



**ENHANCING INTRA-EU SOLIDARITY TOOLS TO IMPROVE
QUALITY AND FUNDAMENTAL RIGHTS PROTECTION IN THE
COMMON EUROPEAN ASYLUM SYSTEM**

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Executive Summary

Solidarity and responsibility-sharing have been at the heart of the debate on the EU's common policy on asylum since the start of the harmonization process. The continuing asylum crisis in Greece as well as the refugee and migrant flows resulting from the Arab Spring and the war in Libya have resulted in renewed impetus and prompted calls for more solidarity and sustainable responses from the EU. This has provoked important policy debates at EU level about the meaning and scope of solidarity measures underpinning the further development and implementation of the EU's common policy on asylum after the second phase of legislative harmonisation.

The introduction of Article 80 of the Treaty on the Functioning of the European Union (TFEU) has added another dimension to the debate. It requires asylum, border and migration policies of the Union and their implementation to be governed by the **principle of solidarity and fair sharing of responsibility** among the Member States and appropriate Union acts where necessary to give effect to this principle. Although its scope and legal implications are yet to be fully determined, Article 80 TFEU must in any case be interpreted in light of the EU's objective to build a Common European Asylum System (CEAS) based on high standards of protection, in which similar cases should be treated alike and result in the same outcome, regardless of the Member State in which the asylum application is lodged. Combined with the duty of sincere cooperation under Article 4(3) Treaty on the European Union (TEU) Article 80 TFEU amplifies the duty of Member States and EU institutions to consider and/or engage in solidarity and fair responsibility-sharing measures where it is necessary to ensure that the right to asylum is fully respected in practice. Furthermore, the principle of solidarity and fair sharing of responsibility furthermore must underpin all aspects of the EU's common asylum policy, apply beyond crisis situations and cannot be reduced to a matter of mere financial burden-sharing.

The European Asylum Support Office (EASO) is without any doubt an important instrument in enhancing solidarity between EU Member States in the field of asylum. Established in 2010, it has been designed to become one of the key actors in making the common area of protection and solidarity a reality on the ground. EASO must unambiguously do so with the objective of contributing to the establishment of a CEAS that fully respects the right to asylum through enhancing the quality of Member States' asylum systems. This will only be possible if the guarantees in the EASO Regulation for the agency to carry out its tasks in an independent and transparent manner are fully respected and even further strengthened and if it is sufficiently resourced to operate as an **independent European Centre of Expertise** in the field of asylum.

Non-governmental organisations play a key role not only in assisting asylum seekers throughout the asylum process but also in identifying deficiencies as well as good practice in national asylum systems. EASO should further improve the mechanisms for tapping into the wealth of experience and expertise of relevant organisations and continue to develop a meaningful dialogue with civil society. This must include involving NGO and academic experts more systematically in working parties and expert meetings coordinated by EASO which requires full transparency with regard to their organization and preparation.

Synergies and cooperation between EASO and the Fundamental Rights Agency as well as Frontex present an opportunity to further mainstream respect for fundamental rights into EASO's activities as well as protection sensitive border controls in Frontex operations. In this regard, EASO's expertise must be systematically integrated into the planning and implementation of Frontex border control operations. Involving experts with a specific asylum background from EASO's Asylum Intervention Pool as well as UNHCR in Frontex operations will contribute to more efficient and reliable identification of persons with international protection needs and reduce the risk of violations of the principle of non refoulement.

As part of the compromise on the recast Dublin Regulation, EU institutions have agreed on the establishment of an early warning and preparedness mechanism as a tool to identify, in a timely manner, particular pressures on Member States' asylum systems. In ECRE's view, this mechanism cannot compensate for the fundamental flaws in the recast Dublin Regulation and the human rights violations it results in, and therefore does not take away the need for the Regulation to be ultimately replaced with a system that is fair to both asylum seekers and Member States. However, the potential of the early warning mechanism as a solidarity tool should be fully explored and maximised and EU institutions should take the opportunity of the political consensus on the need for such mechanism to adopt a more ambitious approach to its set up and implementation. What is needed is the establishment of a **permanent health and quality check of the CEAS** through a well-resourced early warning mechanism that allows for in-depth monitoring of all aspects of the CEAS and triggers remedial action where indicators show a lack of capacity or quality in a Member State's asylum practice.

Comprehensive, reliable and up-to-date data collection from all available sources on the practice in Member States is key in order to ensure that a permanent health and quality check presents a complete picture of the realities 'on the ground'. This requires, first of all, improved collection of more sophisticated statistical data, not only on the numbers, nationality, age and gender of asylum seekers applying in each country, but also on the types of decisions taken as well as the procedures used for processing asylum applications and the backlog at first instance and appeal stage. Furthermore, information on actual staff resources in the asylum authorities, capacity of the reception system, availability of interpretation and legal assistance at all stages of the procedure as well as procedural safeguards and facilities for vulnerable asylum seekers must be gathered. In addition, the detention of asylum seekers and conditions in detention centres must be closely monitored, while this regrettably remains common practice in a number of EU Member States and in light of the new standards included in the future recast Reception Conditions Directive and Dublin Regulation. Finally, the level of implementation of the EU asylum standards and Member States' compliance with such standards must be taken into account in the operation of the early warning mechanism.

While Member States have already a primary responsibility to provide much of the required information that would be necessary, including under the EU Migration Statistics Regulation, the permanent health and quality check must rely on the full **range of sources** that are available including expert NGOs, academics but also human rights monitoring carried out by Council of Europe or the UN Human Rights Council in the context of the Universal Periodic Review. This is crucial to ensure that the CEAS is being permanently evaluated with regard to its impact on all actors involved, first and foremost on those seeking protection in the EU. Quality assessment of Member States' asylum systems through **Quality Assessment Teams** established within EASO, involving independent experts and with a key role for UNHCR, must be an integral part of the Early Warning Mechanism. Such teams should carry out on-the-spot checks in Member States on a regular basis and whenever the indicators establish a need for such checks. With regard to the quality of individual decision-making in Member States, this should include the review of samples of individual asylum decisions taken at the various stages of the asylum procedure on the basis of UNHCR's quality assessment methodology. Relevant indicators must be developed with regard to such information in order to enable EU institutions to swiftly identify where the protection and quality gaps are and launch the appropriate remedial action.

The information collected through the permanent health check must furthermore support the Commission's role in monitoring implementation and compliance with the asylum acquis, including through initiating **infringement procedures** where necessary. Increased solidarity should not create disincentives for individual Member States from complying with their obligations under the asylum acquis and international law human rights and refugee law. Post-legislative harmonisation, the Commission should therefore reprioritise its monitoring role and allocate sufficient resources to enforcing individual EU Member State's compliance with EU

law. This would further minimise the risk of States deliberately underperforming in order to trigger solidarity measures.

A variety of solidarity measures is at the disposal of the EU institutions and the Member States to address the flaws and weaknesses in the system. The *ultima ratio* of using solidarity and responsibility-sharing measures must be to enhance the respect of fundamental rights in and the quality of the CEAS. Their purpose must be to strengthen the capacity of Member States to ensure that the fundamental rights of asylum seekers and persons granted international protection are fully respected in practice. This must be the primary concern when using existing or considering more innovative tools as part of one of three avenues for responsibility-sharing: sharing money, sharing expertise and sharing people.

Sharing Money

EU funding through the European Refugee Fund and the Asylum and Migration Fund will continue to distribute financial means among Member States in light of the proportion of persons seeking or benefiting from international protection. It is hoped that the new Asylum and Migration Fund will include some important improvements, including a more flexible system for emergency funding to address the situation in Member States facing particular pressures as well as reduced co-funding requirements for NGOs. A CEAS based on high standards of protection requires that the budget available for activities in the field of asylum is large enough to realistically reflect the costs of processing asylum applications. The foreseen programming of the future Asylum and Migration Fund, including through national policy dialogues and the mid-term review of the Fund, should be linked to the Early Warning Mechanism. This will allow for a more informed decision at EU level on where financial solidarity is most needed. Moreover, in order to ensure that the appropriate funding priorities are being set at the national level, the Commission and Member States must ensure an effective opportunity for relevant NGOs to provide input on funding priorities, including as part of the national policy dialogues and the mid-term review of the Asylum and Migration Fund.

Sharing Expertise

Practical cooperation in the field of training and Country of Origin Information (COI) is an important solidarity instrument with potentially high impact on the quality of decision-making on individual asylum applications. EASO's training activities through the European Asylum Curriculum (EAC) must be further strengthened, including through earmarking resources for **translation of key EAC training modules** into the national language in the programming of the Asylum and Migration Fund. As interpreters play a key role in asylum processes a training manual on their role and guidelines on the use and content of a code of conduct for interpreters should be developed by EASO. As regards COI, EASO's competences in gathering COI, managing the COI portal and drafting COI reports on specific countries provide the agency with significant powers to influence the outcome of asylum applications. The creation of an **independent expert panel** competent to advise EASO on its COI methodology, review its COI reports and analyse the impact and relevance of EASO COI reports at the national level would significantly contribute to the quality of EASO's work in this field. In order to ensure full equality of arms in national asylum procedures, EASO's COI portal must be made accessible to asylum seekers and their legal representatives.

Joint processing of asylum applications lodged in one of the EU Member States *within the EU* would constitute one of the most advanced ways of responsibility-sharing. Mainly two theoretical models can be distinguished on the basis of who has the power to decide on the individual asylum application: Member States or the EU level. While there is no agreed definition of joint processing, in the EU context it requires at a minimum the active involvement of national experts from other EU Member States than the EU Member State in which an asylum application was lodged in the examination of such application. A maximum option would consist of the creation of a system of **centralised EU decision-making** at the first instance by an EU asylum authority with national branches in all EU Member States. This

would also require the creation of an appeals mechanism at the EU level in order to ensure maximum convergence of decision-making in light of the final objective of the CEAS to ensure the same outcome of the asylum application wherever the claim is being lodged. While important legal questions remain with regard to this option, it is in any case politically unrealistic in the short term. However, such an option should be revisited in the event that the current divergences in decision-making practice between the EU Member States continue to exist in the long term.

A more realistic short term option is the model whereby joint processing is carried out through the **deployment of EASO Asylum Support Teams** consisting of national experts competent to examine asylum applications lodged in the host Member State on that Member State's territory. The competence of such experts would be limited to making a recommendation for a positive or negative decision to the asylum authority of the host Member State that would remain responsible for taking the decision. This could be complemented with additional support in the provision of emergency accommodation for asylum seekers where necessary. Such an option would require only limited changes to the EASO Regulation and would not interfere with the existing national appeal system since first instance decisions would still be taken by the national asylum authority. A major difficulty with such a model is that national experts from other EU Member States would be required to operate in an asylum procedure and language that they are unfamiliar with, which risks undermining the quality of interviews and reports or transcripts of the interviews as well as complicating the work of legal assistance providers, including at the appeal stage. Therefore and in order to ensure that joint processing maintains its proper focus of ensuring that States comply with their obligations under the 1951 Refugee Convention and other human rights treaties, such a model should be conditional on a prominent role of UNHCR in operational terms in joint processing and on independent evaluation. In any event, ECRE believes that this model of joint processing should be first tested within a controlled pilot on a narrowly defined caseload, such as with regard to asylum seekers rescued at sea, unaccompanied children in Greece or another discrete caseload from a Member State facing capacity issues.

Sharing People

A third possible avenue of solidarity that has recently been the subject of renewed attention at EU level is the physical relocation of beneficiaries of international protection as well as the creation of a distribution key for asylum seekers across the EU. While **intra-EU relocation of beneficiaries of international protection** may be beneficial for the persons concerned, its added value as a solidarity instrument within the CEAS is questionable, in particular in view of the low number of persons relocated so far. Should EU Member States further engage in intra-EU relocation, it must be made conditional on concrete steps to be taken in the Member State "benefiting" from relocation to address protection gaps in its national asylum system as it should not result in mere responsibility-shifting. Furthermore, it should always be based on the informed consent of the persons concerned, be clearly kept separate from resettlement programmes and prioritise the most vulnerable persons whose special needs require immediate relocation to another EU Member State. ECRE considers the establishment of an **EU distribution key for asylum seekers**, involving forced relocation of asylum seekers on the basis of a quota system within the EU to be unrealistic and unfeasible in light of the many legal and practical questions it raises as well as its lack of cost-effectiveness.

Rather **free movement rights of beneficiaries of international protection within the EU** should be further enhanced. This would not only contribute to their integration into European societies, but also have positive side-effects in alleviating pressures on certain Member States. While the amended Long Term Residence now includes refugees and beneficiaries of subsidiary protection in its scope, further amendment is needed in the short term in particular to mandatorily include the entire duration of the asylum procedure when calculating the period of five years of legal and continuous residence on the territory required to obtain long term resident status. In the long term beneficiaries of international protection should be granted free

movement rights immediately after recognition. This must be coupled with a proper system guaranteeing the transfer of protection status when exercising the right of free movement and taking up residence in another Member State than the one that granted protection status.

Introduction

The role of responsibility-sharing in the global protection regime has been widely debated at regional and global level. While the need for international cooperation is referred to in the preamble of the 1951 Refugee Convention as well as other human rights instruments “the refugee protection regime offers no agreed parameters of how it could be concretized in practice”.¹ International refugee law is neutral as regards the question of fair sharing of responsibilities of states vis-à-vis refugees and asylum seekers. There is no legal basis in international law that obliges refugees to claim protection in the first country they reach after leaving the country where they fear persecution. States face what Hathaway has described as a “peremptory regime” because international refugee law “arbitrarily assigns full legal responsibility for protection to whatever state asylum-seekers are able to reach”.² Under the principle of *non refoulement*, states are under an international legal obligation not to send a person to a country where he or she risks persecution or serious harm. At the same time, there is no mechanism in international refugee and human rights law that compensates states for the inevitably disproportionate burdens the international refugee protection regime places on states. Moreover, it must be acknowledged that for many years now the majority of the world’s refugees are hosted in regions that are least equipped to accommodate them and provide them access to the catalogue of rights due to them under the 1951 Refugee Convention and other human rights treaties.³

Attempts have been made in the past to address this issue at the global and regional level and to install mechanisms that more evenly distribute responsibility for protecting refugees between the states party to the 1951 Refugee Convention. The latest of those attempts at the global level was in 2011 when UNHCR organised an expert meeting on responsibility-sharing, reviewing lessons from the past and taking stock of existing mechanisms and tools. The development of a “common framework on international cooperation to share burdens and responsibilities” was suggested as a next step.⁴ One of the conclusions of the meeting was that clear ownership and political leadership by states as well as adequate monitoring of cooperative arrangements can assist in making such cooperation sustainable, while also the role of international and non-governmental organisations in responsibility-sharing mechanisms was emphasised.⁵

Also at the European Union (EU) level, responsibility-sharing and solidarity between EU Member States is at the heart of the debate on the future of the Common European Asylum System (CEAS) post-2012. The Stockholm Programme’s call for a common area of protection and solidarity emphasises the central role of solidarity mechanisms for the CEAS and recently the three EU institutions have published documents setting out their views and perspectives.⁶

¹ UNHCR, *International Cooperation to Share Burden and Responsibilities*. Expert Meeting in Amman, Jordan, 27-28 June 2011, Discussion Paper, June 2011, p. 2.

