

Challenges and Possibilities for a European Asylum Agency – from a historical, functional and legal perspective

Exposé

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I. Outline

This work would like to explore the possibility to introduce a European Asylum Agency. As opposed to the work of the current Asylum Support Agency, the agency envisaged in this dissertation would effectively be dealing with all asylum claims made within the European Union and allocate refugees across the territory of the EU. The legal framework chosen for this analysis will be EU asylum law, general EU law as well as international and national law. The research will concentrate on three aspects: Firstly, it will explore the historic development of EU asylum law up to the most recent attempts of the EU to solve the current policy crisis. The dissertation will try to extract regulatory principles from this analysis and draw conclusions for potential future developments. Secondly, it will analyse the development of EU agencies in general, have a close look at functional reasons for the creation of agencies and apply them to asylum law and the current policy crisis. It will then have a look at the status quo of the European Asylum Support Agency EASO and evaluate its work and impact and will finally scrutinize other EU agency models as well as national bodies deciding on asylum applications and review whether any of these models could be successfully used for a European Asylum Agency. Finally, the dissertation will evaluate crucial challenges stemming from European law as well as from international law and Austrian national law. Finally, it will draw its conclusions from these analyses, give recommendations and an outlook.

II. Relevance of the topic

The last few years have seen an unprecedented increase in refugees, reaching up to 65 million displaced persons e.g. in 2016.¹ While many of these refugees constitute internally displaced people (in other words, persons who flee their homes but stay within their home countries' borders) and neighbouring countries still host the overwhelming majority of these displaced persons,² the number of persons who try

¹ *UNHCR*, Global Trends – Forced Displacement in 2016, 2.

² Turkey roughly hosts 3.5 million Syrians, while Lebanon accounts for roughly 1 million Syrians (in addition, however, to 500,000 Palestinians) and Jordan for 660,000: <http://data2.unhcr.org/en/situations/syria>.

to make their way to Europe to seek asylum within the European Union continues to be a hot topic in European politics. The reasons for this surge in asylum seekers are as manifold as they are complex. Global terrorism, the financial and economic crisis, rising inequality as well as the partially related increase in internal armed conflicts and crisis areas around the globe have contributed to the rise in numbers. In addition to conflicts in Afghanistan, Pakistan, Libya, the Democratic Republic of Congo and Somalia, armed conflicts have recently newly emerged in Syria, Ukraine, Yemen, the Central African Republic, Burundi, South-Sudan, Niger, Nigeria, Djibouti, Egypt and Iraq.³

While these developments have caused many to leave their home countries in search of protection, the journey has proved to be risky. Especially the way to Europe via the Mediterranean Sea keeps causing a high death toll. The number of people who have not survived the journey across the sea to reach the shores of Greece or Italy climbed up to 3,140 persons in 2017 alone. In 2016, however, it even reached a peak of 5,096 persons killed.⁴

For the refugees who have safely made their way to the European coast, the difficulty is not quite over yet. For many, Italy or Greece are not the countries of their final destination, many have family bonds, want to join a local community or simply look for better living standards and thus want to reach not only Europe, but a certain Member State of the European Union. These “pull-factors” lead to an unbalanced situation: Some countries are particularly in the focus of asylum seekers whereas others receive close to zero persons. Germany e.g. received about 476,000 applications in 2015⁵ and Austria received roughly 90,000.⁶ To compare, countries like Romania, Croatia, Lithuania, Slovenia and Latvia, in the same year, saw a decrease in the number of asylum applications – applications remained close to zero.⁷

³ UNHCR, *Global Trends – Forced Displacement in 2016*, 6; *Institute for Economics and Peace*, *Global Peace Index 2017*, 11.

⁴ <http://data2.unhcr.org/en/situations/mediterranean>.

⁵ *Bundesamt für Migration und Flüchtlinge*, *Aktuelle Zahlen zu Asyl* (June 2016), 3.

⁶ *BM.I*, *Asylstatistik 2015*, 3.

⁷ *Eurostat*, *Asylum statistics* (18 April 2018), http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics.

The allocation of asylum seekers within the European Union is not a new issue. This problem was one of the first aspects of a common asylum and immigration law that the Member States of the European Communities dealt with: already in 1990, the first predecessor of the current Dublin III Regulation was drafted. The Dublin system was created to determine the Member State responsible for conducting the asylum procedure. While very close family ties present the top hierarchical condition in the Dublin system, the most frequently applied criterion relates to the country of first “irregular” entry.⁸ This system has already been met with considerable critique from human rights experts as well as from the countries that were particularly burdened through this criterion. The European Court of Human Rights found the Dublin System to be in violation of the European Convention of Human Rights several times.⁹ In 2015, following Germany’s announcement to host large numbers of asylum seekers, many countries decided not to apply the Dublin rules and let asylum seekers travel to Germany. Countries with external borders were unable to stem the larger number of asylum-seekers. The Dublin System thus proved to be unfit for a situation of mass influx. Several suggestions have been made to amend or replace the outdated regulation, among them an official proposal from the Commission¹⁰ which the Maltese Presidency and representatives of the European Parliament have already broadly agreed on¹¹ and currently negotiate in further detail.

