

# **ECRE RECOMMENDATIONS ON THE OCCASION OF THE DANISH PRESIDENCY OF THE EU (JANUARY – JUNE 2012)**

## **1. General remarks**

Denmark is taking over the Presidency of the EU at a critical moment in the construction of the Common European Asylum System (CEAS) in various respects. Only one year is left for the EU institutions to meet the self-imposed 2012-deadline for completing the second phase of harmonisation of asylum legislation as the foundation of the common area of protection and solidarity envisaged in the Stockholm Programme. While progress has been made under the Polish and Hungarian Presidencies on the asylum package, negotiations on the Commission proposal recasting the Dublin Regulation and the amended Commission proposals recasting the Asylum Procedures Directive and the Reception Conditions Directive remain difficult. At the same time discussions on the new multi-annual financial framework of the Union, including on the newly proposed Asylum and Migration Fund will continue. Furthermore, the European Asylum Support Office (EASO) will have to show in 2012 its potential as a key player in the further development of the CEAS. While its resources are limited, expectations are high and it remains to be seen what role this new agency will be able to play in coordinating and supporting practical cooperation between EU Member States in the field of asylum. Finally, the EU will need to further develop in 2012 a coherent and protection-orientated approach with regard to the external dimension of the CEAS. The EU's response to the migratory and protection challenges resulting from the Arab Spring both as regards resettlement of persons in need of international protection and the strengthening of protection space in the region has been relatively poor. If the CEAS is to be credible to the outside world it will have to include serious efforts to share responsibility with those countries and regions that host far greater numbers of refugees than the EU.

At the start of the Danish Presidency, the European Council on Refugees and Exiles (ECRE), a pan-European alliance of 70 refugee assisting non-governmental organisations in 31 countries in Europe, presents a number of recommendations to the EU institutions and the EU Member States on key aspects of the EU's common asylum policy in the making. ECRE is supportive of a CEAS that is built on high standards of protection and a full and inclusive interpretation of the 1951 Refugee Convention and other relevant human rights instruments. Such a CEAS must ensure access to the territory of the EU Member States for those in need of international protection, as the best protection regime in the world will be of little use to refugees if they are unable to reach it.

## 2. Legislative Harmonisation

Discussions on the remaining parts of the Commission's asylum package have continued under the Polish Presidency. Some progress has been made in the Council on the Commission proposal recasting the Dublin Regulation, and the amended Commission proposals recasting the Reception Conditions Directive and the Asylum Procedures Directive, but negotiations with the European Parliament have yet to start. According to the Stockholm Programme, the CEAS should be based on high protection standards, and its ultimate objective should be that "similar cases should be treated alike and result in the same outcome". ECRE believes that there is a need for considerable improvement of the protection standards in EU asylum legislation to meet these objectives. As the Council and the European Parliament remain determined to meet the ambitious 2012 deadline, ECRE urges all institutional actors to remain equally ambitious with regard to the quality of second phase legislative instruments and the level of protection they must ensure.

### 2.1. Commission proposal recasting the Dublin Regulation

The application of the Dublin Regulation continues to cause hardship and injustice for asylum seekers arriving in the EU as well as an additional burden on the Member States located at the external borders of the EU. In the aftermath of the European Court of Human Rights (ECtHR) judgment of *M.S.S. v. Belgium and Greece*<sup>1</sup> most Member States have formally suspended transfers to Greece. However, at the national level courts face challenges to transfers to other Member States such as Italy and Malta due to the low level of reception conditions and procedural safeguards there.<sup>2</sup> Protection gaps also remain in other EU Member States such as Hungary, where Dublin returnees may be barred from access to the asylum procedure regardless of whether the merits of their asylum application has been examined.<sup>3</sup> In the case of *N.S. v. Secretary of State for the Home Department and M.E. and others v. Refugee Applications Commissioner*<sup>4</sup> the Court of Justice of the European Union (CJEU) confirmed that Member States are under an obligation to assess compliance with the Charter of Fundamental rights in the Member State responsible for examining the asylum application under the Dublin Regulation and cannot operate this Regulation on the basis of a conclusive presumption that the responsible Member State observes the fundamental rights of the European Union. It is clear that the Dublin system as it now exists is not working and that this situation will continue as long as there is lack of equivalent high standards of protection across Europe. The negotiations on the Commission proposal recasting the Dublin Regulation must set **high procedural standards** for effective protection within this system of allocating responsibility for asylum applications in light of the right to seek asylum as affirmed in Article 18 of the Charter of Fundamental Rights along with Member States' other human rights obligations. In particular strong safeguards are needed with regard to the right to an effective remedy with suspensive effect, the right to a personal interview and safeguards against arbitrary detention in the context of a Dublin procedure.

