the operational activities and the deepening of the competences of the EU agencies in the hotspot approach, see D. FERNANDEZ-ROJO, *Los hotspots: expansión de las tareas operativas y cooperación*

Consequently, the officers deployed by EASO do not simply support and assist the national authorities; *de facto* they outnumber the national authorities and undertake a substantial amount of work on their behalf.<sup>32</sup> In particular, they may independently conduct interviews with migrants, without national authorities being present and supervising. Indeed, it has been reported that most interviews in the Greek hotspots (around 50 per cent)<sup>33</sup> were conducted exclusively by EASO staff members.<sup>34</sup> Given the fact that the interviews are the only moment in the procedure to undertake a preliminary assessment of the merits of the asylum claims of the individuals arriving in the hotspots, the final decision taken by the national authorities is fully based on them, even though the national authorities might not have been the ones conducting the interviews in the first place. This has led to episodes where the Greek authorities mistakenly declared certain asylum claims inadmissible because they have fully relied on mistaken information obtained during the interviews.<sup>35</sup>

Irrespective of the expanded role of EASO in the interviews, national authorities still maintain a direct involvement in the process because they are the ones to ultimately issue the final decision. However, the fact that the preliminary assessment undertaken by EASO, in spite of being a preparatory and non-binding measure, forms the basis of the final decision proves that the national authorities are no longer the only actors involved in the decision-making process and that EASO has gained indirect decision-making powers. Indeed, even though EASO is not the one to issue the decision, its indirect involvement is sufficient to qualify the decision-making process as no longer a solely national procedure, but rather a form of shared administration in the form of shared decision-making.<sup>36</sup> This reasoning has been supported by various other authors, who have pointed out that the actual role of EASO has evolved from simple assistance towards a *de facto* form of shared administration, where administrative discretion in the processing of asylum applications is exercised by both the national authorities and the competent EU agencies.<sup>37</sup>

*multilateral de las agencias europeas Frontex, Easo y Europol*, in *Revista de Derecho Comunitario Europeo*, 2018, p. 1013 *et seq.*

<sup>32</sup> S. HORII, *Accountability, Dependency, and EU Agencies*, cit., p. 224.

<sup>33</sup> Committee on Civil Liberties, Justice and Home Affairs, *Mission Report Following the LIBE Mission to Greek Hotspots and Athens*, 30 June 2017, [www.europarl.europa.eu](http://www.europarl.europa.eu), p. 11.

<sup>34</sup> A. PAPADOPOULOU, *The Implementation of the Hotspots in Italy and Greece*, Amsterdam: Dutch Council for Refugees, 2016, p. 38.

<sup>35</sup> Further on the situation in Greece, see A. DRAKOPOULOU, *Hotspots: the Case of Greece*, in *Searching for Solidarity in EU Asylum and Border Policies. A Collection of Short Papers Following the Odysseus Network's First Annual Policy Conference*, Brussels: Université Libre de Bruxelles, 2017.

<sup>36</sup> E. TSOURDI, *Bottom-up Salvation? From Practical Cooperation Towards Joint Implementation Through the European Asylum Support Service*, in *European Papers*, 2016, Vol. 1, No 3, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 1030.

<sup>37</sup> This episode has been described as "further deepening of competences" (M. SCIPIONI, *De Novo Bodies and EU Integration: What is the Story behind EU Agencies' Expansion?*, in *Journal of Common Market Studies*, 2017, p. 777), "gap between the *de jure* and *de facto* accountability" (S. HORII, *Accountability, Dependency*,



The issue lies with the fact that such a form of shared administration exceeds the limits of the competences of EASO as set out in its mandate. The fact that EASO officials are the ones to conduct the interviews clearly goes beyond the power to simply facilitate the initial analysis of asylum applications set out in Art. 10, let. a), of the EASO Regulation. Furthermore, as Tsourdi pointed out, “inherent parts of this process [of conducting interviews] are assessing credibility, detecting vulnerability and making a finding on the safety of third countries; all of these entail elements of discretion”,<sup>38</sup> which clashes in particular with Art. 2, para. 6, of the EASO Regulation which expressly excludes EASO from having powers in relation to the taking of decisions by Member States’ asylum authorities on the individual applications for international protection.

