Chapter 1: The EU's New Role in the Asylum Administration

This chapter presents the EU hotspot administration as a paradigm example of the EU's new role in the asylum administration. The first section briefly outlines how the role of the EU has changed in the aftermath of the 2015 crisis. The key observation is that EU bodies have become crucial to the functioning of the European asylum administration. As a consequence, the EU has become an 'ordinary' public actor in the sense that it not only protects refugee rights but also poses a potential threat thereto (1).[1] On this basis, the second section reconstructs the EU hotspot administration, including its history and regulatory framework. This shows that EU hotspots were conceived as an 'administrative experiment' and, until today, function as a 'testing ground' for the EU's new administrative role (2). The following sections then zoom in on the EU's new role and outline its main administrative actors and forms of operation. The third section portrays the EU asylum agency (EUAA, formerly EASO), the EU border agency (Frontex), and the European Commission (3). The fourth section presents support and supervision as the main forms of administrative conduct at the EU level and, on this basis, argues that the EU, in the context of the asylum administration, mainly 'determines without deciding'. This means that the EU steers and guides the course of the administration without, however, issuing formally-binding decisions to individuals – this task is always left to member states. The lack of formal bindingness in the EU's conduct is precisely what makes it so difficult, but at the same time utterly necessary, to establish possibilities for judicial protection (4).

1 An observation that might seem obvious considering the EU's colonial legacies – a perspective that is well-established in historical scholarship, see e.g. Peo Hansen, Stefan Jonsson, *Eurafrica: The Untold History of European Integration and Colonialism*, Bloomsbury Academic 2014, but only recently emerging in legal scholarship, see e.g. Hanna Eklund, „Peoples, Inhabitants and Workers: Colonialism in the Treaty of Rome", *The European Journal of International Law* 34 (2023), p. 831-854. Based on the still prevailing narrative in legal scholarship, however, the EU's role in the European asylum system is often reconstructed as a protector of refugee rights against member states, see in more detail 1.1.

1 Granting and Threatening Rights

From the perspective of the European Commission, the overarching aim of the 2015 crisis response was to reduce the number of asylum seekers that arrived in the EU and to 'restore order', as it was often framed, at external borders.[2] To this end, the EU considerably stepped up its own involvement at all levels of the European asylum system, ranging from external relations to administrative support in individual asylum procedures.[3]

As a result of this process, the traditional narrative of the EU as a defender of refugee rights against member states can no longer persist. Today, it is clear that the EU itself poses a potential threat to the rights of asylum seekers and refugees. The EU has become an 'ordinary' public actor in the sense that it does what most public actors in the Global North do: it pursues harsh externalisation policies by taking measures at all regulatory levels, including legislation and soft law, international agreements and 'deals', as well as, more recently, administrative regulation and administration.

1.1 The EU as an 'Ordinary' and Ambivalent Public Actor

In the founding phase and first decade of the Common European Asylum System, the EU was largely perceived as a guarantor of refugee rights. Indeed, several major achievements were made at EU level during this period. Among other things, the EU accomplished the creation of an internal allocation mechanism, harmonisation of legislative standards across member states, the introduction of the status of international protection and, arguably most importantly, the conception of refugee rights as fundamental rights. Critical voices focused on human rights violations 'occurring within the Union' rather than those committed by the Union itself and argued that these should be addressed through an even more proactive human

2 See only 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, 10.02.2016, COM(2016) 85 final, p. 3: 'Restoring orderly management of borders on the Eastern Mediterranean/Western Balkans route is the most pressing priority for the European Union today.', p. 8: 'Restoring order in these circumstances requires swift coordinated European action to address the immediate failings as well as to reduce the scale of the migratory inflows themselves.'.

3 In detail on the post-crisis reforms of Frontex and EASO see below 3.

rights policy by the EU.[4] From a constitutional perspective, there were good reasons to see the EU as a defender of refugee rights against member states.[5]

Today – and justified earlier critique from postcolonial studies notwithstanding[6] – such ideas must appear out of place, even from a conventional constitutionalist perspective. At the latest since the crisis, it has become obvious that the EU poses an increasingly serious threat to refugee rights.[7] In fact, the EU has since 2015 adopted a whole series of measures aimed at restricting access to the asylum system and lowering protection standards in Europe.[8] Rather than striving to realise the aspiration to provide international protection to those in need, as its mandate in Art. 78 para 1 TFEU provides, the EU's political focus today clearly lies on shifting responsibility for international protection to third countries and outsourcing responsibilities for the ensuing large-scale human rights violations, too. In brief, the EU has become a classic representative of externalisation policies.[9]

4 Philip Alston, J. H. H. Weiler, „An 'Ever Closer Union' in Need of a Human Rights Policy", *European Journal of International Law* 9 (1998), p. 658–723, p. 670, p. 718–719.

5 Armin von Bogdandy, „The European Union as a Human Rights Organization? Human Rights and the Core of the European Union", *Common Market Law Review* 37 (2000), p. 1307–1338, p. 1317, 1336.

6 See fn. 1.

7 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, p. 190: 'the rule of law is not secured sufficiently, either in the EU or by the EU, causing all concerned to lose face: EU values deserve better.', p. 208: 'both the national (…) and the EU regulatory levels have demonstrated eagerness to annihilate fundamental rights, undermining the basics of the rule of law (…).'.

8 Cathryn Costello, Minos Mouzourakis, „The Common European Asylum System. Where did it all go wrong?", in Maria Fletcher, Ester Herlin-Karnell, Matera Claudio (ed.), *The European Union as an Area of Freedom, Security and Justice*, Routledge 2017, p. 263-299, p. 298–294.

9 'Externalisation' refers to the externalisation of the responsibility to provide protection to refugees to third states. Externalisation policies mainly appear in the form of non-arrival policies; they are often referred to as 'policies of non-entrée', a term coined by James C. Hathaway, „The Emerging Politics of Non-Entrée", *Refugees* 91 (1992), p. 40. See further B. S. Chimni, „The Geopolitics of Refugee Studies: a View from the South", *Journal of Refugee Studies* 11 (1998), p. 350-374, p. 351; Thomas Gammeltoft-Hansen, James C. Hathaway, „Non-refoulement in a World of Cooperative Deterrence", *Columbia Journal of Transnational Law* 53 (2015), p. 235–284, p. 241: 'Whereas refugee law is predicated on the duty of *non-refoulement*, the politics of *non-entrée* is based on a commitment to ensuring that refugees shall not be allowed to arrive.'.

Consequently, the EU's role in the asylum system must be conceptualised as ambivalent: it is both a guarantor and a potential threat to refugee rights. While the EU's major achievements remain central safeguards for refugee protection in Europe, its externalisation policies and related measures clearly pose a threat thereto. Interestingly, this shift in the EU's role is rarely made explicitly in legal scholarship,[10] but most recent contributions seem to agree in substance.[11] Opinions differ, however, when it comes to judging or qualifying the EU's new role. Some argue that the main problem is the EU as such,[12] thereby implying that re-shifting power to regulate asylum to member states would improve refugee protection. But this assumption seems implausible. There is simply no reason why member states should be more open towards receiving refugees than the EU. Based on the understanding of the EU as the polity representing European society,[13] one cannot reasonably expect that willingness to provide protection would be significantly affected simply by switching from one regulatory level to another.[14] Instead, it rather seems plausible that the mechanisms of exclusion at the EU level today are the very same mechanisms that previously

10 See, however, Jürgen Bast, Frederik von Harbou, Janna Wessels, *Human Rights Challenges to European Migration Policy. The REMAP Study*, Nomos 2022, p. 15. In the same direction Evangelia (Lilian) Tsourdi, Cathryn Costello, „'Systemic Violations' in EU Asylum Law: Cover or Catalyst?", *German Law Journal* 24 (2023), p. 982–994, p. 993.

11 See only Violeta Moreno-Lax, „Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States' Obligations to Provide International Protection to Refugees", *European Journal of Migration and Law* 10 (2008), p. 315-364; Melanie Fink, *Frontex and Human Rights. Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law*, Oxford University Press 2018; Cathryn Costello, Itamar Mann, „Border Justice: Migration and Accountability for Human Rights Violations", *German Law Journal* 21 (2020), p. 311–334.

12 In this direction, but differentiated, Steve Peers, „Building Fortress Europe: The Development of EU Migration Law", *Common Market Law Review* 35 (1998), p. 1235-1272; Elspeth Guild, „The Europeanisation of Europe's Asylum Policy", *International Journal of Refugee Law* (2006), p. 630-652.

13 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.

14 As Barbara Grabowska-Moroz, Dimitry Vladimirovich Kochenov, „The Loss of Face for Everyone Concerned. EU Rule of Law in the Context of the 'Migration Crisis'" (fn. 7), p. 189 note 'politically and also legally, deep intolerenace to the migrant other became the new normal in the EU'.

operated at the member state level.[15] Seen from this perspective, the new role of the EU is nothing exceptional. The EU reacts to forced migration in the 21st century as most public actors in the Global North do. Its current role as a potential threat to refugee rights simply reflects that the relevant competences have been shifted to EU level with the Amsterdam Treaty, i.e., that the EU has become key to regulating forced migration to Europe.

Yet, the argument goes beyond the realm of asylum law: in fact, the ambivalence in the EU's new role is a very normal state of public law. Any public actor can guarantee and violate rights, and usually does both. This ambivalence is inherent in the relationship between public actors and individuals, and the fact that the EU is now becoming ambivalent, too, only reflects the 'normalisation' of the EU.[16] The point can be made with examples from every regulatory level, but the administrative context is perhaps the most obvious, as administrative activity inevitably comes with the risk of violating individual rights, and this risk is particularly high in contexts located at the EU external border.[17] When the EU acts as part of the integrated administration, it, hence, necessarily becomes an 'ordinary' public actor.

1.2 The EU as a Critical Actor in Asylum Administration

While the EU's role has shifted at all regulatory levels, its new role has become especially clear at the administrative level. For a long time, legislative

15 The transfer of exclusion mechanisms from member state to EU level becomes very clear in the case of EU citizenship. Moving beyond a mere transfer of 'nationalistic' ideas from member state to EU level would in fact require to reconceptualise EU citizenship as including, in some form, third-country-nationals see Dimitry Kochenov, „The Essence of EU Citizenship Emerging From Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon?", *The International and Comparative Law Quarterly* 62 (2013), p. 97-136, p. 106 with further references.

16 Differently Armin von Bogdandy, „Grundprinzipien", in Armin von Bogdandy, Jürgen Bast (ed.), *Europäisches Verfassungsrecht. Theretische und dogmatische Grundzüge*, Springer 2009, p. 13-71, p. 56 who argues that the relation between Union and individual is only beneficial for the individiual: 'entwickelt der EuGh die Prinzipien in einer Weise, dass die den Einzelnen rechtlich grundsätzlich nur begünstigen, sie betreffen nicht die klassische Dialektik von Hoheitsgewalt und Freiheit.'.

17 Fundamental Rights Agency, Update of the 2016 Opinion on fundamental rights in the 'hotspots' set up in Greece and Italy, February 2019, p. 7: 'The processing of asylum claims in facilities at borders (…) brings along built-in deficiencies. (…) this approach creates fundamental rights challenges that appear almost unsurmountable.'.

integration has been conceptualised as key to the project of a Common European Asylum System (CEAS). At the latest since the 2015 crisis, however, administrative integration has moved into the focus. In fact, administrative cooperation has seen the most significant development in the past decade and, in this sense, constitutes the most recent step towards further integration.

To get a clear understanding of administrative cooperation in the asylum system, two forms of cooperation must be distinguished. First, there is horizontal cooperation among member states. The paradigm example here is cooperation between national asylum authorities in the context of the so-called 'Dublin procedure', i.e. to determine the member state responsible for conducting the asylum procedure. This horizontal form of cooperation, persisting practical difficulties notwithstanding, is largely consolidated.[18]

The second and much less consolidated form is vertical administrative cooperation between member states and EU bodies. This form of cooperation has exponentially gained relevance only since the early 2000s.[19] The initial step in this regard was the foundation of the European Asylum Support Office (EASO) in 2004.[20] Mandated to support member states with the implementation of EU asylum law, the agency provides training as well as general and concrete operational support, which obviously requires close administrative cooperation with member state authorities.[21] Similarly,

18 From the countless contributions on horizontal cooperation see only Jürgen Bast, „Transnationale Verwaltung des europäischen Migrationsraums: Zur horizontalen Öffnung der EU-Mitgliedstaaten", *Der Staat* 46 (2007), p. 1–32; Francesco Maiani, „The Dublin III Regulation: A New Legal Framework for a More Humane System?", in Vincent Chetail, Philippe De Bruycker, Francesco Maiani (ed.), *Reforming the Common European Asylum System*, 2016.

19 Council of the European Union, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, 13 December 2004, OJ C 53/1, 1.3., para 3 for the first time defines the creation of a 'European support office' as a political goal.

20 See Françoise Comte, „A New Agency Is Born in the European Union: The European Asylum Support Office", *European Journal of Migration and Law* 12 (2010), p. 373-405.

21 Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office (hereinafter: EASO Regulation); Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 (hereinafter EUAA Regulation).

other EU agencies such as Frontex,[22] Europol, and Eurojust cooperate with national asylum administrations at both the supervisory and operational levels.[23] And finally, the European Commission is increasingly involved in administrative cooperation, too. Unlike the agencies, however, the Commission mainly operates at the supervisory level, setting administrative guidelines and coordinating administrative cooperation.[24] As will be argued in more detail below, vertical administrative cooperation has gained new momentum in the aftermath of the 2015 crisis, with the EU hotspots representing the most advanced state of administrative integration in the European asylum system today.[25]

To describe and analyse the complex web of administrative cooperation, this study relies on the well-established notion of an 'integrated European administration' and applies it to the context of the asylum system. The concept of an integrated administration, generally speaking, refers to a tension between separation in organisational terms and unification in functional terms.[26] Member state authorities and EU bodies share the same function, namely implementing EU law, while at the same time remaining distinct organisational units. In terms of structure, the European administration is thus characterised by elements of cooperation as well as of hierarchy.[27] In the specific context of the asylum administration, both the separating and the unifying elements are especially pronounced. This is so because, on the one hand, the limits of the Union's competences in the area of asylum and

22 Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 (hereinafter Frontex Regulation).

23 In more detail on Europol's role see David Fernández-Rojo, *EU Migration Agencies. The Operation and Cooperation of FRONTEX, EASO and EUROPOL*, Edward Elgar 2021.

24 See below 3.3.

25 See below 2; chapter 2.

26 Herwig C. H. Hofmann, Alexander Türk, „The Development of Integrated Administration in the EU and its Consequences", *European Law Journal* 13 (2007), p. 253–271; Eberhard Schmidt-Aßmann, „Einleitung: Der Europäische Verwaltungsverbund und die Rolle des Europäischen Verwaltungsrechts", in Eberhard Schmidt-Aßmann, Bettina Schöndorf-Haubold (ed.), *Der Europäische Verwaltungsverbund. Formen und Verfahren der Verwaltungszusammenarbeit in der EU*, Mohr Siebeck 2005, p. 1–23.

27 Eberhard Schmidt-Aßmann, „Europäische Verwaltung zwischen Kooperation und Hierarchie. Festschrift für Helmut Steinberger", in Hans-Joachim Cremer (ed.), *Tradition und Weltoffenheit des Rechts*, Springer 2002, p. 1375-1399, p. 1399.

return are politically charged with the argument of national sovereignty,[28] and on the other hand, sincere cooperation is reinforced by the principles of mutual trust and solidarity.[29] As will become clear throughout this study, this reinforced tension lies at the root of the particular difficulties concerning the allocation of responsibility in the context of the EU hotspots and, at the same time, makes this case study so particularly instructive.

To understand the structure of vertical administrative cooperation, two points are of particular relevance. The first concerns the structure of the EU's administrative competences. Generally, the competence to implement EU law lies with member states, as follows from Art. 197 para 1 and Art. 291 para 1 TFEU. The EU can support member states in their implementation, for instance, through capacity building, as Art. 197 para 2 TFEU provides in general terms. With regard to the asylum system, the Treaties confer additional administrative competences upon the Union. These are enshrined in Art. 78 para 2 and Art. 74 TFEU, and, insofar as return decisions and deportations are concerned, in Art. 77 para 2 lit d and Art. 79 para 2 lit c TFEU. More specifically, Art. 78 para 2 TFEU allows the EU to provide support and supervise member states' authorities with regard to various aspects of the asylum administration, such as the provision of reception conditions and the conduct of asylum procedures. As will become clear throughout this study, the precise scope of the EU's competences is controversial, with dispute arising in particular on the question of whether the EU has the competence to issue administrative decisions towards individuals.

The second point concerns the relevant EU bodies that cooperate with national authorities. These include the agencies specifically mandated to implement EU asylum law, namely the EUAA and Frontex, as well as the agencies supporting them, such as inter alia the European Union Agency for Law Enforcement Cooperation (Europol), the EU Agency for Funda-

28 See only Guy S Goodwin-Gill, Jane McAdam, *The Refugee in International Law*, Oxford University Press 2007, p. 357: 'From the point of view of international law, therefore, the grant of protection to its territory derives from the State's sovereign competence, a statement of the obvious.'; Paul Kirchhof, „Staatliche Souveränität als Bedingung des Asylrechts", in Georg Jochum, Wolfgang Fritzemeyer, Marcel Kau (ed.), *Grenzüberschreitendes Recht - Crossing frontiers. Festschrift für Kay Hailbronner*, C.F. Müller 2013, p. 105-121, p. 114.

29 On solidarity see Art. 80 TFEU; on mutual trust see 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, paras 78–83.

mental Rights (FRA), and the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA). Certainly, the agencies have become increasingly relevant for the functioning of the European asylum administration – a phenomenon that is often referred to as agencification.[30] The Commission's activities, however, are pivotal, too: they range from the provision of large sums of EU funding to administrative supervision on the ground to the provision of operational support, e.g. in the context of camp planning.[31]

1.3 The Failure to Regulate the EU's Responsibility

As a consequence, and this is the crucial point here, the regulatory requirements for EU law largely correspond to those for national law: EU law must define and hedge the responsibility of the EU itself, which includes allocating competences and enabling judicial protection. In the context of the asylum system, however, this regulatory task is not adequately fulfilled by EU law as it currently stands. Put bluntly, EU law continues to be conceived almost as if the EU were a human rights organisation, when in fact, it has since long acquired the legal competences and political powers to govern forced migration towards Europe. In this sense, European asylum law is largely characterised by a failure to regulate the EU's responsibility.[32] As a result, EU bodies often act without legal basis, and concerned individuals usually have no possibility to challenge the EU's conduct before a court.

This lagging behind of the law in relation to administrative reality can be traced back to several factors. One of the most obvious explanations has to do with the character of crisis response as an informal administrative experiment.[33] From a governmental perspective, the perpetuation of emergency instruments through belated legalisation reflects the function of crises as

30 See only Merijn Chamon, „Agencification in the United States and Germany and What the EU Might Learn From It", *German Law Journal* 17 (2016), p. 119-152; Miroslava Scholten, Marloes van Rijsbergen, „The Limits of Agencification in the European Union", *German Law Journal* 15 (2014), p. 1223-1255.

31 See below 3.3.

32 This regulatory gap cannot, of course, be filled by national law and also not by ECHR law, as long as the EU is not a party to the ECHR.

33 On informal governance prior to 2015 see for instance Maarten Vink, Claudia Engelmann, „Informal European Asylum Governance in an International Context", in Thomas Christiansen, Christine Neuhold (ed.), *International Handbook on Informal Governance*, Edward Elgar 2012, p. 534-553.

an opportunity for administrative experimentation.[34] This is particularly clearly visible in the area of asylum and migration, where the rights of non-citizens are at stake.[35] In this sense, the EU's increased involvement in the asylum system appears as outcome of a crisis-induced experiment.[36]

Historically, EU law has long not accounted for the EU as an ordinary public actor. The Treaty drafters did not conceive of either the EU agencies or of the Commission as actors that pose a potential threat to individual rights, let alone as administrative actors involved in procedures that have direct and severe effects on basic fundamental rights.[37] The Commission was originally conceived as a sort of governmental institution that would enforce EU law against member states, which implied the idea that it would act mainly in the interest of those persons to whom EU law grants individual rights.[38] EU agencies, in turn, were initially designed as regulatory bodies to assist and support member states in implementing EU law through activities such as coordination, training or funding.[39] Closely connected, European administrative law has historically developed in such a way that

34 Charles F. Sabel, Jonathan Zeitlin, „Experimentalist Governance", in David Levi-Faur (ed.), *The Oxford Handbook of Governance*, Oxford University Press 2012, p. 169-184; Jonathan Zeitlin, „EU experimentalist governance in times of crisis", *West European Politics* 39 (2016), p. 1073-1094.

