31. The Common European Asylum System

Salvatore Fabio Nicolosi

1. INTRODUCTION

The reform of the Common European Asylum System (CEAS) is one of the major legislative challenges in European Union (EU) law, and has continuously attracted academic attention (*inter alia* Tsourdi and Costello 2021). Designed to harmonize the procedures and rights for third country nationals who apply for international protection across the EU, over the past decade the CEAS has been undergoing a process of reform, recently re-launched by the new European Pact on Migration and Asylum (COM/2020/609 final), and progressively oriented towards further law harmonization (Nicolosi 2019). Such a reform also aims to address the main challenges raised by the migratory pressure, and most notably the solidarity gap in the system of allocation of Member State's responsibility for asylum applications (Arenas Hidalgo 2021; Chetail et al. 2016).

Significantly less consideration has been given to the dynamics of enforcement of the CEAS. Yet, this is a crucial issue, because – as acknowledged by the European Commission – the migratory pressures of recent years have stressed the 'structural weaknesses and shortcomings in the design and implementation of European asylum and migration policy' (COM/2016/197 final, 2). Apart from a 'protracted implementation deficit', EU asylum law has been suffering from a 'protracted compliance deficit' (Thym 2017). This has made the need for a more effective enforcement strategy even more urgent.

In an attempt to offer an overview of all possible enforcement strategies for the CEAS, this chapter aims to explain whether EU direct enforcement mechanisms through EU agencies such as the European Asylum Support Office (EASO), with its most recent transformation into the EU Agency for Asylum (EUAA) by Regulation 2021/2303, can be more effective than traditional forms of enforcement by national authorities in ensuring better implementation of relevant EU rules. To this end, section 2 will contextualize the notion of enforcement in the field of asylum and illustrate the main enforcement dynamics within the CEAS. Next, section 3 will unfold the shift from direct implementation by national authorities to EU direct enforcement, as an emerging feature of the new European governance of asylum matters. Finally, section 4 will draw some conclusions by stressing the potential and challenges for the progressive involvement of EU agencies in the enforcement of the CEAS legal toolbox. In particular, it will be argued that direct enforcement by EU agencies can ensure greater convergence in the implementation of the CEAS and inject a considerable amount of resources and expertise into national administrations. However, this potential should be counterbalanced by a clear division of responsibilities between the EU and the national administration and by an adequate framework for access to justice for migrants that interact with EU agencies.

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2. CONCEPTUALIZING ENFORCEMENT IN EUROPEAN UNION ASYLUM LAW

Different definitions of enforcement exist in the literature. Broadly it 'comprises preventive and repressive monitoring, investigating and sanctioning substantive norms' (Vervaele 1999, 131). In this connection, enforcement is, therefore, dependent on the implementation of the substantive rules of a given policy. Scholars have defined the process of legal implementation as a process that consists of two elements: transposition into national law and application (Duina 1997, 156). Accordingly, implementation is the first phase of the enforcement of EU law into the legislative framework of Member States, followed by operationalization, which entails the designation of the national authorities responsible for the further phases, namely application, monitoring and sanctioning (Jans et al. 2015). This involves a number of actors at the national level that contribute with an administrative capacity to integrate EU rules in the implementation of the relevant policies (Schittenhelm 2019).

While the EU has been traditionally seen as a regulatory authority (Majone 1994), according to the theory of executive federalism, the power of enforcement is left in principle to the Member States (Lenaerts 1993, 28). This contributes to explaining why studies on enforcement at the European level generally focus on the domestic transposition of EU law rules (Cremona 2012). As will be illustrated in the following sub-sections, the CEAS perfectly exemplifies such a paradigm which is common to many areas of EU law, in which legislative harmonization vehiculates implementation and enforcement by State authorities. In this regard, scholars have emphasized that 'the Common European Asylum System should be understood as an output that encompasses both the legislative harmonisation component, and its operationalisation' (Tsourdi 2020, 201).

2.1 EU Legislative Harmonization and National Enforcement

Since the early 2000s, the CEAS has evolved through different phases of European regulation. Between 2000 and 2005, during the first legislative phase – pursued on the basis of Article 63, inserted in the Treaty establishing the European Community (TEC), following the reform of the Treaty of Amsterdam (Guild and Harlow 2011) – emphasis was given to the harmonization of domestic legislation on minimum common standards of reception and protection of asylum seekers (Guild 2006). Such a legislative approach resulted in the adoption of an 'integrated system' (Battjes and Spijkerboer 2005, 27), comprising directives on:

- the definition of, and the standards of treatment for refugees and beneficiaries of subsidiary protection (Directive 2004/83/EC, later replaced by Directive 2011/95/EU);
- asylum procedures (Directive 2005/85/EC, later replaced by Directive 2013/32/EU);
- reception conditions for asylum seekers (Directive 2003/9/EC, later replaced by Directive 2013/33/EU);
- and temporary protection (Directive 2011/55/EC).

