Chapter 2: The Integrated EU Hotspot Administration

The second chapter presents the operation of the integrated EU hotspot administration. In line with the aim of this study, the focus lies on activities of EU agencies and the European Commission. To get a clear picture of their role, a distinction is made between an operational level and a supervisory level. The first section sets out the EU's role at the operational level. Here, the competence to issue individual decisions lies with the host member state, while the EU's role is de jure limited to providing support (1).[1] The second section turns to the supervisory level, where the European Commission itself is in charge of coordinating and monitoring while the host member state provides support. The analysis shows that EU bodies determine the course of the relevant procedures without issuing binding administrative decisions: the EU hotspot administration thus clearly reflects the EU's mode to 'determine without deciding' (2).[2] The third section shows that the EU hotspot administration is systemically deficient. Fundamental rights of asylum seekers, including reception-related rights such as Art. 4, 6 ChFR and procedure-related rights such as Art. 41 ChFR, are violated on a regular basis. As the EU Fundamental Rights agency aptly put it, processing asylum claims in remote border locations comes with 'in-built deficiencies' so the EU hotspot approach 'creates fundamental rights challenges that appear almost unsurmountable' (3).[3] On this basis, and with a view to determining the EU's legal responsibility, the fourth section identifies the relevant types of misconduct on the part of the agencies and the Commission (4). The

1 On the basis of EU secondary law as it currently stands. EU primary law would allow for broader competences of EU agencies, see Catharina Ziebritzki, *The EU's Responsibility in the Asylum Administration. Administrative Integration, Judicial Protection and the Case of the EU Hotspots,* Dissertation at Frankfurt University, Law Department, January 2024, p. 117 et seq.

2 See chapter 1, 4.3.

3 European Union Agency for Fundamental Rights, Opinion 3/2019, Update of the 2016 Opinion on fundamental rights in the 'hotspots' set up in Greece and Italy, 4 March 2019, https://fra.europa.eu/en/publication/2019/update-2016-fra-opinion-fundamental-rights-hotspots-set-greece-and-italy (hereinafter: FRA, Opinion EU Hotspots 2019), p. 7: 'The processing of asylum claims in facilities are borders, particularly when these facilities are in relatively remote locations, although *per se* not unlawful, brings along in-built deficiencies. As almost three years of experience in Greece shows, this approach creates fundamental rights challenges that appear almost unsurmountable.'.

chapter closes by drawing conclusions on the EU's responsibility, thereby preparing the ground for the doctrinal analysis in the following chapters (5).

1 Operational Level

Between 2015 and 2021, roughly half of the staff operating in the EU hotspots were deployed by EU agencies.[4] These figures reflect the actual influence of Frontex and the EUAA clearer than a glance at their respective Regulation. While the Regulations limit the agencies to mere support, their support in practice is so considerable that Frontex and the EUAA effectively determine the course of the administration. As the analysis will show, the agencies issue recommendations and opinions in critical areas, and national authorities – even though not legally obliged to do so – routinely adopt these recommendations.[5]

1.1 A Multitude of Actors

To get a clear picture of the EU hotspot administration, it is necessary to start with a brief overview of all actors involved. The first type of actors are EU bodies. These include the European Commission and several EU agen-

4 FRA, Opinion EU Hotspots 2019 (fn. 3), p. 19 reporting that the operational agencies were 'significantly involved in the day-to-day administration'. The numbers of Frontex deployments is not publicly available. For the numbers of the EUAA's deployments of 2017 and 2018 see David Fernández-Rojo, *EU Migration Agencies. The Operation and Cooperation of FRONTEX, EASO and EUROPOL*, Edward Elgar 2021, p. 150–151; for 2019 to 2022 see the relevant Operational Plans, all availbale at: https://euaa.europa.eu/archive-of-operations?field_operation_year_value=2021&field_member_state_value=Greece&field_operation_type_value=All.

5 This chapter is limited to the argument that empirical data or the concerned EU bodies' own statements suggest that Greek authorities usually adopt the EU's non-formally binding recommendations and guidelines. On the basis, it will be argued in the fifth chapter that there is a causal link in the sense that the EU's non-formally binding conduct de facto predetermines the national authorities' decisions. As regards the compliance rate, it must be noted already here that the fact that not all non-formally binding acts are followed by Greece does not weaken the argument because legally binding acts do not entail a full compliance rate either, as extremely high non-compliance rates in the asylum system clearly confirm.

cies, namely the EUAA, Frontex, Europol,[6] and the Fundamental Rights Agency (FRA). As will be set out in more detail below, these agencies provide comprehensive support to national authorities concerning both camp management and asylum procedures and, to this end, cooperate closely with national authorities but also among themselves. The Commission, in turn, is charged with coordinating and supervising the entire construct of the EU hotspot administration.

Secondly, authorities of the host member state are involved. In Greece, these include the First Reception Service (RIS), the Asylum Service (GAS), the Hellenic Police, the Hellenic Army, and the Hellenic Centre for Disease Control and Prevention (KEELPNO). Out of these, the First Reception Service and the Asylum Service, which were created with the reforms of April 2016 and 2011, respectively,[7] are of central importance. In principle, the First Reception Service is responsible for camp management, and the Asylum Service is responsible for conducting the relevant procedures. The Hellenic Police, in turn, was in charge of asylum matters before the April 2016 reform and is since responsible mainly for matters related to first registration, camp security and deportation.[8] The Army has only temporarily been charged with camp management in the immediate crisis context.[9] The Hellenic Centre for Disease Control and Prevention has always had a rather marginal role, remarkably even during the outbreak of the Covid-19 pandemic.[10]

---

6 Note that Europol's involvement is particularly obscure, as Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA (hereinafter: Europol Regulation) does not even provide for a legal basis for the deployment of operational Europol teams, see in more detail David Fernández-Rojo, *EU Migration Agencies* (fn. 4), p. 146–148. Yet, the focus here lies on Frontex and the EUAA, which is justified because their involvment is esesential to the operation of the EU hotspot administration, as evidenced by their function and reflected in numbers of deployment.

7 Hellenic Republic, Ministry of Migration and Asylum Service, About G.A.S, https://migration.gov.gr/en/gas/plirofories/.

8 ECRE, Country Report Greece, 2020 Update, https://asylumineurope.org/reports/country/greece/, p. 48. Note that in case of mass arrivals, the Police may be charged with conducting interviews.

9 Catharina Ziebritzki, Robert Nestler, „'Hotspots' an der EU-Außengrenze. Eine rechtliche Bestandsaufnahme", *MPIL Research Paper Series (SSRN)* 17 (2017), p. 9.

10 Equal Rights Beyond Borders, Report of February 2023, Extraordinary Measures. How Greece Used the Covid-19 Pandemic as a Pretext for the Unlawful Detention

The third type of actors involved in the EU hotspot administration are international organisations, specifically the United Nations High Commissioner for Refugees (UNCHR) and the International Organisation for Migration (IOM). The UNHCR is responsible for tasks related to information provision, the protection of vulnerable groups, and specific tasks in the area of camp management. The IOM also implements the so-called voluntary return program.[11] Unlike in many non-European countries, however, neither UNHCR nor IOM is in a position to steer the course of administration. Overall, the role of international organisations is rather marginal.[12]

A fourth type of actors are private entities. These include specialised NGOs that provide assistance ranging from medical services to legal aid and a security company whose tasks include safety inside the camp and assisting the Hellenic police with measures related to the confinement of residents.[13]

Considering the sheer number of actors, it becomes comprehensible why responsibility-shifting is such a key problem. In practice, involved actors tend to shift responsibilities around even for the smallest daily tasks. This attitude is clearly reflected at the political level: whenever the existing fundamental rights violations are discussed, Greek authorities argue that either the EU or international organisations are responsible; EU bodies blame Greece and international organisations; international organisations refer to the responsibility of Greece and the EU; and so on. The result is that nothing changes. It is precisely against this background that this study seeks to entangle the EU's involvement and determine its responsibilities.

---

of Asylum Seekers in Chios, https://www.equal-rights.org/resources/publications; Equal Rights Beyond Borders, November 2020, Update of the Report of May 2020. Abandoned and Neglected. The Failure to Prepare for a Covid-19 Outbreak in the Vial Refugee Camp, https://www.equal-rights.org/resources/publications.

11 Notably in Cooperation with the Commission, see European Ombudsman, Report on (i) the inspection of the European Commission's documents and (ii) the meeting of the European Ombudsman inquiry team with representatives of the European Commission, Inspection Report 9 March 2023, Case OI/3/2022/MHZ, para 11.

12 This corresponds to the marginal role of international organisations in the asylum administration more generally.

13 Catharina Ziebritzki, Robert Nestler, „'Hotspots' an der EU-Außengrenze" (fn. 9), p. 63; United Nations Human Rights Office of the High Commissioner (OHCHR), 20 December 2019, Concerns over States contracting private security companies in migration situations, https://www.ohchr.org/en/stories/2019/12/concerns-over-states-contracting-private-security-companies-migration-situations.

1.2 The 'Migration Management Support Teams'

Both the EUAA and Frontex deploy staff in the form of so-called migration management support teams (MMST). This EU-hotspot-specific type of deployment is regulated in Art. 40 Frontex Regulation and Art. 21 EUAA Regulation. In comparison to other deployment types, MMSTs have two distinctive features. First, the teams are characterised by close inter-agency cooperation. MMSTs are composed of staff deployed by Frontex, EUAA, Europol, as well as, optionally, FRA and other EU bodies.[14] Second, and as a result, the supervisory structure of MMSTs is distinct, with the main difference to regular EUAA or Frontex teams being that responsibility for coordination and supervision ultimately lies with the European Commission.[15]

Insofar as Frontex is concerned, there is no doubt that deployments to the EU hotspots have always taken place in the specific form of the MMST. Since the adoption of the 2016 reform, Frontex could deploy its staff to EU hotspots on the basis of the then Art. 18, the predecessor of Art. 40 of the current Regulation, which is the legal basis for the deployment of MMST.

As for the EUAA, the form of deployment has long not been unequivocally clear. This is because a specific legal basis for the deployment of MMST was introduced only with Art. 21 of the 2021 EUAA reform. Formally, the earlier deployments thus took place on the basis of Art. 13 EASO Regulation, i.e. as regular asylum support teams (AST).[16] Yet, it is argued here that the earlier deployments qualified as MMST. De facto, deployed EASO staff has been working hand-in-hand with staff of the other agencies, as if they were deployed as MMST, ever since 2016.[17] In conceptual terms, EASO itself differentiated between different kinds of operational support, one of which was described as dedicated specifically to the EU hotspot

14 Art. 2 para 19 Frontex Regulation.

15 Art. 40 para 3 Frontex Regulation, Art. 21 para 2 EUAA Regulation.

16 See for instance EASO, Operating Plan to Greece 2021, 2.1; EASO, Operating Plan to Greece 2022, 5.1.

17 EASO, Standard Operating Procedures for the implementation of the border asylum procedures in the context of the EU-Turkey Statement 18/03/2016, Version of 19 June 2019 (redacted), available at: https://fragdenstaat.de/anfrage/standard-operating-procedures-for-the-implementation-of-the-border-asylum-procedures/425864/anhang/SOPS_border_en_jointEASO_August16_190624redacted.pdf (hereinafter: SoP EU-Hotspots June 2019); interviews with EASO Union Contact Point conducted on 13 December 2019 and on 19 February 2021 (introduction, fn. 102).

approach.[18] Furthermore, and this is decisive, the Commission has, as a matter of fact, exercised its supervision also over EASO staff working in the EU hotspots, thereby implicitly considering them as part of the MMST. Therefore, it would have been formally correct to cite as a legal basis for the earlier deployments Art. 13 EASO Regulation in conjunction with Art. 18 of the former or Art. 40 of the 2019 Frontex Regulation.[19]

To disentangle the responsibilities of the agencies in the EU hotspot administration, it is indispensable to understand who decides what with regard to the MMSTs' operations. To get a clear picture, it must first be recalled that any teams deployed by Frontex or the EUAA consist of different types of staff.[20] The first type is national officers, often referred to as national experts, who are deployed for a short term or seconded for a long term to the agencies by the border guard or the asylum authority of the participating member states. The second type is statutory staff, i.e. the respective agency's own personnel. The third type, which is relevant only in the case of the EUAA, is the so-called interim staff, i.e. contracted staff that is hired to cover shortages.[21] Crucially, all types of MMST staff are subject to the same supervision structure. This also applies to seconded or deployed staff because, although they retain their status as civil servants of the home member state, that state cannot control their daily administrative activities.

The supervisory structure for MMST consists of two levels, with supervision at a first level resting with the host member state and the agency and at a second level with the Commission.[22] At the first level, the dual supervision is designed in a manner that differentiates between detailed

18 EASO, Work Programme 2016, Rev. 2, March 2016, p. 10–11; EASO, Operational Support, Types of Operations, available online: https://www.easo.europa.eu/operational-support/types-operations (last accessed 2 August 2018).

19 Art. 13 EASO Regulation formulated the mandate of the asylum support teams so broadly that close cooperation with other agencies is not excluded, as long as this is provided for in the OP.

20 Art. 19 para 1 EUAA Regulation; formerly Art. 15, 16, 38 EASO Regulation; Art. 2 para 15, para 21, 22 Frontex Regulation.

21 According to interviews with EASO Union Contact Point conducted on 13 December 2019 and on 19 February 2021 (introduction, fn. 102), EASO has between 2019 and 2021 to an increasing extent relied on interim staff because member states' contributions were insufficient. EASO, Operating Plan to Greece, 6.3. differentiates in more detail and refers to six types of staff.

22 See Art. 21 EUAA Regulation; Art. 40 Frontex Regulation. In more detail on the Commission's supervisory role see below 2.

and general instructions. While the host member state issues detailed operations concerning daily operations, the agency ensures general compliance with EU law. On the part of the member state, the person in charge is determined by the responsible national authority. On the part of the agency, the person in charge is the coordinating officer, previously referred to as Union Contact Point under the EASO Regulation.[23] The coordinating officer represents the agency in the host member state and is responsible for the correct implementation of the Operational Plan, which includes ensuring that the agency generally complies with EU law. As the coordinating officer, in turn, is appointed by the Executive Director and reports to them, the supervisory competence ultimately lies with the Executive Director.[24] At the second level, supervision lies with the European Commission. As the Commission's supervisory obligations enshrined in Art. 40 para 3 Frontex and Art. 21 para 2 EUAA Regulation will be analysed in more detail below; suffice to note here that the scope of supervision differs between procedure-related and reception-related conduct.[25]

1.3 The Agencies' Procedure-Related Support

The distinction between procedure-related and reception-related conduct is key to conceptualising the MMSTs' operational support. As regards, first, conduct related to asylum and return procedures in the EU hotspots, the scope of support is aptly described as the agencies making full use of the competence limits set by the Treaties. The agencies respect traditional sovereignty concerns in the manner that they neither issue formal decisions towards individuals nor carry out deportations on their own. Yet, they provide extensive support in almost every procedural step, which results in the EU hotspot procedure qualifying as a composite administrative procedure.

23 Given the large number of staff deployed to Greece, the EUAA coordinating officer usually establishes a hierarchical system of team leaders and several mid-level coordinators under their authority, as confirmed in interviews with EASO Union Contact Point conducted on 13 December 2019 and on 19 February 2021 (introduction, fn. 102).

24 Art. 25 EUAA Regulation; formerly Art. 20 EASO Regulation; Art. 44 Frontex Regulation.

25 See below 2.3.

In order to set out the agencies' specific tasks in more detail, it is useful to go through the relevant steps of the EU hotspot procedure.[26]

a *Identification and First Registration*

The first procedural step takes place upon arrival of the asylum seekers to the respective island and consists of identification measures. These are carried out by the First Reception and Identification Service (RIS) and the Hellenic Police with the support of Frontex. Frontex's role here is to conduct a so-called debriefing aimed at detecting smuggling routes and, more importantly, for the purpose of this study, to register personal data.[27] More precisely, Frontex is responsible for nationality determination, age assessment, and the identification of vulnerable persons,[28] which involves the use of various methods such as verifying the authenticity of documents, visual inspection and, at least in theory, socio-psychological assessments. Frontex then communicates the determined nationality or age in a non-binding manner to national authorities, which register the person using a certain set of data.

The lack of bindingness of Frontex's recommendations notwithstanding, national authorities routinely register persons according to the data identified by Frontex.[29] For instance, if Frontex identifies a person as being minor or as being of a certain nationality, national authorities typically register the person as being of that age and of that nationality. This is crucial because, although registration may seem a minor issue at first sight, nationality and age, of course, have a fundamental impact on the entire asylum procedure. Thus, potential failures by Frontex during registration have far-reaching consequences for the concerned persons.[30]

---

26 See for a similar account of the role of Frontex, EASO and Europol in the EU hotspot procedure David Fernández-Rojo, *EU Migration Agencies* (fn. 4), p. 149–157.

27 Operating Plan to JO Poseidon 2019 (see chapter 1, fn. 157), 4.3.

28 Frontex JO Poseidon OP 2019 (fn. 27), p. 8.

29 Anecdotal evidence suggests that Frontex's recommendation is followed without further investigation in about 90 % of the cases, see interview with Commission representative 3, conducted on 16 February 2021 (introduction, fn. 102); own observation of the author (see introduction, fn. 103). Similarly, David Fernández-Rojo, *EU Migration Agencies* (fn. 4), p. 153 refers to 'Frontex' strong recommendatory powers', further p. 214–215.

30 If, for instance, a person who claims to be minor is registered as adult, this will also have the consequence that the person is not considered as eligible for family

b *Hearing and Examination of Claim*

The second step, and the centrepiece of the EU hotspot procedure, is the hearing and the subsequent examination of the claim. More precisely, the hearing consists of several elements, which are either conducted in one single interview or split up, depending on the country of origin of the concerned applicant.[31] The most important elements are the vulnerability assessment, the admissibility interview dedicated to assessing whether Türkiye is safe for the applicant, and the substantive interview dedicated to assessing whether the applicant is in need of international protection.

Since the hearing is particularly capacity-intensive, the EUAA provides extensive support in this context. The agency conducts asylum interviews and vulnerability assessments, provides interview transcripts, examines individual asylum claims, and drafts legal opinions recommending the rejection or acceptance of the claims.[32] As mentioned already, this practice clearly exceeded the agency's competences under the former EASO Regulation because it means that the agency influences individual asylum decisions; the practice has been vested with a legal basis only with the entry into force of the EUAA Regulation in 2021.[33]

The dispute on competences notwithstanding, the agency's involvement has been further intensified with the introduction of the so-called embed-

---

reunification under Art. 8 of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (hereinafter: Dublin III Regulation). If, for instance, a person who identifies as Kuwaiti Bidoon is initially registered not as stateless, but as Iraqi national, this will have important effects on the assessment of their claim for international protection.

31 See I.1.b.

32 SoP EU-Hotspots June 2019 (fn. 17), p. 25: 'the task of the EASO case officers during the interview is in the first place (…) to examine the claim for international protection'; European Union Agency for Fundamental Rights, Opinion on fundamental rights in the 'hotspots' set up in Greece and Italy, 29 November 2016, http://fra.europa.eu/en/publication/2018/fra-opinion-fundamental-rights-hotspots-set-greece-and-italy (hereinafter: FRA, Opinion EU Hotspots 2016), p. 17: 'Although (…) EASO is working side-by-side with colleagues from the Greek Asylum Service, EASO-deployed experts carry out the bulk of the fact-finding work for the determination of the asylum claim, thereby supporting first instance decision, which the Greek Asylum Service ultimately takes.'.

