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# Master Working Paper

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The role of EASO's Role in Supporting Member States

Hotspots as Incubators of an Integrated European Asylum Policy

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*"I want us [EASO] to be the leading agency when it comes to the operations on the ground."*<sup>1</sup>

Nina Gregori  
Executive Director EASO

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<sup>1</sup> EASO, *Nina Gregori, #EASO Executive Director*. [video] (2019), available at: <<https://www.youtube.com/watch?v=mzzah5GWU24>> (accessed 13 Aug. 2019)

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## Abbreviations

AIDA	<b>Asylum Information Database</b>
AFSJ	Area of Freedom, Security and Justice
AST	Asylum Support Team
CEAS	Common European Asylum System
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
COI	Country of Origin
DRC	Danish Refugee Council
EASO/ Support Office	European Asylum Office
EBCG/Frontex	European Border and Coast Guard
ECCHR	European Center for Constitutional and Human Rights
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EDAL	European Database on Asylum Law
EP	European Parliament
EU	European Union
EUAA	European Agency for Asylum
Eurodac	European Dactyloscopy
Eurojust	The European Union's Judicial Cooperation Unit
Europol	European Union Agency for Law Enforcement Cooperation
FRA	European Union Agency for Fundamental Rights
GAS	Greek Asylum Service
GCR	Greek Council for Refugees
GNCHR	Greek National Commission for Human Rights
IOM	International Organization for Migration
JHA	Justice and Home Affairs
MMST	Migrant Management Support Team
MS	Member State(s)
TCN	Third Country National
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNCHR	UNCHR United Nations High Commissioner for Refugees

## **Abstract**

European agencies form an essential part of the EU executive and gain momentum especially in times of crisis. Since the arrival of massive mixed migration flows in Europe in 2015, the European Asylum Support Office (EASO) has played a significant role in supporting EU Member States in so-called hotspots. The undefined legal nature of hotspots and the rather vague wording of tasks of the EU agencies involved qualifies the hotspot approach as an adaptable tool for assisting MS under pressure. While the *de jure* limitations of EASO's mandate have not been amended since the EASO Regulation entered into force in 2010, the *de facto* powers of the agency seem to have grown progressively, especially in Greek hotspots. The thesis assesses EASO's operational tasks in the hotspots in the East-Aegean islands under Greek asylum law and the execution of the activities in the on-site operations in the light of EASO's existing as well as its envisioned extended mandate. The findings shed light on the relationship between Member States and EASO in joint processing of asylum claims in hotspots and indicate the development of an increasingly integrated European administration.

## 1. Introduction

European Union (EU) agencies play a key role in the European integration process by providing technical expertise, offering flexible administrative capacity in complex policy areas, and improving the cooperation of national authorities.<sup>2</sup> The European Asylum Support Office (EASO; Support Office), established in Malta in 2010 based on the EASO Regulation<sup>3</sup>, falls within this characterization. Operating in the Area of Freedom, Security and Justice (AFSJ), it aims to achieve more coherence in the interpretation and application of the Common European Asylum System<sup>4</sup> (CEAS) through cooperation and the exchange of information with the aim to achieve approximation of national procedures through the harmonisation of practices.<sup>5</sup> Moreover, it is tasked with providing increasing operational support to Member States (MS) faced with difficulties.<sup>6</sup> However, EASO does not formally have any say or influence on the national decision-making process concerning asylum.<sup>7</sup>

In the second half of 2015, Europe faced the largest influx of migrants since World War II<sup>8</sup> during the so-called migration crisis<sup>9</sup> which predominantly affected forefront MS such as Greece.<sup>10</sup> Soon, it became clear that the CEAS as well as national administrative procedures were unprepared for such an unprecedented high and sustained influx of mixed flows.<sup>11</sup> As a result, EASO's budget and staff were doubled between 2015 and 2016 to

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<sup>2</sup> Commission, *European Agencies – The Way Forward*, COM (2008) 135 final, p. 5, available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52008DC0135>> (accessed 22 August 2019); see also Michelle Everson, Cosimo Monda and Ellen Vos, 'European Agencies in between Institutions and Member States' in M. Everson, C. Monda and E. Vos (eds), *European Agencies in between Institutions and Member States* (Kluwer Law International BV 2004) 3

<sup>3</sup> Regulation (EU) No 439/2010 of 19 May 2010 establishing a European Asylum Support Office (EASO Regulation) [2010] OJ L 132

<sup>4</sup> For an overview of the CEAS as a legal framework, see Pieter Boeles, Maarten den Heijer, Gerrie Lodder and Kees Wouters, 'Forced Migration' in P. Boeles, M. den Heijer, G. Lodder and K. Wouters (eds), *European Migration Law* (Intersentia 2014) 243-341

<sup>5</sup> EASO Regulation, Art. 2(1); this is in line with the wider trend of *agencification* at EU level which satisfied the demand for decentralized management of a progressively supranational and growing regulatory framework outside of the Commission, see Ellen Vos, Reforming the European Commission: What role to play for EU agencies, *Common Market Law Review* 37,2 (1997) 225-245,

<sup>6</sup> EASO Regulation, Art. 8

<sup>7</sup> EASO Regulation, Art. 2(6), Recital 14; see also Evangelia Tsourdi, Bottom-up salvation?: from practical cooperation towards joint implementation through the European Asylum Support Office, *European Papers* 1 (2016), 997-1031

<sup>8</sup> In 2015 alone 1,014,973 people reached Europe irregularly by crossing the Mediterranean, while additional 3,771 people are estimated to have drowned attempting the same journey, see UNHCR, 'Mediterranean Situation' (2019) available at <<https://data2.unhcr.org/ar/documents/download/53447>> (accessed 20 April 2019)

<sup>9</sup> This paper uses the term 'migration crisis' in accordance with official EU communications and without prejudice to any political connotations denying relative higher migratory pressures of Syria's neighbouring countries.

<sup>10</sup> UNHCR 2019, supra 8

<sup>11</sup> Evangelia Tsourdi, Intra-EU solidarity and the implementation of the EU asylum policy: a refugee or a governance "crisis"? *Searching for Solidarity in EU Asylum and Border Policies* (2015), 5-9; Daniel

ensure better support capabilities.<sup>12</sup> While EASO was not created in response to a crisis<sup>13</sup>, it was now assigned with a key role in the establishment and running of so-called hotspots in Greece due to the migration crisis.<sup>14</sup>

The hotspot approach aims to provide emergency assistance to frontline MS in order to inject greater capacities into migration management at key arrival points.<sup>15</sup> In this framework, EASO plays a vital role in supporting Greek authorities in conducting admissibility and eligibility interviews as well as vulnerability assessments.<sup>16</sup> However, the hotspot approach and EASO's role in it are not regulated by an over-arching legal framework but by a patchwork of policy documents and guidelines. While the EASO Regulation assigns EASO the role of an independent source of information and coordination with explicit boundaries, the hotspot approach arguably extends these legal limits in practice regarding its operational support<sup>17</sup>.

Therefore, this thesis asks: To what extent does a gap exist between EASO's *de jure* and *de facto* operational tasks in the hotspot approach?<sup>18</sup> The existence of a gap would present a challenge to the legality of the operational tasks undertaken by EASO and would signify an informal shift of competence from the MS directly to EASO. Accordingly, the thesis analyses the operational tasks bestowed upon EASO in the context of hotspots in the case of Greece, at the forefront of the Union's external border since the establishment of the hotspot approach in 2015. Special attention is paid to EASO's current mandate in comparison to the

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Thym, The "refugee crisis" as a challenge of legal design and institutional legitimacy, *Common Market Law Review* 53,6 (2016) 1545-1573

<sup>12</sup> EASO, *EASO Statement of Revenues and Expenditures 2015 - Amendment 2/2015*, available at <<https://www.easo.europa.eu/sites/default/files/public/EASO-AmBu-2-2015-adopted-financial-resources.pdf>> (accessed 1 August 2019); EASO, *EASO Statement of Revenues and Expenditures 2016 – Amendment 4/2016*, available at <<https://www.easo.europa.eu/sites/default/files/EASO%20Budget%202016%20-%20Amendment%204%20-5122016.pdf>> (accessed 2 August 2019)

<sup>13</sup> The creation of EU agencies is often a response to crises e.g. the BSE crises, oil tanker Erika crisis and the financial crisis to regain trust and credibility, see Ellen Vos, EU agencies on the move: challenges ahead, *SIEPS* 2018:1, 17; Morten Egeberg and Jarle Trondal, *Agencification of the European Union Administration: Connecting the Dots*, TARN working paper No. 1/2016, 4

<sup>14</sup> Commission, 'A European Agenda on Migration' (Communication) COM(2015) 240 final <[https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/communication\\_on\\_the\\_european\\_agenda\\_on\\_migration\\_en.pdf](https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/communication_on_the_european_agenda_on_migration_en.pdf)> (accessed 22 June 2019) 6

<sup>15</sup> Commission, *Annex 2 to the Communication from the Commission to the European Parliament, the European Council and the Council: Managing the refugees crisis: immediate operational, budgetary and legal measures under the European Agenda on Migration* COM(2015) 490 final/2

<sup>16</sup> EASO, 2019 Operating Plan Agreed by EASO and Greece (2018) 12, available at <<https://www.easo.europa.eu/sites/default/files/OP-Greece-2019.pdf>> (accessed 14 July 2019)

<sup>17</sup> European Ombudsman, Decision in case 735/2017/MDC on the European Asylum Support Office's (EASO) involvement in the decision-making process concerning admissibility of applications for international protection submitted in the Greek Hotspots, in particular shortcomings in admissibility interviews

<sup>18</sup> The formulation "to what extent" does not exclude that the extent and therefore the gap is non-existent.



execution of the activities in its on-site operations. Consequently, the aim of this study is to evaluate whether EASO's operational practice in Greece as an EU agency is legal in that it has a legal basis in EU law, particularly the EASO Regulation. Additionally, the thesis sheds light on the relationship between EASO and MS asylum authorities under the hotspot approach.

As a legal study, this thesis starts by introducing EASO's organizational structure. Second, it analyses EASO's mandate in the context of the EASO Regulation. Third, the hotspot approach and EASO's role in it is scrutinized. Fourth, the mandate is compared to the reality in the field work of EASO in Greece's hotspots through policy documents such as EASO's *Special Support Plans to Greece* as well as reports by the Asylum Information Database (AIDA) and the European Center for Constitutional and Human Rights (ECCHR). The proposal for the European Agency for Asylum (EUAA) is then considered as a potential remedy for the practice in hotspots which potentially goes beyond EASO's current mandate. Finally, the conclusion summarizes the findings and puts them into a wider perspective.

## 2. EASO's Organisational Structure

Before we turn to EASO's mandate, it is important to give an overview of the main characteristics of EASO's organizational structure in order to understand its relationship with both MS and the Commission and to give context to its growing operational tasks.

In June 2010, the EASO Regulation entered into force, establishing EASO which was officially inaugurated in Valetta, Malta one year later<sup>19</sup>, following the objectives set out in the Hague Programme of 2004 to approximate national policies in the field of asylum<sup>20</sup>. The agency is governed by a Management Board consisting of representatives of all 28 MS<sup>21</sup>, two Commission representatives<sup>22</sup> with voting rights<sup>23</sup> and one consulting representative of the UNHCR without voting rights<sup>24</sup>. Thus, the Management Board is dominated by the MS.<sup>25</sup>

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<sup>19</sup> EASO, Seat Agreement between the Government of Malta and the European Asylum Support Office (2011)

<<https://www.easo.europa.eu/sites/default/files/EASO%20SEAT%20AGREEMENT%20EN%20and%20MT.pdf>> (accessed 9 July 2019)

<sup>20</sup> Council, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, Council (2005) OJ C53/1, III.1.3, available at <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:053:0001:0014:EN:PDF>>

<sup>21</sup> EASO Regulation, Art. 25(1); see also EASO Regulation Rec. 21: Based on Art. 3 Protocol 21 to the Lisbon Treaty, the United Kingdom and Ireland executed their *opt-in* right in respect of the AFSJ with regards to the adoption and application of the EASO Regulation. They have full voting rights except in cases where the Management Board decides on the adoption of technical documents which fall exclusively to an asylum instrument by which they are not bound (EASO Regulation Art. 28(4)); see also EASO Regulation, Rec. 22: Based on Protocol 22 to the Lisbon Treaty, Denmark is in a complete *opt-out* situation for the AFSJ and thus did not participate in the adoption of the EASO Regulation. However, EASO Regulation, Rec. 23 in conjunction with Art. 48 indicates that Denmark holds a special status to "facilitate operational cooperation" which includes the participation of a Danish representative in meetings of the Management Board without voting rights and the exchange of information and best practices. Denmark's standing is thus elevated over the observer status of the associate countries Iceland, Liechtenstein, Norway and Switzerland pursuant to EASO Regulation, Art. 49.

