

# 10. Out of control? The case of the European Asylum Support Office

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## 1. INTRODUCTION

The growing phenomenon of ‘agencification’ within EU law<sup>1</sup> reveals that challenges related to control are also likely to arise within the less politicised information-gathering types of agencies, which focus on drafting reports or research informing the EU bodies and the general public.<sup>2</sup>

In this connection, the European Asylum Support Office (EASO) and its process of transformation into the European Union Asylum Agency (EUAA)<sup>3</sup> offer a suitable case study to investigate, from the perspective of the control on the Agency’s activities, the particular challenges determined by the expansion of EASO’s operational competence as well as the exercise of the mandate. This chapter argues that EASO’s recent overstepping of its operational powers has determined a *de facto* constitutional transformation. This has shifted the Agency from purely expert consulting to undertaking interviews with asylum seekers and submitting recommendations that are followed and formally endorsed by domestic authorities. This is significantly illustrated by the recent practice in the Greek hotspots,<sup>4</sup> which will serve as a case study for the purposes of this chapter.

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<sup>1</sup> See in particular Herwig CH Hofmann and Alessandro Morini, ‘The Pluralisation of EU Executive: Constitutional Aspects of “Agencification”’ (2012) 37 *European Law Review* 419–443.

<sup>2</sup> Literature on EU agencies has been significantly expanding; see recently Marta Simoncini, *Administrative Regulation Beyond the Non Delegation Doctrine: A Study on EU Agencies* (Hart Publishing, 2018).

<sup>3</sup> For references see Sarah Katz, ‘A More Acceptable Solution: The Proposed European Union Agency of Asylum and Refugees’ (2017) 49 *Case Western Reserve Journal of International Law* 275–301.

<sup>4</sup> Pursuant to art 2(10) of the current Regulation (EU) 2016/1624 of 14 September 2016 on the European Border and Coast Guard (Frontex), [2006] OJ L251/1, and art

Such a particular transformation based on the *de facto* activities of the Agency signals the need to address the issue of control over activities which might impact on individuals, namely asylum seekers, and undermine the Member States' competence as to the determination of refugee status. In the light of this twofold problematic characterisation, the chapter will conclude by stressing the importance of civil society as an accountability forum through which the activities of EASO and the future EUAA can be subjected to scrutiny.<sup>5</sup>

## 2. FROM THE EUROPEAN ASYLUM SUPPORT OFFICE TO THE EU ASYLUM AGENCY

### 2.1 The Origins and Development

EASO was established by Regulation 439/2010<sup>6</sup> and has been fully operational since 2011.<sup>7</sup> The 1999 Tampere Programme<sup>8</sup> and the Treaty of Amsterdam<sup>9</sup> set out the general competence for the EU to establish a Common European Asylum System (CEAS), understood as an integrated body of legal instruments relevant for the assessment of claims of international protection in accordance with international law.<sup>10</sup> It was then decided to complement the CEAS legal

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2(23) of the new Frontex Regulation agreed between the European Parliament and the Council of the EU in April 2019, Interinstitutional File 2018/0330(COD) of 9 April 2019, “hotspot area” means an area in which the host Member State, the Commission, relevant Union agencies and participating Member States cooperate, with the aim of managing an existing or potential disproportionate migratory challenge characterised by a significant increase in the number of migrants arriving at the external borders’. For references see David Fernández-Rojo, ‘Los hotspots: expansión de las tareas operativas y cooperación multilateral de las agencias europeas Frontex, Easo y Europol’ (2018) 61 *Revista de Derecho Comunitario Europeo* 1013–1056.

<sup>5</sup> See generally Mark Bovens, ‘New Forms of Accountability and EU-Governance’ (2007) 5 *Comparative European Politics* 104–120.

<sup>6</sup> Regulation 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office (EASO Regulation) [2010] OJ L132/11.

<sup>7</sup> See Françoise Comte, ‘A New Agency is Born in the European Union: The European Asylum Support Office’ (2010) 12 *European Journal of Migration and Law* 373–405.

<sup>8</sup> European Council, Presidency Conclusions, Tampere, 16 October 1999, available at <https://www.consilium.europa.eu/media/21059/tampere-european-council-presidency-conclusions.pdf> accessed 9 July 2019.

<sup>9</sup> Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts [1997] OJ C340/1.

<sup>10</sup> The Common European Asylum System (CEAS) consists of the following binding acts: Council Regulation 604/2013 (Dublin III Regulation) [2013] OJ

toolbox with an operational organism to support Member States and facilitate cooperation.<sup>11</sup> EASO was established as a decentralised regulatory agency after the Commission undertook an impact assessment where options such as an executive agency or a network were also considered.<sup>12</sup>

As a regulatory agency, EASO operates independently, while being funded by the EU budget, with a Management Board and an Executive Director.<sup>13</sup> With ‘no direct or indirect powers in relation to the taking of decisions by the Member States’ authorities on individual applications for international protection’,<sup>14</sup> EASO is considered to have ‘soft powers’,<sup>15</sup> being mainly concerned with providing the operational support to national asylum authorities in cases of any ‘particular pressure’ on their asylum systems.<sup>16</sup> Some of the activities also involve providing information on the countries of origin, training the staff of national asylum authorities and helping with the relocation of beneficiaries of international protection, thereby giving EASO not only an operational role, but also an informational, monitoring and solidarity role.<sup>17</sup>

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L180/31; Council Regulation 603/2010 (Eurodac Regulation) [2013] OJ L180/1; Directive 2011/95/EU (Qualification Directive) [2011] OJ L337/9; Directive 2013/33/EU (Reception Directive) [2013] OJ L180/96; and Directive 2013/32/EU (Procedures Directive) [2013] OJ L180/249. For an interpretation of the CEAS as an integrated legal system, see extensively Hemme Battjes and Thomas Spijkerboer, ‘The Systematic Nature of the Common European Asylum System’, in Julien Laferrière, Henri Labayle and Örjan Edström (eds), *The European Immigration and Asylum Policy: Critical Assessment Five Years After the Amsterdam Treaty* (Bruylant, 2005) 27, who argue that ‘the conception of European asylum legislation as an integrated system is in some quite important respects necessary to interpret its rules, including claims on protection relevant for international law’.