² James C. Hathaway, *Reconceiving International Refugee Law*, Martinus Nijhoff Publishers, The Hague/Boston/London, 1997, at p. xviii.

³ As illustrated in the Australian High Court Judgment declaring invalid an agreement between Australia and the Malaysian government on the resettlement of 4,000 refugees to Australia in exchange for Malaysia taking over 800 asylum seekers from Australia on the basis that Malaysia is not legally bound to provide access to effective asylum procedures or protection for persons given refugee status. See High Court of Australia, Plaintiff M70/2011 v Minister for Immigration and Citizenship, Plaintiff M106 of 2011 v Minister for Immigration and Citizenship [2011] HCA 32 (31 August 2011).

⁴ Consisting of “(1) a set of understandings on international cooperation; (2) an operational toolbox to facilitate the conclusion of bilateral and multilateral agreements”. See Expert Meeting on International Cooperation to Share Burdens and Responsibilities, Amman, Jordan, 27-28 June 2011, Summary Conclusions, *International Journal of Refugee Law* Vol. 24 No. 2 pp. 471–481.

⁵ *Idem*.

⁶ See 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 EU agenda for better responsibility-sharing and more mutual trust* (hereinafter ‘Communication on intra-EU solidarity in the field of asylum’), Brussels, 2 December 2011; Council of the European Union, *Council Conclusions on a Common Framework for genuine and practical solidarity towards Member States facing particular pressures on their asylum systems, including through mixed migration flows* (hereinafter ‘Conclusions on a Common Framework for genuine and practical solidarity’), Brussels, 8 March 2012 and European Parliament, *Resolution on enhanced intra-EU solidarity in the field of asylum*, P7_TA-PROV(2012)0310, 11 September 2012.

Recent events, such as the Arab Spring, the war in Libya, the ongoing conflict in Syria and the resulting migratory and refugee flows have prompted calls for more solidarity and ad hoc responses from the EU. Also the situation in Greece has contributed to a growing acknowledgment at the political level that solidarity between EU Member States should be a quintessential component of the CEAS. The latter also illustrates that responsibility-sharing and solidarity can be indispensable to ensuring that the fundamental rights of asylum seekers and refugees are fully respected in the EU today. This is the case where asylum systems are not sufficiently resourced to cope with sudden increases in the number of asylum applications in a particular country or region but also where asylum systems have been systematically under-resourced over a long period of time, even in the absence of an emergency situation.

In this paper, ECRE presents its views on the range of measures and initiatives taken or under discussion at EU level with the aim of promoting solidarity and responsibility-sharing in the field of asylum. In particular, it assesses their potential impact on the protection of fundamental rights of asylum seekers and beneficiaries of international protection and includes a number of recommendations on how to ensure that such responsibility-sharing and solidarity measures fully respect fundamental rights and contribute to high protection standards across the EU. The debate on solidarity and responsibility-sharing relates to all aspects of states' asylum and immigration policies: access to the territory, qualification for international protection, reception conditions for asylum seekers, asylum procedures, integration pre- and post-recognition, return and resettlement. However, the focus of this paper is exclusively on a number of tools aiming to enhance solidarity and responsibility-sharing *within the EU* and their potential impact with regard to the quality of asylum systems of EU Member States within the CEAS. As stated by the Commission, solidarity is an essential component of the CEAS⁷ and without any doubt the various forms of practical cooperation Member States undertake and EASO's capacity to promote such measures, will to a great extent determine the success or failure of the CEAS post-2012. Moreover, in the Stockholm Programme, Member States have committed to enhance solidarity in the field of asylum, while the Lisbon Treaty now requires that the EU's common asylum policy be governed by the principles of solidarity and fair responsibility-sharing.

While the operation of the Dublin Regulation is relevant in the debate on responsibility-sharing, it is not extensively addressed in this paper as ECRE's views on the operation of the Dublin Regulation and possible alternatives to the Dublin system are expressed elsewhere.⁸ ECRE maintains the view that the Dublin Regulation counteracts solidarity and undermines the fundamental rights of asylum seekers arriving in Europe as has been recently confirmed by the European Court of Human Rights (EctHR)⁹ and the Court of Justice of the European Union (CJEU).¹⁰ Nevertheless, Member States and the Commission have repeatedly referred to the Dublin system as the cornerstone of the CEAS and also the recent recast of the Dublin Regulation did not result in a fundamental review of the system as such. This does not exclude such fundamental reform in the future as the Stockholm Programme invites the Commission "to consider, if necessary, in order to achieve the CEAS, proposing new legislative instruments on the basis of an evaluation".¹¹ However, as it is unlikely that the principles underlying the

⁷ See European Commission, *Communication on intra-EU solidarity in the field of asylum*, at p.1.

⁸ ECRE, [Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered](#), March 2008.

⁹ ECHR, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgment of 21 January 2011.

¹⁰ 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*, Judgment of 21 December 2011.

¹¹ See European Council, *The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens* (hereinafter 'Stockholm Programme'), section 6.2.1, OJ 2010 C 115/1. Also the recast Dublin Regulation in its recital 7 envisages the possibility of a review of its principles and functioning "as other components of the CEAS and EU solidarity tools are built up". For the text of the final compromise, see Council of the European Union, *Position of the Council at first reading with a view to the adoption of a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 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 a stateless person (recast)*, 15605/12, Brussels, 14 December 2012. At the time of writing the Recast Dublin Regulation was not yet formally adopted. However, for the purpose of this paper, it is referred to as "Recast Dublin Regulation". On the application of the Dublin II Regulation and its impact on the fundamental rights of asylum

Dublin system will be abandoned soon, the recommendations and suggestions included in this paper take into account the legal framework of the CEAS as it exists today, including the recast Dublin Regulation. As long as the Dublin system is not replaced with a system that is fair to both asylum seekers and states, this paper suggests to reinforce the early warning and preparedness mechanism included in the recast Dublin Regulation as part of a permanent health and quality check of the CEAS as a means to effectively identify the needs for concrete solidarity measures through in-depth monitoring of the protection and quality gaps of the CEAS.

The exclusive focus on solidarity and responsibility-sharing within the EU is not to suggest that ECRE considers solidarity with third countries in the field of refugee protection less important. On the contrary, the EU and its Member States have an important role to play in assisting third countries as they often face significant challenges in the effort to assist refugees, in a context where their own nationals often do not enjoy basic rights.¹² An important tool in this regard is resettlement and ECRE has consistently advocated for a much stronger engagement of the EU and its Member States in resettling refugees from third countries.¹³ As the EU also engages in the capacity-building efforts in third countries a comprehensive rights-based approach is needed which takes into account the real needs of the countries and refugees concerned and does not simply result in shifting responsibilities to countries that are already hosting the vast majority of the world's refugees.¹⁴ The recommendations for responsibility-sharing and solidarity within the EU as set out in this paper therefore must be read as addressing the specific legal and political context of the EU without in any way negating the need for enhanced solidarity with third countries and the refugees they are hosting.

Chapter 1 provides a short description of the relative pressure on EU Member States and the uneven distribution of asylum caseloads between EU Member States and briefly analyses the legal basis in the Lisbon Treaty for responsibility-sharing and solidarity in the field of asylum. The European Asylum Support Office (EASO) as a key actor for promoting and coordinating responsibility-sharing is addressed in chapter 2 from the perspective of its independence and cooperation with civil society and other EU agencies. Chapter 3 advocates for a permanent health and quality check of the CEAS through a boosted early warning mechanism. Finally, chapter 4 provides further analysis and recommendations on the ways in which responsibility is already being shared between EU Member States and engages with current debates on joint processing and the possibility of an EU distribution key for asylum seekers. A list of recommendations is included in the Annex.

seekers see European Network for Technical Co-operation on the Application of the Dublin II Regulation, *The Dublin II Regulation. Lives on Hold. Comparative Report*, (forthcoming February 2013, soon to be available at www.dublin-project.eu).

¹² According to UNHCR, at the start of 2011, developing countries hosted 80 % of the 10.5 million refugees under its mandate, while “the 20 countries with the highest number of refugees in relation to GDP were all in the developing world, and more than half were least-developed countries (LDCs)”. See UNHCR, *The State of the World's Refugees. In search of solidarity*, Oxford University Press, 2012, at p. 197.

¹³ ECRE is among the six organisations that have launched the [‘Resettlement saves lives – 2020 campaign’](#).

¹⁴ For further information on ECRE's position and further analysis, see *inter alia* ECRE, [‘The Way Forward - Guarding Refugee Protection Standards in Regions of Origin’](#), December 2005 and ECRE, [‘ECRE's Comments to the Commission Communication on the Global Approach to Migration and Mobility COM \(2011\) 743 final’](#), April 2012.

Chapter 1 Setting the scene

Before discussing the tools and policy responses to enhance responsibility-sharing and solidarity in the field of asylum within the EU in chapters 2 and 3, this chapter provides a general overview of the evolution of asylum applications in the EU in recent years and contextualises this within global trends of refugee flows. Furthermore, this chapter also elaborates on the potential impact of the new Article 80 of the Treaty on the Functioning of the European Union (TFEU), which establishes solidarity and fair responsibility-sharing as principles governing the EU's asylum and immigration policies.

1.1. Asylum in the EU in numbers

It is well-known that the EU Member States host only a fraction of the world's refugees. According to UNHCR Global Trends some 42,5 million persons were displaced worldwide due to conflict or persecution by the end of 2011.¹⁵ This number includes 15,2 million refugees, 26,4 million internally displaced persons and about 895.000 persons whose asylum applications were still pending. Developing countries hosted 80% of the world's refugees while the 48 least developed countries gave protection to 2,3 million refugees (22% of the total). In comparison, the Middle and North African region hosted 17%, while Europe hosted 15 % of the world's refugees. Germany was the only EU Member State in the top ten of major refugee hosting countries with 571,700 refugees and ranked fourth after Pakistan (1.702,700), Iran (886,500) and Syria (755,400).¹⁶

Asylum applications in EU Member States have fluctuated considerably in EU Member States, but after the peak in the nineties resulting from the war in former Yugoslavia, numbers have been at a manageable level, in particular when compared to other regions in the world taking into account Member States' resources. The table below shows the evolution of asylum applications lodged in the EU between 2003 and 2011.¹⁷

	2003	2004	2005	2006	2007
EU Total	349,320	281,550	240,950	201,000	222,910
EU 'Old'¹⁸	309,340	241,000	212,690	180,960	197,450
EU 'New'¹⁹	39,980	40,550	28,260	20,040	25,460

	2008	2009	2010	2011
EU Total	239,150	247,330	240,410	277,370
EU 'Old'	217,240	222,130	224,850	262,190
EU 'New'	21,910	25,200	15,560	15,180

¹⁵ See UNHCR, *Global Trends 2011*, at p. 5.

¹⁶ Idem, at p. 14.

¹⁷ Source: UNHCR, *Global trends 2010*, p. 6.; UNHCR, *Asylum levels and Trends in Industrialised Countries, 2011. Statistical overview of asylum applications lodged in Europe and selected non-European countries* (hereinafter 'Asylum levels and Trends in industrialised Countries 2011'), 2012, at p. 8 and UNHCR, *Asylum Levels and Trends in Industrialised Countries, 2007. Statistical overview of asylum applications lodged in Europe and selected non-European countries*, Annex, at p. 12.

¹⁸ Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom.

¹⁹ Bulgaria, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, Slovenia.

The number of asylum applications in the 27 EU Member States increased by 15% in 2011 compared to 2010 and reached a total of 277,370. This is in line with the overall trend in industrialised countries in 2011 that registered a 20% increase.²⁰ Within the EU numbers of asylum applications are unevenly distributed between EU Member States. Overall a distinction can be made between 'old' and 'new' EU Member States. The 15 'old' EU Member States registered an increase of 17% in 2011 while the 12 'new' Member States registered a drop of 2% of applications. Also in the Nordic region, a decrease of 10% was registered in 2011 compared to 2010.²¹ Unsurprisingly, within the EU the largest relative increase was registered in the southern EU Member States and, in particular, in Italy and Malta as a result of the forced migration flows resulting from developments in North-Africa and the Middle East in 2011.²² However, while considerable, the number of asylum applications registered in the EU, during and immediately after the civil war in Libya remained relatively modest, especially when compared to the numbers that fled from Libya to the neighbouring countries Egypt and Tunisia.

Based on the absolute numbers of asylum applicants lodged in the 27 EU Member States the top five countries receiving the highest numbers in 2011 were France (56,250); Germany (53,260); Italy (34,115); Belgium (31,915) and Sweden (29,670).²³ However, the ranking of EU Member States changes when the relative share of Member States in receiving asylum applications is calculated according to population size or Gross Domestic Product (GDP). For instance, when ranking EU Member States according to the number of asylum applications per 1 million population or 1,000 units of GDP, Cyprus, Sweden and Belgium are the top three EU Member States²⁴, whereas when the number of asylum applications per 1,000 km² is taken into account, Belgium, Malta and the Netherlands are the top three receiving EU Member States.²⁵

Another characteristic of the situation in the EU today is that, despite over 10 years of harmonization, the vast majority of asylum applications are lodged and dealt with in a limited number of EU Member States.²⁶ In 2011, for instance, 90% of asylum applicants were registered in only 10 EU Member States.²⁷ Regarding the country of origin of asylum seekers applying in EU Member States, in recent years the same countries have consistently figured in the top five, although the ranking has varied over the years. In 2011, the top five countries of origin of asylum seekers in the EU were: Afghanistan, Serbia (and Kosovo), Russian Federation, Pakistan and Iraq.²⁸ Asylum statistics produced by EUROSTAT in 2010 show that the majority of asylum claims from the top 5 countries of origin are lodged in only a limited number of EU Member States. In 2010, 68% of all asylum applications lodged by Afghan nationals were lodged in only five countries (Germany, Sweden, UK, Belgium and Austria).