<sup>22</sup> EASO Regulation, Art. 25(1)

<sup>23</sup> EASO Regulation, Art. 28(1): Representatives of the MS and the Commission each have one vote with the exceptions mentioned in supra n. 18

<sup>24</sup> EASO Regulation, Art. 25(4)

<sup>25</sup> The composition of Management Boards and their influence on agencies' independence are subject to extensive scholarly debate, see E. Vos, *Institutional Frameworks of Community Health and Safety Regulation, Committees, Agencies and Private Bodies* (Oxford: Hart Publishing, 1999), Chapter 2.5.; Madalina Busuioac, *The Accountability of European Agencies. Legal Provisions and Ongoing Practices* (Delft: Eburon, 2010), 60; Morten Egeberg & Jarle Trondal, EU-level Agencies: New Executive Centre Formation or Vehicles for National Control?, *Journal of European Public Policy* 18, no. 6 (2011): 870–872;

This thesis will not repeat that. Instead, as indicated in the introduction, it addresses the relationship between MS and EASO in EASO's operative support with a very specific focus on the hotspots approach.

The Management Board acts as monitoring body of the Support Office, playing a central role in drawing up its budget.<sup>26</sup> MS are involved at two stages of the budget adoption, namely during drafting the budget in the Management Board<sup>27</sup> and during its approval in the Council as a co-legislator with the European Parliament (EP)<sup>28</sup>, giving them control over EASO's development as an agency and therefore *in extenso* its operational capabilities. Furthermore, the Management Board appoints the Executive Director<sup>29</sup>, which is currently Nina Gregori<sup>30</sup>. The Executive Director is the legal representative of the agency<sup>31</sup> and she is accountable to the Management Board.<sup>32</sup> She is in charge of the administrative management of the Support office and it is her task to inter alia take care of the day-to-day management of EASO<sup>33</sup>, to establish and implement the Support Office's work programmes<sup>34</sup> and to take all decisions on the internal management of EASO<sup>35</sup>.

Administratively, the Support Office is composed of three departments: Asylum Support, Operations, and Administrations which consists of scientific, operative, managerial and administrative staff.<sup>36</sup> Additionally, EASO draws expertise from working groups composed of experts from MS authorities, contributing to its scientific output.<sup>37</sup> Furthermore, EASO consults regularly with relevant stakeholders from civil society in consultative fora.<sup>38</sup>

From the outset until the height of the migration crisis in 2015, EASO had to work with very limited financial resources. From 2011 to 2015, the annual budget<sup>39</sup> increased from €8

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<sup>26</sup> EASO Regulation, Art. 34

<sup>27</sup> EASO Regulation, Art. 34(2)

<sup>28</sup> EASO Regulation, Art. 34(6)

<sup>29</sup> EASO Regulation, Articles 29(1)(b) and 30(1); According to the latter provision (second paragraph), the managing board shall take into account the opinion of the EP when appointing the Executive Director. However, there are no EP representatives in the managing board, which is the case e.g. for EU-OSHA, see Regulation (EU) 2019/126 of the European Parliament and of the Council of 16 January 2019 establishing the European Agency for Safety and Health at Work (EU-OSHA), and repealing Council Regulation (EC) No 2062/94 [2019] OJ L 30, Art. 4(1)(e)

<sup>30</sup> EASO, *Nina Gregori takes up duties as Executive Director of EASO* [Press Release 17 June 2019], available at < <https://www.easo.europa.eu/news-events/nina-gregori-takes-duties-executive-director-easo>> (accessed at 12 July 2019)

<sup>31</sup> EASO Regulation, Articles 31(4) & 40(3)

<sup>32</sup> EASO Regulation, Art. 31(1); She is supported by a personal Senior Advisor, the Executive Support Office, the Liaison Officers to the EU institutions and Frontex, and the Communications and Stakeholders Unit.

<sup>33</sup> EASO Regulation, Art. 31(6)(a)

<sup>34</sup> EASO Regulation, Art. 31(6)(b)&(c)

<sup>35</sup> EASO Regulation, Art. 31(6)(i)

<sup>36</sup> EASO, EASO SINGLE PROGRAMMING DOCUMENT 2019-2021 – ANNEXES – REVISION 1 November 2018, available at < [https://www.easo.europa.eu/sites/default/files/2\\_SPD2019-21%20Annexes%20Revision%201%20-%20adopted%2020181127.pdf](https://www.easo.europa.eu/sites/default/files/2_SPD2019-21%20Annexes%20Revision%201%20-%20adopted%2020181127.pdf)> (accessed 1 August 2019), 35

<sup>37</sup> EASO Regulation, Art. 32

<sup>38</sup> EASO Regulation, Art. 51; see EASO, *Civil Society*, available at < <https://www.easo.europa.eu/civil-society>> (accessed 1 August 2019)

<sup>39</sup> In this regard see also the official external evaluation commissioned by the Commission: Ernst & Young, Independent External Evaluation of EASO's activities covering the period from February 2011

million to €15.9 million.<sup>40</sup> However, in 2016, the budget was amended significantly in the course of one year from €19.4 to €53 million.<sup>41</sup> The Support Office's budget was increased once more to €79 million in 2017<sup>42</sup>, and stayed steadily at €98 million in 2018<sup>43</sup> and 2019<sup>44</sup>. At every increase the share of expenditures for operative support to MS constituted the main cost factor.<sup>45</sup> The increased relevance of EASO due to the migration crisis can also be seen in staff development. While the Commission in 2013 projected staff numbers to increase from initially 45 to 51 by 2020, the most recent establishment plan of 2018 indicates current staff amounting to 214 people.<sup>46</sup> This is a clear indication of the increased relevance of EASO as a service provider of operative support to the MS in a time of increased migratory pressure. For the period of 2017-2020, the Commission set aside €364 million to finance the proposed extension of EASO, the EUAA<sup>47</sup> (chapter 7). The administrative structure of the EUAA would remain the same, apart from some minor changes.<sup>48</sup>

Given the research focus of this thesis, EASO's organisational structure is relevant for the execution of its mandate in practice, especially regarding the resources made available by MS for operational support. Additionally, this chapter illustrated that the

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to June 2014 (2015) available at <<https://www.easo.europa.eu/about-us/governance-documents>> (accessed 6 August 2019)

<sup>40</sup> EASO, *État des recettes et des dépenses du Bureau européen d'appui en matière d'asile (EASO) pour l'exercice (2013/C 52/12)* OJ C 52/49; see EASO 2015, supra n. 12 at 1

<sup>41</sup> EASO 2016, supra n. 12 at 2

<sup>42</sup> EASO, *EASO Statement of Revenues and Expenditures 2017 – Amendment 2/2017*, available at <<https://www.easo.europa.eu/sites/default/files/EASO-budget-amendment%202-2017-v3-fund-sources-final.pdf>> (accessed 2 August 2019), 1

<sup>43</sup> EASO, *EASO Statement of Revenues and Expenditures 2018 – Amendment 1/2018*, available at <<https://www.easo.europa.eu/sites/default/files/easo-budget-2018-am1.pdf>> (accessed 2 August 2019), 2

<sup>44</sup> EASO, *EASO Statement of Revenues And Expenditures 2019*, available at <<https://www.easo.europa.eu/sites/default/files/EASO%20detailed%20budget%202019.pdf>> (accessed 2 August 2019), 1-2

<sup>45</sup> *Ibid.*, supra n. 40-44

<sup>46</sup> see Commission, *Programming of human and financial resources for decentralized agencies 2014-2020*, COM(2013) 519 final, 23; see EASO, *EASO Establishment Plan 2018*, available at <<https://www.easo.europa.eu/sites/default/files/easo-establishment-plan-2018-final-web.pdf>> (accessed 1 August 2019)

<sup>47</sup> Commission, *Proposal for a Regulation of the European Parliament and the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 (EUAA Proposal)*, COM/2016/0271 final - 2016/0131 (COD), available at <[http://www.europarl.europa.eu/RegData/docs\\_autres\\_institutions/commission\\_europeenne/com/2016/0271/COM\\_COM\(2016\)0271\\_EN.pdf](http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2016/0271/COM_COM(2016)0271_EN.pdf)> (accessed 2 August 2019), 5; To put EASO's budget into perspective, the comparison to FRONTEX's budget development is compelling. FRONTEX started out on a budget of €6.2 million in 2005, reaching an equivalent to EASO's current budget in 2013 and has €333 million in 2019 at its disposal, see FRONTEX, *Key Facts*, available at <<https://frontex.europa.eu/faq/key-facts/>> (accessed 2 August 2019); for a detailed comparative analysis see Florian Trauner, *Asylum policy: the EU's 'crises' and the looming policy regime failure*, *Journal of European Integration* 38:3 (2016), 318

<sup>48</sup> See Commission, *EUAA Proposal 2016* supra n. 47, Art. 39; The composition of the Management Board remains the same but the term of office of its members is extended from three to four years.

migration crisis and the related introduction of the hotspot approach in 2015 (chapter 4) steered EASO's increasing resources towards operational support in an unprecedented way.

### 3. EASO's Mandate

This section examines EASO's mandate as set out by the EASO Regulation and reflects on the scope of the agency's powers and their limitations. EASO was established as an EU agency<sup>49</sup> by introducing it as (i) a permanent body under (ii) EU public law<sup>50</sup>, (iii) established by the institutions through secondary legislation<sup>51</sup> and endowed with (iv) its own legal personality<sup>52</sup>. Unlike Europol<sup>53</sup>, Eurojust<sup>54</sup>, and the European Defence Agency<sup>55</sup>, the vast majority of EU agencies, including EASO, do not have an explicit legal base in EU primary law. Due to the lack of a general separate legal basis for the creation of agencies<sup>56</sup>, either broad provisions, Articles 114 and 352 TFEU, or sectorial provisions are used to establish and confer competences to EU agencies<sup>57</sup>. Accordingly, the EASO Regulation, which establishes the Support Office<sup>58</sup>, is based on Articles 74 and 78(1) & (2) TFEU.

#### 3.1 The Exclusion of Decision-Making Powers

The legal bases chosen for the EASO Regulation have wide-ranging consequences for the scope of the Support Office's mandate. On the one hand, Art. 74 TFEU on the administrative

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<sup>49</sup> As EU law lacks a precise definition of EU agency, the following four elements are based on the definition by Chamon, see Merijn Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press 2016) 14

<sup>50</sup> The EASO Regulation does not contain a sunset clause as opposed to executive agencies which are set up by the Commission for a limited period of time to manage a specific EU program, see Council Regulation (EC) No 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes [2003] OJ L 11, Art. 3(1)

<sup>51</sup> see EASO Regulation based on Articles 74 in conjunction with 78 (1) & (2) TFEU

<sup>52</sup> EASO Regulation, Art. 40(1)

<sup>53</sup> Art. 88 TFEU

<sup>54</sup> Art. 85 TFEU

<sup>55</sup> PROTOCOL (No 10) on permanent structured cooperation established by Article 42 of the Treaty on European Union

<sup>56</sup> For a comprehensive discussion of the Treaties' constitutional neglect of agencies which also includes the lack of recognition of a possibility to delegate powers to agencies under Articles 290 and 291 TFEU, see E. Vos 2018, *supra* n. 11, at 22-24; Ellen Vos, 'European Agencies and the Composite EU Executive' in M. Everson, C. Monda and E. Vos (eds), *European Agencies in between Institutions and Member States* (Kluwer Law International BV 2004) 43; Herwig Hofmann, Seven Challenges for EU administrative law, *Review of European Administrative Law* 2,2 (2009) 44-48

<sup>57</sup> M. Chamon 2016, *supra* n. 49, 192-212

<sup>58</sup> EASO Regulation, Art. 1

cooperation among MS and Commission authorities in the AFSJ is a notably broad legal base<sup>59</sup> which is often combined with a substantive legal base<sup>60</sup>. Situating EASO in administrative cooperation between MS is reflected in the first two pillars of its mandate and reflects the supportive character of the agency. On the other hand, Art. 78 TFEU restricts EASO's decision-making powers considerably. While Art. 78(1) TFEU strongly anchors the EASO Regulation in the asylum acquis, Art. 78(2)(e) TFEU establishes the MS as solely responsible for examining applications for international protection by stating that "criteria and mechanisms for determining *which Member State is responsible* for considering an application for asylum or subsidiary protection" [emphasis added]. Thus, EASO may not be prohibited from making preliminary or preparatory assessments of individual asylum claims and applications for subsidiary protection<sup>61</sup>, but the final decision clearly lies with the MS' authorities.<sup>62</sup>

Accordingly, the EASO Regulation explicitly rules out any discretionary decision-making powers by stating that the agency "shall have no power in relation to the taking of decisions by Member States' asylum authorities on individual applications for international protection".<sup>63</sup> Rec. 14 of the EASO Regulation even goes further by extending the prohibition of decision-making to "direct or indirect powers". This insistence on the exclusion of decision-making powers should be understood as an expression of the sensitivity of the AFSJ for MS<sup>64</sup>, particularly vis-à-vis asylum policy<sup>65</sup>, combined with the absence of extreme migratory

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<sup>59</sup> Striking examples are the European Judicial Network (EJN) based on Decision 2001/470 (OJ 2001, L 174) and the Visa Information Network (VIS) based on Regulation 767/2008 (OJ 2008, L 218/60). While the EJN deals with informational exchanges for the facilitation of judicial cooperation, the VIS plays a vital role in the management of external borders; see also Marcus Klamert, Manuel Kellerbauer, & Jonathan Tomkin, *Commentary on the EU Treaties and the Charter of Fundamental Rights* (Oxford University Press 2019) 793

<sup>60</sup> see REGULATION 2018/1726 on the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA), and amending Regulation (EC) No 1987/2006 and Council Decision 2007/533/JHA and repealing Regulation (EU) No 1077/2011, which combines Art. 74 TFEU with no less than seven substantive legal bases

<sup>61</sup> see EASO Regulation, Art. 10(a)

<sup>62</sup> E. Tsourdi *supra* n. 7 at 1002; secondary legislation designates a single MS responsibility for individual asylum claims, see Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (**Dublin III**) [2013] OJ L 180, Articles 7-9

<sup>63</sup> EASO Regulation, Art. 2(6)

<sup>64</sup> Jörg Monar, *The institutional dimension of the European Union's area of freedom, security and justice* (Peter Lang 2010), 24; M. Busuioc 2010, *supra* n. 25 at 217; Martijn Groenleer, *The autonomy of European Union agencies: A comparative study of institutional development* (Eburon Uitgeverij 2009), 300f.