It remains ECRE's opinion that the Dublin Regulation is an obstacle to an efficient and protection-orientated CEAS based on solidarity between EU Member States and should eventually be replaced with a more equitable and efficient system. Nevertheless, it is acknowledged that the Commission recast proposal introduces a number of significant improvements to the operation of the current system which, if adopted, will have a positive impact on the protection of asylum seekers' fundamental rights.<sup>5</sup> Recently, the debate has concentrated on the recent proposal for an **early warning/evaluation mechanism** as an

alternative to a temporary suspension mechanism. While ECRE supports the idea of a permanent evaluation mechanism as an important tool to identify protection gaps and capacity shortages in EU Member States, it should be complementary to effective tools allowing for suspending transfers of asylum seekers to Member States where they risk human rights violations or treatment that does not comply with the standards set in EU law. A possible evaluation mechanism must also be **transparent** and be based on **all relevant sources**, including from NGOs assisting asylum seekers on a daily basis. However, it is clear that the negotiations must also focus on the inclusion of important procedural safeguards such as access to effective remedies, as highlighted in the above-mentioned EctHR judgment in the case of *M.S.S. v. Belgium and Greece*.

ECRE calls on the European Parliament and the Council in particular to:

- Ensure that the right to information and the right to be heard within a personal interview is guaranteed in all circumstances before a transfer decision is taken and therefore refrain from introducing broad exceptions to these rights.
- Ensure that the right to an effective remedy against a Dublin transfer is guaranteed in the Recast Regulation. In line with Member States' legal obligations, such a remedy must have a suspensive effect and be conducted under rigorous scrutiny.
- Ensure that detention of asylum seekers within the Dublin system remains a measure of last resort by upholding the principle in recast Article 27(2) that individuals can only be detained for the purpose of carrying out a transfer after the Dublin decision has been taken and only if there is a significant risk of absconding.
- Ensure that a possible emergency/evaluation system serves the purpose of ensuring that the right to asylum is fully respected in the context of the operation of the Dublin Regulation, is transparent and based on analysis of all available sources, including from independent non governmental organisations.

## 2.2. Amended Commission proposal recasting the Reception Conditions Directive

Adequate reception conditions for asylum seekers during the examination of their asylum application are an essential part of any asylum system and contribute to the overall quality of the asylum procedure. ECRE is concerned that the amended Commission proposal generally reduces the safeguards for asylum seekers compared with the 2008 Commission proposal by increasing the flexibility for Member States to derogate from the guarantees it is supposed to set.<sup>6</sup> This is the case, for instance, with regard to the possibility for Member States to detain asylum seekers in prison accommodation when lacking sufficient capacity in specialised detention facilities. Detention of asylum seekers is inherently undesirable and should be avoided as much as possible, as it concerns persons who have not committed any crime. ECRE believes it is important that EU legislation clearly distinguishes between asylum-related detention and imprisonment as a result of criminal charges or conviction. Mixing both has stigmatising effects, while prisons do not constitute an appropriate

environment for an asylum seeker to prepare for the various stages in the asylum procedure. ECRE also regrets that the amended Commission proposal no longer includes a clear **ban on the detention of unaccompanied children**, an area where the recast Reception Conditions Directive could provide real added value for the global protection regime. Furthermore, ECRE considers it important that the Recast Reception Conditions Directive includes clear procedural guarantees against arbitrary detention of asylum seekers and affirms the principle that detention of asylum seekers can only be used in exceptional circumstances, as a matter of last resort and where no alternatives to detention can be applied.

As far as access to the labour market is concerned it remains ECRE's position that asylum seekers should have **access to the labour market** no later than 6 months after their asylum application was lodged as this is essential in allowing them to become self-sufficient while it reduces the costs of reception of asylum seekers. However, the amended Commission Proposal now allows important derogations to this principle which, if adopted, would likely result, in practice, in the continuation of the status quo and thus provide little added value. Finally, ECRE believes that as far as the level of material reception conditions for asylum seekers is concerned, this should be at the same level as what is granted to nationals who require social assistance. The possibility for Member States to grant less favourable treatment to asylum seekers "where it is duly justified" is open to wide interpretation and may lead to Member States granting unacceptably low levels of material reception conditions that may be well below an adequate standard of living and should therefore be deleted.