While the determination of the Member State competent to conduct a certain asylum procedure has been at the centre of EU asylum law from the beginning, EU asylum law is not limited to this field. In a community without internal border controls, it

⁸ Art 13 (1) Regulation 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or stateless person (“Dublin III Regulation”).

⁹ ECtHR, *M.S.S. v. Belgium and Greece*, Case 30696/09 (21. 01. 2011). The Dublin Regulation has been reformed and now contains the possibility not to apply the criterion of first entry if the state of first entry does not fulfil European reception condition standards – Art 3 (2) 2nd paragraph. Nevertheless, other cases have followed: e.g. ECtHR, *Tarakhel v. Switzerland*, Case 29217/12 (04. 11. 2014).

¹⁰ *European Commission*, *Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe* (06. 04. 2016), 7f.

¹¹ <http://www.consilium.europa.eu/en/press/press-releases/2017/06/29/eu-agency-for-asylum/>;

has proved to be important that the standards for recognizing a person as an asylum seeker are equally applied in all Member States. In addition, it can be presumed that for an asylum seeker, besides family ties and pre-existing communities of fellow nationals, higher standards concerning reception as well as the length of the procedure and the chance to be recognized as a refugee can be a crucial reason to apply for asylum in a particular country and thus constitute a pull-factor.

As a reaction to these considerations, the EU has tried to harmonize the relevant fields in two steps: in a first phase following the Amsterdam Treaty, “minimum standards” were drawn up. In a second phase, following The Hague Programme, these standards were detailed and given binding legal status so as to reach utmost harmonization in the concerned areas. The last few years, however, have shown that these efforts were not utterly successful: the recognition rates have still differed across the Member States.¹² Reception conditions could not be held at a uniform level either.¹³

All the dangers and problems outlined above – the surge in conflict areas, the high death toll in the Mediterranean Sea, the overburdening of certain Member States with asylum applications, the malfunctioning of the Dublin Regulation, the differences in recognition rates, procedural standards and reception conditions – have also galvanised the European Union and the Member States.

¹² Eurostat, Asylum quarterly report (20. 03. 2018), table 6: [http://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:First instance decisions by outcome, selected Member States, 4th quarter 2017.PNG](http://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:First_instance_decisions_by_outcome_selected_Member_States_4th_quarter_2017.PNG);

¹³ Minos Mouzourakis, The reception of asylum seekers in Europe: failing common standards (20. 04. 2016), <http://eumigrationlawblog.eu/the-reception-of-asylum-seekers-in-europe-failing-common-standards/>; Statewatch, Reception of asylum seekers – recast Directive, <http://statewatch.org/news/2016/nov/ep-briefing-reception-conditions-directive-recast-11-16.pdf>; Directorate Generale for Internal Policies, The Implementation of the Common European Asylum System (May 2016), 84ff [https://www.icmpd.org/fileadmin/ICMPD-Website/Asylum and Protection/Implimentation Common EU AsylumSystem.pdf](https://www.icmpd.org/fileadmin/ICMPD-Website/Asylum_and_Protection/Implimentation_Common_EU_AsylumSystem.pdf).

Several suggestions were made to solve the resulting policy crisis of European asylum law. Some of them were implemented single-handedly at national level¹⁴, while in other cases the responses were regional.¹⁵ The European Union itself concluded the much-criticised EU-Turkey Deal¹⁶ so as to be able to better control who enters its territory and to simultaneously deter refugees from entering irregularly as well as to reduce the number of deaths in the Mediterranean. In April 2016, the Commission presented its proposal for an amendment of EU asylum law.¹⁷ The recommendations did not only include the already above-mentioned reformed Dublin System. A significant part of it also dealt with an upgrade of the European Asylum Support Office towards an EU agency with more competences including several possibilities to sanction Member States who do not comply with the guidelines and standards issued by the agency.¹⁸

The idea of giving more powers to EASO was not invented by the Commission – it had been called for by a number of experts in the field before.¹⁹ To this date, EASO is little more than a supportive agency trying to coordinate Member State measures, provide a platform for the exchange of information²⁰ and organize support from Member States to other Member States in need.²¹ The Commission’s previously cited Communication regarding a reform of the asylum system and EASO provides not only for the Agency’s above-mentioned competence to sanction Member States that disregard its standards and guidelines, but also envisages a case-auditing system that allows the Agency to monitor the quality of asylum decisions in the Member States, a competence to assess whether third countries fulfil the “safe third country”

¹⁴ Austria, Denmark, Sweden, Hungary and Greece have e.g. restricted their asylum laws as a response to the crisis.