These Directives complemented the Regulation on the State responsible for an asylum application (Regulation 342/2003, later replaced by Regulation 604/2013, known as 'Dublin III Regulation') and Regulation 2725/2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Regulation (later replaced by Regulation 603/2013).

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The emphasis on further harmonization was a distinct feature of the second legislative phase between 2007 and 2013, which was especially oriented towards a truly common policy with a view to establish 'a common area of protection and solidarity based on a common asylum procedure and a uniform status for those granted international protection' (European Council 2009). The second phase was based on Article 78 of the Treaty on the Functioning of the European Union (TFEU) and, importantly, also made it binding on the Member States to comply with the Charter of Fundamental Rights of the EU when transposing, implementing and enforcing EU asylum law. Between the years 2011 and 2013, the EU thus amended previous legal acts with the new recast legislative package, maintaining the four directives and two regulations at the core of the EU asylum policy (Chetail et al. 2016). The same policy goals are still salient in the current third round of legislative reform, triggered in the aftermath of the migratory pressure of 2015 (COM(2016) 197 final) and re-launched by the 2020 European Pact on Migration and Asylum (Thym and Odysseus Academic Network 2022).

EU legislative choices can be crucial to facilitate effective enforcement: legislation based on regulations can certainly ensure stricter enforcement by the Member States, which have, for instance, less discretion at the level of implementation, namely a more limited power to make legislative decisions or a more limited latitude of choice within certain legal boundaries (van den Brink 2018). However, 'a regulation may be directly applicable, but its effectiveness continues to be dependent on administrative capacities and practices on the ground' (Thym 2017). The Dublin Regulation is a clear example of a Regulation with very detailed normative prescriptions but a very low level of enforcement (Maiani 2017).

As has been mentioned, harmonized legislation is only one phase of the policy cycle (Tsourdi 2020). To preserve the teleological effectiveness of the policy, the role of the most relevant actors involved in the implementation and enforcement is crucial. In such a delicate and politically sensitive area as asylum, implementation has traditionally been the primary responsibility of national administrations. It is worth noting that, as pointed out in scholarly debates, discretionary space is often afforded by the EU legislative framework itself to the Member States in delicate policy areas that are subject to political controversy (van den Brink 2018). As argued, this may adversely impact the implementation and enforcement of EU rules: a study commissioned by the European Parliament confirmed that the wide discretion of the CEAS resulted in the creation of 'unattractive national asylum systems that deter asylum seekers and showing minimal commitment to solidarity measures' (European Parliament 2016, 8).

Nonetheless, the practice following the two phases of harmonization has shown a lack of a common approach to the implementation of the CEAS legislative toolbox, owing to significant delays in the transposition of the legislative instruments as well as divergent enforcement practices (Consterdine 2019). For example, while the Procedures Directive requires the Member States to register an asylum application within three working days (Article 6 of Directive 2013/32/EU), 'recent practice has shown much longer delays before asylum seekers are able to register or formally lodge their applications' (ECRE 2016a, 3). Furthermore, as highlighted by the Council of Europe, the implementation of the Dublin system has in a number of instances given rise to violations of asylum seekers' human rights – first and foremost the right not to be subjected to inhuman or degrading treatment, but also the right not to be detained arbitrarily, the right to respect for private and family life, the right to an effective remedy and the prohibition of collective expulsions (Council of Europe 2015, para 6).

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2.2 National Implementation Failures and EU Indirect Enforcement

The practice of implementation and enforcement of the EU asylum legislative framework has over the years disclosed a number of problems and weaknesses. In EU asylum law, difficulties in enforcement are a direct consequence of non-implementation or wrong implementation of EU rules. This can occur for different reasons, such as a lack of resources to apply EU rules (Thym 2017), as significantly epitomized by the Court of Justice of the European Union (CJEU) in *NS and ME* with reference to the 'systemic deficiency in the asylum procedure and in the reception conditions of asylum seekers' in Greece (Joint Cases C-411/10 and C-493/10, para 89).

