

AGENT OF PROTECTION? SHAPING THE EU ASYLUM AGENCY

ECRE'S ANALYSIS OF THE POTENTIAL AND RISKS CONTAINED IN THE PROPOSAL TO TRANSFORM EASO INTO AN EU ASYLUM AGENCY

I. INTRODUCTION

Since its creation in 2010 the European Asylum Support Office (EASO) has become one of the key players in the implementation and maintenance of the Common European Asylum System (CEAS). As an EU regulatory agency it performs a variety of tasks related to asylum processes within the EU and beyond. It has three main strands of activity: technical and operational support; information collection and analysis, including on countries of origin; and coordination of practical cooperation to enhance convergence of asylum practices across the EU.

The unprecedented increase in asylum applications in the EU has revealed weaknesses and limitations inherent in EASO's mandate which constrain its response to operational challenges. Harmonisation efforts have so far failed to produce tangible results with regard to approximating Member States' asylum practices. In this regard, more prescriptive EU-level guidance on decision-making in individual cases, which remains the preserve of national asylum agencies is called for by some stakeholders. The Commission proposal for a Regulation on the European Union Agency for Asylum would further boost the Agency's pivotal role in the CEAS through expanding its mandate in the three afore-mentioned strands of activity.

However, some of the proposed changes raise fundamental questions relating to the new Agency's accountability, impartiality and independence. This is particularly the case where they concern powers which would significantly increase the Agency's impact on individual decision-making carried out by national asylum authorities. As both co-legislators have already adopted their negotiating positions on the proposed EU Asylum Agency, this policy note focusses on controversial issues and provides ECRE's key recommendations on the role of the EU Asylum Agency in the implementation of the CEAS and on its cooperation with third countries.

II. ANALYSIS

The Commission proposal foresees the new Agency as the operational and analytical driver of harmonisation across the EU. This is illustrated in particular by the proposal for a full-fledged monitoring and assessment mechanism covering Member States' performance on the implementation of EU asylum law. In ECRE's view, this is an essential tool for creation of a robust CEAS and should even be strengthened. However, other elements in the proposed broader mandate carry certain risks from an international protection perspective. Particular concerns include the new competences to process personal data and to provide common analysis on country of origin information and guidance on its use, the widened scope for joint processing activities, including in hotspots, and cooperation with third countries.

I. A MEANINGFUL AND COMPREHENSIVE MONITORING AND ASSESSMENT MECHANISM

The structural shortcomings of the CEAS and violations of asylum seekers' human rights both result - first and foremost - from Member States' non-compliance with their obligations under the EU asylum *acquis* and the EU Charter. Lack of effective monitoring and preventive assessment of Member States' capacity, preparedness and performance in the field of asylum constitutes an important gap in the CEAS. The proposed mechanism could be an important tool to ensure a permanent fitness check for the CEAS, allowing the Agency to prevent rather than remedy deficiencies in Member States' asylum practices. Unannounced on-site visits by expert teams and evaluation of samples of individual decisions are indispensable methods to ensure meaningful qualitative and quantitative assessment. ECRE believes that the proposed monitoring and assessment mechanism should be further strengthened by including detention practices and legal assistance as topics for assessment. Furthermore, the views, experiences and assessments of non-governmental actors and UNHCR should be systematically incorporated, as they provide the unique perspective of those providing services to asylum seekers and refugees. Failure to include these sources would inevitably result in the mechanism missing crucial information and providing an incomplete picture of the realities on the ground. Posting EU Asylum Agency staff as liaison officers in Member States would facilitate information exchange and early identification of protection gaps and may help to make the Agency less dependent on timely provision of information by national authorities.

II. COMMON ANALYSIS ON COUNTRY OF ORIGIN INFORMATION

Reliable and up-to-date country of origin information (COI) is essential for quality decision-making in robust status determination processes and is central to the credibility of asylum procedures. A common approach to the production, interpretation and application of COI is key to ensuring a sufficient level of convergence of individual decision-making across the EU. In this respect, the proposed competence of the EU Asylum Agency to produce common analysis providing guidance on the situation in specific countries of origin, which must then be taken into account by Member States in decision-making, represents an important step forward.

That said, due to its governing structure (i.e. that it is governed by a Management Board composed of Member State representatives) and because it has no protection mandate *per se*, entrusting the Agency with such competence entails the risk that the guidance is shaped by political considerations and administrative convenience rather than international protection considerations.

In order to enhance the Agency's independence and impartiality, ECRE recommends that ultimate responsibility for endorsing common analysis and guidance should lie with the Executive Director and that a peer review system for the Agency's work on COI composed of a panel of independent COI experts should be set up.

Further amendments are also needed to ensure that any guidance provided by the Agency with respect to specific countries of origin does not undermine the authority of UNHCR's eligibility guidelines, issued as part of its global responsibility to supervise the correct implementation of the 1951 Refugee Convention.