²⁰ The total number of asylum applications registered in the 44 industrialised countries included in UNHCR's statistics reached an estimated 441,300. This is the highest number of applications in the 44 industrialised countries in 8 years, but is still considerably below the peak in 2001 when almost 620,000 applications were registered. See UNHCR, *Asylum Levels and Trends in Industrialized countries 2011*, at p. 7.

²¹ UNHCR, *Asylum Levels and Trends in Industrialized countries 2011*, at p. 8. In 2010 the ranking was: Serbia (and Kosovo); Afghanistan, Russian Federation, Iraq and Somalia.

²² The number of Tunisian and Libyan nationals applying for asylum in the EU increased dramatically in 2011 with an increase of 911% and 293% respectively compared to 2010. See UNHCR, *Asylum Levels and Trends in Industrialized countries 2011*, at p. 24.

²³ See EUROSTAT, *Asylum in the EU27*, 46/2011, 23 March 2012.

²⁴ According to such calculation France ranks 9th (population) or 6th (GDP), Germany 11th (population) and 12th (GDP), Italy 17th (population) and 19th (GDP) and Malta 13th (population) and 11th (GDP). See European Commission, *Communication on intra-EU solidarity in the field of asylum*, at p. 15.

²⁵ Idem.

²⁶ There is a variety of reasons why asylum seekers lodge their applications for international protection in a particular country, including the geographical location of a State, the presence of family members or diaspora communities, the perception that a country applies high protection standards and the likelihood of finding protection there or historical ties between the country of origin and the country of asylum. In some cases, the destination country was determined for them, either by those facilitating the asylum seeker's access to the EU by irregular means or through the operation of the Dublin system within the EU. Whereas a better understanding of those mechanisms is also important, this is beyond the scope of this paper.

²⁷ France (56.300), Germany (53.300), Italy (34.100), Belgium (31.900), Sweden (29.700), the United Kingdom (26.400), the Netherlands (14.600), Austria (14.400), Greece (9.300) and Poland (6.900). It should be noted that the numbers for each Member State refer to the number of applicants, not the number of applications. See EUROSTAT News release, *Asylum in the EU27*, 46/2012 – 23 March 2012.

²⁸ UNHCR, *Asylum Levels and Trends in Industrialized countries 2011*, at p. 24.

Germany, Sweden, Belgium, France and Italy together registered no less than 93% of all asylum applications lodged by Serbian nationals while 89% of all asylum applications lodged in the EU by Somali nationals were lodged in Sweden, The Netherlands, Germany, the UK and Finland.²⁹

Today, Member States disagree on what criteria should be taken into account in the debate on responsibility-sharing in the area of asylum and absolute numbers of asylum applications are often used to support the image of a Member State taking a disproportionate share of the number of asylum applications in Europe.³⁰ While it is acknowledged that the issue is complex, the debate on responsibility-sharing and solidarity in the field of asylum in the EU should in any case be based on the relative rather than absolute numbers of asylum applications, taking into account a combination of indicators including GDP and population size.³¹ Including these indicators in the equation is necessary to ensure that policies of responsibility-sharing and solidarity are based on the real capacity of countries to receive asylum seekers and host those in need of international protection.³² As further discussed in chapter 3, it is also important to include the number of persons who are in need of international protection but who do not lodge an asylum application in the Member State of arrival for lack of trust in the asylum system or because practical and administrative barriers prevent them from doing so and those whose application has been rejected but cannot be removed.

1.2. Responsibility-sharing and solidarity in the EU Treaty

The Lisbon Treaty has added another dimension to the debate by introducing a new Article 80 in the Treaty on the Function of the European Union (TFEU) according to which, “The policies of the Union set out in this chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle”.

Whereas it may not be possible yet to fully grasp the meaning and legal implications of Article 80 TFEU for the EU and its Member States in terms of shaping and further developing the CEAS, it must in any case be interpreted in line with the policy goals of Title V, Chapter 2 TFEU.³³ The overall goal of the Union in this policy area is to “constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States”, while “it shall frame a common policy on asylum, immigration and external border controls, based on solidarity between Member States, which is *fair towards third-country nationals*”.³⁴ At the same time, Article 78(1) TFEU requires the Union to develop a common policy on asylum, subsidiary protection and temporary protection which is in accordance with the 1951 Geneva Refugee Convention and other relevant Treaties while the Stockholm Programme calls for a CEAS based on “*high standards of protection*”. As a result, the scope of the obligations of the Union and the Member States resulting from Article 80 TFEU with regards to EU asylum policy will have to be assessed within that framework. This means *inter alia* that its meaning cannot be reduced to the obligation to adopt a series of measures that would solely serve Member States’ interests and needs. Solidarity measures

²⁹ With Sweden, The Netherlands and Germany being responsible for 81% of those applications. See EUROSTAT, *Asylum applicants and first instance decisions on asylum applications in 2010*, Data in focus 5/2011, at p. 7.

³⁰ Resulting in “one-dimensional burden-sharing regimes” that “aim to equalize the efforts of states on one particular contribution dimension, usually by seeking to equalise the number of asylum seekers and refugees that states have to deal with”. See E. Thielemann, “The Future of the Common European Asylum System: In Need of a More Comprehensive Burden-Sharing Approach”, *European Policy Analysis*, February, Issue 1 –2008.

³¹ See also below chapter 4.3.

³² See UNHCR, *Asylum Levels and Trends in Industrialized countries 2011*, at p. 13.

³³ European Parliament, *The Implementation of Article 80 TFEU on the principle of solidarity and fair sharing of responsibility, including its financial implications, between Member States in the field of border checks, asylum and immigration. Study* (hereinafter ‘Article 80 TFEU Study’), PE. 453.167, April 2011, at p. 37.

³⁴ Italics added.

must also serve the purpose of a common policy that is fair towards third country-nationals.³⁵ In the case of asylum this means that whatever measures are considered necessary to comply with Article 80 TFEU they will necessarily also have to contribute to establishing high standards of protection and may never contravene or undermine obligations arising from the 1951 Geneva Refugee Convention and other relevant human rights treaties as well as the right to asylum as laid down in Article 18 EU Charter of Fundamental Rights.

While the notion of fair sharing of responsibility as such is exclusively used within the context of Title V TFEU on the area of freedom, security and justice, the principle of solidarity has a much broader scope within EU law and has been identified by the Court of Justice as a “general principle inferred from the nature of the Communities”.³⁶ A concrete expression in the Treaty of the principle of solidarity is the principle of sincere cooperation as laid down in Article 4(3) Treaty on European Union (TEU). This principle includes both a positive and negative obligation. It requires the Union and the Member States, in full mutual respect, to “assist each other in carrying out tasks which flow from the Treaties” and to “take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union” and “to facilitate the achievement of the Union’s tasks”.

The negative obligation is reflected in the obligation for Member States to “refrain from any measure which could jeopardise the attainment of the Union’s objectives”. As it is the case with Article 80 TFEU, both the Union and the Member States are bound by the principle of sincere cooperation and EU institutions need to observe this principle in their relations with Member States as well as with other EU institutions. The CJEU has developed the principle of sincere cooperation in its jurisprudence and has interpreted this notion as encompassing a duty for Member States to cooperate with the Commission as well as institutions and organs in other Member States responsible for the implementation of Union law in addition to a general duty of diligence in implementing EU law, a duty to respect the interests of the Union and the institutional balance of the Union.³⁷ As a result, according to the principle of sincere cooperation, which applies to all policy areas, the Union and the Member States have a duty to assist each other in the area of asylum and immigration.³⁸ In line with the above-mentioned jurisprudence of the Court of Justice on Article 4(3) TEU, such a duty also exists between EU Member States, in particular where this is necessary to achieve the objectives of the Union.

What can be further derived from the wording of Article 80 TFEU is that solidarity and fair sharing of responsibility between Member States as a guiding principle for Union policies in the field of asylum, immigration and border policies should not be reduced to merely a matter of financial burden-sharing.³⁹ Since the financial implications of applying the principle of solidarity and fair sharing of responsibility in Union policies in this field are only quoted in Article 80 TFEU as an example, non-financial implications must be governed by this principle as well. While financial burden-sharing may be the most concrete way of implementing the solidarity and fair responsibility-sharing principles in the area of asylum today, other tools must be used where they are necessary to ensure compliance with Article 80 TFEU. Therefore, it may require, for instance, tools that provide Member States with the expertise necessary to comply with EU standards at a high level of protection, such as practical cooperation or the deployment of Asylum Support Teams to Member States under particular pressure. The

³⁵ “While Member States remain primarily responsible, a more comprehensive response is needed, especially as the Union has a duty not only to its Member State, but also to asylum applicants”. See European Commission, *Communication on intra-EU solidarity in the field of asylum*, at p. 10.

³⁶ See European Parliament, *Article 80 TFEU Study*, at p. 29. Article 222 TFEU, the so called solidarity clause, establishes an obligation for the Union and its Member States to act jointly in a spirit of solidarity if one of the Member States is the object of a terrorist attack or victim of a natural or man-made disaster.

³⁷ See K. Lenaerts and P. Van Nuffel, *Europees Recht*, Intersentia, Antwerpen – Cambridge, 2011, pp. 103-109. Between EU institutions the same obligations of sincere cooperation as Member States exist but the CJEU has so far established this principle only with regard to the obligation for the Council to consult the European Parliament in the framework of decision-making processes as laid down in the Treaties.

³⁸ See European Parliament, *Article 80 TFEU Study*, at p. 31.

³⁹ See also P. McDonough and E. Tsourdi, “Putting solidarity to the test: assessing Europe’s response to the asylum crisis in Greece”, *UNHCR New issues in Refugee Research*, Research Paper No. 231, January 2012, at p.10.

principle of solidarity and fair sharing of responsibility obviously also must govern all aspects of asylum policy for which the EU has competence according to Article 78 TFEU.⁴⁰ This also implies that the principles of solidarity and fair sharing of responsibility apply both with regard to persons who have been granted an international protection status under EU law and those who are waiting for a decision on their application.

The last sentence of Article 80 TFEU clearly imposes an obligation for Union acts adopted pursuant to this chapter to contain appropriate measures to give effect to the principle of solidarity and fair sharing of responsibility, whenever this is necessary. The latter indicates that solidarity and fair sharing of responsibility in this area are subject to the overarching principles of subsidiarity and proportionality as laid down in the TEU. According to Article 5(2) TEU “under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”. Asylum policy is clearly one of the areas in which shared competence between the Union and the Member States applies⁴¹ and therefore does not fall within the exclusive competence of the Union. Under the principle of proportionality, the “content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties”.⁴² While it is true that Article 80 TFEU must be interpreted within the limitations set by both principles, the latter also means that EU action is required where this is necessary to achieve the objectives of the Union.⁴³

Finally, in addition to Article 80 TFEU, the Lisbon Treaty provides a specific legal basis to address emergency situations as part of the common policy on asylum. Article 78(3) TFEU offers a possibility for the Council to adopt, on a proposal from the Commission, provisional measures for the benefit of “one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third country nationals”. While this provision has not been used so far by the Commission and its scope is yet to be further defined, it is in any case to be distinguished from the Temporary Protection Directive⁴⁴ as far as the type of situations that can be covered by such provisional measures is concerned. The reference to an “emergency situation” suggests that it would require at least a situation that is exceeding the capacity of the Member State(s) concerned but a “sudden” inflow of third country nationals is obviously less than the “mass influx” required under the Temporary Protection Directive. The potential of this provision as a legal basis for solidarity and responsibility measures to address specific emergency situations such as Greece or the situation in Italy and Malta in 2011 is certainly to be further explored.

⁴⁰ In the current state of play of EU asylum legislation, it means that it must be taken into account with regard to procedural guarantees, reception conditions, eligibility for international protection, temporary protection but also with regard to the EU mechanism allocating responsibility for examining asylum applications and the external dimension of the EU’s common asylum policy, such as partnership and cooperation with third countries in the field of asylum or resettlement. Whereas Article 80 TFEU does not distinguish between the internal and external dimension of the CEAS and therefore governs also the external dimension of the EU’s asylum policy, including resettlement and the cooperation with third countries in the context of the global approach to migration, this paper will focus mainly on the meaning of this provision for the internal dimension of the CEAS.

⁴¹ See Article 4(2)(j) TFEU.

⁴² See Article 5(4) TEU.

⁴³ As argued in the EP study, a double scrutiny is required for policymaking in the areas of border management, asylum and immigration: “(1) establishing whether or not Union measures are required in the particular field (Articles 77 to 79 TFEU) and (2) determining whether or not Member States will be able to implement them by themselves and whether additional solidarity measures are necessary”. See European Parliament, *Article 80 TFEU Study*, at p. 38.

⁴⁴ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (hereafter ‘Temporary Protection Directive’), OJ 2001 L 212/12. So far the directive has not been applied.

Chapter 2

EASO as a key actor in enhancing solidarity and fair responsibility-sharing

Irrespective of the impact of new Article 80 TFEU on the legal obligations of the EU institutions and Member States in this field, the existing EU legal and policy framework in the field of asylum already provides a variety of tools that can be used to further enhance solidarity and responsibility-sharing. These include instruments to ensure financial solidarity between EU Member States,⁴⁵ a directive addressing situations of mass influx of third country nationals in the EU, projects on the relocation of persons granted international protection within the EU and practical cooperation and exchange of expertise between asylum authorities through EASO, which was established in 2011. EU institutions have in recent publications all referred to the need for better and more efficient use of those existing tools although there are differing views as to what issues should be prioritised in the debate on solidarity.⁴⁶

The pivotal role of EASO in enhancing solidarity between EU Member States through its various activities is invariably stressed by all institutions.⁴⁷ Seen from the perspective of its competences and tasks, EASO has been designed to become one of the key actors to provide support to EU Member States and EU institutions in making the common area of protection and solidarity as defined in the Stockholm Programme a reality. However, this is not necessarily reflected in the financial resources dedicated to this new agency, as discussed below. ECRE acknowledges the growing importance of EASO in the development of the CEAS and the potential impact of its activities on asylum practices in the EU Member States.⁴⁸ However, this is without prejudice to the respective institutional roles and responsibilities of the Commission, the Council and the European Parliament with regard to further developing a common policy on asylum and individual Member States' obligations under EU and international human rights law towards those in need of protection. This chapter will discuss a number of issues relating to the general political and institutional context in which it operates; its relationship with non-governmental actors and cooperation with other EU agencies such as the Fundamental Rights Agency and Frontex. In addition, a number of recommendations are made to ensure that the envisaged early warning mechanism operates as a tool to identify, implement and monitor solidarity tools and measures as recommended by ECRE in this paper.

