



ARTICLES

THE EU'S SHIFTING BORDERS RECONSIDERED: EXTERNALISATION, CONSTITUTIONALISATION, AND ADMINISTRATIVE INTEGRATION

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FUNDAMENTAL RIGHTS VIOLATIONS IN THE HOTSPOTS: WHO IS WATCHING OVER THEM?

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ABSTRACT: The European Commission introduced the EU 'hotspot' approach in its European Agenda on Migration (2015). The objective of that approach was to provide operational support on the ground to Member States under particular and disproportionate migratory pressure at their external borders. These centres are put in place in a sensitive environment significantly affecting fundamental rights. Criticism rapidly arose from various UN bodies, civil society organisations and scholars as to the violations of fundamental rights occurring in the hotspots. The present *Article* analyses the role of five European monitoring mechanisms, being the European Commission, the European Parliament, the European Ombudsman, the Fundamental Rights Agency, and the Agencies' internal monitoring mechanisms. The analysis shows that the various mechanisms are insufficient to monitor the complex environment of the hotspots. It becomes clear that it is essential to enhance political and social monitoring mechanisms to ensure an efficient protection of fundamental rights in the hotspots.

KEYWORDS: hotspots – fundamental rights violations – monitoring – European institutions – Fundamental Rights Agency – internal mechanisms.

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I. INTRODUCTION

“Is this the Europe that says it protects human rights? Where we came to seek protection?” asked Abdallah, a migrant from Sudan.¹ “There is no peace, no safety, no dignity in Moria. It’s worse than jail. We are not treated as belonging to society, as human beings,” described Roula, a Syrian mother of two children.² “I can’t handle this. Sometimes I think it would have been better to have been killed in Afghanistan” claimed an Afghan woman.³

A swathe of similar accounts attests to the deplorable conditions of the hotspots in Greece and in Italy, and the violation of fundamental rights occurring in them. Incoming migrants entering the European Union (EU) through Greece or Italy are held in hotspots that are reception centres. These have been created as an immediate response to help border controls and deal with the migratory pressure in these two Member States (MS).⁴ The approach was recommended by the European Commission in 2015, in the European Agenda on Migration,⁵ and later implemented in Greece and in Italy, with five reception centres set up in Greece (Lesvos, Chios, Samos, Leros and Kos) and four in Italy (Taranto, Messina, Pozzallo and Lampedusa).⁶ As the challenges to fundamental rights in these centres proliferate, the need for their rigorous monitoring is enhanced.⁷

The present *Article* seeks to ascertain whether efficient monitoring mechanisms have been put in place to watch over the hotspots in Greece and in Italy, and particularly over the fundamental rights violations occurring in them.

In that regard, the *Article* will not focus on the judicial review of these operations, namely by national courts, the Court of Justice of the EU and the European Court of Human Rights, nor on the possibilities of administrative reviews of potential violations. Whilst Cornelisse and Moraru offer in their *Article* a more optimistic approach to judicial oversight, notably with regards children rights, the same cannot be seen in this area.⁸ In

¹ Amnesty International, *Hotspot Italy: How EU's Flagship Approach Leads to Violations of Refugee and Migrant Rights* (1 November 2016) www.amnesty.org.

² E Ćerimović, ‘Asylum Seekers’ Hell in a Greek Hotspot’ (30 November 2017) Human Rights Watch www.hrw.org.

³ *Ibid.*

⁴ S Horii, ‘Accountability, Dependence and EU Agencies: The Hotspot Approach in the Refugee Crisis’ (2018) *Refugee Survey Quarterly* 204.

⁵ Communication COM(2015) 240 final from the Commission of 13 May 2015 on a European Agenda on Migration.

⁶ Fundamental Rights Agency (FRA), *Update of the 2016 Opinion of the European Union Agency for Fundamental Rights in the “Hotspots” set up in Greece and Italy of 11 March 2019* fra.europa.eu.

⁷ Dutch Council for Refugees and others, *The Implementation of the Hotspots in Italy and in Greece* (2016) www.ecre.org.

⁸ See in this *Special Section* G Cornelisse and M Moraru, ‘Judicial Interactions on the European Return Directive: Shifting Borders and the Constitutionalisation of Irregular Migration Governance’ (2022) *European Papers* www.europeanpapers.eu 127.

fact, the limited nature of judicial and administrative control over EU agencies and national authorities in the hotspots has been repeatedly pointed out in the literature, notably due to the composite and opaque nature of the area.⁹ Thus, we must look at alternative solutions to fill this gap. By focusing on the political and social nature of monitoring actions, the *Article* intends to offer an analysis of political and social mechanisms and strategies which can be operationalized to monitor the activities of EU agencies, national authorities and other third parties in the hotspots.

In response to this question, the *Article* will start by shedding light on the hotspots approach, by showing the fragmented and complex nature of these reception centers (II). Pursuant to this, an illustration of the fundamental rights violations in the hotspots will ensue. Any attempt to control fundamental rights violations will require pre-existing knowledge of such violations. Thus, this *Article* will demonstrate how the monitoring and reporting mechanisms, whether national, European, or international are essential in enabling awareness of violations (III). Finally, a focus will be made on European institutional ways of monitoring and on five monitoring mechanisms in particular: the European Commission, the European Parliament (EP), the European Ombudsman (EO) the Fundamental Rights Agency (FRA) and Agencies' internal monitoring mechanisms (IV).

II. SHEDDING THE LIGHT ON THE HOTSPOTS APPROACH: LEGAL FRAMEWORK AND ACTORS

The hotspots approach has been criticized for lacking a clear and precise framework.¹⁰ Thus, this section intends to illuminate on the legal and policy framework of the hotspots (II.1) as well as on the actors involved (II.2).

II.1. LEGAL AND POLICY FRAMEWORK OF THE HOTSPOTS

No single over-arching legal framework describing the hotspots and their management exists. Instead, various legal and policy documents mention aspects of these reception centres. Only by pulling these sources together, does a true picture of the hotspots and the role of agencies emerge. The understanding of hotspots is based on a mosaic collection of several legal and policy documents drawn from various levels.

⁹ S Tas, 'Frontex Actions: Out of Control? The Complexity of Composite Decision-Making Procedures' (TARN Working Papers 3-2020); G Lisi and M Eliantonio, 'The Gaps in Judicial Accountability of EASO in the Processing of Asylum Requests in Hotspots' European Papers (European Forum Insight of 21 October 2019) www.europeanpapers.eu 589.

¹⁰ D Neville, S Sy and A Rigon, *On the Frontline: The Hotspot Approach to Managing Migration* (European Parliament Study 2016).

a) The European level.

At the European level, the main instrument that needs mentioning is the European Commission's European Agenda on Migration of 2015.¹¹ It is the first instrument that mentioned the hotspots approach and the involvement of EU agencies, notably of Frontex, Europol and the European Asylum Support Office (EASO). It did not however offer a clear definition of the approach. Consequently, the Commissioner to the Justice and Home Affairs Council, Avramopoulos, adopted an explanatory note clarifying the approach: "The aim of the Hotspot approach is to provide a platform for the agencies to intervene, rapidly and in an integrated manner, in frontline Member States when there is a crisis due to specific and disproportionate migratory pressure at their external borders, consisting of mixed migratory flows and the Member State concerned might request support and assistance to better cope with that pressure".¹² This note provides greater clarity on the hotspots and describes the role of EU agencies therein.¹³

In addition, the Regulations of the EU agencies also offer some insights. Whilst the Regulation of the EASO and Europol do not mention the hotspots, they still indicate the potential functions the agencies could perform in the centres. In that regard, Chapter three of the EASO Regulation mentions for example the possibility for the agency to deploy Asylum Support Teams to MS under particular migratory pressure.¹⁴ Europol's Regulation also clarifies Europol's involvement in the fight against migrant smuggling and human trafficking,¹⁵ which is Europol's core function in the hotspots.¹⁶ Finally, Frontex's Regulation mentions the hotspots and the agencies involvement through the screening, debriefing, identification and fingerprinting, and help in return operations.¹⁷

b) The international and national level.