There is thus a clear discrepancy between the mandate of EASO and its actual role in the hotspot context. This issue has been discussed in the relation to the proposal for a EU Agency for Asylum,<sup>39</sup> which provides a potential solution by not excluding the exercise of discretionary powers by the agency and explicitly stating the possibility for EASO officials to examine such asylum applications.<sup>40</sup> In this context, it has been argued that recognising the powers of EU bodies in the assessment of the asylum claims would undermine the principle of subsidiarity, according to which the EU can act only if the objectives of the proposed action cannot be sufficiently achieved by the Member States, since the assessment falls within the responsibility of the Member States under Art. 78, para. 2, let. e), TFEU.<sup>41</sup> Despite the above, Tsourdi pointed out that, although the EU agencies are present during most of the admissibility interviews, it is the national authorities that formally adopt the admissibility decision.<sup>42</sup> Therefore, this approach would not formally be in violation of the EU Treaties.

However, the current mandate of the agency has as yet remained unchanged.<sup>43</sup> The highlighted gap between the *de jure* powers and tasks of the Agency and the *de facto* role of EASO raises accountability questions. Indeed, as EASO exercises shared decision-making powers by being involved in the initial admissibility analysis, which heavily influences the content of the final measure issued by the national authorities, EASO would need to be held accountable for the results of its involvement. This need might become especially pressing in the situation where an error in the assessment of asylum requests made by EASO leads the national authorities to force individuals to return to

*and EU Agencies*, cit., p. 213), and as “[an exhibition of] signs of more direct forms of supranational administration” (S. SCHNEIDER, C. NIESWANDT, *EASO – Support Office or Asylum Authority?*, cit., p. 18). For an international law perspective see F. CASOLARI, *The EU’s Hotspot Approach to Managing the Migration Crisis: a Blind Spot for International Responsibility?*, in *Italian Yearbook of International Law Online*, 2016, pp. 109-134.

<sup>38</sup> E. TSOURDI, *Bottom-up Salvation?*, cit., p. 1023.

<sup>39</sup> For more in-depth information, see Communication COM(2018) 633 final, cit.

<sup>40</sup> *Ibid.*, Art. 16, para. 2, and Art. 16a.

<sup>41</sup> E. TSOURDI, *Bottom-up Salvation?*, cit., p. 1007.

<sup>42</sup> *Ibid.*, p. 1024.

<sup>43</sup> S. SCHNEIDER, C. NIESWANDT, *EASO – Support Office or Asylum Authority?*, cit., p. 18.

their country of origin when they would have preliminarily fulfilled all the requirements to obtain international protection. In the following section, the concrete possibilities of judicial control of EASO's actions in the hotspots are discussed.

### III.3. THE CALL FOR JUDICIAL ACCOUNTABILITY

The rationale behind discussing the system of judicial accountability in place in hotspots is that the decision on the admissibility of the asylum application is an extremely sensitive matter that severely impacts the legal sphere of the individual concerned. Declaring a claim admissible and channelling the individual in question to the national asylum application procedure means that the individual, who has experienced not the least dramatic journey of crossing the Mediterranean, is allowed to stay within the EU and is not (yet) forced to return to her country of origin, which she has most likely fled to escape war, persecution and poverty.<sup>44</sup> Holding EASO accountable for errors made in the assessment of the asylum claims during the interviews would ensure judicial protection for the individuals, who would be able challenge each step of the decision-making process rather than only the final decision. Requirements for accountability become particularly urgent considering that the administration acts on matters particularly sensitive to human rights. To give an illustration, the failure to provide adequate processing might lead to potential violations of the right to asylum, non-refoulement and good administration.<sup>45</sup> What is more, asylum seekers and migrants might be exposed to discrimination on the basis of nationality,<sup>46</sup> as well as to forced fingerprinting, inadequate housing conditions, lack of provision of legal information<sup>47</sup> and use of coercion by the administration.<sup>48</sup>