35 Johannes Pollak, Peter Slominski, „Experimentalist but not Accountable Governance? The Role of Frontex in Managing the EU's External Borders", *West European Politics* 32 (2009), p. 904-924; Martina Tazzioli, „Refugees' Debit Cards, Subjectivities, and Data Circuits: Financial-Humanitarianism in the Greek Migration Laboratory", *International Political Sociology* 13 (2019), p. 392-408; Joanna Parkin, *The Difficult Road to the Schengen Information System II: The legacy of 'laboratories' and the cost for fundamental rights and the rule of law*, CEPS Policy Paper 2011, https://www.ceps.eu/ceps-publications/difficult-road-schengen-information-system-ii/.

36 Similarly David Fernández-Rojo, *EU Migration Agencies* (fn. 23), p. 149–157; Giuseppe Campesi, „Seeking Asylum in Times of Crisis: Reception, Confinement, and Detention at Europe's Southern Border", *Refugee Survey Quarterly* 37 (2018), p. 44-70, p. 53–56.

37 In addition, the prevailing narrative of the 'EU with a clean slate' might have been another factor.

38 It is symbolic in this regard that it was the European Commission who initiated the proposal for the EU's accession to the ECHR, see European Commission, Memorandum of 4 April 1979, Bulletin of the European Communities, Supp. 2/79. Until the late 1990s, the EU's human rights policies, insofar as they existed, largely fell within the institutional mandate of the European Commission, see Philip Alston, J. H. H. Weiler, „An 'Ever Closer Union' in Need of a Human Rights Policy" (fn. 4), p. 667.

39 Paul Craig, *EU Administrative Law*, Oxford University Press 2018, p. 153–155; Merijn Chamon, *EU Agencies. Legal and Political Limits to the Transformation of the EU Administration*, Oxford University Press 2016, p. 102–106.

the relationship between EU bodies and individuals is structurally underregulated. Unlike national administrative law, which has always focused on the state-individual relationship, European administrative law has long focused on the state-state and state-EU relationship, thereby often losing sight of the concerned individual.[40]

Against this background, the crisis response would have required to explicitly regulate the EU's new legal responsibility. But the crisis measures largely failed to do so. In the immediate context of the 2015 crisis, new tasks were assigned to the Commission and the agencies in an ad hoc manner. In essence, the crisis response was introduced on the basis of policy papers, memoranda of understanding or similar political agreements among the involved stakeholders.[41] For instance, EASO and Frontex were de facto charged with tasks for which the then-applicable Regulations provided no legal basis,[42] and the Commission was entrusted with tasks that lacked definition in secondary law altogether.[43] This mode of operation persists until today. As the Commission's reaction to the burning of *Moria* in 2020 or to the Covid-19 crisis clearly shows, informal means of regulation still prevail.[44] Politically, these measures were often justified on the basis of an

40 Eberhard Schmidt-Aßmann, „Einleitung: Der Europäische Verwaltungsverbund und die Rolle des Europäischen Verwaltungsrechts" (fn. 26), p. 6–7.

41 See only Federico Casolari, „The unbearable lightness of soft law: on the European Unions recourse to informal instruments in the fight against irregular immigration", in Francesca Ippolito, Gianluca Borzoni, Federico Casolari (ed.), *Bilateral Relations in the Mediterranean. Prospects for Migration Issues*, Edward Elgar 2020, p. 215-228; Caterina Molinari, „EU Readmission Deals and Constitutional Allocation of Powers: Parallel Paths that Need to Cross?", in Eva Kassoti, Narin Idriz (ed.), *The Informalisation of the EU's External Action in the Field of Migration and Asylum*, Springer 2022, p. 15-35. See further below 3; chapter 2.

42 On the de facto expansion of EASO's mandate see Evangelia (Lilian) Tsourdi, „Bottom-Up Salvation? From Practical Cooperation Towards Joint Implementation Through the European Asylum Support Office", *European Papers* 1 (2017), p. 997–1031; on the de facto expansion of Frontex's mandate see David Fernández-Rojo, *EU Migration Agencies* (fn. 23), p. 63–77, 87–100. In some instances, the de facto extended competences were then later enshrined in secondary law; see in detail below 3.1 and 2; chapter 2.

43 See below 3.3; chapter 2.

44 An illustrative example is the establishment of the EU hotspots 2.0. on the basis of 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

emergency narrative. Especially those measures that appeared particularly restrictive or strongly changed the EU's role were defended with the argument that they were necessary to prevent chaos or worse.[45]

1.4 The Challenge to Redefine the EU's Responsibility

In legal terms, however, such emergency argumentation cannot be convincing. To begin with, and quite apart from the fact that the structure of the argument as such is doubtful, it must be observed that hardly any emergency measure was withdrawn after the immediate crisis context. On the contrary, almost all measures, including those which were explicitly introduced only for a limited period of time, have been perpetuated in one way or another.[46] This holds true not only for those measures restricting asylum seekers' rights[47] but also for those expanding the EU's role. Consider, for instance, the crisis reaction to task EASO with providing operational support, including the examination of individual asylum claims,[48] although the then applicable EASO Regulation allowed for the deployment of asylum support teams only for 'a limited time' and excluded any 'direct or indirect powers' in relation to the taking of decisions on individual asylum claims;[49] or the similar tasking of Frontex without formal compe-

Reception and Identification Centre in Lesvos, Brussels 2 December 2020, C(2020) 8657 final (hereinafter: MoU Joint Pilot). See in more detail below 2.1.

45 See only Klaus Ferdinand Gärditz, „Territoriality, Democracy, and Borders: A Retrospective on the "Refugee Crisis"", *German Law Journal* 17 (2016), p. 907-922, p. 919: 'The general political atmosphere evoked connotations of a constitutional crisis. (…) Soon, rhetorical hysteria invoked emergency scenarios. An ominous Schmittian yearning to (…) declare the state of emergency regrettably exerts some intellectual fascination even today and inspires crisis rhetoric, which (…) relishes in the idea of a nearing apocalypse.'.

46 An exception in this regard is the relocation mechanism which was not perpetuated but to the contrary hardly implemented, see Thomas Matthies, *Relocation. Die Umsiedlung von Asylbewerbern in der Europäischen Union*, LIT Verlag 2021, p. 28–30. It hence appears that the tendency of perpetuation is limited to those crisis mechanisms that limit the rights of individuals and/or broaden the EU's competences.

47 For examples see Cathryn Costello, Minos Mouzourakis, „The Common European Asylum System. Where did it all go wrong?" (fn. 8), p. 298–294.

48 For details see EASO, *Archive of Operations*, available at: https://easo.europa.eu/archive-of-operations.

49 For the time limit see Art. 13 EASO Regulation. Note that the EUAA Regulation – again reflecting the process of belated legalisation – does no longer set a specific time limit. Instead, Art. 18 para 2 lit b merely requires to define 'the foreseeable

tence.[50] Once the immediate crisis context was over, the EU's increased administrative involvement was usually not withdrawn – which would have brought administrative practice again in line with legislative basis. In fact, the approach was often reversed: practices that were introduced as 'emergency instruments' were subsequently underpinned by a legislative basis and thereby perpetuated. EASO's and Frontex's crisis-induced increased involvement, for instance, was not scaled back but instead enshrined in secondary law through subsequent reforms.[51] In this manner, results gained through real-life administrative experiments on the ground were literally written into the law.

From a constitutional perspective, it is obvious that the approach of an administrative real-life experiment is deeply problematic. First, it implies the idea that a situation of crisis can justify administrative conduct without a formal legal basis, which runs counter to the very foundations of the rule of law as enshrined in Art. 2 TEU. In the specific context at hand, the question also arises as to whether such far-reaching measures without a legal basis would have been politically feasible vis-à-vis citizens, too, or whether the rights of non-citizens were not implicitly regarded as 'less worthy'. If this were the case, then not only the rule of law but also the principles of equality before the law and the prohibition of discrimination on the grounds of race and ethnic origin, as enshrined in Art. 21 para 1 ChFR, would have been at stake. Second, ex-post legalisation cannot, of course, legitimise the EU's conduct in retrospect. Third, the writing into

duration of the deployment'; similarly also Art. 20, in particular para 5 thereof. For the competence limit see recital 14, Art. 2 para 6 EASO Regulation.

50 Matthias Lehnert, *Frontex und operative Maßnahmen an den europäischen Außengrenzen. Verwaltungskooperation – materielle Rechtsgrundlagen – institutionelle Kontrolle*, Nomos 2014, p. 119–120.

51 For Frontex see only Vittoria Meissner, „The European Border and Coast Guard Agency Frontex After the Migration Crisis: Towards a 'Superagency'?", in Johannes Pollak, Peter Slominski (ed.), *The Role of EU Agencies in the Eurozone and Migration Crisis. Impact and Future Challenges*, Palgrave Macmillan 2021, p. 151-174. For the EUAA see Evangelia (Lilian) Tsourdi, „Beyond the 'Migration Crisis': The Evolving Role of EU Agencies in the Administrative Governance of the Asylum and External Border Control Policies", in Johannes Pollak, Peter Slominski (ed.), *The Role of EU Agencies in the Eurozone and Migration Crisis. Impact and Future Challenges*, Palgrave Macmillan 2021, p. 175–203; Salvatore F. Nicolosi, David Fernandez-Rojo, „Out of control? The case of the European Asylum Support Office", in Miroslava Scholten, Alex Brenninkmeijer (ed.), *Controlling EU Agencies. The Rule of Law in a Multi-jurisdictional Legal Order*, Edward Elgar 2020, p. 177–195, in particular p. 187–186.

the law often remains deficient and incomplete. The reformed EUAA and Frontex Regulations, for instance, still define the agency's competences in a convoluted and vague manner, and fail to establish a strong independent complaints mechanism.[52] Fourth, the approach of belated legalisation has the effect that the asylum system operates in a perpetuated state of crisis.[53] At the administrative level, for instance, the involvement of the Commission and the agencies continue to be characterised by features and tools that were developed from a logic of crisis or even a state of emergency.

Thus, one of the central challenges in the European asylum system today is to redefine the EU's responsibility. More specifically, the challenge is to determine what exactly the EU is legally competent to do and how the EU can be held responsible before a court in case of alleged misconduct.[54]

As follows from the rule of law, especially the fundamental right to effective judicial protection enshrined in Art. 47 ChFR, and as the CJEU has consistently held since *Les Verts*, all public acts, including those issued by the EU itself, must be subject to judicial review.[55] The EU legal protection system, however, lags far behind administrative reality. It was not designed to address the challenges that arise when the EU operates at the administra-

52 It must be stressed that this process of belated legalisation often leads to deficient outcomes. The reformed Regulations on Frontex and the EUAA, for instance, remain vague concerning the agency's competences and fail to provide for sufficient safeguards for individuals. On the considerable delays in hiring fundamental rights monitors and connected failures, for instance, see Luisa Marin, „Frontex and the Rule of Law Crisis at EU Borders", Verfassungsblog of 05/09/2022.

53 Note, however, the Commission's explicit attempt to overcome the crisis rhetoric in its Communication on a New Pact on Migration and Asylum, Brussels 23/09/20, COM(2020) 609 final (hereinafter: New Pact on Migration).

54 Similarly for the case of the EUAA Salvatore F. Nicolosi, David Fernandez-Rojo, „Out of control? The case of the European Asylum Support Office" (fn. 51) who at p. 178 identify as central challenge the 'control over activities which might impact on individuals, namely asylum seekers, and undermine the Member States' competence as to the determination of refugee status', and at p. 187 argue that 'the control over the de facto expansion of (EASO's) competences is crucial because of the enormous impact of its activities on the individual situations of asylum seekers and also because of possible tensions with relevant domestic authorities in the field of asylum.'.

55 CJEU, Court, judgement of 23 April 1986, Parti écologiste 'Les Verts' v European Parliament, 294/83, para 23; CJEU, Court, judgement of 25 July 2002, Unión de Pequeños Agricultores v Council of the European Union, C-50/00 P, para 38–39: '[T]he European Community is, however, a community based on the rule of law in which its institutions are subject to judicial review of the computability of their acts with the Treaty and with the general principles of law which include fundamental rights. Individuals are therefore entitled to effective judicial protection (…)'.

tive level, including in areas that are especially sensitive to fundamental rights and in direct contact with concerned individuals. As a result, judicial protection against the EU is rather difficult to obtain. In the context of the European asylum administration – and specifically in the context of EU hotspots – the key question is hence not so much whether but rather *how* the EU can be held responsible for alleged misconduct.[56]

The challenge of finding a procedural way to hold the EU responsible is constitutional in nature. The root of the insufficient regulation of the EU's responsibility lies in primary law, which is still based on the anachronistic understanding that the EU would not be an ordinary public actor. Given the persisting regulatory deficits in secondary law, the key problem is that the EU's new role is not, or perhaps not yet, sufficiently reflected in the constitutional framework. Moreover, it is highly unlikely that EU secondary law will be reformed at any time soon in such a way that the EU's responsibility will be clearly defined. On the contrary, it currently seems more likely that ad hoc policy arrangements and informal governance will continue to prevail. Therefore, if a solution is to be found based on the law as it currently stands, the challenge must be addressed at the level of primary law.[57]

Finding ways to hold the EU responsible for its administrative conduct is important in many areas of law but remains of particular salience in the context of the asylum system. Certainly, the increasing reliance on agencies can also be observed in other policy fields, ranging from financial regulation to the medical market.[58] Also, the Commission's increasing involvement is a general tendency that can be observed in different policy fields, ranging from competition to the Eurozone.[59] And, of course, the

56 This follows from Art. 2 TEU, Art. 47 ChFR, as argued in more detail in 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. 190 et seq.

57 In other words, the approach is to explore the potential inherent in EU constitutional law, see chapter 3.

58 See only Miroslava Scholten, Marloes van Rijsbergen, „The Limits of Agencification in the European Union" (fn. 30), p. 1225, 1229–1231; Merijn Chamon, „Agencification in the United States and Germany and What the EU Might Learn From It" (fn. 30).

59 John Peterson, „Juncker's political European Commission and an EU in crisis", *Journal of Common Market Studies* 55 (2017), p. 349-367; James D Savage, Amy Verdun, „Strengthening the European Commission's budgetary and economic surveillance capacity since Greece and the euro area crisis: a study of five Directorates-General", *Journal of European Public Policy* 23 (2015), p. 101-118.

increasing involvement of EU bodies in these policy fields also raises urgent questions concerning the EU's responsibility, including questions related to the competences of agencies,[60] and questions related to the EU's responsibility for fundamental rights violations by these and the European Commission.[61]

Yet, the challenge is particular in the asylum system.[62] The violation of fundamental rights is particularly likely because the relevant agencies interact directly with individuals in an especially vulnerable situation. The relevant EU bodies operate in a context that is especially sensitive to basic fundamental rights such as Art. 4, 6, 7 18, 19, 24, 41 ChFR.[63] These rights protect the essence of human life and the rule of law and thus form part of the constitutional core as defined in Art. 2 TEU.[64]

2 EU Hotspots as a Paradigm Example of the EU's New Role

The case of the EU hotspots constitutes a paradigm example of the EU's new role. It exemplifies both the EU's role as a critical administrative actor and the EU's ambivalence as both a guarantor of and a threat to the rights of asylum seekers. As will be shown in the following, the development

60 See CJEU, Court (Grand Chamber), judgement of 22 January 2014, UK and Northern Ireland v European Parliament and Council of the European Union (ESMA-Short-selling), C-270/12.

61 On the latter see 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; in more detail chapter 3 to 5.

62 Similarly Sergio Carrera, Leonhard Den Hertog, Joanna Parkin, „The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability versus Autonomy?", *European Journal of Migration and Law* 15 (2013), p. 337–358, p. 337–339; Jorrit R Rijpma, „Hybrid Agencifiation in the Area of Freedom, Security and Justice and its inherent tension: The case of Frontex", in Madalina Busuioc, Martijn Groenleer, Jarle Trondal (ed.), *The Agency Phenomenon in the European Union. Emergence, Institutionalisation and Everyday Decision-Making*, Manchester University Press 2012, p. 84-102, p. 84, p. 92–94.

63 David Fernández-Rojo, *EU Migration Agencies* (fn. 23), p. 63–64.

64 For the understanding of Art. 2 TEU as the core of the EU's constitution Armin von Bogdandy, *The Emergence of European Society through Public Law* (fn. 13), p. 85 et seq. One step further Reijer Passchier, Maarten Stremler, „Unconstitutional Constitutional Amendments in European Union Law: Considering the Existence of Substantive Constraints on Treaty Revision", *Cambridge Journal of Internationa and Comparative Law* 5 (2016), p. 337-362, p. 356–359. On the agency's systemic interference with the cited fundamental rights in more detail chapter 2, 3.

of the EU hotspots from their establishment in the 2015 crisis to their current form under the so-called Joint Pilot of 2020 is a textbook example of a crisis-driven administrative experiment. Studying the integrated EU hotspot administration hence allows to better understand the European asylum administration more broadly.

As mentioned, the focus here lies on the EU hotspots in Greece, which are located on the Aegean islands of Lesvos, Chios, Kos, Samos and Leros. This is justified because the EU hotspots located in Italy function differently and do not appear as a testing ground for advanced administrative integration.[65] While the reasons for the location of the 'testing laboratory' in Greece remain understudied, one factor seems to lie in the close connection of the initial EU hotspot approach in Greece to the EU-Türkiye Statement.[66]

2.1 From Initial EU Hotspots to 'EU Hotspots 2.0'

The idea of establishing EU hotspots dates back to a feasibility study on Frontex published by the European Commission in 2014.[67] This study proposed the gradual supranationalisation of border control in three phases, with the second phase consisting of the limited transferral of executive powers upon Frontex only in so-called EU hotspots. Although the 2014 proposal was never realised, it is key in that it introduced the concept of EU hotspots and defined them as geographical areas subject to 'urgent and exceptional' migratory pressure where increased administrative cooperation would take place.[68]

Since then, EU hotspots are conceptualised as consisting of two elements. First, they are established in response to a 'crisis' caused by a relative increase in the number of asylum applications in a specific location at the EU's external border. Second, they are characterised by increased vertical

65 Given that the EU hotspots in Greece evolve rapidly and change frequently, it must be recalled that this study takes into account only developments from 2015 to 2022 (see already introduction, fn. 25).

66 In this direction also interviews with Commission representative 1 and Commission representative 2 conducted on 12 February 2021, and interview with Commission representative 4 conducted on 26 February 2021 (introduction, fn. 102).

67 See in more detail David Fernández-Rojo, *EU Migration Agencies* (fn. 23), p. 297.

68 Unisys, *Study on the Feasibility of the Creation of a European System of Border Guards to Control the External Borders of the Union (ESBG), conducted for the European Commission*, 2014, p. 7, 24.

cooperation between national authorities and EU bodies, with the latter exercising broader competences than in other contexts.

a *The Initial EU Hotspot Approach of 2015*

Against this background, it comes as no surprise that the Commission took up the idea of establishing EU hotspots in the context of the 2015 crisis. The Commission mentioned the EU hotspot approach already in its European Agenda on Migration published in May 2015.[69] Upon request of the Council to explain the approach in more detail, the Commission, together with the relevant EU agencies, and the designated host member states Italy and Greece, then worked out the approach in a non-public policy paper. This paper was entitled the 'EU hotspot explanatory note' and was sent to the member states' Interior Ministries and to the European Parliament in July 2015.[70] In September 2015, a shortened version of the explanatory note was published as annex to a communication by the Commission.[71]

According to the Commission's initial idea from 2015, the EU hotspots were conceived as platforms for the implementation of the relocation program.[72] As this program provided for the relocation of 160.000 asylum applicants from Greece and Italy to other member states, the idea was that these relocations would take place directly from the EU hotspots. Yet the

69 European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda on Migration, 13/05/2015, COM(2015) 240 final (hereinafter: European Agenda on Migration), p. 6.

70 European Commission, Explanatory Note on the 'Hotspot' Approach, available at: http://www.statewatch.org/news/2015/jul/eu-com-hotsposts.pdf (hereinafter: EU Hotspot Explanatory Note).

71 European Commission, Communication to the European Parliament, the European Council and the Council, Managing the Refugee Crisis: Immediate Operational, Budgetary and Legal Means under the European Agenda on Migration, 23/09/2015, COM(2015) 490 final, in particular Annex 2 on Migration Management Support Teams working in 'hotspot' areas.

