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# THE NEVER-ENDING STORY OF JUDICIAL REVIEW IN COMPOSITE ADMINISTRATIVE PROCEEDINGS: LATEST DEVELOPMENTS IN THE FIELD OF ASYLUM

by Kamilla Galicz

***Abstract:*** *This article focuses on the issue of judicial review in composite administrative proceedings in the European Union' legal order. In this regard, it aims to understand which – either EU or national – court is entitled to review the measures taken in the different procedural stages and what consequences the joint implementation of EU laws and policies may imply at judicial level. Following to the general analysis, the article seeks to investigate such issues in the field of asylum. To this end, it first focuses on the emergence of composite proceedings within the so-called hotspot approach and the reinforcement of EU bodies, especially of the European Asylum Support Office (EASO). Second, it points out the changes to which the recent setting up of the European Union Agency for Asylum (EUAA) pursuant to Regulation (EU) 2021/2303 has led. In this regard, a first assessment of EUAA's tasks in the crisis situations at the Eastern borders of Europe is provided. Last, a fundamental rights-based approach is put forward to assess the judicial reviewability of composite asylum proceedings.*

***Abstract:*** *Il presente contributo si concentra sulla questione della revisione in sede giudiziaria dei procedimenti amministrativi composti nell'ordinamento dell'Unione Europea. In tale prospettiva, si cerca di valutare a quale corte – dell'UE o nazionale – spetti la revisione delle misure adottate nelle diverse fasi procedurali e quali conseguenze a livello giurisdizionale possa comportare l'implementazione congiunta di leggi e politiche europee. In seguito a un'analisi generica, il contributo mette a disamina tali questioni nel campo dell'asilo, concentrandosi in primo luogo sull'emergere dei procedimenti composti nell'ambito del c.d. approccio hotspot, e sul rafforzamento degli organi dell'UE, in particolare dell'Ufficio europeo di sostegno per l'asilo (EASO). In secondo luogo, il contributo sottolinea i cambiamenti riconducibili alla recente istituzione dell'Agenzia dell'Unione Europea per l'asilo (EUAA), ai sensi del Regolamento (UE) 2021/2303. A tal riguardo, si cerca di fornire una prima valutazione delle attività della nuova Agenzia nelle situazioni di crisi sviluppate ai confini orientali d'Europa. Per ultimo, si suggerisce di valutare la revisione giudiziaria in procedimenti composti di asilo adottando una prospettiva basata sui diritti fondamentali.*


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# THE NEVER-ENDING STORY OF JUDICIAL REVIEW IN COMPOSITE ADMINISTRATIVE PROCEEDINGS: LATEST DEVELOPMENTS IN THE FIELD OF ASYLUM

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## 1. Introduction

The administrative system of the European Union (EU) has undergone significant changes over the decades. The development of implementing mechanisms to ensure the full effectiveness of Community law was envisaged already at the beginning of European integration. Within the constitutional framework of the Treaty of Rome, three main patterns have developed; namely direct, indirect, and shared administration, depending on the key actors (Community authorities, national administrations, or bodies composed of both levels' representatives) which have been charged with the implementation of EC laws and policies. These three patterns implied a number of functional, organizational and procedural interactions between the different actors. As a result, today's integrated administration is a composite system based on the co-dependence and close cooperation between supranational bodies, Member State authorities, mixed bodies, and other stakeholders, such as private actors and the civil society[1]. In this system, key role is played by the so-called

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1. The evolution of European administration has been extensively analysed by the legal scholarship. The present overview highlights only the main features which are necessary to understand the salient nature of composite administrative proceedings. For a recent analysis, see E. Chiti, *The Agencification Process and the Evolution of the EU Administrative System*, in *The Evolution of EU Law*, edited by P. Craig, G. de Búrca, Oxford, Oxford University Press, 2021, pp. 125-131; E. Chiti, J. Mendes, *The Evolution of EU Administrative Law*, in *The Evolution of EU Law,* edited by P. Craig, G. de Búrca, Oxford, Oxford University Press, 2021, pp. 339-372. Similar to these analyses, also Cananea and Franchini suggest that the widely used term «multi-level» does not appropriately describe the prominent features of European administration, since it implies a sort of hierarchy. Instead, a plurality of actors and forms of interactions, e.g., integration, cooperation or competition, should be emphasized. C. Franchini, G. Della Cananea, *I principi dell'amministrazione europea*. Torino, Giappichelli, 2010, pp. 23-25.

composite proceedings, i.e., proceedings in which the EU and national stages alternate, therefore decision-making is shared between national and supranational bodies[2].

Composite proceedings are present in many areas of European integration, including asylum cooperation, part of the area of freedom, security and justice. This field has recently experienced substantial changes, involving both the structure of proceedings and the cooperation between EU agencies and national authorities. Such changes have been incorporated in the new Pact on Migration and Asylum, published by the European Commission on 23 September 2020, which proposes a rethink of the normative framework[3]. The Pact both strengthens cooperation between national and EU bodies and reinforces the role of the latter in the implementation of EU policies and laws. Most proposals are still under negotiations between the different stakeholders[4]. Among the acts already adopted, Regulation 2021/2303[5] sets up the European Union Agency for Asylum (EUAA), a fully-fledged agency and successor of the European Asylum Support Office (EASO).

In light of the latest developments in asylum cooperation, it is appropriate to examine how composite proceedings have emerged in this field, what issues have raised and what changes the Pact is expected to introduce. Such analysis serves a double purpose. On one hand, it scrutinizes the cooperation in the field of migration and asylum through the lens of European administrative law. On the other hand, it assesses the implementation in a specific policy field of composite proceedings as a general technique of administration. To this end, the article is divided into the following parts. Section 2 analyses the main features of composite proceedings and their interconnectedness with the proliferation of EU agencies, first in general terms, then with special regard to the field of asylum. It focuses on how this intertwinement has raised questions of judicial review in composite decision-making.

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2. On composite administrative proceedings, see in particular S. Cassese, *European Administrative Proceedings*, in *Law and Contemporary Problems* n. 68.2004, pp. 22-24; M.P. Chiti, *Diritto amministrativo europeo*, 3rd ed. Milano, Giuffrè, 2008, pp. 519-521; G. Della Cananea, *I procedimenti amministrativi dell'Unione europea*, in *Trattato di diritto amministrativo europeo*, vol. I, 2nd ed., edited by M. P. Chiti, G. Greco, Milano, Giuffrè, 2007, pp. 507-509; F.B. Bastos, *Derivative Illegality in European Composite Administrative Procedures*, in *Common Market Law Review* n. 55.2018, pp. 105-108; M. Eliantonio, *Judicial Review in an Integrated Administration: the Case of 'Composite Procedures'*, in *Review of European Administrative Law*, vol. 7. n. 2.2015, pp. 68-69.

3. European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum*. Brussels, 23.9.2020. COM (2020) 609 final.

4. Within the scope of this article, it is not possible to provide a thorough analysis of the Pact. Several studies scrutinizing the single proposals have been published, for an overview, see, *ex multis*, M. Mouzourakis, *More laws, less law: The European Union's New Pact on Migration and Asylum and the fragmentation of "asylum seeker" status*, in *European Law Journal*, n. 26.2020, pp. 171-180; M. Borraccetti, *Il nuovo Patto europeo sull'immigrazione e l'asilo: continuità o discontinuità col passato?*, in this *Journal*, n. 1.2021.

5. 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.

Section 3 focuses on one of the EU agencies, namely EASO's involvement in composite administrative proceedings in the field of asylum, circumscribing its strengthening role through multiple crises. To this end, this section first analyses the extension of EASO's powers outside the normative framework provided by Regulation (EU) No 439/2010[6]. Second, it outlines EASO's transformation into EUAA envisaged by Regulation 2021/2303. Third, the article provides a first assessment of EUAA's new tasks in the crisis situations at the borders between Belarus, Poland, Lithuania and Latvia, and in light of the mass displacement from Ukraine. Last, a fundamental rights-based approach is put forward to assess the judicial reviewability of composite asylum proceedings. Specifically, the right to an effective remedy enshrined in Art. 47 of the Charter of Fundamental Rights of the European Union is circumscribed with a view to investigating on the Agency's accountability. Based on such analysis, Section 4 aims to outline the future perspectives of judicial review in composite administrative proceedings.