33 See chapter I, 3.I.

ded model in 2020.[34] With this model, responsibility for daily instructions has been shifted from the agency's so-called 'team leader' to the Greek asylum service.[35] In addition, the legal opinions recommending to reject or accept the claim do no longer indicate the author, and on some islands, the opinions are not even included in the file anymore.[36] While this has made it much more difficult to identify the agency's contribution in practice, the shift towards the embedded model is of limited relevance from a legal perspective.[37] An operational shift cannot amend the internal decision-making and reporting structures as established by secondary law. In particular, the embedded model cannot absolve the coordinating officer from their responsibilities under the EUAA Regulation. Instead, the embedded model only means that the coordinating officer exercises their responsibility by delegating the day-to-day coordination to the national authority. This understanding is clearly reflected in administrative practice, as the coordinating officer still conducts quality-ensuring measures, organises coordination meetings, gives general instructions and reports to the Executive Director.[38] Ultimately, the responsibility for ensuring that the agency's staff generally complies with EU law and hence still lies with the Executive Director.

This being said the crucial point here is that in the vast majority of cases, the asylum service routinely adopts the agency's recommendation.[39] For instance, if the EUAA recommends rejecting the asylum claim of a certain applicant as inadmissible, arguing that the interview has shown that Türkiye could be considered safe for them, the Greek asylum service

34 Interviews with EASO Union Contact Point conducted on 13 December 2019 and on 19 February 2021 (introduction, fn. 102). Note that for practical reasons, the cooperation between EASO and the First Reception and Identification Service (RIS) has always been organised along the lines of the embedded model, without however being referred to as such.

35 In more detail EASO, Operating Plan to Greece 2021 (fn. 16), 5.3.

36 Interviews with EASO Union Contact Point conducted on 13 December 2019 and on 19 February 2021 (introduction, fn. 102); own observation of the author (see introduction, fn. 103).

37 From a procedural perspective, the main difference is that it has become more difficult to collect evidence for misconduct on the part of EUAA.

38 Interviews with EASO Union Contact Point conducted on 13 December 2019 and on 19 February 2021 (introduction, fn. 102).

39 Remarkably, no statistics presenting the percentage of compliance with EASO's recommendations are published, and EASO representatives do not disclose any figures either. Anecdotal evidence, collected over the past five years by the author (see introduction, fn. 103), however suggests that the Greek asylum service adopts EASO's opinion fully in about 85 % of the cases, and partly in the remaining 15 %.

will typically dismiss the claim as inadmissible without further inquiries, typically even adopting the reasoning and structure of the EUAA's recommendation.[40] This cannot surprise because the procedural arrangement necessarily requires that the national asylum service base its decision on the file compiled by the agency.[41] Furthermore, capacity constraints on the part of national authorities and the general assumption that the agency's recommendations are well-qualified contribute to the result that the agency's recommendations have a de facto binding effect.[42]

c *Administrative and Judicial Appeals*

The third procedural step, which becomes pertinent only in case of a rejection of the asylum claim at first instance, is administrative and judicial appeals. Administrative appeals can be made before the Appeals Committees. While the EUAA also assists in this second instance, the scope of its support is much more limited here.[43] Unlike in the first instance, the agency only has an auxiliary function. The so-called rapporteurs deployed by the EUAA compile files and provide country of origin information but do not make recommendations on how the individual case should be decided.[44] As a result, the influence of the EUAA at the Appeals Stage is much less concrete, which makes it, for now, very difficult to reconstruct the EU's responsibility in this context. Judicial appeals can be lodged before Greek

40 Equal Rights Beyond Borders, July 2021, Consequences of the EU-Turkey Statement. The Situation of Syrian Asylum Seekers on the Greek Aegean Islands, https://www.equal-rights.org/resources/publications, p. 13.

41 Based on anecdotal evidence, collected over the past five years by the author (see introduction, fn. 103), there are only a few case constellations in which, due to political disagreement between EU and national level, the asylum service systemically deviates from the agency's recommendation. Apart from these constellations, national authorities make use of their right to invite the applicant for another hearing only in very exceptional cases.

42 See in more detail chapter 5.

43 EASO, Operating Plan to Greece 2021 (fn. 16), p. 21.

44 It is telling that in the words of EASO, 'the agency, *unlike in the first instance*, is not involved in any decision-making in the second instance' (emphasis added), interviews with EASO Union Contact Point conducted on 13 December 2019 and on 19 February 2021 (introduction, fn. 102).

administrative courts.[45] In this context, EU bodies have not been involved so far.

d *Deportation Procedure*

In case of a final rejection of the asylum claim, the last step is the deportation procedure. This is where Frontex comes in again. While deportations are carried out under the competence of the national Police, Frontex provides support. Inter alia, the agency provides technical assistance such as vessels and other equipment, and supports through operational coordination, for instance by organising return flights. In addition, Frontex deploys specialised return escorts who accompany individual deportations.[46]

1.4 The Agencies' Reception-Related Support

With regard to reception conditions, the support provided by the MMST is much less comprehensive than the procedure-related support. Moreover, the focus here is on EUAA staff because Frontex has – at least according to the available information – not been entrusted with any substantial reception-related tasks so far.[47] This being said, a distinction must be made between the EUAA's support provided under the original EU hotspot approach and that provided under the EU hotspot approach 2.0.

45 In case of a rejection in second instance before the Appeals Committees, asylum seekers have, at least on paper, the possibility to initiate an annulment procedure, see ECRE, Country Report Greece, 2021 Update, https://asylumineurope.org/reports/country/greece/, p. 32. In practice, however, the annulment procedure is subject to manifold obstacles, as there is no free legal aid.

46 Frontex JO Poseidon OP 2019 (fn. 27), 4.3.9.

47 To the best of the author's knowledge. Note, however, that European Commission, Annex to the Commission Decision approving the Memorandum of Understanding between the European Commission, European Asylum Support Office, the European Border and Coast Guard Agency, Europol and the Fundamental Rights Agency, of the one part, and the Government of Hellenic Republic, of the other part, on a Joint Pilot for the establishment of a new Multi-Purpose Reception and Identification Centre in Lesvos, 2 December 2020, C(2020) 8657 final, Annex (hereinafter: MoU Joint Pilot), p. 11–12, 18–20 provides that Frontex shall provide support concerning design and planning services for the new camps, and remains unclear concerning some tasks such as provision and installation of appropriate equipment or the establishment of a reception qualify monitoring system, where reference is made only to 'agencies' in general.

Under the original approach, i.e. between 2015 and 2019, EASO's assistance mainly consisted in capacity-building and advice. This included the development of Standard Operating Procedures but also concrete tasks related to general reception, unaccompanied minors, vulnerable persons, communication and infrastructure planning.[48]

Under the EU hotspot approach 2.0, the EUAA's reception-related support has been stepped up considerably. Although the Memorandum of Understanding stresses that the enhanced assistance is 'without prejudice to the competences of the Greek authorities, e.g. for the site planning, design, construction and management' of the new camp[49], it foresees that the EUAA shall be closely involved in the development and construction of the new MP-RIC as well as in the maintenance of adequate reception conditions. Inter alia, the MoU provides that the EUAA shall support with the determination of the location of the new camp, design and planning services, provide experts, including engineers, and assist with the construction of the new camp comprising a reception facility and a closed detention centre, as well as with the provision of food and in-kind assistance to meet basic reception needs, the assessment of and adequate care for vulnerable persons, the provision of recreational and vocational training activities, and continuous information provision in the camp.[50]

Given this broad definition of the EUAA's reception-related support, it seems that the same applies here as for procedure-related support: Generally speaking, the scope of the support can be defined as making full use of the agency's competences as set in primary law.[51]

Yet, it has so far been very difficult to reconstruct the reception-related support of the EUAA as precisely as the procedural support. This is because reception-related support has just begun to increase and is not documented in files. Thus, if one wanted to analyse the EU's legal responsibility on the basis of the EUAA's reception-related support for the EU hotspots 2.0, one would first have to wait and see how the conditions in these new camps develop and then find out by means of access to documents requests to what extent exactly the EUAA provides support. For the purposes of

48 Interviews with EASO Union Contact Point conducted on 13 December 2019 and on 19 February 2021 (introduction, fn. 102).

49 MoU Joint Pilot (fn. 47), p. 1.

50 MoU Joint Pilot (fn. 47), p. 11–12, p. 18–20.

51 On the EU's administrative competences in the CEAS see in more detail Catharina Ziebritzki, *The EU's Responsibility in the Asylum Administration* (fn. 1), p. 114 et seq.

this study, however, the focus will be on the already more consolidated procedure-related support.[52]

2 Supervisory Level

At the supervisory level, the central actor is the European Commission. After the Commission had been charged with supervision in the immediate crisis context in an ad hoc manner, its obligations were subsequently consolidated in secondary law. Today, the Commission's mandate to coordinate and supervise the EU hotspot administration is enshrined in Art. 40 para 3 Frontex Regulation and Art. 21 para 2 EUAA Regulation, which must be read in light of Art. 17 para 2 TEU. As the purpose of this study requires a precise understanding of the Commission's involvement, the following provides a detailed reconstruction of its supervisory obligations and practices.

2.1 Belated Consolidation of the Commission's Supervision

The Commission's supervisory obligation is another example of an ad hoc crisis arrangement that was subsequently legalised in secondary law. As the 2015 EU hotspot approach required close operational cooperation between the host member state and several EU agencies, there was an obvious need for coordination and supervision. The Commission, as the initiator of the new policy, was the obvious candidate for this role and thus coordinated and supervised the implementation of the EU hotspot approach as of 2015. Inter alia, the Commission collected information on the ground through its deployed staff and organised meetings among the involved stakeholders to discuss and coordinate the implementation of the EU hotspot approach.[53]

The Commission's supervisory role was then reinforced with the entry into force of the EU-Türkiye Statement in March 2016. As the European Council[54] announced that the Commission would be responsible for coor-

52 See in more detail chapter 5.

53 Interview with Commission representative 4 conducted on 26 February 2021 (introduction, fn. 102).

54 Note the announcement by the Council although the Statement, according to the CJEU, was concluded by the member states, and not by the Council, see CJEU, General Court (First Chamber, Extended Composition), order of 28 February 2017, NF v European Council (EU-Turkey Statement), T-192/16.

dinating and organising the necessary structures to implement the Statement in Greece, the Commission reacted on the same day and created the new office of the EU coordinator.[55] This newly appointed EU coordinator, a Commission staff member, immediately established the European Regional Task Force (EURTF) and the Steering Committee as the central fora for coordinating the EU hotspot administration. In addition, the Commission henceforth issued regular reports on the implementation of the EU-Türkiye Statement, which also covered the implementation of the EU hotspot approach.[56] While the Commission had assumed all these tasks without a formal legal basis in the immediate crisis context, this changed in September 2016, when the reformed Frontex Regulation with its Art. 18 para 3 eventually codified pre-existing administrative practices and created a basis for the Commission's role as supervisor of the EU hotspot administration.[57]

Today, the almost identical successor provisions are enshrined in Art. 40 para 3 Frontex Regulation and Art. 21 para 2 EUAA Regulation. Both articles regulate, with only minor editorial differences in the wording, that 'the Commission shall, in cooperation with the host Member State and the relevant Union bodies, offices and agencies, establish the terms of cooperation at the hotspot area and be responsible for the coordination of the activities of the migration management support teams.' Both provisions must be read in light of the relevant recitals, respectively, providing that 'in hotspot areas, the Member States cooperate, under the coordination of the Commission, with relevant Union bodies, offices and agencies. Union bodies, offices and agencies are to operate in accordance with their respective mandates and powers. The Commission, in cooperation with the relevant Union bodies, offices, and agencies, ensures that activities in hotspot areas comply with relevant Union law.'[58]

---

55 European Commission, Press Release 18 March 2016: President Juncker appoints EU Coordinator to organise operational implementation in Greece, https://europa.eu/rapid/press-release_IP-16-942_en.htm. As the only measure of the Statement to be implemented in Greece was the return policy, the main responsibility of the EU coordinator was the coordination of the EU hotspot administration.

56 Regular reports were issued until November 2017. The reports are available at: https://ec.europa.eu/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package_en (last accessed 23 March 2018).

57 Art. 18 para 3 Frontex 2016 Regulation (chapter 1, fn. 150): 'The Commission shall, in cooperation with the host Member State and the relevant agencies, establish the terms of cooperation at the hotspot area and be responsible for the coordination of the activities of the migration management support team.'.

58 Recital 55 Frontex Regulation; recital 34 EUAA Regulation.

2.2 Coordination and Ensuring Legality

The history and the wording of Art. 40 para 3 Frontex Regulation, Art. 21 para 2 EUAA Regulation clearly show that the Commission's supervisory mandate covers two aspects. The Commission has the duty, first, to coordinate the cooperation within the EU hotspot administration and, second, to ensure its legality, including compliance with fundamental rights.

As regards the first aspect, the scope of the Commission's obligation is easily clarified. Art. 40 para 3 Frontex Regulation and Art. 21 para 2 EASO Regulation are unequivocal in that the Commission is responsible for the coordination of the administrative cooperation. This includes both the coordination of inter-agency cooperation, in particular in the framework of the MMST, and vertical administrative cooperation between agencies and the host member state.[59]

The second aspect is more difficult: While recital 55 Frontex Regulation and recital 30 EUAA Regulation provide that the Commission is responsible for ensuring the legality of the EU hotpot administration,[60] that aspect is not explicitly mentioned in Art. 40 para 3 Frontex Regulation and Art. 21 para 2 EUAA Regulation. Yet, it is argued here that the wording of the legal provisions must be read in light of the relevant recitals, i.e. as meaning that the Commission is, in principle at least, responsible for ensuring the legality of the EU hotspot administration. This interpretation is supported by two main arguments.

First, the Commission itself interprets its obligations in this manner.[61] In fact, the Commission places a particular emphasis on ensuring fundamental rights compliance in the EU hotspot administration. Already in the immediate crisis context, the Commission argued that it had conducted a human rights impact assessment.[62] Since then, the Commission's supervi-

59 This understanding is clearly confirmed by recital 55, establishing that 'the member states should cooperate with the relevant Union agencies, which should act within their respective mandates and powers, under the coordination of the Commission'.

60 The German version 'sicherstellen' is as clear in this regard as the English version. The French version 'veiller', however, is less unequivocal 'veiller'.

61 European Ombudsman, Inspection Report 9 March 2023, Case OI/3/2022/MHZ (fn. 11), para 6: 'The Task Force seeks to *facilitate cooperation* with the different Greek authorities involved. It also aims to *ensure* the camps on the islands Lesvos, Chios, Samos, Leros and Kos *comply with EU standards*.' (emphasis added).

62 See European Ombudsman, 18 January 2017, Decision of the European Ombudsman in the joint inquiry into complaints 506–509–674–784–927–1381/2016/MHZ against

sory practice within the EURTF has put a particular focus on fundamental rights compliance. This is evident from the fact that the Fundamental Rights Agency (FRA) has been invited to participate permanently in the EURTF meetings.[63] Accordingly, Commission representatives explicitly emphasise that their task within the EURTF is to monitor compliance with EU law, especially with fundamental rights.[64] With the EU hotspot approach 2.0, this focus on fundamental rights has been reinforced. In fact, one of the main political objectives of the approach is to ensure that the new centres are built and managed in line with fundamental rights.[65] Consequently, Commission representatives themselves stress that their task within the newly created Steering Committee is to ensure not only coordination but also compliance with EU law, and especially with the Charter.[66]

Second, the Commission's own interpretation of its obligations under Art. 40 para 3 Frontex Regulation, Art. 21 para 2 EUAA Regulation corresponds to its duties under Art. 17 para 1 TEU. As the CJEU has consistently held, the Commission, as guardian of the Treaties, must not engage in any conduct that violates EU law or even fundamental rights.[67] In the present context, it is therefore crucial that the Commission itself forms part of the EU hotspot administration so that a failure to ensure the legality of the EU hotspot administration is necessarily tantamount to a failure to ensure the legality of its own conduct. In other words, if the Commission failed to ensure the legality of the EU hotspot administration, it would itself be

---

the European Commission concerning a human rights impact assessment in the context of the EU-Turkey Agreement, Case 506/2016/MHZ, para 11 to 15.

63 Interview with Commission representative 1, conducted on 12 February 2021 (introduction, fn. 102), FRA, Opinion EU Hotspots 2019 (fn. 3), p. 19; RoP-EURTF-GR, para I.1.

64 Interview with Commission representative 3 conducted on 16 February 2021 (introduction, fn. 102).

65 MoU Joint Pilot (fn. 47), p. 1: 'the swift creation of a new Multi-Purpose Reception and Identification Centre (MPRIC) on Lesvos, in line with relevant standards and Union law (…) has been outlined as a key priority'; p. 2: 'The implementation of the Joint Pilot, which is based on existing national and EU law, is setting an example (…) for a holistic approach to migration (…) ensuring respect of the EU Charter of Fundamental Rights (…)'.

66 MoU Joint Pilot (fn. 47), p. 1, 3–5; interviews with Commission representative, conducted on 26 February 2021; interview with Commission representative 5, conducted on 7 April 2021 (introduction, fn. 102).

67 See only CJEU, Court (Grand Chamber), judgement of 20 September 2016, Ledra Advertising Ltd et al v European Commission et al, Joined Cases C-8/15 P to C-10/15 P, para 57–59.

engaged in unlawful administrative conduct. Furthermore, 'the Commission has a duty to ensure that EU-funded initiatives uphold fundamental rights', as the European Ombudsman recalls in its own-initiative inquiry concerning how the Commission ensures respect for fundamental rights in the EU hotspots 2.0.[68] In light of Art. 17 para 1 TEU, Art. 40 para 3 Frontex Regulation and Art. 21 para 2 EUAA Regulation must thus be read to mean that the Commission is obliged to ensure the legality of its own cooperation with EU agencies and member states and, as a consequence, also the legality of the EU hotspot administration as a whole.

2.3 Procedure-Related vs. Reception-Related Supervision

That being said, a distinction must be made between procedure-related and reception-related supervision. In a nutshell, the Commission fulfils its procedure-related supervisory duty already when it instructs and urges agencies and host member state to conduct lawful procedures. With respect to reception conditions, however, its duties go much further. At the latest since the Commission's reception-related duties have been stepped up with the EU hotspot 2.0, it must, if required, itself ensure that the reception conditions comply with EU law.[69]

Again, this follows from an interpretation of Art. 40 para 3 Frontex Regulation, Art. 21 para 2 EUAA Regulation in light of Art. 17 para 1 TEU. While the Commission's obligations as guardian of the Treaties must generally be interpreted in a broad manner, the specific scope of its obligations in a given policy area depends on its competences. Depending on the competences and the context concerned, the Commission can either be obliged to follow a certain procedure and to ensure a certain outcome.[70]

68 European Ombudsman, How the European Commission ensures respect for fundamental rights in EU-funded migration management facilities in Greece, Case OI/3/2022/MHZ, opened on 11 July 2022, case description.

69 This is based on a distinction between supervisory duties to ensure the legality of the supervisee's conduct and duties to ensure the achievement of a certain outcome. In more detail on this distinction Gerard C. Rowe, „Administrative supervision of administrative action in the European Union", in Herwig Hofmann, Alexander Türk (ed.), *Legal Challenges in EU Administrative Law*, Edward Elgar 2009, p. 179–217, p. 208–209.