Established as a Regulatory Agency with the main objective to provide support to EU Member States, ECRE believes that EASO can only be successful and credible if Member States are willing to let it play its role in the interest of preserving the institution of asylum and developing a CEAS that is a protection model for other regions in the world.

EASO as a sufficiently resourced, transparent and independent agency

As the Agency is established to enhance practical cooperation and emergency support between EU Member States, it is to be considered as an instrument of solidarity in itself. ECRE acknowledges the potential of EASO as a tool to promote solidarity and responsibility-sharing within the EU but believes that this must be clearly framed in a context of promoting a CEAS based on high standards of protection. The EASO Regulation states that the agency "should fulfil its purpose in conditions which enable it to serve as a reference point by virtue of its independence, the scientific and technical quality of the assistance it provides, the transparency of its procedures and operating methods and its diligence in performing the

⁴⁵ The Future Asylum and Migration Fund. See also Chapter 4.1 below.

⁴⁶ See footnote 6.

⁴⁷ According to Article 1 of the EASO founding Regulation, EASO has been established to contribute to three main objectives: (1) improve the implementation of the CEAS, (2) to strengthen practical cooperation among Member States on asylum and (3) to provide and/or coordinate the provision of operational support to Member States subject to particular pressure on their asylum and reception systems. In addition to this, EASO has been called upon by the JHA Council to play a key role in the implementation of the future early warning, preparedness and crisis management mechanism including through developing tools for detecting situations likely to give rise to particular pressures. See Council, *Conclusions on a Common Framework for genuine and practical solidarity*, par. 10.

⁴⁸ See also chapter 4 below elaborating and making specific recommendations on a number of key activities of EASO.

duties assigned to it”.⁴⁹ This will require not only that EASO is provided with the necessary resources but also that it is free from inappropriate political interference so that it can operate as a truly independent European centre of expertise on asylum.

The safeguards with respect to the independence of the Executive Director vis-à-vis the management board as well as any government or any other body are particularly important in this respect.⁵⁰ They must be rigorously observed in order to enable EASO to analyse as accurately and objectively as possible the performance of EU Member States, identify deficiencies and protection gaps in the CEAS and to develop its activities as efficiently and effectively as possible. The members of the Management Board of EASO, who are appointed on the basis of their experience, professional responsibility and high degree of expertise in the field of asylum, have an important responsibility to ensure that the Agency can operate under the conditions as stated above.

As a Regulatory Agency, EASO is subject to the 2001 Regulation on access to documents of EU institutions, which not only includes a procedure to request access to documents, but also requires EU institutions to make documents directly accessible to the public in electronic form or through a register, including, where possible, documents relating to the development of policy or strategy.⁵¹ While this constitutes an important safeguard as such, further steps can be taken to increase transparency. Such measures could include, for instance, publication of operating plans of asylum support teams prior to their deployment so as to inform the general public about the aims and objectives of the support teams, their terms of reference and the resources allocated to them. Also further efforts could be made to make increase the transparency of Management Board meetings,⁵² working parties and expert meetings organized by EASO. The publication of the minutes of these meetings should be considered where possible and, at a minimum, a short summary of the main issues discussed should be made accessible, including through the Consultation Calendar on the EASO’s Consultative Forum’s homepage.⁵³ This would contribute to establishing the transparent procedures and operating methods required by the EASO Regulation. Transparency with regard to content and outcomes of the expert meetings is important as such meetings influence national asylum policies and approaches at least indirectly. Increased transparency of EASO in these areas would also contribute to further strengthening its position as an independent centre of expertise in the field of asylum.

The expectations have been high from the beginning for EASO and, as it has been the case for Frontex, the agency risks being used as a scapegoat by some stakeholders for the lack of progress in addressing some of the key weaknesses of the CEAS. At the same time, EASO has repeatedly referred to its lack of resources and staff as an important obstacle to reaching its full potential and achieving concrete results. ECRE acknowledges that the agency is under-resourced to deal with the variety of tasks within its mandate. EASO’s budget for 2012 is €12 million and an increase to €15 million in 2013 was requested for. However, citing austerity measures, the Council and the Commission have proposed a €3.1 million reduction in EASO’s budget for 2013.⁵⁴ As 2/3 of the budget is allocated to staff remuneration and administrative and infrastructural expenses, it has as little as €4 million in 2012 and €5 million in 2013 at its disposal for operating costs.⁵⁵ Compared to other agencies such as Frontex and the

⁴⁹ See recital 16 and Article 2(4) EASO Regulation.

⁵⁰ See Article 31(2) EASO Regulation stating that “[W]ithout prejudice to the powers of the Commission, the Management Board, or the Executive Committee, if established, the Executive Director shall neither seek nor take instructions from any government or from any other body”. The independence of the Agency is also explicitly referred to in recital 16 and 19 EASO Regulation.

⁵¹ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145/43.

⁵² See recital 17 EASO Regulation calling on the Management Board to establish transparent working procedures for decision-making by the Support Office.

⁵³ This should complement the limited information already provided with regard to such meetings in EASO’s annual activity report and EASO’s newsletter. A consultation calendar is one of the consultation tools envisaged in the Consultative Forum Operational Plan and is announced at EASO’s website. See <http://www.easo.europa.eu>.

⁵⁴ See EASO, *EASO Work Programme 2013*, p. 11.

⁵⁵ Operational costs in the 2012 Work Programme include emergency support (in total €1.470.000 for the asylum intervention pool and the asylum support teams); permanent support (in total € 2.391.000 for EAC, Quality Initiatives, COI, Interpreter’s Pool

Fundamental Rights Agency (FRA), and in light of EASO's mandate this is a very small budget. Frontex and FRA have started with similar modest budgets but, certainly in the case of Frontex, this has expanded enormously over the years.⁵⁶ ECRE believes that EASO's budget will need to grow at a similar pace to address the huge challenges in fully realising the CEAS. ECRE therefore calls for sufficient funding to be made available which would be an important signal that ensuring the right to asylum is considered as important as securing the EU's external border.

Recommendation

EU Member States must fully support and consolidate the development of EASO as an independent European centre of expertise that aims to secure the institution of asylum in the EU in accordance with international refugee and human rights law and the objectives of the Stockholm Programme.

Recommendation

As a key instrument to enhance solidarity in the field of asylum, EASO must be properly resourced to reflect the importance and variety of its tasks and its role as a key player in enhancing solidarity and quality in the CEAS.

Recommendation

EASO must further increase transparency concerning the functioning of its main governing body, the Management Board, including through making agendas of Management Board meetings publicly accessible. Summaries of the main outcomes and conclusions of meetings of expert working groups and working parties organized by EASO must also be made public.

2.2. Effective Consultation and dialogue with civil society

The role of non-governmental organisations (NGO's) and civil society organizations in asylum systems in EU Member States is acknowledged in the EASO Regulation mainly through the creation of a Consultative Forum. According to Article 51(4) EASO Regulation, the Consultative Forum must be called upon to make suggestions to the Management Board on the annual work-programme, give feedback and suggestions for follow-up measures on the annual report on the situation on asylum and communicate conclusions and recommendations of seminars and meetings to the Executive Director and the Management Board. EASO has already usefully stated that it considers the Consultative Forum as a continuous two-way dialogue and not as just an annual meeting.⁵⁷ It has established a Consultative Forum Register that, if properly utilised, may be a useful tool to identify the relevant organizations for the various consultation activities that will be organized within the Consultative Forum through workshops, seminars and e-consultation. Moreover, at the second annual meeting of the Consultative Forum in November 2012, an operational plan was adopted for the Consultative Forum which describes the methods and tools for consultation of civil society organisations with regard to EASO activities, including e-consultation and a Consultation Calendar as well

and Unaccompanied minors); Information, Documentation and Analysis (in total €585.000 for early warning mechanism, annual report and EASO website/portal); relocation, resettlement and external dimension (in total €175.000) and the Consultative Forum (in total €150.000). See EASO, *Work programme 2012*, EASO/MB/2011/25, September 2011, p. 9-11. Operational costs in the 2013 Work Programme after budget cuts include support for CEAS implementation (in total €800.000 for horizontal support for implementation, annual report on asylum and early warning and data analysis); support for practical cooperation (in total €2.800.000 for *inter alia*, training, quality processes, COI and relocation); support for Member States under particular pressure (€1.250.000 mainly for emergency support) and cooperation with partners and stakeholders (€150.000). See EASO, *EASO Work Programme 2013*, at p. 13.

⁵⁶ While Frontex started in 2005 with a €6.2 million budget it was raised to €19.2 million in 2006. Frontex' budget was €118.187.000 in 2011 and €84.960.000 in 2012. See Frontex, *Budget 2012*. Available at http://www.Frontex.eu.int/gfx/Frontex/files/budget/budgets/final_budget_2012.pdf

⁵⁷ EASO, *2011 Annual Report on the Situation of Asylum in the European Union and on the Activities of the European Asylum Support Office* (hereinafter 'Annual Report EASO 2011'), at p. 60.

as the selection criteria for membership of the Forum.⁵⁸ While these are welcome and useful initiatives to engage civil society in the activities of EASO, further steps should be taken.

Firstly, interactions between the Consultative Forum and the Management Board as EASO's governing body should be developed beyond the mere presence of some Management Board members during the annual Consultative Forum Meeting. This would be useful in particular to ensure that suggestions and recommendations made by the Consultative Forum to the Management Board on the basis of Article 51 of the EASO Regulation are effectively addressed. As things currently stand, no satisfactory mechanism is in place to ensure that civil society organizations have a clear understanding of how and/or if their suggestions and recommendations have been received and acted upon. At a minimum, the Management Board should commit to provide detailed feedback to the suggestions and recommendations made by the Consultative Forum and present and discuss these at the Forum's annual meeting.

Furthermore, better use should be made of the possibility under the EASO Regulation to involve NGO experts in the working parties EASO may set up, that essentially bring together governmental experts and judges.⁵⁹ Article 32(3) EASO Regulation explicitly mentions the possibility for working parties to invite representatives of civil society working in the field of asylum. EASO acknowledges that "many organizations working in the field of asylum have specific experience and expertise that is not readily available to national administrations and other institutions".⁶⁰ ECRE believes that EASO as an independent European centre of expertise on asylum should develop its activities based on the input from both governmental and non-governmental stakeholders. Therefore, it should set up a mechanism to involve relevant experts from NGOs, academia, judiciary etc. in these working parties or otherwise seek their input prior to the meeting. The Consultative Forum Register can already assist EASO in identifying relevant expertise among the organizations registered. Moreover, EASO should systematically share the dates and topics of working parties with the organizations registered with EASO sufficiently in advance so as to enable them to make concrete suggestions for the participation of NGO experts. Such information could easily be provided through the annual consultation calendar foreseen in the operational plan of the Consultative Forum and should be consistently updated on the EASO website. In addition, it should develop tools to reach out to those non-governmental organisations or civil society representatives that have relevant expertise but are not (yet) registered as a member of the Consultative Forum. NGO-consultation mechanisms developed within the UN and the Council of Europe⁶¹ but also within the FRA and Frontex could also provide further guidance and inspiration in further enhancing consultation processes within EASO. The positive experience so far with the involvement of NGO-experts alongside academics in the context of the European Asylum Curriculum (EAC) should encourage EASO to further mainstream contributions of non-governmental experts in a meaningful way in its activities.

⁵⁸ See EASO, *EASO Consultative Forum Operational Plan*, September 2012.

⁵⁹ And is obliged to set up with regard to the analysis of country of origin information under Article 4(1)(e) EASO Regulation. See Article 32(1) EASO Regulation.

⁶⁰ EASO, *Annual Report EASO 2011*, at p.59.

⁶¹ See for example the Conference of International Non-Governmental Organisations established since 2005 within the Council of Europe and the Annual Consultations with NGOs within UNHCR.

Recommendation

EASO must make full use of the wealth of expertise and experience NGOs have acquired through their work with asylum seekers. EASO must further invest in developing efficient tools and structures to deepen the dialogue with civil society, including an e-platform for consultation. Direct interaction with the Management Board must be established in particular with regard to the feedback and suggestions provided by the Consultative Forum under Article 51 EASO Regulation.

Recommendation

EASO must establish a transparent procedure to verify which relevant experts from NGOs, academia and the judiciary can be involved in working parties and other expert meetings organized by EASO. Dates and topics of such meetings must be shared sufficiently in advance with Consultative Forum members and be made publicly available *inter alia* through a permanently updated annual consultation calendar as envisaged in the Consultative Forum Operational Plan.

2.3. EASO's interaction and cooperation with other EU Agencies

EASO's activities in enhancing solidarity and responsibility-sharing in the field of asylum within the EU are linked to activities of other EU Agencies or bodies. The EASO Regulation requires the agency to cooperate with all relevant bodies of the Union in order to create synergies and prevent duplication of efforts.⁶² Two EU agencies are particularly relevant to the work of EASO: Frontex and the FRA.⁶³ FRA's main task is to provide expertise and advice to European institutions and bodies, including other EU agencies with respect to fundamental rights when implementing Union law.⁶⁴ FRA has been active in documenting and monitoring EU Member States' performances with regard to respect for the fundamental rights of asylum seekers and refugees.⁶⁵ Based on its mandate, FRA must play a key role in ensuring compliance with the EU Charter of Fundamental Rights and, in particular, that the right to asylum is mainstreamed in all activities of EASO including training, operational support through Asylum Support Teams or cooperation with third countries. This should be properly reflected in the future working arrangement between EASO and FRA.⁶⁶ In addition, EASO should make fundamental rights training based on the EU Charter mandatory for its own staff as this would further contribute to creating a "fundamental rights culture" within EASO.⁶⁷ In this regard, the appointment of a fundamental rights officer within EASO competent to independently monitor in particular EASO's activities in providing operational support to Member States and on the external dimension of the CEAS as to their compliance with the EU Charter of Fundamental Rights and in particular the right to asylum, should be considered. Operational plans for the deployment of EASO Asylum Support Teams should include a complaints mechanism allowing a swift and independent investigation of alleged human rights violations.⁶⁸

⁶² Article 52 EASO Regulation.

⁶³ Although Article 52 EASO Regulation requires that such cooperation is established in working arrangements concluded with those agencies, no such arrangements have been published so far.

⁶⁴ "In order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights". See Article 2 Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ 2007 L 53/1.