## 2. Composite Decision-Making in European Administration: Asylum Cooperation in the Spotlight

Composite proceedings are one of the pillars of European administration. To understand their way of functioning, it is necessary to point out their most salient features. Procedural rules are set at EU level, but there is no general code which lays down the minimum standards applicable to all types[7]. Instead, such rules have consolidated in each integration area at different times and paces, which reveals a strong heterogeneity between the single proceedings[8]. Composite proceedings are designed to represent both EU and national interests, mobilise the involved actors and vest them with specific roles in the different stages from the agenda-setting to implementation[9]. The proliferation of such proceedings is

6. Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office.

7. While there is no uniform administrative code, there are several provisions in primary EU law (e.g., Arts. 6 (2), 8, 18, 19, 263 TFEU, Arts. 41-43 of the Charter) that provide a general framework. Cfr. C. Franchini, G. Della Cananea, *I principi dell'amministrazione europea*, cit., pp. 180-188, G. Della Cananea, *I procedimenti amministrativi dell'Unione europea*, cit., pp. 509-525, J. Ziller, *Verso una codificazione del procedimento amministrativo dell'Unione europea?*, in *Lo Spazio amministrativo europeo. Le pubbliche amministrazioni dopo il Trattato di Lisbona*, edited by M.P. Chiti, A. Natalini, Bologna, il Mulino, 2012, pp. 217-239. The European Union Network for the Study of Administrative Law (ReNEUAL) has developed a set of model European rules of administrative procedure for 2014. Research Network on EU Administrative Law, *ReNEUAL Model Rules on EU Administrative Procedure ReNEUAL SC* 2014: http://www.reneual.eu/projects-and-publications/reneual-1-0.

8. On the classification of composite proceedings see, S. Cassese, *op. cit.*, pp. 24-30; G. Della Cananea, *The European Union's Mixed Administrative Proceedings, Law and Contemporary Problems*, in *The Administrative Law of the European Union*, vol. 68. n. 1.2004, pp. 199-205; M. Eliantonio, *op. cit.*, pp. 68-77.

9. H.C.H. Hofmann, A. Türk, *The Development of Integrated Administration in the EU and its Consequences*, in *European Law Journal*, vol. 13. n. 2.2007, p. 255.

intertwined with the rise of European agencies. Playing a central role in EU administration, such bodies contribute to the overcoming of the executive federalist model[10]. Their participation in composite proceedings may take many forms (e.g., decision-making, coordinating the activities of national authorities, providing expert knowledge.) By institutionalising cooperation between Member States and the Commission, they are to smoothen the joint implementation of EU laws and policies[11].

Today's European administration is characterised by this integrated model, which raises several issues. Of particular importance is the question of judicial review of composite decision-making. Proceedings are characterised by the so-called decisional interdependence, i.e., one level cannot exercise its powers until the previous level has not completed its procedural stage[12]. In contrast to the integrated administration, the judicial system has *not* undergone a similar transformation and remains characterised by a strict division of jurisdiction between EU and national courts. The two systems have evolved separately, which has triggered discrepancies in the judicial review of administrative decisions[13]. In this regard, several questions may be raised, i.e., the identification of the competent court, the scope of its jurisdiction, the reviewability of the measure at stake or the applicant's standing to challenge such measure[14].

As regards the competent court and the scope of its jurisdiction, national courts may only review decisions issued by Member State authorities at the national stage, while the Court of Justice of the EU (CJEU) may review decisions taken by EU bodies at the supranational stage. As regards the question of reviewability, according to Article 263 of the Treaty on the Functioning of the European Union (TFEU), only acts which are «intended to produce legal effects vis-à-vis third parties» are subject to judicial review. Therefore, final decisions may fall under the scope of Art. 263 TFEU, but other measures,

10. D. Curtin, *Executive Power of the European Union.* Oxford, Oxford University Press, 2009, p. 146 ff.

11. E. Chiti, *Decentralized Implementation: European Agencies,* in *Oxford Principles of European Union Law, Volume I: The European Union Legal Order*, edited by R. Schütze e T. Tridimas Oxford, Oxford University Press, 2018, p. 749 ff.

12. F.B. Bastos, *An Administrative Crack in the EU's Rule of Law: Composite Decision-making and Nonjusticiable National Law*, in *European Constitutional Law Review*, vol. 16. n. 1.2020, pp. 63-68. A central element of such proceedings is the gathering and evaluation of information to reach a meaningful decision. Cfr. H.C.H. Hofmann, *Decision-Making in Eu Administrative Law – The Problem of Composite Procedures*, in *Administrative Law Review*, n. 61.2009, p. 206.

13. Such a dualistic design of administrative justice is not «inherently faulty» since it was shaped in line with the model of executive federalism. Cfr. F.B. Bastos, *An Administrative Crack in the EU's Rule of Law*, cit., p. 64. In general, EU administrative law sets is own rules of application, relations with other legal orders and interpretation. To better understand it, legal doctrine should assess it as a distinct system and not as a «defective national administrative law». Cfr. F.B. Bastos, *Doctrinal Methodology in EU Administrative Law: Confronting the "Touch of Stateness"*, in *German Law Journal*, n. 22.2021, p. 623.

14. M. Eliantonio, *op. cit.*, p. 77 ff.

taken at an initial or intermediate stage, may not. Such shortcomings may entail a breach of procedural guarantees such as the duty of the competent institution to examine carefully and impartially all the relevant aspects of the case, the right of the person concerned to make his views known and to have an adequately reasoned decision, the right to an effective remedy, or the principle of due process[15].

In light of the above, it is necessary to examine the instruments available to ensure review of composite decision-making by courts. Given the diversity of these proceedings, this article examines this question in the field of asylum, within the area of freedom, security and justice, based on the following rationale. Over the decades, the Court of Justice has adopted different approaches concerning the *lacunae* in the judicial review system[16]. Joint administration is characterised by a predominance of decision-making at EU level, with a smaller proportion of proceedings resulting in decisions issued at national level[17]. Therefore, what is often left out of scrutiny, is the involvement of EU bodies in composite proceedings concluded at Member State level. Such proceedings characterise the field of asylum cooperation; thus, the following analysis focuses on this specific integration area.

The European normative framework on migration and asylum has been evolving since the late 1980s. The need to harmonise national legislations was justified by the security risk posed by the abolition of internal borders between Member States[18]. As a result, a regulatory framework has not been for long conceived as an integration goal *per se*, rather it has been designed to counterbalance the Schengen *acquis* and the need to protect national sovereignty and internal security[19]. Despite the increasing harmonisation under the

15. In *Technische Universität München*, the Court highlighted that «where the Community institutions have such a power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance». Case C-269/90 *Technische Universität München v Hauptzollamt München-Mitte,* [14]. Cfr. H.C.H. Hofmann, *op. cit.*, p. 211 ff., M. Eliantonio, *op. cit.*, p. 77 ff. On the legal protection and participation of natural and legal persons in EU administrative law see J. Mendes, *Participation in EU Rule-Making: A Rights-Based Approach*, Oxford, Oxford University Press, 2011, pp. 142-191.

16. In its case-law, the Court seeks to remedy the shortcomings of the judicial review system, depending on which level of administration is competent to issue the final decision. According to the *Borelli* judgment (3 December 1992, Case C-97/91, *Borelli*), where the national body adopts a preparatory act binding on the final EU decision, this precludes EU judicial review. However, if the EU body is not bound by the national preparatory act, therefore has decisional discretion (see judgement 19 December 2018, Case C-219/17, *Berlusconi*), all acts – preparatory and those on the merits – are subject to judicial review at EU level. The case-law raises further questions, *inter alia*, as to whether judicial review of breaches of national law is possible at EU level. In this regard, see F.B. Bastos, *An Administrative Crack in the EU's Rule of Law*, cit., p. 71 ff. On the Court's rationale in *Borelli*, see F.B. Bastos, *Doctrinal Methodology in EU Administrative Law*, cit., pp. 614-615.