72 The Relocation Programme was established by Council Decision (EU) 2015/1523 of 14 September 2015 and Council Decision (EU) 2015/1601 of 22 September 2015 resp. establishing provisional measures in the area of international protection for the benefit of Italy and of Greece (hereinafter: Relocation Decisions I and II). On the interconnections between the EU hotspot approach and the Relocation programme see Francesco Maiani, „Hotspots and Relocation Schemes: The Right Therapy for the Common European Asylum System?", eumigrationlawblog of 03/02/2016.

relocation program largely failed, with only less than 30.000 relocations implemented before the program expired in September 2017.[73] As widely known, this overall failure was due to strong political resistance from several member states, practical difficulties and conceptual flaws in the program itself.[74]

b *The EU-Türkiye Statement of March 2016: From Relocation to Return*

Insofar as the specific context of the EU hotspots in Greece is concerned, however, the failure of the relocation program is also due to another reason, namely the policies of the European Commission itself. The Commission ensured that relocation was suspended as from the day of the entry into force of the EU-Türkiye Statement.[75] This is remarkable because the Commission generally advocated for the implementation of the relocation program.

The background to the Commission's contradictory policies is that the entry into force of the EU-Türkiye Statement in March 2016[76] led to a complete overhaul of the function of the EU hotspots located in Greece. Literally overnight, the EU hotspots were transformed from relocation centres into return centres.[77] From the perspective of EU policymakers,

73 European Commission, Report from the Commission to the European Parliament, the European Council and the Council, Fifteenth Report on Relocation and Resettlement, 06/09/2017, COM/(2017) 465 final, p. 2.

74 See only Thomas Matthies, *Relocation* (fn. 46), p. 279–282.

75 European Commission, Communication from the Commission to the European Parliament, the European Council and the Council. First Report on the progress made in the implementation of the EU-Turkey Statement, 20 April 2016, COM(2016) 231 final, 5: 'With the support of the Commission and Frontex, the hotspots are being adapted to facilitate swift returns to Türkiye from the islands, and the integration of return and asylum officers in the infrastructure and workflow of the hotspots.'; European Commission, Report from the Commission to the European Parliament, the European Council and the Council. Second report on relocation and resettlement, 12 April 2016, COM(2016) 222 final, 2.2.: 'The nature of the hotspot work has significantly changed after the adoption of the EU-Turkey statement and currently provision of information on the relocation scheme in the Hotspot is suspended for migrants arriving after 20 March (2016).'.

76 European Council, Press Release, EU-Turkey statement, 18 March 2016, https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-Turkey-statement/.

77 Catharina Ziebritzki, Robert Nestler, „'Hotspots' an der EU-Außengrenze. Eine rechtliche Bestandsaufnahme", *MPIL Research Paper Series (SSRN)* 17 (2017), p. 17–20, 22–23.

this was only consequential. Given that the EU-Türkiye Statement aimed to 'end irregular migration from Türkiye to the EU', its implementation required a comprehensive return policy. The central idea was that all asylum applicants who entered the EU irregularly via the EU hotspots in the Greek Aegean should be swiftly deported, either back to Türkiye or to their country of origin.[78]

This fundamental change in the function of the EU hotspots obviously had a profound impact on the administrative procedure conducted in these centres. To begin with, it was politically considered necessary to keep asylum seekers on the relevant island during the entire procedure in order to facilitate their deportation. This was initially ensured through a general detention scheme,[79] which was soon replaced by a restriction of movement on some islands[80] and permanently remained in place on others.[81] In addition, the procedure was transformed into a border procedure under Art. 43 Asylum Procedures Directive allowing for restrictions in terms of individual procedural rights.[82] Further, and this is the central point, the EU hotspot procedure was redesigned to reject asylum applications with the least possible administrative burden. Although the understanding that asylum procedures serve, first and foremost, to reject applications perverts

78 EU-Turkey Statement (fn. 76), para 1.

79 Nora Markard, Helene Heuser, „‚Hotspots' an den EU-Außengrenzen: Menschen- und europarechtswidrige Internierungslager", *Zeitschrift für Ausländerrecht und Ausländerpolitik* (2016), p. 165-172, p. 166–167; Maria Pichou, „Reception or Detention Centres? The detention of migrants and the EU 'Hotspot' Approach in the light of the European Convention on Human Rights", *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 99 (2016), p. 114-131, p. 116–118.

80 Catharina Ziebritzki, Robert Nestler, „Implementation of the EU-Turkey Statement: EU Hotspots and restriction of asylum seekers' freedom of movement", eumigrationlawblog of 22/06/2018. In the context of the outbreak of the Covid 19 pandemic, some EU hotspots were temporarily 'closed' again, see only Equal Rights Beyond Borders, Report of February 2023, Extraordinary Measures. How Greece Used the Covid-19 Pandemic as a Pretext for the Unlawful Detention of Asylum Seekers in Chios, https://www.equal-rights.org/resources/publications.

81 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. See in more detail on the detention policy chapter 2, 31.

82 Art. 43 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (hereinafter: Asylum Procedures Directive).

the very purpose of these procedures as such, this understanding is implicit in the political aim of return.[83]

Since March 2016, the EU hotspot procedure has been roughly structured as follows.[84] For applicants from countries of origin with low recognition rates, it is assumed that the application can be rejected as unfounded, so an interview on the merits is conducted. In the case of countries of origin with higher recognition rates, a rejection as unfounded seems unlikely from the outset.[85] Accordingly, the central idea is to reject asylum claims with the argument that the concerned persons should seek protection in Türkiye instead. This idea is operationalised on the basis of protection elsewhere clauses, i.e. the concepts of first country of asylum and safe third country, enshrined in Art. 35 and 38 Asylum Procedures Directive,[86] which allow the rejection of asylum applications regardless of whether or not the claim is substantiated. In practice, the focus of the procedure hence lies on the admissibility interview, which is conducted with the political aim of

83 This aim was defined in the EU-Turkey Statement (fn. 76) and was confirmed by European Commission, New Pact on Migration (fn. 53), p. 4.

84 See in more detail on the EU hotspot procedure and its development over the past years: Equal Rights Beyond Borders, December 2019, The Lived Reality of Deterrence Measures. Inhumane Camps at Europe's External Border, https://www.equal-rights.org/resources/publications; 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; 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/.

85 In 2016, this concerned in particular applicants of Syrian nationality. Note, however, that applications submitted by Syrians has reduced considerably over the past five years: While in 2015, almost 60 % of applicants arriving to the EU hotspots were of Syrian nationality, the number fell to about 20 % in 2020, see UNHCR, Greece data snapshot, 26 December 2015, https://data2.unhcr.org/en/documents/details/46627; UNHCR, Sea Arrivals Dashboard of December 2020, 22 February 2021, available at: https://data2.unhcr.org/en/documents/details/85039.

86 While the first country of asylum concept (Art. 35 Asylum Procedures Directive) refers the person to a third state where they *had already* been granted protection prior to entering the EU, the safe third country concept refers to a third state with the argument that they *could potentially* seek and be granted protection in the third state (Art. 38 Asylum Procedures Directive). Art. 33 para 2 lit b and lit c Asylum Procedures Directive allows for the rejection of a claim for international protection as inadmissible on the basis of both concepts. Given that the safe third country concept is practically much more relevant, the following is limited to that concept.

considering Türkiye as safe and, on this basis, rejecting the application as inadmissible.[87]

c *Political Insistence on a Non-Functional Return Policy*

A crucial point for understanding the EU hotspots is that the politically envisaged return policy has never actually worked. Although the procedures were aligned with the return policy envisaged in the EU-Türkiye Statement, the implementation of this policy has failed. The idea of deporting all asylum seekers may have been politically effective in the sense that the EU-Türkiye statement was largely perceived as efficient, but it was never implemented in practice. In fact, the number of deportations to Türkiye has remained vanishingly small, with only about 2,000 deportations between March 2016 and March 2020.[88]

The main reasons for this were practical and legal obstacles to the return policy as such. Most importantly, the political assumption that Türkiye can be considered a safe third country has proven to be legally untenable in most cases.[89] Since March 2020, the implementation of the return policy

87 The non-refoulement principle requires an individual examination of each asylum claim. Hence, even where a country has adopted a list of safe countries, each individual must at least be heard and have the possibility to refute the assumption that the third country is safe for them, see only Stephen H Legomsky, „Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection", *International Journal of Refugee Law* 51 (2003), p. 567-677, p. 669 with further references. The obligation to examine each individual case is explicitly codified in the EU Asylum Procedures Directive, see Art 10 para 3 lit a, Art 33 para 2 lit b ('a first country of asylum *for the applicant*') and lit c ('a safe third country *for the applicant*'), Art 35 last sentence ('The applicant shall be allowed to challenge the application of the first country of asylum concept to his or her particular circumstances.'), Art 38 para 2 lit c ('rules in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that the third country is not safe in his or her particular circumstances.').

88 UNHCR, Returns from Greece to Turkey (in the framework of the EU-TUR Statement) as of 31 March 2020, https://data.unhcr.org/en/documents/details/75075.

89 Between January 2021 and February 2022, Greece has usually rejected between 11 and 25 % of applications for international protection as inadmissible, see https://migration.gov.gr/en/statistika/. Note that Greece invokes a lack of enforcement capacity as another reason for the low number of returns, see Ekathimerini, 14 Jan 2021, Greece submits request for return of 1,450 failed asylum seekers

has even come to a complete standstill. The reason for this is that Türkiye no longer accepts any readmissions, citing first the Covid-19 pandemic and then Greece's non-compliance with specific political demands.[90] Despite diplomatic efforts on the part of Greece, this situation has not changed until the end of 2023. For the past three years, there have thus been almost no deportations to Türkiye.

The EU hotspot procedure is thus characterised by a fundamental and persistent mismatch between the goal of a comprehensive return policy and the fact that the implementation of such policy is impossible due to practical, legal and political obstacles. Although it is clear that deportations cannot be carried out in the overwhelming majority of cases, the procedure is nevertheless designed to reject claims as swiftly as possible.[91] The politically intended function of the EU hotspots as deportation centres thus runs dry, and the EU hotspots function as containment centres instead.

d *The EU Hotspot Approach 2.0 of 2020*

Unsurprisingly, the non-functional return procedures and the de facto containment policy quickly led to severe deficiencies in the EU hotspot administration. As will be set out in more detail below, these include extreme overcrowding, inhumane living conditions, practices of systemic detention, systemically unlawful procedures, and eventually completely inadequate pandemic management. It was amid these circumstances that a fire broke out in the largest EU hotspot, *Moria,* on the island of Lesvos in September 2020. Unlike previous fires, this one did not remain confined to a small

to Turkey, https://www.ekathimerini.com/news/261208/greece-submits-request-for-return-of-1-450-failed-asylum-seekers-to-Turkey/.

90 EU Observer, 19 Jan 2021, *Turkey snubs Greece on migrant returnees*; interview with Commission representative 1, conducted on 12 February 2021 (introduction, fn. 102); European Commission, Communication from the Commission to the Council and the European Parliament. Sixth Annual Report on the Facility for Refugees in Türkiye, 24 May 2022, COM/2022/243 final, p. 3: Turkey demands Greece to stop push backs to Turkey, and to revoke its national list of safe third countries.

91 As will be explained in more detail in chapter 2, 3.2.c, the continued application of the safe third country concept despite the halt of readmissions is unlawful. This was recognised by the Commission, although belatedly, with EN P-000604/2021, 1 June 2021, Answer given by Ms Johansson on behalf of the European Commission, available at: https://www.europarl.europa.eu/doceo/document/P-9-2021-000604-ASW_EN.pdf.

section but burned down almost the entire camp, including administrative areas, leaving some 13,000 residents without shelter.[92]

The fire of *Moria* in September 2020 is emblematic. It not only led to the physical destruction of Europe's largest refugee camp but has also become a symbol of the disastrous living conditions. Some even speak of Europe's values having burned down with the fire.[93] Leaving aside the question of the adequacy of this metaphor, it can be observed in any case that the fire has brought the EU hotspots back into the consciousness of the European public, even though only for a very short time. This public attention, combined with the fact that the EU's new migration policy plan was due to be published in the fall of 2020 anyway, had the effect that the Commission, after years of a rather passive stance, eventually felt called upon to take concrete steps to improve conditions in the EU hotspots in Greece.

To this end, the Commission proposed to step up both EU funding and its own administrative involvement in the EU hotspot administration and to replace the previous Reception and Identification Centres (RIC) with so-called Multi-Purpose Reception and Identification Centres (MP-RIC). This proposal was labelled Joint Pilot and presented by the Commission in the context of its New Pact on Migration.[94] In December 2020, a Memorandum of Understanding on the Joint Pilot (MoU-JP) was then concluded between the Commission and the relevant agencies on one part and Greece on the other part.[95] While the MoU was formally limited to the island of Lesvos, it de facto also applied to the other islands. At the end of 2021, the construction of MP-RICs on Samos, Kos and Leros was already completed, whereas the works in Chios and Lesvos still remained stuck due to difficulties in finding a suitable site for the new camp.[96]

92 BBC, 9 September 2020, Moria migrants: Fire destroys Greek camp leaving 13,000 without shelter, https://www.bbc.com/news/world-europe-54082201.

93 Heinrich Boell Stiftung, 10 September 2020, Moria is burnt. Europe's values, too. Europe's double responsibility towards human dignity, https://www.boell.de/en/2020/09/10/moria-burnt-europes-values-too-europes-double-responsibility-towards-human-dignity.

94 European Commission, New Pact on Migration (fn. 53), p. 3.

95 European Commission, MoU Joint Pilot (fn. 44). For now, the Joint Pilot is framed by the Commission as a Greece-specific project, thereby reinforcing the already different development of the EU hotspots located in Greece and Italy respectively.

96 European Commission, Directorate-General HOME, Annual Activity Report 2021, p. 26; interview with Commission representative 4, conducted on 26 February 2021; interview with Commission representative 5, conducted on 7 April 2021 (introduction, fn. 102).

According to the Commission's plan, the main difference between the previous RIC and the new MP-RIC is that the latter shall have an increased capacity and provide for several additional social services. At the same time, however, the MP-RIC also include an adjacent detention area, which is de facto conceived as a closed centre.[97] Considering the combination of all these innovations and taking into account that a significant gap between policy plans and administrative reality is common in the context of the EU hotspots, it thus remains to be awaited whether the Joint Pilot will actually lead to substantial improvements in living conditions. Based on the current state of implementation in any case, it rather seems that the Commission's new plans entail increased detention practices.[98]

For the purpose of this study, the Joint Pilot is of particular interest not so much because of the promised improvements in reception conditions but mainly because it constitutes a new stage in the gradual process of increasing administrative integration. As will be set out in more detail below, the MoU strengthens the Commission's involvement at both the supervisory and the operational level, with the focus of these new competences being on ensuring adequate reception conditions.[99] In order to fulfil its new tasks, the Commission established a 'dedicated task force' in the fall of 2020, and the already existing Steering Committee was adapted accordingly.[100] The agencies are also increasingly involved under the Joint Pilot, especially

97 MoU Joint Pilot (fn. 44), p. 2–7. Tellingly, the Greek terminology refers to 'closed controlled centres'.

98 See only ECRE, 6 October 2020, Joint Statement: The Pact on Migration and Asylum: to provide a fresh start and avoid past mistakes, risky elements need to be addressed and positive aspects need to be expanded, https://ecre.org/the-pact-on-migration-and-asylum-to-provide-a-fresh-start-and-avoid-past-mistakes-risky-elements-need-to-be-addressed-and-positive-aspects-need-to-be-expanded; Equal Rights Beyond Borders, April 2024, Still Detained and Forgotten. Update on Detention Policies, Practices and Conditions on Kos 2023/24, https://equal-rights.org/resources/publications. For parallels to recent developments in US policies see UCLA School of Law, Center for Immigration Law and Policy and Equal Rights Beyond Borders, July 2024, Immigration Detention Across Borders, https://law.ucla.edu/news/amidst-rise-anti-immigrant-policies-across-globe-new-report-examines-treatment-migrants-seeking-protection-us-and-eu/.

99 See below 3; and chapter 2, 2.

100 See in more detail below 3.3.b; and chapter 2.

regarding reception-related activities.[101] Furthermore, the new centres are largely funded by the EU.[102]

2.2 Regulatory Framework: Crisis and Informality

As the outline of the historical developments has indicated already, the regulatory framework governing the EU hotspot administration is characterised by informality and a logic of crisis. This can be traced back to the fact that EU hotspots were initially conceived as a temporary mechanism. In the following years, the EU hotspot approach was perpetuated, and in this process, the legal framework was formalised to a certain extent. The belated legalisation, however, remains incomplete and deficient. As a result, informal rules remain central, and the crisis logic persists to this day.

a *Relevant Informal Rules as EU Soft Law*

Initially, the EU hotspots were established without a formal legal basis. In 2015, Greek law did neither provide for the instalment of asylum processing centres at the external borders, nor for the application of the safe third country concept in accelerated border procedures, nor for close administrative cooperation between national authorities and EU bodies.[103] EU law did not provide for a formal legal basis either: in 2015, there was neither provision for the establishment of EU hotspots nor for specific support by agencies or supervision by the Commission.

Instead, the initial framework consisted almost exclusively of informal rules that were adopted in an ad hoc manner by the Commission, the relevant agencies, and the concerned member states. These rules, enshrined for instance in policy papers, Operating Plans or Standard Operating Procedures, lacked formal legal force but nonetheless had the effect that EU hotspot centres were built, that agencies deployed their staff to work hand-in-hand with national authorities, and that asylum and deportation procedures were implemented as envisaged by the Commission.

101 See below 3.1 and 3.2; and chapter 2.

102 European Commission, Directorate-General HOME, Annual Activity Report 2021, p. 26: 'the Commission has granted € 276 million to Greece to build these five centres.'.

103 ECRE, Country Report Greece, 2018 Update, https://asylumineurope.org/reports/country/greece/, p. 31–32: 'legislative vacuum'.

Thus, it is argued here that these informal rules qualify as EU soft law. EU soft law is an intermediate category of rules that are not formally binding but nonetheless legally relevant. It is usually set by the executive and often not published. Consequently, internal administrative guidelines, i.e. rules that are set by the administration itself to regulate its own conduct, also qualify as EU soft law insofar as they address, at least inter alia, another authority than the one that has issued the guideline.

In the context of the EU hotspots, one can distinguish a more general and a more detailed level of EU soft law. While the general rules establish the basic framework, the detailed rules carve out the administrative details. At the general level, a central example is the so-called explanatory note on the EU hotspot approach. At the detailed level, typical examples include the Standard Operating Procedures (SOP), Terms of Cooperation (ToC) and staff working documents that are set up by involved administrative actors to regulate specificities such as the course of the EU hotspot procedure, or the operation of the main supervisory fora.[104] Arguably, Operational Plans (OP) also qualify as detailed EU soft law, as they are not legislative rules and are agreed upon by the EUAA or Frontex and the host member state to regulate the precise tasks of the respective agency.[105] However, it must be kept in mind that OPs are different from other means of EU soft law in that they have a legal basis in secondary law, which explicitly vests them with binding force.[106]

b *In Search for a Legal Basis in Primary Law*

Regulation by EU soft law always raises the question of an appropriate legal basis in primary law. Against this background, it is astonishing how vague

104 See in particular 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).

105 Similarly Roberto Cortinovis, „The Evolution of Frontex Governance: Shifting from Soft to Hard Law?", *Journal of Contemporary European Research* 11 (2015), p. 252-267, p. 260.

106 For the notion of soft law see introduction, fn. 85. For the difference between OPs and other means of EU soft law see Art. 18 para 2 EUAA Regulation; Art. 38 para 3 Frontex Regulation.

legal scholarship remains concerning the legal basis of the EU hotspot approach. While some have suggested the crisis competence under Art. 78 para 3 TFEU,[107] others have argued that the EU hotspot approach was adopted on the basis of Art. 78 para 3 TFEU in conjunction with the solidarity clause under Art. 80 TFEU.[108] Neither view is convincing. Art. 78 para 3 TFEU cannot constitute the correct legal basis already because it requires a Council decision, whereas the EU hotspot approach was introduced on the basis of policy papers by the Commission. Art. 80 TFEU, in turn, does not even qualify as a self-standing competence norm.[109] And even if it were, it cannot constitute an adequate legal basis because EU hotspots, at the latest since their transformation from relocation into return centres, have ceased to function as solidarity mechanisms.