<sup>11</sup> Commission, ‘The Hague Programme: Ten Priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security, and Justice’ (Communication) COM (2005) 184 final. See also Stephanie Schneider and Carolin Nieswandt, ‘EASO – Support Office or Asylum Authority? Boundary Disputes in the European Field of Asylum Administration’ (2018) 43 *Österreichische Zeitschrift für Soziologie* 13–35.

<sup>12</sup> Comte (n 7) provides an analysis of all options looked at in the impact assessment, such as the strengthening of the Asylum Unit at the Commission, the creation of an executive agency, and the creation of a network, as well as the reasoning of the Commission in choosing in the end a regulatory agency for the institutional form of EASO.

<sup>13</sup> EASO Regulation, recitals 17 and 19.

<sup>14</sup> *Ibid*, recital 14.

<sup>15</sup> Schneider and Nieswandt (n 11).

<sup>16</sup> EASO Regulation, art 1.

<sup>17</sup> Marco Scipioni, ‘De Novo Bodies and EU Integration: What Is the Story Behind EU Agencies’ Expansion?’ (2018) 56 *Journal of Common Market Studies* 768–784.

## 2.2 The Ongoing Transformation Process

While EASO's powers were rather limited within the initial framework, its role has expanded after the CEAS reform of 2013, which especially involved EASO in the response to situations of extraordinary migratory pressure. Apart from being involved in drawing up information, which can be politically sensitive, about possible situations of emergency in a Member State in the context of the mechanism for early warning, preparedness and crisis management,<sup>18</sup> EASO has recently been involved at the domestic level in the admissibility procedure of asylum applications.<sup>19</sup> As will be argued, this expansion of tasks that do not always correspond with EASO's statutory mandate has given rise to a recommendation to recast the legal framework and to transform EASO into a 'fully-fledged' agency.<sup>20</sup>

In particular, in 2016 the European Commission presented a wide-ranging asylum package, which included the establishment of an EUAA.<sup>21</sup> While the Council and the European Parliament reached a partial agreement on the text of the EUAA Regulation on 28 June 2017, the Commission, following President Juncker's speech on the 2018 State of the Union,<sup>22</sup> submitted an amended proposal to further reinforce the operational tasks of the EUAA put forward in 2016.<sup>23</sup> The 2018 proposal of the European Commission mainly focuses on expanding the EUAA's role in the administrative procedure for international protection. The EUAA's asylum support teams should, among other measures, identify any needs for special procedural guarantees, carry out the admissibility and substantive interview, assess the evidence and prepare decisions on applications for international protection.

Although the European Commission keeps referring to a fully fledged agency for asylum matters in the EU, the EUAA will neither be conferred de jure decision-making powers regarding asylum applications, nor executive or

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<sup>18</sup> Dublin III Regulation, art 33.

<sup>19</sup> For a general overview see the latest annual report, EASO, *Annual Report on the Situation of Asylum in the EU 2018* (2018 EASO Annual Report) 24 June 2018, available at <https://easo.europa.eu/easo-annual-report-2018> accessed 9 July 2019.

<sup>20</sup> Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010' COM (2016) 271 final, 6.

<sup>21</sup> *Ibid.*

<sup>22</sup> Commission, 'The Hour of European Sovereignty', Authorised Version of the State of the Union Address 2018, available at [https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-speech\\_en\\_0.pdf](https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-speech_en_0.pdf) accessed 9 July 2019.

<sup>23</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' COM (2018) 633 final.

enforcement tasks on the ground. The future EUAA will be given an assisting role in the examination of applications for international protection. The EUAA will be far from independently processing and deciding asylum applications lodged in the EU. Instead, the future Regulation on the EUAA opts for reinforcing the operational tasks of the Agency and maintaining the Member States as the exclusive decision-making authorities. Future developments are nonetheless unpredictable due to the impasse in the negotiations on the whole asylum package.<sup>24</sup>

### 3. THE *DE FACTO* EXPANSION OF EASO'S MANDATE AND ITS IMPLICATIONS

#### 3.1 Operational Implications: The Case of the Greek Hotspots

Several provisions in Regulation 439/2010 refer to EASO's operational tasks. Article 2(2) states that, drawing upon all useful resources at its disposal, the Agency must provide effective operational support to Member States which are subject to particular pressure on their asylum and reception systems. Article 5 indicates that EASO must promote, facilitate and coordinate the exchange of information and other activities related to relocation within the EU. Significantly, Article 10 details the support that the Agency must coordinate in order to assist the competent national authorities which are subject to particular pressure on their asylum systems. Accordingly, a Member State which is subject to particular pressure may request that EASO deploy an Asylum Support Team (AST).<sup>25</sup>

Since the EU-Turkey Statement was adopted<sup>26</sup> and the hotspot approach designed by the European Agenda on Migration,<sup>27</sup> EASO's ASTs were increasingly involved in the eligibility and merits examination procedure of

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<sup>24</sup> See in this regard, Salvatore F Nicolosi, 'La riforma del sistema europeo comune di asilo tra impasse negoziale e miopia normativa' (2019) 2 *Rivista trimestrale di diritto pubblico* 521–540.

<sup>25</sup> EASO Regulation, art 13.

<sup>26</sup> Council of the EU, 'EU-Turkey Statement' Press release 144/16, 18 March 2016, available at <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/pdf> accessed 9 July 2019.