At the international level, the deal agreed between the EU and Turkey on the 18 March 2016 affected in essence the functioning of the hotspots in Greece,¹⁸ transforming them from reception centres to return and detention centres.¹⁹ That deal sought to end irregular migration flows from Turkey to the EU.

¹¹ Communication COM(2015) 240 final cit.

¹² State Watch, *Explanatory note on the "Hotspot" approach* www.statewatch.org.

¹³ *Ibid.*

¹⁴ Regulation (EU) 439/2010 of the European Parliament and of the Council of 19 May 2010 on a European Asylum Support Office.

¹⁵ Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on Europol.

¹⁶ DF Rojo, 'An Enforcement Role for EUROPOL in the Aftermath of the "Refugee Crisis"?' (31 May 2018) EU Law enforcement eulawenforcement.com.

¹⁷ Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard.

¹⁸ EU-Turkey Statement of 18 March 2016, in European Council Press Release 144/16 of 18 March 2016.

¹⁹ D A Papapanagiotou-Leza and N Garipidis, 'Implementing the "Hotspot Approach" on the Greek Islands: Legal and Operational Aspects' (2017) *Diritto, Immigrazione e Cittadinanza* 1.

At the national level, national rules have been adopted in Greece and in Italy to frame the establishment of their hotspots. In that regard, Italy adopted 'Standard Operating Procedures applicable to Italian hotspots' in 2015.²⁰ These procedures regulated the hotspots and clarified the role of the various actors in them. Greece did not adopt such operating procedures, but adopted a new legislation on the 3rd of April 2016, Law n. 4375 that not only regulated the hotspots but also implemented the EU-Turkey deal.²¹

The rules which regulate the hotspots are found in a variety of documents of different legal character deriving from different institutions. In attempting to understand the hotspots approach, one must pull from different levels of legal and political authority. This leaves the rule on hotspots fragmented, cloudy and difficult to join into a cohesive whole. Additionally, none of these documents mention the need for independent monitoring mechanisms to watch over the activities occurring in these centres. Only the Explanatory note refers to the possible function of the FRA in the hotspots, not as monitoring but as influencing EU agencies.²²

II.2. MAIN ACTORS INVOLVED IN THE HOTSPOTS

A variety of actors can be involved at one stage or another in the hotspots in Greece and in Italy. For this *Article*, it is unnecessary to examine in-depth the role of each actor, but basic knowledge is important.

In Greece and in Italy, national authorities and EU agencies work together and cooperate vertically and horizontally in a so-called "shared administration".²³ In fact, whilst the agencies supposedly merely assist national authorities, in practice they strongly influence them and have operational competences.²⁴ With regards national actors, various authorities can play a role. In Greece, for example, four national authorities participate daily in the hotspots: the Greek Asylum Service, the Hellenic Police, the Hellenic Army and the Hellenic Centre for Disease Control and Prevention.²⁵ In the performance of their activities, national authorities are near individuals, and as such can affect their fundamental rights at any moment. Concerning EU actors, the European Commission plays an important managing role, but it is the EU agencies that continuously assist MS in the hotspots (Frontex, EASO and

²⁰ Italian Ministry of the Interior, *Standard Operating Procedures Applicable to Italian Hotspots* (2016) www.libertaciviliimmigrazione.dlci.interno.gov.it.

²¹ E Tsourdi, 'Bottom-Up Salvation? From Practical Cooperation towards Joint Implementation through the European Asylum Support Office' (2016) *European Papers* www.europeanpapers.eu 998, 1022.

²² Communication COM(2015) Explanatory note cit.

²³ H Hofmann, GC Rowe and A Türk, *Administrative Law and Policy of the European Union* (Oxford University Press 2011) 50.

²⁴ DF Rojo, 'Frontex, EASO and Europol: From a Secondary to a Pivotal Operational Role in the Aftermath of the "Refugee Crisis"' (9 April 2019) *Open Migration* openmigration.org.

²⁵ Communication COM(2015) Explanatory note cit.

Europol).²⁶ Frontex is the agency that deploys the most personnel.²⁷ It offers technical and operational support by providing assistance in the screening of incoming migrants, by providing initial information and by helping in the return operations.²⁸ Its tasks can affect fundamental rights and influence Greek officials in their decision-making.²⁹ EASO can offer technical and operational support to national authorities by helping with the asylum applications.³⁰ In Greece, the agency is expressly involved in the registration and admissibility interviews of asylum seekers, thereby exceeding its classical role as envisaged by its Regulation.³¹ Finally, Europol has strong operational powers in the hotspots ranging from conducting secondary security checks of suspicious individuals to fast-tracking information exchange and assisting in debriefing arriving migrants.³²

In addition, international organizations and non-governmental organizations (NGOs) play a role in the hotspots. The United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM) are present in Greece and in Italy,³³ namely to provide accommodation, assistance, and information.³⁴ NGOs will also be on the field to provide services to incoming migrants, such as medical help or education. The tasks carried out by the various actors mentioned engage fundamental rights and thus demand efficient monitoring.

III. THE FUNDAMENTAL RIGHTS VIOLATIONS IN THE HOTSPOTS AND THEIR REPORTING

The media and particularly, national, European, and international bodies have reported on the critical situations of migrants within the hotspots (III.2), and the numerous fundamental rights violations that occur in them (III.1).

III.1. WHICH FUNDAMENTAL RIGHTS ARE BEING VIOLATED?

The Charter of fundamental rights (Charter) has the same legal value as the Treaties of the EU and is legally binding. It applies to EU institutions and EU agencies, as well as MS

²⁶ Communication COM(2015) 240 final cit.

²⁷ Dutch Council for Refugees and others, *The Implementation of the Hotspots in Italy and in Greece (2016)* cit.

²⁸ Regulation 2019/1896 cit.

²⁹ DF Rojo, 'Migration, Asylum and Border Management: the New Role of Frontex in the Aftermath of the "Refugee Crisis"' (3 April 2019) Open Migration openmigration.org.

³⁰ EASO, *EASO Operating Plan to Italy of December 2016* easo.europa.eu.

³¹ D A Papapanagiotou-Leza and N Garipidis, 'Implementing the "Hotspot Approach" on the Greek Islands' cit. 10; E Tsourdi, 'Holding the European Asylum Support Office Accountable for its role in Asylum Decision-Making: Mission Impossible?' (2020) German Law Journal 506, 515.

³² Europol, *Europol Review of 2016-2017* www.europol.europa.eu.

³³ *Ibid.*

³⁴ European Court of Auditors, *EU response to the refugee crisis: the 'hotspot' approach* www.eca.europa.eu.

implementing EU law.³⁵ By implementing the hotspots approach, Greece and Italy act within the scope of EU law. Consequently, EU agencies and national authorities' activities in the centers fall firmly within the scope of the Charter. Additionally, Greece and Italy are members of the European Convention on Human Rights (ECHR), they must therefore also respect this instrument.

Reports have shown that the situation in the hotspots could be characterized as inhumane. In fact, the living and reception conditions are inadequate,³⁶ and violence frequently occurs (whether from the police or between refugees).³⁷ Incoming migrants are being denied access to adequate asylum procedures and lack relevant information.³⁸ Consequently, as witnessed in the hotspots of Greece and Italy, the following fundamental rights are generally the most susceptible to violation: the right to human dignity, the prohibition of torture and inhuman or degrading treatment, the prohibition of trafficking in human beings, the right to liberty and security, the respect for private and family life, the right to asylum, the right to equality and non-discrimination, the rights of the child and of the elderly, the right to good administration and finally the right to an effective remedy and to fair trial.³⁹

The situation on the hotspot is constantly shifting and varies between different locations and times. In Greece for example, the situation worsened after the EU-Turkey Statement⁴⁰ and it has more recently been exacerbated by the Covid-19 pandemic. The EU-Turkey deal prescribed the return to Turkey of new arrivals who were yet to request asylum or whose applications were inadmissible. However, this deal could only be implemented if Greece ceased transfers from individuals on the islands to the mainland.⁴¹ Thus, individuals faced generalized detention followed by a geographical restriction on the island⁴² which consequently lowered their basic fundamental rights protection.