17. F.B. Bastos, *An Administrative Crack in the EU's Rule of Law,* cit., p. 68.

18. V. Chetail, *The Common European Asylum System: Bric-à-Brac or System?* In *Reforming the Common European Asylum System: The New European Refugee Law*, edited by V. Chetail, P. De Bruycker & F. Maiani, Immigration and Asylum Law and Policy in Europe, n. 39.2016, p. 3 ff.

19. S. Lavenex, '*The Europeanization of Refugee Policies: Normative Challenges and Institutional Legacies*', in *Journal of Common Market Studies*, vol. 39. n. 5.2001, p. 855 ff.

Amsterdam and Lisbon Treaties and the strengthening of the protection of human rights under the latter, the original securitarian approach of the rules has not significantly changed[20].

Such tendency may be explained by two tensions, highlighted by Tsourdi and Costello, which are at the foundation of EU asylum law and policy. The first tension stems from the Member States' commitment to provide international protection, and their containment practices to prevent third country nationals to reach the territory of the EU and potentially seek asylum there. The second tension, strongly connected to the emergence of the common asylum policy as a stand-alone integration goal, regards the contraposition between the principle of free movement and the immobilization of asylum seekers and recognized beneficiaries of international protection. Despite the Lisbon Treaty included the creation of the Common European Asylum System (CEAS) as an objective in Art. 78 (2) TFEU, secondary legal acts still foresee a number of mechanisms which restrict secondary movements within the EU[21].

The structural weaknesses of the CEAS which may be traced back to these two tensions came to the surface in the so-called «2015-2016 migration crisis» and have not been properly addressed since then. In addition to the asymmetrical responsibility-allocation scheme envisaged by the Dublin system, another key fragility factor is the disequilibrium between the role of legislative harmonization and the implementation process. On one hand, much attention has been paid to the setting up of a normative framework, on the other hand, the administrative dimension has not been thoroughly exploited. Yet, the CEAS shall not be understood as a mere set of norms adopted to achieve a goal set by the Treaties, but «as an output that encompasses both the legislative harmonization component, and its operationalisation»[22].

It is therefore necessary to analyse the evolution of the implementation process in the field of asylum. In a first phase, the intergovernmental dimension of administrative cooperation has implied limited involvement of European institutions. However, the steady expansion of supranational competences has led to a formula whereby, EU law, mainly enshrined in directives, sets forth minimum standards, while the implementation rules are set at Member State level, with national authorities bearing the ultimate responsibility for the examination of asylum applications. To provide support to Member States in the

20. For a critical reconstruction see: V. Chetail, *op. cit.*, pp. 5-22.

21. E.L. Tsourdi, C. Costello, *The Evolution of EU Law on Refugees and Asylum*. In *The Evolution of EU Law*, edited by P. Craig, G. de Búrca, Oxford, Oxford University Press, 2021, p. 794 ff.

22. E.L. Tsourdi, *The Emerging Architecture of EU Asylum Policy. Insights into the Administrative Governance of the Common European Asylum System*, in *EU Law in Populist Times. Crises and Prospects*, edited by F. Bignami, Cambridge, Cambridge University Press, 2020, p. 200 ff.

implementation process, different forms of cooperation have been put to the test[23]. As a result, nowadays' cooperation is indeed more strengthened than a mere exchange of information between national authorities and EU bodies, it contains patterns of integrated administration[24].

The CEAS is currently undergoing a rethink. On 23 September 2020, the Commission published the new Pact on Migration and Asylum, a package containing both original proposals from the 2016 package with amendments and new ones. They foresee the substantial reshape of procedural aspects and the restructuration of cooperation between EU bodies and national authorities[25]. One of the acts already adopted concerns the European Union's Agency for Asylum, thus, it is appropriate to investigate on the expansion of its competences in a double perspective: on one hand, to reconstruct the ways in which composite proceedings have risen in the field of asylum and have led to the extension of EASO's competences, on the other hand, to discuss whether such extension had the appropriate legal basis and what novelties are foreseen by the new normative framework[26].

## 3. Composite Asylum Proceedings: Evolution through Multiple Crises

### *3.1. Hotspot Approach: EASO Pushing Its Limits*

The introduction of the supranational element in the asylum proceedings, traditionally circumscribed by national competences, was intertwined with the implementation of the so-

23. E.g., in 2014-2015, EASO and several Member States conducted pilot projects of joint-processing activities, whereby EASO's role was limited to registering newly arrivals and data archiving. In contrast to the activities performed in Greek and Italian hotspots, these activities did not entail any discretionary powers or even indirect influence on decision-making. E.L. Tsourdi, *The Emerging Architecture of EU Asylum Policy*, cit., p. 212 ff.

24. E.g., as it is the case of the (often criticised) Dublin system under Regulations (EU) No 603/2013 on the so-called EURODAC system and (EU) No 604/2013 on the criteria for determining the Member State responsible for the examination of asylum application. In the Dublin procedure, the outcome of the national decision-making process depends on the communication from the central system, without any margin of appreciation on the side of Member States. S.A. de León, *Composite Administrative Procedures in the European Union*. PhD Thesis. Madrid, Universidad Carlos III de Madrid, 2016, p. 253 ff.

25. The proposals are available at: https://ec.europa.eu/info/publications/migration-and-asylum-package-new-pact-migration-and-asylum-documents-adopted-23-september-2020_en. For an evolutionary analysis of the New Pact and its main challenges, see D. Thym, *Never-Ending Story? Political Dynamics, Legislative Uncertainties, and Practical Drawbacks of the 'New' Pact on Migration and Asylum*, in *Reforming the Common European Asylum System: Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New Pact on Migration and Asylum*, *Schriften zum Migrationsrecht*, n. 1.2022, edited by D. Thym, Baden-Baden, Nomos, pp. 11-32.

26. This article focuses on the questions regarding judicial review of composite asylum proceedings. On other forms of control, cfr. D. Fernández-Rojo, *La supranacionalización de la asistencia operativa a los sistemas nacionales de asilo en la Unión europea*, in *Revista Electrónica de Estudios Internacionales*, n. 41.2021, pp. 22-27; F. Nicolosi, *Alla ricerca di un controllo strutturato sul mandato operativo dell'Ufficio europeo di sostegno all'asilo*, in *Rivista di Diritti Comparati*, n. 2.2020, pp. 229-233.

called hotspot approach[27]. Such approach was set out in the Commission's Communication of 13 May 2015, a document of an explicitly operational nature[28]. The Communication stated that, in the crisis units (hotspots) created to handle the mass influxes affecting first and foremost Italy and Greece, EU bodies (Frontex, EASO and Europol) should carry out the identification and registration of arrivals. After the pre-selection process, they were to perform activities complementary to one another; EASO was specifically tasked with supporting the rapid processing of asylum applications, Frontex with the assistance of Member State authorities in the return of those who would not apply for asylum and, together with Europol, in the fight against human trafficking and smuggling[29].

In Italian and Greek hotspots, Frontex, EASO and Europol got involved in the various (asylum, relocation, return) proceedings to mitigate the migratory pressure on Member State authorities. As a result, proceedings of purely national competence became composite, so that decision-making was based on a series of procedural steps in which the two – supranational and national – levels were not separated anymore[30]. Specifically, EASO was supposed to provide information, to channel the applicants into the asylum or relocation proceedings, and to assist national authorities in the preliminary examination of asylum applications. Such examination aimed at quickly identifying those in need of protection, by taking a decision on the *admissibility* of the claim rather than on its *merits*. This was based on the rationale that the hotspot approach was invented to frame a pre-selection process,

27. The idea of jointly processing asylum applications has been for long on the agenda. See European Commission, *Commission Policy Plan on Asylum: An Integrated Approach to Protection Across the EU*. Brussels, 17.6.2008 COM (2008), 360 final, pp. 9-11; European Commission, *Study on the feasibility and legal and practical implications of establishing a mechanism for the joint processing of asylum applications on the territory of the EU*. Brussels, 13.2.2013. Cfr. E.L. Tsourdi, *Holding the European Asylum Support Office Accountable for its role in Asylum Decision-Making: Mission Impossible?*, in *German Law Journal*, n. 21.2020, pp. 513-514.

