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*AFSJ Agencies:  
Perspectives and Shortages in Strengthening the Rule of Law*

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*Key Words*

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**Introduction**

This post aims at giving a brief analysis of the contradictory impact of the EU Agencies related to asylum on the Rule of Law. In this regard, the respect of Fundamental Rights of migrants and EU law on asylum will be more particularly assessed.

Indeed, agencies take a significant part in monitoring and preserving the Rule of Law in Member States. On the one hand, the European Asylum Support Office (EASO) was established in order to support Member States in implementing the Common European Asylum System, which aim was to enhance asylum seekers' protection in the European Union and bring national legislations closer.

Therefore, it supports Member States struggling with the implementation of EU law or subjected to an important number of new asylum applications. For this purpose, the

Agency's competences are not limited to monitoring but can also involve operational support to Member States. Consequently, the EASO was recently put forward in preserving the Rule of law while dealing with the so-called migratory crisis. On the other hand, the Fundamental Rights Agency (FRA) plays as a monitoring actor over the respect of Fundamental Rights by national asylum administrations and its work is essential in this context.

### **An effective contribution of AFSJ Agencies to strengthening the respect of the Rule of Law by Member States**

To begin with, agencies have a significant monitoring role regarding the respect of the Rule of Law. In fact, the EASO takes a growing part in monitoring the correct implementation of the CEAS. Although its main task was initially to enhance cooperation between Member States on countries of origin information exchanges, thus contributing to improve transparency and objectivity in assessing an asylum claim, and enhancing protection in the CEAS framework, its role is progressively expanding. Therefore, the EASO enables the detection of disruption on national asylum systems and violations of the Common European Asylum System.

Indeed, the Agency collects and analyses data on asylum and produces annual reports on EU Member States. Its role is particularly useful for the European Commission which uses this information to launch infringement procedures. It also constitutes a way of exerting pressure on Member States to correct violations to the Rule of Law. In this way, the Agency might even produce guidelines for them on how to implement the CEAS legislation.

It must however be noted that its findings have in itself no mandatory effect on Member States and are more likely to constitute a moral pressure for Member States. Its monitoring effect could also be hindered by its governance which might challenge the reports' impartiality. Indeed, as an EU Agency, its managing board is mainly intergovernmental and is composed, among two members of the European Commission and a member of the High Commissioner for Refugees, of a representative of each Member State. However, representatives provide no guarantee of independence. Nonetheless, in practice, annual reports remain a useful tool to underline shortcomings in national systems. In fact, at the moment, information provided by the Office are being examined by the Commission to launch infringement procedures.

At the same time, the FRA acts, as well, in supporting the Rule of Law by Member States thanks to its monitoring competences. Although its field of action is not limited to asylum, unlike the EASO, and focuses on the respect of Fundamental Rights, its action is particularly relevant in the migration management's context. The Commission explicitly acknowledged that information collected by this Agency will help detecting threats to the Rule of Law (European Commission, A new EU Framework to strengthen the Rule of Law, Communication, COM (2014) 158). With a managing board providing guarantee of independence, both agencies have complementary monitoring activities.

Furthermore, the EASO takes a more operational part in the Member States' compliance with the Rule of Law. By training national asylum officers, the EASO takes a key part in the respect of European law and Fundamental Rights in the asylum procedure, of which these officers are the main actors.

More recently, the Office has been increasingly involved in the migratory-crisis management, through the asylum support teams in the hotspots. As an indicator, the exceptional growth of its budget is to be pointed out. The support teams' activities imply either mere expertise assistance such as translation and countries of origin information, or support to asylum procedures such as identification of vulnerability and even admissibility assessment of asylum seekers. Consequently, they can provide a concrete support to Member States in order to ensure compliance with the Rule of Law. This aspect of the EASO's activities will be further assessed in the second part, as that has *in fine* a negative effect and leads to challenging the Rule of Law in the EU.