¹⁵ E.g. the Conference of West Balkan States (February 2016).

¹⁶ EU-Turkey Statement (18. 03. 2016).

¹⁷ *European Commission*, Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe (06. 04. 2016), 12f.

¹⁸ *European Commission*, Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe (06. 04. 2016).

¹⁹ E.g. *Manfred Nowak* in an interview with *standard.at* (20.09.2015), available at <https://derstandard.at/2000022498828/Rechtsexperte-Nowak-fordert-gemeinsame-EU-Asylbehoerde>; *Melissa Berger/ Friedrich Heinemann*, Why and How There Should Be More Europe in Asylum Policies, ZEW Policy Brief 01 (January 2016).

²⁰ Art 4 Regulation 439/2010 establishing the European Asylum Support Office (“EASO Regulation”) (09. 05. 2010).

²¹ Art 9 para 1 EASO Regulation.

or “safe third country of origin”-criteria, possibly the operation of a revised Dublin system distribution mechanism and the competence to intervene in emergency situations, particularly regarding case-handling and reception-related support. The pleas to upgrade EASO that have been made by academia, however, go much further than the changes and upgrades proposed by the Commission. They demand a proper European Asylum Agency – an agency with the power to decide individual cases, to allocate recognized refugees according to preferences and capacities across the Member States and to finance accommodation and supply for asylum seekers via a central budget. While this might not solve all problems the EU currently has to deal with, it could make a substantial contribution.

III. Current state of research

In the heat of the recent discussions, many suggestions have been made and many steps have been demanded. While the evolution of Frontex and its legal foundations²² as well as hotspots, relocation and the definition of competence²³ and the EU’s attempts to reform the Dublin system²⁴ have been the subject of academic discussions, up to this date, there has not been much academic writing on EASO, its work or its further development. In January 2016, a very interesting study by Melissa Berger and Friedrich Heinemann²⁵ looked at the potential gains that can be made by the transfer of competence and financing to a European level from an economic perspective and concluded that from a fiscal point of view, the current distribution of tasks create disincentives and unnecessarily high costs. A quota system, as favoured by some, would not be promising either if it is not part of a more

²² *Matthias Lehnert*, Frontex und operative Maßnahmen an den europäischen Außengrenzen: Verwaltungskoordination – materielle Rechtsgrundlagen – institutionelle Kontrolle, Baden-Baden (2014); *Melanie Fink*, Frontex and Human Rights: Responsibility in ‘Multi-Actor Situations’ under the ECHR and EU Public Liability Law, Vienna (2017).

²³ *Joachim Stern*, Zulassung und Zuständigkeit, in Franz Merli/Magdalena Pöschl/Bettina Baumgartner, Das Asylrecht als Experimentierfeld: eine Analyse seiner Besonderheiten aus vergleichender Sicht, Vienna (2017), 99.

²⁴ *Francesco Maiani*, The reform of the Dublin system and the dystopia of ‘sharing people’, *Maastricht Journal of European and Comparative Law*, 24/5 (2017), 622.

²⁵ *Melissa Berger/Friedrich Heinemann*, Reformoptionen für die europäische Kompetenzverteilung in der Asylpolitik in *Zeitschrift für Staats- und Europawissenschaften*, 14/1 (2016), 33.

comprehensive strategy. While, from a financial perspective, the financing of asylum procedures by the EU would be a viable solution, the by far best option according to Berger and Heinemann lies in the transfer of competences for finance and administration to a European Asylum Agency. They do admit, however, that such a transfer of competences would raise numerous political and legal questions.²⁶ The present dissertation will attempt to answer some of these questions.

IV. Research Questions

While non-legal considerations like potential financial advantages will play a certain role, the focus of this dissertation shall lie on the political/functional and legal feasibility of a European Asylum Agency deciding on individual asylum applications. The central research question of this dissertation is whether the establishment of a European Asylum Agency would be legally and politically feasible and how such an Agency could be designed and legally based. The dissertation will approach these questions in a threefold way and will look at them from a historical, functional and legal perspective. Accordingly, it will be divided into three parts:

Firstly, it will look at the chances of a European Asylum Agency from a historical perspective. Research questions from a historical point of view will in particular be the following: Is the establishment of a European Asylum Agency in line with the previous development and interests of the EU in the asylum and immigration law field? What strategies and techniques were used in the past to overcome the Member States' doubts regarding the transfer of asylum and immigration law competences to the EU and the gradual enlargement of these competences? What can be drawn from these experiences with regard to a potential future enlargement?