28. European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a European Agenda on Migration*. Brussels, 13.5.2015 COM (2015) 240 final. p. 6. In the absence of an overarching legal framework, the hotspot approach has been long regulated by a number of legally non-binding sources, such as policy documents and guidelines. Cfr. E.L. Tsourdi, *Bottom-up Salvation? From Practical Cooperation Towards Joint Implementation Through the European Asylum Support Office*, in *European Papers. On the Agenda: The Refugee Crisis and European Integration*. vol. 1, n. 3.2016, p. 1011 ff; C. Loschi, P. Slominski, *The EU hotspot approach in Italy: strengthening agency governance in the wake of the migration crisis?*, in *Journal of European Integration*, 2022, p. 5; M. Eliantonio, G. Lisi, *The Gaps in Judicial Accountability of EASO in the Processing of Asylum Requests in Hotspots,* in *European Papers*, vol. 4, n. 2.2019, European Forum, Insight of 21 October 2019, p. 591.

29. According to the Explanatory Note on the hotspot approach, the tasks conferred to EASO were registering asylum seekers and preparing case files at the request of national authorities. European Commission, *Explanatory Note on the "Hotspot" Approach,* 15.7.2015.

30. E.L. Tsourdi, *Bottom-up Salvation?* cit., p. 1024., C. Loschi, P. Slominski, *op. cit.*, p. 10.

whereby access to the asylum proceedings would be reserved for those most likely to be eligible for international protection[31].

Following the Commission's Communication, EASO signed several operational plans (OP) with Italy and Greece to frame their cooperation on the hotspots[32]. These plans interpreted EASO's role quite extensively, establishing competences to conduct admissibility interviews, to draft expert opinions, and to provide support to national decision-making[33]. Therefore, the reality quickly started to show quite a different picture from what had been originally envisaged as «operational support»[34].

In the framework of the hotspot approach, EASO acquired indirect powers in the decision-making process, so that national authorities lost their exclusive role of decision-makers. This extension of powers stretched the limits framed by Regulation (EU) No 439/2010. The Office was created to support Member States' efforts in the field of asylum[35], and even indirect forms of decision-making powers were explicitly excluded[36]. Although its role consisted of apparently supportive tasks, e.g., conducting interviews and drafting opinions, its indirect involvement led to the emergence of a kind of shared

31. M. Eliantonio, G. Lisi, *op. cit.*, pp. 592-593. On the geographical location, reception capacities of Italian and Greek hotspots and the procedural steps thereof see also S. Horii, *Accountability, Dependency, and EU Agencies: The Hotspot Approach in the Refugee Crisis*, in *Refugee Survey Quarterly*, n. 37.2018, pp. 219-222.

32. The list of the operational plans is available at https://euaa.europa.eu/archive-of-operations. EASO had signed operational plans both with Greece and Italy before the setting up of hotspots, as well as with other Member States. Compared to the support provided *outside* the hotspots, the novelty of EASO's involvement in the hotspots consists precisely of the effect of its activities on the decision-making process. On EASO's operations *outside* the hotspot approach see E.L. Tsourdi, *Bottom-up Salvation?* cit., p. 1008 ff.

33. EASO, *EASO Hotspot-Relocation Operating Plan to Italy*. Valletta Harbour and Rome, 12.12.2015, p. 3; EASO, *EASO Hotspot Operating Plan to Greece*. Valletta Harbour and Athens, 30.9.2015, p. 2; EASO, *EASO Hotspot Operating Plan to Greece. Amendment No 2*. Valletta Harbour and Athens, 1.4.2016, pp. 3-4.

34. In Greek hotspots, asylum seekers were interviewed mainly by EASO staff, who then drafted opinions on the outcome. Even though such opinions may have been preliminary, overwhelmed national authorities would tend to align the final decision with them. In more than one case, this led to asylum applications being declared inadmissible by Greek authorities based on an erroneous assessment by EASO. Moreover, amendments to Law No. 4375 of 3 April 2016 extended EASO's powers, allowing to its personnel to conduct asylum interviews autonomously, and laying down the grounds for their involvement in the decision on the merits and in appeal procedures. E.L. Tsourdi, *Holding the European Asylum Support Office Accountable,* cit., pp. 516-517. In Italy, the so-called Standard Operating Procedures (SOPs), a legally non-binding document adopted by the Ministry of the Interior circumscribed the division of tasks in Italian hotspots between national authorities and EU agencies. More specifically, the SOPs prescribed that EASO shall «provide Italy with specific know-how in the various steps of the asylum procedure and to facilitate the analysis of asylum applications in examination by the competent national authorities through, for example, forms of joint evaluation». Ministry of Interior, *Standard Operating Procedures (SOPs) applicable to Italian hotspots*, 3.2016, p. 22. In overall, such cooperation was considered fruitful for both sides. On one hand, EASO, alongside with Frontex, could monitor closely EU law implementation by Member State authorities. On the other hand, Italy's reception system improved significantly, because of which the Commission closed the ongoing infringement procedure. Cfr. C. Loschi, P. Slominski, *op. cit.*, pp. 7-9.

35. S. Schneider, C. Nieswandt, *EASO-Support Office or Asylum Authority? Boundary Disputes in the European Field of Asylum Administration*, in *Österreichische Zeitschrift für Soziologie*, n. 43.2018, pp. 15-18.

36. Cfr. Recital 14 and Art. 2 (6) of Regulation (EU) No 439/2010.

administration[37]. It has been argued that such joint processing might be *formally* compatible with the Lisbon Treaty. Nevertheless, EASO experts conducted interviews independently on several occasions and overloaded national authorities relied on their opinions, therefore, EASO obtained a substantial role in decision-making, originally not included in its mandate[38].

Such a composite procedural pattern raised several issues under the previous regulatory framework. Of key importance where the questions whether preparatory acts drafted by the Office may have been reviewable and which court may have been entitled to conduct such review. According to the rationale behind, the opinion based on the interviews has an impact on the outcome of the decision-making process, ultimately affecting the legal status of asylum seekers. Erroneous assessments may violate both principles of international refugee law, e.g., the right to seek asylum or the principle of *non-refoulement*, and procedural guarantees, such as the right to an effective remedy and the principle of good administration[39]. However, it has been argued that under Regulation (EU) No 439/2010 neither national nor EU courts could rule upon EASO's involvement in the decision-making process, since national courts may assess the activity of national authority, and the complementary tasks performed by EASO could not be brought before the Court of Justice. A similar conclusion has been reached on the question of the reviewability of preparatory opinions; despite having an indirect impact on decision-making, they do not fall under the scope of Art. 263 TFEU[40].

As a result, based on the patchwork of policy documents, Commission's communications and operation plans, it seemed hardly plausible to subject EASO's activities to judicial review under Regulation (EU) No 439/2010. Nevertheless, such *lacunae* did not entail the complete absence of control mechanisms on the Office's involvement in the decision-making process[41]. Art. 47 on administrative control foresaw that «[t]he activities of the Support Office shall be subject to the controls of the Ombudsman in accordance with Article 228 of the TFEU». Indeed, the Ombudsman enquired twice the tasks performed by EASO in Greek hotspots under Regulation (EU) No 439/2010. While in the first case she concluded that

37. Cfr. M. Eliantonio, G. Lisi, *op. cit.*, pp. 594-596, E.L. Tsourdi, *Bottom-up Salvation?* cit., p. 1030.

38. The Commission's 2013 study highlights that Art. 78 (2), in conjunction with Arts. 78 (1) and 80 TFEU, provides sufficient legal basis for joint processing of asylum applications. European Commission, *Study on the feasibility and legal and practical implications of establishing a mechanism for the joint processing of asylum applications on the territory of the EU*. Brussels, 13.2.2013, pp. 74-75. Cfr. D. Fernández-Rojo, *op. cit.*, p. 21; E.L. Tsourdi, *Bottom-up Salvation?* cit., p. 1024.

39. Cfr. F. Nicolosi, *op. cit.*, pp. 225-226; M. Eliantonio, G. Lisi, *op. cit.*, p. 598.

40. M. Eliantonio, G. Lisi, *op. cit.*, p. 599. By contrast, Tsourdi argues that it is debatable whether the expert opinions may or may not produce legal effects *vis-à-vis* the applicants, terming them as «acts that entail executive discretion». E.L. Tsourdi, *Holding the European Asylum Support Office Accountable,* cit., p. 525.