<sup>27</sup> Commission, 'A European Agenda on Migration' (Communication) COM (2015) 240 final. Regarding the hotspot approach, see Federico Casolari, 'The EU's Hotspot Approach to Managing the Migration Crisis: A Blind Spot for International Responsibility?' (2016) 25 *Italian Yearbook of International Law* 109–134; Satoko Horii, 'Accountability, Dependency, and EU Agencies: The Hotspot Approach in the Refugee Crisis' (2018) 37 *Refugee Survey Quarterly* 204–230 and Fernández-Rojo (n 4) 1013.

applications for international protection by conducting admissibility interviews, drafting opinions and recommending decisions.<sup>28</sup> The joint processing of asylum claims is expressly mentioned in Article 60(4)(b) Greek Law No. 4375 of 3 April 2016. Article 60(4)(b) states that, while the Hellenic police or the armed forces are responsible for registering applications for international protection, notifying decisions and receiving appeals at the hotspots, EASO may assist the national authorities in conducting interviews with applicants for international protection as well as any other procedure.<sup>29</sup>

Article 60(4) Greek Law No. 4375 was revised by Greek Law No. 4399 of 22 June 2016, which further expanded the operational powers conferred on EASO. In the Greek hotspots, the Agency may autonomously conduct the interviews of the applicants for international protection.<sup>30</sup> The officials of EASO deployed at the Greek hotspots play a crucial role in the admissibility procedure of an asylum application by undertaking vulnerability screenings, interviewing asylum seekers, assessing their cases and filing recommendations to the Greek competent authorities, which are ultimately responsible for making a decision.

Due to the extraordinary pressure facing the Greek asylum system, EASO is, in practice, responsible for independently conducting interviews, assessing whether the safe third country or the first country of asylum concept applies, and adopting a recommendation on the admissibility of the international pro-

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<sup>28</sup> EASO, 'Hotspot Operating Plan to Greece – Amendment No 2' EASO/COS/2016/391, available at <https://bit.ly/2z04lv9>, 3; 'Special Operating Plan to Greece' EASO/DOP/OU/2016/1812, available at <https://bit.ly/2h1M2dF>, 9 and 'Operating Plan Agreed by EASO and Greece', available at <https://bit.ly/2BO6EAo>, 13. All documents accessed 9 July 2019.

<sup>29</sup> 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, 03 April 2016, unofficial translation available at <http://www.refworld.org/docid/573ad4cb4.html>, cf in Greek <http://asylo.gov.gr/wp-content/uploads/2016/10/Απόφαση-εφαρμογής-διατάξεων-παρ.-4-αρ.-60.pdf> accessed 24 June 2019.

<sup>30</sup> Law 4399, 'Institutional framework for establishing Private Investment Aid schemes for the country's regional and economic development – Establishing the Development Council and other provisions', 22 June 2016, 6905, available at [https://startupgreece.gov.gr/sites/default/files/gr\\_development\\_law\\_en\\_2.pdf](https://startupgreece.gov.gr/sites/default/files/gr_development_law_en_2.pdf) accessed 24 June 2019. Cf Evangelia (Lilian) Tsourdi, 'Solidarity at Work? The Prevalence of Emergency-driven Solidarity in the Administrative Governance of the Common European Asylum System' (2017) 24 *Maastricht Journal of European and Comparative Law* 1–20.

tection application.<sup>31</sup> While this recommendation has *de jure* no legal effect on the Greek asylum officials, EASO's opinion has *de facto* quasi-binding consequences, since on the whole the Greek Asylum Service does not undertake any assessment of the application, but rather rubber-stamps the Agency's decision in regard to the applications for international protection. Such a situation creates tensions from the perspective of control on the activities of the EU Agency.<sup>32</sup>

Although the 14th recital of the Regulation of 19 May 2010 establishing EASO states that the Agency 'should have no direct or indirect powers in relation to the taking of decisions by Member States' asylum authorities on individual applications for international protection', the officers of EASO deployed in the Greek hotspots exerted a significant influence on the competent national authorities regarding the admissibility of an asylum application. In fact, based on the *de facto* joint processing experience of EASO in the Greek hotspots, the future Regulation on the EUAA will merely provide a legal basis for the new Agency's assistance to the competent national authorities in screening third-country nationals and registering and examining applications for international protection.

In such a context, the European Centre for Constitutional and Human Rights (ECCHR) submitted a complaint to the European Ombudsman in April 2017. The ECCHR argued that the interviews conducted by EASO failed to take individual experiences and vulnerabilities of the applicants into consideration and that 'EASO's involvement in the decision-making process of applications for international protection has no legal basis in the applicable Regulation

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<sup>31</sup> European Council for Refugees and Exiles (ECRE), 'The implementation of the hotspots in Italy and Greece. A Study' 2016, available at <https://www.ecre.org/ecre-the-implementation-of-the-hotspots-in-italy-and-greece/> accessed 9 July 2019, 38.

<sup>32</sup> See Evangelia (Lilian) Tsourdi, 'Bottom-up Salvation?: From Practical Cooperation Towards Joint Implementation through the European Asylum Support Office' (2016) *European Papers* 997, 1023; Ioannis Papageorgiou, 'International Protection in Greece. Background Information for the LIBE Committee Delegation to Greece 22–25 May 2017' (Study for the European Parliament LIBE Committee) PE 583.145, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583145/IPOL\\_STU\(2017\)583145\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583145/IPOL_STU(2017)583145_EN.pdf), 38; ECRE (n 31) 38; European Union Agency for Fundamental Rights, 'Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the "hotspots" set up in Greece and Italy' Opinion 5/2016, available at <https://fra.europa.eu/en/opinion/2016/fra-opinion-hotspots-approach>, 17; Catharina Ziebritzki, 'Chaos in Chios: Legal Questions Regarding the Administrative Procedure in the Greek Hotspots' (EU Immigration and Asylum Law and Policy, 26 July 2016) <http://eumigrationlawblog.eu/chaos-in-chios-legal-questions-regarding-the-administrative-procedure-in-the-greek-hotspots/>. All documents accessed 24 June 2019.