In addition, the predominant legislative framework of minimum harmonization has proved detrimental to the practical effectiveness of the CEAS, because of the wide margin of discretion left to the Member States (Vicini 2020). In essence, the EU asylum legal framework has not been supported by procedural rules facilitating their implementation – as has been emphasized, in fact, 'what is common is the set of legal rules that Member States are called on to implement, rather than the implementation stage itself' (Tsourdi 2020, 510). On the contrary, the legislative design of the CEAS does not facilitate correct implementation, because the rules essentially oblige the Member States to act in many cases against their interests (see also den Heijer et al. 2016, 614). This is well illustrated by the Dublin system for the State responsible for an asylum application, which obliges frontline States to register asylum applications, with the consequence of overloading the national reception facilities.

Another problem is the lack of political will, as illustrated by the arm-wrestling over the relocation of asylum seekers between the Visegrad States (Czech Republic, Hungary, Poland and Slovakia) and the EU (Segeš Frelak 2017), culminating in two CJEU rulings dismissing the Member States' arguments (Joined Cases C-715/17, C-718/17 and C-719/17 *European Commission v Poland, Hungary and the Czech Republic*; Joined Cases C-643/15, C-647/15 *Slovak Republic and Hungary v Council*). These circumstances confirm that, while direct enforcement by State authorities is necessary to ensure an effective policy, specific supervisory mechanisms must be in place to address any failure in enforcement at the domestic level. Direct enforcement through State authorities is, thus, usually complemented by forms of indirect enforcement by different organs of the EU administration involved in the supervision of the application of the law by State authorities (Rowe 2009).

The difficulties in ensuring adequate enforcement of and full compliance with EU rules by State authorities raise the question of the effectiveness of indirect enforcement by the European Commission. As the central EU administrative apparatus and 'guardian of the treaties', the European Commission 'shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them' (Article 17(1) of the TEU). This role is usually exercised in coordination with the Court of Justice through infringement proceedings, based on Article 258 of the TFEU (Prete 2017). However, the European Commission has not always been proactive in launching infringement actions. Since 2012, a number of infringement proceedings have been launched by the European Commission for reasons related to incorrect application of the EU asylum acquis, delays in communicating the transposition measures and non-compliance. The European Commission's Register of Infringement Decisions reports 34 cases concerning the Qualification Directive, 47 cases concerning the Procedures Directive and 41 cases concerning the Reception Directive.

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Infringement cases indicate clear failures in the implementation of EU asylum legislation; however, it is worth stressing that not all infringement actions necessarily result in the European Commission's referral to the CJEU, this falling into the discretionary power of the European Commission. Nonetheless, even after a successful action brought before the Court, this traditional enforcement mechanism proves ineffective, because Member States can repeatedly violate EU law. The case of Hungary is particularly illustrative: to enforce the EU's asylum rules, the Commission started several actions against Hungary (Progin-Theuerkauf 2021), complementing various references for preliminary rulings (Joined Cases C-924/19 *PPU* and C-925/19 *PPU FMS and Others*; Case C-556/17 *Torubarov*; Case C-564/18 *Bevándorlási és Menekültügyi Hivatal (Tompa)*; Case C-406/18 *PG*), in which the Court ultimately confirmed that Hungary's legislation encroached upon the asylum acquis (Case C-808/18 *Commission v Hungary*). The lack of cooperation by some Visegrad Member States on the relocation of asylum seekers offers another point of criticism on the effectiveness of this EU indirect enforcement mechanism. In this regard, the CJEU's ruling (Joint Cases C-715/17, C-718/17 and C-719/17 *Commission v Hungary, Poland and Czech Republic*) was issued three years after the expiration of the Relocation Decision (Council Decision (EU) 2015/1601).

This cannot lead to the conclusion that infringement procedures have to be delayed or avoided; on the contrary, they are necessary but insufficient. They play a role in highlighting the axiological nature of EU law enforcement. This is meant to ensure the commitment of the EU and its Member States not only to adequately enforce the EU legislation but also to guarantee compliance with the values on which the Union is founded (De Schutter 2017), and asylum legislation is indeed adopted to serve such values, first and foremost fundamental rights protection.