ECRE calls on the European Parliament and the Council in particular to:

- Ensure that the recast Reception Conditions Directive is premised on the principle that detention of asylum seekers should be avoided and should only be used as a matter of last resort and where no alternatives to detention can be applied (Article 8).
- Maintain the presumption that detention of children is not in their best interest and reintroduce a prohibition on the detention of unaccompanied asylum seeking children as they are particularly vulnerable (Article 11).
- Ensure access to the labour market no later than six months after the asylum application has been lodged (Article 15).
- Ensure that the level of material reception conditions provided to asylum seekers is equivalent to social welfare assistance granted to nationals (Article 17).

### *2.3. Amended Commission proposal recasting the Asylum Procedures Directive*

The Asylum Procedures Directive is without any doubt the most problematic of the first phase instruments of the asylum acquis. It establishes a low level of procedural safeguards for asylum seekers while allowing for a range of tools to speed up the asylum procedure that at the same time seriously undermine a fair and full examination of the applicants' need for international protection. Furthermore, as it includes a wide margin of discretion for Member States it fails to set a common standard or to contribute to the approximation of procedural

standards across the EU.<sup>7</sup> ECRE had generally welcomed the 2009 Commission proposal recasting the Asylum Procedures Directive, as it significantly raised standards with regard to crucial issues such as the right to a personal interview, training requirements for caseworkers, the right to legal assistance and representation and the right to an effective remedy. While the Council did not achieve a common position on the 2009 Commission proposal, the European Parliament adopted its position in plenary in April 2011 in which it generally supported the Commission recast proposal.<sup>8</sup> At the same time, it proposed to fundamentally review the use of safe country concepts in the recast Asylum Procedures Directive by deleting the concept of European Safe Third Countries and the possibility of national lists of safe third countries and safe countries of origin.

In order to solve the deadlock in the Council, in June 2011 the Commission presented its amended proposal recasting the Asylum Procedures Directive. The proposal contains a watering-down of some of the crucial aspects of the 2009 Commission recast proposal, which risks undermining a key objective of the Commission proposal: increasing overall quality of decision-making and frontloading of the asylum procedure.<sup>9</sup> This includes, for instance, the flexibility for Member States to use staff from other authorities than the asylum authority to conduct personal interviews in case of “large numbers of asylum seekers”. As it remains undefined what constitutes a large number ECRE fears that this may be open to broad interpretation while added value of such an option maybe limited as it could impact negatively on the quality of interviews and thus on the quality of decision-making.

Furthermore ECRE is opposed to the possibility in Article 31(3) for Member States to postpone a decision on an asylum application “due to an uncertain situation in the country of origin which is expected to be temporary”. Such an approach may not only deprive refugees from obtaining the protection status they are entitled to and thus undermine the right to asylum as laid down in Article 18 of the Charter of Fundamental Rights. It also unnecessarily prolongs asylum procedures, which is incompatible with Member States’ concerns as to the length of asylum procedures and the costs of reception conditions for asylum seekers. ECRE is also concerned that the possibility in new Article 21 for **legal assistance and representation** at the appeal stage of the asylum procedure to be provided **by government officials** will inevitably result in a conflict of interest and undermine asylum seeker’s confidence in the overall fairness of the asylum procedure.

Finally, ECRE regrets that the amended Commission proposal continues to include procedural tools, such as the various safe country concepts, that often create insurmountable procedural hurdles for asylum seekers to a full examination of the merits of their asylum application. ECRE opposes in particular the **European Safe Third Country concept** as this allows Member States not to examine asylum applications of nationals originating from those countries, which is incompatible with international refugee and human rights law. In the above-mentioned recent judgment on the joint cases of *N.S. v. Secretary of State for the Home Department and M.E. and others v. Refugee Applications Commissioner*, the CJEU affirmed that this is also incompatible with fundamental rights protection under the Charter of Fundamental Rights and general principles of EU law. As the Court found that EU law precludes the application of a conclusive presumption that Member States observe fundamental rights in the context of the Dublin Regulation, it explicitly stated that the same reasoning applies to provisions laying down that certain states are “safe countries” with regard to compliance with fundamental rights. According to the Court, an interpretation of such provision as “constituting a conclusive presumption, not admitting of any evidence to

the contrary” would be regarded as “undermining the safeguards which are intended to ensure compliance with fundamental rights by the European Union and its Member States”.<sup>10</sup> As the European Safe Third Country as defined in Article 36 Asylum Procedures Directive and Article 39 of the amended Commission proposal allows Member States to apply this concept on the basis of a non-rebuttable presumption, it is not compatible with the Court’s jurisprudence and should be deleted.