The Covid-19 pandemic further deteriorated the already precarious situation of refugees. As described above, hotspots, such as the Moria hotspot, are overcrowded, ill-equipped and unhygienic,⁴³ and health measures mandated by each national government

³⁵ Art. 51 of the Charter of Fundamental Rights of the European Union [2012].

³⁶ Dutch Council for Refugees and others, *The Implementation of the Hotspots in Italy and in Greece (2016)* cit.

³⁷ G Matevžič, *Crossing a Red Line. How EU Countries Undermined the Right to Liberty by Expanding the Use of Detention of Asylum Seekers upon Entry: Case Studies on Bulgaria, Greece, Hungary and Italy* (Hungarian Helsinki Committee 2019).

³⁸ E Ćerimović, 'Asylum Seekers' Hell in a Greek Hotspot' cit.

³⁹ FRA, *Opinion of the European Union Agency for Fundamental Rights in the "Hotspots" set up in Greece and Italy of 29 November 2016* fra.europa.eu.

⁴⁰ EU-Turkey Statement (2016) cit.

⁴¹ A Dimitriadi, 'Governing Irregular Migration at the Margins of Europe' (2017) *Etnografia e ricerca qualitativa* 75.

⁴² E Takou, 'The Implementation of the "Hotspot Approach" and the EU-Turkey Statement in Greece: a Crisis Contained, But Not Over' (12 November 2017) Human Rights 360 www.humanrights360.org.

⁴³ *Ibid.*

are impossible to respect in camps.⁴⁴ In addition, NGOs were forced to suspend their operations, which can significantly affect the lives of migrants in the reception centres.⁴⁵

III.2. WHO MONITORS AND REPORTS ON THESE VIOLATIONS? A MULTI-LEVEL APPROACH

To know the existence and content of fundamental rights violations, it is imperative that reports are made. Reports continue to be published on the national, European, and international level, pursuant to the multi-level approach regulating the hotspots, its framework, and its actors.

At the European level, various institutions offered detailed reports on the hotspots and violations of fundamental rights occurring therein. Five European monitoring mechanisms can be mentioned: the European Commission, the EP, the European Court of Auditors, the FRA and the Consultative Forums (CF). The European Court of Auditors for example highlighted fundamental rights violations in its reports, notably linked to the overcrowding of the centres.⁴⁶ The European Commission has a constant presence on the field and plays the role of manager and monitor of these centres. In its monitoring function, it publishes various reports on the "Implementation of the European Agenda on Migration" and on the "Implementation of the hotspots".⁴⁷ The EP also conducted numerous visits on the field and published Missions Reports about the hotspots in Italy,⁴⁸ and in Greece,⁴⁹ where it also pointed out the inadequate living conditions and other fundamental rights violations occurring in the centres. The FRA also published two reports, one in 2016,⁵⁰ and an update of it in 2019⁵¹ that solely focused on the fundamental rights challenges. The EO also conducted own-initiative inquiries on Frontex, and notably on the agency's compliance with human rights standards, and the role of the Fundamental Rights Consultative Forum and Officer.⁵² Finally, CF of EU agencies specifically report on the agency's role in the hotspots.⁵³

⁴⁴ S Tas, 'The Institutional Response to the COVID-19 Pandemic in the Greek Hotspots: Sufficient to Stave off a Disaster?' (31 May 2020) EU Law Enforcement eulawenforcement.com.

⁴⁵ *Ibid.*

⁴⁶ European Court of Auditors, *EU response to the refugee crisis: the 'hotspot' approach* cit.

⁴⁷ Communication COM(2018) 301 final from the Commission of 16 May 2018 on the progress report on the implementation of the European Agenda on Migration.

⁴⁸ European Parliament Mission Report of 12 June 2017 following the mission to Italy of 18-21 April 2017, Committee on Civil Liberties, Justice and Home Affairs.

⁴⁹ European Parliament Mission Report of 30 June 2017 following the LIBE mission to Greece hotspots and Athens 22-25 May 2017, Committee on Civil Liberties, Justice and Home Affairs.

⁵⁰ FRA, *Opinion of the European Union Agency for Fundamental Rights in the "Hotspots" set up in Greece and Italy of 29 November 2016* cit.

⁵¹ FRA, *Update of the 2016 Opinion of the European Union Agency for Fundamental Rights in the "Hotspots" set up in Greece and Italy of 11 March 2019* cit.

⁵² European Ombudsman Special Report OI/5/2012/BEH-MHZ in own-initiative inquiry concerning Frontex of 07 November 2013.

⁵³ Frontex, *Frontex Consultative Forum on Fundamental Rights Seventh Annual Report (2019)* frontex.europa.eu.

Out of these European mechanisms, four will be subject to an in-depth study in Part four of this *Article*.

Monitoring on a national level can be performed either by national Parliaments and national officials, or by independent national fundamental rights monitoring bodies and NGOs. National Parliaments were for example invited to conduct visits to the hotspots in Italy and in Greece to report back on the situation in these MS.⁵⁴ National fundamental rights monitoring bodies, such as the Greek National Commission for Human Rights (GNCHR) for example monitored the fundamental rights protection in the Greek hotspots.⁵⁵ It reported on the fundamental rights challenges linked to the deprivation of liberty as well as the detention measures taken in Greece.⁵⁶ Finally, NGOs are also important reporting actors, since they are in principle independent and have no strategic or political interest in the hotspots.⁵⁷

On the international level, international NGOs can report on the situation, such as Amnesty International,⁵⁸ as well as bodies of the Council of Europe, such as the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), the Commissioner for Human Rights and the Group of Experts on Action against Trafficking in Human Beings (GRETA). The CPT for example visited the hotspots in Chios, Lesbos and Samos in Greece in July 2016 to report on the situation in these centers.⁵⁹

By way of summary, the table below offers a non-exhaustive list of the various monitoring and reporting mechanisms that exist at the European, national, and international levels. The reporting and monitoring mechanisms operating at each level serve to elucidate the extent of the fundamental rights challenges in the hotspots and to raise awareness of the fundamental rights violations occurring therein.

European mechanisms	National mechanisms	International mechanisms
European Commission European Parliament Fundamental Rights Agency European Court of Auditors European Ombudsman Consultative Forums	National Parliaments National fundamental rights bodies (Greek National Commission for Human Rights...) National NGOs (Danish Council for Refugees...)	NGOs (Amnesty International, <i>Médecin Sans Frontières</i> ...) Council of Europe instruments: the European Committee for the Prevention of Torture, the Commissioner for Human Rights... UN Special rapporteur

TABLE 1: European, national and international reporting and monitoring mechanisms.

⁵⁴ D Neville, S Sy and A Rigon, *On the Frontline* cit.

⁵⁵ Greek Council for Refugees, *Greece Country Report: Reception and identification procedure* asylumineurope.org

⁵⁶ The Greek National Commission for Human Rights, *Statement: The GNHCR expresses its deep concerns about the situation in the Reception Centers of Eastern Aegean Islands* www.nchr.gr.

⁵⁷ Dutch Council for Refugees and others, *The Implementation of the Hotspots in Italy and in Greece (2016)* cit.

⁵⁸ Amnesty International, *Hotspot Italy* cit.