Instead, it is argued here that the EU hotspot approach could only have been based on Art. 78 para 1, 2 TFEU in conjunction with Art. 17 para 1 TEU. As argued in detail elsewhere, Art. 78 TFEU confers upon the EU a comprehensive competence to involve itself in the administration of the asylum system, including in conduct of asylum procedures and management of reception centres.[110] Art. 17 TEU then regulates that the institutional competences to issue informal rules on these issues lies with the Commission, who is both guardian of the Treaties and administrative actor itself. Consequently, the adoption of rules on EU hotspots after consultation

107 Darren Neville, Amalia Rigon, Sarah Salome Sy, *On the frontline: the hotspot approach to managing migration, Study conducted for the European Parliament, Committee on Civil Liberties, Justice and Home Affairs*, 2016, p. 26.

108 Violeta Moreno-Lax, *Europe in Crisis: Facilitating Access to Protection, (Discarding) Offshore Processing and Mapping Alternatives for the Way Forward, Study for the Red Cross*, 2015, p. 12 with reference to the Council's view; David Fernández-Rojo, *EU Migration Agencies* (fn. 23), p. 114, 136–137; similarly also European Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, on the Delivery of the European Agenda on Migration, 27 September 2017, COM(2017) 558 final, p. 12.

109 Art. 80 TFEU does not confer additional competences upon the Union, but it must be taken into account when interpreting the EU's competences, see only Matthias Rossi, „Artikel 80 AEUV", in Christian Calliess, Matthias Ruffert (ed.), *EUV/AEUV. Kommentar*, C.H. Beck 2022, para 1; Daniel Thym, „Legal Framework for EU Asylum Policy", in Daniel Thym, Kay Hailbronner (ed.), *EU Immigration and Asylum Law. Article-by-Article Commentary*, C.H. Beck, Hart Publishing and Nomos 2022, p. 1129-1176, p. 1129–1176, para 43.

110 Catharina Ziebritzki, *The EU's Responsibility in the Asylum Administration* (fn. 56), p. 117 et seq. Still, the following is based on the prevailing opinion, according to which the EU's competences are limited to providing support.

with the relevant agencies or member states, or even a joint adoption by the Commission and agencies, can be considered to be based on primary law – as long as the doctrine of delegated powers is respected.[111]

This being said it is crucial to note that the Commission's administrative competence cannot go beyond the limits set by the legislator. In other words, the Commission's competence under Art. 17 TFEU is limited to interpreting and concretising EU secondary law. The Commission cannot, however, adopt informal rules that alter rules enshrined in secondary law. For the EU hotspot approach, this means that it disposes of a legal basis in primary law only insofar as it respects the limits set by secondary law.

In order to determine to what extent the EU hotspot approach is covered by primary law, one must hence distinguish between, firstly, informal rules that merely interpret or concretise secondary law and, secondly, informal rules that alter or override secondary law. The majority of informal rules establishing the EU hotspot approach indeed fall within the first category. Most relevant informal rules prescribe which provisions of EU secondary law shall be applied and how these are to be interpreted. This is well illustrated by the SOP on the EU hotspot procedure as adopted by EASO and the Greek asylum service in 2016.[112] The SOP prescribe that, in the EU hotspots, only certain legal provisions of the EU asylum acquis shall be applied and that these shall be interpreted in a particular manner. Inter alia, the SOP foresees that the clauses for protection elsewhere are enshrined in Art. 33, 35, 38 Asylum Procedures Directive shall be applied with regard to Türkiye and the possibility of restricting the freedom of movement of

111 From the vast literature on the delegation doctrine see only Merijn Chamon, *EU Agencies* (fn. 39), p. 175–298; Marta Simoncini, *Administrative Regulation Beyond the Non-Delegation Doctrine. A Study on EU Agencies*, Hart Publishing 2020, p. 14–47, passim.

112 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). A later version is only available in Greek: Standard Operating Procedures for the implementation of the Border asylum procedures in the context of the EU-Turkey Statement, instructions by the Greek Asylum Service for the management of applications submitted under the procedure of Art 90 para 3, version of December 2019 (redacted), on file with the author (hereinafter: SoP EU-Hotspots December 2019). The change in authorship is due to the so-called 'embedded model', see chapter 2, I.3.b.

asylum under Art. 7 para 2 Reception Conditions Directive shall be used with the view of confining freedom of movement to the respective island.[113]

Then, there are some informal rules that have moved over time from the problematic second into the first category. A good example here are the rules governing the European Regional Task Force (EURTF), i.e. the main supervisory forum. As will be explained in more detail below, the EURTF was initially established without any written rules.[114] In 2017, however, after the European Court of Auditors (ECA) had criticised that the EURTF's tasks were not clearly defined,[115] the Commission called for enhanced internal administrative regulation,[116] which eventually led to the adoption of specific Terms of cooperation and Rules of procedure.[117] Subsequently, the Commission's supervisory competence has been formalised in secondary law with the reform of the Frontex Regulation and the EUAA Regulation. As a result, the EURTF is today governed by informal rules, which can be read as concretising the Commission's tasks established by secondary law.[118]

Lastly, there are also some rules that have always fallen and continue to fall within the second category and, accordingly, lack a legal basis in primary law. The most prominent example here concerns the cooperation of the then EASO with national authorities.[119] According to the relevant OP and SOP adopted in the context of 2015, the agency was tasked with

113 Art. 7 para of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (hereinafter: Reception Conditions Directive). See in more detail Catharina Ziebritzki, Robert Nestler, „Implementation of the EU-Turkey Statement: EU Hotspots and restriction of asylum seekers' freedom of movement" (fn. 80).

114 See chapter 2, 2.6.a.

115 European Court of Auditors, Special Report No 06/2017, EU response to the refugee crisis: the 'hotspot' approach (report pursuant to Article 287(4), second subparagraph, TFEU), 25 April 2017: https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=41222 (hereinafter: ECA Special Report 2017), p. 34–35.

116 European Commission, SWD EU Hotspots 2017 (fn. 104).

117 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.

118 More precisely under Art. 40 para 3 Frontex Regulation; Art. 21 para 2 EUAA Regulation; in more detail see chapter 2, 2.6.

119 For examples of Frontex overstepping its competences see David Fernández-Rojo, *EU Migration Agencies* (fn. 23), p. 71 fn. 27; Sergio Carrera, Elspeth Guild, „Joint Operation RABIT 2010'. FRONTEX Assistance to Greece's Border with Turkey:

conducting asylum interviews and drafting legal opinions recommending the acceptance or rejection of the asylum claim. As will be explained in more detail below, this practice necessarily entailed that EASO influenced individual asylum decisions.[120] According to the then applicable Regulation, however, the agency had no competences whatsoever in relation to individual asylum decisions.[121] The agency thus acted ultra vires, or in other words, the applicable secondary law was de facto overridden by informal rules.[122] While the European Ombudsman expressed genuine concerns in this regard already in 2018,[123] the administrative practice has not been brought back into the limits of EU secondary law until today. On the contrary, since 2020, the agency has operated under the so-called embedded model, which entails an even closer involvement in the taking of individual

Revealing the Deficiencies of Europe's Dublin Asylum System", *CEPS Liberty and Security in Europe* (2010), p. 7.

120 See chapter 2, 1.

121 Art. 2 para 6 EASO Regulation: 'The Support Office shall have no powers in relation to the taking of decisions by Member States' asylum authorities on individual applications for international protection.'; recital 14: 'The Support Office should have no direct or indirect powers in relation to the taking of decisions by Member States' asylum authorities on individual applications for international protection.' Not that the French ('ne dispose d'aucune compétence'), Spanish ('no tendrá competencia alguna') and German ('keine Befugnisse (…) Einfluss zu nehmen') version of Art. 2 para 6 EASO Regulation reflect recital 14 more clearly.

122 Evangelia (Lilian) Tsourdi, „Bottom-Up Salvation? From Practical Cooperation Towards Joint Implementation Through the European Asylum Support Office" (fn. 42), p. 1024; David Fernández-Rojo, *EU Migration Agencies* (fn. 23), p. 154–156: 'Until the future Regulation on the EUAA enters into force, the Agency's operational power to autonomously conduct the asylum interviews and draft an admissibility recommendation to the Greek Asylum Service will openly exceed the mandate of Regulation 429/2010 establishing EASO. (…) The experts deployed by EASO in the Greek hotspots were thus operating in a legal limbo (…)'.

123 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, para 32–35: the Ombudsman acknowledged that 'EASO is being encouraged politically to act in a way which is, arguably, not in line with its existing statutory role' but refrained from further action because 'it is likely that EASO's founding Regulation will be amended in the near future to provide explicitly for the type of activity in which EASO is currently engaged, thus resolving the issue of EASO possibly operating outside of its statutory brief.' This argument is remarkable in that the Ombudsman implicitly sanctions the approach to make use of the EU hotspots for an administrative experiment without legal basis.

asylum decisions, while the legal basis has still not fully been adjusted to administrative reality.[124]

To conclude, the informal rules governing the EU hotspot approach are partially based on Art. 78 TFEU, Art. 17 TEU, namely insofar as they merely concretise secondary law. Insofar as the informal rules go beyond secondary law, however, they also lack a legal basis in primary law.

c *Belated Formalisation in National and EU Secondary Law*

In the years following 2015, and the political insistence on the idea of an 'emergency response' notwithstanding, the EU hotspot approach was perpetuated and has since become a permanent feature of the asylum system. This perpetuation has been brought about by several factors, including the consolidation of administrative practices and the repeated extension of the temporal scope of the application of informal rules. The most important factor, however, was the adoption of legal reforms that created, albeit belatedly, a formal legal basis for the operation of the EU hotspot administration.

This process of belated legalisation adapted the legislative framework to a pre-existing administrative reality and thereby ensured its persistence. Remarkably, this process took place both at national and at EU level.

At national level, the process of legalisation began in the immediate crisis context. Less than two weeks after the EU-Türkiye Statement took effect, the Greek asylum system was fundamentally reformed.[125] With Law 4375/2016, adopted in April 2016, the Asylum Procedures Directive and the Reception Conditions Directive were transposed in a manner that allowed for the implementation of the EU hotspot approach. Inter alia, the new law formally established the EU hotspot facilities as Reception and Identification Centres (RIC),[126] created the possibility to reject asylum applications as inadmissible based on the safe third country concept in the

124 See chapter 2, I.3.b.

125 Law No. 4375 of 2016 on the organization and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC, 3 April 2016 (hereinafter: Greek Asylum Law 4375/2016), unofficial English translation available at: https://www.refworld.org/docid/573ad4cb4.html.

126 Art. 19 Greek Asylum Law 4375/2016.

context of so-called fast-track border procedures,[127] and vested operational cooperation with EASO with a legal basis.[128]

In the following years and until today, Greece has then continuously readjusted its asylum legislation with a view to implementing the EU hotspot approach as envisaged by the Commission.[129] The June 2016 reform provides an illustrative example. After it had become clear that the Appeals Committees under the Law of April 2016 mostly concluded that Türkiye could not be considered safe, the composition of the Committees was amended,[130] with the result that their decision-making practice was aligned to the Commission's opinion that Türkiye could generally be considered as a safe third country.[131]

Similarly, the fundamental reform of the Greek asylum law in November 2019, at least inter alia, served to align the Greek legal framework to the Commission's policies.[132] The considerable extension of the possibilities to detain asylum seekers,[133] for instance, corresponds to the Commission's recommendation to make returns more effective and increasingly rely on

127 Art. 54 to Art 5, Art 60 para 4 Greek Asylum Law 4375/2016.

128 In this regard, however, the April 2016 version of the law still lagged behind practical realities and was hence revised in June 2016 already. See Evangelia (Lilian) Tsourdi, „Bottom-Up Salvation? From Practical Cooperation Towards Joint Implementation Through the European Asylum Support Office" (fn. 42), p. 1023.

129 This adaptation at national level took place by means of administrative decrees specifying or amending the scope or manner of application of specific provisions, by means of legislative reform.

130 Previously consisting of one human rights expert, one UNHCR representative, and one representative of the Greek government, the Appeals Committee since the June 2016 amendment consists of two Greek administrative judges and one person that is proposed by UNHCR or the Greek human rights Committee; at the same time, the previous second hearing was limited to exceptional cases. See on this reform 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. 84.

131 Catharina Ziebritzki, Robert Nestler, „'Hotspots' an der EU-Außengrenze" (fn. 77), p. 30. Note, however, that the recomposition changed the decision-making practice only in the short term, as shown by Mariana Gkliati, „The Application of the EU-Turkey Agreement" (fn. 130), p. 86, 115–116, 122.

132 Law No. 4636/2019, 'The International Protection Act' of 1 November 2019 (usually referred to as 'IPA'), https://www.hellenicparliament.gr/UserFiles/bcc26661-143b-4f2d-8916-0e0e66ba4c50/dietnis-prostasia-pap-aposp.pdf. The reform entered into force on 1 January 2020.

133 See in more detail Minos Mouzourakis, „All but last resort: The last reform of detention of asylum seekers in Greece", eumigrationlawblog of 18/11/2019.

detention for that purpose.[134] Another example is the repeal of the so-called vulnerability exemption. Under the law of 2016, and in accordance with the Asylum Procedures Directive, vulnerable asylum seekers were exempted from the EU hotspot procedure.[135] This exemption, despite its deficient implementation,[136] had the effect that vulnerable persons were at least legally pre-empted from return.[137] Against this background, the Commission had already in 2016 recommended abolishing the vulnerability exemption in order to increase returns.[138] Back then, the proposal was met with justified legal concerns of Greek authorities and EASO.[139] In November 2019, however, these concerns did not hinder the Greek legislator from implementing the Commission's proposals and abolishing the exemption.[140]

At EU level, the process of belated legalisation is even more obvious. The EU hotspot approach was never consolidated in a tailored 'EU hotspot Regulation'.[141] Instead, the Commission included some central regulatory elements in its proposals for the Frontex and the EUAA reforms. The first formal provisions reflecting administrative reality in the EU hotspots were thus enshrined in the 2016 Frontex Regulation, with the EUAA Regulation

134 European Commission, Communication from the Commission to the European Parliament, the European Council and the Council. Progress report on the Implementation of the European Agenda on Migration, 16 October 2019, COM(2019) 481 final; European Commission, Recommendation of 7 March 2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council, C(2017) 1600 final, para 10 lit c, para 12.

135 Art. 14 para 8, Art. 60 para 4 lit f of Greek Asylum Law 4375/2016; Art. 43 para 3 Asylum Procedures Directive.

136 In practice, vulnerable persons often remained in the EU hotspots for several months before they were actually transferred to the mainland, see Catharina Ziebritzki, Robert Nestler, „'Hotspots' an der EU-Außengrenze" (fn. 77), p. 46.

137 Karin Aberg, „Examining the Vulnerability Procedure: Group-based Determinations at the EU Border", *Refugee Survey Quarterly* (2021), p. 1-27.

138 European Commission, Joint Action Plan on the Implementation of the EU-Turkey Statement, agreed upon between Greece and the EU coordinator for the implementation of the EU-Turkey Statement in Greece, December 2016 (on file with the author).

139 Catharina Ziebritzki, Robert Nestler, „'Hotspots' an der EU-Außengrenze" (fn. 77), p. 46.

140 The relevant reform was introduced with Law 4636/2019, enacted in January 2020, see Equal Rights Beyond Borders, July 2021, Consequences of the EU-Turkey Statement (fn. 84), p. 20.

141 See for criticism Darren Neville, Amalia Rigon, Sarah Salome Sy, *On the frontline: the hotspot approach to managing migration, Study conducted for the European Parliament, Committee on Civil Liberties, Justice and Home Affairs* (fn. 107), p. 9, 30.

following in 2021.[142] Arguably, the latest attempt to consolidate the EU hotspot approach in EU secondary legislation was made by the Commission with its 2020 New Migration Pact.[143] The Pact, providing for the comprehensive CEAS reform adopted in 2024, foresees a pre-entry screening and an expedited procedure geared towards return.[144] Although the reform package remained silent on where this procedure would be conducted, it can be inferred from the respective instruments that the procedures are to be carried out in the EU hotspots.[145] In essence, the 2024 reform thus amounts to consolidating the type of procedures that have already been conducted in the EU hotspots since March 2016.

d *Formalisation of Key Elements in EU Secondary Law and Remaining Regulatory Gaps*

Prior to the 2024 reform, however, the formalisation at EU level had already progressed so far that three central elements of the EU hotspot approach were laid down in secondary law: first, the definition of an EU hotspot, second, the specific form of administrative cooperation between agencies and national authorities and, third, the specific form of administrative supervision by the Commission.

142 See below 3.1. and 3.2.

143 In fact, the entire Pact largely proposes to belatedly legalise what is already administrative reality, see for the aspect of the agencies' involvement Evangelia (Lilian) Tsourdi, „The New Pact and EU Agencies: An Ambivalent Approach Towards Administrative Integration", eumigrationlawblog of 06/11/2020.

144 European Commission, Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/81, 23 September 2020, COM(2020) 612 final, 2020/0278 (COD) (hereinafter: Screening Regulation Proposal); European Commission, Amended Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, 23 September 2020, COM(2020) 511 final, 2016/0224 (COD) (hereinafter: Asylum Procedures Regulation Proposal); European Commission, Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum, 23 September 2020, COM(2020) 613 final, 2020/0277 (COD) (hereinafter: Crisis Regulation Proposal).

145 European Commission, New Pact on Migration (fn. 53), p. 10; Screening Regulation Proposal (fn. 144), recital 20.

Regarding the first regulatory element, the 2016 Frontex Regulation and its successors, as well as the 2021 EUAA Regulation, define a 'hotspot area' as 'an area in which the host Member State, the Commission, relevant Union agencies and participating Member States cooperate, with the aim of managing an existing or potential disproportionate migratory challenge characterised by a significant increase in the number of migrants arriving at the external borders.' Remarkably, this definition abandons the notion that EU hotspots are limited in time to an acute crisis situation. Instead, the definition confirms that the characteristic feature of the EU hotspot administration is close cooperation between EU bodies and national authorities.[146] Regarding all other aspects, however, the definition remains rather vague.

Secondly, the Frontex and the EUAA Regulation provide for specific teams that shall be deployed to the EU hotspots in order to provide administrative support, namely the so-called migration management support teams (MMST).[147] The distinct feature of those teams lies in their composition. MMSTs are composed of experts from several EU agencies, including Frontex, Europol and the EUAA.[148] Again, it is worth noting that such inter-agency teams have been operating in the EU hotspots since 2016 already, so the Regulations merely consolidated an existing administrative practice.[149]

The third regulatory element concerns the Commission's supervision of the EU hotspot administration. Both the Frontex and the EUAA Regulations state that the Commission 'shall establish the terms of cooperation at the hotspot area and shall be responsible for the coordination of the activities of the migration management support teams'.[150] Unlike in the case of support, however, the Regulations do not provide a legal basis for the

146 Evangelia (Lilian) Tsourdi, „Bottom-Up Salvation? From Practical Cooperation Towards Joint Implementation Through the European Asylum Support Office" (fn. 42), p. 1015.

147 Art. 2 para 19, Art. 36 para 1 lit d, Art. 40 Frontex Regulation; Art. 16 para 2 lit l, 21 EUAA Regulation.

148 Art. 2 para 19 Frontex Regulation; in detail see chapter 2, I.2.

149 Consequently, EASO staff operating in the EU hotspots prior to the EUAA proposal of 2021 must be considered as part of MMST; see chapter 2, I.2.

150 Art. 40 para 3, recital 55 Frontex Regulation; Art. 21 para 2, recital 34 EUAA Regulation. Similarly, already Art. 18 para 3 Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European

specific institutional form in which the Commission shall exercise this task. Therefore, the European Regional Task Force (EURTF) to date remains governed solely by informal rules.[151]

This shows that the formalisation in secondary law still has important gaps. The most relevant gap arguably concerns the overall function of the EU hotspot administration. Both the Frontex and the EUAA Regulation define the function as 'the management of [a] [...] migratory challenge'. This formulation is so open that it allows for almost any concrete function to be assigned to the EU hotspot administration. This flexibility was explicitly intended by the Commission, which stressed in September 2015 that even though EU hotspots could facilitate relocation, the approach should also allow for the implementation of any other policies.[152] Consequently, the legal framework as laid down in secondary law allows political actors to specify the function of the EU hotspots in accordance with current policy objectives. In other words, the formalisation of the legal framework at the EU level has intentionally remained incomplete.

e *Persisting Relevance of Informal Rules and Logic of Crisis*

As a result, the regulatory framework is still strongly characterised by informality, even after the adoption of the 2024 CEAS reform.[153] For instance, the organisation of the Commission's supervisory forum, the course of the EU hotspot procedure, and the recently established EU hotspots 2.0 are still not regulated in formal legal terms. Crucially, the continuing focus on informality coincides with a perpetuated logic of crisis. When the Commis-

Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC (hereinafter: Frontex 2016 Regulation).

151 This is even more remarkable considering that the establishment of an EURTF is not limited to Greece, but seems to be a general approach of the Commission to 'manage' the EU hotspot administration.