Having said that, the possibility to challenge the inadmissibility of a claim is, in general, far from reality for many individuals arriving at the hotspots: access to legal aid is limited,<sup>49</sup> and even those who are supported by a lawyer are often unable to receive regular and clear information.<sup>50</sup> Therefore, even if judicial accountability were at present formally sufficient, it may not be very much relevant in practice because those who have been wrongly refused international protection do not have access to adequate legal aid and have most likely already been forced to return to their country of origin, ex-

<sup>44</sup> For a complete overview of the percentages, see A. D'ANGELO, *Refugee's Reception in Italy: Past and Present of a Humanitarian Crisis*, in A. PETROFF, G. MILIOS, M. PÉREZ (eds), *Refugees on the Move. Political, Legal and Social Challenges in Times of Turmoil*, Bellaterra: Universitat Autònoma de Barcelona, 2018, p. 96.

<sup>45</sup> M. SCIPIONI, *De Novo Bodies and EU Integration*, cit., p. 779.

<sup>46</sup> N. CAICEDO, A. ROMANO, *Vulnerability in the context of EU asylum policies: the challenges of identification and prioritisation*, in A. PETROFF, G. MILIOS, M. PÉREZ (eds), *Refugees on the move*, cit., p. 81.

<sup>47</sup> A. D'ANGELO, *Italy: the 'illegality factor'?*, cit., p. 2224.

<sup>48</sup> M. BALDWIN-EDWARDS, B.K. BLITZ, H. CRAWLEY, *The Politics of Evidence-Based Policy in Europe's 'Migration Crisis'*, in *Journal of Ethnic and Migration Studies*, 2019, p. 14.

<sup>49</sup> See A. PAPOUTSI, J. PAINTER, E. PAPADA, A. VRADIS, *The EC Hotspot Approach in Greece: Creating Liminal EU Territory*, in *Journal of Ethnic and Migration Studies*, 2019, p. 10.

<sup>50</sup> See A. D'ANGELO, *Refugee's reception in Italy*, cit., p. 102.

cluding them from the possibility to challenge the inadmissibility of their asylum claim in the EU against their Member State of arrival and the EU agencies.

On top of these general and practical difficulties relating to the challenge of national output decisions, holding EASO itself accountable for its role in the decision-making procedure, where the final decision is taken by national authorities, may give rise to problems of judicial protection because the preliminary assessment undertaken during the interviews may be considered simply as an informal action that does not necessarily take the shape of a measure and, even if it were considered as a measure, it may not be considered reviewable before the EU courts.<sup>51</sup>

This is, first of all, because of the requirement of a “reviewable act”, which, for the purposes of an annulment action under Art. 263 TFEU, excludes from judicial review acts and actions which are not “intended to have legal effects”.<sup>52</sup> Furthermore, specifically concerning acts of agencies, Art. 263 TFEU provides that these can be reviewed if they are “intended to produce legal effects vis-à-vis third parties”. This limitation entails that EASO’s activities will not be considered a reviewable act before the EU courts, because they are not capable of affecting an individual’s legal sphere, but constitute mere preparatory actions for the purposes of taking the final decisions on the admissibility of an asylum claim.

Secondly, even resort to an indirect challenge is not straightforward. Challenging the lawfulness of the actions of the concerned EU agency would indeed depend on an action brought against the final measure before the national courts and on the discretion of the national courts to ask a preliminary question on the validity of the EU measure and to formulate the question in accordance with the applicant’s claims.<sup>53</sup> However, even if the range of measures which can be challenged indirectly through a question of validity under Art. 267 TFEU is wider than those which are amenable to judicial review in direct actions since it is held to include “all acts of the institutions without exception”,<sup>54</sup> it is still doubtful whether EASO’s actions would be even be “discernible” from those imputable to the national authorities. Indeed, because of the close cooperation of the national authorities and the EU agency, and the operation of EASO being based on purely *de facto* arrangements, it seems next to impossible to identify, pinpoint, and, consequently, subject to judicial control, EASO’s contribution to the decision-making process.