(EU) No 439/2010 establishing the agency'.<sup>33</sup> While the Ombudsman accepted that there were 'genuine concerns about the quality of the admissibility interviews as well as about the procedural fairness of how they are conducted', she did not take any further action since the 'ultimate legal responsibility for decisions on individual asylum applications rests with the Greek authorities'.<sup>34</sup>

Furthermore, the Greek asylum officials are, in principle, exclusively in charge of identifying vulnerable applicants for international protection to whom the hotspot fast-track border procedure does not apply.<sup>35</sup> However, the Greek asylum system is inundated with asylum applications and is only able to identify those cases of manifest vulnerability. In practice, while EASO is conducting asylum interviews, it also identifies vulnerable cases and forwards them to the Greek asylum office, which ultimately confirms the existence of such vulnerability. Occasionally, asylum seekers initially identified as vulnerable by the Greek Asylum Service may, during the examination of their application, be subject to another vulnerability assessment by EASO since there is no clear referral pathway between the Agency and the national authorities.<sup>36</sup> This lack of coordination between EASO and the Greek Asylum Service is problematic from the perspective of control for it is not clearly provided anywhere whether and under what principles EASO is to carry out vulnerability assessments and because it may lead to contradictory findings vis-à-vis the existence of vulnerability in a particular case.<sup>37</sup>

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<sup>33</sup> European Centre for Constitutional and Human Rights (ECCHR), 'EASO's influence on inadmissibility decisions exceeds the agency's competence and disregards fundamental rights', April 2017, available at <http://www.statewatch.org/news/2017/may/eu-ecchr-case-report-greece-EASO.pdf> accessed 24 June 2019. Cf European Ombudsman, 'EASO's involvement in applications for international protection submitted in the "hotspots" in Greece', Case 735/2017/MDC opened 13 July 2017.

<sup>34</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', Case 735/2017/MDC, 5 July 2018.

<sup>35</sup> Greek Law No. 4375 of 3 April 2016, art 60(4).

<sup>36</sup> ECRE (n 31) 44; and Elli Kriona Saranti, Danai Papachristopoulou and Maria-Nefeli Vakouli, 'EASO's Operation on the Greek Hotspots: An Overlooked Consequence of the EU-Turkey Deal' Greece Refugee Rights Initiative (March 2018), 7, 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 9 July 2019.

<sup>37</sup> Minos Mouzourakis, Kris Pollet and Ruben Fierens, 'The concept of vulnerability in European asylum procedures' (ECRE Asylum Information Database, 31 August 2018), 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), 30, accessed 24 June 2019.



EASO's assessment of vulnerability is not trivial but in fact carries significant consequences for the applicant of international protection. If a deployed expert of EASO, who is undertaking an asylum interview, does not identify vulnerability or wrongly classifies an applicant as non-vulnerable, the case will follow the fast-track border procedure, which provides fewer guarantees. In particular, Article 60(4) Greek Law No. 4375 provided an expedited procedure applicable to the hotspots. Under this procedure, the Hellenic police or the armed forces may register applications for international protection, notify decisions and other procedure-related documents, as well as receive appeals. Additionally, EASO may conduct, within 15 days, applicant interviews regarding international protection.<sup>38</sup> In this regard, the United Nations Special Rapporteur on the human rights of migrants was concerned that 'asylum seekers may not be granted a fair hearing of their case, as their claims are examined under the admissibility procedure, with a very short deadline to prepare'.<sup>39</sup>

Lastly, EASO also plays a significant role at the appeal stage. Since most of the Greek Asylum Service's first instance decisions that are denied in the hotspots are brought to the Independent Appeals Committees' attention, significant delays have also been registered at the second instance level. Hence, EASO experts assist both applicants with the submission of their appeals<sup>40</sup> and the Appeals Authority with file processing and administrative support.<sup>41</sup> According to the 2018 Operating Plan agreed upon by EASO and Greece, the Greek Appeals Authority must appoint a coordinator to liaise with EASO and ensure effective operational coordination and implementation.<sup>42</sup> However, neither EASO's original Regulation, nor the Greek legislation, provide a legal basis for the operational role that the Agency should play during the appeal stage.

In this regard, alongside the operational and technical assistance that the future EUAA should provide to Member States upon their request, the Agency will facilitate the examination of applications for international protection submitted to the competent national authorities (Article 16(2)(b) partial agreement EUAA). Additionally, the amended proposal for a Regulation on the EUAA, put forward by the European Commission on 12 September 2018, goes one step

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<sup>38</sup> Greek Asylum Service, 'Flowcharts of the Asylum Procedure in Greece: Asylum procedure in the context of the EU-Turkey Statement', available at <http://asylo.gov.gr/en/wp-content/uploads/2017/11/Islands-procedure.pdf> accessed 24 June 2019.

<sup>39</sup> Human Rights Council, 'Report of the Special Rapporteur on the human rights of migrants on his mission to Greece' A/HRC/35/25/Add.2, 24 April 2017, para 82.

<sup>40</sup> ECRE (n 31), 44.

<sup>41</sup> Operating Plan Agreed by EASO and Greece (n 28) 17.

<sup>42</sup> *Ibid.*

further by saying that the Agency's AST should identify any needs for special procedural guarantees, carry out the admissibility and substantive interview, assess the evidence and prepare decisions on applications for international protection.<sup>43</sup> Nonetheless, Recital 2 of the 2018 European Commission's proposal states that while the Agency may conduct the entire procedure for international protection, the Member States maintain their competence to take decisions on individual applications.

