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IMPLEMENTING THE “HOTSPOT APPROACH” ON THE GREEK ISLANDS: LEGAL AND OPERATIONAL ASPECTS

di Angeliki Papapanagiotou-Leza, Nikolaos Garipidis

***Abstract:** The “hotspot approach” is so far the main response of EU institutions to the current refugee crisis. In the essay we try to set out certain operational aspects of the hotspot approach as implemented on the Greek islands. Our aim is to assess their legal foundations and repercussions in order to highlight dysfunctions in the operation of asylum procedures and identify potential threats to the rights of international protection claimants.*

***Abstract:** L’“approccio hotspot” è fino ad ora la principale risposta delle istituzioni europee all’attuale crisi dei rifugiati. Nell’articolo si cerca di descrivere alcuni aspetti operativi dell’approccio hotspot, così come sviluppato nelle isole greche. Il nostro obiettivo è di individuarne i fondamenti normativi e le ripercussioni, al fine di evidenziare eventuali disfunzioni nell’applicazione operativa delle procedure di asilo ed identificare potenziali minacce al diritto alla protezione internazionale dei soggetti richiedenti.*

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SUMMARY: 1. The Organization of Greek Asylum System. – 2. The Hotspot Approach as a European Response to the Refugee Crisis. – 3. Implementation of the Hotspots Approach on the Greek Islands.

1. The Organization of Greek Asylum System

Whereas refugees from the Middle East and Africa started entering Greece already since the mid-seventies, at this time, and for many years afterwards, the legal framework of the Greek asylum system was premised on the idea that Greece is only a transit and not a receiving country. Law no. 1971/1991 was probably the first major piece of legislation which reflected a realization that part of this refugee population entered the country with the intention to stay and be intergraded in the society.¹ Since then, the Europeanization of Greek refugee law initiated several legal developments.² However, the improvements were marginal and, no doubt, the reception and asylum procedures constantly suffered from systemic flaws. The poor detention conditions, restricted access to the asylum procedures, low quality decisions and interviews, and a very low rate of recognition were only some of these flaws. The main cause of those inefficiencies can be traced back to the fact that the competence of refugee status determination was allocated to the police authorities, who lacked the necessary information, knowhow and material resources to implement the law.

As a result of the above, the safety of Greece as a third country in the context of Dublin Regulation remained for a long time a disputed matter.³ In 2011 both the European Court of Human Rights⁴ and the European Court Justice⁵ decided that returning asylum

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1. M. Stavropoulou, *Refugee Law in Greece*, *International Journal of Refugee Law*, Vol. 6 (1), (1994), pp. 53-62.

2. For those developments and their implications, see Achilles Skordas, *The New Refugee Legislation in Greece*, *International Journal of Refugee Law*, Vol. 11 (4), (1999), pp. 678-701 and N. Sitaropoulos, *Modern Greek Asylum Policy and Practice in the Context of the Relevant European Developments*, *Journal of Refugee Studies*, vol. 13 (1), (2000), pp. 105-117.

3. A. Skordas/N. Sitaropoulos, *Why Greece is not a Safe Host Country for Refugees*, *International Journal of Refugee Law*, 16 (1), (2004), pp. 25-52.

4. *M.S.S. v. Belgium and Greece*, App. N. 30696/09 (Eur. Ct. H.R., Jan. 21, 2011).

5. Joined Cases C-411/10 and C-493/10 [Eur. Ct. Justice (Grand Chamber), Dec. 21, 2011].

claimants to Greece exposed them to detention conditions amounting to degrading treatment and the risk of deportation without the serious examination of their applications, because of the deficiencies in the Greek asylum procedures. Soon after the two decisions, E.U. member states decided to withhold all returns to Greece.

Responding to the external pressure, the Greek State decided to completely reorganize its asylum system. Law no. 3907/2011⁶ established the Asylum Service which is an independent civilian authority, whose main competence is the examination of asylum applications. On the second instance, asylum applications are examined by the Appeals Authority, which according to Law no. 3907/2011 consisted of committees, whose members were independent lawyer and asylum experts. The effort resulted very soon to tangible improvements that were reflected in the quality of decisions and the rate of refugee recognition. The following years, the thirteen Regional Offices of the Asylum Service, which the Law provided for with the purpose to cope with the accessibility problem, started gradually their operation.

Simultaneously, First Reception Service was established, which is responsible for the management of all third country nationals that enter the country irregularly. Its main tasks are to separate those who wish to apply for international protection and identify the vulnerable persons. The First Reception Service is organized flexibly with regional Centers and emergency Units in order to be able to respond to sudden flows of refugees in different parts of the country.