<sup>51</sup> For more detail on this point, see M. ELIANTONIO, *Judicial Review in an Integrated Administration*, cit., p. 65 *et seq.*

<sup>52</sup> Court of Justice, judgment of 31 March 1971, case 22/70 *Commission v. Council (ERTA)*, para. 42.

<sup>53</sup> The limits of indirect review of EU measures were first developed in Opinion of AG Jacobs delivered on 21 March 2002, case C-50/00 P, *Unión de Pequeños Agricultores v. Council*.

<sup>54</sup> Court of Justice, judgment of 13 December 1989, case 322/88 *Grimaldi v. Fonds des maladies professionnelles*, para. 8; General Court, judgment of 4 October 2006, case T-193/04 *Tillack v. Commission*, para. 80.

#### IV. CONCLUSION

The examination of the current legal framework regulating the functioning of the hotspot approach and the analysis of the actual role of EASO in relation to the assessment of the admissibility of asylum claims and their registration have shown that the system of hotspot approach may bring about significant gaps of accountability. Closely intertwined operational activities between the national authorities on one side and EASO on the other create a complex system of decision-making, to which the system of accountability set up in the hotspot approach has not been able to keep up.

The focus of this paper was to examine the gaps of accountability, if any, arising from the processing of asylum requests in the hotspot approach, with a specific focus on EASO. With the lack of a single legal framework governing hotspots, there is little clarity on the arrangements between EASO and the Member States in relation to the examination of the asylum applications. Although the mandate of EASO foresees mere assistance in this area, the actual operational activities undertaken by the agency in the hotspot areas show otherwise. As seen above, EASO independently conducts interviews and submit findings on the basis of which the competent national authorities take the final decision. As a result, the asylum decision-making process in the hotspots does no longer qualify as a national procedure but rather as a form of shared administration, where both the competent EU agencies and national authorities are involved in the decision-making process.

With the movement from mere assistance towards a form of shared decision-making, the actual role of EASO is no longer reflected in the current legislative accountability arrangements. Indeed, EASO carries out operational activities that have a clear bearing on the final decision (i.e. interviews), while the current accountability arrangements that allocate the responsibility solely to the competent Member State are based on the ground that the EU agency merely provides administrative assistance to the competent authorities.

This discrepancy between the *de jure* accountability arrangements and the *de facto* tasks carried out by EASO in the hotspots render the existence of a suitable system of judicial control all the more important. This contribution has shown that effectively exerting control over the hotspot activities and in particular EASO's contribution to national decisions on asylum requests is frowned with considerable difficulties. First, individuals arriving at the hotspots have limited access to legal aid. Secondly, even if they were supported by adequate legal aid, individuals subject to an error in the assessment of the admissibility of their asylum claims might have already been forced to return to their country of origin before having the possibility to challenge the decision before national courts. Thirdly, while a direct action under Art. 263 of the TFEU against EASO's actions seems impracticable, little more is offered by the preliminary reference set out in Art. 267 of the TFEU, because of the difficulty in clearly delineating EASO's contribution to the final national decisions.

Nevertheless, discussing the gaps of judicial accountability of EASO in the hotspots remains essential when one considers that declaring an asylum claim admissible means that the individual, who has experienced not the least dramatic journey of crossing the Mediterranean to flee from war, persecution and poverty, is allowed to stay within the EU, which will positively impact the present and future aspects of her life. In this context, it should be noted that this examination has been limited to the possibilities of direct control of the EASO's actions. Further research is certainly needed to explore the potential for the liability action to ensure some degree of protection to individuals.<sup>55</sup>

<sup>55</sup> With respect to the actions of Frontex, this issue has been masterfully explored by M. FINK, *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law*, Oxford: Oxford University Press, 2018.