⁶⁵ See e.g. FRA, *Access to effective remedies: The asylum-seeker perspective*, 2011 and FRA, *Coping with a fundamental rights emergency. The situation of persons crossing the Greek land border in an irregular manner*, 2011.

⁶⁶ See EASO, *EASO Work Programme 2013*, at p.32.

⁶⁷ As it is envisaged for all Commission departments in the legislative process, the creation of a "fundamental rights reflex" is particularly relevant EASO staff as well in view of the nature of EASO's activities. See COM(2010) 573 final, *Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union*, Brussels, 19 October 2010.

⁶⁸ In September 2012 the Frontex Management Board designated a fundamental rights officer within the EU border agency, as required by Article 26a amended Frontex Regulation. See on this issue also European Parliament, *Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office*, Study, 2011, pp. 111-112.

Frontex' operations at the external borders of the EU and outside EU territory directly impact on access to the territory and protection in the EU. Furthermore, its activities in the field of risk analysis and data gathering about migratory flows to the EU are directly relevant to EASO's mandate, including its role in identifying situations where additional support is needed and with regard to the early warning mechanism. Closer involvement of EASO in the activities of Frontex can contribute to swifter and accurate identification of operational needs to better ensure access to protection during external border control operations coordinated by Frontex.⁶⁹ This will require closer involvement of EASO in Frontex' planning of border control operations. Given its specific expertise and as it is responsible for the deployment of Asylum Support Teams and the management of an Asylum Intervention Pool, EASO is best placed to ensure that the proper expertise required for the initial assessment of protection needs is made available. Therefore, it should be ensured that EASO's expertise in the field of asylum is systematically integrated in any border control operation carried out by Frontex. This would ensure that core functions with regard to the identification of persons in need of international protection in such situations is carried out by qualified experts in the field of country of origin information (COI), interpretation, interview techniques etc., rather than by border guards that are often not properly trained for this purpose. The recently adopted working arrangement between Frontex and EASO raises the possibility of "establishing common or mixed teams of border management and asylum experts".⁷⁰ ECRE believes this could indeed be further explored as a way to ensure that identification of persons in need of international protection is mainstreamed in Frontex operations provided that UNHCR has a prominent role within such teams and that such operations are subject to effective human rights monitoring. The latter should not only include monitoring through the activities of the Frontex Fundamental Rights Officer and Consultative Forum as laid down in the Frontex Regulation but also regular monitoring by reputable human rights organisations and UN and Council of Europe bodies, such as the Council of Europe's Commissioner for Human Rights. EASO's involvement in such operations should also be consolidated in the common operational procedures for border guards for joint operations with due regard to ensuring access to the asylum procedure, which Frontex is required to prepare according to the March 2012 Council Conclusions on a Common Framework for genuine and practical solidarity.⁷¹

⁶⁹ EASO, together with UNHCR and the FRA is a member of the Consultative Forum that is set up within Frontex as part of its fundamental rights strategy. See Article 26a Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (hereinafter 'Amended Frontex Regulation'), OJ 2011 L 304/1.

⁷⁰ See Article 3 Working Arrangement between the European Asylum Support Office (EASO) and the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 29 September 2012.

⁷¹ "Frontex should prepare in accordance with its mandate as well as applicable EU and international law clear and detailed common operational procedures for border guards containing operational procedures for joint operations both on land, at sea and at airports, with due regard to ensuring access to the asylum procedure". See Council of the European Union, *Conclusions on a Common Framework for genuine and practical solidarity*, par. 13, vi.

Recommendation

The Fundamental Rights Agency must systematically monitor and assess EASO's work in the area of practical cooperation and support to Member States subject to particular pressure as to their compliance with the EU Charter on Fundamental Rights. Such assessments and specific recommendations to EASO should be included in the annual report on EASO's activities.

Recommendation

EASO's expertise in the field of asylum must be systematically integrated in any border control operation carried out by Frontex to ensure that experts with specific asylum-related expertise are used in the identification of persons with international protection needs in mixed migration flows. This must be explicitly consolidated in Frontex' common operational procedures for border guards for joint Frontex operations.

Chapter 3

A Permanent Health and Quality Check of the CEAS through a comprehensive early warning mechanism

Making a CEAS based on high protection standards a reality for both states and asylum seekers is the key challenge for the EU in the coming years. Based on EU asylum legislation, it is implementation in practice of these standards that will eventually determine the success or failure of the CEAS. Permanent monitoring of Member States' asylum systems and the treatment of asylum seekers in practice will be necessary to identify in a timely manner where the protection gaps are and which solidarity or responsibility-sharing measures are necessary and contribute to remedy the flaws within the CEAS. The need for a specific tool at the EU level ensuring that particular pressures on or malfunctioning of Member States' asylum systems are detected and addressed promptly has been politically acknowledged in the compromise on the Dublin recast Regulation. The mechanism for early warning, preparedness and crisis management (hereafter 'Early Warning Mechanism' or 'EWM') envisaged in Article 33 recast Dublin Regulation should fulfil this role albeit explicitly for the purpose of securing the proper functioning of the Dublin Regulation. This chapter acknowledges the potential of such a mechanism but suggests adopting a more ambitious approach and to build on the political consensus around the EWM to achieve a permanent health check of all building blocks of the CEAS including an assessment of its quality. Such a system must fully respect the Commission's role of monitoring implementation of EU asylum legislation and where necessary launching infringement procedures against Member States failing to comply with the EU asylum acquis.

3.1. A permanent health check of the CEAS through a comprehensive EWM

Article 33 recast Dublin Regulation is not the only legal basis in EU law for an Early Warning Mechanism. Article 9(3) EASO Regulation requires the agency to "make use of existing early warning systems and mechanisms and, if necessary, set up an early warning mechanism for its own purposes". This is further supported by EASO's task in Article 11 EASO Regulation to organise, coordinate and promote the exchange of information between the Member States' asylum authorities concerning the implementation of all relevant instruments of the EU asylum acquis. The Regulation contains no clear definition of an early warning mechanism or system and how it would operate and therefore gives flexibility to EASO. However, Article 9(2) EASO Regulation describes in detail the type of information the agency needs to gather, with regard to Member States under particular pressure in order to "foster quick and reliable mutual information to the Member States' authorities".⁷² Whereas Article 9 EASO Regulation seems to link an early warning mechanism primarily to situations of particular pressure involving large numbers, it is not limited to the operation of the Dublin Regulation. Moreover, gathering and exchanging information on the implementation of the CEAS and in particular on the processing of asylum applications by national administrations and authorities is among the key tasks of EASO. As EASO has been invited by the Council to assist in the implementation of the EWM under the Dublin Regulation and to develop tools for detecting situations that may develop into particular pressures, this provides an opportunity to develop a multifunctional tool based on a comprehensive set of data on asylum practices in the EU Member States and Schengen Associated States.

As laid out in the recast Dublin Regulation, the EWM triggers a sequence of actions to be taken by the Member State under pressure or where a flaw in the asylum system has been

⁷² This includes data relating to the structures and staff available, especially for translation and interpretation, information on countries of origin and on assistance in the handling and management of asylum cases and the asylum capacity in those Member States subject to particular pressure. EASO's objective for 2013 is to further enhance the early warning and preparedness system in particular by refining the mechanism for collecting data and the building of a risk-assessment procedure. See EASO, *EASO Work Programme 2013*, p. 26-27,

identified. As such, this is in line with the individual responsibility placed on each individual Member State to comply with its obligations under EU asylum legislation and international refugee law. However, some of the crucial steps in the chain of action envisaged under the EWM remain optional for the Member State concerned, therefore making the entire system dependent on whether or not the Member State is willing or able to take the initiative to draft a preventive action plan following an assessment of the Commission.⁷³ Furthermore, EU solidarity in the EWM is mainly enacted through EASO's involvement in various stages of the mechanism: (1) identification of the problem through permanent information gathering; (2) assistance with drafting a preventative action plan; (3) analysis of the implementation of the preventive action plan; (4) assistance for the elaboration of a crisis management action plan. While the Commission steers the process, EASO's role is key, as its intervention at each stage of the process determines whether subsequent action is necessary by the Member State concerned.

Building on the legal basis provided in the EASO Regulation and the existing political consensus on the need for a proper monitoring system, ECRE believes that a more ambitious approach is both necessary and possible. What is needed is a well-resourced and sophisticated monitoring system that allows for a permanent health check of all aspects of the CEAS and triggers targeted actions to strengthen Member States' capacities to deal with their obligations under EU and international human rights and refugee law where necessary. Regular on the spot visits by Quality Assessment Teams as suggested by ECRE below in section 3.2. must also be part of this system. Such a mechanism is central to a CEAS based on the full respect of the fundamental rights of asylum seekers and refugees and the principle of solidarity and fair sharing of responsibility. It should therefore not merely be seen as a tool that primarily aims to save the Dublin system but rather supports Member States in establishing and maintaining high quality asylum systems that respect the fundamental rights of asylum seekers in accordance with Member States' obligations under international and EU law. Therefore, such a mechanism must perform three main functions: (1) permanent assessment of Member States' asylum systems, including their quality, on the basis of accurate information from all available sources; (2) analysis and identification of protection gaps, human rights violations and particular pressures; (3) coordinate the use of the appropriate responsibility-sharing tools. EASO should be properly resourced for setting up the mechanism as an independent centre of expertise in the field of asylum and collecting the information indicated below.

The Early Warning Mechanism should operate on the basis of up-to-date and reliable information regarding asylum practices in each Member State.⁷⁴ Relevant indicators should be developed with regard to this information in order to enable an assessment of where quality and/or capacity gaps exist and require remedial action. The Early Warning Mechanism must collect information on the following areas in particular:

(1) Monthly/quarterly statistics about the numbers of asylum applications and decisions taken at the various stages of the asylum procedure in accordance with Member States obligations under Article 4 of the EU Regulation on migration statistics.⁷⁵ Statistics should be disaggregated according to nationality, gender, age, sex. Statistical information on decisions taken should be disaggregated according to the type of procedure used (Dublin, admissibility, accelerated, regular procedure) and according to the type of protection status granted (refugee

⁷³ The case of Greece, for instance, shows that sometimes the administrative structures in a Member State can be weakened to such an extent that the responsible authorities may not be capable anymore of taking the steps necessary to launch requests to the EU level for assistance.

⁷⁴ This should also include the Schengen Associated States as they are part of the of Dublin system for allocating responsibility for examining asylum applications. Data must be gathered on Schengen Associated States with respect to all aspects listed except compliance with the EU Asylum acquis other than the Dublin and EURODAC Regulation.

⁷⁵ Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers, OJ 2007 L 199/23.

status, subsidiary protection, humanitarian status). This should also include the number of forced/voluntary returns disaggregated according to nationality;

(2) Information on staff resources at first instance and appeal bodies, training programmes, average duration of first instance and appeal procedures;

(3) Bi-annual updates on the backlog of asylum decisions at the first instance and at the appeal stage;

(4) Availability and accessibility of interpreters and legal assistance in first instance and appeal procedures, availability of information to asylum seekers;

(5) Availability and accessibility of mechanisms to identify vulnerability and special needs, use of medico-legal reports and age assessment tools;

(6) Capacity of the reception system for asylum seekers, conditions in reception centres, and access to health services;

(7) Conditions in detention centres, average duration of detention, availability and accessibility of legal assistance and other support services for asylum seekers in detention;

(8) Implementation of standards and safeguards laid down in the EU asylum acquis and level of compliance in practice with such standards⁷⁶

It should be noted that exclusive focus on the number of asylum applications officially lodged in EU Member States would provide only an incomplete picture, as it would fail to take into account the increasing number of persons that are on the territory of the EU Member States and in need of international protection but do not lodge an asylum application. This may be because they do not wish to apply for asylum in the Member State of first arrival as they have no faith in its asylum system or because practical and administrative obstacles provide them from doing so, which is, for instance, the case in Greece. In other cases, persons wishing to apply for international protection prefer to do so in a particular Member State because of the presence of family members or relatives there. In both cases, the Dublin Regulation acts as an additional barrier to effectively applying for asylum and finding international protection. It is acknowledged that it is challenging to assess this as by definition no detailed statistical data are available. However, data such as on the number of refusals of entry and detections at the borders of EU Member States of nationalities that are of particular concern to UNHCR, compared to the number of asylum applications actually lodged in these Member States, can be used to make a first estimate of the potential number of persons in such situation. In addition, the third-country nationals that have been refused international protection status but are still on the territory because they cannot be removed in compliance with the *non refoulement* principle or because of administrative reasons that are beyond the individual's control must be taken into account. Both categories of persons in need of protection present on EU territory trigger the obligations of EU Member States under international refugee and human rights law and EU asylum and immigration law. They therefore must be taken into account as well in the discussion on fair sharing of responsibility and solidarity in the field of asylum.

The national contact points within the asylum authorities of each Member State should be responsible for the collection and provision of objective and up-to-date information on the issues listed above to EASO. However, the effectiveness of the EWM is premised on all relevant information and sources, including non-governmental sources being taken into account in EASO's analysis of the situation in a Member State. While the reference to the EASO Regulation in Article 33 recast Dublin Regulation presupposes that this must be included, there is a concern that this was not being adhered to in practice in the context of the first EASO annual report on the situation of asylum in the Union. Indeed, notwithstanding the

⁷⁶ Including as a result of Commission monitoring. See on the specific role of the Commission in this regard section 3.3.

fact that various national NGOs provided EASO with often detailed and specific information on good and bad practice in EU Member States, the report predominantly relied on the information provided by governments.⁷⁷ Therefore, the EWM should include clear guarantees that all relevant sources will be taken into account, including channels to facilitate consultation of practitioners and relevant NGOs active in the field. Through the consultation channels established in the framework of the Consultative Forum or through specific channels, national non-governmental organisations, lawyers and academic experts should be given an opportunity to provide further input to EASO, so as to ensure that the information provided to EASO is as comprehensive as possible.⁷⁸ Moreover, the EWM should also take into account the results of monitoring of the human rights situation in EU Member States carried out by the Committee for the Prevention of Torture of the Council of Europe and in the context of the Universal Periodic Review under the auspices of the UN Human Rights Council.