Consequently, the European Commission clearly establishes that the future EUAA cannot be granted decision-making powers. The future EUAA will be far from deciding, at first instance and on appeal, every asylum application within the EU. Instead, the European Commission has opted to reinforce the operational tasks of EASO and maintain the Member States as the exclusive decision-making authorities. According to the proposed Regulation, the main limitation to the EUAA's strengthened operational role will come from the Member States. While it is true that the EUAA will assist the Member States in matters closely linked to their national sovereignty prerogatives, the competent national authorities that vote at the management boards will tightly control its reinforced operational, implementation and supervisory functions. Only two representatives of the European Commission will have voting rights on the Agency's Management Board. The presence of the European Parliament in the EUAA's Management Board will continue to be non-existent. The Member States will thus maintain control of the strategic decisions, operational activities and daily management of the EUAA.

### 3.2 Constitutional Implications: Examining Control from a Multidimensional Perspective

The *de facto* expansion of powers that ultimately finds formalisation in the Commission's proposal for the EUAA raises a number of concerns from the perspective of control over the Agency's activities. The focus in this section will be especially on legal, institutional and social accountability.<sup>44</sup>

With over 30 EU agencies having been established since 2000, the powers of these bodies have been the topic of discussion not only by scholars,<sup>45</sup> but also at the judicial level.<sup>46</sup> The criticism is usually focused on the role of these

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<sup>43</sup> COM (2018) 633 final, art 16(2).

<sup>44</sup> For a functional understanding of these concepts, see Chapters 2, 4, 7 and 8 in this volume.

<sup>45</sup> Miroslava Scholten and Marloes van Rijsbergen, 'The Limits of Agencification in the European Union' (2014) 15 *German Law Journal* 1223–1256.

<sup>46</sup> See Court of Justice of the EU (CJEU), Case 9/56 *Meroni v High Authority* [1958] ERC 11; Case 98/80 *Romano v Institut national d'assurance maladie-invalidité*

agencies within the EU institutional landscape.<sup>47</sup> Moreover, owing to the *de facto* expansion of powers, concerns arise about the incompatibility of these powers with the *de jure* tasks of the agencies.<sup>48</sup> This triggers the question of how to address the loopholes from the perspective of control.

As regards EASO, the control over the *de facto* expansion of competences is crucial because of the enormous impact of its activities on the individual situations of asylum seekers and also because of possible tensions with relevant domestic authorities in the field of asylum. In this context, the constitutional implications of EASO's activities from the perspective of control can be framed in a multidimensional dynamic. In particular, it is relevant to understand to what extent State authorities can exercise scrutiny over the Agency's activities. Also, since EASO plays a key role as an advisor for the European Commission when it comes to the response to emergency situations,<sup>49</sup> it is worth considering what kind of scrutiny the EU institutions, and most notably the European Commission, can exercise. Finally, considering the substantial involvement of EASO in the refugee determination process, it is helpful to examine the cooperation with the United Nations High Commissioner for Refugees (UNHCR) as to the impartial application of refugee law principles.<sup>50</sup>

### 3.2.1 Effective judicial protection and legal accountability

The case of the Greek hotspots confirms the need for a structured scrutiny by Member States as the main stakeholders for the activities performed by EASO in support of the refugee status determination procedures. Admittedly, the expansion of competences in the field of refugee protection reflects a political compromise in situations with a clear functional need for more regulatory capacity at the EU level but in which Member States were reluctant to transfer more powers to the European Commission.<sup>51</sup> Such a compromise is 'without prejudice to the competence of Member States to take decisions on individual applications and with full respect for the organisation of the judiciary in each Member State as well as judicial independence and impartiality'.<sup>52</sup>

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[1981] ERC 1241; Case 270/12 *UK v Parliament*, (*Short-selling case*) ECLI:EU:C:2014:18, where the CJEU discussed the discretion of powers of the EU agencies.

<sup>47</sup> Scholten and van Rijsbergen (n 45).

<sup>48</sup> For further references see Miroslava Scholten, *The Political Accountability of EU and US Independent Regulatory Agencies* (Brill/Nijhoff, 2014).

<sup>49</sup> Dublin III Regulation (n 10), art 33.

<sup>50</sup> EASO, 'Working arrangement with UNHCR', 13 December 2013, available at [www.easo.europa.eu/sites/default/files/public/EASO-UNHCR-Working-Arrangement\\_0.pdf](http://www.easo.europa.eu/sites/default/files/public/EASO-UNHCR-Working-Arrangement_0.pdf) accessed 9 July 2019.

<sup>51</sup> Daniel R Kelemen, 'The Politics of "Eurocratic" Structure and the New European Agencies' (2002) 25 *West European Politics* 93, 95.

<sup>52</sup> COM (2018) 633 final, 1.

Nonetheless, the case of the Greek hotspots underscores the tensions voiced by civil society concerning the risks for an effective judicial protection.

As has been highlighted in this chapter, apart from the issue of competence, fundamental rights issues arise with regard to the procedural rights that applicants might have during the interview with EASO staff. There is no reference to such rights in the EASO Regulation, nor in the rules of conduct of the Operating Plans. It is also unclear whether national procedural rules are and have to be respected by EASO staff. As has been reported, Greek law is not often applied by EASO staff, who consider domestic law as a ‘side issue’, since all staff are ‘very experienced asylum experts’.<sup>53</sup>

While concluding that the ‘ultimate legal responsibility for decisions on individual asylum applications rests with the Greek authorities’,<sup>54</sup> the European Ombudsman’s decision highlights flagrant loopholes as regards the legal accountability of the Agency and, what is more, such a circumstance shifts the entire responsibility to the State authority, leaving the Agency outside any legal scrutiny. At present, in fact, a judicial review of EASO staff activities before domestic courts does not seem realistic because the personnel enjoy immunity before national judges, while only the CJEU has competence over the conduct of EU agencies. On the contrary, Article 21(1) of the EASO Regulation on civil liability establishes that ‘where members of an asylum support team are operating in a host Member State, that Member State shall be liable in accordance with its national law for any damage caused by them during their operations’.