2. The Hotspot Approach as a European Response to the Refugee Crisis

Throughout 2015 Greece witnessed an unprecedented wave of refugees and immigrants entering the country. The flow was of such scale that caused a shock to the newly reorganized Greek asylum system. UNHCR estimates the total number of arrivals in Greece during this year to amount to 856,723 people.⁷ In 2015, however, the Greek Police reports 911,471 arrests for irregular entry into the country. Most of them (737.363) took place only in the Region of the Northern Aegean islands (Lesvos, Chios and Samos). Compared to the year 2014, the rise is estimated to be 1081% overall, and 3000% in the

6. Law 3907/2011: «On the Establishment of an Asylum Service and a First Reception Service, transposition into Greek Legislation of the provisions of the Directive 2008/115/EC “on common standards and procedures in Member States for returning illegally staying third- country nationals” and other provisions», (in English), available at: <http://www.asylumlawdatabase.eu/en/content/en-greek-law-39072011-%E2%80%9C-establishment-asylum-service-and-first-reception-service>.

7. *Greece Refugee Emergency Response: Update #8*, UNHCR, (31 December 2016), available at: <http://reliefweb.int/report/greece/greece-refugee-emergency-response-update-8-29-november-31-december-2015>.

Northern Aegean.⁸ As the asylum applications lodged during this period demonstrates,⁹ the larger part of this population was crossing the Greek territory with the intention of reaching destinations in Central and Northern Europe. With the closure of the Balkan route, nonetheless, tens of thousands of people were “stranded” on the Greek islands and mainland. At the same time, a steady, albeit lower, flow of refugees and immigrants continued passing through the Greek-Turkish sea borders, triggering the risk of an uncontrollable humanitarian crisis.

To cope with the crisis, the European Commission started from early 2015 elaborating on the so called “hotspot approach”, which was officially presented in May 2015.¹⁰ The aim of the project was for the European agencies to provide a comprehensive and targeted support to Italy and Greece, the two frontline countries that faced disproportionate and mixed migratory flows. Hence, the hotspot approach concerns coordinated inter-agency collaboration with member states administration. More precisely, the EASO, Frontex, Europol and Eurojust were to assist national authorities with the identification, registration, fingerprinting and debriefing of the arriving immigrants, the processing of their asylum applications and the return of those not in need of protection. It should be stressed that with the term “hotspot” legislation denotes a segment of the EU’s external territorial border, «for the limited period of time during which the emergency or crisis situation subsists and during which the support of the “hotspot” approach is necessary».¹¹ This said, for the purposes of the essay we henceforth use the term the same way as in the policy jargon, which is to describe the specific facilities where the interagency and state authorities’ cooperation materializes.

The fundamental idea underlying the hotspot approach was that the migrant population can be divided into three distinct categories: i) Persons clearly in need of protection, ii) those who can return immediately and iii) asylum claimants whose applications needed further processing.¹² The first of the above categories comprised the beneficiaries of the ad

8. *Year 2014-2015*, Hellenic Police and Coastguard Authorities, available at: goo.gl/dHarjA.

9. *Statistical Data of the Greek Asylum Service (1.1.2015 - 31.12.2015)*, Hellenic Ministry of Interior, available at: http://asylo.gov.gr/en/wp-content/uploads/2016/01/Greek-Asylum-Service-statistical-data-2015_en.pdf.

10. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration*, European Commission, (Brussels 13.5.2015), available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0240&from=EN> and Explanatory Note on the ‘Hotspot’ Approach, <http://www.statewatch.org/news/2015/jul/eu-com-hotspots.pdf>.

11. *Explanatory note on the “Hotspot approach”*, Satewatch, (2015), <http://www.statewatch.org/news/2015/jul/eu-com-hotspots.pdf>.

12. Anuscheh Farahat/N. Markard, *Forced Migration Governance: In Search of Sovereignty*, *German Law Journal*, Vol. 17 (6), (2016), pp. 923-948, (934).

hoc relocation scheme decided on in September 2015.¹³ The scheme appears to be a kind of derogation from the Dublin responsibility allocation system. According to the E.U. Council decisions, until September 2017 the responsibility for 66,400 applications from Greece and 39,500 from Italy are to be transferred to other Member States. Pursuant to art. 3(2) of the relocation decision, eligible for participating in the program are applicants belonging to nationalities «for which the proportion of decisions granting international protection among decisions taken at first instance on applications for international protection [...] is, according to the latest available updated quarterly Union-wide average Eurostat data, 75 % or higher». In art. 8(3) there is a clear interrelation between the relocation scheme and the hotspot approach, as the Commission can suspend the former in case Italy or Greece fail to promote the implementation of the latter.