152 Chiara Loschi, Peter Slominski, „The EU hotspot approach in Italy: strengthening agency governance in the wake of the migration crisis?", *Journal of European Integration* 44 (2022), p. 769-786.

153 Evangelia (Lilian) Tsourdi, „Bottom-Up Salvation? From Practical Cooperation Towards Joint Implementation Through the European Asylum Support Office" (fn. 42), p. 158: '(...) the EU hotspot approach strengthened, like never before, the operational assistance and inter-agency cooperation of Frontex, EASO and Europol on the ground. Nonetheless, there is not yet a legally binding framework regulating and delimiting the tasks of these agencies and the competent national authorities in the hotspots.'.

sion relies on informal rules to regulate those aspects that are left open by secondary law, it tends to invoke the idea of emergency.

The persisting relevance of informal rules and crisis logic is well illustrated by the overall function of the EU hotspot administration. As mentioned above, EU hotspots were transformed from relocation into return centres in 2016. This shows that, although EU hotspots had already been defined in secondary law, the definition remained sufficiently open to allow for a complete overhaul of the function of EU hotspots without legislative reform. Given that the legislative definition remains open until today, EU hotspots could again be retransformed into relocation centres.[154] This option, however, remains rather theoretical, as the CEAS reform has instead reinforced the conceptualisation of EU hotspots as designated return centres.[155]

Another example of persisting informality concerns the kind of agency support. While EU secondary law regulates the composition of the teams deployed to the EU hotspots, it remains flexible concerning the agencies' exact tasks in the EU hotspots. Instead, the concrete tasks are defined in the relevant OPs.[156] The EASO-OP, for instance, regulates in much detail which support shall be provided by the agency and how it shall cooperate with the Greek Asylum Service (GAS), the First Reception and Identification Service (RIS), and the Hellenic Police. The same holds true for the relevant Frontex-OP.[157] In short, EU soft law remains central to the regulation of administrative cooperation between EU agencies and national authorities.

154 In 2020, some member states adopted national ad hoc relocation programs which were partly implemented in EU hotspots, see: EASO, Operating Plan 2021, p. 23, Measure EL-REL.

155 For an early analysis of the Commission's reform proposals see ECRE, *Reception, detention and restriction of movement at EU external borders*, Heinrich Böll Stiftung 2021, p. 38–47.

156 Since 2015, the support provided by EASO to the EU hotspot administration is defined in annual OPs which are published on the agency's website. For a different opinion see Evangelia (Lilian) Tsourdi, „Holding the European Asylum Support Office Accountable for its role in Asylum Decision-Making: Mission Impossible?", *German Law Journal* 21 (2020), p. 506–531; Gaia Lisi, Mariolina Eliantonio, „The Gaps in Judicial Accountability of EASO in the Processing of Asylum Requests in Hotspots", *European Papers* 4 (2019), p. 589–602, p. 516 who argues that the role of EASO is 'currently regulated exclusively by national administrative law'.

157 Frontex's support is defined the OP relevant to the Joint Operation Poseidon; Frontex Operating Plans are not published. The author's request for access to currently applicable OPs has been rejected by the agency with reference to Art. 4 para 1 lit a first indent of the Transparency Regulation. Therefore, reference is made in the following to the latest OP to which access has been granted, namely: Operating

The most recent and arguably the most relevant example of persisting informality and crisis logic concerns the establishment of the EU hotspots 2.0. As explained above, the EU hotspots 2.0 were introduced in reaction to the burning of Moria in 2020 on the basis of a Memorandum of Understanding alone. The Memorandum, albeit informal in nature, has brought about substantial changes in the EU hotspot administration, as it has changed decision-making structures and the character of administrative cooperation with a view to increasing the involvement of EU bodies. Again, the EU hotspot administration was fundamentally restructured through informal rules in the context of an immediate crisis. And again, the relevant informal rules conceive the changes as strictly limited to the period of emergency.[158] Experience, however, suggests that the innovations of the EU hotspots 2.0 are likely to be perpetuated, too.

2.3 EU Hotspots as a Testing Ground

Against this background, it becomes clear that the EU hotspots function as a testing ground for advanced administration integration and are, hence, the most suitable case to study the EU's new role as a central administrative actor in the asylum system.

In fact, EU hotspots have always served as testing laboratories, from their establishment in 2015 to their current form under the 2020 Joint Pilot.[159] The case clearly illustrates that the EU's new role is brought about through crisis-induced administrative experiments. As the Commission itself puts it, reform proposals often 'build on the hotspot approach' or 'draw on recent experience of crisis response'.[160] Typically, new forms of cooperation are introduced in an informal manner and usually as an emergency mechanism. Once some administrative experience is gathered, the intensified cooperation is then consolidated and partially formalised in secondary law

Plan to JO Poseidon 2019, Main Part including Annexes and Handbooks, 21 January 2019 (redacted version on file with the author; hereinafter: Frontex JO Poseidon OP 2019).

158 The MoU Joint Pilot (fn. 44) was initially limited to a period of two years.

159 Similarly Evangelia (Lilian) Tsourdi, „Bottom-Up Salvation? From Practical Cooperation Towards Joint Implementation Through the European Asylum Support Office" (fn. 42), p. 1015 describing the EU hotspots as a 'breeding ground' for the integrated European asylum administration; David Fernández-Rojo, *EU Migration Agencies* (fn. 23), p. 149.

160 See only European Commission, New Pact on Migration (fn. 53), p. 10.

– although only to the extent that such formalisation is deemed politically desirable.

Obviously, the experimentalist approach endangers fundamental principles of the rule of law, including respect for fundamental rights, the principle of a legal basis, and the right to judicial protection. The costs for the testing results are thus unbearably high.[161] Given that decades of systemic fundamental rights violations are tolerated, one cannot help but suspect that the 'EU hotspot experiment' is possible only because it is the rights of third-country nationals, and not those of EU citizens, that are being violated.[162]

Yet, it is precisely the experimentalist character that makes the EU hotspots the best-suited case study. First, the EU hotspots must be studied because they represent the most advanced form of administrative cooperation in the entire European asylum system today. This concerns both vertical and inter-agency cooperation. Second, it seems likely that these intensified forms of administrative cooperation will, in the future, be extended to other contexts, such as, for instance, processing centres at internal borders or on the territory of third countries. This will raise even more complex questions about the EU's responsibility, the analysis of which presupposes a clear understanding of the EU's responsibility in the EU hotspots. Third, the systemic deficiencies as such argue in favour of focusing on the case of the EU hotspots. The question of whether the EU is responsible for the systemic deficiencies has become so pressing that it urgently requires an answer – for the sake of the rule of law and for the sake of the concerned individuals.

3 The EU's Main Administrative Actors

Any attempt to define the EU's responsibility presupposes a clear understanding of what exactly EU bodies do in the context of the EU hotspot

161 Five years of systemic violations of fundamental rights, leaving durable marks on the lives of ten thousands of people does not exactly seem an appropriate price to pay. Similarly Refugee Support Aegean (RSA), 'The "hotspots" experiment: removing human rights from the equation', 9 October 2018, available at: https://rsaegean.org/en/the-hotspots-experiment/.

162 Imagine, for instance, an administrative practice that allows for the detention of criminal suspects without legal basis, and in close cooperation with EU agencies. The outcry would be loud, and rightly so.

administration. This requires a precise understanding of the relevant EU bodies, their competences and internal decision-making structures.

The main argument here is that, at the latest since 2015, the EUAA, Frontex and the European Commission have become vital for the functioning of the European asylum administration. More precisely, it is argued that the EU's new political focus on operational support required an institutional strengthening of the agencies,[163] and that this in turn created new needs in terms of supervision which were essentially taken over by the Commission.

This argument comes with the caveat that the EU's role varies greatly from one member state to another, depending on the extent to which a national asylum system relies on EU support. This, in turn, depends on a complex interplay of a whole range of factors, including the member state's geographical location, the strength of its national asylum administration, its political willingness to accept EU support, and the interplay with other crises such as the Eurozone crisis[164] or the rule of law crisis.[165] This caveat does not weaken the main argument. On the contrary, the fact that some national subsystems, e.g. the Greek one,[166] depend almost entirely on EU support only confirms that the functioning of the European asylum system as a whole also depends on the EU. An isolated observation of national sub-systems does not lead any further. The European asylum system is only as functional as its weakest subsystems[167] and must hence be considered as a whole.

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163 David Fernández-Rojo, *EU Migration Agencies* (fn. 23), p. 7–13; Cathryn Costello, „Administrative governance and the Europeanisation of asylum and immigration policy", in Herwig C.H. Hofmann, Alexander H. Türk (ed.), *EU Administrative Governance*, Edward Elgar 2006, p. 287–340, p. 305–309.

164 Notably in Greece, see Angeliki Dimitriadi, Antonia-Maria Sarantaki, „The refugee 'crisis' in Greece: politicisation and polarisation amidst multiple crises", *CEASEVAL Research on the Common European Asylum System* 11 (2018), http://ceaseval.eu/publications.

165 Notably in Hungary, see Barbara Grabowska-Moroz, Dimitry Vladimirovich Kochenov, „The Loss of Face for Everyone Concerned. EU Rule of Law in the Context of the 'Migration Crisis'" (fn. 7), p. 190 and passim.

166 Consequently, EU bodies have long played a much lesser role in Hungary or Germany than in Italy, Spain or Malta. Against this background, this section mainly refers to the example of Greece where, due to several factors, including the geopolitically difficult location as Türkiye's neighbour, the weakness of its national asylum system, and the Commission's consolidated role as a strong actor in the context of the financial crisis, EU support has been most extensive since 2015.

167 Remarkably, it is more often stated that 'the external border is as strong as its weakest link', see only Maarten Den Heijer, Jorrit R Rijpma, Thomas Spijkerboer,

3.1 The EU Asylum Agency (EUAA)

As mentioned above, the foundation for the EU's involvement in the asylum administration was laid with the establishment of agencies that were entrusted with implementing European asylum law.[168] In the following, these agencies became increasingly important, with the 2015 crisis being an important catalyst. The central agency here is the EU Asylum Agency (EUAA), founded in 2010 as the European Asylum Support Office (EASO) and mandated to support member states in implementing the EU asylum acquis. In the years following its establishment, EASO remained a small and largely unknown body.[169] This changed fundamentally with the 2015 crisis. In just one year, the agency developed from a rather insignificant office into one of the most important agencies. EASO has become essential to the functioning of the CEAS and, thus, of the Area of Freedom, Security and Justice more broadly.

Remarkably, this change in EASO's role was not brought about by legislative reform but by policy decisions. In the early 2010s, the agency was tasked mainly with information-gathering and coordination.[170] Since 2013, the scope of its operational support, its overall activities and its budget were significantly and steadily increased.[171] In response to the crisis, EASO immediately and significantly expanded its operational support as well as its information and training activities.[172] Crucially, this increased engagement was not scaled back after the crisis context but has been maintained since. This is clearly reflected in the agency's budget. After it had increased from only 8 to 15 million between 2011 and 2015, it was augmented to almost 60

„Coercion, prohibition, and great expectations. The continuing failure of the Common European Asylum System", *Common Market Law Review* 53 (2016), p. 607-642, p. 615.

168 In more detail David Fernández-Rojo, *EU Migration Agencies* (fn. 23), p. 21–62.

169 For an early account see Françoise Comte, „A New Agency Is Born in the European Union: The European Asylum Support Office" (fn. 20).

170 With the exception of Greece, where operational support was provided since 2011.

171 Therefore, Salvatore F. Nicolosi, David Fernandez-Rojo, „Out of control? The case of the European Asylum Support Office" (fn. 51), p. 180 date the fundamental shift in EASO's role to 2013 rather than to 2015.

172 Similarly, for the other agencies, David Fernández-Rojo, *EU Migration Agencies* (fn. 23), p. 63–113.

million in one fell swoop in 2016.[173] Since then, the budget has been steadily increased and amounts to about 180 million in 2023.[174]

After facts had been created, it took another five years until the legal basis was eventually adapted. Although the Commission had recognised in 2016 already that an adjustment of the legal basis was urgently required,[175] political negotiations turned out extremely controversial, so that the new EUAA Regulation did not enter into force until 2021.[176] The EUAA Regulation is, hence, a paradigm example of belated legalisation. In essence, the new Regulation codifies and legitimises practices that have been implemented already since 2016. In large part, the Regulation merely creates a legal basis for already existing practices and provides institutional safeguards in an ex-post manner. After EASO had considerably stepped up its operational support in the crisis, it operated without a concrete legal basis and without urgently required safeguards. With the EUAA Regulation, these crisis-induced practices were eventually vested with a legal basis and, at least on paper and at least partially, with institutional safeguards such as an individual complaints mechanism.[177]

a *The EUAA's Competences as a Political Compromise*

The EUAA Regulation thus reflects a political compromise. It adjusts the legal basis to the fact that the agency has become central to the asylum administration but decidedly refrains from establishing a 'true' decision-making EU asylum authority. This is important because the question of whether an EU agency should be vested with powers to decide on individu-

173 In more detail on the development of EASO's budget Evangelia (Lilian) Tsourdi, „Bottom-Up Salvation?" (fn. 42), p. 1006–1007.

174 EUAA, Statement of Revenues and Expenditures 2016, https://is.gd/2mgQ0q (30.05.2024); Statement of Revenues and Expenditures 2023, https://euaa.europa.eu/publications/budget-2023 (23.05.2024).

175 European Commission, Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, 04/05/2016, COM/2016) 271 final.

176 EUAA Regulation (see introduction, fn. 39).

177 Art. 39 EUAA Regulation. On the modelling of the EUAA Regulation after the Frontex Regulation see Alexandra Tarzikhan, „The European Union Agency for Asylum: A Promising Improvement or Vestige of the European Asylum Support office?", *Refugee Law & Migration Studies Brief* 1 (2022), p. 1-10, p. 6.

al asylum claims creates an intractable tension in the agency's mandate.[178] Accordingly, the innovations of the EUAA reform are anything but groundbreaking. The reform is characterised by two main developments: firstly, an expansion of the agency's competences; and secondly, a reconfiguration of its institutional structure.[179]

As regards the first point, it should be recalled that the EUAA's competences can be roughly divided into three areas.[180] The first and oldest area of competences is the provision of knowledge-based support to member states. This includes the provision of training for national asylum authorities, the preparation and sharing of operational standards, guidelines or so-called best practices, and the gathering, analysing and sharing of information concerning, inter alia, the situation in countries of origin or in third countries, or the situation within the EU and at its external borders. Second, the agency is tasked with the provision of operational support to national authorities. This includes selection and deployment of staff and technical devices to specific areas, often located at the EU's external borders, where the deployed staff works hand-in-hand with national authorities on the ground in order to enhance the functioning of the concerned asylum system. Third, and this is the most recent area of competences, the agency is tasked with 'monitoring' the European asylum system. In this context, too, a particular focus lies on those national systems that have been identified as relatively weak, which often concerns member states located at the EU external border.

While the 2021 reform expanded the agency's competences in terms of operational support and in terms of monitoring, the following focuses on its operational competences.[181] The EASO Regulation had formulated that

178 Note that the question is not whether the EU can provide international protection (which is a difficult question, given that the idea underlying protection is to substitute a broken state-bond) but merely whether the EU can decide whether member states shall grant international protection.

179 In more detail on the EUAA reform David Fernández Rojo, „From EASO to the European Agency for Asylum: 'Business as Usual?'", eumigrationlawblog of 15/10/2018.

180 Similarly, with respect to EASO Evangelia (Lilian) Tsourdi, „Bottom-Up Salvation?" (fn. 42), p.1002 – 1003. For an enumeration of the EUAA's tasks see Art. 2 para 1 lit. a to s EUAA Regulation.

181 This is because the agency's monitoring activities are not yet clearly defined in practice, so that a discussion of the EU's legal responsibility for failure to adequately monitor the European asylum system would remain a rather hypothetical exercise. See further on EUAA's monitoring role David Fernández-Rojo, *EU Migration*

the agency shall have 'no direct or indirect powers' in relation to the 'taking of decisions by member states' asylum authorities on individual applications for international protection'.[182] Still, the crisis-induced soft law tasked EASO with conducting asylum interviews and issuing legal opinions recommending the acceptance or rejection of the claim. Since 2015, the agency had thus systemically overstepped the limits of its competences under the EASO Regulation.[183] Against this background, the EUAA Regulation reads as a failed attempt to adjust the legal basis as far as necessary, while at the same time accommodating political concerns against a 'true' EU asylum agency. It reflects both the need to codify crisis-induced practices, which, as a matter of fact, include EASO conducting asylum procedures, and the continuous political reluctance to make individual asylum decisions at EU level. The result is that the EUAA Regulation tones down the limits of the agency's competence to a considerable extent[184] and defines its operational tasks in remarkably fuzzy and convoluted terms.[185] Certainly, these compromise-like formulations do leave ample room for manoeuvre on the ground which appears to have been a central political aim. When it comes to defining the EU's responsibility in legal terms, however, the EUAA Regulation is hardly a step forward.

b *The EUAA's Internal Decision-Making Structure*

This leads to the second point of the EUAA reform that is of interest here, namely, the agency's internal decision-making structure. For in order to determine who is responsible for fundamental rights violations committed

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Agencies (fn. 23), p. 102–104; Evangelia (Lilian) Tsourdi, „Monitoring and Steering through FRONTEX and EASO 2.0: The Rise of a New Model of AFSJ agencies?", eumigrationlawblog of 29/01/2018; Evangelia (Lilian) Tsourdi, „The New Pact and EU Agencies: An Ambivalent Approach Towards Administrative Integration" (fn. 143).

182 Recital 14, Art. 2 para 6 EASO Regulation.

183 See only Evangelia (Lilian) Tsourdi, „Bottom-Up Salvation?" (fn. 42), p. 1021–1026.

184 Stressing that all tasks of the agency are 'without prejudice' to the 'competence of national asylum authorities to decide on individual applications for international protection', see recital 17, 21, 66; Art. 11 para 3, Art. 18 para 2 lit. j, Art. 22 para 4 EUAA Regulation.

185 See only Art. 16 para 2 lit c which provides that 'the Agency shall (…) facilitate the examination by the competent national authorities of applications for international protection or provide those authorities with the necessary assistance in the procedure for international protection'.

by or with the contribution of EUAA staff, it is essential to have a precise picture of who knows what and who takes which decisions.

Generally, the internal structure of the EUAA is similar to that of other agencies. It consists of two main decision-making bodies, the Management Board and the Executive Director.[186] The Management Board is composed of one representative of each member state, two representatives of the Commission, and one non-voting representative of UNHCR. As its name indicates, the management board is responsible for the overall management of the agency. This includes the taking of general decisions related to the agency's budget and policy, as well as the issuance of more specific guidelines.[187] The Executive Director, on its part, is the agency's legal representative and responsible for its day-to-day administration. This includes inter alia, evaluating, approving and coordinating the agency's operational support and ensuring the implementation of the Operational Plans.[188] In principle, the office is designed as independent,[189] but a certain dependence on the Management Board cannot be denied: after all, the Executive Director is appointed by the Board, shall implement its decisions, and remains accountable to it.[190]

When it comes to the EUAA's operations on the ground, the Executive Director accordingly plays a key role. They decide on the deployment of asylum support teams (AST) or migration management support teams (MMST). Once the teams are deployed, the Executive Director delegates their supervisory power to one or several coordinating officers, formerly so-called Union contact points, who coordinate the work of the deployed teams and act as interface between the agency and the host member state. The coordinating officers are responsible for 'monitoring' compliance with the Operational Plan and EU law and, to this end, provide general instructions. At the same time, the host member state retains responsibility for detailed instructions concerning daily operations. In this sense, the regular AST are subject to a dual supervision structure. Supervision works slightly differently in the case of MMST. As will be set out in more detail below, MMSTs are subject to a two-layered supervision structure, with the first

186 Art. 39 EUAA Regulation.
187 Art. 40, 41 EUAA Regulation.
188 Art. 46, 47 EUAA Regulation.
189 Art. 47 para 2 EUAA Regulation.
190 Art. 47 para 1, para 2, para 3, para 5 lit b to f, lit h, lit o, lot r to s, lit x EUAA Regulation.

layer corresponding to the dual structure of the AST and the second layer consisting of supervision by the European Commission.[191]

In addition to the Management Board and Executive Director, the EUAA disposes of two complementary bodies that serve to improve the agency's fundamental rights record, namely the Fundamental Rights Office and the Consultative Forum.[192] Both have been introduced only with the EUAA Regulation and are modelled after the Frontex Regulation.[193] Their purpose is to secure the agency's overall compliance with fundamental rights and, in the event of a violation, strengthen its accountability. The Consultative Forum consists of representatives of civil society organisations and relevant stakeholders, including UNHCR, Frontex and FRA, and serves to maintain the agency's dialogue with these.[194] The task of the Fundamental Rights Office is formulated as 'ensuring' the agency's compliance with fundamental rights.[195] This, however, seems quite ambitious, if not unrealistic, considering that the actual competences of the Office are mainly advisory and consultative in nature. In most agency-internal procedures, such as the conclusion of operational plans and the adoption of the agency's code of conduct, the Fundamental Rights Officer must be consulted but cannot ensure that its advice is followed.[196] In addition, the Fundamental Rights Office is responsible for handling individual complaints under the new complaints mechanism.[197] Although this arguably is the core task of the Office, its position remains relatively weak even in this context because it is competent to review only the admissibility of the complaints, while the competence for reviewing the substance and ensuring follow-up lies with the concerned member state or the Executive Director.[198]

191 This is very simplified. For details see Art. 18–21, 25 EUAA Regulation. In more detail on the supervisory structure in the case of MMST see chapter 2, I.2.