⁵⁹ Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *The CPT visits "hotspots" in Greece from 19-25 July 2016 of 26 July 2016* www.coe.int.

IV. FOCUS ON THE EUROPEAN MONITORING MECHANISMS

The section will consider the four main EU institutions and bodies that are involved in the monitoring of the EU hotspots approach: the European Commission (IV.1), the EP (IV.2), the EO (IV.3) and the FRA (IV.4), as well as internal monitoring mechanisms in place within the EU agencies (IV.5). Although understudied, these monitoring mechanisms are interesting to analyse. The role of the Court of Auditors will not be developed here since it mainly concerns the financial and administrative aspects of the hotspots.

IV.1. A CONTRADICTIONARY MONITORING ROLE OF THE EUROPEAN COMMISSION

The European Commission has a coordinating and monitoring role in the hotspots. As guardian of the Treaties, it must ensure that the EU hotspot approach is implemented and managed in line with EU law and protects fundamental rights. This dual role of both management and oversight places the Commission in a delicate position. In addition to its reporting role, mentioned above, the Commission issues recommendations on the implementation of the hotspots approach.

a) The Commission's negative influence in Italy and in Greece.

With regards to Italy, at the end of 2015 the Commission published the "Progress Report on the Implementation of the hotspots in Italy" in which it pointed out what still needed to be done.⁶⁰ Amongst its recommended measures, some served to protect fundamental rights: the need to increase the medical presence and the reception conditions, as well as to improve the transfer systems to the mainland. Others, however, undermined their protection. The Commission requested the Italian authorities to adopt legislation authorizing "[...] the use of force for fingerprinting and to include provisions on longer term retention for those migrants that resist fingerprinting".⁶¹ However, it seems hard to believe that the use of force to obtain fingerprints can ever be justified. In fact, the FRA stated in its report that the use of physical or psychological force may result in the violation of the prohibition of torture and inhuman or degrading treatment, as well as the right to human dignity.⁶²

The objective in the hotspots is to ensure a 100 per cent fingerprint rate for incoming migrants into the European Asylum Dactyloscopy Database (Eurodac). Following Italy's failure to do so, the Commission opened an infringement procedure against Italy, but also Greece, for violation of the Eurodac Regulation.⁶³ However, the Commission did not

⁶⁰ Communication COM(2015) 697 final cit.

⁶¹ *Ibid.*

⁶² FRA, *Fundamental rights implications of the obligation to provide fingerprints for Eurodac of 22 October 2015* fra.europa.eu.

⁶³ European Commission *Implementing the Common European Asylum System: Commission escalates 8 infringement proceedings of the 10 December 2015* ec.europa.eu.

have to go beyond the first step of the infringement procedure; after sending out letters of formal notice, both MS reached the 100 per cent fingerprinting rate.

Whilst Italy did not change its legislation, it has been reported that coercion and force were used to obtain fingerprints, as requested by the Commission.⁶⁴ Amnesty International and the FRA reported and interviewed victims of supposed excessive use of force,⁶⁵ allegedly at least 24 individuals.⁶⁶ That use of force ranged from severe beatings to infliction of electric shocks and sexual humiliation, violations that should not been taken lightly.⁶⁷ As of today, no new cases of excessive use of force have been noted, neither in Italy nor Greece.⁶⁸ Despite this, the fact remains that the Commission encouraged MS to take an approach that goes against the basic protection of fundamental rights. It prioritized the implementation of EU law and the Eurodac Regulation over the protection of fundamental rights, and its managing role over its monitoring role.

In Greece, the Commission's negative influence relates to the EU-Turkey deal - a political decision adopted by the MS. Thus, whilst the Commission was not party to the agreement, it regularly reports on the implementation of the statement,⁶⁹ and influenced it through the adoption of the EU "safe countries of origin" list.⁷⁰ The EU put Turkey on this list at a time where national countries did not recognize Turkey as a "safe" country (with the exception of Bulgaria). Thus, initially, the Greek asylum appeal bodies disagreed with Turkey being considered safe and rejected the sending back of asylum seekers.⁷¹ Nevertheless, since the implementation of the deal, Greece has returned more than 300 individuals to Turkey, having been at least indirectly influenced by the Commission. Whilst this decision does not affect the hotspots as such, in sending back individuals to a country that does not respect fundamental rights, the national authorities are themselves violating fundamental rights.⁷²

⁶⁴ Communication COM(2015) 697 final cit.

⁶⁵ FRA, *Opinion of the European Union Agency for Fundamental Rights in the "Hotspots" set up in Greece and Italy of 29 November 2016* cit.

⁶⁶ Amnesty International, *Hotspot Italy* cit.

⁶⁷ *Ibid.*

⁶⁸ FRA, *Update of the 2016 Opinion of the European Union Agency for Fundamental Rights in the "Hotspots" set up in Greece and Italy of 11 March 2019* cit.

⁶⁹ European Commission, *Factsheet of 4 October 2016 Managing the Refugee Crisis, EU-Turkey Statement* reliefweb.int.

⁷⁰ Communication COM(2015) 452 final from the Commission of 9 September 2015 on the proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin for the purpose of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection and amending Directive 2013/32/EU.

⁷¹ S Carrera, 'An Appraisal of the European Commission of Crisis: Has the Juncker Commission Delivered a New Start for EU Justice and Home Affairs?' (CEPS Working Papers 2018).

⁷² E Roman, T Baird and T Radcliffe, 'Why Turkey is Not a "Safe Country"' (February 2016) Statewatch www.statewatch.org.

b) The Commission's more positive impact in its response to Covid-19.

The European Commission actively participated in the response to the Covid-19 pandemic, and in this regard, it positively impacted the situation of refugees in the hotspots in two ways.

First, the Commission took an active stand with regards to the right to asylum. This was exemplified when, during the pandemic, the Greek authorities decided to suspend the right to asylum. In response, Commissioner for Home Affairs Ylva Johansson stated that "Individuals in the European Union have the right to apply for asylum. This is in the treaty; this is in international law. This we can't suspend."⁷³ The Commission thus published in April 2020 a "Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement".⁷⁴ The aim of this guidance was to support MS in ensuring continuity of asylum and return procedures to the extent possible, and ensuring the full protection of people's health and fundamental rights in compliance with the Charter.⁷⁵ In this regard, the Commission tried to safeguard the fundamental rights of refugees in extraordinary circumstances and to positively impact the hotspots. Greece, however, continued to suspend its Asylum services until the 15th of May on grounds of public health, thereby ignoring the Commission's recommendations.⁷⁶

Second, the Commission stressed the need for enhanced solidarity in times of a global health pandemic. It pointed out the need to continue resettlement activities, highlighting the need for greater solidarity and increased relocation to decongest the hotspots.⁷⁷ Thus, it is closely working with MS in order to offer support and assist in the relocation of more refugees. In addition, it also provided reception centres with health materials and financial support of 350 million euros. These measures aim at preventing potential fundamental rights violations and can be considered as positive measures taken by the Commission.

⁷³ ECRE, *Violations Continue in Greece, EU Says Asylum Procedures Cannot be Suspended* (13 March 2020) ECRE www.ecre.org.

⁷⁴ Communication COM(2020) 2516 final from the Commission of 16 April 2020 on COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement.

⁷⁵ *Ibid.*

⁷⁶ S Tas, 'The Institutional Response to the COVID-19 Pandemic in the Greek Hotspots' cit.

⁷⁷ *Ibid.*

IV.2. AN INSUFFICIENT DEMOCRATIC OVERSIGHT FROM THE EUROPEAN PARLIAMENT?

The EP enjoys its classical role of democratic oversight of EU institutions and agencies. The added value is that it can monitor the role of the EU agencies and of the European Commission. Oversight of the EP can be done through oral and written questions,⁷⁸ from the right to information and reports from other EU institutions and bodies, and through visits.⁷⁹

a) The EP's visits on the field.