41. E.L. Tsourdi, *Holding the European Asylum Support Office Accountable,* cit., pp. 526-530.

any shortcomings are better addressed in an appeal procedure under national law, rather than in the context of an inquiry under Article 228 TFEU[42], in the second case she confirmed that EASO's failure to correct its assessment constituted maladministration[43].

In light of the strengthening of EASO's role outside its previous normative framework, it is necessary to assess whether this gap has been filled by Regulation (EU) 2021/2303 on the European Union Agency for Asylum.

### *3.2. The European Union Agency for Asylum: Regulation (EU) 2021/2303 and New Challenges at the Eastern Borders of Europe*

The 2015-2016 migration crisis made clear that the competences initially conferred to EASO would not provide a sufficient support to Member States under particular pressure. Therefore, the Commission aimed at strengthening the Office's mandate with a wider view to ensuring the smooth functioning of the CEAS. Such objective was crystallised by the regulation proposal published in 2016[44], and confirmed by the amendments submitted in September 2018[45]. After the partial agreement on several chapters reached between the European Council and the European Parliament in June 2017 (i.e., before the publication of the amendments in 2018), the negotiations got stuck despite the Commission's repeated urges to adopt the new Regulation[46]. With the launch of the new Pact, such negotiations were boosted once again and, based on the amended proposal published in 2018, finally led to the adoption of the new regulatory framework in December 2021.

42. European Ombudsman, Case 735/2017/MDC, opened on 13.7.2017, decided on 5.7.2018.

43. European Ombudsman, Case 1139/2018/MDC, opened on 23.7.2018, decided on 30.9.2019.

44. 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*, Brussels, 4.5.2016, COM(2016) 271 final. As the Commission pointed out in 2016, «[...] [i]t would not be plausible to reform the CEAS without providing the Agency with a mandate that corresponds to the demands that the reform will entail. It is essential to equip the Agency with the means necessary to assist Member States in crisis situations, but **it is all the more necessary to build a solid legal, operational and practical framework for the Agency** to be able to reinforce and complement the asylum and reception systems of Member States [...]». p. 2. (Emphasis added).

45. European Commission, *Amended Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010*, Brussels, 12.9.2018, COM(2018) 633 final. «[...] This amended proposal for a Regulation on a European Union Agency for Asylum focuses on the provisions concerning the operational and technical assistance to ensure that, at the request of the Member State, **the Agency will be able to provide support to the fullest extent possible by carrying out the entire administrative procedure for international protection or parts of it**, by assisting with or carrying out the procedure for determining the Member State responsible to examine an application for international protection and by assisting courts or tribunals with the handling of appeals, **without prejudice to the competence of Member States to take decisions on individual applications** and with full respect for the organisation of the judiciary in each Member State as well as judicial independence and impartiality [...]». p. 1. (Emphasis added).

46. D. Fernández-Rojo, *op. cit.*, pp. 3-4.

Regarding the role of EU agencies, the new Pact takes an ambivalent approach; it partly recognizes their increased involvement in the implementation, yet it does not sufficiently transpose their new functions developed outside the previous normative framework[47]. Regulation (EU) 2021/2303 on the European Union Agency for Asylum (EUAA) is one of the few proposals already adopted. Pursuant to the Regulation, the EUAA became operational on 19 January 2022, as EASO's fully-fledged successor. Compared to Regulation (EU) No 439/2010, the new normative framework significantly extends the Agency's tasks and competences[48]. A holistic description of EUAA's new mandate, as well as of the other proposals, is not possible within the scope of this article. Therefore, the analysis focuses on the Agency's new competences relevant from a procedural perspective.

Regulation (EU) 2021/2303 does not contain the provisions excluding the Agency's (whether direct or indirect) decision-making powers set forth in Regulation (EU) No 439/2010. Instead, it states that it «does not affect the competence of national asylum authorities to decide on individual applications for international protection»[49]. As for its purposes, EUAA contributes «to ensuring the efficient and uniform application of Union law on asylum in the Member States in a manner that fully respects fundamental rights»[50]. To this end, an interesting novelty is the monitoring mechanism, according to which EUAA has competence to monitor the operational and technical application of the CEAS, involving the identification of possible shortcomings in the national asylum and reception systems and the assessment of the Member States' capacity and preparedness to manage situations of disproportionate pressure[51]. As pointed out, the Agency's role is rather contradictory: on one side, it shall implement jointly the measures, on the other side, it shall supervise the joint implementation[52].

Regarding operational and technical assistance, the Regulation foresees that the Agency may provide it not only at the request of the Member State subject to disproportionate pressure, but also on its own initiative (with the agreement of the Member

47. E.L. Tsourdi, *The New Pact and EU Agencies: A Tale of Two Tracks of Administrative Integration and Unsatisfactory Embedding*, in *Reforming the Common European Asylum System: Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New Pact on Migration and Asylum*, *Schriften zum Migrationsrecht*, n. 1.2022, edited by D. Thym, Baden-Baden, Nomos, pp. 114-117.

48. Recital (6) of Regulation (EU) 2021/2303. Recital (7) explicitly states that «the tasks of EASO should be expanded, and in order to reflect those changes it should be replaced and succeeded by an agency entitled the European Union Agency for Asylum (the 'Agency'), with full continuity in all of its activities and procedures».

49. Recital (66) of Regulation (EU) 2021/2303.

50. Art. 1, par. 2 of Regulation (EU) No 439/2010 emphasized the contribution to improving the implementation of the CEAS, strengthening practical cooperation between Member States and providing them operational support.

51. Arts. 14 and 15 of Regulation (EU) 2021/2303.

52. E.L. Tsourdi, *The New Pact and EU Agencies*, cit., p. 121.

State)[53], while the previous Regulation contained only the possibility of assistance at the request of the Member State under particular pressure[54]. According to Art. 16, par. 2, different activities may be foreseen, such as assistance with the identification and registration of third-country nationals, with the registration of asylum applications, facilitation of the examination by the national authorities of asylum applications and providing necessary assistance in the proceedings. Art. 17 regulates the procedure for providing operational and technical assistance, Art. 18 lays down the details for the operational plan, leaving intact, at least in principle, the competence of the Member State authorities to decide on asylum applications[55].

In the framework of operational and technical assistance, the OPs establish the conditions for the deployment of asylum support teams (AST), which shall perform the task above. Such teams consist of experts with different backgrounds; selected among the Agency's personnel, national authorities, seconded by Member States to EUAA, and even experts not employed by the Agency[56]. The heterogeneity of the teams, logically, needs to be accompanied by appropriate control mechanisms to monitor the performance of the tasks assigned. Therefore, Art. 49 foresees the appointment of an independent fundamental rights officer (FRO) who shall be responsible for ensuring the Agency's compliance with fundamental rights in all its activities. The two main channels through which the FRO performs such monitoring task are the so-called complaints mechanism and the adoption of a fundamental rights strategy.

Art. 51 establishes the EUAA's obligation to set up the complaints mechanism, through which any person directly affected by the actions of an expert participating in an AST may submit a complaint in case of alleged violation of his/her fundamental rights. In accordance with the right to good administration, the FRO provides a linkage between individuals and the concerned expert, informing the Agency's Executive Director as well, by forwarding individual complaints and guaranteeing a follow-up procedure. In case of proven violation of fundamental rights, it may ultimately lead to the removal of the expert concerned from the AST[57]. Such mechanism may ensure an efficient *ex post* control. However, since par. 3 of Art. 51 explicitly states that «complaints which challenge a national authority's decision

53. Art.16, par. 1 of Regulation (EU) 2021/2303.

54. Cfr. Art. 8 of Regulation (EU) No 439/2010.

55. Pursuant to par. 2, lett. j), such plan contains the conditions «[...] regarding assistance with applications for international protection, including regarding the examination of such applications, and **without prejudice to the competence of Member States to decide on individual applications for international protection**, specific information on the tasks that the asylum support teams may perform and a clear description of their responsibilities and of the applicable Union, national and international law, including the liability regime [...]» (Emphasis added).