ECRE calls on the European Parliament and the Council to:

- Include clear safeguards with regard to improving the quality of asylum procedures in EU Member States and reject those provisions that potentially undermine this objective, such as the possibility to use non-specialised personnel to conduct asylum interviews in case of undefined “large numbers of third country nationals that simultaneously request international protection” (Article 14).
- Reject the possibility for Member States to postpone decisions on asylum applications in view of an “expected change in the situation of the country of origin” of the asylum seeker as it undermines the right to asylum and fair and efficient-decision making (Article 31(3)).
- Ensure that the recast Asylum Procedures Directive includes the necessary safeguards as to the impartiality and expertise of providers of legal assistance and representation and to rule out potential conflicts of interest, in particular in the context of appeal procedures (Article 21).
- Delete Article 39 of the amended Commission Proposal on the European Safe Third Country concept as it is incompatible with international refugee and human rights law.
- Ensure that recast Article 46 on the right to an effective remedy fully reflects international human rights law principles as established by the jurisprudence of the ECtHR and the CJEU.

### **3. Practical cooperation and responsibility-sharing between EU Member States**

The construction of a common area of protection and solidarity is one of the main objectives the EU has set itself in the Stockholm Programme. Sharing responsibility through practical cooperation between EU Member States on all aspects of asylum policy will be key for the further development of the CEAS. The recent communication of the Commission on intra EU solidarity comes at a time when solidarity between Member States in the area of asylum and migration at EU level has been put to the test as a result of the situation in Greece and the migration flows resulting from the Arab spring. However, according to Article 80 TFEU the policies of the Union on border checks, asylum and immigration shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States and Union acts adopted in this field must contain appropriate measures to give effect to this principle whenever necessary.

### 3.1. EASO as a tool for support and sharing best practice

With the publication of its workprogramme for 2012, the EASO has identified its priorities for the coming year.<sup>11</sup> Unsurprisingly, further support to Greece in building its asylum system and building the EASO organisation are high on the agenda of the agency, in addition to continuing its work on the European Asylum Curriculum (EAC), COI, quality and the Interpreters' Pool.

While some steps have been taken to improve the situation of asylum seekers and refugees in Greece, it is clear that the challenge is enormous and goes far beyond the capacity of an agency like EASO. The situation of asylum seekers in **Greece** with regards to access to the asylum procedure and reception conditions as well as detention conditions remains dramatic and is aggravated by the current economic crisis in that country.<sup>12</sup> Continued support from other EU Member States and the EU will be necessary to provide for the most basic accommodation and reception needs of asylum seekers. Such support should not only focus on enhancing capacity of Greek asylum bodies but also the capacity of NGOs and lawyers to provide legal assistance and other support to asylum seekers and refugees in Greece. EASO should also install a transparent process of permanent evaluation and monitoring of the activities of the asylum support teams it is deploying in Greece, so as to incorporate the input and views from all civil society organisations active in Greece on where the Asylum Support Teams are most needed. Meanwhile, all Dublin transfers of asylum seekers to Greece must continue to be suspended, and asylum applications must be examined by the Member States where it was lodged in line with the CJEU judgment in *N.S. v Secretary of State for the Home Department and M.E. and others v. Refugee Applications Commissioner*.

ECRE welcomes the emphasis on developing activities in 2012 on training, country of origin information and quality assessment as they are key to both the efficiency and fairness of asylum procedures. The added value EASO can provide through coordinating these activities at the European level is obvious as it can ensure more efficient use of available resources and expertise across the EU while at the same time contributing to the development of a common approach and standards in these areas. However, it is important that EASO develops these activities with the aim of establishing high standards of protection in the EU, as required in the Stockholm Programme. While EASO has no competence to develop policy, its activities will not be developed in a vacuum but in the framework of existing, and often very diverging (good and bad) practices in Member States and will influence individual decision-making. For instance, choices made on methodology for the production of common COI, transparency and accessibility and use of such COI in national procedures will eventually have a substantial impact on the outcome of individual asylum applications. As is required under the EASO Regulation, EASO should take into account all relevant expertise available, including those of NGOs and academics. In ECRE's view, the Consultative Forum, which held its first meeting on 15 December 2011, is only one channel to do so. The work of EASO would certainly benefit from **involvement of expert NGOs, academics and other civil society actors** in the meetings of thematic working parties that may be set up by EASO. Through their daily work in assisting asylum seekers and refugees, NGOs have expertise and experience to share which governmental actors do not have and that is relevant to the tasks of EASO's three operational units. EASO's commitment during the first meeting of the Consultative Forum to engage in a meaningful and constructive dialogue with civil society actors is encouraging in this respect. However, concrete steps now need to be taken to put the mutual commitment into practice.