### 3.2.2 Political and institutional accountability

Institutional accountability plays an important role in the context of EASO’s mandate and the lack thereof leads to more discretion for the Agency to expand its *de facto* powers.<sup>55</sup> The European institutions, most notably the European Commission and the European Parliament, as well as the UNHCR, are relevant stakeholders of EASO’s activities and adequate forms of institutional control are necessary to counterbalance the discretionary powers that the Agency has developed and remedy the lack of judicial accountability, as argued above.<sup>56</sup>

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<sup>53</sup> Ziebritzki (n 32).

<sup>54</sup> European Ombudsman (n 34).

<sup>55</sup> Scipioni (n 17); see also Madalina Busuioc, ‘Accountability, Control and Independence: The Case of European Agencies’ (2009) 15 *European Law Journal* 599–615.

<sup>56</sup> For more general references see Ellen Vos, ‘EU Agencies, Common Approach and Parliamentary Scrutiny’ (Study by the European Parliamentary Research Service, 2018) available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2018/627131/EPRS\\_STU\(2018\)627131\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/627131/EPRS_STU(2018)627131_EN.pdf) accessed 9 July 2019.

As regards the role of EU institutions, a form of control may operate with regard to the Executive Director,<sup>57</sup> who is responsible for the management of EASO for the Operating Plan agreed upon with a Member State for deployment of the AST. This means that the Executive Director exercises an oversight role on the operational activities of the Agency.<sup>58</sup> Apart from being accountable before the Management Board,<sup>59</sup> the Executive Director has a duty to report to the European Parliament. However, this form of institutional accountability is also considered problematic.<sup>60</sup>

The relationship between the agencies and the EU institutions has been addressed by the so-called Common Approach, an interinstitutional document aimed at ensuring coherence, effectiveness, accountability and transparency of EU agencies.<sup>61</sup> Different procedures ensuring control have been addressed, including ex ante control and ex post control mechanisms. Nonetheless, the Operating Plan agreed upon by EASO and Greece reflects an expansion of powers which has not been regulated by the European Commission. Admittedly, the hotspot approach proposed by the European Commission in 2015 in the light of the European Agenda on Migration did not contemplate the numerous tasks that EASO has been exercising.<sup>62</sup> Considering the emergency situations in which the Agency has been operating, it is doubtful whether any preliminary consultation with the European Commission has been established.

Ex post control usually entails scrutiny on the basis of an annual report.<sup>63</sup> This report is drafted by the Executive Director, assessed by the Management Board and sent to the European Parliament, the Council, the Commission and the Court of Auditors. While providing useful information and data on the situation of asylum applications in the EU, these reports do not set out in detail the activities, powers and concerns regarding the engagement of EASO staff at

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<sup>57</sup> According to art 30(1) EASO Regulation, the Executive Director is appointed for five years by the Management Board from among the suitable candidates identified in an open competition organised by the Commission.

<sup>58</sup> EASO Regulation, art 18(1).

<sup>59</sup> *Ibid*, art 31(1).

<sup>60</sup> See Scipioni (n 17).

<sup>61</sup> European Parliament, Council, Commission, Joint Statement and Common Approach, 2012, available at [https://europa.eu/european-union/about-eu/agencies/overhaul\\_en](https://europa.eu/european-union/about-eu/agencies/overhaul_en) accessed 9 July 2019.

<sup>62</sup> COM (2015) 240 final.

<sup>63</sup> As set out in the Common Approach, the Commission has adopted in cooperation with the agencies a template for these reports. See also European Commission, Communication from the Commission on the guidance for programming document for decentralised agencies and the template for the Consolidated Annual Activity Report for decentralised agencies (C(2014) 9641 final), 2014.

the operational level.<sup>64</sup> This also raises issues in terms of transparency, which is a crucial component to consider when it comes to political and institutional accountability.

As regards the role of the UNHCR, it is essential to stress that the EASO Regulation enshrines a duty of cooperation.<sup>65</sup> Several provisions acknowledge the overriding role played in the field of refugee protection by the UNHCR, which is represented by a non-voting member on the EASO Management Board<sup>66</sup> who also sits *ex officio* in the Consultative Forum (CF) of the Agency.<sup>67</sup>

The general duty of cooperation is also complemented by a number of provisions recalling the need to coordinate with UNHCR in the pursuit of many operational activities, such as the relocation of asylum seekers throughout the EU.<sup>68</sup> More importantly, Article 12 of the EASO Regulation confirms that ‘due regard shall be given to relevant UNHCR guidelines’ as regards the adoption of technical documents on the implementation of EU asylum legislation, including guidelines and operating manuals. Such a duty of cooperation has been also operationalised through the Working Arrangement of 2013, which frames the cooperation within a spirit of mutual trust.

Nonetheless, aside from its role played within the CF, which will be addressed in the following section, even though the UNHCR has no scrutiny or enforcement powers vis-à-vis EASO, the duty to cooperate with the UNCHR is constitutionally relevant. This, in fact, acknowledges the general duty of compliance of EU law with international refugee law, which, in consequence, would also require the correct and impartial application of international refugee law instruments by EASO. Such a duty becomes more crucial owing to the recent involvement of EASO staff and deployed experts in the fast-track inadmissibility procedure in Greece, and most recently in the registration and examination of asylum claims on merit.

### 3.2.3 The EASO Consultative Forum and social accountability

The *de facto* expansion of tasks has created several loopholes in the multi-dimensional system of control, which is naturally designed to assess *de jure* activities. In this connection, EASO’s mandate seems to have grown out of control, which increases the need for the development of a suitable accountability framework. As has been highlighted in the literature, there are various forms of accountability that may arise in connection with the different activi-

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<sup>64</sup> See e.g. the 2018 EASO Annual Report.

<sup>65</sup> EASO Regulation, art 50.

<sup>66</sup> *Ibid*, art 25(4).

<sup>67</sup> *Ibid*, art 51(3).