70 Similarly, Uwe Säuberlich, *Die außervertragliche Haftung im Gemeinschaftsrecht. Eine Untersuchung der Mehrpersonenverhaltnisse*, Springer 2005, p. 232–234 refers to 'Erfolgshaftung' v 'obligation de moyens'. In CJEU, judgement of 14 July 1967,

As regards, first, the Commission's procedure-related supervision, the key point is that the operational competence to conduct asylum and return procedures, according to the prevailing reading of the Treaties, lies with the host member state, to which the agencies provide support. The Commission's obligation is thus limited to giving instructions and can, in this sense, be described as a due diligence obligation. The concrete scope of its obligations, then, differs between the host member state and the agencies. With respect to the host member state, the Commission's supervisory obligation is rather broad. As the Commission's obligations under Art. 17 para 1 TEU include the duty to ensure that member states comply with EU law concerning EU-funded projects, the Commission is obliged to take all supervisory measures that remain below the threshold of issuing legally-binding instructions or acting in the place of the member state. In the case of the EU hotspots 2.0, this explicitly includes the option to withdraw or withhold EU funding.[71] With respect to the agencies, the Commission's supervisory obligation is comparatively narrow. The crucial point here is that the Commission must respect the agencies' independence.[72] Although the independence postulate as such is not entirely convincing insofar as the Commission forms part of the management boards of Frontex and the EUAA,[73] it aptly describes that the agencies do not directly report to the Commission and that the Commission, in turn, has no competence to issue binding instructions to the agencies. Accordingly, the Commission's

Kampffmeyer, Joined Cases 5, 7, and 13 to 22/66, p. 262, for instance, the court concluded that the specific provision obliged the Commission to ensure that the outcome of the administrative cooperation complies with EU law, whereas in its judgement of 10 May 1987, Société pour l'Exportation des Sucres, 132/77, in particular para 23, the court found that the specific provision obliged the Commission merely to follow the applicable procedural rules.

71 European Ombudsman, Inspection Report 9 March 2023, Case OI/3/2022/MHZ (fn. 11), para 15.

72 Note that Matthias Lehnert, *Frontex und operative Maßnahmen an den europäischen Außengrenzen. Verwaltungskooperation – materielle Rechtsgrundlagen – institutionelle Kontrolle*, Nomos 2014, p. 473 therefrom concludes that the Commission, based on the secondary law as it stood back then, did not have the competence to supervise Frontex's operational activities.

73 Note that both member states and the Commission participate in the agencies' management board. See on Frontex' and EASO's management boards David Fernández-Rojo, *EU Migration Agencies* (fn. 4), p. 176–182. For a critical account of the independence postulate see only Ellen Vos, „EU Agencies and Independence", in D Ritleng (ed.), *Independence and Legitimacy in the Institutional System of the European Union*, Oxford University Press 2016, p. 206-227.

supervisory obligation cannot go beyond urging the agencies to conduct procedures in compliance with EU law.

As regards, second, the Commission's reception-related supervision, it must be taken into account that the operational competence to provide reception conditions in the EU hotspots lies with the host member state which is supported, since the implementation of the Joint Pilot, by the Commission itself. Accordingly, the Commission fulfils its supervisory duty only if it ensures that reception conditions actually comply with EU law. If the host member state fails to implement the Commission's requests and informal instructions, the Commission is obliged to make use of its own operational competence and provide the required administrative support itself.[74] In this sense, the reception-related aspect of Art. 40 para 3 Frontex Regulation, Art. 21 para 2 EUAA Regulation can be described as an outcome obligation, i.e. an obligation to ensure that reception conditions in EU-funded centres which are co-managed by the Commission comply with EU law. The pertinence of this interpretation is underpinned by the Commission's current administrative practice. In the framework of the Joint Pilot, the Commission itself defines its task as ensuring that reception conditions comply with EU law and, in particular, with fundamental rights.[75] To this end, the Commission has not only adapted its internal organisational structure[76] but also provides considerable operational support. Inter alia, it is actively engaged in designing and planning the new infrastructure and finding a suitable site for the new camp.[77] The question of the continuity of these developments notwithstanding,[78] the Commission's current practice clearly confirms that it interprets its reception-related mandate under Art. 17 para 1 TEU, Art. 40 para 3 Frontex Regulation, Art. 21 para 2 EUAA Regulation as 'outcome obligation'.

74 While the Commission cannot act against the will of the concerned member state, it must do everything it can, within the limits of its competences, to ensure that the concerned member state agrees.

75 MoU Joint Pilot (fn. 47), p. 3–5; interviews with Commission representative 4, conducted on 26 February 2021; with Commission representative 5, conducted on 7 April 2021 (introduction, fn. 102).

76 See on the dedicated Task Force on Migration Management below 2.7.

77 MoU Joint Pilot (fn. 47), p. 4–5.

78 While the Commission stresses the temporary nature of these developments (see interviews with Commission representative 5, conducted on 7 April 2021 (introduction, fn. 102), note that the MoU Joint Pilot (fn. 47) is conceived as strictly limited to a period of two years), experience rather suggests that the Commission will not reduce its increased involvement.

2.4 Reduced Discretion in Case of Systemic Deficiencies

In order to determine whether the Commission has violated its supervisory obligations Art. 40 para 3 Frontex Regulation, Art. 21 para 2 EUAA Regulation, Art. 17 para 1 TEU, it must be taken into account that these are discretionary in nature. The Commission generally enjoys broad discretion when exercising its tasks as guardian of the Treaties,[79] especially when it comes to ensuring compliance with fundamental rights.[80] In principle, the Commission can thus decide *whether* it takes any supervisory measures and, if so, *which* measures it takes.

The Commission's discretion, however, is not unlimited. As a rule, discretionary limits depend on the specific circumstances of the individual case.[81] In the context of the EU hotspot administration, this case-by-case assessment is arguably guided by two general considerations.

First, the Commission must make use of its competences to the fullest extent possible in order to ensure that the EU hotspot administration complies with EU law. This doctrine of a 'maximum use of competences' is confirmed by Commission representatives themselves, who explain that their understanding is that the Commission is obliged 'to do everything it can, within the scope of its competences of course, to ensure the legality of the EU hotspot administration'.[82] The same follows from the CJEU's consistent case law, according to which the Commission must refrain from participating in behaviour that is in breach of EU law. As the CJEU has held both concerning supervisory obligations under secondary law and concerning Art. 17 para 1 TEU, the Commission's role as guardian of the Treaties implies that it must not participate in conduct that violates EU law. The Commission must hence use its competences to prevent breaches of EU law and, where this is not possible, at least 'insist' on national authorities to not continue their unlawful behaviour.[83] Applied to the context of the

79 Matthias Ruffert, „Artikel 17 EUV", in Christian Calliess, Matthias Ruffert (ed.), *EUV/AEUV. Kommentar*, C.H. Beck 2022, para 7–11.

80 Uwe Säuberlich, *Die außervertragliche Haftung im Gemeinschaftsrecht* (fn. 70), p. 228.

81 In more detail on discretion in EU law see Joana Mendes, „Bounded Discretion in EU Law: A Limited Judicial Paradigm in a Changing EU", *The Modern Law Review* 80 (2017), p. 443-472.

82 See only interview with Commission representative 2, conducted on 16 February 2021 (introduction, fn. 102).

83 CJEU (Grand Chamber), judgement of 20 September 2016, Ledra (fn. 67), para 57–59; CJEU, judgement of 26 February 1986, Krohn, 175/84, para 21.

integrated EU hotspot administration – where a violation of EU law necessarily has the consequence that the Commission, as the general supervisor, itself becomes entangled in unlawful conduct – this must mean that the Commission is obliged to do everything it can to prevent the occurrence of unlawful conduct in the first place. Therefore, Art. 40 para 3 Frontex Regulation, Art. 21 para 2 EUAA, Art. 17 para 1 TEU must be interpreted to mean that the Commission cannot rely on political considerations when deciding whether or not to exercise its supervisory powers, but that it must make use of these powers in the manner which most likely prevents the occurrence of the unlawful conduct, i.e. to the fullest possible extent.[84]

Second, and as a consequence, it is argued here that once the Commission is informed about systemic violations of fundamental rights in the EU hotspot administration, its discretion is reduced to 'how' to exercise supervision, i.e. to the choice of the most suitable measure. Again, the Commission itself appears to agree with this interpretation. When asked what they would do in case of systemic fundamental rights violations, Commission representatives emphasised that they would certainly not remain inactive but would choose those supervisory measures that can be expected to be most effective.[85] This understanding is also doctrinally consistent. While the Commission's discretion under Art. 17 para 1 TFEU, in principle, encompasses both the 'whether' and the 'how', it is well established that the more obvious and persistent the breach of a rule of EU law on the part of the supervisee, the more can be expected from the supervisor.[86] Also, there can be little doubt that the Commission's discretion is reduced when its supervisory obligation follows not only from Art. 17 para 1 TEU but is defined as specific obligations in secondary law.[87] Against this background, and given that the Commission must refrain from participating in conduct that constitutes a violation of EU law, it follows that the Commission, when it is informed that an administrative structure of which it forms part itself is systemically deficient, must not remain inactive. Mere inaction despite

84 The limit lies in Art. 258 TFEU in the context of which the Commission has political discretion, see chapter 3, 2.1.

85 Interview with Commission representative 3 conducted on 16 February 2021 (introduction, fn. 102).

86 Melanie Fink, „EU Liability for Contributions to Member States' Breaches of EU Law", *Common Market Law Review* 56 (2019), p. 1227–1264, p. 1256 with reference to the relevant case law.

87 Similarly Uwe Säuberlich, *Die außervertragliche Haftung im Gemeinschaftsrecht* (fn. 70), p. 237.

knowledge of systemic deficiencies in such case would amount, at least, to tacit approval. As a result, the Commission's discretion under Art. 40 para 3 Frontex Regulation, Art. 21 para 2 EUAA Regulation, Art. 17 para 1 TEU, in a case where it informed about systemic fundamental rights violations, must be reduced to the choice of the most suitable measure.

2.5 The Agencies' Obligation to Assist the Commission

So far, the wording of Art. 40 para 3 Frontex Regulation and Art. 21 para 2 EUAA Regulation has been considered only partially, as it has only been established that the Commission is responsible for administrative supervision. According to the relevant provisions, however, the Commission shall 'in cooperation with the host Member State and the relevant Union bodies, offices and agencies', establish the terms of cooperation at the hotspot area and be responsible for coordination. Similarly, the corresponding recitals provide that the Commission, 'in cooperation with the relevant Union agencies', should ensure that activities in hotspot areas comply with relevant Union law and fundamental rights.

To get a clear understanding of the EU's role at the supervisory level, it is hence required to consider the agencies' involvement in supervision, too.

Starting with the wording of the relevant provisions, the mere grammatical structure of Art. 40 para 3 Frontex Regulation and Art. 21 para 2 EUAA Regulation shows that the provisions must be read as meaning that the Commission, first and ' in cooperation with' the relevant agencies, shall establish the terms of cooperation at the hotspot area and, second, shall be responsible for the coordination of the migration management support teams.[88] Similarly, the relevant recitals provide that the Commission, 'in cooperation with' the relevant agencies, should ensure the legality of the EU hotspot administration while, at the same time, the agencies act 'under the coordination of the Commission'. The wording thus suggests that the agencies' role at the supervisory level is rather limited and that the agencies are themselves subject to supervision by the Commission, at least insofar as their conduct within the EU hotspots is concerned.

88 The English version is grammatically not entirely clear insofar as the addition that the Commission is responsible 'in cooperation with' the relevant Union bodies could be read as referring to the overall coordination. The German, French and Spanish version, however, make unequivocally clear that the qualification 'in cooperation with' refers to the establishment of the terms of cooperation alone.

Although this understanding obviously creates tension in the agencies' mandate, as they are both supervisors and supervisees, it is clearly confirmed by administrative practice. In fact, the main bulk of the supervisory work, i.e. coordinating and ensuring the legality of the EU hotspot administration, is exercised by the Commission. It is the Commission that publishes reports on the implementation of the EU hotspot approach, sets the agenda of the EURTF meeting, gathers information from all actors, in short, oversees the whole situation. Further, it is also the Commission that is in the position to control EU funds and, as a last resort, to initiate an infringement procedure.

The agencies assist at the supervisory level, namely with two specific tasks. First, the agencies assist the Commission with setting up the terms of cooperation. Frontex and the EUAA participate in drafting the general rules for cooperation; and this role of the agencies has been confirmed under the EU hotspot approach 2.0.[89] Second, the agencies provide the Commission with the information that it needs to effectively supervise the EU hotspot administration. Art. 40 para 3 Frontex Regulation and Art. 21 para 2 EUAA Regulation must hence be read as obliging the agencies to forward the relevant information to the Commission. If, for instance, the EUAA or Frontex take note of national authorities systemically violating EU law, and if the matter cannot be settled in a cooperative manner, the coordinating officer or the Executive Director is obliged to bring this information to the attention of the EURTF in order to enable the Commission to exercise its supervisory mandate.[90]

The administrative practice thus also clearly confirms that the agencies, insofar as their conduct in the EU hotspots is concerned, are themselves subject to supervision by the Commission. In case of misconduct or a dispute among administrative actors that cannot be settled at the operational level, the matter is brought to the EURTF for the Commission to solve the issue. Ultimately, it is hence the Commission that is responsible for co-

89 MoU Joint Pilot (fn. 47), p. 20; Terms of cooperation for European Union Regional Task Forces, Ref. Ares(2018)1622597 – 23/03/2018 (hereinafter: ToC-EURTF); Rules of procedure of the European Union Regional Task Force for migration management support to Greece as endorsed on 4 Oct 2018 (hereinafter: RoP-EURTF-GR); both documents are on file with the author.

90 In practice, the agencies usually settle issues with the national authorities without involving the Commission for reasons of 'keeping good communication channels', interviews with the interviews with EASO Union Contact Point conducted on 13 December 2019 and on 19 February 2021 (introduction, fn. 102).

ordinating the overall EU hotspots administration and ensuring its legality. Insofar as the Commission is concerned, this understanding is clearly conform with Art. 17 para 1 TEU. Insofar as the agencies are concerned, it might seem to contradict the independence postulate.[91] But this contradiction is only apparent: Quite apart from the doubts on the independence postulate as such, it must be kept in mind that the postulate is mainly established by secondary law, so that secondary law can, of course, also restrict it. In fact, Art. 40 para 3 Frontex Regulation and Art. 21 para 2 EUAA Regulation must be read as setting limits to the agencies' independence. Of course, these limits only concern the specific case of the MMST; any issues related to the agencies' internal organisation fall outside the scope of the Commission's mandate. The proposed interpretation is clearly reflected in the MMSTs' dual reporting structures: The EUAA coordinating officer reports to the agency's headquarters in Malta concerning issues relating to the agencies' internal organisation and to the EURTF in Athens concerning issues relating to the coordination or legality of the EU hotspot administration.

To conclude, responsibility for coordinating and monitoring the EU hotspot administration lies with the Commission. The agencies assist the Commission at the supervisory level, as they participate in setting up the terms of cooperation and gather the relevant information. At the same time, the agencies are subject to the Commission's supervision insofar as their conduct in the EU hotspots is concerned.

2.6 The Commission's Institutional Supervisory Structure

Having defined the Commission's supervisory obligations under Art. 40 para 3 Frontex Regulation, Art. 21 para 2 EUAA Regulation, Art. 17 para 2 TEU, this section focuses on the corresponding institutional structure. Since 2015, the Commission has essentially relied on three institutional pillars to exercise its supervision, namely the European Regional Task Force (EURTF), several Steering Committees, and deployed staff. With the introduction of the EU hotspot approach 2.0, the so-called Dedicated Task Force for Migration Management (Task Force) was established as an additional fourth pillar.

91 See fn. 73.

a *The European Regional Task Force (EURTF)*

The EURTF is the oldest institutional structure that serves to coordinate and monitor the EU hotspot administration.[92] As set out above, it has been established without legal basis in the immediate crisis context and is, until today, mainly regulated by EU soft law. Initially, it was conceived as a meeting between the Commission and EU agencies alone, but national authorities were soon added to the list of permanent participants.[93] The circle of participants was then gradually expanded so that by now, all EU and national actors involved in the EU hotspot administration take part in the EURTF.[94] In addition to the regular general meetings of all participants, several working groups have been established which focus on specific topics and meet more frequently.[95]

For the purpose of this study, the crucial point is that the EURTF, albeit formally conceived as a coordination meeting where all actors meet at eye level, functions as a forum for the Commission to exercise its supervision.[96] The EURTF was created by the European Commission and convened under its auspices. It is the Commission who sets the agenda, invites the participants, and chairs the general meetings.[97] Consequently, it is also the Commission that has the last word in case of disagreement among the participants. Although the written rules are not entirely clear on this point, providing both that the work of the EURTF is 'based on consensus' and that the Commission is in charge of 'ensuring' that all participants work

92 European Commission Staff Working Document, Best Practices on the implementation of the hotspot approach, accompanying the document: Report from the Commission to the European Parliament, the European Council and Council. Progress Report on the European Agenda on Migration, 15 November 2017, SWD(2017) 372 final (hereinafter: European Commission, SWD EU Hotspots 2017), p. 2; ToC-EURTF, Introduction, both referring to Art. 18 para 3 Frontex 2016 Regulation (chapter 1, fn. 150) as the predecessor of Art. 40 para 3 Frontex Regulation.

93 ECA Special Report 2017, para 60; interviews with Commission representative 1 and Commission representative 2 conducted on 12 February 2021; interview with Commission representative 3, conducted on 16 February 2021 (introduction, fn. 102).

94 ToC-EURTF; RoP-EURTF-GR; interviews with Commission representatives (as in fn. 93).

95 Interview with Commission representative 4, conducted on 26 February 2021 (introduction, fn. 102).

96 FRA, Opinion EU Hotspots 2019 (fn. 3), p. 19, note 37 and 38.

97 ToC-EURTF; RoP-EURTF-GR.

together,[98] practice shows that controversies among the participants are settled by the Commission.[99]

b *The Steering Committee*

Second, the Commission also makes use of a so-called Steering Committee to exercise its supervision. This forum is complementary to the EURTF in that the latter focuses on operational coordination, whereas the Steering Committee focuses on funding-related aspects.[100] Like the EURTF, the Steering Committee was initially set up without written rules and lacks formal regulation until today. Its main focus has then evolved over time. In 2016, the initial Steering was set up by the EU coordinator for the implementation of the EU-Türkiye Statement under the auspices of the Commission's Structural Reform and Support Service, the predecessor of DG REFORM.[101] In 2017, another Steering Committee was established under the auspices of DG Home and DG ECCHO for the purpose of financial planning and monitoring funding for Greece's asylum and migration in general.[102] In 2020, these two Committees were merged and replaced with the Steering Committee for Migration Management, which was established for the purpose of implementing the EU hotspot approach 2.0.[103] As a consequence, it appears that the Commission's focus has shifted from the EURTF to the Steering Committee as the primary supervisory forum.

98 RoP-EURTF-GR, para 7, para 28.

99 Interview with Commission representatives (as in fn. 95).

100 Note, however, that the EURTF and the Steering Committee are institutionally linked. All higher level staff participates in both meetings, and the Commission makes sure that its staff responsible for funding is on the same page as its staff responsible for operational aspects, see interviews with Commission representative 3, conducted on 16 February 2021; with Commission representative 4, conducted on 26 February 2021 (introduction, fn. 102).

101 Interview with Commission representative 4, conducted on 26 February 2021 (introduction, fn. 102).

102 The idea of that second Steering Committee was to monitor the implementation of the yearly financial plans, see interview with Commission representative 4, conducted on 26 February 2021 (introduction, fn. 102).