ECRE calls on EASO and the EU Member States to:

- Build on the first meeting of the Consultative Forum to engage in a meaningful dialogue with NGOs and other civil society actors and to make full use of the wealth of expertise available in the NGO communities in the EASO's activities.
- Continue efforts to support Greece in building a fair asylum system, including through strengthening capacities of NGOs to assist asylum seekers and investing in the improvement of reception conditions for asylum seekers and refugees.

### *3.2. Beyond the rhetoric: intra-EU solidarity to enhance protection in the EU*

Solidarity and responsibility-sharing between EU Member States have always been key issues in the debate on the CEAS, but were particularly topical in 2011. The increased numbers of migrants and asylum seekers at the EU's southern borders resulting from the uprisings in North Africa and the Middle East had triggered calls for solidarity with those Member States directly affected. In addition to emergency funding under ERF, and the launching of a FRONTEX operation at the coast of Sicily, together with the deployment of RABIT teams at the Greek-Turkish border,<sup>13</sup> some Member States engaged in the relocation (in limited numbers) from Malta of persons granted international protection. Overall, there was little appetite to engage in concrete solidarity-measures beyond financial solidarity through ERF. At the same time, as has been the case in the past, as soon as the numbers of arrivals in Lampedusa and Malta decreased, media attention as well as the sense of urgency, at the political level, disappeared.

The importance of solidarity and responsibility-sharing measures for the future, and sustainability of the CEAS, has recently been highlighted in a Commission Communication on enhanced intra-EU solidarity in the field of asylum.<sup>14</sup> Rather than suggesting new tools and mechanisms, the Communication provides an overview of the tools in EU law that already exist and should be better used by Member States. This is presented as constituting a flexible toolbox that should allow Member States to respond to different needs for solidarity. While the Commission's communication rightly emphasises the need for Member States to respect their obligations under human rights law and the EU asylum acquis, this is mainly for the purpose of ensuring mutual trust in each other's asylum systems. In ECRE's view, solidarity and responsibility-sharing must first serve the purpose of assisting States to **comply with their obligations to provide protection to those in need**, in order to strengthen the common area of protection as a whole. This may enhance mutual trust, but as has become clear from recent EctHR and CJEU case-law relating to the application of the Dublin Regulation, this cannot result in developing policies on the basis of conclusive presumptions of compliance with fundamental rights in EU Member States. Sharing responsibility in the field of asylum can never absolve Member States from their obligation to protect the individual from refoulement and respect the right to asylum in accordance with Article 18 of the Charter of Fundamental Rights.

One concrete form of solidarity is the project on **relocation of persons granted international protection** in Malta to other Member States, that was extended during the course of 2011.<sup>15</sup> Such initiatives can obviously benefit both the Member State and the



persons granted protection concerned, but should not result in responsibility-shifting. Relocation should always take place with the full and informed consent of the persons concerned, take into account relative absorption capacities and prioritise those who are most vulnerable. In particular with regard to Malta, ECRE believes that further relocation commitments from other Member States should be made conditional on reviewing Malta's policy of automatic detention and substantial improvement of detention and reception conditions, in line with international human rights standards and EU law, as well as concrete measures to support the integration of persons in need of international protection and migrants into Maltese society. At the same time, while Member States have relocated beneficiaries of international protection from Malta, they continue sending asylum seekers back to Malta under the Dublin Regulation, which clearly undermines the relocation effort.

ECRE calls on EU Member States and EU institutions to:

- Ensure that intra-EU solidarity measures aim to enhance protection standards across the EU by assisting Member States to comply with their obligations under international refugee and human rights law and the EU asylum acquis.
- Ensure that intra EU-relocation is based on the informed consent of the persons concerned, prioritizes the most vulnerable persons and includes strong commitments from the Member State benefiting from relocation to effectively address protection gaps in its asylum system.