<sup>65</sup> Steve Peers, 'Immigration and Asylum' in Chatherine Barnard and Steeve Peers (eds), *European Union Law* (Oxford University Press 2017) 298 & 813; Eiko Thielemann and Carolyn Armstrong, *Understanding European asylum cooperation under the Schengen/Dublin system: a public goods framework*, *European Security* 22.1 (2013) 148-164

pressures at the time of crafting the EASO Regulation<sup>66</sup>. This explanation goes hand in hand with the general notion often shared among MS that agencies, as non-majoritarian and independent actors, should not become “uncontrollable centres of arbitrary power”<sup>67</sup>. Against this backdrop, it is unsurprising that the EASO Regulation also explicitly precludes the Support Office’s reports and other technical documents<sup>68</sup> from being legally binding upon MS.<sup>69</sup> Logically, this prevents any binding instruction towards MS about the granting or refusal of international protection. Additionally, the potential weight of EASO’s ‘guidelines and operating manuals’ in the context of asylum policy, an area of high political salience for MS regarding sovereignty, cannot be compared to the impact of *guidelines* of agencies in the internal market area which are close to quasi-binding rules.<sup>70</sup>

### 3.2 The Three Pillars of EASO’s Mandate

Generally, the EASO Regulation establishes the Support Office as an independent source of information, providing scientific and technical assistance in the field of asylum policy.<sup>71</sup>

EASO’s assigned tasks can be divided into three main pillars:

The first pillar comprises the coordination of practical cooperation among MS<sup>72</sup> to enhance convergence of asylum practices.<sup>73</sup> This involves identifying and disseminating best practices in the field of asylum<sup>74</sup>, gathering and reporting information on countries of origin<sup>75</sup>

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<sup>66</sup> For detailed overview of the negotiations over EASO’s mandate see Françoise Comte, A new agency is born in the European union: the European asylum support office, *European Journal of Migration and Law* 12.4 (2010) 375-383

<sup>67</sup> Michelle Everson, ‘Agencies: the “the dark hour” of the executive?’ in H. Hofmann, and A. Türk (eds), *Legal Challenges in EU Administrative Law: Towards and Integrated Administration* (Edward Elgar 2009) 190; see also Joseph Weiler, ‘Epilogue: “Comitology” as Revolution-Infranationalism, Constitutionalism and Democracy’ in C Joerges and E. Vos (eds), *EU Committees: Social Regulation, Law and Politics* (Oxford 2009) 347-349

<sup>68</sup> EASO publishes and updates a multitude of technical documents every year, such as EASO, EASO Guidance on Reception Conditions: Operational Standards and Indicators (2016), available at <<https://www.easo.europa.eu/news-events/easo-guidance-reception-conditions-operational-standards-and-indicators>> (accessed 23 August 2019)

<sup>69</sup> EASO Regulation, Art. 4(e) & Art. 12(2)

<sup>70</sup> F. Comte 2010, supra n. 66 at 402; compare with e.g. EASA, which is responsible for adopting guidelines for the allocation of certification tasks, see Ellen Vos, ‘European Agencies and the Composite EU Executive’ in M. Everson, C. Monda and E. Vos (eds), *European Agencies in between Institutions and Member States* (Kluwer Law International BV 2004) 22-23

<sup>71</sup> EASO Regulation, Rec. 13 & Art. 2(4)

<sup>72</sup> EASO has taken over the responsibilities of the former Commission expert group Eurasil in this area, see Commission, ‘Eurasil’ (Migration and Home Affairs, 2019) available at <[https://ec.europa.eu/home-affairs/what-we-do/networks/european\\_migration\\_network/glossary\\_search/eurasil\\_en](https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/eurasil_en)> (accessed 11 July 2019)

<sup>73</sup> EASO Regulation, Art. 2(1) & Chapter 2 Section 1

<sup>74</sup> EASO Regulation, Art. 3

<sup>75</sup> EASO Regulation, Art. 4; This is a significant task because national decisions on asylum requests highly depends on accurate and reliable information about the conditions in countries of origin, see F. Comte, supra n. 66 at 395; Their significance as a monitoring tool is reinforced in the EUAA amended proposal (chapter 7).

(COI), coordinating the exchange of information and activities regarding relocations of asylum seekers within the EU<sup>76</sup>, and providing training for national asylum authorities<sup>77</sup>.

Within the second pillar, EASO is mandated with the support for MS facing particular pressure which may arise as a result of sudden arrivals of third-country nationals or of the geographical or demographical particularities of the respective MS.<sup>78</sup> Particularly, EASO is empowered to coordinate common action and capacity building measures. This includes gathering information to facilitate the processing of increased migratory pressure<sup>79</sup> and coordinating efforts to support MS<sup>80</sup>, including the measures referred to in Chapter 3 of the EASO Regulation<sup>81</sup> concerning the Asylum Support Teams<sup>82</sup> (ASTs).

Finally, the third pillar addresses EASO's contribution to the implementation of the CEAS<sup>83</sup>. Accordingly, its agenda involves the gathering of information, the organisation of the data exchange among MS' asylum authorities<sup>84</sup> and the drafting of non-binding policy documents such as annual reports on the situation of asylum, guidelines and operating manuals<sup>85</sup>. This set of tasks, in comparison to the other two pillars, does not entail the support of MS only, but also of the Union as a whole by striving to approximate the implementation of the CEAS, giving it a "true European character"<sup>86</sup>.

Despite having no decision-making powers, EASO holds a broad mandate within its supporting role<sup>87</sup> as a producer of expert knowledge and a coordination hub. In practice, EASO has established itself as an "interface" in the network of individual MS' national asylum authorities<sup>88</sup> which collectively rely on EASO e.g. for COIs<sup>89</sup>, training<sup>90</sup> and interpretation of

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<sup>76</sup> EASO Regulation, Art. 5

<sup>77</sup> EASO Regulation, Art. 6

<sup>78</sup> EASO Regulation, Art. 2(2) & Art. 8; This rather vague definition of 'particular pressure' potentially covers a wide variety of possible pressure situations of very differing intensity which makes the deployment of AST's in practice dependent on upon a MS' request with regards to EASO Regulation, Art. 13(1)

<sup>79</sup> EASO Regulation, Art. 9

<sup>80</sup> EASO Regulation Art. 10

<sup>81</sup> EASO Regulation, Art. 10(3)

<sup>82</sup> EASO Regulation, Art. 13

<sup>83</sup> EASO Regulation, Chapter 2 Section 3

<sup>84</sup> EASO Regulation, Art. 11; Paragraph 2 refers to the exchange of information regarding the (a) processing of applications for international protection and (b) national legal developments

<sup>85</sup> EASO Regulation, Art. 12

<sup>86</sup> F. Comte 2010, supra n. 66 at 401

<sup>87</sup> The predominant supporting factor is reinforced throughout the EASO Regulation by the reoccurring formulation "[t]he Support Office shall organise, promote, and coordinate", see EASO Regulation, Articles 3, 4(1), 8(2), 11(1); Nevertheless,

<sup>88</sup> Stephanie Schneider and Carolin Nieswandt, EASO—Support Office or Asylum Authority? Boundary Disputes in the European Field of Asylum Administration, *Österreichische Zeitschrift für Soziologie* 43.1 (2018) 17

<sup>89</sup> For the relevance of COI reports, see Claudia Engelmann, *Informelles Regieren in der Europäischen Asylopolitik*, *Zeitschrift für Vergleichende Politikwissenschaft* 4 (2004)



the CEAS<sup>91</sup> aiming to close the implementation gap<sup>92</sup>. Moreover, the value-laden nature of asylum policy gives reason to assume that EASO's managerial and scientific tasks are not exclusively technical but also address political issues.

In this context, it can be assumed that the broad nature of EASO's mandate would require financial and personnel resources considerably transcending the pre-2015 levels in order to provide a high quality of services.<sup>93</sup> Furthermore, it is questionable whether the absence of decision-making powers as described above makes the effective execution of these tasks, particularly operational support, feasible. Thus, it has to be asked how serious MS were initially interested in a functional Support Office.<sup>94</sup>

### 3.3 EASO's Operational Support

Following the focus of this thesis, this section goes more into detail with regard to the operational aspect of EASO's mandate. This serves (4.2) as a basis to situate EASO's role in the hotspot approach.

EASO's most wide-ranging area of activity constitutes the provision of operational support to MS whose asylum and reception systems are subject to 'particular pressure'<sup>95</sup>. Apart from gathering and ensuring the exchange of relevant information among MS and the Commission concerning heavy and urgent migratory pressures<sup>96</sup>, EASO may deploy ASTs in the field upon request of a MS concerned<sup>97</sup> whose operational and technical assistance is coordinated by the Support Office<sup>98</sup>. The ASTs are made up of experts from other MS<sup>99</sup> contributing to the Asylum Intervention Pool according to the required profiles<sup>100</sup>. However,

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<sup>90</sup> EASO, Types of Operations, available at <<https://www.easo.europa.eu/operational-support/types-operations>> (accessed 14 July 2019)

<sup>91</sup> Ibid.

<sup>92</sup> Ibid., see Michael Kaeding and Esther Versluis, 'EU Agencies as a Solution to Pan-European Implementation Problems' in M. Everson, C. Monda and E. Vos (eds), *European Agencies in between Institutions and Member States* (Kluwer Law International BV 2004) 81-86

<sup>93</sup> This point is highlighted several times by Tsourdi who asks whether EASO could be considered a "paper tiger", see E. Tsourdi, supra n. 7 at 1005

<sup>94</sup> This holds especially true, when compared to the development of EBCG, see supra n. 47

<sup>95</sup> In the meaning of EASO Regulation, Art. 8

<sup>96</sup> EASO Regulation, Art. 9(3); In order to maximize its capabilities in this area, EASO entered working agreements with International Organisations in the field of migration, e.g. the International Organization for Migration (IOM), see EASO & IOM, Working Arrangement between the European Asylum Support Office (Easo) and the International Organization For Migration (IOM), available at <<https://www.easo.europa.eu/sites/default/files/easo-iom-working-arrangement.pdf>> (accessed 23 July 2019)

<sup>97</sup> EASO Regulation, Art. 13(1)

<sup>98</sup> EASO Regulation, Art. 13(2); It remains unclear if it is possible to take legal steps of any kind against the members of ASTs in case of maladministration because they are seconded by other MS, see Chatarina Ziebritzki and Robert Nestler, 'Hotspots' an der EU-Außengrenze: Eine rechtliche Bestandsaufnahme, *MPIL Research Paper Series* 2017-17 (2017) 12

<sup>99</sup> EASO Regulation, Art. 15(1);

<sup>100</sup> EASO Regulation, Art. 15(2)

MS retain autonomy concerning the number, profiles, and deployment duration of deployed national experts and may refuse to contribute if the requested staff is essential for the functioning of national authorities.<sup>101</sup> The Executive Director, informing the Management Board, takes the decision to deploy one or several ASTs to a MS<sup>102</sup> and agrees with that MS on an Operating Plan defining the situational, temporal, geographical scope and the staff requisition of the operation<sup>103</sup>. The Operational Plans are non-binding agreements between EASO and the requesting MS which constitute a tailor-made roadmap for the ASTs tasks in cooperation with national authorities. On a policy level, EASO further distinguishes between ‘special support’, ‘emergency support’, ‘joint processing activities’ and ‘hotspots’ regarding its operational activities.<sup>104</sup>

The second phase of the CEAS in 2013 broadened the scope of EASO’s operational support through recast secondary legislation. The Qualifications Directive (recast)<sup>105</sup>, the Reception Conditions Directive (recast)<sup>106</sup>, and the Asylum Procedures Directive (recast)<sup>107</sup> confirm EASO’s operational role in the MS’ implementation of the CEAS, particularly to those MS which are faced with specific and disproportionate pressures on their asylum systems. For the legal analysis of hotspots in Greece (4.3), it is important to highlight that none of these three legal acts confer a role in their provisions with regard to processing asylum claims. Exclusively, Dublin III assigns an operational role in the “mechanism for early warning, preparedness and crisis management”, as MS draw up a crisis management plan in