The limits of indirect enforcement coupled with the operational nature of the CEAS contribute to explaining the significant expansion of EU direct enforcement powers through agencies. This process has determined what the doctrine defines as 'Europeanization' or 'verticalization of enforcement' (Scholten 2017, 1348) and has added a further level of enforcement in which the EU through its institutions and bodies directly contributes to the enforcement of relevant EU rules. The growing trend towards the verticalization of enforcement has become salient also in the area of EU asylum law and, as will be explained in section 3, is justified by the need to improve the implementation and overall functioning of the CEAS.

3. THE EMERGING SYSTEM OF SHARED ADMINISTRATION AND EU DIRECT ENFORCEMENT IN THE AREA OF ASYLUM

Scholars have aptly acknowledged that the EU has also 'acquired enforcement competences in areas where it previously only had regulatory authority' (Scholten and Scholten 2017), and has thus added a further level of enforcement in which the EU, through its institutions and bodies, directly contributes to the enforcement of relevant EU rules. Such a composite model of enforcement encompasses 'a system of integrated levels' (Hofmann and Türk 2006, 583), with a primary level of enforcement to be ensured by State authorities under complementary supervision by the European Commission. A secondary level of enforcement is based instead on the operational mandate of relevant EU agencies and their integration into a system of shared administration (see Figure 31.1).

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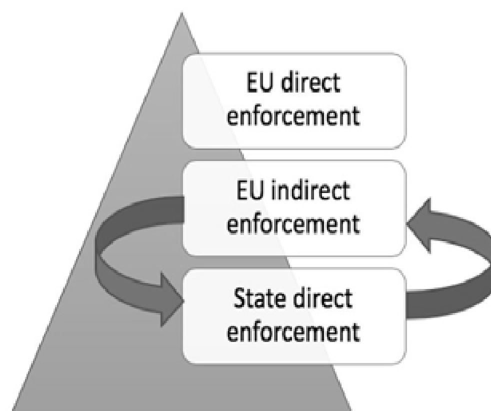

Figure 31.1 Composite system of EU law enforcement

In the area of asylum, this phenomenon has been driven by the increasingly expanding mandate of EU migration agencies (Fernández-Rojo 2021), particularly EASO (EASO Regulation 439/2010), replaced and succeeded as of 19 January 2022 by the EU Agency for Asylum (Article 1(1) of EUAA Regulation 2021/2303). Together with the European Border and Coast Guard Agency (Frontex) (Regulation 2019/1896) and the EU Law Enforcement Agency (Europol) (Regulation 2022/123), EASO and its successor, the EUAA, cooperate and synergically contribute to the implementation of the CEAS. However, since 'ensuring the efficient and uniform application of Union law on asylum in the Member States' (Article 1(2) of EUAA Regulation) constitutes the primary scope of the EUAA, this chapter will not delve into the other EU migration agencies.

The following sub-sections will illustrate the evolving institutional and operational dimension of shared administration and EU direct enforcement in the field of asylum and will address the potential and challenges beyond such an emerging form of enforcement, with a view to outlining avenues for future research.

3.1 From EASO to EUAA: The Evolution of the Institutional Design of EU Direct Enforcement

As acknowledged in the Preamble to Regulation 2021/2303, EUAA builds on the role of its predecessor and on the need to strengthen EASO's role 'to not only support practical cooperation among Member States but to reinforce and contribute to ensuring the efficient functioning of the asylum and reception systems of the Member States' (Recitals 5 and 6 of the EUAA Regulation). It is thus worth recalling that, back in 2010, EASO was created as an 'institutionalisation push' (Tsourdi 2022, 4) to address the implementation gap that was especially salient in frontline States and 'to support Member States of the European Union in their efforts to bring closer national practices in the field of asylum' (Comte 2010, 374).

EASO was established, on the basis of Articles 74 and 78(1) and (2) of the TFEU, as a regulatory agency, namely as 'a legal entity set up by the legislative authority in order to help regulate a particular sector at European level and help implement a […] policy' (COM/2005/59

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final; Chamon 2016). EASO's mandate was based on three pillars, including support for practical cooperation, such as exchange of information on countries of origin (Article 4 of the EASO Regulation); relocation of asylum seekers (Article 5 of the EASO Regulation) or training for national officers (Article 6 of the EASO Regulation); support for the Member States subject to situations of particular pressure (Article 8 of the EASO Regulation), including the deployment of Asylum Support Teams (Article 10 of the EASO Regulation); and contribution to the implementation of the CEAS through the exchange of information on the processing of asylum applications and national legal developments (Article 11 of the EASO Regulation).