<sup>68</sup> *Ibid*, art 5.

ties of a body.<sup>69</sup> Social accountability constitutes a suitable pattern to address the challenges that, from the perspective of control, have been raised by the expansion of EASO's mandate as this implies that the Agency is accountable to civil society and citizens through different bodies such as NGOs for example.<sup>70</sup> This framework is suitable for a twofold reason. On the one hand, civil society is gaining momentum within the EU, especially owing to the growing perception of the democratic deficit.<sup>71</sup> In this connection, the involvement of civil society would contribute to mitigate such a deficit. On the other hand, the EASO Regulation itself formalises the duty 'to maintain a close dialogue with relevant civil society organisations' through a CF.<sup>72</sup>

Such a CF is a usual characteristic of EU agencies as it reflects the need illustrated by the 2012 Common Approach that 'when relevant stakeholders are not represented in management boards, they should be involved in agencies' internal bodies and/or advisory groups/working groups, if appropriate'.<sup>73</sup> Accordingly, the structure of EASO comprises not only a Management Board and an Executive Director, but also a CF. The operation and coordination of the CF is within the responsibilities of the EASO Executive Management.<sup>74</sup> As such, the CF is set up for the purpose of maintaining a constant dialogue between the relevant civil societies and competent bodies that operate within the field of asylum at the different levels of action, such as local, regional, national, European and/or even international.<sup>75</sup> As has been mentioned, the UNHCR, as part of the Management Board, also takes part in the dialogue with the other actors.<sup>76</sup>

Despite initial resistance to its establishment,<sup>77</sup> the CF of EASO encompasses different activities involving civil society organisations which are being consulted for different purposes.<sup>78</sup> All these actors take part in the CF through

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<sup>69</sup> Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 *European Law Journal* 447–468.

<sup>70</sup> *Ibid.*

<sup>71</sup> See in this regard Marija Bartl, 'The Way We Do Europe: Subsidiarity and the Substantive Democratic Deficit' (2015) 21 *European Law Journal* 23–43.

<sup>72</sup> EASO Regulation, art 51.

<sup>73</sup> Common Approach (n 61) para 65.

<sup>74</sup> EASO Regulation, art 31(j).

<sup>75</sup> *Ibid.*, art 51.

<sup>76</sup> *Ibid.*

<sup>77</sup> Comte (n 7).

<sup>78</sup> As of 2018, the majority of the CF's composition consists of different NGOs and IGOs and has in comparison a smaller representation of Member States' authorities, academia and the EU institutions, see EASO Consultative Forum, available at <https://www.easo.europa.eu/civil-society/easo-consultative-forum> accessed 9 July 2019.

different meetings, conferences and workshops that are organised in order to involve civil society within the field of asylum.

Looking at the Annual Reports of EASO's CF, it can be seen that civil society organisations, along with other interested parties that are part of the CF, not only provide information for the purpose of creating statistics on the situations related to asylum within the Member States and the EU, but also provide input when it comes to any further action to be taken by EASO in its activities.<sup>79</sup> While the extent to which EASO is taking this advice into account is not regulated as such, and thus it is done on a voluntary basis,<sup>80</sup> the role of civil society is not to be overlooked. Including civil society in the activities of EASO and having its opinion as a contribution to the Annual Plenary Meetings or the Annual Report on the Situation of Asylum in the EU, for example, makes the Agency socially accountable to citizens. Taking into account views of different social actors and other interested parties has been used as a method for rendering social accountability to citizens in EU agencies,<sup>81</sup> and as such the introduction of a CF within EASO can be considered to give rise to some sort of social responsibility. Thus, the CF is not to be seen just as a means of creating and maintaining dialogue between the interested actors in the field of asylum, but it also has the potential of delivering social accountability.

The future Regulation on the EUAA strengthens the role of the CF. EASO's external evaluation highlighted the significant role of the CF in further involving civil society in the programming of EASO's activities.<sup>82</sup> However, the evaluation also brought to light an internal tension between civil society delegates, who asked for additional involvement in the consultation process of the Agency, and Management Board representatives, who opposed further integrating the CF in EASO's operational responsibilities.<sup>83</sup> In this respect, further strengthening the dialogue between EASO, NGOs and civil society,

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<sup>79</sup> See, e.g. EASO, 'Annual Report on the Situations of Asylum in the EU 2017' (Executive Summary) available at [http://publications.europa.eu/webpub/easo/annual-report-2017/img/Executive-Summary\\_EN.pdf](http://publications.europa.eu/webpub/easo/annual-report-2017/img/Executive-Summary_EN.pdf) accessed 2 April 2019.

<sup>80</sup> Bovens (n 5) 104–120; see also Deirdre Curtin, 'Delegation to EU Non-Majoritarian Agencies and Emerging Practices of Public Accountability', in Damien Geradin, Rodolphe Muñoz and Nicolas Petit (eds), *Regulation Through Agencies in the EU: A New Paradigm of European Governance* (Edward Elgar Publishing, 2005) 88–119.

<sup>81</sup> Curtin (n 80).

<sup>82</sup> Ernst & Young, 'Independent External Evaluation of EASO's activities covering the period from February 2011 to June 2014' (Final Report December 2015) 74, available at <http://statewatch.org/news/2016/mar/eu-easo-External-evaluation-of-EASO-Final-report.pdf> accessed 9 July 2019.