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<sup>101</sup> EASO Regulation, Art. 16(1); in practice EASO lacked administrative human resources in Greek hotspots in the past because MS did not provide sufficient seconded asylum experts, see European Commission, Sixth Report on the Progress made in the implementation of the EU-Turkey Statement COM(2017) 323 final, 3

<sup>102</sup> EASO Regulation, Art. 17

<sup>103</sup> EASO Regulation, Art. 18(1)(a)-(e); So far EASO has provided operational support in differing forms to Greece, Italy, Malta, Cyprus, Bulgaria, Sweden and Luxembourg between 2011 and end of June 2019, see EASO, Types of Operations, available at <<https://www.easo.europa.eu/operational-support/types-operations>> (accessed 14 July 2019)

<sup>104</sup> EASO, Annual Report on the Situation of Asylum in the European Union 2018 (2019) 109, available at <<https://www.easo.europa.eu/sites/default/files/easo-annual-report-2018-web.pdf>> (accessed 1 August 2019); The legal discussion concerning this policy distinction with regard to the practice in different MS goes beyond the scope of this thesis, see David Fernandez Rojo, Evolution of the Operational Tasks of Frontex, EASO and Europol: Towards an Integrated Border Management, Migration and Asylum Administration [2018], 213-216; E. Tsourdi 2016, supra n. 7 at 1007-1015

<sup>105</sup> Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (**Qualification Directive**) [2011] OJ L 337, Rec. 11

<sup>106</sup> Directive 2013/33/EU laying down standards for the reception of applicants for international protection (**Reception Conditions Directive**) [2013] OJ L 180, Rec. 6

<sup>107</sup> Directive 2013/32/EU on common procedures for granting and withdrawing international protection (**Procedures Directive**) [2013] OJ L 180, Rec. 9

cooperation with EASO where applicable.<sup>108</sup> However, this mechanism has never been triggered to date and is proposed to be abolished in the next reform of the CEAS.<sup>109</sup>

At this stage, several observations can be made. First, the hybridity of EASO as an EU agency can be found both in its institutional structure, where representatives of MS, the Commission and the UNHCR build their steering bodies, and its various tasks addressing the MS and the Union as a whole, qualifying EASO as “betwixt and between”<sup>110</sup>. Especially in its role of providing and facilitating exchange of complex information, the Support Office acts as a central junction between various executive levels of an emerging European executive.<sup>111</sup> Second, EASO is highly dependent on MS’ financial and personnel contributions and on the cooperation in the field of their national counterparts, especially in its operative support, keeping the Support Office at “arm’s length”<sup>112</sup>. This dependency affects in particular EASO’s operational support which is cost-intensive<sup>113</sup> and whose ASTs can only be assembled if MS contribute sufficiently to the Asylum Intervention Pool. It is this operational capacity in the form of the AST that equips EASO with the necessary flexibility to temporarily induce administrative capacity and efficiency to MS under pressure. It allows shifting administrative asylum staff and interpreters between national asylum agencies under the coordination of EASO in order to enable MS to fulfil their obligations under the CEAS. With reference to EASO’s rapid growth starting in 2015, it is evident that the migration crisis qualifies as the ‘contingent event’<sup>114</sup> in the Support Office’s development. It coincides with the emergence of the hotspot approach introduced by the Commission in which EASO was assigned a pivotal role that would increase its operational mandate tremendously.

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<sup>108</sup> Dublin III, Art. 33

<sup>109</sup> Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the MS by a third-country national or a stateless person (recast), COM 2016 270 final, 66-67

<sup>110</sup> Deidre Curtin, *Executive Power of the European Union: Law, Practices and the Living Constitution* (Oxford: Oxford University Press, 2009), 174

<sup>111</sup> Compare with Herwig Hofmann and Alexander Türk (eds), *EU Administrative Governance* (Cheltenham: Edward Elgar Publishing, 2006), 524

<sup>112</sup> E. Vos 2018, *supra* n. 13, at 38-39; F. Comte 2010, *supra* n. 66 at 395; The priority of procedural accountability mechanisms in the EU agencification process due to struggles to uphold EU institutional balance has led to an accountability modus where no-one controls an independent agency, yet the agency is under control, see Giandomenico Majone, ‘The European Commission as Regulator’ in G. Majone (ed), *Regulating Europe* (Routledge 2004) 77-96

<sup>113</sup> EASO 2019, *supra* no. 40

<sup>114</sup> M. Egeberg and J. Trondal 2016, *supra*. 13 at 4

## 4. The Hotspot Approach

This chapter introduces hotspots as a concept, examines EASO's role in it and introduces the Greek case.

### 4.1 The Policy Framework of Hotspots

There is no concrete legal definition of the hotspot approach because it was introduced and further developed by a patchwork of policy documents, guidelines and provisions in existing and intended founding regulations. The term has its origins in Frontex's internal jargon to label a confined area of the EU external border at risk of receiving a high number of mixed migratory flows.<sup>115</sup>

The European Agenda on Migration of May 2015<sup>116</sup> introduced the hotspot approach as a model of operational support to frontline MS in the form of identifying, registering and fingerprinting arriving migrants with the aim to enable and accelerate their asylum procedure.

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<sup>115</sup> European Parliament, Implementation of the 2015 Council Decision Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece PE 583 132 (2017), available at [http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL\\_STU\(2017\)583132](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2017)583132) (accessed 11 August 2019)

<sup>116</sup> Commission 2015, supra 14

This support would be provided on site by EASO support teams assisting in processing asylum cases, by Frontex coordinating returns and by Europol and Eurojust assisting MS in dismantling trafficking networks.<sup>117</sup> Ostensibly based on Art. 80 TFEU, the approach was endorsed by the European Council in June 2015.<sup>118</sup>

The approach was further elaborated by the Commission in the “Explanatory Note on the Hotspot Approach”<sup>119</sup>, which was distributed to the MS’ Justice and Home Affairs Ministers in July 2015<sup>120</sup> and whose essential features were summarized in Annex 2 to the Commission Communication of 29 September 2015<sup>121</sup>. According to these documents, “an external border section should be considered to be a “hotspot” for a limited period of time during which the emergency or crisis situation subsists and during which the support of the “hotspot approach is necessary.”<sup>122</sup> The hotspot approach is to be triggered upon the request of a MS to the Commission and the relevant agencies.<sup>123</sup> However, it is the MS in question that remains formally in charge of the asylum processing on its territory, the agencies involved assist.<sup>124</sup>

The Regulation establishing the European Border and Coast Guard (EBCG)<sup>125</sup> of 13 September 2016 defines a hotspot for the first time in binding EU legislation as

“an area in which the host Member State, the Commission, relevant Union agencies and participating Member States cooperate, with the aim of managing an existing or potential disproportionate migratory challenge characterised by a significant increase in the number of migrants arriving at the external borders”

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<sup>117</sup> Ibid.

<sup>118</sup> European Council, European Council meeting – Conclusions (25 and 26 June 2015) EUCO 22/15, available at <<https://www.consilium.europa.eu/media/21717/euco-conclusions-25-26-june-2015.pdf>> (accessed 15 August 2019)

<sup>119</sup> Commission, *Explanatory note on the “Hotspot” approach* (2015), available at <<https://www.statewatch.org/news/2015/jul/eu-com-hotspots.pdf>> (accessed 29 July 2019); this unofficial version is only available under statewatch.org, the Commission published a shortened version of the document here <[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/2\\_hotspots\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/2_hotspots_en.pdf)>

<sup>120</sup> European Parliament, *On the frontline: the hotspot approach to managing migration* PE 556.942 (2016) 26, available at

<[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556942/IPOL\\_STU\(2016\)556942\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556942/IPOL_STU(2016)556942_EN.pdf)> (accessed 12 August 2019)

<sup>121</sup> Commission, *supra*. n. 15

<sup>122</sup> Commission 2015, *supra* n. 119 at 3

<sup>123</sup> Ibid.

<sup>124</sup> Ibid.

<sup>125</sup> 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) 2016/399 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 (**EBCG Regulation**) [2016] OJ L 251, Art. 2(10)

In sum, hotspots are inter-agency asylum processing centres, involving EASO, EBCG/Frontex, Europol and Eurojust assisting national authorities, which are placed at sections of the EU external border facing high numbers of arriving migrants.<sup>126</sup> Additionally, the approach was initially linked to the implementation of the relocation programme.<sup>127</sup>

A significant characteristic of the hotspot approach is the high level of inter-agency cooperation. In individual hotspots, this is reflected in the Migration Management Support Teams (MMSTs). It is an operational framework which fosters close coordination and complementarity of efforts among the EU agencies and with the authorities of the host MS in order to achieve a high level of efficiency regarding the use of available resources.<sup>128</sup> In practice, this coordination takes place in regular coordination meetings between national authorities, the EU agencies and the main international organisations.<sup>129</sup> Coordination of all hotspots in one host MS is addressed in European Union Regional Task Forces (EURTF)<sup>130</sup>, which is a coordinating office staffed with representatives of EASO, EBCG, Europol and Eurojust.<sup>131</sup> For Greece, it is located in Piraeus.<sup>132</sup> The depth of coordination and collaboration among EU agencies in the EURTF and with the authorities of the host MS in the MMSTs qualifies as a sign of a more integrated European administration in the field of asylum and migration management.<sup>133</sup>

While the hotspot approach was introduced as an immediate and temporary measure in reaction to the migration crisis<sup>134</sup>, it seems to become a permanent part of the CEAS for the foreseeable future<sup>135</sup>. Given that there is no specific legal framework under EU law to

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<sup>126</sup> ECRE describes it as a “hybrid EU-Member States tool”, see ECRE, *The implementation of the hotspots in Italy and Greece* (2016) 7, available at <<https://www.ecre.org/wp-content/uploads/2016/12/HOTSPOTS-Report-5.12.2016..pdf>> (accessed 9 August 2019)

<sup>127</sup> Commission 2015, supra n. 14 at 3

<sup>128</sup> EBCG Regulation, Art. 2(9); see also Commission 2015, supra n. 119 at 2

<sup>129</sup> European Court of Auditors, EU response to the refugee crisis: the ‘hotspot’ approach (2017) 34, available at <<https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=41222>> (accessed 11 August 2019)

<sup>130</sup> Commission 2015, supra n. 114 at 9

<sup>131</sup> EBCG, Situation at External Border: What is the EURTF?, available at <<https://frontex.europa.eu/faq/situation-at-external-border/>> (accessed 13 August 2019)

<sup>132</sup> Commission 2015, supra n. 119 at 3

<sup>133</sup> Tsourdi 2016, supra n. 7 at 1017; in the specific case of EASO, its support regarding admissibility and eligibility was implemented in close cooperation with the relevant Greek ministries and Greek Asylum Service, see EASO, EASO Annual General Report 2016 (2017) 14, available at <<https://www.easo.europa.eu/sites/default/files/EASO-AGR-2016-ENN.pdf>> (accessed 9 August 2019)

<sup>134</sup> Commission 2015, supra n. 13 at 6: hotspots are listed under the title ‘Immediate Action’

<sup>135</sup> In support of this assessment three main points have to be considered: (i) the hotspot approach has already been applied for more than five years and there are no signs for its discontinuation, (ii) the EU-Turkey Statement which is largely dependent on Greek hotspots is deemed to be a ‘longer-term policy measure’ by the EP’ Committee on Budgetary Control (CONT), see European Parliament, *ECA Special Report 6/2017: EU response to the refugee crisis: the “hotspot” approach* PE604.614v01-00

regulate hotspots, the term *approach* should be taken literally in that it implies a reshaping of existing legal instruments, covering the founding acts of the EU agencies involved and, by extension of MS being in charge, national procedural asylum law formally in accordance with the CEAS. Despite the notion of the Union *supporting* Greece and Italy financially<sup>136</sup> and operationally through EU agencies in the hotspot approach, it is obvious that it intends to shift the responsibility of processing applications for identification and registration back to frontline MS.<sup>137</sup>

#### 4.2 EASO's Role in Hotspots

According to the European Agenda on Migration<sup>138</sup>, EASO is assigned with supporting the asylum process<sup>139</sup> by deploying its ASTs made up of seconded experts from other MS who assist the host MS' authorities.<sup>140</sup> More specifically, EASO provides

“Asylum support, in line with the *joint processing* concept, by channelling asylum seekers into the appropriate asylum procedure (normal, accelerated/border procedure, prioritized/Article 78(3) procedure, according to the relevant national legal system) and assisting with registration of asylum seekers and subsequent preparation of case files.”<sup>141</sup> [emphasis added]

Consequently, EASO is involved in several steps of the asylum procedure and operational steps in the running of hotspots. For reasons of scope, only the asylum procedures applicable in Greek hotspots will be discussed in the next section. At this point, it is important to highlight that the task of ‘asylum support’ assigned to EASO entails a range of working areas, from admissibility to asylum procedures and registration of asylum seekers to the preparation of individual applications for international protection.