### **The challenges to the Rule of Law in posed by EASO**

As stated above, the EU, through its agencies, monitors and promotes the respect of the Rule of Law by Member States. However, the 2016 so-called migratory crisis has had a paradoxical effect as it led the EASO to challenge it by its actions.

Indeed, the legality of its action in the hotspots is particularly called into question. It must be noted that the Regulation that established the Agency explicitly states that it has no decision power. But yet, in the Greek hotspots, the EASO takes a decisive part in the asylum determination process. They can conduct interviews to assess the admissibility of an asylum claim. Then, the Greek authorities, which bear responsibility for the decision, simply endorse what has been decided by the EASO's agent.

Therefore, that gives a *de facto* decision power to the Agency. Moreover, in Italian hotspots, violations of Fundamental Rights by EU agents have been exposed, such as resorting to force to proceed to identification. In any case, the EASO cannot be held responsible for violations committed in the determination process, as long as its decisions are not considered as having a binding legal effect. Consequently, Member States remain responsible for effective remedy against a decision deriving from a procedure lead by the Office's agents. Therefore, an asylum seeker would have to bring an action before a national Court and, on account of shortcomings in hotspots underlined by reports, the EU involvement does not bring any solution to accountability for asylum decisions.

Moreover, as foreseen in article 47 of the Agency status, the legal implication of the Office in the hotspots has been questioned by a German Non-Governmental Organisation before the European Ombudswoman (Aff. 735/2017/MDC). The plea also questioned the respect of asylum seekers' Fundamental Rights. Both foreseeably and surprisingly, the case was rejected in July 2018. Foreseeably, because this is in accordance with the EU attempt to protect its means of managing the migratory-crisis, the hotspots being one of them. However, it remains surprising as the arguments are extremely questionable. Indeed, the

Ombudswoman acknowledged that the EASO has overstepped its mandate. But, the fact that discussions on a recasted Regulation are ongoing is enough to counter a further examination of the claim.

This is questionable both because a violation is to be appreciated regarding the actual legal framework, not the potential future one, and because months after this decision discussions on the recast are still ongoing, the issue being uncertain. This means that, currently, the situation remains an issue. Regarding the violation of Human Rights, while once again acknowledging the shortcomings, she judges that the responsibility of enforcing the procedural guarantees lays on the Greek authorities. Ruling differently would have been a way to overpass the difficulties regarding effective remedies faced by asylum seekers in the hotspots and would have been in accordance with the reality of the Office's activities. Furthermore, providing a complete and fully operational system of legal remedies would have strengthened the legitimacy of such areas as a model for migration-management tools.

The EASO's activities are therefore subjected to debates. In an uncontested way, it has been destabilized by the disruption of national asylum system since 2016. Its increased and unorganised part in dealing with the crisis even brought the European Court of Auditors to find severe irregularities in its management, leading to its director's resignation. Therefore, a reform of the Agency is urgently needed to strengthen its legitimacy within the EU administrative governance. Nonetheless, it is delayed by the general blockage on the Common European Asylum System's negotiations.

Indeed, the proposal for a recast regulation from 2016 intended to give the EASO an increased part in the Asylum System's functioning. Its responsibility in its operational activities should be clarified, and the training of the support team should be improved. A temporary agreement was found in June 2017 between the Council and the European Parliament, and apart from the blockage related to the CEAS, negotiations are, currently, also challenged by a conflict with the European Commission which initiated a new proposal diverging from the common agreement. In any case, the recast does not intend to give the asylum Agency any decision power, and therefore should not solve the issue of effective remedy in hotspots. Therefore, as such, the reform will fail to put the Agency in conformity with the Rule of Law.

To conclude, AFSJ agencies have great potential to guarantee the Rule of Law in Member States while dealing with asylum seekers. However, they were not prepared to face such important disruption of national asylum systems and failed to bring a solution, compliant with the Rule of Law, to the crisis-management.