Secondly, this dissertation will look at agency creation and design from a functional perspective. Central research questions in this section will concern agency creation and agency design. Regarding agency creation, research questions will be the following: Which conditions are generally favourable for agency creation and have

²⁶ *Melissa Berger/Friedrich Heinemann*, Reformoptionen für die europäische Kompetenzverteilung in der Asylpolitik in *Zeitschrift für Staats- und Europawissenschaften*, 14/1 (2016), 52.

led to agency creation in the past? Which are the functional advantages of an EU agency compared to national bodies? Does the current asylum law situation in the EU constitute a condition favourable for agency creation? Would the functional advantages of agency creation also benefit Member States and individual applicants in the asylum law field? Regarding agency design, research questions will include: Which agencies perform tasks that actually include deciding individual matters on an EU level? What are the advantages and drawbacks of the various agency models and what can be drawn from them with regard to a European Asylum Agency? How do national asylum agencies work and can inspiration be taken from these agencies when creating an EU agency?

Thirdly, the dissertation will look at the feasibility of a European Asylum Agency from a legal point of view. Research in this part will focus on the following questions: From a national law perspective, how could an EU agency deciding on individual asylum applications manage to have its decisions executed by national officials? How could this link be established and on which legal basis could this be done? From an EU law point of view, is the establishment of an executive body covered by the EU's current competences in the asylum and immigration law field or are these competences purely limited to law-making and exclude the execution of these laws? How do the principles of proportionality and subsidiarity come into play? Lastly, from an international law perspective, how could the concept of sovereignty stand in the way of a European Asylum Agency? What would it mean for a Member State's sovereignty if it transferred its asylum and immigration law competence to a supranational entity? Lastly, which international treaties would be binding on the new European Asylum Agency? What if Member States have ratified e.g. human rights treaties guaranteeing a higher level of protection than the EU offers?

The aim of this dissertation is an objective analysis of the pro- and counter arguments regarding the feasibility of a European Asylum Agency from a historical, functional and legal point of view. It wants to illustrate challenges and make suggestions as to how they could be overcome.

V. Methodology

Since the aim of this dissertation is to shed light on legal challenges and difficulties, it will primarily focus on the analysis of related legal texts and secondary literature as well as case law where it is considered relevant. Firstly, the EU treaties and official texts as well as academic contributions to this regard shall be analysed and reviewed in detail. Regarding the historical part, a careful analysis of the manifold legal documents governing the EU asylum law over time will be used to fully explore the evolution of the EU asylum law competences and point out strategies used by the EU and the Member States to further the transfer of competences or to fight it. Regarding the functional part, academic writing regarding the creation and design of agencies will be a crucial source, as well as EU legal acts establishing comparable agencies (in other words, agencies deciding on individual matters). The periodical reports of these agencies shall also be analysed in order to get a comprehensive impression of their design and performance. An in-depth analysis of the EASO Regulation as well as of the Office's Guidelines, Handbooks and support plans shall give a realistic picture of its current competences and their implementation. The last part will explore legal challenges and thus consist in an in-depth interpretation of the relevant national law provisions, the EU treaties and the respective international treaties. The methodology of the dissertation will thus be based on research in libraries. In addition, the Internet will serve as a source of legal texts and publications.

The dissertation will be written in English since its subject is a topic of European and international interest. The intended publication will reach a greater audience when written in English while a German version would be naturally limited to readers in Austria, Germany and Switzerland.

VI. Structure

1. Preface

The preface will outline the developments concerning refugees in the recent years. It will give an overview over trends and challenges in these last years and explain the relevance of the topic of the dissertation.

2. First Chapter: Looking back: The development of the EU competence in asylum and immigration law

The first chapter will concern the historic part of the analysis. It will look in some detail into the development of EU asylum and immigration law and chronologically follow its evolution. The method used will primarily consist in the in-depth analysis and comparison of the respective legal texts as well as the use of secondary literature. This approach has two purposes: firstly, it shall explain in some detail how immigration and asylum law became an EU competence in the first place. Reasons and logics leading to more integration in the asylum law field shall be explained. Secondly, however, this analysis shall also be used to illustrate that not only today, Member States find it difficult to give up competences in the asylum and immigration law field. This evolution was never without stumbling blocks. The chapter will demonstrate how resistances of certain Member States slowed the developments down and, on the other hand, by an in-depth analysis and comparison of the respective legal texts, explain the mechanisms used in- and outside the treaties to still keep integration going. The chapter shall thus question the popular argument of political infeasibility and take away lessons for a potential establishment of a European Asylum Agency. Secondly, the role of the European Court of Justice in the asylum law field shall be analysed and it shall be explored how the Court would interact with the new agency.