103 As a result, the current Steering Committee, while covering all funding-related issues, thus has a particular focus on the EU hotspots, see interview with Commission representative 4, conducted on 26 February 2021 (introduction, fn. 102).

c *Deployment of Staff to the Ground*

The third pillar of the Commission's supervisory structure is deployed staff. Since 2015, the Commission has apparently considered it necessary to deploy its own staff to the EU hotspots in order to adequately exercise its supervisory mandate. This is consequential because the Commission requires timely and correct information regarding all operational aspects, and this information is provided only partially by the agencies and national authorities.

Figuratively referred to as 'the Commission's eyes and ears on the ground', the representatives' main task is information-gathering and reporting.[104] Since 2015 and until today, the representatives have regularly sent their detailed reports to Brussels, covering every single aspect of the EU hotspot administration, including reception conditions, asylum procedures, and deportation.[105] The Commission thus always holds up-to-date information on conditions and incidents in each EU hotspot and can accordingly address misconduct and deficiencies in the EURTF and the Steering Committee. This is of particular importance for the purpose of this study, as the Commission cannot convincingly argue that it was not informed about misconduct by authorities and violations of EU law at any time since 2015.

d *The Dedicated Task Force Migration Management*

The fourth pillar is the Dedicated Task Force Migration Management, short Task Force. This forum was established in 2020 for the purpose of implementing the EU hotspot approach 2.0[106] and is formally integrated into the Commission's internal structure. The Commission itself describes

104 Interviews with Commission representatives 1 and 2, conducted on 12 February 2021; with Commission representative 3, conducted on 16 February 2021; with Commission representative 4, conducted on 26 February 2021 (introduction, fn. 102).

105 Interview with Commission representative 4, conducted on 26 February 2021 (introduction, fn. 102).

106 European Commission, Press Release of 23 September 2020, Migration: A European taskforce to resolve emergency situation on Lesvos; European Ombudsman, Inspection Report 9 March 2023, Case OI/3/2022/MHZ (fn. 11), para 4. See further European Commission, Task Force Migration Management, https://home-affairs.ec.europa.eu/policies/migration-and-asylum/migration-management/task-force-migration-management_en.

the Task Force in a rather obscure manner, stating that it is 'not a separate team dedicated to specific tasks' but rather 'a collaboration framework between many different people in different units that, through the Task Force, come together to further certain objectives.'[107] What is clear is that the Task Force is headed by a Deputy Director-General from the Commission's Directorate-General for Migration and Home Affairs (HOME), that it consists of several staff in Brussels, and that it is supported by several staff members permanently based in Greece, including some in Athens and some on the islands.[108] Further, it is clear that, although the Task Force monitors operations in several countries, it puts a clear emphasis on Greece.[109] Insofar as Greece is concerned, the work of the Task Force includes 'ad hoc meetings wherever needs arise' and participation in the reformed Steering Committee, which is, in fact, defined as consisting of the Task Force and national authorities.[110]

For the purpose of this study, the Task Force is of particular interest insofar as it is responsible for the implementation of the EU hotspot approach 2.0.[111] According to the Commission itself, the creation of the Task Force must be understood as a belated reaction to the deficiencies in the implementation of the original EU hotspot approach.[112] It operates both on the ground, thereby integrating the previous individual deployed staff members,[113] and at a policy level, thereby formalising the Commission's various practises to exert influence and pressure over the host member state. With the Task Force, the Commission has thus streamlined its previous practices and, at the same time, reinforced its involvement in the EU hotspot administration. In sum, the Task Force can be described as a manner of organising the Commission's internal structure in a way that

107 European Ombudsman, Inspection Report 9 March 2023, Case OI/3/2022/MHZ (fn. 11), para 4, 8.
108 Ibid., para 4, 6, 12.
109 Ibid., para 8, passim.
110 Ibid., para 7.
111 Another responsibility of the Task Force is the 'monitoring of the implementation of EU funds (…) in the area of border management', as formulated by the European Commission in its response to questions by the European Ombudsman in the case opened on 7 November 2023, How the European Commission monitors EU funds granted to Greece in the context of border management operations, Case 1418/2023/VS, p. 5.
112 European Ombudsman, Inspection Report 9 March 2023, Case OI/3/2022/MHZ (fn. 11), para 1–5.
113 Ibid., para 12.

allows it, inter alia, to effectively exercise its mandate to coordinate and supervise the integrated EU hotspot administration.

2.7 The Commission's Concrete Supervisory Measures

This last section presents some concrete measures that the Commission has as its disposal to exercise its supervisory mandate. This is necessary because the purpose of this study, namely to determine whether the EU bears responsibility for systemic deficiencies in the EU hotspots, requires to identify specific misconduct or omissions.

Generally speaking, the Commission's toolbox consists of a wide range of measures, including policy-making, funding, and operational instructions.[114] In fact, the first and temporally earliest possibility for the Commission to adequately exercise its supervisory mandate would have been to design the EU hotspot approach, from the outset, as a policy that complies with EU law. The Commission, however, even failed to conduct a correct fundamental rights assessment,[115] resulting in the 2015 EU hotspot approach being designed in a manner that its implementation almost inevitably results in systemic fundamental rights violations.[116]

The second way for the Commission to exercise its supervisory mandate relates to funding.[117] As explained above, the Commission could ensure legality either by dedicating funding to specific activities that serve to

114 Monitoring, as established in chapter 1, 4.2., is less important here because it refers to measures ensuring the legality of the entire asylum system; in more detail on these categories Catharina Ziebritzki, *The EU's Responsibility in the Asylum Administration* (fn. 1), p. 100 et seq.

115 European Ombudsman, 18 January 2017, Case 506/2016/MHZ (fn. 62), para 30.

116 FRA, Opinion EU Hotspots 2019 (fn. 3), p. 7; in detail below 3.

117 Note that both NGOs and UNHCR have recently taken increasing interest in the Commission's funding-related obligations, see for instance ECRE and UNHCR, Follow the Money. Assessing the Use of EU Asylum, Migration and Integration Fund (AMIF) funding at the national level, 2018, https://ecre.org/wp-content/uploads/2018/01/follow-the-money_AMIF_UNHCR_ECRE_23-11-2018.pdf; ibid., Follow the Money II, Assessing the Use of EU Asylum, Migration and Integration Fund (AMIF) funding at the national level 2014–2018, 2019, https://ecre.org/follow-the-money-ii-report/; and the subsequent reports; PICUM and ECRE, Fundamental Rights Compliance of Funding Supporting Migrants, Asylum Applicants and Refugees inside the European Union, Policy Note 2023, https://ecre.org/ecre-and-picum-policy-note-fundamental-rights-compliance-of-funding-supporting-migrants-asylum-applicants-and-refugees-inside-the-european-union/.

ensure compliance with EU law or through direct or indirect conditionalities.[118] Considering that the infrastructure and the administration of the EU hotspots have since 2015 been funded to a significant extent by the EU[119] and that the EU hotspots 2.0 are almost entirely EU-funded,[120] funding-related measures must appear as a promising way for the Commission to exert influence. Yet, the Commission has so far been reluctant to make use of this option. According to publicly available information,[121] the Commission has long not imposed explicit conditionalities, even though Greece has received about 3.15 billion of EU support in the area of asylum, migration and border policy between 2015 and 2021.[122] In the context of the EU hotspots 2.0, the Commission has still not considered it necessary to require a fundamental rights impact assessment, but at least reaffirmed its right to withdraw or withhold funding in case of persisting deficiencies.[123]

Third, the Commission could fulfil its obligations under Art. 40 para 3 Frontex Regulation, Art. 21 para 2 EUAA Regulation, Art. 17 para 1 TEU through operational instructions. This includes negotiation and soft instructions within the framework of the EURTF and the Steering Commit-

118 See chapter 1, 4.2.

119 Interviews with Commission representatives 1 and 2, conducted on 12 February 2021; with Commission representative 3, conducted on 16 February 2021; with Commission representative 4, conducted on 26 February 2021 (introduction, fn. 102).

120 European Ombudsman, Inspection Report 9 March 2023, Case OI/3/2022/MHZ (fn. 11), para 15.

121 See European Ombudsman, case opened on 7 November 2023, How the European Commission monitors EU funds granted to Greece in the context of border management operations, Case 1418/2023/VS; initial complaint letter on file with the author.

122 European Commission, Factsheet: Managing Migration. EU Financial Support to Greece, March 2021, https://ec.europa.eu/home-affairs/what-we-do/policies/european-agenda-migration/background-information_en.

123 European Ombudsman, Inspection Report 9 March 2023, Case OI/3/2022/MHZ (fn. 11), para 15: 'The MPRICs are funded under emergency assistance awarded to the Greek government through the Asylum, Migration and Integration Fund (AMIF). (…) Although the financial rules do not refer to the need for fundamental rights impact assessments, the grant agreement gives the Commission the right to *recover or stop payments* if the requirements of the grant agreement are not respected.' (emphasis added).

tee. As the Commission itself explains, these fora allow it to effectively 'guide' or 'steer' the conduct of national authorities and agencies.[124]

Again, the crucial point here is that national authorities usually follow the Commission's operational instructions, although these lack formal bindingness. This is confirmed by the Commission itself, which reports that it is able to effectively influence the host member state's legislative and executive branches.[125] In the context of the EU hotspots 2.0, for instance, the Commission reported that it 'ensured the adoption of a ministerial decision' in the context of the EU hotspots 2.0, and 'requested written assurances at the highest level concerning the openness of accommodation areas'.[126] Similarly, the Commission has also reported in other areas of the asylum system that it has been able to make use of its special position to persuade the host member state to enact certain laws, adopt certain resolutions, or implement certain administrative practices.[127] As will be argued below, this can be explained by the fact that the Commission's instructions come with implicit financial pressure, informational advantage and political authority and thus have a de facto binding effect on national authorities.

It arguably follows that the Commission has been obliged, since 2015, to negotiate, conclude, and implement a Memorandum of Understanding in order to ensure the legality of the EU hotspot administration. Certainly, the conclusion of an MoU presupposes the consent of the concerned member state. According to the doctrine of the maximum use of its competences,[128] however, the Commission was obliged to at least insist upon the member state to agree, if all other measures have proven insufficient. However, the Commission made use of this option only after a devastating fire destroyed

124 Interviews with Commission representative 3, conducted on 16 February 2021; with Commission representative 4, conducted on 26 February 2021 (introduction, fn. 102).

125 Interviews with Commission representatives, passim (introduction, fn. 102). There is no empirical data to support this claim already because the Commission gives its instructions in non-public fora.

126 European Ombudsman, Inspection Report 9 March 2023, Case OI/3/2022/MHZ (fn. 11), para 16.

127 For instance, the Commission's influence with regard to the composition of the Greek Appeals Committees (see chapter 1, fn. 130 et seq.) or with regard to the abolishment of the exemption of vulnerable persons from border procedures, see Catharina Ziebritzki, Robert Nestler, „'Hotspots' an der EU-Außengrenze" (fn. 9), p. 30, 46.

128 See above 2.4.

Moria. With a view to the EU's responsibility, the MoU Joint Pilot could thus become relevant in two variants. If the MoU keeps its promise, the argument could be made that the Commission has failed to fulfil its supervisory obligations by not doing everything to ensure the conclusion of such MoU already earlier. If the MoU fails to ensure that the new reception centres comply with EU law, which currently seems likely,[129] the argument could be made that the Commission has failed to fulfil its obligations by failing to implement the MoU in compliance with EU law.[130]

3 Systemic Deficiencies in the EU Hotspot Administration

Keeping in mind the EU's involvement as set out hitherto, the following argues that the EU hotspot administration is systemically deficient. The disastrous living conditions entail a risk of inhuman or degrading treatment, in particular for vulnerable persons, and risks resulting from systemic detention practices; procedure-related deficiencies include violations of the right to be heard, specific procedural guarantees for children and the prohibition of refoulement.

This being said, two preliminary remarks are in order. The first is that, in order to determine whether or not the EU bears legal responsibility for fundamental rights violations occurring in the EU hotspots, a distinction must be made between inherent and resulting violations.[131] Due to the EU's mode of determining without deciding, some fundamental rights violations are inherent in the EU's misconduct, whereas others are brought about by the ensuing national decision and, in this sense, only result from the EU's misconduct. Inherent violations are well illustrated with procedure-related deficiencies. For instance, when the EUAA fails to adequately interview an asylum seeker, the violation of the fundamental right to good administration is inherent in the agency's misconduct. Also, when Frontex conducts an age assessment based on visual inspection alone and, on this basis, wrongly registers a child as an adult, the violation of the fundamental rights of the child is inherent in the agency's misconduct. Resulting violations, in turn, are well illustrated with reception-related deficiencies. For instance, when a person is subject to reception conditions that amount to inhuman

129 See below 3.
130 See in more detail chapter 5.
131 See on the further consequences of this distinction chapter 4 and 5.

treatment, that violation is not inherent in the Commission's failure to adequately supervise the EU hotspot administration but results from it.[132]

The second preliminary note concerns the objective of this section. Although it is argued here that two sets of systemic deficiencies can be identified, the consequentiality of this study as a whole does not depend on whether specific fundamental rights are violated or not. This study is not primarily concerned with 'proving' a specific fundamental rights violation but rather with reconstructing the role of the EU in the EU hotspots and, on that basis, assessing whether the EU bears legal responsibility for fundamental rights violations. In other words, the interest of this study is not so much to determine whether fundamental rights are violated or not – for this is the task of the numerous reports cited in this section – but rather to assess which entity is responsible for fundamental rights violations, if they occur.

3.1 Reception-Related Deficiencies

While the powerful pictures of 2015, showing vast makeshift camps of flimsy tents drowning in mud and snow, have long disappeared from the media, the reception conditions in the EU hotspots to this day remain disastrous. In fact, the prohibition of inhuman or degrading treatment as enshrined in Art. 4 ChFR is largely violated, especially in case of vulnerable persons.

a *The Prohibition of Inhuman or Degrading Treatment (Art. 4 ChFR)*

As consistently and extensively documented during the past years by bodies of the UN, the Council of Europe and the EU, Greek national bodies, and NGOs,[133] living conditions in the EU hotspots remain dire. Ever since their establishment, basic requirements such as housing, food, medical and psychological services, schooling and social services are either absent or absolutely insufficient. During the Covid-19 pandemic, the situation has

132 'Resulting' is used here in an non-technical sense. With regard to the EU's responsibility, resulting violations raise intricate doctrinal questions of causation, as will be discussed in chapter 5.

133 For a few relevant reports see introduction, fn. 3.

been further aggravated, namely through confinement of asylum seekers to the camps and restricted access to public health care services.[134]

In fact, there can be no doubt that the standards of the Reception Conditions Directive[135] are hardly complied with in any respect. The main dispute then revolves around whether the conditions constitute a violation of Art. 3 ECHR respectively Art. 4 ChFR. This alone shows the scale of the problem. While no generalised assessment can be made in this regard because it depends on the individual case whether or not the minimum requirements are met, a brief account of the relevant standard helps to orient in the discussion.

The starting point here is the judgement of the ECtHR in the case *M.S.S. v Greece and Belgium*. The ECtHR held that even though Art. 3 ECHR does not oblige state parties to provide everyone within their jurisdiction with a home; it must be taken into account that asylum seekers, as such, are a particularly underprivileged and vulnerable population group in need of special protection and that EU member states are bound to comply with their own standards, namely the Reception Conditions Directive.[136] Based on its previous judgement in *Budina v Russia*,[137] the ECtHR, therefore, concluded that a situation of extreme material poverty amounts to a violation of Art. 3 ECHR where an applicant, in circumstances wholly dependent on State support, finds themselves faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity.[138] With a view to the facts in the case *M.S.S.*, the ECtHR emphasised that the applicant found himself in a particularly difficult situation

134 Equal Rights Beyond Borders, Report of February 2023, Extraordinary Measures (fn. 10); Equal Rights Beyond Borders, November 2020, Update of the Report of May 2020. Abandoned and Neglected (fn. 10); Equal Rights Beyond Boders, HIAS Greece, Refugee Support Aegean, September 2022, The State of the Border Procedure on the Greek Islands, https://rsaegean.org/en/border-procedure-greek-islands/, p. 27–31.

135 The same holds true under Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 laying down standards for the reception of applicants for international protection (recast) (hereinafter: reformed Reception Conditions Directive) which lowers standards, but not the extent to legalise practices in the EU hotspots.

136 ECtHR, judgement of 21 January 2011, M.S.S. v Belgium and Greece, Application No 30696/09, para 250.

137 ECtHR, judgement of 18 June 2009, Budina v Russia, Application No 45603/05.

138 ECtHR, judgement of 21 January 2011, M.S.S. v Belgium and Greece (fn. 136), para 253.

for several months, in which his essential needs were not met, which was marked by prolonged uncertainty, and which aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. Therefore, the ECtHR ruled that the national authorities were responsible, because of their inaction, for the situation, which had attained the level of severity required to fall within the scope of Art. 3 ECHR.[139] In its following case law, the ECtHR clarified that the standards are higher for asylum seekers who have additional vulnerabilities. In its case *Tarakhel v Switzerland*, for instance, the ECtHR held that for children asylum seekers, due to their extreme vulnerability, already a situation in which they 'may be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions', could amount to a violation of Art. 3 ECHR.[140]

The CJEU, interpreting Art. 4 ChFR in the context of the CEAS, has adopted the ECtHR's standard in its landmark judgement *N.S.* and the following jurisprudence.[141] More recently, the CJEU's judgement in *Jawo* and the following jurisprudence may raise doubts as to whether it is lowering the standard compared to that of the ECtHR.[142] Those doubts, however, are irrelevant here because the *Jawo* line of case law concerns recognised beneficiaries of international protection and not asylum seekers.

In the case law of the ECtHR dealing with the reception conditions in EU hotspots specifically, a change seems to be taking place. In its early judgements concerning the living conditions in the closed centres that were established in March 2016, the Court decided that Art. 3 ECHR was not violated.[143] In 2020, however, the ECtHR granted numerous interim measures concerning cases of vulnerable persons and requested Greece to

139 Ibid., para 263 and 264.

140 ECtHR, judgement of 4 November 2014, Tarakhel v Switzerland, Application No 29217/12, para 98, para 118 et seq.; ECtHR, judgement of 19 January 2012, Popov v France, Applications Nos 39472/07 and 39474/07, para 91 and 102.

141 Court (Grand Chamber), judgment of 21 December 2011, N.S. v Secretary of State for the Home Department and M.E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, Joined cases C-411/10 and C-493/10, para 88 et seq.

142 CJEU, judgement of 19 March 2019, Abubacarr Jawo v Bundesrepublik Deutschland, C-163/17, para 91 et seq., para 95 et seq. See Georgios Anagnostaras, „The Common European Asylum System: Balancing Mutual Trust Against Fundamental Rights Protection", *German Law Journal* 21 (2020), p. 1180-1197, 1192 et seq.

143 ECtHR, judgement of 25 January 2018, J.R. et al v Greece, Application no 22696/16; ECtHR, judgement of 21 March 2019, O.S.A. at al. v Greece, Application no

provide conditions in compliance with Art. 3 ECHR.[144] Similarly, the European Committee of Social Rights has, in a case concerning the situation of unaccompanied minors in EU hotspots, found a violation of the rights to housing, the rights of children and the right to protection of health.[145] It can, therefore, reasonably be expected that the ECtHR would also find a violation of Art. 3 ECHR in the remaining complaints currently pending before the Court.[146]

In sum, existing jurisprudence clearly confirms that EU hotspots structurally entail a risk of a violation of Art. 3 ECtHR, at least in case of vulnerable persons. This means that any person, at least any vulnerable person, seeking asylum in the EU hotspots is exposed to a structural risk of inhumane or degrading treatment due to inadequate reception conditions.

b *The Prohibition of Systemic Detention of Asylum Seekers (Art. 6 ChFR)*

Furthermore, asylum seekers in EU hotspots are exposed to a systemic risk of being subject to unlawful detention in breach of Art. 6 ChFR. While detention practices have evolved over time and differ between different islands, this section focuses on two practices that have occurred on the island of Kos, namely, first, the systemic detention of asylum seekers between 2020 and 2021 and, second, the systemic detention of unaccompanied mi-

39065/16; ECtHR, judgement of 3 October 2019, Kaak and Others v Greece, Application no 343215/16.