3. Implementation of the Hotspots Approach on the Greek Islands

Greece was reprimanded rather soon, even by the UNHCR,¹⁴ for delaying the execution of the hotspot project. The Greek red tape was definitely a major setback. The prolonged procrastination probably reflects, however, a certain disinclination on the part of both the Greek state and society. For instance, part of the local community on the island of Kos protested fiercely against the construction of the hotspot.¹⁵ At the same time, in a symbolic statement to the press, the Greek Minister of Immigration explicitly stated that “Greece will not accept becoming Europe’s Lebanon, a warehouse of souls, even if this were to be done with major [EU] funding”¹⁶.

Be that as it may, there are at the moment five hotspots in Greece, all of them located on islands close to the Greek/Turkish sea borders, more specifically on Lesbos, Chios, Samos, Leros and Kos. The closure of the Balkan route and the implementation of the EU/Turkey Statement have entirely changed the function of the hotspots. The statement,¹⁷ whose legal nature, validity and effect remain highly contested,¹⁸ intends to

13. Council Decision (EU) 2015/1601 of 22 September 2015, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015D1601> and Council Decision (EU) 2015/1523 of 14 September 2015, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32015D1523>.

14. *Building on the Lessons Learned to Make the Relocation Schemes Work More Effectively: UNHCR’s Recommendations*, UNHCR, (January 2016), available at: <http://www.unhcr.org/569fad556.pdf>.

15. *In Greece Protests Against EU Refugee Hot Spot on Kos*, Deutsche Welle, 15 February 2016, available at: <http://www.dw.com/en/in-greece-protests-against-eu-refugee-hot-spot-on-kos/a-19050397>.

16. *Greece Recalls Ambassador from Austria over EU Refugee Row*, The Guardian, 25 February 2016, available at: <https://www.theguardian.com/world/2016/feb/25/greece-wont-be-lebanon-of-europe-yannis-mouzas-refugees-eu>.

17. EU-Turkey Statement of 18 March 2016, in European Council Press Release 144/16 of 18 March 2016, available at: <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>.

reduce the number of migrants entering the EU and to block human smuggling across the Aegean Sea. This is mainly achieved by returning to Turkey irregular migrants and the Syrian refugees through the application of the concept of «first country of asylum» or the «third safe country». The agreement stipulates, nonetheless, that only migrants and refugees from the islands will be returned and thus, those who have reached the mainland will remain in Greece. These means that people crossing the borders after the March 20, 2016 (the date that the Statement was put into effect) must be forced to stay on the islands, until their asylum application is examined either with regard to their admissibility for Syrian nationals or on the whole for all other nationalities. Inevitably, instead of facilities where it would have been possible to «swiftly identify, register and fingerprint incoming migrants»¹⁹ in transit before they continued to the mainland, as was initially planned, hotspots became detention and pre-removal structures.

The Statement had major influence on the legal environment as well. The Joint Ministerial Decisions No 2969/2015²⁰ and 6834/8-1-2016 issued in December 2015 and January 2016 respectively, provided for the establishment of First Reception Centers on the five islands, while the operation of these Centers had already been regulated by the existing legislation. However, Law 3907/2011 was deemed inadequate for dealing with the challenges arising from the function of hotspots. Therefore, a new Law 4375/2016²¹ was issued on April 3, 2016, tailored to implement the hotspot approach and the EU-Turkey Statement. Most significantly, the law introduces a swift «border procedure» (art. 60). It also foresees that, under exceptional circumstances, the EASO can support the Greek Asylum Service in the interview of asylum seekers and even the police or the army can be assigned the task to register applications or notify the final decision.

Identification and registration follows certain steps in the Reception Centers.²² After disembarkation migrants are taken to «registration areas» administered by the Reception

18. For a full elaboration of the Statement from the perspective of international, European and asylum law see R. Hofmann/A. Schmidt, *Die Erklärung EU-Türkei vom 18.3.2016 aus rechtlicher Perspektive*, Neue Zeitschrift für Verwaltungsrecht, 2016, Vol. 35 (11), pp. 1-9.

19. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration*, European Commission, (9-10 December 2015), p. 6, available at: <http://www.eesc.europa.eu/?i=portal.en.soc-opinions.35966>.

20. Common Ministerial Decision N. 2969/2015 (OG 2602/B/2-12-2015).

21. Law 4375/2016: «On the organization and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC “on common procedures for granting and withdrawing the status of international protection (recast) (L 180/29.6.2013)”, provisions on the employment of beneficiaries of international protection and other provisions», (in Greek), available at: <https://www.synigoros.gr/?i=foreigner.el.politikoi-nomoi.359552>.