56. Arts. 19 and 20 of Regulation (EU) 2021/2303.

57. Art. 51, parr. 4-11 of Regulation (EU) 2021/2303.

on an individual application for international protection shall be inadmissible», one may ask what actual relevance it will have in concrete situations. In addition, Art. 57 foresees that «the Agency shall guarantee the protection of fundamental rights in the performance of its tasks» in compliance with the relevant EU and international law. To this end, EUAA shall adopt and implement a fundamental rights strategy based on the FRO's proposal[58].

In summary, the new Regulation significantly enhances EUAA's mandate; therefore, in July 2022, the European Ombudsman launched her own initiative to enquire upon the Agency's enhanced role, accountability and the respect of fundamental rights[59]. The own-initiated enquiry focuses on the monitoring mechanism, the Agency's involvement with non-EU countries, the complaints mechanism and the FRO's role. The questions regard the procedure and the specific instruments with which EUAA intends to monitor the operational and technical application of EU legal obligations by the Member States. In addition, the Ombudsman's main concerns are the start of the FRO's operation, the adoption of the fundamental rights strategy and the investigation of violations committed by experts not employed by the Agency. The Agency was invited to provide an answer by the end of October 2022; at the time of writing, no further information has been disclosed by either side.

Recently, new crisis situations unfolding at the Eastern borders of Europe have put the CEAS to the test. In the second half of 2021, the influxes from the direction of Belarus mainly concerned Poland, Latvia and Lithuania[60], while the armed conflict in Ukraine since February 2022 has triggered the biggest displacement crisis in Europe since World War II[61]. Since these emergencies differ in terms of nature and magnitude, EU institutions have sought to implement appropriate countermeasures. On one hand, in December 2021, the Commission submitted a proposal for a Council decision to adopt emergency measures in derogation to EU asylum law for Poland, Latvia and Lithuania (not adopted)[62]. On the other

58. Art. 57, par. 3 of Regulation (EU) 2021/2303.

59. European Ombudsman, Case SI/4/2022/MHZ, opened on 11.7.2022. Specifically referring to the enquiries conducted against another EU agency (Frontex), with regard to EUAA the Ombudsman explains, that «the Agency has gained powers that will significantly increase its involvement in decision making on asylum by national authorities and lead to an increase in direct contacts between the Agency and individuals concerned by its actions. These new powers also come with enhanced fundamental rights obligations and raise questions as to how the Agency will comply with these obligations and ensure accountability for its actions».

60. For further analysis, see M. Cometti, *La "strumentalizzazione" delle persone migranti: la risposta dell'Unione europea e la reazione lituana a confronto. Un'occasione per riflettere (anche) sull'operato dell'Agenzia dell'UE per l'asilo*, in D. Vitiello, S. Montaldo (eds.), *Insight. Instrumentalization of Migrants, Sanctions Tackling Hybrid Attacks and Schengen Reform in the Shadows of the Pact. European Papers*, vol. 7, n. 1.2022, pp. 287-304.

61. For a critical assessment, see C. Scissa, *La protezione temporanea per le persone in fuga dall'Ucraina in UE e in Italia: alcuni profili critici*, in *Questione Giustizia*, published on 31 March 2022.

62. European Commission, *Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland*. Brussels, 1.12.2021. COM (2021) 752 final, 2021/0401 (CNS).

hand, in March 2022, the Council decided to activate the temporary protection directive to address the mass displacement from Ukraine[63]. In the two different contexts, the ways in which EASO/EUAA provides operational assistance to the Member States have their own salient features.

Up to the present moment, with a view to the migratory pressure from Belarus, Lithuania and Latvia requested operational and technical assistance from EASO in July-August 2021. With regard to the mass displacement from Ukraine, EUAA signed operational plans with Romania in March, and the Czech Republic in June 2022. It is interesting to note that Poland, concerned by the influxes from Belarus and the most affected Member State by the mass displacement from Ukraine, has not sought EUAA's assistance yet[64]. On the contrary, the Agency has established cooperation with Moldova, first non-EU country, to provide personnel who would assist Moldavian authorities in the reception of the displaced from Ukraine[65]. In these contexts, EUAA's tasks are rather diversified, i.e., they range from registering newly arrivals, conducting interviews and drafting opinions to enhancing reception capacities, or holding workshops and trainings.

Specifically, the 2021 operating plans with Latvia and Lithuania highlighted EASO's/EUAA's tasks to provide support in conducting interviews and drafting opinions[66]. By contrast, the current operational plans signed with these countries (extended due to the mass displacement from Ukraine), as well as the operational plans signed with Romania and the Czech Republic confer to EUAA activities resembling the traditional mandate of operational support (such as registering newly arrivals, organizing trainings to the administrative personnel and interpreters, providing support in managing voluntary transfers or enhancing the reception capacities)[67]. This might be explained by the stand-

63. Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection.

64. As regards Poland, UNHCR has registered more than 7,5 million border crossings from Ukraine since 24 February 2022. In addition, more than 1.5 million people have applied for temporary protection. UNHCR, *Ukraine Refugee Situation*. Last update: 22 November 2022.

65. EUAA, *EU Asylum Agency deploys to Moldova*. Press release published on 24 May 2022, operational plan not available on the website of the Agency.

66. EASO, *Operating Plan agreed by EASO and the Ministry of the Interior of the Republic of Lithuania*, Valletta and Vilnius, 15.7.2021, amended on 14.9.2021 with extension until 30.6.2022, p. 16; EASO, *Operating Plan agreed by EASO and the Ministry of the Interior of the Republic of Latvia*, Valletta and Riga, 31.8.2021, amended on 14.12.2021 with extension until 31.3.2022, p. 16. As M. Cometti points out, the Commission's proposal for a Council decision does not contain any further element on the Agency's tasks either, art. 7 lists the activities foreseen also by the OPs. See M. Cometti, *La "strumentalizzazione" delle persone migranti*, cit., pp. 299-301.

67. EUAA, *Operational Plan 01 July 2022 – 30 June 2023, agreed by the European Union Agency for Asylum and the Ministry of Interior of the Republic of Lithuania and the Ministry of Social Security and Labour of the Republic of Lithuania*. Valletta and Vilnius, 1.7.2022, p. 17; EUAA, *Operational Plan agreed by the European Union Agency for Asylum and Latvia*, Valletta Harbour and Riga, 29.3.2022, pp. 21-22; EUAA, *Operational Plan 2022 agreed by the*

alone EU response given to the mass displacement from Ukraine. Since the activation of the 2001/55/EC Directive on temporary protection establishes a rather simplified procedural scheme, the recognition of beneficiary status does not require complex assessment activities which would entail the exercise of wide discretionary powers. Instead, emphasis is put on enhancing the registration and reception capacities of frontline Member States, such as the countries cited above[68].

At this stage, the following two conclusions may be put forward. First, it is rather difficult to assess what EUAA's role will actually be under the new regulatory framework. The situation at the EU's eastern borders with Belarus and the mass displacement from Ukraine have different structure, nature, and evolution, therefore, they require different set of measures and actions both from the EU and Member States. Moreover, other pieces of the new Pact are still under negotiations, which might entail amendments on the proposals and eventually affect EUAA's role in asylum proceedings. It is foreseeable that the Agency's role will be both strengthened and diversified through these crises. On one hand, it is predictable that its mandate will be strengthened in asylum proceedings, confirming the patterns of shared administration emerged especially in Greek hotspots. On the other hand, it is plausible that the activation of the temporary protection scheme requires different forms of cooperation, which might lead to a diversification of EUAA's activities. What is sure that, unfortunately, current challenges provide enough opportunities for such analysis.

Therefore, as last point, it is necessary to reflect on the instruments ensuring judicial protection against composite decision-making in light of the EUAA's enhanced competences under the new Regulation.