144 ECtHR, Decision on interim measure of 14 May 2020, A.B. v Greece, Application no. 19614/20; ECtHR, Decision on interim measures of 7 April 2020, M.A. v. Greece, Application no. 15782/20; ECtHR, Decision on interim measures of 26 March 2020, M.A. v. Greece, Application no. 15192/20; ECtHR, Decision on interim measure of 16 April 2020, E.I. and Others v Greece, Application No 16080/20 (available at: https://www.proasyl.de/news/egmr-urteil-fluechtlinge-aus-moria-muessen-menschenwuerdig-untergebracht-werden/). For further similar decisions, see Refugee Support Aegean (RSA), *European Court of Human Rights orders Greece to safeguard asylum seekers' life and limb on Lesvos, 24 September 2020*, available at: https://rsaegean.org/en/european-court-of-human-rights-orders-greece-to-safeguard-asylum-seekers-life-and-limb-on-lesvos/.

145 European Committee of Social Rights, Decision of 26 January 2021, International Commissions of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v Greece, Complaint No. 173/2018.

146 ECtHR, M.A. and others v Greece, Application No. 16865/20 concerns the living conditions and medical treatment of the applicants in the EU hotspots of Lesvos, Chios and Samos as well as the Nea Kavala camp.

nors in the newly built MP-RIC in 2022. The choice of these examples is justified because the first is representative of similar systemic detention practices that have been applied earlier on other islands,[147] and the second shows in which direction policies tend to develop in the context of the implementation of the EU hotspot approach 2.0.

Detention practices in EU hotspots must be seen in the context of the general policy of immigration detention in Greece. In 2019, Greece expanded the grounds for administrative detention of asylum seekers, limited the examination of alternatives to detention and extended the duration of detention to up to three years.[148] As a result, administrative detention of irregular migrants, including asylum seekers, has increased sharply from 2016 to 2021.[149] In addition, detention policy increasingly reflects the general shift towards informalisation. Recent practices, such as the so-called '25-day ban' and measures taken in response to the Covid-19 pandemic, tend to replace explicitly designated detention with other forms of restriction of liberty that resemble detention or even qualify as such.[150]

Before setting out the two case examples in more detail, a brief account of the standard established by Art. 6 ChFR in the context of asylum and border policy is required. As the CJEU has recently recalled in its case law concerning the Hungarian transit zones, the Reception Conditions Directive defines 'detention' as 'confinement of an applicant by a Member

147 For instance, systemic detention scheme that was applied on all islands as from the entry into force of the EU-Türkiye Statement in March 2016, see Catharina Ziebritzki, Robert Nestler, „'Hotspots' an der EU-Außengrenze" (fn. 9), p. 34–41.

148 The main changes were brought about with the adoption of Law 4636/2019 (International Protection Act), in particular Art. 46 thereof. The most recent reform, adopted with Law 4939/2022 (Asylum Code), replacing Art. 46 IPA with Art. 50 Asylum Code, did not change much in terms of content. See in more detail Equal Rights Beyond Borders, February 2023, Still Detained and Forgotten. Update on Detention Policies, Practices and Conditions on Kos 2022/23, https://equal-rights.org/resources/publications, p. 8.

149 Oxfam, 16 November 2021, Briefing Paper, Detention as the Default: How Greece, with the support of the EU, is generalizing administrative detention of migrants, https://policy-practice.oxfam.org/resources/detention-as-the-default-how-greece-with-the-support-of-the-eu-is-generalizing-621307/, p. 6.

150 On recent forms of so-called 'de facto detention' or 'alternatives to detention' as well as on the legal distinction between restriction of movement and detention see Equal Rights Beyond Borders, February 2023, Still Detained and Forgotten (fn. 148), p. 37–43. On the restrictions related to Covid-19 see further Equal Rights Beyond Borders, Report of February 2023, Extraordinary Measures (fn. 10); Equal Rights Beyond Borders, November 2020, Update of the Report of May 2020. Abandoned and Neglected (fn. 10).

State within a particular place, where the applicant is deprived of their freedom of movement'. This means that detention is 'any coercive measure that deprives that applicant of his or her freedom of movement and isolates them from the rest of the population, by requiring them to remain permanently within a restricted and closed perimeter'.[151]

According to settled case law, Art. 6 ChFR prohibits detaining persons solely due to their status as asylum seekers.[152] The few cases in which detention is allowed are exhaustively listed in Art. 8 para 3 Reception Conditions Directive; now, the reformed Art. 10 para 4 Reception Conditions Directive.[153] Apart from pre-removal detention, detention is allowed only for specific reasons such as inter alia, the determination of identity, to counter a risk of absconding, and to protect national security or public order.[154] All detention grounds can be applied only as a last resort, and detention of minors is subject to even stricter preconditions.[155]

Noting that the 2024 CEAS reform broadens the grounds for detention in border procedures,[156] the following refers to the case study as defined

151 CJEU (Grand Chamber), judgement of 17 December 2020, European Commission v Hungary, C-808/18, para 159; CJEU (Grand Chamber), judgement of 14 May 2020, FMS et al v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság et al, C-924/19 PPU and C-925/19 PPU, para 223. Note that the definition of 'detention' is now enshrined in Art. 2 para 12 Regulation (EU) 2024/1356 of the European Parliament and of the Council of 14 May 2024 introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 (hereinafter: reform Screening Regulation II) as follows: ''detention' means the confinement of a person by a Member State within a particular place, where such person is deprived of freedom of movement.'.

152 As explicitly laid down in Art. 8 para 1 Reception Conditions Directive.

153 On the qualification of the list as exhaustive see CJEU, judgement of 17 December 2020, European Commission v Hungary, C-808/18 (fn. 151), para 168; CJEU, judgement of 14 May 2020, FMS, C-924/19 PPU et al (fn. 151), para 250.

154 CJEU, judgement of 17 December 2020, European Commission v Hungary, C-808/18 (fn. 151), para 175; CJEU (Fourth Chamber), judgment of 14 September 2017, K. v Staatssecretaris van Veiligheid en Justitie, C-18/16, para 48.

155 See Art. 11 Reception Conditions Directive; Article 17 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (hereinafter: Return Directive). For the corresponding provisions in Greek Law, see Art. 50 para 2 Law 4939/2022, Art. 31 para 1 Law 3907/2011.

156 See ECRE, ECRE Comments on the Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 laying down standards for the reception of applicants for international protection (recast), September 2024, p. 8 et seq.

above, i.e. the period between 2015 and 2022, and hence to the law as it stood before the reform.

In the context of EU hotspots, the detention ground enshrined in Art. 8 para 3 lit c Reception Conditions Directive is of particular relevance. It allows detention 'in order to decide (…) on the applicant's right to enter the territory' and is designed precisely to enable member states to detain asylum seekers in border procedures. Consequently, detention is only allowed within the limits of Art. 43 Asylum Procedures Directive, i.e. the period of detention is limited to a maximum of four weeks from the date of the application for international protection, and detention is allowed only to determine whether a claim is inadmissible or unsubstantiated for specific reasons.[157]

Against this background, it becomes clear that the two mentioned cases raise the risk of a systemic violation of Art. 6 ChFR. The first case concerns systemic detention in Kos between 2020 and 2021. Since January 2020, all asylum seekers, including vulnerable persons who had newly arrived on the island and those whose claims had been rejected in last instance, were subject to prolonged detention for a period of up to eighteen months.[158] Detention conditions were wholly inadequate, with overcrowding, maltreatment by police officers, inadequate nutrition, lack of healthcare, and poor hygienic conditions.[159] Procedural rights and remedies were severely deficient, including a limited number of legal aid providers, failure to inform applicants about reasons for their detention, and widespread failure to grant access to an effective remedy.[160] In September 2021, after NGOs had intervened and successfully challenged detention in a large number

157 Those reasons are enlisted in Art. 31 para 8 Asylum Procedures Directive. See CJEU, judgement of 17 December 2020, European Commission v Hungary, C-808/18 (fn. 151), para 178–183; CJEU, judgement of 14 May 2020, FMS, C-924/19 PPU et al (fn. 151), para 237–239, 241–245.

158 Equal Rights Beyond Borders, Report of 10 November 2021, Detained and Forgotten at the Gates of the EU: Detention of Migrants on the Island of Kos, https://www.equal-rights.org/resources/publications, p. 13–21; Equal Rights Beyond Boders, HIAS Greece, Refugee Support Aegean, September 2022, The State of the Border Procedure on the Greek Islands (fn. 134), p. 31–32.

159 All persons were detained in the so-called Pre-Removal Detention Centre (PRDC), regardless of the alleged grounds of detention. On the conditions in the PRDC see Equal Rights Beyond Borders, 10 November 2021, Detained and Forgotten at the Gates of the EU (fn. 158), p. 44–61.

160 Equal Rights Beyond Borders, 10 November 2021, Detained and Forgotten at the Gates of the EU (fn. 158), p. 25–32.

of cases, the practice was lifted to some extent[161] but immediately replaced with detention-like Covid-19 restrictions.[162]

The second case concerns the detention of unaccompanied minors in the EU hotspot 2.0 on Kos. As mentioned above, the Centre on Kos was among the first to be inaugurated at the end of 2021 and has been operational since August 2022.

In general terms, it is not yet entirely clear to what extent asylum seekers are subject to detention in the newly built MP-RIC. Concerned persons describe their situation of 'imprisonment',[163] and independent reports speak of 'prison-like' facilities, 'quasi-detention centres' or 'de facto detention'.[164] What can be said with certainty is that the structures feature barbed wire fences, including internal fencing, and surveillance systems to control entry and exit, including cameras, x-ray scanners, and magnetic doors.[165] Uncertainty remains, however, as to whether recent practices in the MP-RIC that severely restrict asylum seekers' liberty without constituting formal administrative detention under Greek law qualify as detention in the sense

161 Since October 2021, the usual duration of detenion was reduced to 12 months, and since March 2022, it was further reduced to 6 months, see Equal Rights Beyond Borders, February 2023, Still Detained and Forgotten (fn. 148), p. 9–10. The conditions in the PRDC, however, remain inadequate and the procedural remedies remain insufficient, see ibid, p. 20–35.

162 Equal Rights Beyond Borders, February 2023, Still Detained and Forgotten (fn. 148), p. 9.

163 Twitter, Account Samos Advocacy Collective, 22 November 2021, shared experiences from concerned asylum seekers, https://twitter.com/AdvocacySamos/status/1462769773104746500?s=20.

164 ECRE, 26 November 2021, Greece: Excessive Use of Detention, Shortcomings in Asylum Procedures, Food Crisis Develops as Assistance to Refugees and Asylum Seekers Halted, https://ecre.org/greece-excessive-use-of-detention-shortcomings-in-asylum-procedures-food-crisis-develops-as-assistance-to-refugees-and-asylum-seekers-halted/; Oxfam, 16 November 2021, Briefing Paper, Detention as the Default (fn. 149); I Have Rights, 23 February 2023, Report: The EU-Funded Closed Controlled Access Centre. The De Facto Detention of People Seeking Protection on Samos, https://ihaverights.eu/de_facto_detention_in_the_ccac/.

165 ECRE, 26 November 2021, Greece: Excessive Use of Detention, Shortcomings in Asylum Procedures, Food Crisis Develops as Assistance to Refugees and Asylum Seekers Halted (fn. 164); ECRE, 3 December 2021, Greece: Government Continues NGO Crackdown, Closed Controlled Centres Close in on Asylum Seekers, Significant Jump in Negative Decisions Since Turkey Declared Safe Third Country, https://ecre.org/greece-government-continues-ngo-crackdown-closed-controlled-centres-close-in-on-asylum-seekers-significant-jump-in-negative-decisions-since-Turkey-declared-safe-third-country/.

of EU law.[166] Tellingly, relevant Greek law refers to the MP-RIC as 'closed controlled centres'.[167]

Despite all this, the European Commission indicates on its website that all MP-RICS are open structures.[168] When confronted with the contradiction between its own description versus Greek legal terminology and independent reports, the Commission insisted that only one part of the camp is a pre-removal detention area, whereas the rest of the camp is an open structure.[169] Remarkably, however, the Commission did not further specify whether the open structure is also used as such and which practices of restriction of liberty are applied. Against this background, it is at least likely that the MP-RIC have already led and will further lead to an increase in systemic detention practices.[170]

These uncertainties concerning the general practice under the EU hotspot approach 2.0 notwithstanding, independent reports describe that unaccompanied minors are subject to systemic detention in the MP-RIC in Kos. Since August 2022, unaccompanied minors who seek asylum are obliged to stay in the so-called 'safe zone', which is a closed section inside the MP-RIC. The section is surrounded by barbed wire and guarded by security personnel around the clock. Minors cannot leave during their entire stay on the island, there is no procedure to request unguarded exit, and lawyers must have prior legal authorisation to enter. Applying the above

166 For analysis see Equal Rights Beyond Borders, February 2023, Still Detained and Forgotten (fn. 148), p. 46–47.

167 Art. 8 para 4 of Greek Law 4375/2016, as last amended by Law 4825/2021, describes the facilities as *'Κλειστές Ελεγχόμενες Δομές', i.e. 'closed controlled centres'.*

168 According to European Ombudsman, Inspection Report 9 March 2023, Case OI/3/2022/MHZ (fn. 11), para 17. As of 27 March 2023, the webpage accessible under European Commission, Migration and Home Affairs, New multi-purpose reception and identification centres on Samos, Kos and Leros, https://home-affairs.ec.europa.eu/new-multi-purpose-reception-and-identification-centres-samos-kos-and-leros_en, shows no more than 10 briefly commented pictures of the construction process.

169 European Ombudsman, Inspection Report 9 March 2023, Case OI/3/2022/MHZ (fn. 11), para 17.

170 The fact that the Commission funds and co-manages detention centres in Greece, while at the same time condemning similar centres in Hungary (see only CJEU, judgement of 17 December 2020, European Commission v Hungary, C-808/18 (fn. 151), para 155) reflects that the Commission is both an administrative and a political actor in the European asylum system; on the tensions arising from this dual role see chapter 3, 2.1.

definition, there can be no doubt that this systemically applied practice qualifies as detention.[171]

In sum, it follows that the administrative practice in the EU hotspots violates Art. 6 ChFR in a large number of similar cases, and thus systemically.

3.2 Procedure-Related Deficiencies

Albeit less media-effective than reception conditions, the procedures conducted in the EU hotspots entail systemic fundamental rights violations, too. Three cases are of particular relevance here. First, the EUAA's failures in the context of the hearing regularly; second, Frontex's mistakes in the context of age assessment; and third, the misconduct of both agencies consisting in a misapplication of the third country concept with regard to Türkiye. The first and the second case concerns inherent violations, whereas the third case concerns a resulting violation.

a *The Right to Good Administration (Art. 41 ChFR)*

According to Art. 41 ChFR, the right to good administration guarantees that 'every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time' which, according to Art. 41 para 2 lit a and lit c ChFR, explicitly includes the 'right of every person to be heard, before any individual measure which would affect him or her adversely is taken' and 'the obligation of the administration to give reasons for its decisions'.

The right to good administration serves to ensure 'that any decision adversely affecting a person is adopted in full knowledge of the facts', and that the person concerned is enabled to submit all 'information relating to his personal circumstances as will argue in favour of the adoption or non-adoption of the decision, or in favour of its having a specific content'.[172]

171 Equal Rights Beyond Borders and Terre des Hommes, 23 February 2023, Unaccompanied Minors on Kos are Deprived of Their Liberty and Childhood, https://www.equal-rights.org/articles/101.

172 CJEU (Seventh Chamber), judgment of 4 June 2020, European External Action Service v Stéphane De Loecker, C-187/19 P, para 69 with further references to the case law.

Generally, the scope of the right is 'extremely broad' and of 'general application'.[173]

In the context of asylum procedures, the right to a hearing is of vital importance, as it guarantees that every person must be given the opportunity to explain their individual situation and the reasons for their claim for international protection, including particular vulnerabilities, and the possible application of protection elsewhere clauses.[174] Although Art. 41 ChFR is directly applicable,[175] the Asylum Procedures Directive guarantees specific procedural standards which appear as concretisation of the right to be heard, namely the right to a personal interview in full confidentiality and with the assistance of an interpreter if necessary.[176] Crucially, the purpose of Art. 41 ChFR in this context is to ensure that all persons concerned are granted appropriate status within the meaning of Art. 78 para 1 TFEU.[177]

Consequently, Art. 41 ChFR is violated when the concerned person is not heard by the relevant authority. This applies regardless of whether or not the concerned person can prove that, if they had been heard, the outcome of the procedure would have been different. As the CJEU has consistently held, a breach of Art. 41 ChFR requires only that the procedural error has possibly influenced the content of the decision.[178] In the context of asylum

173 See only Advocate General Yves Bot, Opinion delivered on 7 November 2013, H.N. v Minister for Justice, Equality and Law Reform, C-604/12, para 62–63 with further references to the case law.

174 CJEU (Grand Chamber), judgment of 25 July 2018, Serin Alheto v Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite, C-585/16, para 125–128.

175 CJEU (First Chamber), judgement of 22 November 2012, M.M. v Minister for Justice, Equality and Law Reform and Others, C-277/11, para 86; Hans Jarass, „Art. 41 Recht auf eine gute Verwaltung", *Charta der Grundrechte der EU*, C.H. Beck 2021, para 10.

176 Art. 14–17 Asylum Procedures Directive. Note that in the context of the appeal the right to a hearing derives from Art. 47 ChFR, see CJEU, judgment of 25 July 2018, Alheto, C-585/16 (fn. 174), para 125.

177 Advocate General Yves Bot, Opinion delivered on 7 November 2013, H.N., C-604/12 (fn. 173), para 64.

178 CJEU (Eigth Chamber), judgment of 6 September 2012, August Storck KG v Office for Harmonisation in the Internal Market, C-96/11 P, para 80; CJEU (Fifth Chamber), judgement of 3 July 2014, Kamino International Logistics BVabdDatema Hellmann Worldwide Logistics BV v Staatssecretaris van Financiën, para 79: 'in particular the right to be heard, results in the annulment of the decision taken at the end of the administrative procedure at issue only if, had it not been for such an irregularity, the outcome of the procedure might have been different' with further references to the case law; Hans Jarass, „Art. 41 Recht auf eine gute Verwaltung" (fn. 175), para 5, para 19.

procedures, it follows from this doctrine that the right to be heard is violated in all cases of significant errors, such as for instance, the omission of an interview, a lack of confidentiality or interpretation, suggestive questions on the part of the interviewer, a failure to let the interviewee finish their answers, or a failure to ask follow-up questions where required. As the course of the entire asylum procedure up to the final decision by courts is, to a large extent, predetermined by the information contained in the very first interview transcript, any of the mentioned errors possibly influence the outcome of the relevant procedure.

Applying this standard to the case of the EU hotspots, it must be kept in mind that the EUAA typically fails to comply with procedural standards as laid down in secondary law[179] and systemically oversteps its competences. Due to the seriousness or accumulation of secondary law violations, it is argued here that these mistakes frequently amount to a violation of Art. 41 ChFR. Two constellations require particular attention.