The Committee on Civil Liberties, Justice and Home Affairs of the EP went on a mission to Greece and to Italy to visit the hotspots and exchange information with the relevant actors. During its mission in Italy for example, they visited the hotspot in Pozzallo and met with EU agencies at the EU Regional Task Force (EURTF).⁸⁰ In Greece, the delegation visited the hotspots in Kos and Lesbos.⁸¹ There, the delegation engaged in informal discussions with the representatives of organizations active in the hotspots and received explanations on their work.

The work done by the Committee is helpful for the EP as it sheds light on what still needs to be revised at the European level. In this respect, the delegation confirmed the need to revise EU asylum legislation, to accelerate relocation and family reunification and to increase the protection granted to vulnerable individuals.

These visits are however limited and strategically maneuvered, prepared and controlled by national authorities. During the mission in Greece for example, the delegation could not visit the hotspot on Samos and Chios, that are to date important camps frequently criticized for fundamental rights violations.⁸² The cited reason being that the islands were having "ongoing construction works".⁸³ Due to this, we cannot be certain that the delegation grasped the full picture and challenges of the Greek hotspots. Additionally, it failed to interview all important actors in the hotspots, such as Europol in Greece⁸⁴ and FRA in Italy.⁸⁵ Consequently, whilst it is an organ that could have a significant monitoring role and influence on the hotspots, its role is in fact very limited and its impact unclear. Additionally, reports are not being made frequently enough and considering the dynamism of the sector it would benefit from regular assessments.

⁷⁸ N Font and I P Duran, 'The European Parliament Oversight of EU Agencies Through Written Questions' (2016) *Journal of European Public Policy* 1349.

⁷⁹ H Hofmann, GC Rowe and A Türk, *Administrative Law and Policy of the European Union* cit.

⁸⁰ European Parliament Mission Report of 12 June 2017 following the mission to Italy cit.

⁸¹ European Parliament Mission Report of 30 June 2017 following the LIBE mission to Greece hotspots and Athens cit.

⁸² FRA, *Update of the 2016 Opinion of the European Union Agency for Fundamental Rights in the "Hotspots" set up in Greece and Italy of 11 March 2019* cit.

⁸³ European Parliament Mission Report of 30 June 2017 following the LIBE mission to Greece hotspots and Athens cit.

⁸⁴ *Ibid.*

⁸⁵ European Parliament Mission Report of 12 June 2017 following the mission to Italy cit.

b) The commissioning of reports.

The EP can commission reports from two important bodies. First, it commissioned reports and research papers from the Policy Department for Citizen' Rights and Constitutional Affairs on the hotspots approach. These reports intend to provide independent expertise on the topic to support the EP in its exercise of democratic scrutiny.⁸⁶ They do not however "represent the official position of the European Parliament" and are thus an addition to the EP's traditional monitoring role.

Second, it commissioned reports from the FRA. In fact, it is the EP that requested the FRA to submit its first opinion on the fundamental rights situation in the hotspots.⁸⁷ It is also the institution that requested the FRA to update its opinion of 2016.⁸⁸ Thus, whilst the EP has a limited monitoring role with an unclear impact,⁸⁹ it remains the initiator of further protection and monitoring of fundamental rights offered by a decentralized body of the EU, the FRA.

c) Towards a more active stance: adoption of a Resolution and the monitoring of Frontex.

The EP did, however, adopt a more active stance with regards to Covid-19 and, more recently, Frontex. When Covid-19 hit the EU, the EP tried to promote discussion by sending a letter to the Commissioner for Crisis management,⁹⁰ and by organizing a Meeting with the Committee on Civil Liberties, Justice and Home Affairs in which the Greek situation was discussed with relevant stakeholders. In addition, it adopted a Resolution on "EU coordinated action to combat Covid-19 pandemic and its consequences" in April 2020 in which it referred to the Greek hotspots.⁹¹ Due to the lack of adequate health care, the EP urged for solutions to be taken such as "the preventive evacuation and relocation of population at high risk".⁹² It also emphasized the duty of MS to protect fundamental rights and European asylum law, and as such tried to positively impact the situation of refugees in the hotspots.⁹³

In addition, the EP recently decided, in response to widespread heavy criticism towards Frontex, to set up a Frontex Scrutiny Working Group that would investigate allegations on violations of fundamental rights committed by Frontex. Their work will focus on the

⁸⁶ D Neville, S Sy and A Rigon, *On the Frontline: The Hotspot Approach to Managing Migration* cit.

⁸⁷ FRA, *Opinion of the European Union Agency for Fundamental Rights in the "Hotspots" set up in Greece and Italy of 29 November 2016* cit.

⁸⁸ FRA, *Update of the 2016 Opinion of the European Union Agency for Fundamental Rights in the "Hotspots" set up in Greece and Italy of 11 March 2019* cit.

⁸⁹ E Collet and C Le Coz, *After the Storm: Learning From the EU Response to the Migration Crisis* (Migration Policy Institute Europe 2018) 1, 36.

⁹⁰ European Parliament, Letter of 23 March 2020 from Janez Lenarčič Commissioner for Crisis Management, IPOL-COM-LIBE D(2020)1153 www.europarl.europa.eu.

⁹¹ European Parliament Resolution of 17 April 2020 on EU coordinated action to combat the COVID-19 pandemic and its consequences (2020/2616(RSP)).

⁹² *Ibid.*

⁹³ S Tas, 'The Institutional Response to the COVID-19 Pandemic in the Greek Hotspots' cit.

agency's role in the illegal pushbacks on the Greek coast, as well as more generally the functioning of Frontex, their compliance with fundamental rights and accountability to the European Parliament.⁹⁴ The scope of the inquiry will however be limited, in the sense that it will not specifically focus on the situation of the hotspots, and that it excludes for example the role of important actors of the inquiry (other EU agencies, the Commission...).⁹⁵ The Working Group gathered relevant information regarding the implementation of the fundamental rights provisions as well as Frontex's activities in the Aegean Sea,⁹⁶ and published its report on the 14th of July 2021. The report showed that the agency failed to acknowledge, prevent, and reduce fundamental rights violations.⁹⁷ Thus, it came up with a list of recommendations aiming at safeguarding fundamental rights during their operations. The way these recommendations will be implemented remain, however, uncertain.

IV.3. AN ATTEMPTED ROLE TO SELF-INQUIRE FROM THE EUROPEAN OMBUDSMAN

The EO essentially investigates complaints that are made against EU institutions, bodies, offices, and agencies. This specific function of the Ombudsman does not fall into the analysis of the *Article* since it relates to a complaint, and not to monitoring as such. However, the EO can also perform own-initiative inquiries, which give the Ombudsman a monitoring function.⁹⁸

a) The use of own-initiative inquiry by the EO.

The EO performed several self-inquiries into Frontex. A first one in 2013 that concerned the agency's compliance with fundamental rights, and the role of the Fundamental Rights Officer and Consultative Forum, where the EO recommended the introduction of a complaint mechanisms for infringements of fundamental rights.⁹⁹ A second inquiry opened in 2020, on Frontex's complaints mechanisms and the role of the Fundamental Rights Officer, in which the Ombudsman assessed the situation and suggested several improvements. The aim was notably to increase the accessibility of the complaint's mechanisms and the accountability of the agency.¹⁰⁰ Finally, a third report on the meeting of the Ombudsman's inquiry team with agency's representatives, which is the only one that briefly

⁹⁴ N Nielsen, 'MEPs Agree to Mandate and Probe into Frontex' (1 February 2021) EU Observer eu-observer.com.

⁹⁵ *Ibid.*

⁹⁶ ECRE, 'Frontex: One Investigation Closes as Another Begins and the Agency's Role in Return and Ability to Purchase Firearms Under Scrutiny' (5 March 2021) ECRE www.ecre.org.