#### 4. EU Funding on asylum and migration

Under the Danish Presidency, discussions on the Commission proposal on the EU financial perspectives for the period 2014-2020 will continue. In the area of home affairs, the Commission proposes to only maintain two funds, being; the Asylum and Migration Fund (AMF) that would replace the current European Refugee Fund, the European Integration Fund and the European Return fund; and the Internal Security Fund (ISF) that would replace the current European Borders Fund as well as other specific programmes. Both funds will have an external dimension to support actions in, and in relation to, third countries. The proposed **reduction to a “two-pillar” structure** should provide more flexibility to develop programmes that are “tailor-made” to the situation in each Member State and more effectively support actions, such as integration activities for wider target groups and including asylum seekers and refugees, which are at the nexus between current funding instruments. However, in the current AMF- proposal, there is no indication as to how much resources will be allocated to each policy areas covered by the AMF (return, integration and legal migration, and asylum). ECRE is concerned that this move towards more flexibility and simplification, might happen at the expense of sufficient financial resources to support the protection of refugees and asylum seekers.

Under the new proposal, each Member State would be required to develop one multi-annual programme which, if adopted, would be a positive change from the current burdensome system, which comprises, for each of the funds, a multi-annual strategy and annual programmes. These multi-annual programmes will lay down the objectives that Member

States are to achieve in each policy area (return, protection, integration) and the objectives for the use of this funding. It is therefore crucial that these programmes fully take into account the needs of refugees and asylum seekers and the specific situations in each Member State. Therefore, during the preparation (and review) phase of such programmes, and especially during the policy dialogue, it is extremely important to take into account all the relevant information in order to develop the best possible programmes. NGOs are working on a daily basis with refugees, asylum seekers and various other target groups, and have an acute and unique knowledge of the needs on the ground. ECRE therefore calls for a reinforcement of the **partnership principle** in order to ensure that in each Member State civil society and international organisations, as well as the target groups themselves, take part in the preparation, implementation, monitoring and evaluations of the programmes.

Furthermore, ECRE welcomes the proposal to increase the amount of the Commission's contribution to 75% of the total eligible expenditure of a project (currently 50% or 75% in specific circumstances), or even up to 90% for "specific actions or strategic priorities", or in "duly justified circumstances if the project could otherwise not have been implemented". This would constitute an important positive change in practice as the need to find **co-financing** is currently considered by many NGOs as the main obstacle to apply for ERF funding to support their projects.

Previously, funding for the **external dimension** of migration and asylum was only available in the external aid instruments. The creation of an external dimension strand within the AMF and the ISF marks a shift in the approach, as it now becomes possible for Member States to use funding as leverage to pursue cooperation with third countries on the basis of national and internal migration policy objectives. It also raises certain questions with regard to the impact and coherence of EU policy with third countries in the area of migration and asylum. The proposed external dimension strand under the AMF needs to be read in conjunction with the proposal for funding under the external aid instruments published on 7 December 2011.<sup>16</sup> The funding under the AMF will only target actions in third countries that are seen to be of 'direct interest' to the Member States, and more specifically, readmission agreements, cooperation in the area of migration management and mobility partnerships, return, and resettlement in the framework of the Regional Protection Programmes. The external aid instruments on the other hand will feature a structure similar to the current structure of geographic and thematic instruments, with some minor changes. These will cover actions in all areas of migration and asylum that have a development objective, that aim to support partner countries to meet migration and refugee protection challenges. Instead of simplifying funding structures, the existence of both internal and external instruments may lead to increasing gaps between actions in various areas. It is unclear where the line will be drawn between 'development' and 'non development' activities when it comes to capacity building for the authorities and civil society in third countries. ECRE is concerned that pursuing EU interests through a separate funding instrument can impact on the coherence and consistency in the Union's relations with third countries, and potentially undermine the partnerships established with these countries through development policy. More importantly, as the AMF funds are likely to gain more visibility and popularity with Member States than development funding, this may also be marking the external dimension of migration and asylum policy as a policy that essentially aims to serve EU migration management interests and needs.

ECRE calls on the Council and the European Parliament to:

- Ensure that sufficient resources are allocated within the future AMF to the protection of asylum seekers and refugees.
- Reinforce the partnership principle in the future AMF in order to ensure that NGOs, including refugee community organisations, are able to participate in the preparation, implementation, monitoring and evaluation of the multi-annual programmes.
- Ensure that the external dimension strand in the AMF is coherent with recently proposed external aid instruments and not merely serves EU migration management needs but contributes to enhancing protection space in third countries in a spirit of solidarity and responsibility-sharing.