First, the EUAA, in many cases, conducts the asylum interview in a deficient manner. Typical procedural mistakes include conducting the interview in non-private circumstances, a failure to provide adequate translation, inappropriate questions, ignoring relevant claims of applicants, mistakes in the interview transcript, or a failure to provide reasons for its recommendations.[180] Where several procedural mistakes occur in one procedure or where one particularly severe mistake occurs, the misconduct typically amounts to a violation of the right to good administration. All mentioned mistakes constitute clear violations of the procedural safeguards laid down in Art. 14 to 17 Asylum Procedures Directive, now Art. 8 to 14 reformed Asylum Procedures Regulation,[181] and thus result in a failure

179 As the EUAA assists member states in applying EU secondary law, it is consequently obliged to comply with the standards laid down in EU secondary law. Insofar as certain provisions explicitly refer to the member states, such as e.g. Art. 17 para 1 Asylum Procedures Directive and Art. 22 para 1 Reception Conditions, those provisions must hence be applicable by analogy.

180 European Center for Constitutional and Human Rights (ECCHR), April 2019, Case Report: EASO's involvement in Greek Hotspots exceeds the agency's competence and disregards fundamental rights, https://www.ecchr.eu/en/case/greek-hotspots-complaint-against-european-asylum-support-office-to-the-eu-ombudsperson/; own observation of the author (see introduction, fn. 103).

181 Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU (hereinafter: reformed Asylum Procedures Regulation).

to fully take into account the individual circumstances of the applicant. Consequently, the right to be heard under Art. 41 para para 2 lit a ChFR is usually violated. Where the EUAA relies on standard reasoning, it also fails to comply with its obligation under Art. 41 para 2 lit c ChFR to state reasons. Although the agency's recommendation is not legally binding and thus not technically a 'decision' within the sense of that provision,[182] it must nonetheless contain the relevant reasons for the rejection of the asylum claim. As the national asylum authority will issue its decision without ever having heard the applicant in person, it will necessarily have to adopt the reasons stated in the recommendation. The applicability of Art. 41 ChFR to the EUAA's recommendation thus follows from the purpose of the obligation to state reasons, which is 'a corollary of the principle of respect for the rights of the defence' and thus serves, first, to enable the person concerned to recognise whether a certain act is wrongful and to seek judicial protection if so and, second, to enable the responsible court to review the legality of the concerned act.[183]

Second, the EUAA often fails to conduct a correct vulnerability assessment. Typical mistakes range from a complete omission of the vulnerability interview to an incorrect legal evaluation of claims indicating vulnerability.[184] The failure to conduct a vulnerability assessment or mistakes in that assessment typically violate Art. 21 to 25 Reception Conditions Directive, now Art. 24 to 28 reformed Reception Conditions Directive, establishing special guarantees for particularly vulnerable groups. Where the mistakes are particularly serious, the misconduct typically also amounts to a violation of the fundamental right to good administration. This is because the vulnerability assessment is decisive for the further course of the asylum procedure, as it predetermines whether the person must be exempted from the border procedure and is also relevant to the claim for international pro-

182 Hans Jarass, „Art. 41 Recht auf eine gute Verwaltung" (fn. 175), para 31 with further references to the case law on the notion of 'decision' in that context.

183 CJEU (Third Chamber), judgement of 15 November 2012, Council of the European Union v Nadiany Bamba, para 49; CJEU (Fifth Chamber), judgment of 21 April 2016, Council of the European Union v Bank Saderat Iran, para 70; Hans Jarass, „Art. 41 Recht auf eine gute Verwaltung" (fn. 175), para 30.

184 European Center for Constitutional and Human Rights (ECCHR), April 2019, Case Report: EASO's involvement in Greek Hotspots exceeds the agency's competence and disregards fundamental rights, https://www.ecchr.eu/en/case/greek-hotspots-complaint-against-european-asylum-support-office-to-the-eu-ombudsperson/; Equal Rights Beyond Borders, July 2021, Consequences of the EU-Turkey Statement (fn. 40), p. 20–21; own observation of the author (see introduction, fn. 103).

tection as such.[185] Consequently, a failure to give the concerned person the possibility to express the reasons establishing their vulnerability amounts to a violation of the right to be heard under Art. 41 para 2 lit a ChFR.

Since 2016 already, systemic procedural errors on the part of EASO respectively the EUAA have been identified by non-state actors. Yet, there is so far no jurisprudence on the matter. There is only one decision by the European Ombudsman who in 2017 was called upon to decide whether EASO, first, systemically overstepped its competences by effectively determining the outcome of individual asylum procedures in the EU hotspots and, second, systemically failed to respect the right to be heard under Art. 41 ChFR.[186] As regards the first matter, the Ombudsman stressed that EASO's practice raised 'very serious concerns' because it exceeded the legal basis in secondary law, but also recognised that EASO is 'in a particularly difficult position' given that EU soft law confers tasks upon the agency for which it has no competence.[187] Therefore, the Ombudsman argued that the likely future reform of the EASO Regulation would belatedly vest the agency's activities with a legal basis and, on this basis, refrained from further action.[188] Regarding the second matter, i.e., the alleged systemic violation of the fundamental right to be heard, the Ombudsman took a similar stance. Although she acknowledged that 'there are genuine concerns about the quality of the admissibility interviews as well as about the procedural fairness of how they are conducted', she refrained from further inquiries, arguing that EASO has already 'made considerable efforts' and 'steps in the right direction' and that 'ultimate responsibility for decisions on asylum applications rests with the Greek authorities'.[189]

185 Art. 24 para 3 Asylum Procedures Directive provides that vulnerable persons must be exempted from the border procedure if their special needs, in terms of procedure and reception conditions, cannot be met within the framework of the border procedure. Note, however, that the general exemption for vulnerable persons under Law 4375/2016 has always been applied in a deficient manner, and has been abolished in 2019, see Equal Rights Beyond Borders, July 2021, Consequences of the EU-Turkey Statement (fn. 40), p. 5.

186 European Ombudsman, Decision of 5 July 2018, 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.

187 Ibid., para 32–33.

188 Ibid., para 34–35.

189 Ibid., para 45–46. See further Salvatore F. Nicolosi, David Fernandez-Rojo, „Out of control? The case of the European Asylum Support Office", in Miroslava Scholten,

b *Specific Procedural Guarantees for Children (Art. 24 and Art. 41 ChFR)*

Similarly, Frontex typically fails to comply with the applicable procedural standards in the context of first registration. A frequent procedural error is to conduct an age assessment only on the basis of visual inspection. Frontex often ignores claims of applicants to be minors and refuses to accept as proof identity documents issued by certain states. As a result, unaccompanied minors are frequently registered as adults.[190]

This practice of assessing an applicant's age purely based on their physical appearance clearly violates the rights of the child as enshrined in the Charter. Art. 24 para 2 ChFR establishes that in all actions relating to children, the child's best interests must be a primary consideration. The provision must be interpreted in light of Art 3 para 1 of the Convention on the Rights of the Child (CRC)[191] and is reflected throughout the applicable EU secondary law.[192] As the Frontex Regulation emphasises, the agency shall, in all its activities, pay particular attention to children's rights.[193] This is of particular relevance in the context of the EU hotspot administration because, usually, unaccompanied minors must be exempt from the border procedure, and the safe third country concept cannot be applied.[194]

Alex Brenninkmeijer (ed.), *Controlling EU Agencies. The Rule of Law in a Multi-jurisdictional Legal Order*, Edward Elgar 2020, p. 177–195, p. 184–185.

190 Chatham House, 28 July 2022, Lesvos: How EU asylum policy created a refugee prison in paradise, https://www.chathamhouse.org/2022/07/lesvos-how-eu-asylum-policy-created-refugee-prison-paradise, fn. 10; euobserver, 10 May 2021, Frontex 'mislabelling minors as adults' on Greek islands, https://euobserver.com/migration/151784; own observation of the author (see introduction, fn. 103).

191 At least insofar as Frontex is concerned because according to Art. 80 para 1 Frontex Regulation, the agency must comply with both EU law and the CRC.

192 For instance, Art. 11 and 23 Reception Conditions Directive, Art. 25 para 6 Asylum Procedures Directive, Art. 20 para 5 of the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 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 (recast) (hereinafter: Qualification Directive), Art. 6 Dublin III Regulation.

193 See only recital 103 and Art. 80 para 1 and 3 Frontex Regulation.

194 Art. 25 para 6 lit a and b Asylum Procedures Directive provides that the applications of unaccompanied minors can be examined in accelerated border procedures under Art. 31 para 8 Asylum Procedures Directive or the in border procedures under Art. 43 Asylum Procedures Directive only under very specific conditions. Furthermore, Art. 25 para 6 lit c Asylum Procedures Directive provides that the safe third country may only applied if this is in the best interest of the minor. In any case,

With regard to applicants who claim to be minors, it follows from Art. 24 para 2 ChFR that the estimation of their physical appearance as such is not even sufficient to justify a decision to undertake an age assessment. In case of substantial doubt about the age, the applicant's physical appearance can be taken into account, however, only in conjunction with several other criteria and only by qualified physicians.[195] Furthermore, the principle of the benefit of the doubt applies throughout the whole procedure, as Art 25 para 5 Asylum Procedures Directive, now Art. 25 para 2 reformed Asylum Procedures Regulation, explicitly provides.[196] This is especially important in situations of large numbers of arrivals where the responsible authorities' resources might be overstretched.[197]

In addition, estimating the age purely based on visual inspection frequently also violates the fundamental right to good administration, in particular, the right to be heard under Art. 41 para 2 lit a ChFR. According to Art. 24 para 1 ChFR, the child's views shall be taken into consideration on matters which concern them in accordance with their age and maturity. The right to be heard thus applies insofar as the concerned child is capable of forming their own views.[198] In case of doubt about the age, the child must at least be given the opportunity and time to explain any inconsistencies either orally or in writing.[199] Furthermore, age assessment which is purely based on sight can also violate the specific procedural rights inherent in the prohibition of refoulement as granted under Art. 4, 18, 19 ChFR. Insofar as age is a factor relevant to the claim for international protection, it namely follows from Art. 4 para 5 Qualification Directive that credible

---

Art. 11, 23 and 24 Reception Conditions Directive stress that member states must ensure a standard of living adequate for the minor's physical, mental, spiritual, moral and social development. As this is certainly not ensured in the EU hotspots, those provisions imply the obligation to exempt minors from the border procedure.

195 EASO, Practical Guide on Age Assessment, second edition, 2018, https://op.europa.eu/en/publication-detail/-/publication/ceefc444-a67e-11e8-99ee-01aa75ed71a1, p. 20, 23, 49–51, 55.

196 EASO, Practical Guide on Age Assessment (fn. 195), p. 22 formulates the principle as in dubio pro refugio or in dubio pro minore.

197 EASO, Practical Guide on Age Assessment (fn. 195), p. 24–25.

198 In case of doubt about the age, the child must at least be given opportunity and time to explain any inconsistencies either orally or in writing EASO, Practical Guide on Age Assessment (fn. 195), p. 28. Note Art 12 CRC as analysed by UN Committee on the Rights of the Child, General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12, https://www.refworld.org/docid/4ae562c52.html.

199 EASO, Practical Guide on Age Assessment (fn. 195), p. 28.

oral statements about age must be accepted.[200] As it cannot be determined during the first registration whether child-specific protection needs arise, the benefit of the doubt must apply until an age assessment can be carried out at a later procedural stage.[201]

Despite the gravity of Frontex's systemic misconduct in the context of age assessment, there is so far no single decision by a court or Ombudsman on this issue.[202]

c *The Prohibition of Refoulement (Art. 4, 18, 19 ChFR)*

Lastly, the EU hotspot administration structurally entails a risk of refoulement in violation of Art. 4, 18, 19 ChFR. Although this specific risk of refoulement *through deportation from EU hotspots* to Türkiye has so far materialised only in relatively few cases, it will become relevant again as soon as Türkiye reinstates the readmission policy.[203] Unlike the other procedural errors, the violation of refoulement is not inherent to but results from the agencies' conduct. As will be set out in more detail in the following, the ultimate return decision is issued by Greece, while the EUAA routinely issues recommendations which incorrectly assume that Türkiye can be regarded as safe, and Frontex assists in deportations to Türkiye.

This being said a brief note on refoulement *through pushbacks* to Türkiye is in order. Pushback practices at the Greek land and sea borders, including pushbacks from the Aegean islands where the EU hotspots are located, have attracted increased media attention in recent years.[204] Indeed, evidence of

200 Art 4 para 5 lit a to 3 Qualification Directive, establishing that the statement is credible if the applicant has made genuine effort to substantiate the statement, submitted all relevant elements at their disposal and given a satisfactory explanation regarding any lack of other relevant elements, the statement is coherent and plausible, the applicant has applied for international protection at the earliest possible time or has demonstrated good reasons for not having done so, and the general credibility of the applicant is established.

201 This also follows from EASO, Practical Guide on Age Assessment (fn. 195), p. 22, 44–59 and annex 2 thereof.

202 To the best knowledge of the author.

203 See chapter 1, 2.1 on the extremely low numbers of return despite high rejection rates.

204 New York Times, 26 Nov 2020, E.U. Border Agency Accused of Covering Up Migrant Pushback in Greece, https://www.nytimes.com/2020/11/26/world/europe/frontex-migrants-pushback-greece.html; New York Times, 19 May 2023, Video Shows Greece Abandoning Migrants at Sea, https://www.nytimes.com/2023/05/19/world/europe/g

Frontex's involvement in systemic pushbacks was sufficient, in September 2022 already and still in July 2023, for the agency's own Fundamental Rights Officer to conclude that violations of fundamental rights or international protection obligations were of a serious nature or likely to persist and that the agency should therefore, according to Art. 46 para 4 Frontex Regulation, suspend or terminate its operations in Greece.[205] But that alarm call went largely unheard, and Frontex's operations at the Greek-Turkish borders continue. Nevertheless, and the gravity of these violations notwithstanding, the following does not address 'typical pushback practices', simply because they fall outside the scope of this study. Pushbacks usually take place before persons even arrive at the EU hotspot camps. However, it should be kept in mind that the following considerations on the EU's liability are not limited to the EU hotspot administration but can be transferred to pushback cases, too.

reece-migrants-abandoned.html; New York Times, 28 February 2024, Watchdog Finds E.U. Border Agency Too Weak to Prevent Migrant Disasters at Sea, https://www.nytimes.com/2024/02/28/world/europe/eu-migrant-boats-frontex.html; Der Spiegel, 27 April 2022, Frontex in illegale Pushbacks von Hunderten Flüchtlingen involviert, https://www.spiegel.de/ausland/frontex-in-illegale-pushbacks-von-hunderten-fluechtlingen-involviert-a-086f0e5a-0172-4007-b59c-7bced325cc75.

205 Frontex, 10 July 2023, Opinion by the Fundamental Rights Officer, Greece – advice to suspend or terminate Frontex operations in Greece in accordance with Article 46(4) of the EBCG Regulation (redacted version on file with the author), p. 1: 'In the last Opinion, from 1 September 2022, the Fundamental Rights Officer already advised the Executive Director to trigger the mechanism to withdraw the financing, suspend or terminate Frontex activities as provided for in Article 46 of the European Border and Coast Guard Regulation.', p. 2: 'Serious incidents in the pat indicated patterns of behaviour, the cumulation and nature of recent cases from Evros and the Greek Aegean islands now leads the Fundamental Rights Officer to conclude that pushbacks (with other associated fundamental rights violations) are complex, well-resourced and highly coordinated, covert operations conducted systematically, rather than isolated incidents.', p. 3: 'On these grounds, it must be concluded that Frontex support to Greece not only harms the reputation of the agency but also, at least indirectly, enables fundamental rights violations. For these reasons, and as stated at the Management Board meeting on 21 June 2023, the Fundamental Rights Officer considers it necessary to advise the Executive Director to trigger the mechanism to suspend or terminate Frontex activities as provided for in Article 46 of the European Board and Coast Guard Regulation and the corresponding Standard Operating Procedure.'.

i *Why Türkiye is Not a Safe Third Country*

To establish why deportation to Türkiye constitutes misconduct, it must first be argued why Türkiye cannot currently be regarded as a safe third country. For if it was, a deportation to Türkiye would not systemically violate Art. 4, 18, 19 ChFR.

The safe third country concept forms part of protection elsewhere clauses that serve to externalise responsibility for the provision of international protection. International refugee and human rights law sets limits to these externalisation practices. Thus, a third country must fulfil certain criteria in order to be considered as safe. Art. 38 Asylum Procedures Directive, now Art. 59 reformed Asylum Procedures Regulation,[206] codifies these standards and provides – simply put – that a country can be considered as safe only if deportation to that country does not amount to refoulement, i.e. if there is no risk of persecution in the sense of Refugee Convention or of serious harm in the sense of Art. 3 ECHR in the third country, if the third country itself respects the refoulement principle, i.e. if there is no risk of deportation to another non-safe country, and if the possibility exists in the third country to request refugee status and, if found to be a refugee, to receive protection in accordance with the Refugee Convention.[207]

Ever since 2015, it has been fiercely disputed among legal scholars, practitioners, and politicians whether Türkiye qualifies as a safe third country or not.[208] Applying Art. 38 Asylum Procedures Directive first requires a discussion of what it means that the third country must provide protection 'in accordance with' the Refugee Convention. This is of particular relevance because Türkiye is bound to the Convention only insofar as refugees

206 Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU (hereinafter: reformed Asylum Procedures Regulation). Considering the consequentiality of the case study, the following refers to the pre-reform Asylum Procedures Directive.

207 In more detail on Art. 38 Asylum Procedures Directive see CJEU (First Chamber), judgement of 19 March 2020, LH v Bevándorlási és Menekültügyi Hivatal, C-564/18, para 36–39.

208 Daniel Thym, „Why the EU-Turkey Deal is Legal and a Step in the Right Direction", Verfassungsblog of 09/03/2016; Roman Lehner, „The EU-Turkey-'deal': Legal Challenges and Pitfalls", *International Migration* 57 (2018), p. 176-185.

originating from Europe are concerned,[209] whereas refugees originating from Syria and all other relevant countries fall outside the scope of the Convention and instead receive, if at all, a form of temporary protection.[210] Some argue that Art. 38 must be interpreted as meaning that the third country must have ratified the Refugee Convention and thus conclude that Türkiye cannot be considered as a safe third country.[211] Others stress that the provision can also be understood as meaning that it is sufficient for the third country to provide a protection standard that is equivalent to what is required under the Refugee Convention.[212]

This dispute on Art. 38 Asylum Procedures Directive notwithstanding, the main point of discussion is whether the Turkish protection regime ensures a sufficient standard of protection, i.e. at least a standard equivalent to protection under the Refugee Convention.

The CJEU has not pronounced itself on that question yet. This can partly be explained by a political unwillingness on the part of national courts to provoke a decision by the CJEU on that matter.[213] The Greek Council of State, in the mentioned procedure, refrained from referring a preliminary question to the CJEU, arguing, albeit unconvincingly, that the legal question at stake was an acte clair.[214] Following this example, lower Greek administrative courts have since then refrained from making a reference to the CJEU. Courts of other member states are rarely concerned with the

209 UNHCR, Convention Relating to the Status of Refugees, States parties, including reservations and declarations, to the 1967 Protocol Relating to the Status of Refugees as of 4 October 1967, https://www.unhcr.org/5d9ed66a4, p. 4.

210 See only Meltem Ciger-Ineli, „Protecting Syrians in Turkey: A Legal Analysis", *International Journal of Refugee Law* 29 (2017), p. 555-579.