III. SAFEGUARDS ON DATA PROTECTION

The proposal includes provisions on the processing of personal data collected for analytical purposes and in the context of operational and technical assistance provided by the Agency. ECRE believes that additional safeguards are required to ensure that the Agency fully complies with data protection rules and principles of purpose limitation, proportionality and necessity. The Agency is granted broadly defined powers to process applicants' personal data, including for pure research activities such as case-sampling or the analysis of asylum trends; both the utility and the lawfulness of these powers are highly questionable. Given the variety of tasks entrusted to the Agency, the Regulation should define which type of personal data may be processed for which lawful purpose. The proposed Regulation also lacks justification as to why it is necessary for the Agency's own staff to separately collect personal data, such as fingerprints, name, date of birth and gender, which would already be mandatorily collected by Member States under the proposed recast Eurodac Regulation. Furthermore, the lack of any provisions asserting the applicants' right to be informed of the purpose of collecting and processing their personal data or of the recipient of those data and to challenge any wrongful use of their data by the Agency presents a serious protection gap.

IV. COOPERATION WITH THIRD COUNTRIES

In line with the increasing focus on the external dimension of the EU's common policy on asylum, the future EU Asylum Agency will engage much more intensively with third countries, including on their territory. Under the proposed Regulation, such cooperation may concern a variety of activities, ranging from the coordination of resettlement activities and capacity building of third countries' asylum and reception systems to the ill-defined "facilitation of operational cooperation between Member States and third countries". Consistency of the Agency's activities in this field with UNHCR resettlement priorities must be ensured. Close cooperation with UNHCR and expert non-governmental organisations with regard to pre-departure cultural orientation and post arrival integration assistance is key to successful implementation.

The possibility to invite third country officials as observers in operational and technical support activities coordinated by the Agency raises major ethical and legal questions of compatibility with principles of confidentiality and non-disclosure of information to the alleged actor of persecution as laid down in the EU asylum *acquis*. In order not to compromise an applicant's trust in the asylum process and to avoid any unlawful sharing of information, ECRE believes that any participation of third country officials in practical cooperation activities on the territory of a Member State should be excluded.

V. FROM EU ASYLUM AGENCY TO EU FIRST INSTANCE ASYLUM AUTHORITY?

The proposed mandate of the EU Asylum Agency marks a further step in conferring powers to the Agency that have direct bearing on Member States' decision-making processes on individual applications for international protection. Building on current joint processing experiences in the hotspots in Greece, the proposed Regulation provides a legal basis for asylum support teams to engage not only in the registration but also in the examination of applications beyond an initial analysis. This is in addition to the Agency's competence to provide guidance to Member States on the application of country of origin information in individual cases and its comprehensive training activities on procedural as well as substantive refugee law. Consequently, the Agency will increasingly shape rather than support Member States' asylum practices.

Increased operational activity and presence on the ground increase the likelihood of the Agency's actions having an impact on the fundamental rights of individuals and therefore triggering its accountability for human rights violations. An individual complaints mechanism and a sufficiently resourced Fundamental Rights Officer would assist the Agency in systematically promoting and monitoring respect for fundamental rights in all its operational activities. It would also provide applicants affected by such activities with an additional tool to express any grievances that may arise and get redress in case of improper treatment by EU Asylum Agency deployed staff or national experts.

Finally, the debate on the reform of the CEAS, raises the question of the role that could ultimately be envisaged for an EU agency specialised in asylum in the EU's common asylum policy. Although politically unfeasible now, the option of an "EU Asylum Authority" with exclusive competence to decide on individual applications for international protection made in the EU, is inevitably part of the discussion on the long term architecture of

the CEAS. While it may constitute an effective way to address current disparities in recognition rates between EU Member States, entrusting an EU authority with such competence opens complex legal and political questions. A key concern is the nature, composition and governance of such an authority. If such an option is to be pursued, the necessary safeguards would have to be in place to ensure the authority's independence when taking individual decisions on the basis of an international protection mandate.

III. RECOMMENDATIONS

ECRE acknowledges the potential of the proposed Agency to establish high protection standards across the EU and a resilient CEAS. Nonetheless, the negotiations on the mandate of the EU Asylum Agency are part of a wider reform of the EU asylum acquis that raise serious concerns from a human rights perspective. As the Agency's activities will necessarily be determined by the future EU legislative framework on asylum which is currently under negotiation, the debate on its mandate and resources cannot take place in isolation from the rest of the asylum package.

1. The monitoring and assessment mechanism must be expanded to cover detention, legal assistance and resettlement and must systematically include information and assessments carried out by non-governmental organisations, UNHCR and relevant international or European human rights monitoring bodies
2. An Independent Expert Panel on country of origin information (COI) should be established to advise the European Asylum Agency on methodology and to peer review the Agency's COI products. The panel should consist of academic experts, representatives of the judiciary, expert NGOs and UNHCR.
3. The common analysis of COI for specific countries of origin and eligibility guidance must take into account and align with the most recent UNHCR eligibility guidelines for such countries and should be adopted by the Executive Director after consultation with the Independent Expert Panel on COI.
4. In line with principles of purpose limitation, proportionality and necessity, the processing of personal data by the EU Asylum Agency must be subject to strict definition of which data may be processed for which lawful purpose.
5. Any participation of third country officials in practical cooperation activities relating to processing of applications on the territory of a Member State, should be excluded.
6. A Fundamental Rights Officer position reporting to the Management Board and the Consultative Forum and an individual complaints mechanism relating to the Agency's operational activities must be included in the EU Asylum Agency Regulation.