192 Art. 39 EUAA Regulation.

193 On the modelling of the EUAA Regulation after the Frontex Regulation see Alexandra Tarzikhan, „The European Union Agency for Asylum: A Promising Improvement or Vestige of the European Asylum Support office?" (fn. 177), p. 6.

194 Art. 50 EUAA Regulation.

195 Art. 49 para 3 EUAA Regulation.

196 Art. 49 para 5 EUAA Regulation.

197 Art. 51 para 4 EUAA Regulation.

198 Art. 51 para 4 lit. a, c, d, para 6, para 8 EUAA Regulation. Note that the grounds for inadmissibility are defined in an extraordinarily broad and vague manner, as Art. 51 para 3 sentence 3: 'Complaints which are anonymous, abuse, malicious, frivolous, vexatious, hypothetical or inaccurate shall also be inadmissible.'.

3.2 The EU Border Agency (Frontex)

The EUAA cooperates with a considerable number of other agencies whose mandates are in one way or the other connected to the implementation of European asylum law. Out of those, Frontex is of particular importance and, for the purpose of this study, hence requires a closer look.

a *Inter-Agency Cooperation as a Defining Feature of the European Asylum Administration*

Inter-agency cooperation in the asylum system is so extensive that it has itself become a central feature of the European asylum administration.[199] The EUAA's most important cooperation partners are Frontex, Europol, Eurojust, the EU Fundamental Rights Agency (FRA) and the Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA).[200] Each of these agencies, in turn, cooperates with a whole range of other agencies. Frontex, for instance, cooperates with the EUAA, Europol, Eurojust, FRA, the European Fisheries Control Agency (EFCA), and the European Maritime Safety Agency (EMSA).[201]

Given that inter-agency cooperation is increasingly vital to the functioning of the asylum system, scholarly contributions have repeatedly argued for the establishment of a central EU migration agency.[202] Taking into account current political debates and the state of reform so far, however, such proposals are likely to remain within the realm of academic discussion for the time being. Instead, it seems much more realistic that cooperation between the existing agencies will be strengthened further.[203] The present study, hence, concentrates on analysing the allocation of responsibility in inter-agency cooperation as it currently exists. As will be explained in more detail below, the focus is on the example of the so-called migration

199 David Fernández-Rojo, *EU Migration Agencies* (fn. 23), p. 115–120, p. 121–133.
200 Art. 5, 8, 21, 29, 31, 32, 50, and in a general manner Art. 37 EUAA Regulation.
201 Art 10 para 1 lit. q to t Frontex Regulation.
202 See only Elspeth Guild, „Does the EU Need a European Migration and Protection Agency?", *International Journal of Refugee Law* 28 (2016), p. 585-600 with further references.
203 Similarly, David Fernández-Rojo, *EU Migration Agencies* (fn. 23), p. 119–120.

management support teams (MMST), which represent the most advanced form of inter-agency cooperation and operate in EU hotspots.[204]

Yet, this study is limited to the analysis of inter-agency cooperation between the EUAA and Frontex. This limitation is justified for three reasons. First, Frontex's mandate necessarily requires it to comply with, and sometimes even to proactively apply, asylum law.[205] This is increasingly reflected in EU secondary law: while the 2004 Frontex Founding Regulation[206] mentioned neither asylum nor refoulement, the 2019 Regulation puts particular emphasis on the agency's compliance with the EU asylum acquis, in particular the fundamental right to asylum and the non-refoulement principle.[207] Second, Frontex's close cooperation with the EUAA reflects the increasing securitisation of migration policy.[208] Seen from this perspective, Frontex's involvement in the asylum administration is problematic as such, which makes the analysis of its responsibility for misconduct even more pressing. Third, Frontex and the EUAA provide the bulk of operational support in individual asylum procedures and are therefore de facto most likely to be involved in fundamental rights violations.[209]

b *Frontex's Competences and Internal Decision-Making Structures*

Consequently, and with a view to the analysis in the following chapters, the remainder of this section provides a brief introduction to Frontex. As

204 Art. 2 para 19, Art. 40 Frontex Regulation, Art. 21 EUAA Regulation. See chapter 2, 1.2.

205 For instance, a denial of entry for non-compliance with visa requirements is permissible only if the non-refoulement principle is respected. See further Roberta Mungianu, *Frontex and Non-Refoulement*, Cambridge University Press 2016, in particular p. 129–135, 205–206.

206 Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

207 See only recital 51, 84, 103, Art. 21 para 3 lit b, Art. 36 para 2, Art. 43 para 4, Art. 48 para 1, Art. 50 para 3, Art. 71 para 2, Art. 73 para 2, Art. 80, Art. 86 para 4 Frontex Regulation.

208 For the prevailing view see only Sarah Léonard, „EU border security and migration into the European Union: FRONTEX and securitisation through practices", *European Security* 19 (2010), p. 231-254. Challenging that view Andrew W Neal, „Securitization and Risk at the EU Border: The Origins of FRONTEX", *Journal of Common Market Studies* 47 (2009), p. 333-356.

209 See chapter 2.

in the case of the EUAA, the most important steps in the development of Frontex were taken in the aftermath of the crisis.[210] The 2016 reform significantly expanded the agency's mandate, granted it more autonomy vis-à-vis member states and, to this end, introduced the concept of 'shared' responsibility for border control.[211] Also, Frontex was renamed the European Border and Coast Guard Agency, but the use of its previous name remained common usage.[212] In comparison, the latest reform of 2019 seems rather modest.[213] Although the ambitious and perhaps unrealistic[214] goal of establishing a permanent corps of 10,000 operational staff attracted media attention, the 2019 innovations remain mainly quantitative. Qualitatively, the latest reform brings little new, as the idea of establishing a permanent corps with executive powers had in fact already been introduced with the 2016 reform.[215]

Overall, Frontex's legal competences as well as its factual involvement have continuously and substantially increased over the past decades. Again, this is clearly reflected in the agency's budget which has grown exponentially from 6 million in 2005 to 829 million in 2023.[216] An increase of this scale is indeed extraordinary; and a comparison with the EUAA, in terms of budgetary growth and numbers of legislative reforms, clearly shows that political agreement is apparently much easier reached when it comes to 'protecting' the EU's external borders against migrants than when it comes to protecting persons in need of international protection.[217]

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210 Vittoria Meissner, „The European Border and Coast Guard Agency Frontex After the Migration Crisis: Towards a 'Superagency'?" (fn. 51), p. 159–168.

211 Frontex 2016 Regulation (fn. 150).

212 Art. 3 Frontex 2016 Regulation.

213 Frontex Regulation (introduction, fn. 39). See on that reform and its implications David Fernández-Rojo, *EU Migration Agencies* (fn. 23), p. 87–100.

214 Vittoria Meissner, „The European Border and Coast Guard Agency Frontex After the Migration Crisis" (fn. 51), p. 168.

215 Art. 20 para 5 Frontex 2016 Regulation.

216 Statista, Budget der Europäischen Agentur für die Grenz- und Küstenwache (Frontex) in den Jahren 2005 bis 2024, https://de.statista.com/statistik/daten/studie/1172183/umfrage/budget-der-europaeischen-agentur-fuer-die-grenz-und-kuestenwache-frontex/ (30.05.2024).

217 Note that the notion of 'protecting' instead of 'controlling' borders is based on the paradigm of 'migration as danger'. The terminological aberration is taken one step further with the idea of 'vulnerable' borders, see only Art. 32 Frontex Regulation on the 'vulnerability assessment' through which the agency 'shall assess (…) the Member States' capacity to carry out all border management tasks'.

Frontex's competences can be roughly divided into the same categories as those of the EUAA, namely knowledge-based support, operational support and monitoring.[218] As regards, first, knowledge-based support, Frontex conducts research, in particular on the use of advanced surveillance technology, develops technical standards for information exchange or equipment, promotes the interconnection of systems and networks, and supports the development of common minimum standards for external border surveillance. Second, in terms of operational support, the agency deploys different kinds of teams depending on the practical needs on the ground, and provides assistance in all areas related to border control, ranging from the provision of vessels and technical equipment to the registration of asylum seekers in EU hotspots and the coordination and organisation of deportations. Third, Frontex is tasked with monitoring all aspects of the European border administration[219] as well as member states border control capacities.[220] As in the case of the EUAA, these monitoring-based tasks have only recently been assigned to the agency, and yet remain to be defined in terms of both practical activities and legal obligations.

As in the case of the EUAA, the question of Frontex's competence limits is so contentious that the Frontex Regulation appears as an unsuccessful attempt to accommodate all views. Again, the political compromise comes at the expense of legal clarity, as vague formulations and convoluted regulatory structures show. For example, the Regulation provides that the performance of all tasks, and in particular 'those requiring executive powers, shall be subject to the authorisation of the home member state', while stressing at the same time that 'member states may authorise members of the (Frontex) teams to act on its behalf'.[221] Similarly, the 'use of force' shall in principle be exercised only in the 'presence of border guards of the host member state', which may, however, 'authorise members of the teams to use force on its territory in the absence of border guards of the host member state'.[222] Taking into account that Frontex operations usually take place in contexts characterized by quick decisions and actions on the part of public actors

218 For an overview see Art. 10 Frontex Regulation.
219 Similarly, the Frontex Regulation refers to the 'European Border and Coast Guard', see Art. 4 Frontex Regulation, and sometimes also to the 'integrated border management', see Art. 10 para 1 lit. a Frontex Regulation.
220 In particular Art. 10 para 1 lit. a to e Frontex Regulation.
221 Art. 82 para 2 and para 4 Frontex Regulation.
222 Art 82 para 8 Frontex Regulation; see further Art. 2 para 18, 19, 29, Art. 29, Art. 39, 40, 48, 52, and Art. 82 para 8 Frontex Regulation.

as well as by a lack of evidence on the part of the individuals concerned, provisions such as the cited ones necessarily lead to uncertainty as to whether a specific action was covered by the agency's mandate or not. In sum, the Frontex Regulation is at least as deficient in terms of regulating responsibilities as the EUAA Regulation.

The internal organisation of Frontex is very similar to that of the EUAA, too.[223] The agency disposes of a Management Board, an Executive Director who is responsible for the day-to-day administration, as well as a Fundamental Rights Office and a Consultative Forum.[224] As in the case the EUAA, the Fundamental Rights Office is structurally weak, and the recently created individual complaints mechanism works rather poorly.[225]

When it comes to the supervision of deployed support teams, there are three main differences between the EUAA and Frontex. Tellingly, all these differences seem to be due to the traditional understanding of border control as an inherently sovereign task, and concern, in particular, the use of force and the carrying of weapons. First, the home member state is involved to a much greater extent in the case of Frontex. While deployed Frontex teams, as deployed EUAA teams, are subject to supervision by the coordinating officers who act on behalf of the Executive Director, and by the host member state, they are also subject to closer control by the host member state. Second, the host member state is involved to a greater extent in the case of Frontex than in the case of the EUAA. Third, the Frontex Regulation explicitly vests the Executive Director with the power, and thus also the obligation, to unilaterally withdraw the agency's support in case of systemic and persistent fundamental rights violations. These agency-specific differences notwithstanding, the supervisory structure in the case of the inter-agency MMST, in which staff of both the EUAA and Frontex cooperate, is uniform insofar as the Commission is responsible for ensuring the overall legality of the agencies' operational support.[226]

223 Given that the EUAA has been built upon the model of Frontex, see fn. 193.

224 Art. 99 Frontex Regulation.

225 On the considerable delays in hiring fundamental rights monitors and connected failures see Luisa Marin, „Frontex and the Rule of Law Crisis at EU Borders" (fn. 52).

226 Again, this is very simplified. For the supervisory structures on the different deployment types in detail see Art. 36–44, 46, 48–50, 52–53, 54–58, 82 Frontex Regulation. In more detail on the supervisory structure in the case of MMST see chapter 2, 1.2.

3.3 The European Commission

The European Commission has become a central administrative actor in the asylum system, too. While this development is often overlooked in legal scholarship, it is telling that the European Ombudsman has recently opened its first own-initiative inquiry against the Commission concerning its role in the asylum administration.[227] Whether it is a matter of far-reaching policy decisions, the funding of individual projects, the details of the implementation of single provisions of the EU asylum acquis, or the overall state of national asylum administrations: it is always the Commission that has the overview, keeps the relevant information, and takes the key decisions. When it comes to exercising public authority at EU level, all threads come together at the Commission. In this sense, the Commission acts as general supervisor of the European asylum administration. To exercise this supervisory role, it relies on a whole range of measures, out of which policy making, funding, operational instructions, and monitoring are of particular practical relevance.[228]

a *The Commission's Administrative Competences under Art. 17 para 1 TEU*

Unlike in the case of the agencies, the Commission's specific tasks are not bundled in one Regulation. Instead, its competences derive mainly from Art. 17 para 1 TEU and are then concretised in several Regulations, including the EUAA Regulation, the Frontex Regulation, and the AMIF Regulation.[229] Art. 17 para 1 TEU establishes the Commission's role as guardian of the Treaties, or more precisely as guardian of EU law. In a nutshell, it provides that the Commission shall ensure the application of primary and secondary law, oversee the application thereof, and exercise coordinating,

227 European Ombudsperson, How the European Commission ensures respect for fundamental rights in EU-funded migration management facilities in Greece, Case OI/3/2022/MHZ, opened 11/07/2022.

228 In more detail on these four categories see Catharina Ziebritzki, *The EU's Responsibility in the Asylum Administration* (fn. 56), p. 100 et seq.

229 Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC (hereinafter: AMIF Regulation).

executive and management functions.[230] Arguably, the Commission's mandate as supervisor of the integrated European asylum administration, more precisely its competences related to policy making, funding, operational supervision and monitoring, thus follow from Art. 17 para 1 TEU.[231]

First, the Commission's competence to develop policies and issue guidelines on the interpretation of EU law follows, in particular, from sentence 1, 2 and 5 of Art. 17 para 1 TEU.[232] The crucial point here is that Art. 17 para 1 TEU enables the Commission to issue guidelines that interpret the EU asylum acquis, but not to create new rules. In practice, however, this distinction is often difficult to make. The EU hotspot approach of 2015, for instance, can be seen as a guideline on how to apply the then-existing EU asylum acquis. At the same time, the specific interpretative combination has the effect that an entirely new procedure is created, namely the EU hotspots procedure;[233] seen from this perspective, the Commission's guideline could also be qualified as going beyond the EU asylum acquis.

The second aspect of the Commission's competence, namely funding, is more straightforward. Art. 17 para 1 sentence 4 TEU is unequivocal in that the Commission is competent to administer EU funding which includes granting funds and evaluating EU funded projects. This must be read in conjunction with Art. 317 TFEU which provides that the Commission shall implement the budget in cooperation with member states and establishes the principle of sound financial management.[234] The Commission's specific

230 Art. 17 para 1 TEU provides that 'The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation. It shall initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements.'.

231 On the Commission's competences related to external representation see Matthias Ruffert, „Artikel 17 EUV", in Christian Calliess, Matthias Ruffert (ed.), *EUV/AEUV. Kommentar*, C.H. Beck 2022, para 16.

232 'Policy-making' as understood here falls mainly under governmental or executive functions, and only exceptionally under administrative functions; on this distinction see Matthias Ruffert, „Artikel 17 EUV" (fn. 231), para 3.

233 See further chapter 2, I.3. and 3.2.

234 Matthias Ruffert, „Artikel 17 EUV" (fn. 231), para 12. The principle of sound financial management, as established by Art. 317 TFEU, is defined in Art. 33 para of the

competences are then defined in several Funding Regulations.[235] These Regulations usually allow the Commission to withhold or withdraw funding in standard cases of non-compliance with EU law.[236] In grave cases of systemic and persisting fundamental rights violations, the Commission's possibilities to withdraw or withhold funding often go even further, as not only the Regulation on Common Provisions for Funds[237] but arguably also the Conditionality Regulation become applicable.[238] Although the latter was adopted with a view to 'classic' rule of law deficits, it appears to be applicable to rule of law deficits that are specific to the asylum administration, too.[239]

Financial Rules Regulation, see Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union (hereinafter: Financial Rules Regulation).

235 In particular: Regulation (EU) No 515/2014 of the European Parliament and of the Council of 16 April 2014 establishing, as part of the Internal Security Fund, the instrument for financial support for external borders and visa and repealing Decision No 574/2007/EC (hereinafter: ISF Regulation); Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy (hereinafter: Regulation on Common Provisions for Funds). See in particular Art. 14 para 5 AMIF Regulation.

236 Under Art. 10 para 2, 3 ISF Regulation which must be read in conjunction with Art. 3 para 4 thereof, the Commission may condition the approval of EU funding upon compliance with EU law, and especially with the ChFR. The same arguably follows from recital 33, Art. 3 para 1, Art. 19 para 2 AMIF Regulation read in conjunction with Art. 17 TEU. In general terms, Art. 9 para 1, Art. 15 para 1, para 6 Regulation on Common Provisions for Funds in conjunction with Annex III thereof provides that EU funding may be conditioned upon compliance with EU law, and especially with the ChFR.

237 Art. 96 and 97 Regulation on Common Provisions for Funds provide that the 'Commission may suspend all or part of payments' inter alia 'if (…) there is a serious deficiency' as defined in Art. 2 para 32 of that Regulation.

238 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget (hereinafter: Conditionality Regulation).

239 Art. 2 lit a Conditionality Regulation defines the rule of law as the values enshrined in Art 2 TEU, including 'effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights'; Art. 3 defines situations that are indicative of breaches of the principles of the rule of law and refers, in its lit c, to 'limiting the availability and effectiveness of legal remedies,

This leads to the third and fourth aspect of the Commission's competences, namely operational supervision and monitoring of the integrated European administration. Arguably, these competences follow in particular from sentences 1, 2 and 5 of Art. 17 para 1 TEU. The Commission's mandate as guardian of the Treaties comes with a broad competence to undertake all kind of appropriate initiatives in the realm of supervision, coordination and monitoring.[240] This broad interpretation is widely agreed upon in scholarship, if only because the functioning of the EU to an important extent depends on the Commission's comprehensive supervisory mandate.[241] Moreover, this broad reading is also shared by the co-legislators. In fact, EU secondary law confers upon the Commission far-reaching supervisory and monitoring competences, including in areas in which those are not explicitly laid down in the Treaties. As prominently illustrated with the example of the Eurozone,[242] supervising and monitoring the implementation of EU law is certainly one of the Commission's main tasks today.[243]

As far as the asylum system is concerned, this reading of Art. 17 para 1 TEU is confirmed by Art. 74 TFEU. This provision states, albeit rather incidentally, that national administrations, when implementing EU asylum

including through restrictive procedural rules'. Note that the European Parliament in its resolution of 7 February 2024 on the rule of law and media freedom in Greece (2024/2502(RSP) has called upon the European Commission 'to make full use of the tools available to it to address the breaches of the values enshrined in Article 2 TEU in Greece', including an 'assessment under the Rule of Law Conditionality Regulation' with reference to, inter alia, deficits in the context of asylum and migration.

240 Matthias Ruffert, „Artikel 17 EUV" (fn. 231), para 7–11; 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. 185–186 with reference to 211 EC (the predecessor of Art 17 para 1 TEU) as a legal basis for the Commission's comprehensive supervisory powers.

241 Paul F Nemitz, „Artikel 17 EUV", in Ulrich Becker, Armin Hatje, Johann Schoo, Jürgen Schwarze (ed.), *EU-Kommentar*, Nomos 2019, para 41.