3. Second Chapter: Agency development in the European Union

The second chapter will analyse the development of agencies in the European Union. The chapter will be divided into two parts: The first part will regard agency creation.

It will briefly delineate the three waves of agency creation and point out the most obvious reasons why these waves of agency creation occurred. It will then explore in further detail which conditions are generally considered favourable for agency creation and illustrate the advantages and disadvantages of an independent agency compared to national executive bodies. It will then apply the findings of this first step to the current asylum law situation and analyse whether the creation of a European Asylum Agency could also benefit Member States and asylum seekers from a functional point of view.

The second part of the chapter will relate to agency design. It will discuss the various agency functions that exist in the EU²⁷ and focus in particular on the design of those European agencies that decide on individual matters and thus perform an executive function e.g. OHIM or EASA and discuss what can be taken away from their design and operating mode for an asylum agency. Due consideration will also be given to Frontex as example of a recent upward revaluation of an EU agency in a closely related field. Lastly, national agencies, their structure and operating mode will be analysed and it will be established whether these national bodies could serve as an example for the design of a European agency.

The third part will focus on the current status of EASO. It will be divided into three subsections. The first section will consist in an extensive legal analysis of the current EASO Regulation. It will in detail explore why EASO is structured in the way it currently is, what its competences are and why they are formulated the way they are. The second part will check how EASO implements these competences: via a detailed examination of EASO's handbooks, guidelines and support plans as well as using sources like the Ernst & Young evaluation of EASO's efficiency, it shall be explored where the shortcomings could be found as well as where and why greater competences might be an advantage. An analysis of NGO and civil society reports as well as UNHCR reports on situations where EASO was involved as supporting agency will complete the picture. Lastly, the third section will give an in-depth analysis of the Commission's proposal to extend the competences of EASO.

²⁷ See e.g. *Merijn Chamon*, *Les agences de l'union Européenne: Origines, état de lieux et défis* in *cahier de droit européen* 51 (2015), 293ff.

4. Third Chapter: Challenges from the legal perspective: national law, EU law and international law

This chapter will, again, be threefold.

The first part will look at the challenges stemming from national law and, on the basis of a detailed analysis of Austrian national law as an example, will try to establish whether the laws of the Member States in their current form even allow for a European agency to perform such far-reaching executive functions. Consideration will also be given to the question how the link between the Member States' national officials and the agency would have to be designed from a national law point of view if these officials had to take orders from the European Asylum Agency and execute its decisions.

The second part will deal with the question what could hinder the establishment of a European Asylum Agency from an EU law perspective. The central argument here can only lie within the competence section. Is the EU truly competent to establish a proper asylum agency? This section thus firstly explores the nature of the EU asylum and immigration law competence. It then explains the two principles governing the immigration and asylum law competence. Firstly, it will then look at the principle of proportionality and explore its exact content as well as the consequences the application of this principle has had for EU shared competences in other fields. Secondly, it will look at the principle of subsidiarity. Again, the particular features of the principle will be carved out looking at case law and literature. Finally, the findings from these analyses will be applied to the field of asylum and immigration law. Parallels will also be drawn to Frontex and other agencies analysed in Chapter Two. On this basis, an answer shall be given to the question whether the EU asylum and immigration law competence in its current form is sufficient to establish a European Asylum Agency or whether the Treaties would have to be amended to do so.

This last part shall explore the difficulties stemming from an international law perspective. The part will be divided into two sections dealing with the most crucial problems that have been identified by the author. The first section will pose the

question of sovereignty. The section will explore the traditional and modern understandings of sovereignty and analyse the importance of the asylum and immigration competence for a state to be sovereign. It will particularly focus on the importance of the sole internal competence to decide in the matter. The second section will ask which laws the new authority would have to apply and scrutinize potential problems arising for Member States. The questions analysed in this section will in particular be: which international treaties would be binding on the new authority? What if some Member States have ratified further-reaching treaties than the EU? How can it be ascertained that they fulfil their obligations in the case of transferring the competence to a supranational authority? The section will also explore the relationship of the future Asylum Agency towards the European Court of Human Rights.

5. Conclusion

The final conclusion will present the crucial findings from each chapter, try to interrelate them and outline policy recommendations on the basis of these results.

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