Despite the fact that its founding Regulation limited EASO's activities to facilitating, coordinating and strengthening practical cooperation among the Member States and to providing scientific and technical assistance, in recent years EASO has *de facto* progressively stretched its operational powers beyond its legal mandate. This was initially favoured by the recast Dublin III Regulation of 2013 that gave EASO a crucial role in the implementation of practical forms of solidarity for the Member States experiencing exceptional situations, involving the agency in drawing up information – which can be politically sensitive – about possible situations of emergency in a Member State in the context of the mechanism for early warning, preparedness and crisis management (Article 33 of the Dublin III Regulation; Nicolosi and Fernández-Rojo 2020; Scipioni 2018, 774).

This shift was especially triggered by the migratory pressure on the EU in 2015 (Menéndez 2016) and the adoption by the European Commission of the European Agenda on Migration (COM/2015/240 final), which introduced the concept of the 'hotspot', 'an area created at the request of the host Member State 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' (Article 1(23) of Regulation 2019/1896). These circumstances played a major role in favouring the progressive integration between the EU and national administrations in implementing the CEAS legal toolbox (*inter alia* Fernández-Rojo 2018). In particular, as stressed by Scipioni, 'hotspots seem to have created the conditions on the ground for further deepening of competencies' (Scipioni 2018, 777).

This is well illustrated by EASO's progressive involvement in the joint processing of asylum claims (Tsourdi 2016), tested on a very limited scale through pilot projects between 2014 and 2015 (EASO 2015) before a later large-scale implementation in the Greek hotspots (Tsourdi 2020, 516 ff). Defined by the European Commission as arrangements 'under which the processing of asylum applications is jointly conducted by two or more Member States, or by the European Asylum Support Office (EASO), with the potential participation of the UNHCR […] and which includes the definition of clear responsibilities during the asylum procedure' (Urth et al. 2013, 14), joint processing of asylum applications have been distinguished in assisted processing, common processing and EU-level processing (Tsourdi 2020, 514–15). This distinction, based on the degree of involvement of the EU administration, moves from a mere role of coordination played by the EU agency in the assisted processing to its active participation in parts of the admissibility procedure of asylum applications at the domestic level to a complete shift of the responsibility to the EU. While the latter is a scenario that would require a specific treaty amendment that will centralize, at the EU level, the responsibility for an asylum application, the second scenario has been implemented beyond the limits set up by the EASO Regulation, which substantially assigns to the EU agency

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a mere role of assistance and coordination. The joint processing of asylum claims was in fact expressly mentioned in Article 60(4)(b) of Greek Law No. 4375 of 3 April 2016. Article 60(4), further amended in June 2016 (Greek Law No 4399, see also ECRE 2016a; 2016b), expanded the operational powers conferred on EASO, allowing the agency not only to assist the national authorities in conducting interviews with applicants for international protection but also to autonomously conduct the interviews (Nicolosi and Fernández-Rojo 2020, 182–3). Accordingly, as emphasized by Tsourdi, 'EASO's involvement is *de jure* only regulated by Greek law, whereas from the perspective of EU law the agency's involvement is a *de facto* development' (Tsourdi 2020, 516).

On the one hand, such involvement in the decision-making process concerning the processing of asylum applications in Greek hotspots raised genuine concerns in civil society, resulting in a complaint by the European Centre for Constitutional and Human Rights (ECCHR 2017) before the European Ombudsman 'about the quality of, and procedural fairness in, the conduct of admissibility interviews' by EASO (Case 735/2017/MDC). On the other hand, these *de facto* developments prompted the European Commission to issue a proposal in 2016, within the broader process of reform of the CEAS (Nicolosi 2019), for the progressive transformation of EASO into a more operational agency (COM/2016/271). This proposal was lately replaced by an amended proposal in 2018 (COM/2018/633 final) that attempted to formalize EASO's involvement in the joint processing of asylum claims. This proposal was not confirmed by the 2020 New Pact on Migration and Asylum; on the contrary, the Commission urged the legislators to adopt the new EUAA Regulation on the basis of the existing interim agreements. The new Regulation was thus adopted by a qualified majority on 9 December 2021 (with three Member States opposing: Hungary, Poland and Slovakia; and two abstaining: Bulgaria and the Czech Republic) (2016/131/COD). This was the first and is still the only legislative proposal accompanying the new Pact to be adopted. Nonetheless, as will be explained in the next sub-section, this transformation has not included the definition of clear responsibilities during the asylum procedure between the EU administration and national authorities, which remains one of the most controversial challenges in the dynamics of enforcement of EU asylum rules.