### *3.3. Judicial Protection in Composite Asylum Proceedings: A Fundamental Rights-Based Approach*

It has been argued that Regulation (EU) 2021/2303 does not put appropriate emphasis on EUAA's involvement in asylum proceedings nor does it establish clear control mechanisms for such involvement[69]. In this respect, the Ombudsman's own-initiated enquiry is quite telling, since it reflects a clear intent to shed light on the gaps existing in the Agency's accountability measures. Yet, the core issue, i.e., the lack of specific rules on judicial reviewability has not changed; and the increased activities also in Member States traditionally not affected by migratory influxes require a renewed analysis. Since the setting up of the Agency and the extended cooperation with Member States of Eastern Europe are

*European Union Agency for Asylum and Romania*, Brussels, 28.3.2022, pp. 17-22; EUAA, *Operational Plan 2022 agreed by the European Union Agency for Asylum and Czechia*, Luxemburg, 10.6.2022, pp. 18-21.

68. The analysis of the Temporary Protection Directive exceeds the limits of this article. On this regard, see D. Vitiello, *The Nansen Passport and the EU Temporary Protection Directive: Reflections on Solidarity, Mobility Rights and the Future of Asylum in Europe,* in *European Papers*, vol. 7, n. 1.2022, pp. 15-30.

69. E.L. Tsourdi, *The New Pact and EU Agencies*, cit., p. 121.

quite recent, it will take time to collect and assess national practices and case-law. Therefore, this last paragraph tackles the problem from a theoretical point of view. By putting forward a fundamental rights-based approach, it investigates whether the right to an effective remedy may be invoked in composite asylum proceedings, considering Art. 47 of the Charter, and drawing conclusions from a recent judgement of the Grand Chamber.

Much has been discussed regarding the Charter; it undoubtedly provides a written bill of rights which has «the same legal value as the Treaties» [art. 6 (1) TEU]. Nonetheless, general principles, developed in the jurisprudence of the CJEU and recognised by art. 6 (3) TEU, have for long provided an autonomous standard for EU fundamental rights protection[70]. Up to now, the Court is yet to clarify the ways in which the Charter and general principles of EU law interact *in concreto*[71]. For the purposes of this article, the analysis focuses on the access to an effective remedy, which, with other procedural guarantees, e.g., the right to good administration or the right to fair trial, constitutes a key element of the rule of law, one of the EU's founding values [art. 2 TEU]. Developed as a general principle of EU law, it implies both a right of access to a court and a right to seek review of acts concerning the individual's legal status[72]. In this regard, it is appropriate to analyse whether it may be invoked to assess national laws or practices consisting of the adoption of the final decision based on EUAA's preparatory acts[73].

Regarding the direct reliability on the Charter by individuals, one shall start from Art. 51 (1), revealing whether the case concerns not only a Charter provision, but first and foremost a provision of EU (primary or secondary) law. It is not sufficient to identify an EU norm which theoretically covers the subject matter of the case; instead, the EU norm shall be directly relevant to it[74]. Such combination of norms may increase the effectiveness of EU law in national contexts. To this end, national courts are tasked to analyse case by case whether the question falls within the scope of EU law and whether national constitutions or the Charter may guarantee a higher degree of protection[75]. Based on these

70. H.C.H. Hofmann, B.C. Mihaescu, *The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case*, in *European Constitutional Law Review*, n. 9.2013, pp. 73-76.

71. For possible ways of interpretation see the recent in-depth analysis of E. Hancox, *The Relationship Between the Charter and General Principles: Looking Back and Looking Forward*, in *Cambridge Yearbook of European Legal Studies*, n. 22.2020, pp. 233-257.

72. T. Lock, D. Martin, *Article 47 CFR*, in M. Kellerbauer, M. Klamert, J. Tomkin (eds.), *The EU Treaties and the Charter of Fundamental Rights*. Oxford: Oxford University Press, 2019, pp. 2215-2216.

73. E.g., the amendments to Greek law extending EASO's competences or the hotspot approach in general, which are likely to spread also in other emergency context, such as the recent ones at the Eastern borders.

74. A. Rosas, *When Is the EU Charter of Fundamental Rights Applicable at National Level?*, in *Jurisprudence*. vol. 19, n. 4.2012, p. 1277 ff.

75. S. Robin-Olivier, *The evolution of direct effect in the EU: Stocktaking, problems, projections*, in *I•CON*, n. 12.2014, pp. 181-186.

premises, suitable procedural channels shall be identified. Since Regulation (EU) 2021/2303 leaves the decision on asylum claims solely in the hands of national authorities, EUAA's assistance still seems to fall outside the scope of Art. 263 (1) TFEU[76]. However, national courts may rely on the preliminary ruling mechanism set forth in Art. 267 TFEU[77].

A good example for such form of inter-court cooperation is the Grand Chamber's judgement in the joined cases C-924/19 PPU and C-925/19 PPU[78], which may offer useful guidelines. More specifically, one of the questions referred to the Court concerned the effective remedy against return decisions enshrined in Article 13 of Directive 2008/115/EC[79], namely, an administrative decision amending an initial return decision (in terms of the country of destination; from Serbia to Afghanistan), against which the national legislation provides an objection to submit to the asylum authority, i.e., the very same authority which has issued the decision, but no appeal to court. Nonetheless, Article 13 of Directive 2008/115/EC, read in conjunction with Art. 47 of the Charter, requires «that the decision of an authority that does not itself satisfy the conditions laid down in that article be subject to subsequent control by a judicial body that must, in particular, have jurisdiction to consider all the relevant issues»[80]. In this regard, the Court concludes that the national legislation does not provide an effective remedy before court, therefore «it fails to comply with the essential content of the right provided for in Article 47 of the Charter, in that it deprives the person concerned of any judicial remedy against a return decision relating to him or her»[81].

For the purposes of this article, the main question is whether, in the above-stated circumstances, the national court has jurisdiction to hear the appeals under EU law. Reiterating the principle of primacy of EU law, the Court establishes that «Article 47 of the Charter is sufficient in itself and does not need to be made more specific by provisions of EU or national law in order to confer on individuals a right on which they may rely as

76. Cfr. what has been pointed out by M. Cometti, *La "strumentalizzazione" delle persone migranti*, cit., pp. 300-301. Furthermore, it does not seem plausible to assess the Agency's preparatory acts under Art. 263 (4) TFEU either. Cfr. T. Lock, D. Martin, *Article 47 CFR*, cit., pp. 2218-2219.

77. ECJ Opinion of 8.3.2011, Case C-1/09, par. 69.

78. CJEU, 14 May 2020, joined cases C-924/19 PPU and C-925/19 PPU, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*. The judgement, which led to the closure of Hungarian transit zones, has been much discussed elsewhere (cfr. E. Colombo, *Trattenimento nelle zone di transito e inammissibilità delle domande di asilo. La Corte di giustizia e le procedure di frontiera*, in *this Journal*, n. 3.2020, pp. 212-238). For the purposes of this article, only the considerations related to art. 47 of the Charter are object of analysis.

79. Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

80. CJEU, 14 May 2020, joined cases C-924/19 PPU and C-925/19 PPU, par. 128.

81. CJEU, 14 May 2020, joined cases C-924/19 PPU and C-925/19 PPU, par. 137.

such»[82]. Even though under EU law Member States are not required to establish before national courts remedies other than those provided by national law, no legal remedy exists in the case at hand. The Court points out that «it is therefore for the national courts to declare that they have jurisdiction to determine the action brought by the person concerned in order to defend the rights guaranteed to him by EU law if the domestic procedural rules do not provide for such an action in such a case»[83].

Such conclusions on the right to an effective remedy may be a useful starting point to assess EUAA's involvement in asylum proceedings, too. For the purposes of this analysis, Art. 47 of the Charter shall be read together with Art. 46 of Directive 2013/32/EU[84]. Pursuant to Art. 46 (1), the right to an effective remedy shall be guaranteed against decisions on the merits, on the admissibility of the application, as well as against decisions taken in border procedures and decisions not to conduct examination on the concept of European safe third country. According to Art. 46 (3), «Member States shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to Directive 2011/95/EU, at least in appeals procedures before a court or tribunal of first instance». Therefore, national courts shall conduct a full review on the lawfulness of the decisions (taken either on the admissibility or on the merits of the claim), scrutinizing all factual and legal elements.