22. A thorough analysis of the operation of hotspots can be found in *The Implementation of Hotspots in Italy and Greece: A Study*, Dutch Council for Refugees/ECRE/Italian Council for Refugees (CIR)/Greek Council for Refugees

and Identification Service (RIS).²³ The UNHCR informs about the identification procedure, the steps to be taken and the right to lodge an application for asylum. The identification is carried out by the RIS, with the participation of the Police.

The first step is registration and nationality screening, conducted jointly by Frontex and the Greek police. Due to lack of passport or ID documents, nationality screening is based on questions about the history, geography and demography of the alleged country of origin of the claimant. A Frontex document expert takes part in the assessment of presented documents.

Apart from all personal ID data, the first registration form includes an indication about the individual's expressed intention to apply for international protection. This information is inserted in a database accessible to the Police, the RIS and the Asylum Service. That is important both for the initiation of the application procedure and for the prevention of return in case the person is arrested by the police. Frontex debriefs migrants for information about criminal activities, if judged necessary findings are shared with Europol.

Fingerprinting follows as a second step. The relevant data are collected through Eurodac devices and a second interview is undertaken, which focuses on indications of vulnerability. Vulnerability identification is a very important stage. Art. 14 of Law 4375/2016 defines vulnerability broadly, comprising seven categories: «1) unaccompanied minors, 2) persons with disabilities or suffering from incurable or serious disease, 3) the elderly, 4) pregnant women or in the postnatal period, 5) single-headed families with minor children, 6) victims of torture, rape or other severe forms of physiological, bodily or sexual violence or exploitation, persons who suffer from post-traumatic stress disorder, especially survivors of shipwrecks or their relatives and 7) victims of peoples' trafficking».

Identifying an individual as vulnerable is of crucial importance, as this means that s/he is exempted from the border procedure and the effect of the EU-Turkey Statement. Whenever signs of vulnerability occur during the identification process or even during the examination of an application, the person is referred to a vulnerability expert, who opines on the matter. In case an allegation that someone is a minor is disputed, a macroscopic

(GCR) and ProAsyl, (5 December 2016), pp. 34-50, available at: <http://reliefweb.int/report/greece/implementation-hotspots-italy-and-greece-study> and for a more concise presentation see Darren Neville/Sarah Sy/AmaliaRigon, *On the Frontline: The Hotspot Approach to Managing Migration*, Policy Department for Citizen's Rights and Constitutional Affairs European Parliament, (Brussels, May 2016), pp. 18-25, [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556942/IPOL_STU\(2016\)556942_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556942/IPOL_STU(2016)556942_EN.pdf).

23. The First Reception Service was renamed as Reception and Identification Service with Ministerial Decision n. 16931 of the Minister of Interior and Administrative Reconstruction (Official Gazette B' 1410/19.5.2016) http://web3.eetaa.gr:8080/nomothesia/fek/fek/f_1392.pdf.

medical examination is conducted. Torture victims are probably the most problematic part of the vulnerability identification process. Currently no specialized state or state-funded structure can officially certify signs of torture. RIS refers such cases to medical experts of NGOs. Medical screening, usually conducted by NGOs, is the last stage of the identification procedure. By the end of this stage, migrants have to reiterate their intention to apply for asylum.

With the completion of identification and registration that usually takes a few hours or a couple of days, the police issues a decision for the suspension of the return and the detainment of the migrant in view of his/her deportation. Detention can last for 25 days maximum; afterwards a new police order imposes a «geographical restriction» on the migrant's freedom of movement, in the form of an obligation not to depart from the island.

Access to the asylum procedure is hindered by the disproportional number of claimants compared to the Asylum Service's capacity to register and examine applications. Waiting time varies significantly from hotspot to hotspot and can last from a few days to several months. Moreover, the problem constantly deteriorates due to the continuous flow of new arrivals.

Syrian nationals need to make an admissibility interview, so that the safety of Turkey as first country of asylum or third country can be assessed concerning the particular circumstances of the claimant. The interview is conducted in most cases by an EASO expert, who then submits an opinion. Both the interview and the opinion are written in English without translation, which raises an issue of legality, as Greek is the official language of the state administration. The decision is written in Greek by the Asylum Service staff. In case the decision is positive the geographical restriction should be lifted and the claimant be allowed to travel to the mainland. In the opposite case, the asylum seeker can appeal against the decision within five days. The appeal has an automatic suspensive effect against the expulsion order. However, the appellant has to remain on the island. According to the practice followed so far, Syrians who entered Greece after the 20th of March 2016 are not entitled to apply for relocation, even in case their application is accepted as admissible, since this would motivate border crossing, which runs counter to the spirit of EU-Turkey Statement.