⁹⁷ European Parliament LIBE Committee, Report of the 14th of July 2021 on the fact-finding investigation on Frontex concerning alleged fundamental rights violations www.europarl.europa.eu.

⁹⁸ Art. 228 TFEU.

⁹⁹ European Ombudsman Special Report OI/5/2012/BEH-MHZ cit.

¹⁰⁰ European Ombudsman Decision OI/5/2020/MHZ on the functioning of the European Border and Coast Guard Agency's (Frontex) complaints mechanism for alleged breached of fundamental rights and the role of the fundamental Rights Officer of 15 June 2021.

mentions the role of the Fundamental Rights Officer in the hotspots.¹⁰¹ The report, however, does not go further into the agency's action in the hotspots and has thus no impact on the situation in them. Moreover, no self-inquiry is to be found on the hotspots in general, nor on the role of EASO and Europol in them.

b) Insufficient and limited attempts of monitoring.

Whilst the EO showed no fear in conducting inquiries *vis-à-vis* Frontex and other migratory aspects, the reports brought limited change to the situations in the hotspots for two reasons. The first reason is the limited scope and impact of the self-inquiry on the functioning and work in the hotspots. As pointed out above, the inquiries do not deal with the role of EASO and Europol in the hotspots, and only one inquiry on Frontex mentions the role of the agency in the hotspots. However, even this inquiry does not address the real issues in the hotspots.¹⁰² The second reason is the limited powers of the EO. In fact, the decisions taken by the Ombudsman are not legally binding, which ultimately weakens their findings and recommendations.¹⁰³ Thus, sometimes the only option for the EO is to seek support of other bodies, such as the EP. This is precisely what Emily O'Reilly, the current Ombudsman, did after the inquiry of 2013 where Frontex rejected her recommendations.¹⁰⁴

IV.4. A STRONGER ROLE FOR THE FRA

The FRA is an EU agency that was established to provide expert advice to EU institutions and agencies, but also MS on how to safeguard fundamental rights. As such, it can provide advice to the Greek and Italian authorities, as well as the EU agencies involved in the hotspots. Whilst the FRA originally has an informational function and cannot be as such considered a monitor, it did take on a monitoring role, as witnessed in the hotspots.¹⁰⁵

The Explanatory Note on the hotspots approach already mentioned the role of the FRA in the implementation of the approach: "The expertise of the Fundamental Rights Agency (FRA) and its advice on how to address fundamental rights challenges can be used by all EU agencies, in line with existing bilateral cooperation agreements".¹⁰⁶ Thus, the FRA holds a direct and active role on the field, reporting and offering recommendations to the various actors, but also an indirect role within the internal mechanisms of EU agencies.

¹⁰¹ European Ombudsman Report OI/5/2020/MHZ on the meeting of the European Ombudsman inquiry team with FRONTEX representatives of 23 March 2021.

¹⁰² *Ibid.*

¹⁰³ M Busuioc, *European Agencies: Law and Practices of Accountability* (Oxford University Press 2013) 222.

¹⁰⁴ European Ombudsman Special Report OI/5/2012/BEH-MHZ cit.

¹⁰⁵ S Horii, 'Accountability, Dependence and EU Agencies' cit.

¹⁰⁶ State Watch, *Explanatory note on the "Hotspot" approach* cit.

a) An active role and presence of the FRA on the field.

As mentioned above, the FRA has issued a first report about fundamental rights in the hotspots in 2016¹⁰⁷ and updated it in 2019.¹⁰⁸ Within them, it offered various recommendations for national authorities and EU agencies to deal and respond to the current challenges. In its first opinion, the recommendations centred around five key areas: access to international protection, rights of the child, identification of vulnerabilities, safety for all persons in the hotspots and readmissions. In sum, it gave 21 recommendations to participating actors in the hotspots. In its updated opinion, it pointed out that only three of the 21 issues had been properly addressed, the others still needed improvements. The recommendations still furnish guidelines and indications to actors on how to improve the fundamental rights situation on the field. The FRA even prepared short videos on fundamental rights protection for Frontex and EASO deployed experts on the field.

Furthermore, the FRA published a focused report on the “Fundamental rights implications of the obligation to provide fingerprints for Eurodac” which comprised a compliance checklist based on fundamental rights to guide Frontex and responsible national authorities in the collection of fingerprints for Eurodac.¹⁰⁹ The FRA also reported on the Covid-19 pandemic and published a bulletin in this regard. In the first bulletin, the agency expressly dealt with Covid-19 and the Greek island hotspots, but only described the situation in there without providing any recommendations.¹¹⁰

Finally, the FRA is present in the EUTRF in Piraeus (Greece), and sometimes in Catania (Italy). The EUTRF is established to ensure operational coordination and exchange of information between national authorities, EU agencies and other participating actors.¹¹¹ The FRA’s presence within EUTRF can influence other participating actors and promote and ensure the protection of fundamental rights.

b) A direct and indirect role and influence on the EU agencies.

The Explanatory Note on the hotspots approach emphasized the extent to which the FRA could impact the EU agencies.¹¹² This occurs through bilateral cooperation agreements, and through the agency’s participation in the CF.

¹⁰⁷ FRA, *Opinion of the European Union Agency for Fundamental Rights in the “Hotspots” set up in Greece and Italy of 29 November 2016* cit.

¹⁰⁸ FRA, *Update of the 2016 Opinion of the European Union Agency for Fundamental Rights in the “Hotspots” set up in Greece and Italy of 11 March 2019* cit.

¹⁰⁹ FRA, *Fundamental rights implications of the obligation to provide fingerprints for Eurodac of 22 October 2015* cit.

¹¹⁰ FRA, *Coronavirus pandemic in the EU – Fundamental rights implications #1 of 8 April 2020* fra.europa.eu.

¹¹¹ F Casolari, ‘The EU’s Hotspot Approach to Managing the Migration Crisis: A Blind Sport for International Responsibility?’ (2015) *Italian Yearbook of International Law* 109.

¹¹² State Watch, *Explanatory note on the “Hotspot” approach* cit.

Frontex, EASO and Europol traditionally play a role in the hotspots. Whilst Europol's Regulation does not mention the involvement of the FRA, the Regulations of the other agencies expressly refer to it. EASO's Regulation provides in art. 52 that the agency should cooperate with the FRA through bilateral agreements.¹¹³ Frontex's Regulation also refers to the FRA to encourage cooperation between the two agencies and to invite the agency to attend their Management Board meetings when fundamental rights challenges are concerned.¹¹⁴ The FRA adopted a working arrangement with EASO in 2013,¹¹⁵ and a co-operation arrangement with Frontex in 2010.¹¹⁶ As of today, no cooperation agreement between Europol and the FRA has been adopted.

A close examination of the bilateral agreement reveals several interesting junctures where the FRA stands to influence the agency. The FRA can offer its fundamental rights expertise to Frontex at any stage of a joint operation, participate in the training on fundamental rights for border guards and Frontex staff and it helps to develop codes of conducts and good practices for the return activities of Frontex. The working arrangement with EASO follows the same pattern. The FRA can participate in the training of EASO staff and will share information and expertise on vulnerable groups. In that regard, it can influence the activities Frontex and EASO perform in the hotspots in Greece and in Italy. Whilst no publicly available information exists on the concrete support the agency is offering, these agreements show that there is a strong legal mandate for this type of support and that an enhanced monitoring role of the FRA is legally conceivable.

Secondly, the FRA can also indirectly influence EU agencies policies and behaviors in the hotspots regarding fundamental rights as a member of the CF. The FRA is a member of the CF of Frontex and EASO.¹¹⁷ Europol, as of today, has not established a CF. Whilst their role will be developed later, it is important already to note the agency's role in the CF.