Moreover, ‘joint processing’, the pooling of national and EU agency resources in the hotspot administration<sup>142</sup>, is not further defined under the hotspot concept and leaves the

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(Discharge 2016), 3, available at < [http://www.europarl.europa.eu/doceo/document/CONT-DT-604614\\_EN.pdf?redirect](http://www.europarl.europa.eu/doceo/document/CONT-DT-604614_EN.pdf?redirect)> (accessed 12 July 2019), (iii) the Commission considers hotspots as a “key element” in EU border management, see Commission (2018) Communication from the Commission to the European Parliament, the European Council and the Council: Progress report on the Implementation of the European Agenda on Migration (2018) available at <[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180516\\_progress-report-european-agenda-migration\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180516_progress-report-european-agenda-migration_en.pdf)> (accessed 29.10.2018), 5

<sup>136</sup> European Commission, Managing Migration: EU Financial Support to Greece (July 2019), available at <[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/201907\\_managing-migration-eu-financial-support-to-greece\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/201907_managing-migration-eu-financial-support-to-greece_en.pdf)> (accessed 18 August 2019)

<sup>137</sup> European Parliament 2016, supra n. 120 at 9

<sup>138</sup> Commission 2015, supra n. 14

<sup>139</sup> Ibid at 3

<sup>140</sup> Commission 2015, supra n. 119 at 2

<sup>141</sup> Commission 2015, supra n. 15 at 5

<sup>142</sup> Commission, Study on the Feasibility and legal and practical implications of establishing a mechanism for the joint processing of asylum applications on the territory of the EU (2013), 14

door open for interpretation. Taking into account the considerations about EASO's mandate above (chapter 3)<sup>143</sup>, two practical scenarios would be legally possible for joint processing:

- (1) National authorities are in charge of all procedural stages in which EASO's support is prescribed by the hotspot concept and the Support Office merely assists without administrative discretion;
- (2) EASO independently carries out preparatory acts which exclusively do not involve decision-making requiring administrative discretion.

These two scenarios reflect the possible implementation schemes which will serve as point of reference when analysing EASO's administrative practice in Greek hotspots.<sup>144</sup> They are both characterized by the insistence on the assisting nature of administrative support in e.g. a coordinating or expertise providing function. The exclusion of administrative discretion is vital here. It refers to the flexible exercising of judgement and decision-making in the asylum procedure, going beyond the provision of coordination and expertise.<sup>145</sup>

In summary, the undefined legal nature of the hotspot approach and particularly the rather vague wording of tasks of the EU agencies involved qualifies the hotspot approach as an adaptable tool for assisting MS under pressure. Furthermore, the vagueness of 'joint processing' as a cooperative working method between EASO and MS authorities adds to the practical flexibility concerning the distribution of tasks in asylum processing. From a governance perspective, EASO's participation in the administration of hotspots is thus in line with one of the basic rationales for the creation of agencies, namely to induce flexible administrative capacity, expertise and efficiency<sup>146</sup> in national asylum authorities at key arrival points of migrants<sup>147</sup> with the aim of supporting the implementation of the CEAS as a Union policy area. Therefore, EASO supports Greece in fulfilling its obligations under EU

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available at <[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/asylum/common-procedures/docs/jp\\_final\\_report\\_final\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/asylum/common-procedures/docs/jp_final_report_final_en.pdf)> (11 August 2019)

<sup>143</sup> special attention should be paid to EASO Regulation, Art. 2(6)

<sup>144</sup> They are based on the Commission's feasibility study of joint processing, see Commission 2013, supra n. 142 at 2-6; see also E. Tsourdi supra n. 7 at 1002 and Herwig Hofmann, Decisionmaking in EU Administrative Law – The Problem of Composite Procedures, *Administrative Law Review* (2009) 61-199

<sup>145</sup> C. Schneider and C. Nieswandt (2018), supra n. 88 at 18

<sup>146</sup> Commission, European Governance – A White Paper, COM(2001) 428 final, 24

<sup>147</sup> According to the EP, the "creation of hotspots in Greece has fulfilled its primary goal of injecting greater order into migration management", see European Parliament 2016, supra. 120 at 46; compare with M. Everson, C. Monda and E. Vos 2004, supra n. 1 at 3



law<sup>148</sup> and potentially helps to restore confidence in the CEAS system as a whole as well as the Schengen area of free movement without internal border controls.<sup>149</sup>

However, the absence of a stand-alone legal instrument including the clear-cut scope of functions for EASO leaves a lack of legal certainty regarding the preservation of the limitations of EASO's mandate in practice. This particular uncertainty regarding the scope of EASO's authority in joint processing may lead to potential competence overlaps between EASO and national authorities. This is problematic because the EASO Regulation assigns decision-making concerning asylum claims solely to MS and their national authorities<sup>150</sup>. Before we can turn to EASO's support in practice, we first need to determine the special legal characteristics of Greek hotspots.

## 5. Hotspots in Greece

The Greek case remains highly relevant, despite the decrease in the number of arrivals by sea to Greece since 2015. Since the beginning of 2019, 21,987 out of 29,068 migrants arrived via the Mediterranean.<sup>151</sup> Thus, the constant flow of migrants reaching Greek territory remains high and continues to add pressure on the Greek asylum system.<sup>152</sup> Accordingly,

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<sup>148</sup> Commission 2015, supra n. 14 at 3; compare with D. Thym 2016, supra n. 11 at 1556

<sup>149</sup> Commission, *Managing the Refugee Crisis: State of Play of the Implementation of the Priority Actions under the European Agenda on Migration*, COM(2015) 510 final, 3; compare with M. Egeberg and J. Trondal 2016, supra. 13 at 4; compare with E. Vos 2018, supra n. 13, at 17

<sup>150</sup> EASO Regulation, Art. 2(6)

<sup>151</sup> UNHCR, Mediterranean Situation: Greece, available at <https://data2.unhcr.org/en/situations/mediterranean/location/5179> (accessed 18 August 2019)

<sup>152</sup> EASO, Operating Plan Agreed by EASO and Greece (19 December 2018) 3, available at <https://www.easo.europa.eu/sites/default/files/OP-Greece-2019.pdf> (accessed 12 August 2019)

EASO has currently deployed ASTs with some 200 members<sup>153</sup> to the five Greek hotspots in the East Aegean islands of Chios, Kos, Leros, Lesbos and Samos.<sup>154</sup> What is peculiar about the Greek case is the adoption of a national legal framework dedicated to the hotspot approach, which is influenced by the implementation of the EU-Turkey Statement.

### 5.1 The Impact of the EU-Turkey Statement

On 18 March 2016, the EU MS and Turkey agreed on a series of measures to reduce migration streams crossing from Turkey to the Greek islands.<sup>155</sup> In short, the EU-Turkey Statement<sup>156</sup> foresees that the asylum applications of all migrants arriving on the Greek islands would be processed by the Greek authorities in accordance with the Asylum Procedures Directive. Migrants not applying for asylum or whose application was found to be inadmissible or unfounded are bound to return to Turkey from the Greek islands.<sup>157</sup> This changed the application of the hotspot approach fundamentally as the hotspot approach was initially intended to complement relocation<sup>158</sup> by providing early registration of asylum seekers to allow for a subsequent transfer of likely recipients of international protection<sup>159</sup> to other MS under the relocation scheme.<sup>160</sup> The implementation of the EU-Turkey Statement, shifted the work of the hotspots from identification and registration to admissibility and return.<sup>161</sup>

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<sup>153</sup> Ibid. at 16

<sup>154</sup> EASO, Annual Report on the Situation of Asylum in the European Union 2018 (2019) 155, available at <<https://www.easo.europa.eu/sites/default/files/easo-annual-report-2018-web.pdf>> (accessed 1 August 2019)

<sup>155</sup> European Council and Council of the European Union, *EU-Turkey statement, 18 March 2016* [Press Release 144/16], available at <<https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/pdf>>

<sup>156</sup> Contrary to what the title of the press release suggests, the CJEU found that the Union is not a party to the statement, see Case T-192/16, *NF v. European Council* [2017] ECLI:EU:T:2017:128, para71

<sup>157</sup> Supra n. 148

<sup>158</sup> Commission 2015, supra n.15 at 3;

<sup>159</sup> The relocation scheme applied to asylum seekers who get registered by Eurodac, submit their application for international protection in Greece or Italy, and are from third countries with an EU-wide recognition rate of 75 per cent or higher, see Art. 3(2) Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (2015) OJ L 248. The relocation scheme is a partial derogation from Dublin III, Art. 13(1).

<sup>160</sup> The scheme is based on Art. 78(3) TFEU and had been established under Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece OJ L 239; Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece OJ L 248;

<sup>161</sup> Commission, Next Operational Steps in EU-Turkey Cooperation in the Field of Migration, COM(2016) 166, 4, available at <<https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-166-EN-F1-1.PDF>> (accessed 11 August 2019)

In an analogous manner, EASO's responsibilities have been shifted from registration and screening to the so-called 'fast-track border' procedure<sup>162</sup> under Greek national asylum law<sup>163</sup>, particularly Law 4375/2016<sup>164</sup>. Thus, the EU-Turkey Statement drew a clear line between migrants arriving on the Greek islands before 20 March<sup>165</sup> and those arriving afterwards. At large, Law 4375/2016 and its reforms introduced a significant number of changes to the Greek institutional framework, the first reception procedures, the asylum procedure, and the management of refugee flows in Greece. The following sub-section is dedicated to the legal reality after the EU-Turkey Statement with a specific focus on EASO tasks in hotspots.

## 5.2 The Legal Framework of Greek Hotspots

The establishment of the five Greek hotspots was initially made possible by a joint ministerial decision in December 2015.<sup>166</sup> However, this legislation did neither address the procedures applied in hotspots nor the operational support by EU agencies.<sup>167</sup> Therefore, the initial administrative activity performed inter alia by EASO took place in a legislative vacuum.

This changed through the adoption of Law 4375/2016 of April 2016, directly following the publication of the EU-Turkey Statement, in which the Greek legislator transposed the provisions of the Asylum Procedures Directive into Greek national law<sup>168</sup>. Law 4375/2016

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<sup>162</sup> This becomes quite clear through the comparison of the Hotspot Operating Plan of 2015 and its second amendment of 2016, see EASO, EASO Hotspot Operating Plan, EASO/COS/2015/677 (2015), available at

<<https://www.easo.europa.eu/sites/default/files/20150930%20EASO%20Hotspot%20OP%20Greece.pdf>>, (accessed 12 July 2019) and EASO, EASO Hotspot Operating Plan – Amendment No 2 - EASO/COS/2016/391 (2016), available at <<https://www.easo.europa.eu/sites/default/files/20160401%20Hotspot%20Operating%20Plan%20-%20Amendment%20No%202.pdf>> (accessed 12 July 2019)

<sup>163</sup> This thesis comments on the Greek legal framework on the basis of the English versions provided for by the Ministry of Citizen Protection (Υπουργείο Προστασίας του Πολίτη) of the Hellenic Republic, available at <<http://asylo.gov.gr/en/>> (accessed 19 June 2019)

<sup>164</sup> Greece: Law 4375 of 2016 Law No. 4375 of 2016 on the organization and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC, Gov. Gazette 51/A/3-4-2016

<sup>165</sup> The date the EU-Turkey Statement became "applicable"; Commission, Second Report on the Relocation and Resettlement COM(2016) 222 final, 4

<sup>166</sup> Greece: Joint Ministerial Decision No 2969/2015, Gov. Gazette 2602/B/2-12-2015.

<sup>167</sup> AIDA, Country Report: Greece, Update 2018 (2019) 31-32, available at

<<https://www.asylumineurope.org/reports/country/greece>> (accessed 11 June 2019)

<sup>168</sup> In the following, references are given regarding the relevant CEAS legal acts specific, provisions of Greek asylum law have transposed. However, the thesis comments neither on the legal quality of the transposition nor its consequences on the fundamental rights of migrants under European and International Human Rights Law and International Asylum Law in the Greek hotspots. This would consider a different research focus. For a comment on the quality of the compatibility of Greek national asylum law with the procedures directive and fundamental rights granted by the European Charter on Fundamental Rights, see FRA, Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the 'hotspots' set up in Greece and Italy, 3/2019,

puts the Greek Asylum Service (GAS), the national asylum agency, in charge<sup>169</sup> of asylum procedures in hotspots which are referred to as “Reception and Identification Centre”.<sup>170</sup> They are the venue attributed to the fast-track border procedure<sup>171</sup>, which is geared towards accelerated asylum processing with rigorously reduced periods for different stages of the asylum procedure compared to the regular procedure on the mainland of Greece.<sup>172</sup>

The Greek legislator adapted the principle of joint processing regarding EASO several times over the years by amending Law 4375/2016 repeatedly. The original version stipulated that the GAS “may be assisted” in conducting interviews recording the claim of applicants for international protection and other procedures by staff and interpreters deployed by EASO.<sup>173</sup> However, the amendment of June 2016 created the possibility for interviews to be “conducted” by EASO caseworkers<sup>174</sup>, which gives EASO a central role in the individual decision on admissibility and on merits. Vulnerable groups are exempted from the fast-track procedure and are consequently referred to the regular procedure.<sup>175</sup> Since 2018, Greek-speaking EASO caseworkers may also conduct the interviews in the regular procedure in Greek hotspots.<sup>176</sup> This expansion of competences, which was practiced even prior to the amendment in Greek legislation, came under scrutiny by the European Ombudsman concerning the limitations of EASO’s current mandate<sup>177</sup> (section 6.3).