3.2 EU Direct Enforcement and National Administrations: Potential and Challenges

The mandate of the new EUAA entered into force on 19 January 2022, with the exception of the provision under Articles 14 and 15 on the monitoring mechanism for the operational and technical application of the CEAS, which will partly remain on standby until the CEAS reform is completed (Tsourdi 2022). Article 2 of the founding Regulation lists an array of tasks that are not entirely different from the mission of EASO, though more emphasis is placed on practical cooperation through the agency's restructured operational dimension. As highlighted on its brand new website, 'operations now form a core part of the Agency's activities' and the agency has deployed around 2,000 personnel in more than 100 locations in various States. Annex I to the EUAA Regulation also establishes a permanent asylum reserve pool of 500 Member State officials at the disposal of the agency.

This expanded operational dimension, which injects new resources into the agency, may contribute to a better level of enforcement of relevant EU rules. This is also visible in the new competences assigned to the agency under Chapter 6 of the EUAA Regulation, which details the operational and technical assistance. Unlike the EASO Regulation which allowed for the

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deployment of Asylum Support Teams only when a Member State was subject to a particular pressure (Article 13 of the EASO Regulation), the EUAA Regulation makes a more visible connection with enforcement by allowing for deployment also with regard to the implementation of the obligations under the CEAS (Article 16(1)(a) of the EUAA Regulation). Additionally, in case of disproportionate pressure on the reception system of a Member State, the EUAA can deploy the Asylum Support Teams on its own initiative with the agreement of the Member State (Article 16(1)(d) of the EUAA Regulation).

The EUAA Regulation partly formalizes the activities that EASO was undertaking in hotspot areas, especially in light of inter-agency cooperation (Fernández-Rojo 2021). Article 21(3) of the EUAA Regulation, in fact, addresses the role of the Asylum Support Teams in the framework of the Migration Management Support Teams, deployed according to Article 40(1) of the European Border and Coast Guard Agency's Regulation, in case a Member State faces disproportionate migratory challenges (Article 40(1) of Regulation (EU) 2019/1896). These Migration Management Support Teams, including experts from EUAA, Frontex and Europol as well as further relevant experts, are tasked with providing 'technical and operational assistance' under the coordination of the European Commission.

However, some challenges still remain, especially as regards (i) the division of labour between the EU administration and national authorities, on one hand, and (ii) issues of accountability and access to justice for asylum seekers that interact with the emerging system of shared administration, on the other hand. These constitute challenges that deserve further research as well as more societal attention in order to strengthen the EU rule of law, including access to justice and effective remedies.

3.2.1 Unresolved issues of coordination

The EUAA Regulation only pays lip service to the involvement of the agency in the examination and joint processing of asylum claims along with state authorities. Article 16(2)(c) of the Regulation limits the agency's powers to facilitating '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'. In addition, the same provision confirms a role of assistance, advice and support to the national authorities as regards the enforcement of the CEAS, including the implementation of asylum procedures, reception facilities and obligations under the Dublin Regulation (Article 16(2)(d), (e), (f) and (g) of the EUAA Regulation).

On the other hand, as has been highlighted, the EUAA Regulation formalizes a function that offers the potential to further steer policy implementation (Tsourdi 2022, 7). Pursuant to Article 11, the EUAA Management Board adopts guidance notes for the assessment of applications that Member States 'shall take into account' when examining these applications. These guidance notes provide country of origin information and focus on countries selected by the agency in cooperation with the Member States. Some of the key factors taken into account in the prioritization of the countries of origin are the number of applications received in the Member States and associated countries by nationals of specific third countries and the need to foster further convergence in the assessment of international protection needs. Country of origin information is an essential element for refugee status determination as it complements the information provided in the applications (Vogelaar 2019). More importantly, country of origin information is an element on which greater convergence across the Member States should be ensured for effective enforcement of the CEAS. Even though these guidance notes

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are not legally binding, the tone of Article 11 seems to confirm the existence of an obligation for national authorities to take the guidance notes into account. Hence, the EUAA is expected to influence the national administrations in the implementation of the CEAS rules.