An effective EWM furthermore requires sufficient resources in order to ensure permanent and thorough monitoring of Member States' asylum systems and compliance with human rights obligations. In light of its key role in the various stages of the EWM, the limited financial and staff resources of EASO poses the risk that it will not be able to perform its various tasks in the operation of the EWM properly or promptly. Failure to properly resource the EWM may result in the mechanism never being applied in practice or if applied not triggering the action required to address the real flaws in the asylum system of the Member States. This would be unfortunate as a workable tool to promptly identify situations likely to give rise to particular pressures and operational problems in a Member State's asylum system, of which asylum seekers will become the first victim and may also result in onward movements to other Member States, is indispensable in a CEAS. In order to mitigate such risks, EASO's budget must be reviewed to ensure that EASO has sufficient resources to perform its various tasks under the EWM. In case EASO is lacking such resources under its current budget, these should be made available as soon as possible as long as the new Asylum and Migration Fund is not operational. Sufficient funding must also be allocated in national policy dialogues to the provision of data on the performance of the national asylum system to EASO by both national contact points in the asylum authorities as well as non-governmental experts and practitioners.

Where deficiencies in the asylum system of a Member State are identified or can be expected either as a result of a Member State not complying with its obligations under EU and international human rights law or because of disproportional pressure on its asylum system, appropriate remedial action must be undertaken. Non-compliance with the EU asylum acquis must in any case trigger a firm response by the Commission as guardian of the Treaty as further discussed in section 3.3. However, notwithstanding the primary responsibility of each Member State to comply with EU and international standards, additional solidarity measures such as extra funding; enhanced practical cooperation; joint processing or intra-EU relocation as proposed by ECRE in chapter 4 of this paper, may be required to preserve the fundamental rights of asylum seekers, persons in need of international protection and those whose applications were not successful. These should be clearly stipulated in (preventive) action plans, modelled on the preventive action plans and crisis management plans envisaged in Article 33 recast Dublin Regulation but initiated by the Commission on the basis of the information gathered through the EWM as suggested by ECRE. Rather than being optional, each Member State should be under an obligation to draft a tailor-made action plan together with the Commission and EASO, once a protection gap or lack of resources has been identified

⁷⁷ See EASO, *Annual report on the Situation of Asylum in the European Union and on the Activities of the European Asylum Support Office report* (hereinafter 'EASO report'), 2011 and ECRE, [ECRE's Observations on the EASO Annual Report on the Situation of Asylum in the European Union and on the Activities of the European Asylum Support Office](#), Brussels, 14 September 2012.

⁷⁸ The inclusion of civil society organisations in early warning systems developed in the framework of conflict prevention can serve as an example. For instance, the early warning and monitoring mechanism coordinated by the ECOWAS Commission on the basis of Article 58 of the revised Treaty and the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security establishes a partnership with civil society organisations such as WANEP in its monitoring activities. For further information see http://www.comm.ecowas.int/dept/stand.php?id=h_h2_brief&lang=en.

through the EWM. Such action plans should be publicly available to ensure transparency and democratic control by the European Parliament. As discussed in chapter 1, the principle of solidarity and fair responsibility-sharing laid down in Article 80 TFEU requires the adoption of Union acts containing appropriate measures to give effect to this principle whenever necessary. In combination with the principle of sincere cooperation, this suggests a joint responsibility for EU Member States to assist an EU Member State where this is necessary to achieve the objective of establishing a CEAS based on high standards of protection where the right to asylum is fully respected in practice, is being jeopardised. A permanent health and quality check as described in this chapter will contribute to swift identification of the most relevant and appropriate solidarity measures for that purpose.

Recommendation

A meaningful and comprehensive Early Warning Mechanism (EWM) must be established, capable of identifying current and potential protection and resource gaps in the asylum systems of EU Member States in a timely manner and on the basis of accurate and up-to-date information obtained from all available and relevant sources. Such a system must allow for a permanent health and quality check of the CEAS and be based on the following principles:

- The EWM must serve the purpose of improving protection standards and quality of all its aspects and not merely of ensuring the functioning of the Dublin Regulation.
- It must guarantee rigorous and comprehensive monitoring of all aspects of the Member States' asylum systems, including quality of reception conditions, asylum procedures and individual decision-making. Monitoring must include regular spot checks by Quality Assessment Teams.
- Guarantees must be in place to ensure that information gathered and processed in the mechanism is based on a variety of sources, including information provided by expert non-governmental organisations and practitioners and resulting from human rights monitoring carried out by the Committee for the Prevention of Torture, the Human Rights Commissioner of the Council and Europe and the UN Universal Periodic Review.
- Identification of future risks or existing protection gaps through the EWM must trigger immediate action and establish an obligation for Member States to set up targeted action plans in coordination with the Commission and supported by EASO.
- Information processed through the EWM, assessments and recommendations made by EASO and the Commission and the resulting action plans must be publicly available.

3.2. Quality Assessment as an integral part of the Early Warning Mechanism

In recent years, several initiatives have been developed by UNHCR to assess the quality of asylum procedures, which highlights the importance of mainstreaming permanent evaluation and quality assurance mechanisms of decision-making.⁷⁹ The need for ensuring quality of asylum systems is acknowledged in the EASO Regulation,⁸⁰ as well as in EASO's Work Programme 2013.⁸¹ EASO support for such quality activities is seen as "an important tool for gaining a common level of quality in asylum procedures in the EU".⁸²

ECRE has recommended in the past the establishment of quality assessment mechanisms through the creation of independent quality assessment teams (QAT) with a clearly defined reporting role.⁸³ As the CEAS further develops and progresses, ECRE sees an increased relevance and need for an EU quality assessment and assurance mechanism that complements existing systems at the national level with a view to ensuring quality throughout the EU. Such a mechanism should be part of the EWM and should allow for thorough assessment of all components of the CEAS. This should include quality assessment of the asylum procedure, in particular quality of decision-making, and reception conditions as well as of safeguards against arbitrary detention of asylum seekers. This is in addition to national quality assessment and assurance mechanisms which must be mainstreamed in all EU Member States as an integral part of their national asylum system.

QATs should be established within a properly resourced EASO building on the existing EASO quality team, however, in view of the specific nature of its tasks, UNHCR should take the operational lead as it has already developed considerable experience in quality assessment of EU Member States' asylum procedures.⁸⁴ In addition to an EASO staff member they should also comprise renowned academics with a track record in the area of asylum and specialist NGOs. The composition of the QATs should preferably also include independent experts who are active in other Member States than the Member State that is being assessed.

In the medium to long term, quality assessment should be carried out on an annual basis in *all* EU Member States and Schengen Associated States as they should form part of the permanent health check of the CEAS.

In the short term, quality assessments should be prioritised in countries where no such assessments have been carried out recently or where recent assessments have identified significant flaws. As far as the quality of individual decision-making within asylum procedures is concerned, assessment should be carried out through analysis of randomly selected files with regard to four stages: (i) the period of time from an applicant's arrival in the country until the first interview; (ii) the interview itself, including the quality of interpretation;⁸⁵ (iii) the written decision; (iv) the court appeal or review of the first instance.⁸⁶ This should also include screening and assessment of the use of COI, including EASO COI-reports, in individual cases

⁷⁹ See for instance UNHCR, *ASQAEM Summary. Asylum Systems Quality Assurance and Evaluation Mechanism Project in the Central and Eastern Europe sub-region*, February 2010.

⁸⁰ In recital 5 of the preamble of the EASO Regulation it is stated that practical cooperation on asylum aims to increase convergence and "ensure ongoing quality of Member States' decision-making procedures in that area within a European legislative framework". Furthermore training offered by EASO should be of high quality while the agency is required to evaluate the results of its activities and make a comprehensive comparative analysis of them with the aim of "improving the quality, consistency and effectiveness of the CEAS". See Articles 6(5) and 12(1) EASO Regulation.

⁸¹ "With the overall objective of supporting the implementation of a qualitative Common European Asylum System, EASO will contribute to the development of tools, techniques, methodologies and good practices to improve the quality of decision-making throughout the EU". See EASO, *Work Programme 2013*, at p. 17. However, due to budget constraints the engagement of two experts and the organisation of four meetings have been deprioritised.

⁸² See EASO, *Work Programme 2012*, EASO/MB/2011/25, September 2011, pp.15-16.

⁸³ See ECRE, *The Way Forward- Asylum Systems*, pp. 24-25.

⁸⁴ The central role of UNHCR is in accordance with its supervisory role under Article 35 of the 1951 Geneva Convention.

⁸⁵ This should preferably include a possibility for QAT to have one-to-one interviews with decision-makers as this would allow immediate advice on how to address certain flaws at micro-level immediately.

⁸⁶ See UNHCR, *Building In Quality. A Manual on Building a High Quality Asylum System. Further Developing Asylum Quality (FDQ) in the European Union*, September 2011.

at the national level as well as the quality of national training programmes either within or outside the framework of EAC training modules.⁸⁷ Furthermore, assessing the quality and accessibility of legal assistance in the Member States during the various stages of the asylum procedure as well as procedural guarantees for the most vulnerable asylum seekers such as unaccompanied children and victims of torture should be prioritised.

As detention is unfortunately still an inherent part of asylum policies in EU Member States and is sanctioned by EU law and because of its harmful effects, it is important to permanently assess the “quality” of detention practice. This implies a thorough assessment of the quality of procedural safeguards required under international and EU law to prevent arbitrary detention of asylum seekers and, where asylum seekers are detained, of the quality of the conditions of detention. As the Committee for the Prevention of Torture (CPT) has built considerable expertise in monitoring the detention of asylum seekers and migrants in European countries,⁸⁸ the role of QATs in this field should be clearly defined so as not to duplicate or undermine the CPT’s role. In this regard, ECRE believes that QATs could play a complementary role to the CPT’s monitoring of a State’s detention practice, in focussing specifically on the impact of detention on the quality of decision-making on an individual asylum application and on the health of the asylum seeker.

The key findings of quality assessments at national level should be made public to ensure transparency and accountability and that these findings are acted upon by the relevant authorities. They should also be included in EASO’s annual report on asylum as well as any specific recommendations for EASO coordinated support for addressing the quality issues identified by the QAT.

Recommendation

EU-level quality assessment of representative samples of individual decisions, reception accommodation and reception conditions and safeguards against arbitrary detention and detention conditions must be an integral part of the Early Warning Mechanism. Independent Quality Assessment Teams must be established within EASO with a leading role for UNHCR and additionally comprising independent experts, including academics and specialist NGOs. The key findings of quality assessment activities must be made public, including in the EASO Annual Report on Asylum.

Recommendation

As regards detention, the role of Quality Assessment Teams must complement monitoring activities of the Committee on the Prevention of Torture and focus on the quality of procedural safeguards against arbitrary detention and impact of detention on the quality of decision-making on asylum applications and on the health of the asylum seekers

3.3. The Commission’s role in monitoring and enforcing EU asylum law.

Evaluating the health and quality of the CEAS implies evaluating the way Member States comply with their obligations under the EU asylum acquis in practice, as this is what the CEAS is built on. This will inevitably overlap to a certain extent with the Commission’s task of monitoring the implementation of EU legislation as guardian of the Treaty. EASO’s mandate includes contributing to the implementation of the CEAS which necessarily implies gathering information on how the standards and safeguards in the EU asylum acquis are complied with in practice by Member States. However, it is clear that this must be carried out in full respect of the Commission’s monitoring role under the TFEU. It remains for the Commission to assess

⁸⁷ This should preferably be done in close consultation with the panel of independent experts on COI responsible for peer reviewing of EASO COI as proposed in Chapter 4 (section 4.2.2).

⁸⁸ The CPT conducts country visits on a periodic basis (usually once every four years) and ad hoc visits when necessary. It has also adopted a set of standards with regard to immigration detention. See European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *CPT Standards*, CPT/Inf/E (2002) 1 - Rev. 2011, p. 64-82.

whether or not Member State practice breaches these standards and take the appropriate measures to ensure compliance with EU law. Therefore, it is equally crucial for the Commission to allocate sufficient resources to the effective monitoring of transposition and implementation of the EU asylum acquis. This is in particular necessary with regard to the potential negative effects of specific provisions in the asylum acquis on the right to asylum such as with regard to the operation of the Dublin Regulation, detention, safe third country concepts, possibilities to postpone final decisions on asylum applications in the event of large numbers of asylum seekers arriving, actors of protection and exclusion clauses etc. Moreover, Member States' practice with regard to issues such as access to free legal assistance, access to the labour market and safeguards for vulnerable asylum seekers and persons granted protection such as victims of torture and unaccompanied children must be prioritised in view of the new standards adopted in the recast EU asylum legislation. In recent years only a limited number of infringement procedures have been launched by the Commission against Member States related to the EU asylum acquis, notwithstanding the often substandard treatment of asylum seekers reported in a number of EU Member States.⁸⁹ The conclusion of negotiations on the asylum package in 2013 presents an opportunity for the Commission to prioritise monitoring Member State practice and enforcing compliance with EU standards where necessary by investing in additional staff and resources.

Information collected by EASO in the framework of the permanent health and quality check should obviously be used as an additional but not an exclusive source of information for the Commission to fulfil this task. This should complement not replace the Commission's channels for monitoring implementation while duplicating efforts in collecting and producing the required information should be avoided. At the same time non-compliance with EU standards as an indicator for the permanent health check should not be reduced to infringement procedures actually being launched. Whereas an infringement procedure will in most cases be a clear indicator of a protection gap in the asylum system of the Member State concerned, absence of such procedure cannot not automatically lead to the conclusion that State practice fully complies with the EU asylum acquis either.

In the next chapter, ECRE presents its views on how existing and suggested tools for solidarity and responsibility-sharing could and should be used in a way that fully respects the rights of asylum seekers and refugees. A truly permanent health and quality check would enable EU institutions and agencies to launch the most effective solidarity and responsibility-sharing measures where and when they are most needed.

Recommendation

The Commission must allocate sufficient resources to monitoring Member States' asylum policies and practice and enforcing compliance with EU asylum legislation as guardian of the Treaty. Priority areas must include *inter alia* the operation of the Dublin Regulation, detention of asylum seekers, safeguards for particularly vulnerable asylum seekers such as unaccompanied children and victims of torture, access to the labour market and access to free legal assistance and representation.

⁸⁹ According to the Commission's website, a total number of 167 infringement procedures have been launched against EU Member States since March 2005 that are related to EU asylum legislation. This number includes procedures that have been launched because of non-compliance with the deadline of transposition of the EU asylum directives. Only 17 cases have been referred to the CJEU so far. Since the publication of the Commission's asylum package in December 2008, only 24 infringement cases relating to asylum legislation were initiated by the Commission. See http://ec.europa.eu/dgs/home-affairs/what-is-new/eu-law-and-monitoring/index_en.htm (last accessed on 10 January 2013).