In case of a large numbers of appeals against asylum decisions by the GAS, EASO may additionally assist the Appeals Committees through “rapporteurs”.<sup>178</sup> The rapporteurs have access to the file and prepare a summarised report on the case facts to ensure a faster ruling on the appeal.<sup>179</sup> Apart from the asylum procedure, EASO’s mandate has also been extended into a totally different stage of the hotspot administration. According to the latest amendment to Law 4375/2016, in case of urgent need, Greek authorities may also be supported by Greek-speaking EASO experts in the registration process.<sup>180</sup>

The dominant fast-track border procedure in Greek hotspots was initially supposed to be applied “exceptionally” in times of high migratory pressure inter alia at Reception and

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available at <[https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2019-opinion-hotspots-update-03-2019\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-opinion-hotspots-update-03-2019_en.pdf)> (accessed 22 August 2019)

<sup>169</sup> Law 4375/2016, Art. 1

<sup>170</sup> in the meaning of Law 4375/2016, Art. 10(2)

<sup>171</sup> Law 4375/2016, Art. 60(4)

<sup>172</sup> Law 4375/2016, Art. 60(4)(c)-(e), transposing Asylum Procedures Directive, Art. 43

<sup>173</sup> Law 4375/2016, Art. 60(4)(b)

<sup>174</sup> Greece: Law 4399/2016, Gov. Gazette 117/A/22-6-2016, Art. 80(13)

<sup>175</sup> Law 4375/2016, Art. 60(4)(f), referring to the definition given in Dublin III, Articles 8-11

<sup>176</sup> Greece: Law 4540/2018, Gov. Gazette 91/A/22-5-2018, Art. 28(7), transposing the Reception Conditions Directive

<sup>177</sup> European Ombudsman, Decision in case 735/2017/MDC, supra n. 17 at para. 33

<sup>178</sup> Greece: Law 4461/2017, Gov. Gazette 38/A/28-3-2017, Art. 101

<sup>179</sup> Ibid.

<sup>180</sup> Law 4540/2018, Art. 28(7)

Identification Centres and should not exceed six months from the publication of Law 4375/2016 with the possibility of a three month extension.<sup>181</sup> However, since then the applicability of the fast-track border procedure has been extended several times by amendments, which make it still applicable to date<sup>182</sup>.

An important aspect that needs to be mentioned with regard to the Greek case is that the regulation of Greek hotspots is to be understood against the background of the specific national context. This involves migratory flows from mainly Syria via Turkey in 2015<sup>183</sup> and a challenged reception system in the East Aegean Islands<sup>184</sup>. Even if clearly driven by EU objectives, including the EU-Turkey Statement, and supported by EU agencies such as EASO, the hotspots in Greece remain primarily national systems of admissibility and return, embedded in national asylum law.<sup>185</sup> In combination with the broad definition of the hotspot approach, this explains why Greece was able to shift from “assist” to “conduct” interviews in national legislation through Law 4399/2016.<sup>186</sup> Regarding the two possible scenarios of joint processing under EASO’s mandate, the amendment in Greek law brings about a qualitative change from scenario 1 to scenario 2 because EASO is now in charge of conducting different types of interviews. Conducting interviews could qualify in principle as a mere preparatory act. What is decisive for the compliance with the limitations in EASO’s mandate is whether this type of task involves administrative discretion.

In this regard, we have seen that given the evident dependency of Greek authorities on EASO’s support in the administration of hotspots<sup>187</sup>, Greece increasingly incorporated the Support Office’s role in its national asylum legislation and extended its competences

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<sup>181</sup> Law 4375/2016, Art. 80(26)

<sup>182</sup> At the time of the writing of this thesis, Law 4587/2018 Gov. Gazette 218/A/24-12-2018, Art. 7(3) amending Law 4375/2016, Art. 80(26) prolonged the applicability of the fast-track border procedure until 31 December 2019

<sup>183</sup> Frontex, FRAN Quarterly : Quarter 4 – October-December 2015, 3811/2016 (2016), available at <[https://frontex.europa.eu/assets/Publications/Risk\\_Analysis/FRAN\\_Q4\\_2015.pdf](https://frontex.europa.eu/assets/Publications/Risk_Analysis/FRAN_Q4_2015.pdf)> (accessed 24 August 2019); UNHCR, Factsheet: Lesbos Island (2015), available at <<https://www.unhcr.org/protection/operations/5645ddb6c/greece-factsheet-lesvos-island.html>> (accessed 24 August 2019)

<sup>184</sup> UNHCR 2015, supra n. 182

<sup>185</sup> It is therefore important to highlight that the findings of the following discussion for the Greek case have very limited transferability for the Italian case because of significant differences in the national legal asylum systems which lead to different realisations of the hotspot approach. While Greek hotspots are governed inter alia by Law 4399/2016, Italy did not adopt a dedicated legal framework on hotspot procedures and does not fall under the EU-Turkey Statement, see ECRE 2016, supra 126 at 16-32

<sup>186</sup> For the challenges of incorporating EU agencies in the national legal systems and civil service hierarchies for the EU legal order from a constitutional perspective see Joan Solanes Mullor, *Linking EU and National Agencification Processes: A Growing Need to Overcome Inconsistencies*, TARN working paper No. 2/18 (2018)

<sup>187</sup> Greece, including its hotspots, is faced with a massive case backlog. In August 2018 more than 50,000 cases awaited a first-instance decision, see EASO 2019, supra n. 16 at 12

progressively in the fast-track border procedure. Keeping in mind the obscure legal nature of hotspots as an approach combined with the sovereignty of MS in asylum claims assigned by the Treaties<sup>188</sup>, it is only logical that Greece uses its national legislating competence to shape EASO's role in hotspots according to its own needs. As we will see in the next chapter, in practice this raises issues under EU law, regarding the EASO Regulation, and partly under national asylum law.

## **6. EASO operating in Greece's Hotspots beyond its Mandate?**

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<sup>188</sup> Art. 78(2)(e) TFEU, see also considerations section 3.1

Following the research focus, EASO's operational support in practice in comparison to its mandate and applicable Greek asylum law is evaluated. This chapter relies on EASO's Operating Plans, Special Operational Plans, Hotspot Operating Plan and Special Support Plans to Greece because they define EASO's specific tasks agreed upon by the EASO Executive Director and the Greek government. Documentary analysis of policy documents such as the Operating Plans to Greece can provide a wealth of data that reflect law in practice.<sup>189</sup> In addition, the analysis is enriched by empirical reports by highly respected organisations in the field of asylum law such as AIDA/ECRE, and the Greek Council for Refugees<sup>190</sup>. The use of independent reports by well-established legal practitioners in the field assists in reducing the possibility that the following legal analysis leads to misleading conclusions based on an incomplete picture and adds weight to the findings.<sup>191</sup>

## 6.1 The Interviews of Admissibility and Eligibility

The Special Operating Plan to Greece<sup>192</sup> as well as the Operating Plans to Greece for 2017<sup>193</sup>, 2018<sup>194</sup> and 2019<sup>195</sup> enrol EASO in conducting interviews at different stages of the asylum procedure in hotspots.

The admissibility interview examines whether Greece is the appropriate state to review the applicant's claim. Generally, if there is a "safe third country"<sup>196</sup>, then the claim is inadmissible, and the applicant is returned to the appropriate to continue her claim there. Applied to the case of Greek hotspots, an asylum seeker needs first to establish that Turkey

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<sup>189</sup> Peter Cane and Herbert Kritzer, *The Oxford Handbook of Empirical Legal Research* (OUP Oxford 2010) 939

<sup>190</sup> EASO itself cooperates with these organizations for drafting its annual report, see EASO, *Annual Report on the Situation of Asylum in the European Union 2018* (2019) 7, available at <<https://www.easo.europa.eu/sites/default/files/easo-annual-report-2018-web.pdf>>

<sup>191</sup> P. Cane and H. Kritzer 2010, *supra* n. 189 at 940

<sup>192</sup> EASO, *Special Operating Plan to Greece*, EASO/DOP/OU/2016/1812 (2016) 9, available at <<https://www.easo.europa.eu/sites/default/files/EASO%20Special%20Operating%20Plan%20to%20Greece%202017%2014122016.pdf>> (accessed 12 July 2019)

<sup>193</sup> EASO, *EASO Hotspot Operating Plan – Amendment No 2 - EASO/COS/2016/391* (2016), available at <<https://www.easo.europa.eu/sites/default/files/20160401%20Hotspot%20Operating%20Plan%20-%20Amendment%20No%202.pdf>> (accessed 12 July 2019)

<sup>194</sup> EASO, *Operating Plan Agreed by EASO and Greece* (2017), available at <<https://www.easo.europa.eu/sites/default/files/Greece%20OP%202018-13-12-2017.pdf>> (accessed 12 July 2019)

<sup>195</sup> EASO, *2019 Operating Plan Agreed by EASO and Greece* (2018), available at <<https://www.easo.europa.eu/sites/default/files/OP-Greece-2019.pdf>> (accessed 14 July 2019)

<sup>196</sup> For the classification as "safe", refugee protection in the respective state must comply with the Asylum Procedures Directive, Art. 38; For a legal review of this vital concept in the context of international protection, see Daniel Thym, *Why the EU-Turkey Deal is Legal and a Step in the Right Direction* (2016), available at <<https://verfassungsblog.de/why-the-eu-turkey-deal-is-legal-and-a-step-in-the-right-direction/>> (accessed 23 August 2019)

would not constitute a safe country<sup>197</sup> for her before the claim can be examined based on the merits. Thus, the admissibility interview constitutes a crucial step in an individual application.

Since April 2016, EASO conducts admissibility interviews as part of its support to GAS<sup>198</sup>, hence even before the amendment in Law 4399/2016 under the Greek legal framework entered into force. According to EASO's Special Operating Plan to Greece, EASO lists under its support with the implementation of the EU-Turkey Statement "admissibility interviews conducted, opinions drafted and decisions recommended"<sup>199</sup>. This means in practice that EASO personnel conducts the admissibility interview independently without the presence of a GAS representative. It then provides a legal opinion in which it makes a recommendation about the individual case to the GAS. It is the GAS which then decides about the admissibility of the case based on the recommendation.<sup>200</sup> Thus, the recommendation is non-binding and it is the MS through GAS which takes *de jure* the final decision. However, EASO takes *de facto* massive influence in the decision of the on the decision of GAS's final decision for two reasons.<sup>201</sup>

First, the inherent nature of conducting an individual asylum interview clearly entails administrative discretion. EASO formulates and asks the questions according to its own interview techniques and guidelines.<sup>202</sup> Apart from collecting material facts, the admissibility interview involves an assessment of credibility of the applicant's statements<sup>203</sup> a classification of the Turkey as a "safe country" regarding the applicant's individual background. Additionally, EASO is in charge of vulnerability assessments at this stage.<sup>204</sup> All these elements involve discretionary evaluation.<sup>205</sup> Consequently, EASO experts are in full control

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<sup>197</sup> As defined by Law 4375/2016, Art. 56, transposing Asylum Procedures Directive, Art. 38

<sup>198</sup> EASO, EASO Hotspot Operating Plan – Amendment No 2 - EASO/COS/2016/391 (2016) 4, available at

<https://www.easo.europa.eu/sites/default/files/20160401%20Hotspot%20Operating%20Plan%20-%20Amendment%20No%202.pdf> (accessed 12 July 2019)

<sup>199</sup> EASO 2016, supra n. 191 at 9

EASO, Special Operating Plan to Greece, EASO/DOP/OU/2016/1812 (2016) 9, available at

<https://www.easo.europa.eu/sites/default/files/EASO%20Special%20Operating%20Plan%20to%20Greece%202017%2014122016.pdf> (accessed 12 July 2019)

<sup>200</sup> AIDA 2019, supra n.167 at 79

<sup>201</sup> Referring to EASO Regulation, Art. 2(6) and Recital 14

<sup>202</sup> AIDA 2019, supra n. 167 at 77

<sup>203</sup> EASO, EASO Practical Guide: Evidence Assessment (2015), available at

<https://easo.europa.eu/sites/default/files/public/EASO-Practical-Guide-Evidence-Assessment.pdf> (accessed 13 August 2019); HIAS, EASO's Operation on the Greek Hotspots: An overlooked

consequence of the EU-Turkey Deal (2018) 3, available at

[https://www.hias.org/sites/default/files/hias\\_greece\\_report\\_easo.pdf](https://www.hias.org/sites/default/files/hias_greece_report_easo.pdf) (accessed 22 August 2019)

<sup>204</sup> Ibid.