## 5. Resettlement

Negotiations on the Joint EU Resettlement Programme have been blocked for a long time but as the current system for funding of resettlement efforts of Member States under ERF only runs for another year, the joint programme should be adopted in 2012 to make EU funding for resettlement available for the year **2013**. ECRE urges the Danish Presidency to undertake the necessary steps to conclude negotiations between Parliament and Council as soon as possible so as to ensure continued financial incentives at the EU level to further engage resettlement efforts in 2013. In this regard, ECRE also welcomes the recent German offer to resettle 300 refugees per year for the next three years,<sup>17</sup> specifically from the Middle East and North Africa, and hopes that more Member States will follow the example and offer resettlement places or increase their quota, especially for displaced persons in these two regions where there are no solutions in sight.

According to the Commission proposal for a Regulation establishing the Asylum and Migration Fund, a **Union Resettlement Programme** should be in place as of 2014. ECRE welcomes the proposal to create a Union Resettlement Programme within the framework of the proposed Asylum and Migration Fund and believes that it could increase the impact of Member States' individual efforts and encourage Member States to step up their resettlement efforts. The success of such a future programme will *inter alia* depend on the way in which EASO will take up its role in coordinating and supporting resettlement in Europe.

While not being a priority for EASO in 2012, the agency has an important role to play in coordinating and supporting resettlement in the EU in the long run, including within the framework of the envisaged Union Resettlement Programme. Therefore, ECRE calls on the **EASO**, within its mandate and as laid down in the Workprogramme 2012, to define the agency's priority actions and methodology for coordination, information exchange and support to Member States in 2012 and 2013 in the area of resettlement, including the development of a training module on resettlement. EASO's role should not be limited to data collection and information exchange. It should also take the lead in resettlement planning to identify areas where EU common action would have a significant impact; resettlement monitoring and evaluation; and contribute to the definition of the common EU priorities for resettlement as of 2014 as envisaged under the future Union resettlement programme. Here too, EASO needs to work closely with UNHCR and NGOs who are directly involved in

resettlement operations. In this regard, ECRE calls on EASO to invite such NGOs to participate in the two expert meetings on resettlement the agency is expected to organise in 2012.

ECRE calls on EU institutions, EU Member States and EASO:

- To adopt the joint EU resettlement programme before March 2012, in order to be able to benefit from ERF funding for 2013 and increase the number of resettlement places for 2013, in particular from North Africa and the Middle East.
- For EASO to define its priorities and actions in resettlement as soon as possible, in close consultation with UNHCR and NGOs, in order to facilitate the functioning of a Joint EU resettlement programme in 2013 and the planning of a possible Union Resettlement Programme as of 2014.

## 6. Cooperation with third countries

The **Communication on the Global Approach to Migration and Mobility (GAMM)** presented on 18 November 2011<sup>18</sup> marks a clear shift in the current approach towards mobility, while at the same time trying to enhance coherence between the external dimension of migration and asylum policy and the Union's political relations with third countries. The Communication also includes geographic priorities and implementation mechanisms, and makes 'more for more' one of its guiding principles. While seeing the point of a diversified approach, ECRE believes that it is important for the EU to ensure that cooperation with third countries in the field of asylum and migration is based on full respect of human rights of asylum seekers, refugees and migrants.

ECRE welcomes the fact that international protection and the external dimension of asylum policy is now included as one of the four main pillars of the Global Approach, and hopes that a real commitment to protection of refugees will be reflected in the integration, in practice, of protection priorities within Mobility Partnerships and EU dialogues with third countries on migration and mobility. This is all the more necessary in the case of North Africa, where the **Mobility Partnerships with Tunisia and Morocco** are currently being discussed. In the current context of political transition and democratisation, and with the displacement from Libya still affecting the region, Mobility Partnerships should involve not only migration management obligations and labour migration opportunities for the nationals of those countries, but also require full respect for fundamental rights, including non-refoulement and protection and assistance to refugees, asylum seekers and migrants in the region.

In addition, in its political relations with **Libya**, the European Union should make clear commitment to protection and respect for human rights of all persons, including migrants and refugees, a prerequisite for cooperation, starting already from the current phase of transition. Commitment to enhance refugee protection should also be better integrated in regional dialogues and partnerships, such as the EU Africa partnership, the EuroMed partnership and the Eastern Partnership.

**Regional Protection Programmes (RPP)** are presented as the key EU instrument for cooperation with third countries in the area of asylum and international protection, that could also be linked to Mobility Partnerships. The funding proposals for 2014-2020 also make special reference to RPP as key actions to receive funding. ECRE believes that what is important at this point, in order to make RPP a real policy tool, is proper planning and assessment of their potential, in the form of a strategic paper. Such a strategy should take into account the experience and challenges so far. It should lay down the RPP' scope and type of activities, including regional activities; the way in which RPP can contribute to durable solutions; the engagement of the countries concerned and the involvement of Member States, and finally, coordination and coherence with other development, humanitarian and disaster risk reduction programmes in these countries, where refugees and IDPs benefit. At the same time, RPP should not become the sole instrument in the external dimension of asylum; capacity building and support for the protection of the rights of refugees, asylum seekers and migrants in third countries should be consistently pursued through all other means and instruments that are at the disposal of the Union and its Member States.