Apart from these technical aspects, the EUAA Regulation does not fully embed the *de facto* developments already undertaken by EASO, such as joint implementation and processing of asylum claims. EASO's practice has disclosed overlapping competences between the agency and the national asylum authorities (Nicolosi and Fernández-Rojo 2020). This creates issues of transparency for asylum seekers, who are neither aware of which authority they will be interfacing with nor in a position to express their consent about the possibility to be interviewed by the agency instead of national authorities. Additionally, a clear distribution of tasks in the emerging system of shared administration is still missing. Normally, when a need arises, a structured assessment is initiated by EUAA, including through dialogue and consultations with the Member State concerned, in order to jointly define possible assistance measures. Such measures, as well as means to implement them, are then detailed in an Operating Plan, an agreed document binding both the agency and the Member State concerned as well as the participating Member States. Such plans are normally developed in order to provide support to Member States whose asylum and/or reception systems are under disproportionate pressure or when a Member State is facing a disproportionate migratory challenge, or to support the implementation of a Member State's obligation under the CEAS.

These Operating Plans are executed based on an 'embedded model', according to which experts on contract deployed as members of Asylum Support Teams are embedded within the structure of the respective national authorities. In practice, those experts on contract are seconded by the agency to the national authorities of the host Member State and therefore perform their tasks on the premises of the relevant national authorities. While justified by the fact that the treaty confirms the full responsibility of the Member States on applications for international applications, this model blurs the limits set out in the founding Regulation with regard to the involvement of the agency's staff, whose formal contribution to the processing of asylum claims by national authorities remains vague and, as will be discussed in the following section, leaves open issues of accountability.

The operational practice of the new agency will probably continue to unearth these unresolved issues of coordination with national asylum authorities. In this connection, a clearer normative setup, as envisaged by the original 2018 Commission's proposal for the EUAA (COM/2018/633 final), could have contributed to a significant enforcement shift in the institutional design of the EUAA, by recognizing and regulating the practice of joint processing of asylum applications already pursued in practice by EASO.

3.2.2 Fundamental rights implications and accountability

Section 3.1 explained the gradual formalization of EASO involvement in Greek asylum procedures, confirming that initial interviews with applicants for international protection may be conducted by the agency's staff (Article 60(4) of Greek Law No. 4375/2016), until the agency's involvement in the examination of the merits of asylum claims, formalized by the Greek Law No. 4540/2018 (Article 28(7)) and later systematized in the Greek Law No. 4346/2019 of 1 November 2019 (Tsourdi 2020, 518). In this connection, as has been reported, in 2018 EASO conducted 8,958 interviews in the fast-track border procedure introduced by the Greek Law of 2016 and 2,955 during the first half of 2019 (ECRE 2019, 12).

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In such an emerging system of integrated or shared administration, the EU agency is, in practice, responsible for independently conducting interviews, assessing whether the safe third country or the first country of asylum concept applies and adopting a recommendation on the admissibility of the international protection application. While this recommendation has *de jure* no legal effect on the Greek asylum officials, EASO's opinion had *de facto* quasi-binding consequences, since, on the whole, the Greek Asylum Service does not undertake any assessment of the application, but on many occasions rather rubber-stamps the agency's decision in regard to the applications for international protection (Nicolosi and Fernández-Rojo 2020, 182–3; *contra* see ECRE 2019, 12). Such a situation creates tensions both from the perspective of respect for the EU rule of law and from the perspective of accountability, insofar as the activities of the EU agency negatively impact the rights of the applicants and thus access to justice, including the right to an effective remedy.

From the first point of view, the activities that were undertaken by EASO and, arguably, continued by EUAA clearly exceed the limits set out in the founding Regulation. Devising a normative framework that takes into account the agency's developments on the ground is a task for the EU legislative institutions, which missed a valuable opportunity in this regard by not embedding in the EUAA Regulation the practice of joint processing of asylum claims. The fact that a decision on an asylum claim remains a *de jure* responsibility of the national administration cannot condone the proliferation of *de facto* activities that escape clear forms of judicial or political oversight.

From the perspective of access to justice and accountability, it is worth stressing that the enforcement of EU asylum rules cannot be detrimental to the full application of the fundamental rights and safeguards enshrined in EU primary law, including the EU Charter, and in secondary legislation. Fundamental rights issues arise with regard to the procedural rights that applicants might have during the interview with the agency's staff (see, *inter alia*, Lisi and Eliantonio 2019, 598–9). There is no reference to such rights in the EASO (and now EUAA) Regulation, nor in the rules of conduct of the Operating Plans. It is also unclear whether national procedural rules are and have to be respected by EASO staff. As has been reported, Greek law is not often applied by EASO staff, who consider domestic law as a 'side issue', since all staff are 'very experienced asylum experts' (Ziebritzki 2016).