242 Michael W. Bauer, Stefan Becker, „The Unexpected Winner of the Crisis: The European Commission's Strengthened Role in Economic Governance", *Journal of European Integration* 36 (2014), p. 213-229, p. 217 noting that despite the Commission's competences granted by the European Financial Stabilization Mechanism, 'its old mandate of guarding the Treaties' continues to play a role.

243 Stefan Becker, Michael W. Bauer, „Die Europäische Kommission. Koordinationsbürokratie mit Regierungsanspruch", in Peter Becker, Barbara Lippert (ed.), *Handbuch Europäische Union*, Springer 2020, p. 369-389, p. 371–373.

law, shall cooperate with the Commission.[244] Although Art. 74 TFEU does clearly not extend the EU's substantial competences, it promotes formal and informal administrative cooperation between national administrations and EU bodies, notably including in areas where the EU does not have substantial decision-making competences.[245] In this sense, Art. 74 TFEU implicitly confirms that the Commission has a broad competence to supervise and monitor national asylum administrations.

b *The Commission's Internal Decision-Making Structures*

When it comes to determining the EU's responsibility for administrative misconduct, the Commission's internal decision-making structure is less decisive than that of the agencies. This is because when Commission staff violates EU law, it is clear that this act must be attributed to the Commission.[246] The Commission's internal decision-making structures are hence only of interest insofar as it must be determined what the Commission knew or should have known, and which measures it has taken or should have taken.[247]

The Commission is divided into several Directorates-General which operate under the ultimate responsibility of the respective Commissioners. In the context of 2015, the Commission, to a large extent, relied on its Structural Support and Reform Service (SSRS), i.e. today's DG Reform. For instance, the EU coordinator for the implementation of the EU-Türkiye Statement in Greece formed part of the SSRS. Subsequently, responsibilities were moved to DG Home Affairs (HOME) and DG European Civil Protection and Humanitarian Aid Operations (ECCHO). In particular, the EU's

244 Art 74 TFEU reads: 'The Council shall adopt measures to ensure *administrative cooperation between the relevant departments of the Member States* (…) as well as between those departments *and the Commission* (…).' (emphasis added). As here Matthias Rossi, „Artikel 74 AEUV", in Christian Calliess, Matthias Ruffert (ed.), *EUV/AEUV. Kommentar*, C.H. Beck 2022, para 1. Differently, however, Stephan Breitenmoser, Robert Weyeneth, „Artikel 74 AEUV", in Hans von der Groeben, Jürgen Schwarze, Armin Hatje (ed.), *Europäisches Unionsrecht*, Nomos 2015, para 25 arguing that the Commission's main role is not to cooperate with, but to supervise, national administrations, in particular via the infringement procedure.

245 Daniel Thym, „Artikel 74 AEUV", in Winfried Kluth, Andreas Heusch (ed.), *BeckOK Ausländerrecht*, C.H. Beck 2022, para 2.

246 On the attribution of conduct to the agencies see chapter 4.

247 On the relevant questions of causation see chapter 5.

supervisory fora established in Greece were operating under the responsibility of these.[248] In the meanwhile, the Commission's internal structure was adjusted to reflect the political focus on migration, and all matters related to the asylum system were moved within the responsibility of DG Migration and Home Affairs. Within this DG, the department for migration and asylum, that for home affairs funds, and the deputy Director-General who is also the head of the Task Force Migration Management, are of particular relevance for the purpose of this study.[249] Out of these, the Task Force Migration Management deserves particular attention here, as it has been created precisely to ensure the legality of the EU hotspot administration 2.0.[250]

When it comes to determining whether the Commission has knowledge about specific deficiencies in the integrated administration, the Commission's concrete supervisory fora established on the ground are crucial. In order to exercise its extensive administrative tasks, the Commission operates not only from Brussels but also on the ground, and increasingly so. In Greece, for instance, the Commission has established several supervisory fora such as the European Regional Task Force (EURTF) and Steering Committees. While the EURTF focuses on operational coordination, the Steering Committees serve to discuss all funding-related aspects of the asylum administration in Greece.[251] Furthermore, the Commission also deploys representatives that are closely involved at the operational level. Figuratively referred to as 'the Commission's eyes and ears on the ground', the representatives' main task is information-gathering and reporting.[252]

4 The EU's Main Forms of Administrative Cooperation

Having clarified which EU bodies perform the relevant conduct in the EU hotspots, this last section zooms into the main forms of administrative cooperation. With a view to this study's aim of defining the EU's responsibility in legal terms, the section has two specific objectives. First, it seeks

248 See chapter 2, 2.
249 For an organisational chart of DG Home see https://commission.europa.eu/about-european-commission/departments-and-executive-agencies/migration-and-home-affairs_en.
250 See chapter 2, 2.6.
251 See ibid.
252 See ibid.

to classify the forms of cooperation into the categories of European administrative law. Tthe approach here is to avoid reference to asylum-specific or policy-oriented categories such as 'joint' or 'assisted processing',[253] and instead to rely on the more consolidated categories of general European administrative law.[254] This reveals similarities between different areas of the integrated administration, and thus allows to transfer insights from areas such as competition law or the Eurozone to the asylum system.[255] Second, this section seeks to define the EU's legal responsibilities in the context of administrative cooperation in the EU hotspots. While the precise scope of the EU's obligations depends on the specific provision it stake, and hence cannot be determined in a generalised manner, this section provides some basic orientation, thereby preparing the ground for a more detailed doctrinal analysis in the following.[256]

4.1 Administrative Support

Support, for the purpose of this study, is understood as a form of cooperation in which one actor assists another in fulfilling its administrative task. In the context of the asylum administration, support in this sense is usually provided by the EUAA and Frontex to a member state.

253 Based on Helene Urth, Mathilde Heegaard Bausager, Hanna-Maija Kuhn, Joanne Van Selm, *Study on the Feasibility and legal and practical implications of establishing a mechanism for the joint processing of asylum applications on the territory of the EU, conducted for the European Commission*, 2013, most scholarly contributions refer to these categories. For an attempt to reconcile both terminologies see Evangelia (Lilian) Tsourdi, „Holding the European Asylum Support Office Accountable for its role in Asylum Decision-Making: Mission Impossible?" (fn. 156), p. 514–515 who differentiates between three categories of joint processing, namely assisted, common and EU-level processing, and argues that 'common processing essentially refers to "mixed" or "composite" administraive proceedings'.

254 Taking into account that it still holds true that the 'terminology used in the nascent field of EU administrative law is not yet established', as noted by Herwig Hofmann, Alexander Türk, „Legal challenges in EU administrative law by the move to an integrated administration", in Herwig Hofmann, Alexander Türk (ed.), *Legal Challenges in EU Administrative Law*, Edward Elgar 2009, p. 355-379, p. 358. Where appropriate, reference is made here to the Research Network on EU Administrative Law Model Rules on EU Administrative Procedure, Books I to VI, available http://www.reneual.eu/projects-and-publications/reneual-1-0 (hereinafter: ReNEUAL Model Rules).

255 For the transfer of the relevant case law see chapter 5.

256 See chapter 4 and 5.

a *Reception-Related and Procedure-Related Support*

As the main tasks performed by the European asylum administration are to conduct asylum procedures and to provide reception conditions during these procedures, a distinction can be made between procedure-related and reception-related support. In relation to reception conditions, the EU's support has long mainly consisted in the provision of knowledge. More precisely, the EUAA has supported national administrations with trainings, specific advice or counselling, sharing of expertise, and technical equipment. Only recently, the EUAA has extended the scope of its reception-related activities and now also provides operational assistance. In specific contexts, such as the EU hotspots 2.0, EUAA staff is since 2021 actively involved in designing, planning, and building of refugee camps including administrative structures and detention facilities.[257]

Procedure-related support, in turn, only partially consists in knowledge-based measures such as trainings, the provision of information on relevant countries of origin or third countries,[258] or the issuance of best practices and guidelines. The bulk of procedure-related support has always been provided through operational assistance. For instance, the EUAA supports with the conduct of asylum interviews and vulnerability assessments, the assessment of the obtained information in light of EU asylum law, and the issuance of legal opinions recommending to reject or accept the concrete asylum claim. Further, Frontex supports with first registration and identification measures, as well as with organising and carrying out deportations.[259]

For the purpose of this study, procedure-related operational support is more problematic and will hence be in the focus.[260] This is for two reasons. First, the agencies' operational competences are especially sovereignty-sensitive and hence especially controversial in the context of asylum and return procedures. Second, administrative reality over the past years has clearly shown that the EUAA and Frontex are involved in asylum and return

257 See in more detail chapter 2, 1.

258 EUAA (formerly EASO), Country of Origin Information (COI) Reports, partially available online: https://euaa.europa.eu/coi-publications.

259 See chapter, 2.1.

260 In fact, most scholarly contributions that discuss the EUAA's responsibility only on the basis of procedure-related support. Once the EU hotspots 2.0 will be built, however, the question of the EUAA's responsibility due to reception-related support will become relevant.

procedures that result in the systemic fundamental rights violations. The agencies' involvement in reception conditions, by contrast, is so new that its effects can hardly be determined yet.

b *Administrative Support and EU Responsibility*

In order to clarify which of several involved administrative actors bears responsibility for misconduct, it is helpful to rely on the categories of general European administrative law. This will show that, the distinction between reception-related and procedure-related support notwithstanding, cooperation between agencies and national authorities generally results in composite administrative procedures. A procedure is composite when EU bodies and member state authorities have distinct but inter-dependent functions, and therefore cooperate, each assuming a specific sub-task in an administrative procedure.[261] Composite procedures thus generally entail that one actor issues the administrative decision, whilst the other provides support.[262] General doctrine mainly refers to examples where support serves to prepare a decision, in particular support consisting in providing a legal interpretation or a particular information.[263] A closer look, however,

261 ReNEUAL Model Rules, Art I-4(3). Similarly Giacinto Della Cananea, „The European Union's Mixed Administrative Proceedings", *Law and Contemporary Problems* 68 (2004), p. 187-218, p. 208: 'these proceeding are composed of several phases, and these involve both the Community and the national administrations in different capacities and at different stages of the sequence.' For a more comprehensive definition see Herwig C.H. Hofmann, Gerard C. Rowe, Alexander H. Türk, *Administrative Law and Policy of the European Union*, Oxford University Press 2011, p. 406: 'multiple-step procedures with input from administrative actors from different jurisdictions, cooperating either vertically (between EU authorities and those of a Member State), horizontally (between authorities in two or more Member States), or in triangular relations (involving authorities of different Member States and of the EU).'.

262 Mariolina Eliantonio, „Judicial Review in an Integrated Administration: the Case of 'Composite Procedures'", *Review of European Administrative Law* 7 (2015), p. 65-102, p. 69, however, stressed that, unlike linked or complex procedings, composite procedures are characterised by 'decision-making (being) carried out at both national and European level'.

263 See only Filipe Brito Bastos, „Derivate Illegality in European Composite Administrative Procedures", *Common Market Law review* 55 (2018), p. 101-134, p. 103; Timo Rademacher, *Realakte im Rechtsschutzsystem der Europäischen Union*, Mohr Siebeck 2014, p. 274. Note that interpretative and informational support can either relate to an individual case or be generalised.

shows that support can also serve to enforce a decision, for instance when one authority assists the other in overcoming an individual's resistance against the execution of a decision.[264]

Applying these categories to the context at hand, it follows that the asylum and return procedures in which the EUAA or Frontex provide operational support qualify as composite procedures. The EUAA's support is mainly preparatory in nature, and contains interpretational and informational elements which cannot be clearly separated.[265] Frontex's support, by contrast, mainly consists in assistance with enforcement, and contains elements related to the use of force.[266]

At first glance, it hence appears that the EU's responsibility is limited to ensuring the legality of its own conduct. A closer look, however, reveals that things are not quite that simple. With a view to the case at hand, the decisive point is that the EU, through its support, typically predetermines the content of the national decision. As will be set out in more detail in the following chapters, national authorities usually adopt the non-formally binding guidelines, opinions and recommendations issued by the EUAA, Frontex and the European Commission.[267] This is not a mere empirical coincidence, but can be explained by the fact that the EU's conduct, despite its lack of formal bindingness, comes with strong normative force. As will be argued, this can usually be traced back to the EU's political power, to its technical expertise or knowledge advantage in relation to national authorities, or the EU's financial pressure upon the member state.[268]

In general terms, the key question can be formulated as to which actor bears legal responsibility when the supporting actor, i.e. the EU in the

264 The scholarly lack of attention seems due to the fact that one constellation, namely that a member state enforces an administrative decision taken at EU level is the standard situation under Art. 197 para 1 TFEU and Art. 291 para 1 TFEU, and thus usually not even classified as an instance of vertical administration cooperation; and the other constellation, namely that the EU is involved in the enforcement of an administrative decision taken at member state level, has emerged only recently, with Frontex's assistance in the context of deportations constituting a paradigm example. Note that ReNEUAL Model Rules also do not cover 'enforcement assistance', see Book V, C., V-1, para 3 recital 5.

265 See chapter 2, I.

266 See only Herbert Rosenfeldt, *Frontex im Zentrum der Europäischen Grenz- und Küstenwache. Bestandsaufnahme, Unionsrechtmäßigkeit und Verantwortlichkeit*, Mohr Siebeck 2021, p. 86–102.

267 See chapter 2, I.

268 See below 4.3 and chapter 2.

context at hand, determines the content of the decision, i.e. the administrative act issued by the member state. In such cases, the intricate legal question arises as to whether and under which conditions responsibility for an unlawful decision lies with the supporting actor. While this question obviously requires detailed doctrinal analysis that will be carried out in the following,[269] two basic arguments can be made here already. First, it is clear on the basis of European administrative law as it currently stands that the allocation of responsibility between the supporting and the decision-issuing actor depends on a whole set of circumstances and thus requires a careful analysis of each concrete case.[270] Second, it must certainly be avoided that the EU can exploit the structure of the integrated administration as a strategy to circumvent constitutional safeguards and evade its own legal responsibility. Thus, a very generalised answer arguing that 'legal responsibility presupposes the issuance of a formally-binding decision' cannot convince from the outset.

4.2 Administrative Supervision

Administrative supervision is understood here as a form of cooperation in which one actor is responsible for ensuring, at least to some extent, the legality of another actor's administrative conduct.[271] The degree to which the supervisor is responsible then depends on the form of supervision and on the supervisor's obligations in the specific context. Usually, the supervisor is not obliged to detect or even prevent every single breach of law, but only to identify, prevent or remedy widespread, persisting or even systemic issues.[272] In other words, the supervisor is typically responsible for misconduct on the part of the supervisee only insofar as it is systemic.

269 See chapter 5. As will be shown, the relevant issue appears as a doctrinal question of attribution and causation.

270 Gerard C. Rowe, „Administrative supervision of administrative action in the European Union" (fn. 240), p. 186. Even the ReNEUAL Model Rules book V, para 5 clarify that 'Supervisory powers will be regulated in sector-specific legislation (…).'.

271 Similarly Alberto Gil Ibáñez, *The Administrative Supervision and Enforcement in EC Law: Powers, Procedures and Limits*, Hart Publishing 1999, p. 16–17; H. Audretsch, *Supervision in European Community Law*, North-Holland 1986, p. 7.

272 A good example are the Commission's supervisory obligations in the context of EU funding, see above fn. 238 et seq.

Supervision can be internal or external in nature. It is internal when the supervisor and the supervisee form part of the same authority or body: for instance, the Frontex Executive Director bears an internal obligation to supervise the conduct of the teams deployed by the agency.[273] It is external when the supervisor is not part of the body that is supervised: for instance, the Commission bears an external obligation to supervise the migration management support teams (MMST) deployed to the EU hotspots.[274] Given that this study's main interest lies in allocating responsibility in contexts of administrative cooperation, its primary focus lies on external supervision.[275]

As regards supervisory practices, it must first be recalled that supervision encompasses practices of review and of correction. Accordingly, all four areas of conduct identified above, namely policy making, funding, operational supervision and monitoring can, in some sense and to some extent, serve to exercise supervision. For the purpose of this study, however, the latter two are of particular relevance. This is because the supervisory effect of policy making and funding is rather incidental,[276] whereas operational supervision and monitoring serve first and foremost exercise supervision.[277]

a *Operational Supervision as a Consolidated Form of Supervision*

Operational supervision is defined here as the more consolidated or conventional form of supervision – to be distinguished from monitoring as a more recently emerging form of supervision. In terms of concrete practices, a whole range of practices can qualify as operational supervision, from conducting an informal discussion to imposing conditionalities to initiating an infringement procedure.[278]

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273 Art. 106 para 4 lit. b, j, l Frontex Regulation.

274 Art. 40 para 3 Frontex Regulation, Art. 21 para 2 EUAA Regulation; see further chapter 2, 1.2.

275 Internal supervision, however, is also relevant, especially in the context of attribution, see chapter 4, 2.2.

276 With the exception of instruments such as the Conditionality Regulation.

277 In more detail Catharina Ziebritzki, *The EU's Responsibility in the Asylum Administration* (fn. 56), p. 100 et seq.

278 For supervision via the infringement procedure see only Stine Andersen, *The Enforcement of EU Law: The Role of the European Commission*, Oxford University Press 2013; Kim Lane Scheppele, Dimitry Vladimirovich Kochenov, Barbara

This broad functional definition of operational supervision notwithstanding, two particularly common categories can be distinguished, namely coordinating the supervisees' conduct and ensuring its legality. Coordination becomes relevant, in particular, when one actor is entrusted with supervising several actors who cooperate with each other. In this case, ensuring the legality of the supervisees' conduct almost necessarily requires coordination of their cooperation. In the context at hand, agencification and inter-agency cooperation are required to coordinate the work of the growing number of actors. Given that the agencies themselves are able to coordinate their work only to a limited extent, especially because no agency disposes of all relevant information, it only seems consequential to assign the task of coordination to the Commission.[279] Ensuring legality, in turn, is understood here as a supervisory practice that primarily aims to guarantee that the conduct of either one or several supervisees complies with the applicable legal standard. While this understanding is disputed, with some differentiating enforcement from supervision,[280] it is argued here that enforcement activities clearly serve to ensure the legality of the supervisee's conduct and hence qualify as supervision. In the context at hand, the Commission's recommendations to remedy shortcomings identified through the EUAA's monitoring mechanism, for instance, qualify as a means to ensure the legality of the agency's conduct.[281]

A further distinction can be made between soft and hard forms of enforcement. Typically, the supervisor's choice between soft and hard measures will depend on its relation to the supervisee. For instance, when the supervisor depends on cooperation on the part of the supervisee or when its political and financial position suffices to make the supervisee comply, it is more likely to refrain from hard enforcement.[282] In the context

Grabowska-Moroz, „EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union", *Yearbook of European Law* 39 (2020), p. 2-21.

279 See Art. 40 para 2, para 3 Frontex Regulation, Art. 21 para 2 EUAA Regulation; further on the Commission's obligation to coordinate see chapter 2, 2.2.

280 Alberto Gil Ibáñez, *The Administrative Supervision and Enforcement in EC Law* (fn. 271), p. 16–17, however, differentiates supervision and enforcement and understands both as means to 'ensure the application of EC law'.

281 Art. 14 para 5 to 8 EUAA Regulation.

282 As a consequence, soft law is both a means of enforcement and enforced itself, see Oana Ştefan, „Soft Law and the Enforcement of EU Law", in András Jakab, Dimitry Kochenov (ed.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford University Press 2017, p. 202 with reference to Francis Snyder,

of the EU hotspot administration, the Commission depends on the host member state's willingness to cooperate and, therefore, largely refrains from making use of hard means of enforcement, such as, for instance, initiating an infringement procedure. Instead, the Commission mainly relies on non-formally binding guidelines to the relevant national authorities and agencies.[283]

This being said, it must be stressed that the distinction between supervision and support is not clear-cut. Some forms of cooperation are difficult to classify and could fall into either category. In the EU hotspots, the Commission's practice has evolved over time from operational supervision towards elements of operational support. Whereas the Commission has mainly exercised its supervisory obligations through coordination since 2016, it became obvious in 2021 that the Commission has structurally failed to ensure compliance with EU law. As a consequence, the Commission created the EU hotspot administration 2.0 and became more involved at the operational level.[284]

On this basis, the question of allocating responsibility can be addressed, albeit here, only in a prospective manner. Clearly, the supervisee, here the member state, is itself responsible for its own misconduct. The crucial question, then, is whether the supervisor, here in the EU, bears legal responsibility, too. While this will be analysed in detail in the following chapters, two general arguments can be made here already. First, and for the purpose of doctrinal precision, one should realise that the supervisor's responsibility can be construed in two different ways: either as a breach of the supervisory obligation as such or as a breach of the rule that the supervisee has violated. While the former alternative requires a more precise definition of what exactly the relevant supervisory obligation consists of and whether that obligation has been breached at all, the latter alternative raises intricate questions of causation.[285] Second, and based on general supervision doctrine, the argument that 'a supervising authority cannot bear legal responsibility because it does nothing but supervise' cannot persist.