<sup>205</sup> In this context it is important to highlight the qualitative difference between an admissibility and eligibility interviews and a scientific opinion, which can be considered as scientific and technical assistance covered under EASO Regulation, Art. 2(3). While scientific opinions may also carry considerable weight on the decision-making in executive decision-making, they are strictly advisory in nature. They do not form an essential and institutionalised part of a legal and administrative process



of the admissibility interview which is an essential step in the asylum procedure in order to have the claim to be assessed on the merits. Therefore, producing an opinion based on an individual interview, though non-binding on national authorities, amounts to at least an indirect influence on the MS' decision on asylum in the meaning of the EASO Regulation, Recital 14.<sup>206</sup> On the one hand, according to settled case law, the preamble of EU secondary acts has no legally binding effect<sup>207</sup> and thus indirect influence may not qualify as a transgression of EASO's mandate if this distinction was relevant. On the other hand, there is no definition in case law of indirect and direct power. It could be argued that this distinction is irrelevant because Art.2(6) of the EASO Regulation simply refers to "no influence". Consequently, any proven influence by EASO on the decision by MS may be considered as going beyond the Support Office's mandate.

Second, the processing of EASO's recommendation by GAS in its administrative practice gives EASO considerable influence in the decision-making regarding individual applications. Despite GAS' formal discretion not to follow the legal opinion, in practice GAS as a general rule follows EASO's recommendations.<sup>208</sup> Furthermore, several NGOs visiting and working in Greek hotspots reported in a written submission to the European Court of Human Rights in 2017 that it is consistent practice that the GAS caseworkers issue a decision on admissibility based on EASO's recommendation without having had any direct contact with the respective applicant.<sup>209</sup> Thus, GAS refrains from asking further questions to verify the information given. Additionally, EASO's transcript of the interview constitute the only records of the interview.<sup>210</sup> Consequently, fact that GAS would have to rely solely on EASO's records if it wanted to come to divergent decision warrants as an obvious influence on asylum decision-making. The decision on admissibility by GAS is *de facto* exclusively

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concerning the determination of the legal protection status of an individual under national legal responsibility which is regulated under national, European and International law. By definition, they try to objectively provide knowledge to decision-makers. Admissibility and eligibility interviews may also concern fact-finding, but are highly individualised and dependent in the subjective assessment on the scope of legal principles such as "safe third country", "first country of entry" and refugee status and subsidiary protection, see UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1 (1992)

<sup>206</sup> See Tsourdi 2016, supra n. 7 at 1024

<sup>207</sup> Case C-136/04, *Deutsches Milch-Kontor* [2005] ECLI:EU:C:2005:716, para. 32; C-134/08, *Tyson Parketthandel* [2009] ECLI:EU:C:2009:229, para. 16

<sup>208</sup> ECCHR, Case Report: EASO's involvement in Greek Hotspots exceeds the agency's competence and disregards fundamental rights (2018), available at [https://www.ecchr.eu/fileadmin/Fallbeschreibungen/ECCHR\\_Case\\_Report\\_Hotspots\\_Greece\\_EASO\\_March\\_2018.pdf](https://www.ecchr.eu/fileadmin/Fallbeschreibungen/ECCHR_Case_Report_Hotspots_Greece_EASO_March_2018.pdf); AIDA 2019, supra n.166 at 79

<sup>209</sup> *J.B. v. Greece*, Application no. 54796/16, Third Party Intervention: Advice on Individual Rights in Europe (AIRE), Dutch Council for Refugees (DCR), European Council on Refugees (ECRE) and International Commission of Jurists (ICJ), para. 37; see also ECCHR, Case Report

<sup>210</sup> HIAS 2018, supra n. 203 at 3

based on facts determined by an interview entirely concluded by EASO and its resulting recommendation, which is zealously followed without having had contact with the individual in question. According to AIDA's annual reports, the same administrative practice applies also to eligibility interviews both in the fast-track and the regular procedure<sup>211</sup>, which gives EASO "powers in relation to the taking of decisions by MS' asylum authorities on asylum individual applications for international protection"<sup>212</sup> at three decisive stages of the asylum procedure.

All things considered, in the administrative practice GAS does not simply rely on EASO's record of the admissibility. It is directly dependent on EASO's decision-making during the interview and in practice follows the recommendations without further inquiries. Hence, EASO conducting admissibility and eligibility interviews clearly exceeds the limits of joint processing possible under the EASO Regulation.

Regarding Greek national law, there are timely inconsistencies concerning EASO conducting admissibility interviews. According to EASO's amended Hotspot Operating Plan of April 2016, EASO already conducted admissibility interviews before the amendment through Law 4375/2016. Additionally, Art. 60(4)(b) of Law 4375/2016 does not cover the issuance of an opinion and a recommendation by EASO and hence might lack legal basis as well.

## 6.2 Assessing Vulnerability

EASO has been conducting admissibility assessments as part of the admissibility and eligibility interviews from late 2016<sup>213</sup> until to date<sup>214</sup>.

The assessment of vulnerability determines whether an applicant qualifies as vulnerable as defined by Law 4375/2016, Art. 14(8)<sup>215</sup>. Being qualified as vulnerable due to an applicant's individual characteristics or circumstances<sup>216</sup> provides for the enjoyment of a special procedural safeguards and reception guarantees under EU<sup>217</sup> and Greek law<sup>218</sup>. In a

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<sup>211</sup> AIDA 2016, supra n. 167 at 29; see also HIAS 2018, supra n. 203 at 3

<sup>212</sup> EASO Regulation, Art. 2(6)

<sup>213</sup> EASO 2016, supra n. 13 at 9

<sup>214</sup> EASO 2019, supra n 190 at 14

<sup>215</sup> Law 4375/2016, Art. 14(8) defines vulnerability broadly, comprising a non-exhaustive list of seven categories a) Unaccompanied minors, b) Persons who have a disability or suffering from an incurable or serious illness, c) The elderly, d) Women in pregnancy or having recently given birth, e) Single parents with minor children, f) Victims of torture, rape or other serious forms of psychological, physical or sexual violence or exploitation, persons with a post-traumatic disorder, in particularly survivors and relatives of victims of ship-wrecks, g) Victims of trafficking in human beings.

<sup>216</sup> AIDA, The Concept of Vulnerability in European Asylum Procedures (2017), available at <[http://www.asylumineurope.org/sites/default/files/shadow-reports/aida\\_vulnerability\\_in\\_asylum\\_procedures.pdf](http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_vulnerability_in_asylum_procedures.pdf)> (accessed 24 August 2019)

<sup>217</sup> Asylum Procedures Directive, Articles 2(d), 24, 25(6)(b)

first procedural step, if EASO case workers suspect vulnerability of an applicant during an admissibility or eligibility interview, they discontinue the questioning and refer the case to an EASO vulnerability expert.<sup>219</sup> In case the vulnerability expert confirms the qualification for vulnerability, she drafts an opinion for the GAS, recommending a referral to the regular procedure.<sup>220</sup> Again, according to this procedure, EASO *de jure* does not exceed the limitations of its mandate. However, *de facto* it does for two reasons.

First, EASO's regular case workers enjoy a wide scope of discretion to refer to an EASO vulnerability expert because Greek law only provides a non-exhaustive list of categories without indicators for threshold which would make a referral mandatory.<sup>221</sup> Second, if a case is referred to an EASO vulnerability expert and she does not recognize the applicant to be vulnerable, this results in the continuation of the interview with the EASO case worker under the fast-track procedure. This decision is made without notifying GAS<sup>222</sup> and thus amounts to *de facto* decision-making because GAS is deprived of assessing these cases itself on the issue of vulnerability. Notably, EASO's vulnerability experts in most cases assess vulnerability on the merits of the case file by the case workers without having direct contact with the applicant.<sup>223</sup>

Regarding the processing of vulnerable groups, the EASO Regulation only provides for support from Member State administrations through training.<sup>224</sup> The implementation of a vulnerability assessment goes beyond this scope of competence. More importantly, the administrative practice by EASO concerning vulnerability assessments clearly constitutes a violation of the exclusion of powers influencing the GAS decision on individual applications for international protection.<sup>225</sup>

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<sup>218</sup> Law 4375/2016, Art. 14(9): In Greece, the protections entail the exemption from the fast-track procedure and a subsequent assessment under the regular procedure with extended procedural deadlines.

<sup>219</sup> AIDA, Country Report: Greece, Update 2017 (2018) 92, available at <[https://www.asylumineurope.org/sites/default/files/report-download/aida\\_gr\\_2017update.pdf](https://www.asylumineurope.org/sites/default/files/report-download/aida_gr_2017update.pdf)> (accessed 11 August 2019)

<sup>220</sup> *Ibid.* at 93

<sup>221</sup> According to the Greek Ombudsman, there are a significant number of cases in which EASO ignored strong indications for vulnerability, see Greek Ombudsman, Migration Flows and Refugee Protection (2017) 34, available at <[https://www.synigoros.gr/resources/docs/greek\\_ombudsman\\_migrants\\_refugees\\_2017\\_en.pdf](https://www.synigoros.gr/resources/docs/greek_ombudsman_migrants_refugees_2017_en.pdf)> (accessed 28 July 2019)

<sup>222</sup> HIAS 2018, *supra* n. 203 at 7

<sup>223</sup> *Ibid.*

<sup>224</sup> EASO Regulation, Art. 6(4)(b) & (f)

<sup>225</sup> in the meaning of EASO Regulation, Art. 2(6)

As indicated above (5.2), EASO was authorized to support the registration stage and in the second instance the appeal committees.<sup>226</sup> While, the latest Operating Plan to Greece indicates these new expansions of competence to be of genuinely assisting nature<sup>227</sup>, it remains to be seen, how the administrative practice plays out over time.

While the given evidence suggests that EASO's operational support in practice concerning admissibility interviews, eligibility interviews and vulnerability assessments infringes the limitations of its mandate, it does not violate legal limitations in primary law (section 3.1). Art. 78(2)(e) TFEU only determines that MS are in charge of considering an application for asylum or subsidiary protection. It does not define how MS fulfil this competence, with or without influence of third entities.

It is noteworthy that the identified legal ambiguities and infringements remain unresolved even three years after the introduction of the fast-track procedure. The respective Operating Plans agreed between the Greek government and EASO's Executive Director, which have no legal quality, not even in combination with Law 4375/2016, cannot legalize the transgression of EASO's mandate in practice. In this context it is important to take into account the decision by the European Ombudsman of 2017 to close the inquiry concerning EASO's role in Greek hotspots.<sup>228</sup>

### 6.3 The Ombudsman's Inquiry

In March 2017, the ECCHR, a German NGO, lodged a complaint to the European Ombudsman voicing two concerns regarding EASO's involvement in admissibility interviews in the fast-track procedure in hotspots.<sup>229</sup> It claimed that EASO would act outside of its mandate by effectively deciding on the admissibility of asylum applications<sup>230</sup> and that it failed to comply with the right to be heard under Art. 41 under the Charter of Fundamental Rights<sup>231</sup>.

Naturally, the Ombudsman's assessment concerning the first claim is of particular interest in the context of this thesis' research focus. First, she pointed out the obvious that the ultimate responsibility for the decisions on asylum applications remains with Greek authorities.<sup>232</sup> She then highlights that

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<sup>226</sup> Law 4540/2018, Art. 28(7)

<sup>227</sup> EASO assists registration through interpreters and trainings. The appeal committees are assisted through EASO rapporteurs who "prepare files" without making recommendations, see EASO 2018, supra n. 184 at 13-14

<sup>228</sup> European Ombudsman, Decision in case 735/2017/MDC

<sup>229</sup> Ibid.

<sup>230</sup> Ibid. paras. 10, 24

<sup>231</sup> Ibid. para. 44

<sup>232</sup> Ibid. para. 32

“in light of the Statement of the European Council of 23 April 2015[25] (Point P), in which the European Council commits to “*deploy EASO teams in frontline Member States for joint processing of asylum applications, including registration and finger-printing*”. EASO is being encouraged politically to act in a way which is, arguably, not in line with its existing statutory role.”<sup>233</sup>

She therefore concludes that EASO de facto exceeds its mandate under political pressure from MS in conducting admissibility interviews in hotspots. Nevertheless, she concludes that the inquiry in this complaint “would serve no useful purpose” because it is likely that the planned reform of the EASO Regulation which would be likely to occur soon will cover this type of activity.

In the summary of the decision<sup>234</sup>, the first point about the GAS’ final decision-making authority is highlighted as the primary reason for the Ombudsman to close the inquiry. However, this argument does not address the actual claim made by the ECCHR which referred to the limitations of EASO’s mandate concerning the exclusion of taking influence on the MS’ authorities in the decision on asylum applications.<sup>235</sup> Instead, this argument refers to the legal limitations of EU primary law<sup>236</sup> and thus should be of secondary relevance at most. Notably, the Ombudsman enjoys a wide margin of discretion in assessing complaints of alleged maladministration which is expressed in her independence from other entities.<sup>237</sup> Nevertheless, keeping in mind she holds *ex officio* the supervisory function regarding maladministration,<sup>238</sup> her reasoning concerning the potential remedy of future reforms of the EASO Regulation also lacks relevance. The assessment overlooks that the legally decisive question is about the current legal situation under which EASO blatantly oversteps its mandate.