211 See, for instance, Administrative Court of Munich, interim decision of 17 July 2019, para 55; https://www.asylumlawdatabase.eu/de/case-law/germany-administrative-court-munich-17-july-2019-m-11-s-1950722-m-11-s-1950759-0.

212 In this direction Rainer Hofmann, Adela Schmidt, „Ist die Türkei für Asylantragsteller ein sicherer Drittstaat? – Das Urteil des Hellenischen Staatsrats vom 22.9.2017", *Zeitschrift für Ausländerrecht und Ausländerpolitik* 38 (2018), p. 1-6, p. 4 with further references including to European Commission, Communication from the Commission to the European Parliament and the Council on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration, 10 February 2016, COM(2016) 85 final, p. 18.

213 See chapter 3, 2.2.

214 Greek Council of State, decision of 22 September 2017, 2347/2017. The assumption of an acte claire is unconvincing in light of CJEU, judgment of 6 October 1982, Srl CILFIT v Ministero della Sanità, C-283/91, para 16: 'Finally, the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved.'.

issue and have so far not been willing to refer either. To the remainder, the lack of case law is due to the CJEU's own political unwillingness to decide on the matter. When the CJEU had an occasion to pronounce itself on whether Türkiye qualified as safe, namely in the procedure concerning the action for annulment against the EU-Türkiye Statement, the CJEU dismissed the action as inadmissible with the consequence that the question of Art. 38 Asylum Procedures Directive fell outside the scope of its jurisdiction.[215]

The ECtHR, in the same vein but for different reasons than the CJEU, has so far also remained silent on the question of whether deportation to Türkiye amounts to refoulement. Unlike before the CJEU, however, this could change soon, as several individual complaints invoked a violation of Art. 3 ECHR due to deportation from Greece to Türkiye are pending.[216]

Yet, both the CJEU and the ECtHR have recently provided general guidance on the interpretation of the safe third country concept. Mainly in the context of cases concerning deportations from Hungary to Serbia, the CJEU has detailed its interpretation of Art. 38 Asylum Procedures Directive,[217] and the ECtHR, in turn, has specified its interpretation of Art. 3 ECHR in relation to protection elsewhere clauses.[218]

Amongst other things, the ECtHR emphasised that the assessment of the situation in the third country must necessarily take into account the factual situation and that it is the duty of the expelling state to seek all relevant information to substantiate the argument that the third country is safe for the concerned applicant.[219] In the words of the ECtHR in *Ilias and Ahmad*, 'the expelling state cannot merely assume that the asylum seeker will be treated in the receiving third country in conformity with the Convention

215 CJEU, orders of 28 February 2017, NF v European Council (EU-Turkey Statement), T-192/16 (fn. 54).

216 ECtHR, Communication of 18 May 2017, J.B. v Greece, Application No. 54796/16; ECtHR, Dana Ebrahimnezhad v Türkiye, Salih Braim Ahmed Ahmed v Türkiye, Application nos. 53614/19 and 56562/19.

217 See only CJEU, judgment of 25 July 2018, Alheto, C-585/16 (fn. 174); para 121–130; CJEU, Court (First Chamber), judgement of 19 March 202, LH v Bevándorlási és Menekültügyi Hivatal, C-564/18, para 36–47; CJEU, judgement of 14 May 2020, FMS, C-924/19 PPU et al (fn. 151), para 148–165.

218 ECtHR, judgement of 21 November 2019, Ilias and Ahmed v Hungary, Application No. 47287/15.

219 Ibid., para 65–78; ECtHR, judgement of 5 December 2013, Sharifi v Austria, Application No. 60104/08, para 31–32; ECtHR, judgement of 21 January 2011, M.S.S. v Belgium and Greece (fn. 136), para 359.

standards but, on the contrary, must first verify how the authorities of that country apply their legislation on asylum in practice.'[220]

Against this background, it is very problematic that the decision of the Greek Council for State, which has long been cited as confirming that Türkiye is generally safe for Syrian applicants, was based on the factual situation as presented by Turkish diplomats,[221] and stood in stark contradiction to the situation as presented by independent studies.[222]

Today, one of the central problems in assessing the situation in Türkiye is that, due to the increasing state repression of NGOs and lawyers in Türkiye, there are hardly any up-to-date independent situation reports.[223] While this as such speaks against considering Türkiye as safe, most assessments by the EUAA, formerly EASO, as well as decisions by the Greek Asylum Service simply rely on outdated information.[224]

This being said the scarce available and reliable information shows that Türkiye cannot be considered a safe third country under Art. 3 ECtHR, let alone under Art. 38 Asylum Procedures Directive. Several reliable sources

220 ECtHR, judgement of 21 November 2019, Ilias and Ahmed v Hungary (fn. 218), para 141. In addition to general information, the expelling state must also give 'sufficient opportunity' to the concerned person to demonstrate that the country in question is not safe in their particular case, see ibid. para 148.

221 Greek Council of State, decision of 22 September 2017, 2347/2017; Angeliki Tsiliou, „When Greek judges decide whether Turkey is a Safe Third Country without caring too much for EU law", eumigrationlawblog of 29/05/2018; Rainer Hofmann, Adela Schmidt, „Ist die Türkei für Asylantragsteller ein sicherer Drittstaat? – Das Urteil des Hellenischen Staatsrats vom 22.9.2017" (fn. 212), p. 3.

222 Orcun Ulusoy, Hemme Battjes, „Situation of Readmitted Migrants and Refugees from Greece to Turkey under the EU-Turkey Statement", *VU Migration Law Series* (2017); Ilse van Liempt, Maybritt Jill Alpes, Saima Hassan, Sevda Tunaboylu, Orcun Ulusoy, Annelies Zoomers, *Evidence-Based Assessment of Migration Deals. The case of the EU-Turkey Statement*, 2017, https://www.uu.nl/en/research/human-geography-and-planning/evidence-based-assessment-of-the-eu-Turkey-refugee-deal, p. 20 et seq.

223 See only the preface of ECRE, Country Report Türkiye, 2021 Update, https://ecre.org/aida-2021-update-turkiye/, noting that, while the original report and earlier update was drafted by Refugee Rights Turkey, 'the updates since 2017 have been researched and drafted by an independent consultant' and stressing that 'access to official information on the situation of persons under international or temporary protection in Turkey remains limited to date'. For instance, NGOs such as Mülteci-Der have retrieved most of their relevant publications from their website, with currently only one report on sexual and reproductive health being available in English, see https://multeci.org.tr/en/category/publications/.

224 Equal Rights Beyond Borders, July 2021, Consequences of the EU-Turkey Statement (fn. 40), p. 21–24.

report that readmitted persons are regularly subject to detention in Türkiye or to subsequent deportation to their country of origin, including Syria, often without the practical possibility to challenge these decisions before a court.[225] Further, there are numerous reports of severe discrimination, mistreatment or violent abuse on the part of Turkish authorities, of a lack of access to the temporary protection regime, and of a failure of Turkish authorities to provide emergency medical care, food, housing and further similarly basic rights.[226] Based on the factual situation as presented by independent sources, it can hence neither established that there is no risk of persecution in Türkiye, nor that Türkiye respects the non-refoulement principle, nor that Türkiye de facto grants protection that corresponds to protection under the Refugee Convention.

ii *The Administrative Practice in the EU Hotspots*

The practice in the EU hotspots concerning the application of the safe third country concept has evolved over time.[227] Between 2015 and 2019, the Greek asylum service has, in the overwhelming majority of cases, concluded that Türkiye could be considered a safe third country, but these decisions were routinely overturned on Appeal.[228] The arguments of the Appeals Committees were similar to those just presented in the application of the ECtHR's jurisprudence. As mentioned above, the Appeals Committees were then recomposed, which resulted in them generally considering Türkiye as a safe third country.[229]

225 EASO, Country of Origin Information Report, Syria Situation of returnees from abroad, 2021, p. 12–13 with further references; Amnesty International, 2019, Sent to a War Zone: Turkey's Illegal Deportations of Syrian Refugees, p. 5; Human Rights Watch, 24 October 2019, Turkey: Syrians being deported to danger, https://www.hrw.org/news/2019/10/24/Türkiye-syrians-being-deported-danger.

226 ECRE, Country Report Türkiye, 2021 Update (fn. 223), in particular p. 14–19, 26–49, 78–81, 114, 140; Equal Rights Beyond Borders, July 2021, Consequences of the EU-Turkey Statement (fn. 40), p. 14–19 with further references.

227 For a comprehensive case law report based on the analysis of 127 decisions see Greek Council for Refugees, HIAS, RSA, January 2021, Asylum Case Law Report, https://rsaegean.org/en/greek-asylum-case-law-report-issue1/ (available only in Greek).

228 Mariana Gkliati, „The Application of the EU-Turkey Agreement: A Critical Analysis of the Decisions of the Greek Appeals Committee", *European Journal of Legal Studies* 10 (2017), p. 81–124, p. 83.

229 See chapter 1, fn. 130 et seq.

Since the summer of 2020, the decision-making practice has changed again. This is due to a Joint Ministerial Decision (JMD), which classified Türkiye as a safe third country for persons originating from Afghanistan, Syria, Somalia, Bangladesh and Pakistan.[230] The issuance of the JMD immediately had the effect that asylum claims were frequently rejected as inadmissible based on the argument that Türkiye could be considered as safe.[231] The situation in Türkiye, however, had not substantially changed in the relevant period, nor had the information basis been improved.[232] In fact, most decisions were based on a template reasoning that combines standard sentences and references without, however, providing a single convincing argument as to why Türkiye should suddenly be considered safe.

It hence clearly appears that the Greek asylum service systemically misapplies the concept of a safe third country. For the purpose of this study, the crucial point is that both the EUAA and Frontex are involved in this systemic misapplication.

First, the EUAA typically recommends considering Türkiye as a safe third country. In fact, the agency often considers Türkiye as safe on the basis of standard reasoning and without taking sufficient account of the individual situation of the applicant concerned.[233] This practice, as such, violates Art. 38 Asylum Procedures Directive: for although the EUAA's recommendation is not formally binding upon the Greek asylum service,

230 ECRE, 3 December 2021, Greece: Government Continues NGO Crackdown, Closed Controlled Centres Close in on Asylum Seekers, Significant Jump in Negative Decisions Since Turkey Declared Safe Third Country (fn. 165); Equal Rights Beyond Boders, HIAS Greece, Refugee Support Aegean, September 2022, The State of the Border Procedure on the Greek Islands (fn. 134), p. 19–25. Note that the JMD was subject to review before the Council of State, see RSA, 8 October 2021, Decision declaring Turkey a "safe third country" brought before Greek Council of State, https://rsaegean.org/en/Turkey-a-safe-third-country-greek-council-of-state/.

231 Twitter, Account Minos Mouzourakis, 26 November 2021, Clear Signs of Impact of New Greek Safe Third Country Policy From Official EU Data, https://twitter.com/MinosMouz/status/1464209455726436355?s=20. See in more detail on the effects of the JMD: Equal Rights Beyond Borders, 28 February 2022, Submission to the Special Rapporteur on the Human Rights of Migrants, Human Rights Violations at International Borders: Trends, Prevention and Accountability, https://equal-rights.org/resources/publications, p. 4–5.

232 RSA, Common Statement by NGOs and civil society actors, 14 June 2021, Greece deems Turkey "safe", but refugees are not, https://rsaegean.org/en/greece-deems-Turkey-safe-but-refugees-are-not/#endnote-2.

233 Equal Rights Beyond Borders, July 2021, Consequences of the EU-Turkey Statement (fn. 40), p. 13–19; own observation of the author (see introduction, fn. 103).

it is certainly obliged to provide a legally correct recommendation. In addition, Art. 34 para 1 Asylum Procedures Directive, now Art. 59 para 4 lit. a reformed Asylum Procedures Regulation, is frequently violated, as it provides that applicants must be allowed to present their views with regard to the application of the safe third country concept in their particular circumstances.

At the same time, the EUAA's practice also violates the procedural dimension of the non-refoulement principle. It is an essential element of the right not to be refouled that an applicant can fully express all individual circumstances that might speak against the consideration of a particular third country as safe for them and that the responsible authority takes those circumstances into account.[234] The EUAA, however, often fails to give the applicant an effective opportunity to explain their individual experiences, often fails to assess those individual circumstances, and usually relies on outdated general information instead.[235] The agency thus typically violates the applicant's fundamental rights under Art. 4, 18, 19 ChFR too.

Remarkably, the EUAA has continued to consider Türkiye as safe even after readmissions to Türkiye were halted in March 2020.[236] This is problematic because the safe third country concept is based on the idea that the concerned person can effectively seek protection in the third country. With regard to a country that denies asylum seekers access to its territory, this rationale cannot apply. This is confirmed by Art. 38 para 4 Asylum Procedures Directive, which provides that a subsequent asylum procedure must be conducted if the third country does not permit the applicant to enter its territory.[237] In a situation in which it is already unequivocally clear at the time of the inadmissibility decision that the third country will not allow the applicant to enter its territory, it hence follows that this country cannot be considered as safe from the outset. Otherwise, the inadmissibility procedure would become a procedural step that merely delays the proce-

234 As expressly laid down in Art. 38 para 2 lit c Asylum Procedures Directive.

235 Equal Rights Beyond Borders, July 2021, Consequences of the EU-Turkey Statement (fn. 40), p. 21–24.

236 Ibid., p. 3–4, 14–15, 32.

237 Transposed in Art. 91 para 5 of the Greek Asylum Code which providing that 'where the third country in question does not allow the applicant to enter its territory, his application shall be examined on the merits by the Competent Examination Authority' (translation by Equal Rights Beyond Boders, HIAS Greece, Refugee Support Aegean, September 2022, The State of the Border Procedure on the Greek Islands (fn. 134), p. 21).

dure but is completely futile.[238] In sum, the EUAA's more recent practice violates Art. 33, 38 Asylum Procedures Directive, now 38, 59 reformed Asylum Procedures Regulation, and the non-refoulement principle already for the simple reason that Türkiye de facto refuses to take back asylum seekers.

Nonetheless, and second, Frontex supports the enforcement of deportations to Türkiye. Inter alia, the agency provides vessels, technical support, and personnel to accompany forcible returns.[239] Despite the low number of actual deportations, Frontex's misconduct in this context qualifies as systemic because the agency assists in all cases in which deportation actually occurs.

More precisely, Frontex's assistance is unlawful because enforcing deportations to a non-safe third country in itself constitutes a violation of the non-refoulement principle. Certainly, Frontex is not obliged to assess whether an individual deportation is unlawful or not. However, when Frontex becomes aware of indications that a deportation in which it provides assistance violates the non-refoulement principle, it is arguably obliged to inform the host member state and to recommend that the concrete deportation be halted. This follows from the Frontex Regulation which stresses that the agency must guarantee, within the limits of its competences of course, that the non-refoulement principle is granted.[240] This must mean that the agency is obliged to inform the host member state when it becomes aware of indications or evidence as to the unlawfulness of a concrete deportation in which it is assisting. Otherwise, the agency could provide support to unlawful deportations, which would be in breach of Art. 1 Frontex Regulation and Art. 51 para 1 ChFR.

To conclude, the EUAA's recommendation to consider Türkiye as safe, as well as Frontex's assistance in deportations to Türkiye, violates Art. 4, 18, 19 ChFR. The agencies thus engage in systemic misconduct, which results in fundamental rights violations.

238 For the Commission's opinion on that issue see Equal Rights Beyond Boders, HIAS Greece, Refugee Support Aegean, September 2022, The State of the Border Procedure on the Greek Islands (fn. 134), p. 21.

239 Frontex JO Poseidon OP 2019 (fn. 27), 4.1 – 4.3, and especially 4.3.9. on support of implementation of readmission activity.

240 Frontex Regulation, passim, in particular Art. 1, Art. 48 para 1 thereof.

3.3. Qualification as Systemic Deficiencies

It has been established that violations of Art. 4, 6, 24, 18, 19, 24 and 41 ChFR occur on such a regular basis and in such a large number of cases that these violations must be seen as 'built-in' to EU hotspots, in the sense that the construction of the integrated EU hotspot administration as such produces systemic fundamental rights violations. The following justifies the qualification of such deficiencies as 'systemic'.

The notion of systemic deficiencies, systemic deficits, or systemic breaches is an old and widespread one. Its main purpose is to set a threshold of gravity or seriousness beyond which a certain legal or political response becomes necessary.[241] In the context of EU law, there are two main strands of discourse on systemic deficiencies, one concerning the specific context of the asylum system,[242] and one concerning the more general context of the rule of law crisis.[243] While these two strands of discussion increasingly tend to overlap,[244] they are still not fully congruent in terms of structure, argument and telos.

Beginning with the specific context of the asylum system, the notion of systemic deficiencies was developed by the CJEU in its *N.S.* line of

241 On the history and general function Evangelia (Lilian) Tsourdi, Cathryn Costello, „'Systemic Violations' in EU Asylum Law: Cover or Catalyst?", *German Law Journal* 24 (2023), p. 982–994, p. 982 et seq.

242 And similar sub-systems based on mutual trust, see e.g. Anna Lübbe, „'Systemic Flaws' and Dublin Transfers: Incompatible Tests Before the CJEU and the ECtHR?", *International Journal of Refugee Law* 27 (2015), p. 135-140; Cathryn Costello, „Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored", *Human Rights Law Review* 12 (2012), p. 287-339, p. 331; Evangelia (Lilian) Tsourdi, Cathryn Costello, „'Systemic Violations' in EU Asylum Law: Cover or Catalyst?" (fn. 241); Valsamis Mitsilegas, „The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual", *Yearbook of European Law* (2012), p. 319–372; also Koen Lenaerts, „La vie après l'avis: Exploring the Principle of Mutual (Yet Not Blind) Trust", *Common Market Law Review* 54 (2017), p. 805-840, p. 828 et seq.

243 Armin von Bogdandy, Michael Ioannidis, „Systemic Deficiency in the Rule of Law: What it is, what has to be done, what can be done", *Common Market Law Review* 51 (2014), p. 59–96; Armin von Bogdandy, „Principles of a Systemic Deficiencies Doctrine: How to Protect Checks and Balances in the Member States", *Common Market Law Review* 57 (2020), p. 705-740.

244 Evangelia (Lilian) Tsourdi, Cathryn Costello, „'Systemic Violations' in EU Asylum Law: Cover or Catalyst?" (fn. 241), p. 989 et seq.

jurisprudence,[245] which incorporated and adapted the ECtHR's *M.S.S.* line of jurisprudence to the EU legal order.[246] The main function of the notion of systemic deficiencies was to set a threshold for rebutting mutual trust in the context of intra-EU deportations or transfers.[247] As the CJEU put it in *N.S.,* the assumption of mutual trust between member states cannot hold when 'there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter'.[248] Accordingly, systemic deficiencies in the asylum system are generally understood to mean particularly grave and widespread violations that are embedded in a national asylum system.[249]

With regard to the case at hand, however, this consolidated understanding is challenged insofar as it focuses on deficiencies at the national level. In the case of EU hotspots, the key question is whether breaches can be qualified as systemic even when they occur at the EU level or in the context of the integrated administration. In other words, the question is whether the fact that the EU is involved speaks against the conceptualisation of regular and grave fundamental rights violations as 'systemic'. While an in-depth discussion of this question would go beyond the scope of this chapter,[250] a few observations must suffice here. First, the focus of the consolidated

245 CJEU, judgment of 21 December 2011, N.S. et al, C-411/10 et al (fn. 141), para 86–106.

246 ECtHR, judgement of 21 January 2011, M.S.S. v Belgium and Greece (fn. 136). For the history of the concept's history in international human rights law see Evangelia (Lilian) Tsourdi, Cathryn Costello, „'Systemic Violations' in EU Asylum Law: Cover or Catalyst?" (fn. 241), p. 984–985, and for a convincing critique of the CJEU's adaption of the ECtHR's concept see ibid, 985–988 with further references to earlier literature, especially in fn. 16.