Chapter 4

Sharing responsibility and enhancing solidarity in order to improve quality and fundamental rights protection in the CEAS.

While the primary responsibility for ensuring that adequate asylum systems are in place lies with States, the TFEU as well as the Stockholm Programme requires an increased level of solidarity and fair responsibility sharing between the EU institutions as well as the Member States in the development of the CEAS.⁹⁰ Currently, the EU legal framework already offers a variety of solidarity and responsibility-sharing tools and instruments that can assist in addressing the protection gaps and flaws in Member States' asylum systems and enhance overall quality of the CEAS. This chapter presents ECRE's views and recommendations from a protection perspective on a number of key responsibility-sharing tools that are already being implemented as well as the potential of new mechanisms such as joint processing of asylum applications or intra-EU relocation that are increasingly being discussed and explored. It is structured around the three main avenues for sharing responsibility: sharing money, sharing expertise and sharing people.

Sharing money: financial solidarity on the basis of real costs

The most concrete form of solidarity and responsibility-sharing between EU Member States that exists today in the field of asylum is financial solidarity through the European Refugee Fund, to be replaced as of 2014 by the Asylum and Migration Fund. In both cases, funds allocated to each Member State consist of a fixed amount per Member State in addition to a variable amount in light of the proportion of persons seeking or benefiting from protection in each EU Member State.⁹¹

Many aspects of the Commission proposals on the future EU funding in the area of migration and asylum are welcomed, including the reduced co-funding requirements for NGOs when applying for EU-funding and the potentially more simplified and flexible use of funds to address certain needs in a Member State.⁹² A particular concern is that the actual allocation of funds to the various activities that the new Asylum and Migration Fund will cover is not determined in the Commission proposal, while the proposed budget of €3.869 billion must cover a substantial new area of activities, in particular with regard to the external dimension and the final budget of the fund will be lower than the proposed €3.869 billion.⁹³

In any case, for EU funding to meaningfully contribute to the establishment of a CEAS based on high standards of protection, it must be large enough to realistically reflect the cost of processing an asylum application. Furthermore, the distribution of funds must be based on the degree of relative effort required by different Member States. As mentioned above, Member States' responsibilities must be assessed on the basis of relative rather than absolute numbers of asylum seekers received and must therefore also take into account each Member State's population size and GDP in order to properly take into account the variances in absorption capacity of the Member States. At the same time, ECRE believes that there is still a need for EU funding mechanisms to target specifically Member States with less developed asylum systems or coping with structural deficiencies. Despite the financial support of the ERF over a number of years, asylum systems in many new EU Member States remain under-resourced and have difficulty in complying with standards as required under the EU asylum acquis and ensuring quality. With the recast asylum directives requiring even higher standards of reception, procedural guarantees, resources and training, additional financial support

⁹⁰ See above chapter 1.

⁹¹ The proposed Asylum and Migration Fund suggests taking into account a wider range of statistics including the number of resettled refugees, legally residing third country nationals, return decisions issued and number of effective returns. See COM(2011) 751 final, *Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND THE COUNCIL establishing the Asylum and Migration Fund*, Brussels, 15 November 2011, recital 26.

⁹² For a detailed analysis of the Commission proposals on the new Multiannual Financial Framework, see ECRE, [Comments and recommendations on the Commission proposals on the future EU funding in the area of migration and asylum](#), August 2012.

⁹³ No political agreement had been reached yet on the exact amount at the time of writing.

according to the abovementioned criteria, will continue to be necessary. But also the financial situation in 'old' Member States, such as Greece, may deteriorate to such an extent that additional financial solidarity may be necessary beyond the possibility of emergency assistance in order to address specific challenges.

A permanent health and quality check of the CEAS as suggested by ECRE would, if implemented, provide a useful tool to identify the need for adjustments in the funds allocated to EU Member States. The information gathered through the in-depth monitoring of the national asylum systems of Member States should inform the entire process of programming of the Asylum and Migration Fund after final adoption of this fund. The programming and implementation of the Asylum and Migration Fund should also provide non-governmental organisations with an effective opportunity to provide input on funding priorities at the national and EU level at the various stages of the process, including with regard to the policy dialogues between the Commission and Member States as well as the mid-term review of the national programmes. Sufficient resources should be allocated, under the Asylum and Migration Fund to enhance capacity of governmental and non-governmental actors to provide the data required for establishing a permanent health and quality check as described in chapter 3.

Recommendation

Programming of the future Asylum and Migration Fund must also be informed by the results of the in-depth monitoring of national asylum systems through the Early Warning Mechanism. Programming must include an effective opportunity for non-governmental organisations to provide timely input on funding priorities at the national level based on their specific expertise at the various stages of implementation of the Fund, including policy dialogues and the mid-term review of the Fund.

4.2. Sharing expertise to improve quality and fairness of the CEAS

As long as the competence for deciding on individual asylum applications and dealing with appeals against negative decisions is not fully transferred to an EU asylum authority and EU asylum court, practical cooperation will be key to enhancing harmonisation. Moreover, as a tool for responsibility-sharing it has the potential of contributing to enhanced quality of decision-making by pooling resources and sharing expertise. According to the EASO Regulation, activities in the field of practical cooperation must aim to “increase convergence and ensure ongoing quality of Member States’ decision-making procedures in that area within a European legislative framework”⁹⁴ and hence contribute to reducing the disparities between the Member States in the granting of international protection.⁹⁵ The EASO Regulation provides the agency with important powers to achieve such convergence, in particular in the field of COI and training. However, at the same time, the Regulation explicitly limits EASO’s competences to *coordinating* practical cooperation between EU Member States in these areas and emphasises that it shall have “no powers in relation to the taking of decisions by Member States’ asylum authorities on individual applications for international protection”.⁹⁶ The explicit exclusion of any competence in individual decision-making on asylum applications does not prevent EASO from becoming potentially very influential in determining asylum practices in the EU Member States. This is because both COI and training relate directly to decision-making on individual asylum applications as the core function of Member States’ national asylum systems. It is therefore important to ensure that EASO’s activities are taking place with the objective of improving quality of decision-making and promoting high standards of protection in accordance with international refugee and human rights law as required in the Stockholm Programme.

⁹⁴ See recital 5 EASO Regulation.

⁹⁵ See recital 2 EASO Regulation.

⁹⁶ See Article 2(6) EASO Regulation.

The ultimate form of responsibility-sharing in the field of decision-making on individual asylum applications is the joint processing of such applications, which is increasingly being discussed at EU level. However, as further explained below, many legal and practical questions remain to be addressed around joint processing and regardless of its short-term viability, there is still room for critical improvement of asylum decision-making in the EU today.

This section presents ECRE's views and suggestions on how to further improve EASO activities in particular in the field of training and COI with the aim of improving quality of decision-making in accordance with international refugee and human rights law. It furthermore sets out ECRE's views on the feasibility as well as risks and opportunities of joint processing of asylum applications from a protection perspective.

4.2.1. Training

As the level of knowledge of international refugee and human rights law as well as specific skills needed to conduct interviews with asylum seekers for caseworkers as well as judges differ enormously across the EU, training is crucial to increase both convergence and quality of decision-making. Building on an existing project initiated by the Swedish Migration Board, EASO has taken over the European Asylum Curriculum (EAC) and is coordinating the revision of existing training modules while additional modules are being planned.⁹⁷ In ECRE's view, EAC is a valuable and important training tool and the involvement of academics, UNHCR, judges and experts from NGOs in the reference group is generally acknowledged as key to ensure that the EAC training modules meet high quality standards.⁹⁸ However, more can be done to further increase the quality and accessibility of EAC as the core training tool throughout the EU.

Firstly, whereas involvement of external experts in EAC mainly concerns the provision of comments to e-learning modules initially drafted by government experts, ECRE believes that wider involvement of such external experts in train-the-trainer sessions organized by EASO and face-to-face training at national level should be further encouraged. Systematically involving the expertise of UNHCR, the judiciary, academia and NGOs in train-the-trainer sessions, would ensure that national training programmes incorporate the perspectives of the various stakeholders in the asylum procedure. Enhanced participation of members of the EAC reference group as observers during face-to-face trainings of national caseworkers on an ad hoc basis would bring about better understanding of how EAC modules are applied in practice and ensure that the modules could be adjusted accordingly.

Secondly, today, all EAC modules are in English, which is by definition an over-arching obstacle for training people who do not speak English as their mother tongue and indeed in some countries prevents EAC from being used where the modules are not translated into the national language. As a result, EAC remains underused in certain parts of Europe in particular because of budget constraints, although funding is available under the current ERF for such training and will be accessible also under the future Asylum and Migration Fund. ECRE believes that translation of the EAC modules should be encouraged through earmarking the necessary resources in the national policy dialogues between the Commission and Member States in the framework of the Asylum and Migration Fund.

Furthermore, in view of the key role of interpreters in asylum procedures, specific training for both interpreters and caseworkers should be developed, focussing on the role of and

⁹⁷ EAC is a set of 13 e-learning modules on various aspects of the asylum process, ranging from basic modules on international refugee law and international human rights law and the EU asylum acquis to advanced modules on specific aspects such as exclusion and cessation, interview techniques, vulnerable groups etc. EAC is generally seen as a useful tool to increase the knowledge of caseworkers of refugee and human rights law in the Member States as well as improve skills that are specific to the asylum process, such as drafting of decisions, interview techniques etc. A short description of the modules is available at <http://www.asylum-curriculum.eu/>.

⁹⁸ See Article 6(1) EASO Regulation: "The Support Office shall develop such training in close cooperation with Member States' asylum authorities and, where relevant, take advantage of expertise of academic institutions and other relevant organisations".

interaction with the interpreter in asylum interviews. Research by UNHCR indicates that quality and availability of interpretation during asylum interviews varies considerably between EU Member States and has revealed “widespread misconduct involving interpreters in personal interviews and serious shortcomings in the ability of interviewers to work effectively with or manage the conduct of interpreters”.⁹⁹ Organisation of specialized training for interpreters on key issues such as the need for impartiality, neutrality, the duty of confidentiality and the importance of strictly refraining from providing any legal or other advice to asylum seekers would certainly contribute to improving the quality of interpretation. As this is not available in many Member States, EASO could usefully assist Member States in developing a training tool for interpreters at the national level. Since interpreters usually work on a free-lance basis and many EU Member States see a high turn-over, the format of EAC modules is less suitable and less cost-effective for training interpreters. However, a short training manual containing practical guidelines for interpreters and case-workers on the interpreter’s role in asylum interviews and his/her interaction with the interviewer and the asylum seeker could be a useful tool in promoting a common understanding of the interpreter’s role across the EU. In addition guidelines relating to the use and content of a code of conduct for interpreters during asylum interviews could be developed by EASO in close cooperation with UNHCR and expert NGOs based on existing best practice. As such, the adoption of a code of conduct contributes to a better understanding of the interpreter’s role in the asylum process. Such guidelines could both encourage Member States to adopt such a code where they have not yet done so and contribute to a common understanding of the content and role of such a code.

Finally, additional training capacity should be made available by EASO where the Early Warning Mechanism has identified specific shortcomings, including from a quality perspective, in a particular Member State. It should be noted that, in February 2012, an EASO Asylum Support Team was deployed in Luxembourg for the sole purpose of addressing acute training needs arising from a sudden increase in the number of asylum applications.¹⁰⁰

Recommendation

The involvement of external experts, including NGOs, in train-the-trainer sessions organised by EASO must be encouraged as a means to further broaden the perspective of the trainees.

Recommendation

Translation of EAC modules into the national language must be encouraged and where necessary sufficient resources must be secured in the national policy dialogues in the framework of the Asylum and Migration Fund.

Recommendation

A training manual on the role of interpreters in the asylum interview must be developed by EASO as well as guidelines relating to the use and content of a code of conduct for interpreters.

4.2.2. Country of Origin Information

The importance of accurate, reliable, up-to-date and transparent country of origin information for the efficiency and fairness of an asylum procedure cannot be overestimated. In many cases, COI is the only and most objective evidence available to decision-makers and therefore a crucial element in the assessment of asylum applications. However, quality, availability and accessibility of COI in practice continue to vary enormously among EU Member States with

⁹⁹ See UNHCR, *Improving Asylum Procedures: Comparative analysis and recommendations for law and practice. Detailed research on Key Asylum Procedures Directive Provisions* (hereinafter ‘Detailed research on Key Asylum Procedures Directive Provisions’), at p. 122.

¹⁰⁰ For more details see EASO, *Operating Plan for the Deployment of Asylum Support Teams to Luxembourg*, 26 January 2012, available at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/pdf/operating_plan_azst_lu_en.pdf#zoom=100.

some Member States having very limited resources for producing and accessing COI and other Member States disposing of very sophisticated systems.

As mentioned above, EASO has important competences in the field of COI including the organization and coordination of gathering reliable and up-to-date information on countries of origin; the drafting of reports on countries of origin, the management of a common portal on COI and the development of a common methodology for presenting, verifying and using information on countries of origin. COI is among its core activities and has been a priority from the very start. This has resulted in the publication of three reports relating to COI already in 2012: two reports concerning Afghanistan¹⁰¹ and a document on EASO COI methodology.¹⁰²

It is important to note that EASO's competence to publish its own COI reports on countries of origin of asylum seekers in the EU provides it with a potentially powerful tool to influence considerably the decision-making practice of EU Member States. As the reports are produced by the specialized EU Agency in the field of asylum they may become authoritative for decision-makers and judges, in particular in those countries with less developed COI-systems. However, there is some ambiguity in the EASO Regulation as regards the extent to which the agency can provide "guidance" to asylum authorities on how to use EASO's COI products in individual cases. On the one hand, EASO has an explicit competence to analyse "information on countries of origin in a transparent manner with a view to fostering convergence of assessment criteria".¹⁰³ On the other hand, it is explicitly stated that the analysis of the COI produced by EASO "shall not purport to give instructions to Member States about the grant or refusal of applications for international protection".¹⁰⁴

Arguably, there is a thin line between analysing the situation in a country of origin with a view to fostering convergence of assessment criteria and giving direct instructions to Member States, which may easily be crossed in practice. EASO's first report on Afghanistan illustrates this. The 'analysis' section of this report is not limited to an overview of the main findings of the report with regard to Taliban strategies on forced recruitment, it also includes 'conclusions'. While they may technically not qualify as 'instructions' to Member States, they do present a clear suggestion as to how the issue of forced recruitment must be assessed, namely that "forced recruitment by Taliban military commanders, leaders or fighters (...) has to be considered as exceptional".¹⁰⁵ On the day of publication of the EASO report, UNHCR issued a statement criticizing the report for using a too narrow definition of forced recruitment and calling for a nuanced reading of the EASO report taking into account the full range of possible coercive recruitment strategies and the limited geographical scope of the EASO report.¹⁰⁶ Amnesty International also expressed concern with regard to EASO's first Afghanistan report, qualifying its conclusion that the "Forced recruitment by Taliban military commanders, leaders or fighters [...] has to be considered as exceptional" as "untenable".¹⁰⁷ UNHCR's and Amnesty International's criticism illustrates the sensitive nature of EASO's task. EASO's role of providing analysis of COI on the basis of Article 4 EASO Regulation needs to be further defined in close cooperation with UNHCR, expert NGOs in the field of COI, country specific and academic experts. In line with its mandate it should adopt a strictly objective approach and focus on those areas where it can provide most added value in light of already existing research without entering into any "guidance" as to how to assess individual asylum applications in practice.