Based on its Workprogramme 2012, the **EASO** should draft an Action Plan on the External Dimension that should translate the GAMM-objectives into operational objectives and actions. In ECRE's view, such a Plan should *inter alia* define the exact role of EASO in the design and implementation of RPP and the ways in which the agency can enhance coordination between Member States in capacity building in third countries.

ECRE calls on the EU and Member States to:

- Integrate protection as a key commitment in regional and country dialogues and partnerships on migration and mobility.
- Monitor the human rights situation in Libya and make a clear commitment to human rights protection, including of refugees and migrants, a prerequisite in the political relations and cooperation agenda with Libya.

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<sup>1</sup> ECtHR, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgment of 21 January 2011.

<sup>2</sup> ECRE Weekly Bulletin, "European countries urged not to send refugees and vulnerable asylum seekers back to Italy", 20 May 2011.

<sup>3</sup> See Hungarian Helsinki Committee, "Access to Protection Jeopardised. Information note on the treatment of Dublin returnees in Hungary", December 2011.

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<sup>4</sup> CJEU, Joined Cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department and M.E., A.S.M., M.T., K.P., E.H. v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, 21 December 2011.

<sup>5</sup> For a detailed analysis and recommendations on the Commission recast proposal, see ECRE, [Comments on the Commission Proposal recasting the Dublin Regulation](#), April 2009.

<sup>6</sup> For a detailed analysis and recommendations on the Commission recast proposal, see ECRE, [Comments on the Amended Commission Proposal to recast the Reception Conditions Directive \(COM\(2011\) 320 final\)](#), September 2011.

<sup>7</sup> On the implementation of the Asylum Procedures Directive see UNHCR, *Improving Asylum Procedures. Comparative Analysis and Recommendations for Law and Practice. Detailed research on Key Asylum Procedures Directive Provisions*, March 2010.

<sup>8</sup> European Parliament, *European Parliament legislative resolution of 6 April 2011 on the proposal for a directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (recast) (COM(2009)0554 – C7-0248/2009 – 2009/0165(COD), P7\_TA(2011)0136*.

<sup>9</sup> For detailed analysis and recommendations, see ECRE, [Comments on the Amended Commission Proposal to recast the Asylum Procedures Directive \(COM\(2011\) 319 final\)](#), September 2011.

<sup>10</sup> See CJEU, Joined Cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department and M.E. and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, 21 December 2011, par. 100-102.

<sup>11</sup> See EASO, Work Programme 2012, EASO/MB/2011/25, September 2011.

<sup>12</sup> A delegation of the German Bundesrat denounced the appalling detention conditions in Greece after a visit to detention facilities in Greece. See ECRE Weekly Bulletin, “German Bundestag: Human dignity is not negotiable”, 16 December 2011.

<sup>13</sup> On the fundamental rights implications of these operations see Human Rights Watch, *The EU’s Dirty Hands, FRONTEX Involvement in Ill-Treatment of Migrant Detainees in Greece*, September 2011.

<sup>14</sup> COM(2011) 835 final, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on enhanced intra-EU solidarity in the field of asylum. An agenda for better responsibility-sharing and more mutual trust*, Brussels, 2 December 2011.

<sup>15</sup> See European Commission, “Statement by Cecilia Malmström, EU Commissioner in charge of Home Affairs, on the results of the Ministerial Pledging Conference 12 May”, Memo/11/295, Brussels, 13 May 2011.

<sup>16</sup> See COM(2011) 865 final, *Joint Communication Global Europe: a new approach to financing external action*, Brussels, 7 December 2011 and COM(2011) 840 final, *Proposal for a Regulation establishing a financing instrument for development cooperation*, Brussels, 7 December 2011.

<sup>17</sup> See ECRE Weekly Bulletin, “Germany plans to resettle 900 refugees over the next 3 years”, 16 December 2011.

<sup>18</sup> COM(2011) 743 final, *Communication from the Commission to the European Parliament, the Council, the European Economic and social Committee and the Committee of the Regions. The Global Approach to Migration and Mobility*, Brussels, 18 November 2011.