While the arguments for closing of the inquiry may lack merit, the Ombudsman as an EU body confirms that EASO oversteps its mandate by conducting admissibility interviews in hotspots which makes its action illegal due to a lack of legal basis. This confirms the aforementioned findings of a substantial gap between EASO’s *de jure* and *de facto* operational support in Greek hotspots regarding admissibility interviews. However, given the procedural similarities, these findings could arguably be extended to the eligibility interviews

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<sup>233</sup> Ibid. para. 33

<sup>234</sup> European Ombudsman, Summary of the Decision in case 735/2017/MDC on the European Asylum Support Office’s (EASO) involvement in the decision-making process concerning admissibility of applications for international protection submitted in the Greek Hotspots, in particular shortcomings in admissibility interviews

<sup>235</sup> EASO Regulation, Art. 2(6)

<sup>236</sup> Art. 78(2)(e) TFEU

<sup>237</sup> Art. 228 TFEU

<sup>238</sup> Art. 228(1) TFEU; excluding the CJEU acting in its judicial role

as well. Additionally, it has to be pointed out that the Ombudsman's inquiry was based on the partial agreement between the EP and Council regarding the reform of the EASO Regulation. In the meantime, an amended proposal was tabled by the Commission, which will be discussed in the next chapter.

## 7. EUAA – a Sufficient Mandate for Existing Practice in Greek Hotspots?

In May 2016, the Commission submitted an extensive package reform for the CEAS<sup>239</sup>, including the establishment of the EUAA.<sup>240</sup> The EP and the Council reached a partial agreement on the file in June 2017<sup>241</sup>, but as part of the CEAS package deal the conclusion of the final agreement is stalled at Council level<sup>242</sup>. In September 2018, the Commission released an amended proposal<sup>243</sup> based on this partial agreement, which targeted the reinforcement of the operational support of the EUAA. This chapter analyses the key novelties of the 2018 Commission proposal and critically assesses its potential to regulate the established administrative practice in hotspots<sup>244</sup>.

The EUAA Regulation would be based on Art. 78(1) & (2) TFEU. Dropping Art. 74 TFEU as a legal base signifies that the EUAA would no longer be formally confined to administrative coordination among MS. Accordingly, the scope of the EUAA's tasks is defined more ambitiously as ensuring the uniform and efficient application of Union asylum

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<sup>239</sup> Commission, Towards a Reform of the Common European Asylum System and the Enhancing Legal Avenues to Europe COM(2016) 197 final

<sup>240</sup> Commission, EUAA Proposal supra n. 47

<sup>241</sup> European Council, 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 – State of play and guidance for further work, Interinstitutional File: 2016/0131 (COD)

<sup>242</sup> European Council, Progress Report of 26 February 2019 (2019), available at <<https://data.consilium.europa.eu/doc/document/ST-6600-2019-INIT/en/pdf>> (accessed 22 August 2019)

<sup>243</sup> Commission, Amended 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 A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018 (**EUAA Proposal 2018**), COM/2018/633 final, available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0633>> (accessed 22 August 2019)

<sup>244</sup> Interestingly, EASO itself points out in its latest Operating Plan with Greece that the draft EUAA Regulation will enable the Support Office to carry out administrative procedures for international protection while respecting the competence of MS to take decision on individual applications. As we have seen this is already a reality in practice.

law in MS, the facilitation of the implementation of the CEAS and enabling the convergence in the assessment of applications for international protection among MS.<sup>245</sup> To enable the realisation of these aims the agency's mandate has been expanded by inter alia assigning it a monitoring role regarding the implementation of the CEAS.<sup>246</sup>

Regarding the EUAA's operational mandate, the 2018 proposal explicitly addresses the agency's involvement in the examination of international protection claims. The EUAA may provide operational and technical assistance<sup>247</sup> by "assisting or carrying out the admissibility interview and the substantive interview, as applicable"<sup>248</sup>. Furthermore, the EUAA would be assigned with the mandate to "assist Member States in identifying applicants in need of special procedural guarantees"<sup>249</sup> which refers to the assessment of vulnerability during the asylum procedure. However, this preparation of decisions on application for international protection shall be carried out without prejudice to the competence of the national competent authority.<sup>250</sup> Therefore, the amended proposal directly addresses the three crucial steps in the asylum procedure in hotspots which in practice are currently not covered under the EASO Regulation (chapter 6). The amended proposal still rules out a final decision-making power for the EUAA, which strongly indicates the preservation of the joint processing principle.<sup>251</sup> The possibility of assisting with or carrying out admissibility and eligibility seemingly covers the current administrative practice of EASO in hotspots. With regards to vulnerability assessments this is not the case. While the 2018 proposal does not reiterate the formula of having "no power" in relation to the final decision-making of MS concerning individual asylum applications<sup>252</sup>, the exclusive referral to "assisting" in vulnerability assessments<sup>253</sup> seems to signal the exclusion of the EUAA executing the assessment independently. This would consequently also exclude the possibility of administrative discretion because assistance in a task implies the supervision.

However, the amended proposal adds another operational mode coined as "enhanced assistance", which can be requested separately by MS.<sup>254</sup> It enables the EUAA to "carry out the entire procedure or parts of the procedure for international protection at the

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<sup>245</sup> Commission, EUAA, Art. 1(1)

<sup>246</sup> For instance, the COIs produced by the EUAA now in cooperation with MS experts become a more significant role (EUAA Proposal, Art. 10). Additionally, the EUAA is supposed to monitor national authorities to guarantee their preparedness to manage exceptional pressure on their asylum systems (EUAA Proposal, Art. 14)

<sup>247</sup> EUAA Proposal 2018, supra n. 240, Art. 16

<sup>248</sup> EUAA Proposal 2018, supra n. 240, Art. 16(2)(d)(i)

<sup>249</sup> EUAA Proposal 2018, supra n. 240, Art. 16(2)(d)(k)

<sup>250</sup> EUAA Proposal 2018, supra n. 240, Art. 16(2)(d)(m)

<sup>251</sup> Which is in line with the constitutional limitations of the assumed legal basis of Art. 78(2)(e) TFEU

<sup>252</sup> EASO Regulation, Art. 2(6)

<sup>253</sup> EUAA Proposal 2018, Art. 16(2)(e)

<sup>254</sup> EUAA Proposal 2018, Art. 16a(1)

administrative stage...without prejudice to the competence of MS to take decisions on individual applications”<sup>255</sup>. Specifically, the EUAA’s ASTs should *inter alia* assess vulnerability<sup>256</sup>, carry out admissibility and eligibility interviews<sup>257</sup>, assess the evidence<sup>258</sup>, and prepare decisions on international protection and provide those decisions to the competent national authorities who would be responsible for taking decisions<sup>259</sup>. Therefore, the independent admissibility assessment as well as the admissibility and eligibility interviews are explicitly covered under this proposed mandate. They are to be conducted independently by the EUAA which implies powers of administrative discretion which is inherent to the respective procedures.<sup>260</sup> Additionally, the enhanced mandate would even assign the collection of biometric data as part of the registration process<sup>261</sup>, which EASO is already mandated to do under Greek asylum law<sup>262</sup>.

All things considered, the enhanced assistance mode addresses the administrative reality of the hotspot approach in Greece in everything but name. It upgrades the working principle of joint processing by dropping the limitations set out in current EASO Regulation<sup>263</sup> of having no power regarding the MS deciding on applications for international protection. The 2018 proposal would provide *de jure* a legal basis for EASO’s *de facto* already expanded mandate under Greek law and in existing administrative practice. However, the EUAA would still be far from making the decision on individual applications for international protection.<sup>264</sup> Thus, the 2018 proposal respects the absolute constitutional limitations set out in Art. 78(2)(e) TFEU. If the proposal finally gets adopted in a similar manner, it will be interesting to see how this upgraded mandate will be interpreted in the light of the still rather vague hotspot approach.

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<sup>255</sup> EUAA Proposal 2018, Art. 16a(1)(a)

<sup>256</sup> EUAA Proposal 2018, Art. 16a(2)(e)

<sup>257</sup> EUAA Proposal 2018, Art. 16a(2)(f)

<sup>258</sup> EUAA Proposal 2018, Art. 16a(2)(g)

<sup>259</sup> EUAA Proposal 2018, Art. 16a(1)(h)

<sup>260</sup> Compare to the analyses of the assessment and eligibility interview and the vulnerability assessment in chapters 6.1 and 6.2

<sup>261</sup> EUAA Proposal 2018, Art. 16a(2)(c)

<sup>262</sup> Law 4540/2018, Art. 28(7), see section 5.2

<sup>263</sup> EASO Regulation, Art. 2(6)

<sup>264</sup> This is also confirmed by the Commission in the Memorandum attached to the 2018 Proposal that the EUAA, see Commission 2018, *supra*. 242 at



## 8. Conclusion

EASO operates in a highly sensitive area for MS which has been resisting reform efforts since June 2016. However, EASO is far from being a static entity. The hotspot approach has elevated EASO from a start-up agency equipped with limited resources and tasked with information exchange and provision of scientific expertise to a pivotal player in operational support. In this context, this thesis has endeavoured in the question to what extent the gap between the *de jure* and the *de facto* powers of EASO in the hotspot approach exists. Therefore, it compared EASO's existing mandate under the EASO Regulation with (1) the operational tasks bestowed upon EASO in the hotspots under Greek asylum law and (2) the execution of the activities in the on-site operations.

A look at the content of the EASO Regulation provides evidence supporting the Support Office's qualification as decentralized EU agency without decision-making powers, tasked with an assisting and coordinating role through the deployment of ASTs under Operating Plans. Most notably, there is a clear exclusion of powers concerning the decision-making of MS authorities on individual applications for international protection. In the absence of a proper codification in a piece of EU legislation, the hotspot approach qualifies as a legally obscure scenario characterized by a lack of clarity concerning the mandate and role of EASO.

Regarding EASO's involvement in Greek hotspots the evidence reviewed strongly suggests that the hotspot approach extended EASO's operational competences beyond its mandate without being a codified concept or working method. Its vagueness as an adaptable

tool regulated under national asylum law opened the door for Greece to shape the scope of EASO's mandate into an effective facilitator for GAS in implementing the EU-Turkey Statement. By consecutive amendments to Law 4375/2016, EASO was empowered to conduct essential stages of the asylum procedure independently without the supervision of the GAS. The analysis of the administrative practice brought to light that conducting admissibility and eligibility interviews as well as vulnerability assessments clearly entails administrative discretion on behalf of EASO. While the GAS takes *de jure* the final decision on applications for international protection, they are almost exclusively based on decisions made by the Support Office which *de facto* takes vital decisions during the different stages of the asylum procedure. EASO's operational support without a legal basis in its founding regulation qualify as illegal which is ostensible recognized by the European Ombudsman. As of now, this overreach seems to be tolerated by MS and the Commission which both have a political interest to restore credibility in the CEAS. Additionally, they may anticipate the establishment of the EUAA which may remedy the legal shortfalls of the current administrative practice in Greek hotspots.

This work relied in its analysis on the empirical findings of Greek, European and international organisations, which makes the findings subject to their respective scientific objectivity and integrity. Furthermore, it has to be pointed out that the findings of this thesis have limited relevance for EASO's operational support in Italian hotspots because of significant differences in the national asylum system of Greece<sup>265</sup>.

This thesis makes two main contributions in the study of the relationship between MS and EASO. First, the findings show that the obscure legal nature of the hotspot approach enabled Greece to directly transfer competences to an EU agency both in law and practice. This informal shift circumvents the EU legislative process as *pre-ante* control mechanism of European agencies. Secondly, the joint processing of asylum claims by EASO experts and national authorities in hotspots indicates the emergence of an increasingly integrated European administration. This observation is supported by the intensive inter-agency cooperation and the fact that Greece accommodated EASO's role in hotspots in its asylum framework which is planned to be formalized in the creation of the EUAA.

At the current state of play, both the original EASO mandate and hotspots will stay with us for the foreseeable future. A minimum consensus among MS for reforming the CEAS is still lacking<sup>266</sup>, which includes the EUAA reform, and hotspots are considered as part of the long-term approach of Union asylum policy. However, if EASO is supposed to remain an impartial body of expertise and operational support, it must be given a clear and

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<sup>265</sup> ECRE 2016, *supra* 126

<sup>266</sup> European Council, *supra*. 241

comprehensive mandate, especially with regard to its operational tasks in hotspots. Given the continued political instability in the Middle East and Northern Africa<sup>267</sup>, it remains to be seen for how long EASO operates beyond its mandate before the EUAA reform can be realised.

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<sup>267</sup> UNHCR, Global Trends: Forced Displacement in 2018 (2019), available at <<https://www.unhcr.org/5d08d7ee7.pdf>> (accessed 31 August 2019)

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