„The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques", *The Modern Law Review* 56 (1993), p. 19-54.

283 This is deemed sufficient because the Commission's political and budgetary authority entails that its informal guidelines are usually complied with, see below 4.3 and chapter 2.

284 E.g. through creating a dedicated Task Force and a special Steering Committee, see chapter 2, 2.6.

285 See chapter 5.

As will be set out in more detail in the following chapters, it depends on a whole range of factors whether or not the supervisor bears legal responsibility for the violation of individual rights that occur as a result of misconduct on the part of the supervisor.[286]

b *Monitoring as an Emerging Form of Supervision*

As mentioned above, EU secondary law increasingly entrusts the agencies and the Commission with 'monitoring'.[287] The most prominent example is probably the so-called vulnerability assessment of Frontex and the monitoring mechanism of the EUAA. The aim of these mechanisms is for the agencies to assess the overall functioning of the border control and asylum administrations of the member states, in particular with regard to their capacity and readiness to face present and upcoming challenges.[288] Similarly, the Commission's monitoring tasks oblige it to gather information on and evaluate the overall development of the asylum system.[289]

In terms of general European administrative law, however, the notion of monitoring remains vague. While monitoring is generally understood to mean a sort of 'keeping track' of all relevant developments, identifying shortcomings, and 'following up' with the relevant stakeholders, the scope of the activity is not legally defined.[290] In particular, general doctrine does not clarify whether monitoring is a form of supervision, what the legal consequences are if a monitoring body fails to comply with its obligations, and whether monitoring-related measures impose legal obligations on the

286 See chapter 4 and 5.

287 The Frontex Regulation, for instance, refers 122 times to 'monitor' or 'monitoring'. See in more detail on this development Evangelia (Lilian) Tsourdi, „Monitoring and Steering through FRONTEX and EASO 2.0" (fn. 181); David Fernández-Rojo, *EU Migration Agencies* (fn. 23), p. 102–104; Herbert Rosenfeldt, *Frontex im Zentrum der Europäischen Grenz- und Küstenwache* (fn. 266), p. 64–67.

288 Art. 32 Frontex Regulation; Art. 14, 15 EUAA Regulation.

289 Art. 42 para 10 Frontex Regulation; Art. 14, 15 EUAA on cooperation between the agency and the Commission in the context of monitoring. Note that the Commission's monitoring role will be enhanced with the reform proposals, see only Art. 79 of the Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013 (hereinafter: AMM Regulation).

290 Note that Evangelia (Lilian) Tsourdi, „Monitoring and Steering through FRONTEX and EASO 2.0" (fn. 181) speaks of 'monitoring-like' functions.

monitored body. This section is, hence, necessarily tentative in nature and developed inductively from the specific context of the asylum system.[291]

This being said, monitoring is defined, for the purpose of this study, as a reduced form of supervision. Unlike in the case of operational supervision, the monitoring body is not legally responsible for misconduct by the monitored body but only for a breach of its own monitoring obligations as such. This arguably follows from the regulatory structure of monitoring as conceived in EU asylum law. Monitoring obligations are generally designed to consist of a primary and a secondary obligation. The primary obligation of the monitoring body is to review the performance of the monitored body and to identify shortcomings. In case of shortcomings, the monitoring body has a secondary obligation to initiate an inter-administrative procedure vis-à-vis the monitored body, the goal of which is for the monitored body itself to correct its performance.

Due to their regulatory structure, monitoring obligations encompass the issuance of binding or non-binding measures. The primary aim of detecting shortcomings can largely be achieved through non-formally binding measures. When it comes to the secondary aim of inducing the monitored body to remedy these shortcomings, however, legal bindingness is, of course, a very useful tool. Accordingly, EU asylum law usually designs the inter-administrative monitoring procedure as consisting of several escalation steps, with non-binding measures at the beginning, followed by increasingly binding measures. The regulatory structure of monitoring obligations is well illustrated with Frontex's vulnerability assessment or the EUAA's monitoring mechanism.[292] In the first place, the agency is obliged to comprehensively review the member states' conduct. If the agency identifies shortcomings, its secondary obligation to conduct an inter-administrative procedure is activated, with the initial step being that the Executive Director shall make a recommendation to the member state concerned. If the member state fails to comply with this recommendation, the so-called 'follow-up' procedure is initiated.[293] This procedure, which involves the agency's Management Board, the Commission and the Council, consists of several escalation steps, the last option being to legally oblige the member

291 While this comes with the opportunity to further develop the general doctrine, the question of a possible generalisation is explicitly left open here.
292 Art. 32 Frontex Regulation; Art. 14, 15 EUAA Regulation.
293 Note 'following up' is even less defined than 'monitoring'.

state to adopt certain measures and to cooperate with the respective agency.[294]

As regards the difference between operational supervision and monitoring, it is key to realise that a monitoring body has, despite the potentially legally binding nature of its instructions, no way of actually ensuring that the monitored body corrects its performance. For instance, even when the respective agency's Executive Director or the Commission adopt a legally-binding decision, the concerned member state cannot be forced to comply therewith.[295] Unlike in the case of 'true' supervision, where the supervising authority can, as a last resort, enforce EU law by hard means, this is not possible in the case of monitoring. Therefore, it is argued here that a monitoring body is, in principle, responsible only for the breach of its own obligations.

Consequently, monitoring is, per se, external in nature, i.e., the monitoring body is always distinct from the monitored body.[296] The wording of the Frontex and the EUAA Regulation, however, is sometimes misleading on this point. This is clearly illustrated by Frontex's obligation to ensure that operational plans are correctly implemented: Although the Regulation refers to the obligation of the coordinating officer and the fundamental rights monitors to 'monitor' the correct implementation of the operational plan, including compliance with fundamental rights,[297] it is clear from the Regulation itself that this obligation actually requires operational supervision. For the Regulation requires that the Executive Director 'ensure' the correct implementation of operational plans and withdraw the agency's support if fundamental rights are seriously and persistently violated,[298] which implies that the agency itself bears legal responsibility for its involvement in the incorrect implementation of operational plans.

This being said, this study in the following focuses on operational supervision as defined here. One reason for this is that determining the EU's legal responsibility for breaches of its monitoring obligations would remain a

294 The escalation options differ between the EUAA and Frontex, see Art. 14 para 5 to 8 EUAA Regulation vs Art. 32 para 9 to 11, Art. 42 Frontex Regulation.

295 This confirms that the element of cooperation is never absent in the context of the integrated administration, see above fn. 27 et seq.

296 To the extent that so designated 'monitoring' obligations are internal, the monitoring body is actually responsible for unlawful conduct of the monitored body, which means that internal monitoring is simply tantamount to internal operational supervision.

297 Art. 44 para 3 lit b Frontex Regulation.

298 Art. 106 para 4 lit. j, Art. 46 para 3 and 4 Frontex Regulation.

rather hypothetical endeavour. The monitoring mechanism foreseen in the EUAA Regulation has not yet been established. In any case, failures by the agencies to adequately exercise their monitoring obligations are extremely difficult to prove. Another reason for the focus on supervision is that this study is concerned with the relationship between the EU and individuals. A failure of an EU body to adequately monitor a member state, however, affects individuals only indirectly. While a similar difficulty, of course, also arises in the context of supervisory obligations, the link between a breach of the EU's obligations and a violation of individual rights is arguably even more difficult to establish in the case of monitoring obligations than in the case of supervisory obligations. Therefore, it makes sense for this study to focus on the EU's responsibility for breaches in the context of operational supervision. On this basis, subsequent studies – to be conducted after the establishment of the EUAA mechanism – could then examine whether and how individuals can hold the EU responsible for breaches of its monitoring obligations.

4.3 'Determining Without Deciding'

Against the background of what has been presented throughout this chapter, it becomes clear that the EU's mode of operation – in the general context of the European asylum administration and in the specific context of the EU hotspot administration – can be described as 'determining without deciding'.[299] The notion of 'determining without deciding' is used here to describe that the EU's conduct, despite its lack of formal bindingsness, has a strong normative effect. From a strictly formal perspective, the EU merely provides non-formally binding support and supervision. The binding administrative decision towards the individual is always issued by a member state, so that the EU, at least formally, does not cross the line drawn by traditional sovereignty concerns. De facto, however, the EU guides and steers the course of the asylum administration. Despite the lack of formal bindingness, the EU prescribes crisis responses and policies, funds large parts of the asylum system, including the EU hotspot administration, and

299 This will facilitate the analysis in the following chapter. In more detail on 'determining without deciding' as a feature of the European asylum administration more generally see Catharina Ziebritzki, *The EU's Responsibility in the Asylum Administration* (fn. 56), p. 124 et seq.

is largely responsible for the supervision of its legality. Insofar as the EU is involved at the operational level, it even determines the outcome of individual asylum procedures.[300] In sum, the EU thus trumps its de jure weakness with its de facto strength.

a *Factual Conduct as a Strategy to Evade Judicial Review*

As argued above, informal regulation is particularly salient in times of crisis. While informalisation during a crisis can be traced back to a whole range of factors, two appear especially important in the context at hand.[301] First, EU soft law allows for more flexibility and faster reactions than formal legislation. Administrative bodies are typically quicker to react than legislative bodies, and informal rules allow to circumvent legislative procedures. As a result, the EU tends to rely on informal means, in particular when a situation of crisis seems to dictate the swift achievement of policy outcomes or in areas where it is especially difficult to reach a political agreement.[302] Second, EU soft law apparently has a relatively strong normative effect –

300 See chapter 2, I.3.

301 See only Eva Kassoti, Narin Idriz, „The Informalisation of the EU's External Action in the Field of Migration and Asylum", in Eva Kassoti, Narin Idriz (ed.), *The Informalisation of the EU's External Action in the Field of Migration and Asylum*, Springer 2022, p. 1-12; Juan Santos Vara, Laura Pascual Matellám, „The Informalization of EU Return Policy: A Change of Paradigm in Migration Cooperation with Third Countries?", in Eva Kassoti, Narin Idriz (ed.), *The Informalisation of the EU's External Action in the Field of Migration and Asylum*, Springer 2022, p. 37–52; Sergio Carrera, „The 20 years anniversary of the Tampere programme: Securitization, intergovernmentalism and informalization", *Maastricht Journal of European and Comparative Law* 27 (2020), p. 3-9. For the period prior to 2015 see Maarten Vink, Claudia Engelmann, „Informal European Asylum Governance in an International Context" (fn. 33).

302 Oana Ştefan, „COVID-19 Soft Law: Voluminous, Effective, Legitimate? A Research Agenda", *European Papers* 5 (3 June 2020), p. 663–670, p. 663–665. Note the European Parliament, Working Document on Institutional and Legal Implications of the Use of 'Soft Law' Instruments, 14 February 2007, PE 384.581 v02–00, p. 6: 'Where the Community has legislative competence but the political will seems to be lacking to introduce legislation, use of soft law is liable to circumvent the influence of the other (democratic) instruments and may flow out the principles of democracy and legality'.

especially in times of crisis.[303] This could be due to the fact that member states appear more likely to adopt EU instructions when they are administratively overburdened and politically disoriented.[304] In sum, informal rules combine swift policy reaction, circumvention of formal legislative procedures and relatively effective governance. As such, informal rules were particularly well suited to respond to the immediate crisis context of 2015: the situation required a quick response at the EU level, the EU legislator proved largely unable to reach an agreement, and national administrations, by and large, considered informal EU rules as the relevant standard.[305] Seen from this perspective, it cannot be surprising that the European Commission decided to address the 2015 crisis, insofar as the immediate response was concerned, mainly on the basis of informal regulation.

From a rule of law perspective, however, the EU's strategy of 'determining without deciding' is deeply problematic. One central problem is that 'determining without deciding' makes it overly difficult, and in many cases practically impossible, for concerned individuals to access judicial review against the EU. This has two main reasons. The first lies in the lack of legal bindingness. Until today, EU procedural law largely builds on the assumption that public authority manifests itself in formally-binding decisions. As a result, factual conduct continues to largely escape judicial review before the CJEU.[306] The second reason lies in the structure of administrative cooperation as such. The involvement of multiple actors in one procedure, eventually resulting in a violation of rights, makes it difficult to establish which actor bears legal responsibility.[307] Thus, judicial review is difficult in

303 Examples range from environmental law over public procurement to tax law. For examples see Linda Senden, „Soft Post-Legislative Rulemaking: A Time for More Stringent Control", *European Law Journal* 19 (2013), p. 57-75, p. 60.

304 This hypothesis is based on the concept of 'weak member states' developed by Michael Ioannidis, „Weak Members and the Enforcement of EU Law", in András Jakab, Dimitry Kochenov (ed.), *The Enforcement of EU Law and Values. Ensuring Member States' Compliance*, Oxford University Press 2017, p. 476-492, and requires further research.

305 Implementation deficits are not a counterargument because formally binding EU legislation was implemented in a deficient manner, too.

306 Further Timo Rademacher, *Realakte im Rechtsschutzsystem der Europäischen Union* (fn. 263); Timo Rademacher, „Factual Administrative Conduct and Judicial Review in EU Law", *European Review of Public Law* 30 (2017), p. 399–435.

307 For an analysis focusing on the issues related to the multitude of involved actors see Melanie Fink, *Frontex and Human Rights* (fn. 11).

the context of the integrated administration per se, even when the measures at stake are formally-binding.[308]

In the context of the European asylum administration, the combination of both factors – i.e. factual conduct and administrative cooperation – results in severely deficient legal protection against EU bodies. Although EU bodies have been cooperating closely with national authorities and relying mainly on non-formally binding conduct for almost a decade now, and although it is obvious that the EU's policies result in large-scale fundamental rights violations, EU bodies have so far not been held responsible for any of their informal measures before a court.[309] There have been only a few proceedings before the European Ombudsman, and most of these have been unsuccessful.[310] Complaints before international courts[311] or complaints bodies have been even rarer and even less successful.[312] Moreover, scholarship largely adopts an almost apologetic approach and concludes that the law as it currently stands does simply not provide for a remedy which would allow the involved EU bodies to be held responsible in a quasi-judicial forum or a court.[313] Scholars largely conclude that the EU legal protection system is not yet prepared to adequately deal with the challenges that arise when EU bodies operate at the operational level, let alone in an area that is particularly sensitive to fundamental rights.[314]

308 See only Alexander Türk, „Judicial review of integrated administration in the EU", in Herwig Hofmann, Alexander Türk (ed.), *Legal Challenges in EU Administrative Law: Towards an Integrated Administration*, Edward Elgar 2009, p. 218–256.

309 For a recent attempt see CJEU, General Court (Sixth Chamber), judgement of 6 September 2023, WS et al v Frontex, T-600/21.

310 In more detail on the role of the European Ombudsperson see chapter 3, I.

311 For a recent attempt see Omer Shatz and Juan Branco, *EU Migration Policies in the Central Mediterranean and Libya (2014–2019). Communication to the Office of the Prosecutor of the International Criminal Court Pursuant to the Article 15 of the Rome Statute* (The Hague, 2019), https://www.statewatch.org/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf.

312 On the potential of international complaint bodies, however, see Başak Çalı, Cathryn Costello, Stewart Cunningham, „Hard Protection through Soft Courts? Non-Refoulement before the United Nations Treaty Bodies", *German Law Journal* 21 (2020), p. 355–384.

313 See introduction, fn. 64.

314 Mariolina Eliantonio, Nikos Vogiatzis, „Judicial and Extra-Judicial Challenges in the EU Multi- and Cross-Level Administrative Framework", *German Law Journal* 22 (2021), p. 315–324, p. 315–316 who base their argument on the 'premise that there may be decisions affecting natural and legal persons which cannot be easily reviewed judicially'. For further references see introduction, 5.

b *Ensuring Judicial Review by Unfolding the Potential of EU Constitutional Law*

The most obvious occasion to address these shortcomings in judicial protection against the EU would have been the CEAS reform. Developed in the aftermath of the 2015 crisis and adopted in several legislative steps between 2016 and 2024, the reform is based on the experience of the crisis and could have ensured the fundamental right to effective legal protection, for instance, by defining the EU's administrative competences more clearly, by creating a tailor-made remedy, or by writing into secondary law the doctrine that 'de facto' binding conduct is subject to judicial review. Reform proposals in this direction, however, would have required to define compliance with EU constitutional law as a central political objective – when instead, reducing the number of asylum seekers in the EU was defined as the main political aim.[315] Accordingly, neither the reformed Frontex Regulation nor the EUAA Regulation substantially improves the definition of the agencies' and the Commission's competences. The concept of 'shared responsibility' under the Frontex Regulation, while promising, falls short of its ambition, as it does not define how responsibility is shared in concrete terms between member states and the agency[316] and defines Frontex's responsibility in a circular manner.[317] Concerning judicial protection, the mentioned Regulation almost seem to conceptualise non-judicial accountability mechanisms as a substitute.[318] The remaining reform instruments are also in no way aimed at improving legal protection against the EU. On the contrary, the new Regulations only further restrict judicial protection against the member states, especially in border procedures and similarly

315 See fn. 2.

316 Art 7 para 1 Frontex Regulation provides that 'the European Border and Coast Guard shall implement European integrated border management as a shared responsibility of the Agency and of the national authorities responsible for border management, including coast guards to the extent that they carry out maritime border surveillance operations and any other border control tasks. Member States shall retain primary responsibility for the management of their sections of the external borders.' However, it remains unclear what primary responsibility, sole responsibility or shared responsibility entails in concrete terms.

317 Art. 7 para 4 Frontex Regulation in its last sentence provides that 'the Agency shall be fully responsible and accountable for any decision it takes and for any activity for which it is solely responsible under this Regulation.' In essence, this amounts to stating that the agency is responsible when it is responsible.

318 Thereby falling short of the constitutional standard, see chapter 3, I.

precarious situations, and leave judicial protection against the EU largely unregulated.

Against this background, it is argued here that – for a proposal to be realistic and go beyond scholarly advocacy – the issue must be addressed at the level of EU primary law. Given that the EU legal protection system lacks a tailor-made remedy, this will require making creative use of the possibilities offered by the Treaties.

In doing so, the guiding question will not so much be whether but rather how judicial protection against the EU can be ensured. The key point here is that EU constitutional law requires that all public conduct, including factual conduct, is subject to judicial review. This follows from two aspects of the rule of law.[319] First, the fundamental right to an effective judicial remedy enshrined in Art. 47 ChFR guarantees that any conduct of EU bodies is subject to legal review.[320] Second, the effectiveness or *effet utile* of EU law requires that individuals can enforce their individual rights,[321] a mechanism that applies not only to member states but also to the EU, and that becomes particularly relevant in case of systemic deficiencies.[322] Seen from this perspective, the lack of judicial protection against EU bodies not only endangers the individual rights of concerned asylum seekers but also puts at risk the very nature of the Union as a community based on the rule of law. Finding ways to guarantee judicial protection against the EU's factual conduct is, hence, not a scholarly luxury but a very basic work of aligning administrative practice to constitutional requirements.

The process of finding ways to ensure judicial protection against the EU can hence be seen as a kind of 'doctrinal catch-up'. As will be argued in the following chapters, the EU legal protection system still lags behind administrative reality in the sense that those procedures that were traditionally

319 In detail on this argument see Catharina Ziebritzki, *The EU's Responsibility in the Asylum Administration* (fn. 56), p. 190 et seq.

320 CJEU, Court, judgement of 23 April 1986, Parti écologiste 'Les Verts' v European Parliament, 294/83, para 23; CJEU, Court, judgement of 25 July 2002, Unión de Pequeños Agricultores v Council of the European Union, C-50/00 P, para 38–39: '[T]he European Community is, however, a community based on the rule of law in which its institutions are subject to judicial review of the computability of their acts with the Treaty and with the general principles of law which include fundamental rights. Individuals are therefore entitled to effective judicial protection (…)'.

321 CJEU, Court, judgement of 5 February 1963, Van Gend & Loos, 26/62, p. 3, 12.

322 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, p. 63.

central to ensuring judicial review largely fail to ensure review of the EU's 'determining without deciding' measures. Based on this insight, a thorough review of the EU legal protection system will show that the most suitable way to hold the EU accountable before court is through EU liability law.[323]

Put differently, the idea underlying this study is to make use of the rule of law as enshrined in Art. 2 TEU to counter problematic side-effects of administrative integration. As such, the approach of this study can also be described as unfolding or releasing the transformative potential inherent in EU constitutional law.

323 See chapter 3.