This complies also with Art. 4 of Directive 2011/95/EU, according to which «in cooperation with the applicant, it is the duty of the Member State to assess the relevant elements of the application»[85]. The so-called duty of investigative cooperation confers the obligation to Member State authorities (and only to them, since they have the exclusive competence to decide on asylum applications) to conduct a full examination of the claim, in cooperation with the applicant him/herself, in the administrative stage of the asylum proceedings, while in the appeal procedure it is reflected in the conduct of a judicial review

82. CJEU, 14 May 2020, joined cases C-924/19 PPU and C-925/19 PPU, par. 140, then the Court highlights that «the same applies to Article 13(1) of Directive 2008/115, since the characteristics of the action provided for in that provision must be determined in accordance with Article 47 of the Charter, which **constitutes a reaffirmation of the principle of effective judicial protection**», (par. 141) (Emphasis added).

83. CJEU, 14 May 2020, joined cases C-924/19 PPU and C-925/19 PPU, par. 144, where the Court explicitly refers to the judgment of 3 December 1992, *Oleificio Borelli v Commission*, C-97/91, par. 13, and to the judgement of 19 December 2018, *Berlusconi and Fininvest*, C-219/17, par. 46.

84. 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).

85. Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast). According to par. (3), «the assessment of an application for international protection is to be carried out on an individual basis» and shall take into account the elements listed in letters (a)-(e).

regarding both facts and points of law. This duty is functional to give effectiveness of the right to asylum, and consists in assisting the applicant, who is rarely in possess of all (if any) pieces of evidence, to collect all relevant elements to the claim[86]. The exclusive competence to decide on asylum claims is recognised also by several provisions of Regulation (EU) 2021/2303[87].

What shall be concluded, then? Concerning proceedings in which the Agency is involved, national courts shall conduct a full examination of what has happened in the administrative stage, e.g., who has interviewed the applicant, to what extent the final decision is built on opinions drafted by EUAA or it relies also on other sources. If procedural irregularities are revealed, national courts may either rule upon the final decision of the Member State authority, leaving aside EUAA's preparatory acts, or refer preliminary questions to the Court of Justice regarding the scope of review[88]. However, one shall be aware that it depends on the discretion of national courts to raise a preliminary question. Furthermore, the right to an effective remedy is just one piece of the procedural puzzle, i.e., it is closely connected to other procedural guarantees, such as the applicant's right to be thoroughly informed and have access to legal aid[89]. To this end, courts shall be aware of their role, i.e., they are in key position to apply two different, yet deeply intertwined legal orders. In the dualistic design of administrative justice, the cooperation with the Court of Justice seems a plausible solution to guarantee the right to an effective remedy and, ultimately, give effectiveness to EU law[90].

## 4. Judicial Review of Composite Decision-Making: A Long Way to Go

This article has examined the question of judicial review of decision-making in composite proceedings in the field of asylum, focusing on the extension of competences of the EU asylum agency. Regulation (EU) No 439/2010 did not provide a legal basis for establishing EASO's judicial accountability. Regulation (EU) 2021/2303 transformed the Office into the fully-fledged EUAA, and significantly extended its competences, but it does not remedy the *lacunae* above. As highlighted above, key role is played by extra-judicial

86. For more on the duty of investigative cooperation, cfr. M. Acierno, M. Flamini, *Il dovere di cooperazione del giudice, nell'acquisizione e nella valutazione della prova*, in *this Journal*, n. 1.2017, P. Comoglio, *Il dovere di cooperazione istruttoria nei procedimenti di protezione internazionale: un difficile inquadramento sistematico*, in *Questione Giustizia*, n. 3.2020, pp. 9-22.

87. Cfr. Recital (66), Articles 11 (3), 18 (2) j), 22 (4) of Regulation (EU) 2021/2303.

88. It may be allowed to suggest an example: *Must Art. 46 of Directive 2013/32/EU, read in light of Art. 47 of the Charter, be interpreted as meaning that, where the rejection of an asylum application by a Member State authority is overwhelmingly based on an expert opinion drafted by the European Union Agency for Asylum, the review of the final decision by the national court shall be extended to the preparatory act?*

89. M. Eliantonio, G. Lisi, *op. cit.*, pp. 598-599.

90. S. Robin-Olivier, *The evolution of direct effect in the EU, cit.*, pp. 181-182.

instruments, such as the enquires conducted by the European Ombudsman, to which the Agency's activities shall be subject according to Art. 67 of Regulation (EU) 2021/2303. The recent enquiry initiated by the Ombudsman herself is likely to provide an efficient control mechanism; to this end, the next stages of the enquiry shall be object of further analysis.

A further question arises whether a national court may successfully refer the legality of the Agency's preparatory acts to the CJEU for a preliminary ruling under Art. 267 TFEU. In this regard, a fundamental rights-based approach has been put forward. More specifically, one may rely on the right to an effective remedy enshrined in Art. 47 of the Charter, in conjunction with Art. 46 of Directive 2013/32/EU, to obtain a full review of the administrative stage divided between national authorities and the Agency. Nonetheless, one shall bear in mind the courts' discretionary powers to activate such mechanism and the interconnections of the right to an effective remedy with other procedural guarantees. In this regard, further practice is to be shaped in light of the recent developments, i.e., the Agency's strengthened presence in Member States under pressure at the Eastern borders of Europe[91].

Ultimately, the idea of amending the Treaties is not far-fetched either. The normative framework of judicial remedies is provided by the Treaties, and not by ordinary legislation, as in national laws. Therefore, at the present state of EU law, the correction of any *lacunae* in the system should necessarily entail the amendment of EU primary law[92]. Considering the very nature of the Treaties, i.e., they provide the EU constitutional framework, and also the efforts an eventual amendment might require, to lay down minimum rules is the most likely option, which might be further developed in a general administrative procedural code[93]. With regard to the rules on judicial review, one might argue whether the second sentence of Art. 263 (1) TFEU, introduced by the Lisbon Treaty, would need to be amended or not[94].

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91. In this regard, the idea of a «reverse preliminary reference» has been also put forward, whereby the CJEU could consult national courts on the applicable law, or even a horizontal cooperation between national courts might be feasible. Cfr. H.C.H. Hofmann, *op. cit.*, p. 14.

92. F.B. Bastos, *An Administrative Crack in the EU's Rule of Law*, cit., p. 88 ff.

93. To this end, the model rules developed by ReNEUAL might be a feasible starting point. Cfr. what has been explained in note 7.

94. Cfr. K. Lenaerts, P. Van Nuffel, T. Corthaut, *Judicial Protection Vis-à-Vis the Institutions and Bodies of the Union*, in *EU Constitutional Law*, edited by K. Lenaerts P. Van Nuffel, T. Corthaut. Oxford: Oxford University Press, 2022, p. 792. In this regard, it may be allowed to suggest an example: «It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties, *or otherwise affecting their legal status*». The option might be comprehensive enough to make possible a further development by the interpretation of the Court of Justice. In line with Art. 263 (5) TFEU, specific conditions shall be laid down by the constitutive acts of such bodies, therefore, an eventual treaty amendment might entail modifications of these acts as well.

In this regard, one might raise the question– 15 years after the adoption of the Lisbon Treaty, with the experience of the 2008 economic crisis, the transformations affecting the single integration areas (e.g., in asylum field), the Covid-19 pandemic, and the need to strengthen European unity shattered once again by the current geopolitical situation – whether it might be time for another treaty amendment. Certainly, the Conference on the Future of Europe has brought the issue to the public attention[95], and the European Parliament seems particularly keen on changing the EU primary law[96]. However desirable it may be, in light of the present circumstances and the reluctance of several groups of Member States, an imminent amendment of the Treaties does not seem feasible[97]. Therefore, to analyse and tackle issues related to composite administrative proceedings, one shall come up with solutions within the current constitutional framework of EU law.

95. Conference on the Future of Europe, *Report on the Final Outcome*. May 2022.

96. European Parliament, *Parliament activates process to change EU Treaties*. Press Release, 9.6.2022. In this regard, no specific suggestion on amending the framework of judicial protection has been put forward.

97. N. von Ondarza, M. Alander, *After the Conference on the Future of Europe: Time to Make Reforms Happen. Four lessons for a European Union again requiring a new balance between deepening and widening*. SWP Comment, no. 49. German Institute for International and Security Affairs. August 2022, pp. 5-7.