247 See CJEU, Court, Opinion of 18 December 2014 on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 2/13, para 191–195; Bruno De Witte, Šejla Imamovic, „Opinion 2/13 on accession to the ECHR : defending the EU legal order against a Foreign Human Rights Court", *European Law Review* 40 (2015), p. 683-705.

248 CJEU, judgment of 21 December 2011, N.S. et al, C-411/10 et al (fn. 141), para 83–86.

249 Evangelia (Lilian) Tsourdi, Cathryn Costello, „'Systemic Violations' in EU Asylum Law: Cover or Catalyst?" (fn. 241), p. 983.

250 For a work in this direction see Evangelia (Lilian) Tsourdi, Cathryn Costello, „'Systemic Violations' in EU Asylum Law: Cover or Catalyst?" (fn. 241), p. 992: 'the CEAS that entails policies and practices that are nearly certain to expose protection-seekers to recurrent human rights violations', p. 993: 'Where the CEAS leads to systemic human rights violations, (…).', i.e. arguing that the CEAS 'facilitates' systemic breaches.

notion on the national level is not conceptually motivated but due to its historical genesis and doctrinal function.[251] Second, this chapter has shown empirically that the vertically integrated administration can result in the systemic violation of fundamental rights, including Art. 4 ChFR. Third, taking seriously the observation that the EU has become a threat to the fundamental rights of asylum seekers and refugees[252] necessarily implies that systemic deficiencies can occur at EU level. For the purpose of this study, it is hence concluded that the integrated asylum administration can be characterised by systemic deficiencies.

The second and more general strand of discussion on systemic deficiencies emerged in the context of the rule of law crisis in several EU member states and developed the notion as a significant threshold to trigger a specific legal and political response. In a nutshell, breaches of EU law are deemed 'systemic' when they constitute a persistent and significant deviation from the values enshrined in Art. 2 TEU.[253] Taking this argument one step further, and based on the understanding that there is a European society which is held together by its striving towards the realisation of the values enshrined in Art. 2 TEU,[254] it follows that systemic deficiencies in this broad sense must appear as grave deficits of the European society.

Applying this more general concept to the context at hand hence leads to the question of whether systemic deficiencies in the integrated asylum administration qualify as grave societal deficits. This is not a question for the ivory tower; it makes a decisive difference, in concrete political and legal terms, whether systemic deficiencies in the asylum system are understood as grave deficits of the European society or not.[255] Again, given the scope of this chapter, sketching a few points must suffice here. Clearly, systemic

251 See Evangelia (Lilian) Tsourdi, Cathryn Costello, „'Systemic Violations' in EU Asylum Law: Cover or Catalyst?" (fn. 241).

252 See chapter 1, I.

253 Armin von Bogdandy, Michael Ioannidis, „Systemic Deficiency in the Rule of Law" (fn. 243).

254 Armin von Bogdandy, *The Emergence of European Society through Public Law. A Hegelian and Anti-Schmittian Approach*, Oxford University Press 2024, p. 3 et seq., on systemic deficiencies p. 162 et seq.

255 The answer to this question is relevant for the understanding of who forms part of the European society, but also for the understanding of EU law as a tool for transforming the European society. For instance, if systemic deficiencies were grave deficits of the European society, this would argue in favour of the applicability of rule of law mechanisms in this context; in this direction Evangelia (Lilian) Tsourdi, Cathryn Costello, „'Systemic Violations' in EU Asylum Law: Cover or Catalyst?" (fn.

violations of fundamental rights, including of Art. 4 ChFR, constitute a deviation from the EU's foundational values. Thus, an argument against qualifying systemic deficiencies in the asylum system as grave societal deficits would have to posit that it was a prerequisite for the latter that the violation of the values results primarily in the violation of the rights of EU citizens.[256] Put differently, only if violations of the fundamental rights of third-country nationals were less serious, in light of Art. 2 TEU, than similar violations affecting EU citizens, one could say that systemic deficits in the asylum system are not deficits of European society. Such an argument, however, could not be convincing. Art. 2 TEU does not establish a two-track system of values, nor does it provide for two versions of the rule of law,[257] which differ according to whether the persons affected by European public authority are EU citizens or not. Such reading would not only be a misinterpretation of Art. 2 TEU but would also reintroduce the long-overcome idea of migration law exceptionalism[258] through the back door. The values enshrined in Art. 2 TEU, by their very nature, must apply to any exercise of public authority within the EU, be it towards citizens or non-citizens.

Therefore, it is concluded here, for the purpose of this study, that systemic deficiencies in the vertically integrated asylum administration fall under the notion of 'systemic deficiencies' in the sense of the rule-of-law strand, too. The systemic violation of the fundamental rights of asylum seekers must be qualified as a deficiency of the European society as such. This is consistent not only from a doctrinal but also from a societal perspective: The normative standards of society are tested precisely when it comes to the treatment of those persons who do not or not yet have the

241), p. 989 et seq., albeit not referring to the specific context of the integrated administration.

256 Or distinguish on the basis of a similar membership marker, e.g. denizenship.

257 Barbara Grabowska-Moroz, Dimitry Vladimirovich Kochenov, „The Loss of Face for Everyone Concerned. EU Rule of Law in the Context of the 'Migration Crisis'", in V Stoyanova, S Smet (ed.), *Migrants' Rights, Populism and Legal Resilience in Europe*, Cambridge University Press 2022, p. 187–208, passim.

258 Migration law exceptionalism is understood here to refer to the idea that migration law escapes general constitutional principles or even human rights law. See with reference to the US American legal system: Peter H. Schuck, „The Transformation of Immigration Law", *Columbia Law Review* 84 (1984), p. 1-90, 1: 'Immigration has long been a maverick, a wild card, in our public law. Probably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system.'.

status of members. It is precisely in dealing with strangers that it becomes apparent whether a society lives up to its own standards. If the violation of Art. 4, 7, 8, 18, 19, 24, 41 ChFR in ten thousands cases would not constitute a grave deficiency of the society, then the promise of Art. 2 TEU would indeed be rather hollow.

4 Identifying Relevant Misconduct of EU Bodies

Having defined the agencies' and the Commission's involvement, as well as the systemic deficiencies in the EU hotspot administration, this section identifies the EU's specific misconduct. This is necessary because determining whether the EU is legally responsible for fundamental rights violations necessarily requires a precise definition of the misconduct in question. Put differently, only once it is clear what the misconduct is can it be discussed which procedure is best suited to address it before the CJEU.[259]

4.1 The EUAA's Misconduct at Operational Level

The EUAA systemically commits two procedural errors that amount to a violation of Art. 41 ChFR, and hence qualify as inherent violations. First, the agency often fails to conduct a correct vulnerability assessment, and second, it often makes mistakes during the conduct of the asylum interview. These mistakes are well illustrated in cases 1 and 2.

> *Case 1 – Sara Esmaili – Deficient vulnerability assessment (EUAA)*
> Although Ms Esmaili, being a pregnant single mother and a survivor of severe sexual and gender-based violence, clearly qualifies as vulnerable, the EUAA failed to identify and recognise her special needs. This constitutes a violation of Art. 22 para 1 Reception Conditions Directive, providing for the obligation to assess whether the applicant has special reception needs, and Art. 24 para 1 Asylum Procedures Directive, providing for the obligation to assess whether the applicant is in need of special procedural guarantees.[260] Due to the central importance of the

259 This will be discussed in the following chapters. On this basis, the following chapter will then discuss whether the identified instances of misconduct incur liability under Art. 41 para 3 ChFR, Art. 340 para 2 TFEU, or not.

260 Now Art. 25 para 1, 24 et seq. reformed Reception Conditions Directive.

vulnerability assessment to the asylum procedure in EU hotspots, the failure to give Ms Esmaili the opportunity to fully explain her particular situation also constitutes a violation of the right to be heard under Art. 41 para 2 lit a ChFR.

Case 2 – Magan Daud – Deficient asylum interview (EUAA)
In the case of Mr Daud, the EUAA conducted the interview in a semi-open space so that his answers could be easily overheard by the adjacent interviewee speaking the same language. This constitutes a breach of Art. 15 para 2 Asylum Procedures Directive which provides that the appropriate confidentiality must be granted.[261] Further, the EUAA provided an incomplete transcript, thereby violating Art. 17 para 1 Asylum Procedures Directive, according to which a thorough and factual report containing all substantive elements or a transcript shall be made of every personal interview.[262] Taking into consideration that the interview conducted by the EUAA is the only opportunity for Mr Daud to express the reasons for his claim for international protection, the failure to provide a complete transcript also violates his right to be heard under Art. 41 para 2 lit a ChFR because it deprives him of the possibility to review and, if necessary, complement his claim.
Moreover, the responsible EUAA caseworker conducted the admissibility interview in a manner that was primarily aimed at ending the interview quickly, asked standard questions only, and applied a template reasoning instead of analysing the specific circumstances of the individual case. In particular, she brushed aside Mr Daud's references to his experience of torture in Syria with the argument that this was an admissibility interview in which only the applicant's situation in Türkiye would be relevant. She thereby failed to allow Mr Daud to explain that he was tortured in Syria after Türkiye had returned him to his country of origin. This fact, however, was directly relevant to the admissibility interview because it clearly spoke against classifying Türkiye as a safe third country for him. Hence, ignoring the torture claims during the admissibility interview and recommending that Türkiye would be a safe third country for Mr Daud violates Art. 33, 34 para 1, 38 Asylum Procedures Directive, as well as his right to be heard under Art. 41 para 2 lit a ChFR.

261 Now Art. 7 reformed Asylum Procedures Regulation.
262 Now Art. 14 reformed Asylum Procedures Regulation.

Further, the EUAA is also involved in the systemic violation of the non-refoulement principle as granted by Art. 4, 18, 19 ChFR, as it typically misapplies the safe third country concept with regard to Türkiye, including in cases where readmission to Türkiye is de facto impossible due to the halt of the readmission policy.[263] In this constellation, the fundamental rights violation is not inherent in the EUAA's conduct but results from it, as illustrated by case 5.

Case 5 – Kareem Rashid – Misapplication of safe third country concept (EUAA)
In the case of Mr Rashid, the EUAA recommended considering Türkiye as a safe third country, thereby ignoring that the readmission policy had de facto been halted since March 2020. Mr Rashid's asylum claim was hence rejected as inadmissible, but he could obviously not be deported due to the halt of the readmission policy. While he had the right to lodge a subsequent application, he could not make use of that right because Greece had introduced high fees for subsequent applications.[264] As a result, he remained in Greece as a rejected asylum seeker and without access to any state support.

4.2 Frontex's Misconduct at Operational Level

Frontex typically commits two errors. First, it conducts the age assessment on the basis of visual inspection alone, and second, it provides personal and technical support to deportations to Türkiye, including in cases where Türkiye cannot be considered a safe third country. The respective failures are well illustrated with cases 3 and 4. In both cases, the violation of procedural rights is inherent to the agency's misconduct. At the same time, resulting violations come into consideration in both cases, too. As will become clear in the following, this concerns resulting violations relating to reception conditions, as in case 3, and relating to deportation to a non-safe third country, as in case 4.

263 See chapter 1, 2.1.
264 According to Art. 89 para 10 Law 4636/2019 (International Protection Act) as amended by Art. 23 Law 4825/04.09.2021, applicants must pay 100 Euro for every subsequent asylum application. See further ECRE, Country Report Greece, 2021 Update (fn. 45), p. 19, p. 134–135.

Case 3 – Daniat Kidane – Age assessment through visual inspection (Frontex)
In the case of Daniat Kidane, the responsible Frontex expert ignored her explicit claims to be minor. Instead, he exclusively relied on his subjective impression of Daniat's physical appearance and concluded that she was adult. The Frontex expert hence applied his estimation of the physical appearance as the only method for assessing the age. As established above, this constitutes a violation of the procedural rights of the child under Art. 24, 41 ChFR.

Case 4 – Nabeeh Al Badawi – Return to Türkiye (Frontex)
In the case of Mr Al Badawi, Frontex assisted the Hellenic Police in carrying out the unlawful deportation by providing the vessel and personnel to escort the deportation. Before Mr Al Badawi was handed over to Turkish authorities, he again mentioned that he had previously been returned from Türkiye to Syria and that he had subsequently been subject to torture there. He also expressed his fear of again being returned from Türkiye to Syria. The Frontex staff escorting the deportation asked for an interpreter and took note of Mr Al Badawi's concerns. He then informed Mr Al Badawi that he should have raised these concerns during the asylum procedure and that, in any case, Greece, and not Frontex, is responsible for assessing asylum claims. Accordingly, the staff member did not intervene or stop the deportation, nor did he later raise any concerns about the deportation towards the responsible coordinating officer.

4.3 The Commission's Misconduct at Supervisory Level

The Commission's typical misconduct can generally be described as a failure to adequately supervise the EU hotspot administration.[265] This concerns reception conditions as well as asylum and deportation procedures,

265 On the Commission's failure to enforce EU law in the context of the Greek asylum administration more generally, see European Parliament, Resolution of 7 February 2024 on the rule of law and media freedom in Greece, 2024/2502(RSP), para 17, where the Parliament 'calls on the Commission to assess the compliance with EU law of border surveillance systems using behavioural analytics, and *of the EU funding thereof*; condemns the Commission's *dramatic failure to enforce EU laws with regard to reception conditions, pushbacks and human rights*', and para 18, where the Parliament 'calls on the Commission to make *full use of the tools available to*

with the difference being that the Commission's reception-related obligations are broader than its procedure-related obligations. This being said, the Commission's failure to ensure adequate reception conditions – which means at least that basic needs are met and that there is no generic detention scheme – is well illustrated in cases 1, 5 and 6.

Case 1 – Sara Esmaili – Failure to provide humane reception conditions (Commission)
The case of Ms Esmaili and her daughter is representative insofar as the reception conditions in the camp amount to inhumane treatment under Art. 4 ChFR for vulnerable persons. Although this has been documented meticulously, the Commission apparently failed to comply with its obligation under Art. 40 para 3 Frontex Regulation, Art. 21 para 2 EUAA Regulation, Art. 17 TEU to prevent systemic deficiencies. From the outset, the Commission either failed to provide the necessary support or to adequately coordinate its cooperation with the host member state. Once the systemic deficiencies became apparent, the Commission obviously failed to effectively address the issue within the relevant supervisory fora, such as the EURTF and the Steering Committee.

Case 5 – Kareem Rashid – Failure to address limbo situation (Commission)
Similarly, in the case of Mr Rashid, the crucial point is that his case reflects systemic malpractice on the part of the EUAA and Greek authorities since March 2020. The Commission, however, apparently failed to make appropriate use of its competences within the relevant supervisory fora. Remarkably, it was only in June 2021 that the Commission publicly took note of the so-called limbo situation that arose due to the halt of readmissions and clarified that Art. 38 para 4 of the Asylum Procedures Directive was to be interpreted so as to allow asylum seekers affected by the limbo situation to submit a fresh claim for asylum, and that, in the meantime, applicants must be granted access to reception conditions in line with Union law.[266] While this answer can be interpreted as an expression of the Commission's role as a guardian of the Treaties in a

it to address the breaches of the values enshrined in Article 2 TEU in Greece (...)' (emphasis added).

266 Notably in a belated response to a priority question by a member of the European Parliament, see Answer given by Ms Johansson on behalf of the European Commission, EN P-000604/2021, 1 June 2021, available at: https://www.europarl.europa.eu/doceo/document/P-9-2021-000604-ASW_EN.pdf.

broad sense, it is not sufficient to comply with its concrete supervisory obligations under Art. 40 para 3 Frontex Regulation, Art. 21 para 2 EUAA Regulation. The Commission not only failed to take into account that the application of the safe third country as such is unlawful in a situation where the concerned third country generally refuses to accept readmissions but also acted in an ineffective manner, as shown by the fact that its intervention has not led to an adaption of the administrative practice in EU hotspots.

Case 6 – Reem Saeed – Failure to address the practice of prolonged detention (Commission)
In the case of Ms Saeed, it is again crucial that the violation of Art. 6 ChFR reflects a generic issue. And again, the Commission, despite its knowledge of the systemic malpractice in Kos, apparently failed to ensure that the host member state refrains from systemically detaining asylum seekers. Instead, the Commission continued to provide operational and financial support and thereby contributed to the maintenance of a general administrative practice that clearly qualifies as unlawful under EU law.

As regards asylum and deportation procedures, the Commission's typical failure to adequately exercise its supervisory obligations consists, in particular, in a failure to effectively address the EUAA's deficient interview practice and Frontex's deficient age assessment practice. These mistakes are well illustrated with cases 2 and 3.

Case 2 – Magan Daud – Failure to address the deficient interview practice (Commission)
As established above, the EUAA's malpractice in the context of asylum interviews is not limited to the case of Mr Daud, but of general nature. Accordingly, the Commission was obliged, under Art. 40 para 3 Frontex Regulation, Art. 21 para 2 EUAA Regulation, Art. 17 TEU, to address this issue in the framework of the EURTF and the Steering Committee. In particular, the Commission should have effectively exerted influence upon the EUAA to ensure that the agency does not systemically violate EU law.[267]

267 Despite the agencies' independence, the Commission is obliged to supervise the agencies' conduct in the EU hotspots. In concrete terms, the Commission could have urged the Executive Director and the coordinating officer to ensure that the agency does not systemically overstep its competences or engage in fundamental rights violations.

Case 3 – Daniat Kidane – Failure to address the deficient age assessment practice (Commission)
Again, as the agency's misconduct in the procedure of Daniat Kidane is an expression of a systemic malpractice, the Commission was obliged to address this issue. The Commission, however, apparently failed to address the issue through exerting influence on Frontex in the framework of the EURTF or the relevant Steering Committees, and thereby failed to comply with its supervisory obligation under Art 40. para 3 Frontex Regulation, Art. 21 para 2 EUAA Regulation, Art 17 TEU.

5 EU Responsibility for EU Hotspots?

In sum, this chapter has found that the EU, without issuing formally-binding decisions, de facto determines the course of the EU hotspot administration. There is no single aspect on which the EU does not have a major impact: The Commission has proposed and implemented the original EU hotpot approach in 2015, it has proposed and implemented the reformed EU hotspot approach 2.0 in 2021 and has throughout been responsible for overall coordination and supervision. EU agencies provide extensive operational support, including the adoption of guidelines, the provision of training, and also the conduct of asylum and deportation procedures in direct interaction with the concerned individuals. And the EU funds the centres to a considerable and increasing extent.

Against this background and in responding to recent calls by scholarship,[268] the remainder of this study will focus on judicial protection against the EU. The aim is to enable the CJEU, as the court responsible for safeguarding the rule of law in its EU dimension, to scrutinise the EU's involvement in the EU hotspot administration and to decide whether or to what extent the EU itself bears responsibility for fundamental rights violations. In doing so, the approach will be to make use of EU constitutional law as it currently stands and unfold the potential of the rule of law as enshrined in Art. 2 TEU – more precisely, of the fundamental right to effective judicial protection, the doctrine of a complete system of legal remedies, and the idea of vigilant individuals. As it follows from these guarantees that the EU's administrative conduct must necessarily be subject to judicial review,

268 See introduction, 5.

the question will not so much be whether but rather through which procedure the EU can be brought before the CJEU.