Debates have been fuelled about the need to ensure an internal administrative fundamental rights monitoring mechanism, especially following the European Ombudsman's investigations into the EASO operational activities. In an inquiry launched after alleged wrongdoings by the EASO experts during interviews, the European Ombudsman concluded that 'EASO's failure to address adequately and in a timely way the serious errors committed' in a particular interview constituted misconduct, and subsequently advised the agency to undertake several improvements to ensure procedural guarantees during asylum procedures (Case 1139/2018/MDC). These included, *inter alia*, the recommendation to inform national authorities 'immediately and systematically' once significant errors have occurred during an interview, and the suggestion to set up an internal complaint mechanism accessible to individuals who come into contact with the agency. In its response to the European Ombudsman, a complaint mechanism has been included in the EUAA Regulation, at the request of the European Parliament. Article 51(2) of the EUAA Regulation establishes that 'any person who is directly affected by the actions of an expert participating in an asylum support team, and who considers that his or her fundamental rights have been violated due to those actions, or any party representing such a person, may submit a complaint in writing to the agency'. Since this complaint mechanism

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is not designed for claims against a national authority's decision, it is all the more urgent to clearly define the operational tasks of the agency and the measures that the asylum support teams can adopt, and dispel doubts about the accessibility and effectiveness of the mechanisms.

Finally, the possibility to undertake judicial actions before the CJEU against the agency is limited by the fact that, despite the assistance provided by the agency, the Member States retain the primary administrative responsibility for asylum applications. This means that asylum seekers can only appeal a negative decision in their regard before domestic courts, even if the national authorities have acted under the influence of the EU agency. Scholars have already highlighted that contesting the agency's advisory opinions through an action for annulment before the CJEU is particularly difficult (Tsourdi 2020, 525 ff), as they would not constitute reviewable acts under the requirements of the action for annulment under Article 263 of the TFEU (the act must be of direct concern to the individual, Case C-486/01 Front national v European Parliament, and of individual concern, Case C-25/62 Plaumann v Commission). Other direct remedies before the CJEU, such as actions for damages ex Article 340(2) of the TFEU, would not be more satisfactory, owing to the difficulty in clearly delineating the agency's contribution to the final national decision.

4. CONCLUDING REMARKS AND FUTURE PROSPECTS

The relaunch of the CEAS reform through the new European Pact on Asylum and Migration has offered a chance to reflect on the evolution of enforcement of EU asylum law. While being primarily left to national administrations, following the migratory pressure of 2015, enforcement has progressively shifted to the EU level with an increasing expansion of competences for the EU agencies in this field, namely EASO and its successor EUAA. EU direct enforcement through EU agencies (Scholten and Luchtman 2017) has much potential to ensure greater convergence in the implementation of relevant EU rules and inject more resources into the national administration. Naturally, this requires careful institutional design and tighter coordination between the domestic systems and the agency, but it can constitute a major step forward for the enforcement of the CEAS.

EASO's involvement in the refugee determination process in the Greek hotspots confirms the need for Member States to integrate the EU support within their domestic system while keeping the primary administrative responsibility for an asylum application (Nicolosi and Fernández-Rojo 2020). This form of EU direct enforcement has the potential to overcome some of the inherent problems of the CEAS. The lack of national resources can be counterbalanced by the injection through the agency of Asylum Support Teams that can provide expertise in applying EU rules. This comes also with financial relief for the Member States concerned. Even the most difficult problem, that of the lack of political will, could be potentially contrasted by empowering the agency with specific operational tasks that, especially in case of emergency, can be enforced against the will of the Member States (Thym 2016). Lastly, even if the regulatory framework is based on Directives, the agency can assist Member States by monitoring the correct implementation of EU rules.

Nonetheless, while this type of enforcement can be more effective than traditional means of indirect enforcement such as infringement proceedings, when national authorities fail to correctly implement the relevant EU legislation, attention should be paid to its implications. The practice over the most recent years has disclosed challenges that the transformation of

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EASO into the EUAA has left unaddressed. These include unresolved issues of coordination between the EU agency and the national administration as regards a clear allocation of tasks and responsibilities as well as fundamental rights issues and accountability gaps that are detrimental to the respect for EU rule of law. If the establishment of EASO was hailed as a step towards more effective enforcement of EU rules (Comte 2010), it is crucial that the new EUAA lives up to those expectations without ignoring the need to fulfil the EU humanitarian tradition of respecting human rights.

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