<sup>83</sup> *Ibid.*, 75.



as well as broadening the integration of the CF representatives in EASO's practical daily work, is imperative.<sup>84</sup>

Article 48 partial agreement text on the EUAA reinforces the autonomy of the CF since it will no longer be chaired by the Executive Director. The CF will also promote the exchange of information, assist the Executive Director and the Management Board, and ensure a close dialogue between relevant civil society organisations and competent bodies operating in the field of asylum policy. In particular, the CF is mandated to: (1) make suggestions to the Management Board on the annual and multi-annual programming; (2) provide feedback to the Management Board and suggest measures as a follow-up to the annual report on the situation of asylum in the EU; and (3) communicate with the Executive Director and the Management Board regarding conclusions and recommendations of conferences, seminars and meetings, as well as on findings from studies or field work carried out by any of the member organisations or bodies of the CF.<sup>85</sup>

In spite of the European Commission not having included a Fundamental Rights Officer (FRO) in its proposal for a Regulation on the EUAA, the European Parliament put forward the creation of an FRO. Specifically, the EUAA's FRO will be in charge of independently ensuring the Agency's compliance with fundamental rights, implementing the complaints mechanism, accessing all information concerning respect for fundamental rights in relation to all the activities of the Agency, and organising visits where the Agency is carrying out operational activities (Article 47a partial agreement text on the EUAA).

Furthermore, during the legislative adoption of the future EUAA, the European Parliament proposed the establishment of a complaint mechanism for the future EUAA. The main issue with the individual complaint mechanism is based on its lack of independence and impartiality.<sup>86</sup> Specifically, the EUAA's Executive Director, who will be in charge of reporting back to the FRO about the measures to be taken regarding an admitted complaint, is not independent from the Agency. Rather, the Director is appointed by the Management Board, which is composed of one representative from each Member State and two representatives from the Commission. In this regard, the mandate of the FRO should be enhanced since the Director will not have the power to suggest operational improvements to existing processes, to imple-

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<sup>84</sup> Ibid.

<sup>85</sup> Cf EASO, 'Consultative Forum Operational Plan' (September 2012), available at <https://www.easo.europa.eu/sites/default/files/public/Consultative-Forum-Operational-Plan.pdf> accessed 9 July 2019.

<sup>86</sup> Steve Peers, 'The Reform of Frontex: Saving Schengen at Refugees' Expense?' (2016) *Statewatch* 281.

ment a plan to execute the measures adopted by the EUAA or Member States, or to impose any sanctions against the Agency.

Should the future EUAA's FRO be provided with the function to compensate individuals for damages, the complaints mechanism would be effectively enhanced. In this respect, the FRO should be directly allocated a special budget to compensate an aggrieved complainant whose fundamental rights are found to be violated, or to finance other remedies. The FRO should at least be granted, jointly with the Executive Director, the power to terminate, suspend or withdraw financial support if an operation of the Agency did not comply with fundamental rights.

Lastly, no reference is made to a remedy within the EUAA if the complainant is not satisfied with the reply, or if the measures adopted by the Agency or the concerned Member State are not executed or implemented effectively. In this regard, offering the individual the option to file a complaint of maladministration against the Agency with the European Ombudsman would ensure the complainant's rights more effectively. For instance, the European Investment Bank, which has a complaints mechanism in place, signed a memorandum of understanding with the European Ombudsman, who committed to use her own initiative power systematically to handle complaints filed against the Bank by non-eligible complainants (individuals who are not citizens of the EU or do not reside in a Member State of the EU).<sup>87</sup>

#### 4. CONCLUDING RECOMMENDATIONS: HOW TO RE-ESTABLISH CONTROL?

This chapter has investigated the loopholes from the perspective of control determined by EASO's expansion of operational powers. While the proposed reinforcement of the Agency's mandate is not in itself an issue, what is problematic is the broad formulation of the legal basis and the lack of transparency surrounding the Agency's operational activities, rendering difficult the task of determining the degree of discretion that it enjoys. As a consequence, the proposed strengthened operational role of the EUAA should be accompanied

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<sup>87</sup> European Investment Bank, 'Complaints Mechanism Principles, Terms of Reference and Rules of Procedure', 31 October 2012, available at [https://www.eib.org/attachments/strategies/complaints\\_mechanism\\_principles\\_2012\\_en.pdf](https://www.eib.org/attachments/strategies/complaints_mechanism_principles_2012_en.pdf) accessed 9 July 2019, and 'Memorandum of Understanding Between the European Ombudsman and the European Investment Bank concerning information on the Bank's policies, standards and procedures and the handling of complaints, including complaints from non-citizens and non-residents of the European Union' (Interinstitutional Agreement) 2008/C 244/01 [2008] OJ C244/1.

by a stringent model of accountability, especially as the Agency will have an increasing impact on the fundamental rights of individuals.

In this connection, social accountability should be developed as a mechanism to promote transparency and bridge the gap between the *de jure* powers conferred on the EUAA and the *de facto* activities that the Agency will undertake on the ground, as well as to ensure that individuals can directly address the Agency should they believe that their fundamental rights have been violated.

Social accountability is a mechanism that allows civil society organisations to exert institutionalised control and promote the EUAA's transparency. According to the Regulation for the EUAA, civil society organisations via the CF and the FRO will not only have access to information and the organising of visits to oversee the daily work of the Agency, but will also be able to make suggestions and ensure the Agency's compliance with fundamental rights. In addition, due to the difficulties that individuals may face when seeking judicial accountability, the introduction of a complaint mechanism within the EUAA's mandate would promote the 'bottom-up' control of the Agency, which would act as compensation against the risk of weak, top-down control from an institutional perspective.

Such a model of accountability based on the direct involvement of civil society might not be limited to the specific case of the Asylum Agency, but it could extend to the wider landscape of EU agencies generally as it would contribute to consolidating not only the control mechanism, but also transparency and dialogue with civil society. Allowing any person to lodge a complaint against an agency would open a direct channel of communication between the individual and that agency. This is more relevant for those agencies with stronger operational tasks, permitting a degree of scrutiny over the activities that an agency develops on the ground. While civil society organisations through the CF, the FRO and the individual complaints mechanism cannot impose consequences for potential violations of fundamental rights by the EUAA, these organisations will be called on to play a crucial role in assessing and providing transparency, as well as exerting public pressure to prevent future breaches of fundamental rights.