CF are set up to offer independent advice to the given agency in fundamental rights matters.¹¹⁸ The CF of Frontex for example offers advice to the agency on how to respect fundamental rights and establish a fundamental rights strategy.¹¹⁹ The EASO, the FRA, the UNHCR, the Council of Europe, the IOM and other civil society organizations sit in the CF. The FRA, through its participation can directly influence Frontex and indirectly impact other actors that are part of the hotspots (EASO, UNHCR and IOM). The CF of EASO is open to any relevant actor operating in the field of asylum policy at national, European,

¹¹³ Regulation 439/2010 cit.

¹¹⁴ Regulation 2019/1896 cit.

¹¹⁵ EASO and FRA, Working Arrangement of 11 June 2013 between the European Asylum Support Office and the European Union Agency for fundamental rights.

¹¹⁶ FRA and Frontex, Cooperation Arrangement of 26 May 2010 between the European Union Agency for the Management of operational cooperation at the external borders of the Member State of the European Union and the European Union Agency for Fundamental Rights.

¹¹⁷ S Horij, 'Accountability, Dependence and EU Agencies' cit. 1625.

¹¹⁸ Art. 108 of the Regulation 2019/1896 cit.

¹¹⁹ Frontex, *Consultative Forum* frontex.europa.eu.

or international level. In that sense, it can include stakeholders ranging from NGOs, international organizations, academia, and EU institutions.¹²⁰ The FRA is part of that CF,¹²¹ and the UNCHR and IOM are also very engaged in it. Both forums involve actors that play a role in the hotspots and that deal with matters linked to the hotspots approach. Consequently, the FRA's role in them can influence the protection of fundamental rights.

Whilst the FRA seems to have an interesting influence, particularly with regards to Frontex and EASO, a clearer role and a stronger presence of the agency in the hotspots would increase its impact and help better address obvious fundamental rights challenges.¹²² The FRA can however not take legally binding decisions and whilst it can offer advice to the actors, and influence their strategies, it cannot coerce them to do so.

IV.5. INTERNAL MONITORING MECHANISMS: STRONGER INFLUENCE ON EU AGENCIES?

Since EU agencies play an essential role in the shared administration of the hotspots, it is essential to complete the analysis by looking at the internal monitoring mechanisms of the EU agencies. The aim is not to mention the internal administrative review mechanisms that exist, such as the individual complaint mechanisms of Frontex, but rather to focus on the monitoring functions, namely of the CF and the Fundamental Rights Officer and future fundamental rights monitors of Frontex.

a) An interesting insider role of Consultative Forums.

As Loschi and Slominski pointed out in this special issue, the CF plays an interesting role within agencies and can contribute to their accountability,¹²³ for example by monitoring the situation and giving advice on fundamental rights matters. As of today, only Frontex and EASO established a CF, which worked and advised on the hotspots and the work of the agencies therein.

The CF of Frontex can carry on-the-spot visits to hotspot areas to witness the situation in practice,¹²⁴ and publish annual reports. The Annual Report of 2016 is the first to include the hotspots and the visit of the CF in Greece of Joint Operation Poseidon Sea and to the hotspots of Chios and Lesbos.¹²⁵ During that visit, the focus was on the fundamental rights challenges of Frontex's operational briefing, public security, and readmission in and from the hotspots. In its Annual Report in 2017, it did not expressly mention a visit

¹²⁰ EASO, *Consultative Forum* www.easo.europa.eu.

¹²¹ Art. 12 of the Regulation 439/2010 cit.

¹²² D Neville, S Sy and A Rigon, *On the Frontline* cit.

¹²³ See in this *Special Section*, C Loschi and P Slominski, 'Frontex's Consultative Forum and Fundamental Rights Protection: Enhancing Accountability Through Dialogue' (2022) *European Papers* www.europeanpapers.eu 195.

¹²⁴ Art. 108(5) of the Regulation 2019/1896 cit.

¹²⁵ Frontex, *Frontex Consultative Forum on Fundamental Rights Fourth Annual Report (2016)* frontex.europa.eu.

to the hotspots but pointed out issues occurring therein, notably the overcrowding of them.¹²⁶ It offered general recommendations to be applied to all functions performed by Frontex, including the hotspots. Recommendations were offered on child protection, on the search and rescue operations on the sea and on trainings of the agency's staff regarding fundamental rights. The same can be said in the Annual Report in 2018, where the CF pointed out the difficult living conditions in hotspots and the persistent overcrowding and gave recommendations on how the agency could deal with the fundamental rights challenges.¹²⁷ The Annual Report of 2019 also mentioned the visit carried out by the CF to the hotspots.¹²⁸

Similarly, the CF of EASO also dealt with matters linked to the hotspots approach. During the 6th plenary meeting of the CF for example, the focus was particularly on relocation and EASO's work in the hotspots.¹²⁹ The meeting took place in Athens, close to the hotspots in Greece, which allowed civil societies and actors participating in them to join the meeting. What emerged was a need for enhanced EASO participation in the hotspots, longer deployments and a better training.¹³⁰ In a similar vein, during the 7th CF plenary meeting, fundamental rights challenges linked to EASO's role in the hotspots were developed, and in particular regarding the treatment of vulnerable individuals, the reception conditions and the coordination of EU agencies with civil societies.¹³¹ Finally, at the latest plenary meeting, the CF mentioned EASO's operation support in Member States, including Greece and Italy as well as EASO's impact on vulnerable groups.¹³²

The CF are interesting monitoring mechanisms put in place within EU agencies. However, their role remains limited for various reasons. First, their scope is limited since they will only directly impact EASO or Frontex. Second, they face issues of access to information. The CF of Frontex for example noted that the forum had difficulties in obtaining relevant operation references and guiding documents.¹³³ Third, the close relationship that CF maintains with the Management Board members of the EU agencies leads to questioning their independence and effectiveness.¹³⁴ Finally, and most importantly, their material scope is limited in the sense that the Management Board and Executive Director are not obliged to seek advice from the CF, nor take into account their reports.¹³⁵

¹²⁶ Frontex, *Frontex Consultative Forum on Fundamental Rights Fifth Annual Report (2017)* frontex.europa.eu.

¹²⁷ Frontex, *Frontex Consultative Forum on Fundamental Rights Sixth Annual Report (2018)* frontex.europa.eu.

¹²⁸ Frontex *Consultative Forum on Fundamental Rights Seventh Annual Report (2019)* cit.

¹²⁹ EASO, *2016 Consultative Forum* easo.europa.eu.

¹³⁰ EASO, *EASO Consultative Forum on Fundamental Rights Sixth Forum Report (2016)* easo.europa.eu.

¹³¹ EASO, *EASO Consultative Forum on Fundamental Rights Seventh Forum Report (2017)* easo.europa.eu.

¹³² EASO, *EASO Consultative Forum on Fundamental Rights 10th Edition of the EASO Consultative Forum Online – Plenary Meeting (2020)* easo.europa.eu.

¹³³ Frontex, *Frontex Consultative Forum on Fundamental Rights Fifth Annual Report (2017)* cit.

¹³⁴ L. Giannetto, 'Frontex, Civil Society Organisations, and Human Rights at EU Borders: A Complex Relationship' (28 October 2020) *Border Criminologies* www.law.ox.ac.uk.

¹³⁵ Statewatch, *"Regaining Control": New Powers of Frontex (2020)* Statewatch www.statewatch.org.

b) The limited monitoring functions of the Fundamental Rights Officer and monitors.

Out of the three active EU agencies, only Frontex possesses a Fundamental Rights Officer. EASO's proposal for a new Regulation intends however to establish a Fundamental Rights Officer. Europol, as of today, has not manifested this desire. Whilst their role is interesting, they are therefore still prevented from influencing an agency that plays an essential role in the hotspots, Europol, and also currently remain excluded from influencing EASO.