For the rest of the applicants, there is an interview concerning their asylum claim, which is conducted either by the Greek Asylum Service or the EASO staff. In the latter case, the EASO expert submits an opinion. The applicant can appeal against a negative decision within five days. There is a restriction on the freedom of movement until the examination of the appeal is over. If granted asylum, the claimant can leave the island.

The second instance procedure takes place in the Appeals Committees in Athens. The Appeals Authority was restructured through an amendment of Law 4375/2016 in June

2016, less than three months after its promulgation. The new Committees consist of two administrative judges and one member designated by the UNHCR. The amendment was made as a result of the majority of the previous Interim Appeals Committees accepting the applications of Syrian nationals as permissible, holding that Turkey is not a safe country. The restructured Appeals Authority has exercised a kind of self-restraint on the matter. With the exception of test-cases, which were brought before the administrative courts and are currently pending before the Council of State, the Appeals Committees withhold all applications from Syrian nationals, awaiting the decision of the Court. The amendment also restricted the right of the applicants to an interview before the Appeals Authority and leaves to the discretion of the Committee to call him/her. In such a case, the interview is carried out through teleconference.

At the level of first instance, legal assistance in hotspots is offered by several NGOs. On the second instance, Law 4375/2016 provides for an institutional structure of state-funded legal assistance before the Appeals Authority (art. 44). Nonetheless, the required Ministerial Act for the establishment of this organization has not yet been promulgated. For the moment, national and international NGOs fill the gap by offering free legal services to the appellants.

There are numerous reports on the dire situation of refugees in Greek hotspots following the Eu-Turkey Statement.²⁴ Overcrowdedness is no doubt the major difficulty in the operation of these facilities. On the 27th of September 27 2016 as many as 13,863 migrants were present on the islands, a number incommensurately higher than the 7.450 reception capacity of the hotspots.²⁵ In December 2016 the migrant population has risen to 15,103.²⁶ The excessive concentration of migrant population arises mostly from delays in the processing of asylum applications. However, absconding in violation of the geographical restriction contributes significantly to the slow pace of returns to Turkey. This situation raises legitimate fears that an insistence on the full implementation of EU-Turkey Deal will inevitably be accompanied by stricter policing and probably, a practice of much lengthier detention in closed pre-removal structures.

24. *Greece: Refugee "Hotspots" Unsafe, Unsanitary*, Human Rights Watch, (19 May 2016), available at: <https://www.hrw.org/news/2016/05/19/greece-refugee-hotspots-unsafe-unsanitary> and *Greece: Refugees Detained in Dire Conditions amid Rush to Implement EU-Turkey Deal*, Amnesty International (7 April 2016), available at: <https://www.amnesty.org/en/latest/news/2016/04/greece-refugees-detained-in-dire-conditions-amid-rush-to-implement-eu-turkey-deal/>.

25. *Communication from the Commission to the European Parliament, the European Council and the Council: Third Report on the Progress made in the implementation of the EU-Turkey Statement*, European Commission, (28 September 2016), p. 6, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/news_corner/migration/com_2016_634_f1_other_act_863309.pdf.

26. *Greece Factsheet*, (1 - 31 December 2016), UNHCR, available at: <http://data.unhcr.org/mediterranean/documents.php?page=2&view=grid&Country%5B%5D=83>.

So far, the border procedure has not attracted much discussion. It is indeed true that under the overwhelming pressure, asylum authorities fail to observe the stipulated time limits, which gives the applicants much time to prepare for the interview and bring evidence. Nonetheless, if followed effectively, the truncated procedure may be completed in fourteen days for both instances, which can definitely be considered an abridgment of the applicants' right to an effective remedy.²⁷

In conclusion, the implementation of hotspot approach faces major challenges in the Aegean Sea islands. As long as there is no systematic regulation and hotspots remain logistically unsupported, their operation will be a constant cause of friction with national and international human rights regimes.

27. For the need of balancing between procedural efficiency and the right to effective remedy in asylum processes see Marcelle Reneman, *Speedy Asylum Procedures in the EU: Striking a Fair Balance Between the Need to Process Asylum Cases Efficiently and the Asylum Applicant's EU Right to an Effective Remedy*, *International Journal Refugee Law*, Vol. 25 (4), (2014), pp. 717-748.