The old Regulation of EASO does not mention the Fundamental Rights Officer. However, the proposal for the strengthening of EASO creates the role of Fundamental Rights Officer. The latter will be in charge of monitoring and ensuring respect for fundamental rights in the Agency's activities.¹³⁶ As of today, the new Regulation has still not been adopted rendering the extent of its influence uncertain. However, a provisional agreement was reached in June 2021 between the Council presidency and the European Parliament.¹³⁷ Alongside the Fundamental Rights Officer, the proposal introduces in Chapter 5 the concept of a monitoring mechanism. The idea is to set up a team of expert that carries out the monitoring of thematic or specific aspects of the Common European Asylum System, to prevent shortcomings in the system. Thus, it can be envisioned that the role of the agency in the hotspots will be subjected to monitoring, or the asylum system in general within them. In fact, the proposal mentions for example that "the reception conditions, capacity, infrastructure [...]" may be susceptible to monitoring,¹³⁸ and that on-site visits can be performed. This could offer an interesting new mechanism, which implementation will be worth studying in the future.

The new Regulation of Frontex from 2019 has extended the already existing monitoring powers of Fundamental Rights Officer of Frontex.¹³⁹ It strengthens its function through an increase in staff, notably with the deployment of fundamental rights monitors that will be mentioned later, as well through an increase in powers. The Fundamental Rights Officer can now monitor compliance with fundamental rights by conducting investigations, by offering advice on its own or upon request of the agency, by providing opinions on operational plans and by carrying out on-the-spot visits.¹⁴⁰ Thus, it could influence Frontex's role in the hotspots. Limits however are apparent, notably with regards its independence. In fact, the Fundamental Rights Officer is appointed by the Management Board of the Agency and only cooperates with the CF (and does not report to it anymore). The biggest limit however is that the Fundamental Rights Officer cannot adopt legally binding decisions and the Agency merely has a duty to take into account the reports of

¹³⁶ E Narrillos (European Parliament, LIBE Committee), New Asylum Agency to ensure respect of EU asylum rules and fundamental rights Press Release of 29 June 2017.

¹³⁷ Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/210 (First reading) of 30 June 2021.

¹³⁸ *Ibid.* art. 13(3)(c).

¹³⁹ Statewatch, "Regaining Control": New Powers of Frontex cit.

¹⁴⁰ Art. 109 of the Regulation 2019/1986 cit.

the Fundamental Rights Officer.¹⁴¹ In any case, as Commissioner Ylva Johansson stated, the Agency has yet to appoint a permanent Fundamental Rights Officer.¹⁴² Additionally, no Annual Report of the Fundamental Rights Officer is publicly available, and only independent observations can be found in the latest “Annual report on the Implementation of Regulation (EU) 624/2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex”.¹⁴³ The report only marginally addresses the hotspots with regards to the principle of *non-refoulement*.

More specifically for Frontex, one of the key EU agencies in the hotspots, recent developments were announced to enforce stronger monitoring of the EU agency. Next to the EP Working Group mentioned above, Fundamental Rights monitors would be employed to monitor Frontex operations at EU borders.¹⁴⁴ Frontex, in cooperation with FRA, will establish the fundamental rights monitors and design their training – the aim being to promote fundamental rights throughout the agency’s activities.¹⁴⁵ The fundamental rights monitors will be integrated within the agency’s Fundamental Rights Office and the Fundamental Rights Officer will oversee their work.¹⁴⁶ Strong criticism arose, since as of today, no fundamental rights monitor has been employed, the objective being to establish a team of 40 monitors by December 2020. Commissioner Ylva Johansson stated that “We should have 40 fundamental rights monitors. We have zero”.¹⁴⁷ These fundamental rights monitors were planned for in the Regulation of 2019 and shall have the following tasks: monitor compliance with fundamental rights, monitor forced-returns, provide advice and assistance, conduct and evaluate operational activities, conduct visits, contribute to training activities...¹⁴⁸ Thus, legally, fundamental rights monitors could visit the hotspots on-site, as well as oversee the operations of Frontex therein. However, it remains an internal mechanism, whose independence can be put into question, notably by its link with the Fundamental Rights Office. In fact, the Fundamental Rights Officer participates in the appointment of the fundamental rights monitors and they work under his supervision.

¹⁴¹ Art. 80(4) of the Regulation 2019/1896 cit.

¹⁴² N Nielsen, ‘MEPs agree to mandate and probe into Frontex’ cit.

¹⁴³ Frontex, Frontex Fundamental Rights Officer Annual report on the implementation of Regulation (EU) 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex (2018) data.consilium.europa.eu.

¹⁴⁴ L Giannetto, ‘Frontex, Civil Society Organisations, and Human Rights at EU Borders’ cit.

¹⁴⁵ Frontex, *Frontex and FRA agree to establish fundamental rights monitors* (10 June 2020) frontex.europa.eu.

¹⁴⁶ *Ibid.*

¹⁴⁷ N Nielsen, ‘MEPs agree to mandate and probe into Frontex’ cit.

¹⁴⁸ Art. 110 of the Regulation 2019/1896 cit.

V. CONCLUSION

This *Article* aimed to analyse the monitoring mechanisms in place in the hotspots in Greece and in Italy. Whilst technically speaking judicial and administrative review could be applied to EU agencies, and other actors involved in the hotspots, the literature shows that such a control has proven difficult. Thus, alternative monitoring mechanisms were analyzed in this *Article*. The hotspots approach is characterized by its complex and the multi-level nature. Thus, their monitoring follows the same multi-governance trajectory. Monitoring fundamental rights violations in the hotspots occur at the national, the European and the international level. Reports have been published that expose the fundamental rights challenges which abound these reception centers. Through a focus on the European monitoring mechanisms, the EP, the European Commission and FRA, one can draw the ensuing conclusions. First, the European Commission plays a controversial role, sometimes negatively impacting the protection of fundamental rights, other times positively enhancing them. Second, the EP's role is disappointing and insufficient. Third, the EO self-inquiries fail to address the fundamental rights issues occurring in the hotspots. Fourth, the FRA is an interesting alternative mechanism, whose influence seems to be broader, but whose impact remains ambiguous. Thus, an enhanced role for the FRA should be expressly stated and implemented in Greece and in Italy. Finally, the internal monitoring mechanisms play an interesting "insider role" within the EU agencies, but their competence remains limited in terms of scope and powers. In sum, these European mechanisms can control national authorities, and EU agencies and institutions on different scales, but have a clear limited impact on international organizations. Even with regards to the monitoring of national authorities and EU actors, gaps appear that need to be palliated with improvements. In fact, political and social monitoring mechanisms need to have an enhanced and broader role to ensure an efficient protection of fundamental rights. The future will show the efficiency of the new fundamental rights monitors of Frontex, as well as the future monitoring mechanism of the European Union Asylum Agency and will hopefully enhance the existing mechanisms or create new ones. In any case, the need for enhanced monitoring is undeniable, and the new Pact on Migration and Asylum highlighted this once again by introducing the need for an effective and stronger monitoring of migration management and respect of fundamental rights.¹⁴⁹ However, there again, concerns are raised with regards notably the limited scope of the mechanism and its independence.¹⁵⁰ Consequently, whether new mechanisms are put in place, or existing ones are strengthened, it is essential for them to have an extensive scope of action, a presence on the field, and the power to impact and influence the existing situation.

¹⁴⁹ Communication COM(2020) 609 final from the Commission of 23 September 2020 on a New Pact on Migration and Asylum.

¹⁵⁰ R Lanneau, 'The Commission's Proposal for a New Independent Monitoring Mechanism at the External Border of the EU: a Necessary but Limited Mechanism' (22 February 2021) EU Migration and Asylum Law and Policy eumigrationlawblog.eu.