¹⁰¹ See EASO, Country of Origin Information report. *Afghanistan. Taliban Strategies – Recruitment*, July 2012 and EASO, Country of Origin Information report. *Afghanistan. Insurgent strategies – intimidation and targeted violence against Afghans*, December 2012.

¹⁰² See EASO, *Country of Origin Information report methodology*, July 2012. See also ARC and Dutch Council for Refugees, *Comments on the EASO Country of Origin Information report methodology*, November 2012.

¹⁰³ See Article 4(e) EASO Regulation.

¹⁰⁴ *Idem*.

¹⁰⁵ See EASO, Country of Origin Information report. *Afghanistan. Taliban Strategies – Recruitment*, July 2012, at p. 42.

¹⁰⁶ UNHCR, Forced recruitment by the Taliban in Afghanistan: UNHCR's perspective, July 2012, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4ffc31a32>.

¹⁰⁷ Amnesty International, *Amnesty International opinion on the EASO COI Report "Afghanistan: Taliban Strategies – Recruitment"*, July 2012 available at http://www.amnesty.eu/content/assets/EASO_COI_Report_.pdf.

The quality of EASO's COI reports will have to be measured against their transparency, objectivity, the variety of sources that are taken into account, how up-to-date the reports are as well as their accuracy and relevance for assessing asylum applications.¹⁰⁸ In this field in particular, it is of crucial importance that EASO demonstrates that it can operate independently and impartially taking into account all available sources as otherwise its credibility in this field may be undermined. In the interest of ensuring such impartiality and objectivity a panel of independent experts on COI, consisting of leading academics, representatives of expert NGOs, representatives of the judiciary and UNHCR should be set up. This independent expert panel would have the task of providing advice to EASO on matters of methodology, have a formal role in reviewing EASO's COI-reports and assessing its sources prior to publication so as to ensure that they meet the highest standard of quality and be involved in reviewing and updating the EAC training module on COI. It should also be responsible for identifying additional sources on the human rights situation in the country concerned as well as making recommendations for the general improvement of the report as regards structure and general approach. Such a peer review system would also be useful to assist EASO in monitoring the relevance and impact of its COI reports in individual decision-making on asylum applications. Expert panel members should be appointed by the EASO Executive Director and consist of academic country-specific experts, representatives of COI units in Member States, judiciary, expert NGOs and UNHCR following a public call for expression of interest.¹⁰⁹

Finally, the COI portal managed by EASO is a powerful tool to share expertise and resources on COI among EU Member States more efficiently. Here too, transparency and accessibility is key to ensuring equality of arms in the asylum procedure. Today, the COI portal is only accessible for governmental actors. This lack of transparency is problematic and may place asylum seekers and their legal representatives in a disadvantaged position in national procedures where decisions are based on information obtained through the COI portal if such information is not or not in a timely fashion shared with the applicant. The right to good administration laid down in Article 41 of the EU Charter of Fundamental Rights includes "the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy" and is affirmed by the CJEU to be of general application.¹¹⁰ EASO's COI portal should be made accessible to asylum seekers and persons legally representing asylum seekers in an asylum procedure according to national law upon their request. Sensitive information could be kept behind a password where publication could put persons who provided the information in danger.

¹⁰⁸ These four criteria are generally accepted as the core characteristics of quality COI research. See Hungarian Helsinki Committee, *Country Information in Asylum Procedures. Quality as a Legal Requirement in the EU*, Updated version, 2011, p. 16-18.

¹⁰⁹ An example of such a peer review mechanism with regard to COI at the national level is the Independent Advisory Group on Country Information (IAGCI) tasked with the review of the content of COI reports produced by the UKBA. See <http://icinspector.independent.gov.uk/country-information-reviews/>.

¹¹⁰ See CJEU, Case C-277/11, *M.M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, 22 November 2012, par. 84.

Recommendation

An independent expert panel must be established to ensure an independent review of EASO COI reports and assist EASO on issues of methodology and monitoring the impact of EASO COI reports on decision-making practice in EU Member States with regard to the country of origin concerned.

Recommendation

EASO's COI portal must be accessible to asylum seekers and legal representatives, in particular with regard to information drawn from the portal used to substantiate a negative decision to ensure full equality of arms in national asylum procedures. Wherever asylum authorities make use of information in the COI portal, it should be explicitly mentioned in the individual decisions stating the reasons for refusing international protection.

4.2.3. Joint Processing

The joint processing of asylum applications lodged in one of the EU Member States would without doubt constitute one of the most advanced ways of sharing expertise in the field of asylum. As it relates to the core function of the asylum procedure – deciding who is entitled to international protection and who is not - it is, at the same time, one of the most politically sensitive aspects of the current solidarity debate at EU level.¹¹¹ Various levels of involvement of experts from other EU Member States in the processing of asylum applications lodged in one EU Member State can be envisaged, each presenting specific challenges.

As the idea of joint processing within the EU is being discussed at EU level there is currently no consensus either on its scope or its objectives. While it may seem useful in particular to address increased numbers of asylum applications in a Member State and therefore primarily be seen as a tool to address a lack of capacity and ensure access to the procedure in “emergency situations” it has, at least theoretically, much wider potential. Within an EU context, joint processing could become an important tool in achieving more convergence of decision-making and addressing the current disparities between EU Member States as regards recognition rates and eligibility for international protection. Another key objective may be to increase quality of decision-making on asylum applications by sharing good practice and expertise. There is also a lack of clarity as regards the scope of joint processing as there is currently no generally accepted definition. In any case, joint processing must be distinguished from the forms of enhanced practical cooperation measures and tools in the field of training, COI and quality assessment as discussed above. In ECRE's view, joint processing as a minimum comprises the active involvement of experts from other EU Member States in the examination of asylum applications lodged in a Member State while the maximum option would consist of individual decisions being taken at EU level as further elaborated below. Any joint processing must always take place physically on EU territory.¹¹²

ECRE considers that any joint processing model is only acceptable if it is operated fully in compliance with the Refugee Convention and other international human rights treaties as well as rights under the EU Charter on Fundamental Rights, in particular Article 18. It must guarantee the full set of procedural guarantees as established in international and EU law and jurisprudence, including the right to a personal interview, access to free legal assistance and representation and an effective remedy. It must ensure adequate reception conditions pending the examination of the asylum claim as required under the recast Reception Conditions

¹¹¹ A forthcoming study financed by the European Commission is expected to further feed the debate on the necessity and legal, political and financial feasibility of joint processing of asylum applications lodged in the EU. This study was not published yet at the time of writing.

¹¹² This must be clearly distinguished from any models promoting joint processing outside EU territory, which ECRE, in principle, opposes for being at odds with the 1951 Refugee Convention and other applicable international human rights instruments. See for instance ECRE, Statement to the European Council, [Respect the right to seek asylum in Europe](#), June 2009.

Directive. ECRE opposes any model of joint processing that would imply detention of asylum seekers. It also rejects in principle forced relocation of asylum seekers or persons granted international protection within the EU. Extended rights of free movement for beneficiaries of international protection as suggested by ECRE in section 4.3.2. will in principle assist in alleviating additional pressure on the Member State where joint processing takes place. This may be further complemented with limited internal relocation of beneficiaries of international protection with their informed consent where such a need has been identified and under the conditions as suggested by ECRE in section 4.3.1. below. This may in particular be necessary to address the exceptional situation where the numbers involved exceed the capacity of the Member State hosting the joint processing operation.

In this section, ECRE's views and concerns are set out with regard to two main theoretical models of joint processing distinguished on the basis of who has the power to decide on individual asylum applications: Member States or the EU level.

Model 1: Decision-making at national level

A first model of joint processing maintains the current division of competences between the EU and national level in the area of asylum, whereby national asylum authorities of the host Member State remain responsible for taking decisions on individual asylum applications. A further assumption in this model is that a system allocating responsibility between EU Member States and Associated States continues to be applicable.¹¹³ However, in ECRE's view, the launching of a joint processing mechanism should be coupled with the suspension of any Dublin transfers to the Member State concerned, in particular where joint processing is considered necessary to address the failure of a Member State to comply with its obligations under EU and international law or in case of particular pressure on its asylum system. Joint processing would be carried out by Asylum Support teams deployed by EASO in the Member States where the permanent evaluation of the situation in the EU Member States through the Early Warning Mechanism has identified a need for joint processing for the purpose of ensuring quality and compliance with EU standards or to address particular pressure on the asylum system of the Member State concerned. Involvement of Member States in joint processing would be ensured as they are already under an obligation to contribute to the Asylum Intervention Pool which is used as a basis for the deployment of Asylum Support Teams and to make such experts available at the request of EASO.¹¹⁴

Joint processing activities of the members of the asylum support teams under this model would in principle be carried out on the territory of the Member State in need of support and include any activity during the first instance stage of the national asylum procedure considered necessary to ensure the quality and fairness of the first instance decision, except taking the decision on the individual asylum application. Within this model two options could be envisaged which both make use of EASO Asylum Support Teams.

Minimum option: organisational support

In a minimal option seconded national experts would provide assistance with caseload management, COI analysis, the organization of interviews, interpretation, etc. within the limitations of the current EASO Regulation. Under this option, national experts from other EU Member States would play a purely supporting role with regard to the organisation of the first instance stage of the asylum procedure, leaving officers of the host Member States in charge

¹¹³ Taking into account the jurisprudence of the ECtHR and CJEU concerning the compatibility of the Dublin Regulation with human rights obligations under the ECHR and the EU Charter on Fundamental Rights. See ECtHR, *M.S.S v. Belgium and Greece* and CJEU, *N.S and M.E.*

¹¹⁴ See Article 16(1) EASO Regulation. However, Member States will be absolved from such obligation to make experts available in case they face a situation "substantially affecting the discharge of national duties". Of course, solidarity with other Member States should not undermine the effective functioning of a Member State's asylum system and where participation in asylum support teams would result in understaffing for instance, the commitment towards the asylum support team should not take priority.

of all actions taken and decisions made. Where necessary asylum support teams could also assist with the provision of emergency accommodation to asylum seekers as defined in Article 10 EASO Regulation.

Maximum option: recommendation for a decision

The maximum option of joint processing in this model would be for seconded national experts to actively conduct interviews and draft a recommendation for an individual decision to the national asylum authority. While strictly speaking the recommendation would not be binding on the responsible asylum authority of the host Member State, it is assumed that the latter would in principle follow the recommendation made by the expert of the EASO Asylum Support Team. In practice, the role of the asylum authority of the host Member State would in general be limited to transforming the recommendation into an individual decision based on national legislation as any greater involvement may substantially reduce the added value of joint processing at least from the perspective of the host Member State. This option would obviously have the highest impact in terms of responsibility-sharing and convergence of decision-making throughout the EU.

As this latter option would not fundamentally interfere with Member States' competence to take individual decisions on asylum applications, yet possibly go beyond the current EASO Regulation, only limited changes would be necessary to the EASO Regulation.¹¹⁵ In order to make joint processing possible through the deployment of Asylum Support Teams in all circumstances and for all possible caseloads with a view of enhancing quality and convergence of decision-making throughout the EU, the current limitation in the EASO Regulation to deployment of such teams in Member States under particular pressure would have to be lifted. Therefore, Article 13(1) and 10 EASO Regulation would need to be amended accordingly. Furthermore, under the EASO Regulation, Asylum Support Teams are required to provide expertise as needed including in relation to interpreting services, COI and "knowledge of the handling and management of asylum cases within the framework of the actions to support Member States". The latter includes action to facilitate "initial analysis of asylum applications under examination by the competent national authorities" which can be interpreted as covering all types of activities described above, with the possible exception of recommendations to the national asylum authority on which a decision should be taken in an individual case. As this may go beyond "facilitating initial analysis", Article 10(a) EASO Regulation may have to be further amended in order to incorporate the possibility of "formulating recommendations for decisions on asylum applications under examination by the competent asylum authorities".

Furthermore, this model of joint processing does not interfere directly with the appeal systems currently operating in EU Member States and leaves the current role of the CJEU in ensuring harmonized interpretation of EU asylum norms through the system of preliminary references unchanged. Also in the field of reception conditions pending examination of the application, this option allows for maintaining the current system whereby accommodation is provided by national authorities. Where necessary, additional support can be provided through EASO Asylum Support Teams to address insufficient capacity in the Member State concerned to accommodate asylum seekers in accordance with EU standards. Therefore, in principle this option would not include any physical relocation of asylum seekers to other EU Member States.

However, in very exceptional cases, the Member State concerned may be confronted with an exceptionally high number of applications resulting in a situation where joint processing in combination with additional reception support alone would not suffice to guarantee those arriving within such a crisis situation access to a fair examination of the asylum application. If such an exceptional situation has been identified through the Early Warning Mechanism

¹¹⁵ Articles 13 to 23 EASO Regulation provide the legal basis for asylum support teams to be deployed at the request of a Member State that is subject to particular pressure and after an operational plan, identifying the required expertise and the conditions for the deployment, has been adopted by the Executive Director of EASO.

additional solidarity measures could be considered. One option would be for EU Member States to indicate additional reception capacity to the Commission and the Council through a mechanism modelled on the solidarity provision in the Temporary Protection Directive.¹¹⁶ This would be with the purpose of assuming responsibility for examining the asylum application of those asylum seekers who gave their informed consent to being transferred to another EU Member State for the examination of their asylum application. Such a mechanism would need to be conditional on the Member State concerned having an asylum system in place that is otherwise in compliance with the EU asylum acquis. This would require investing substantial resources in properly informing asylum seekers through UNHCR and NGOs about the reception conditions and decision-making practice of the Member State offering additional capacity in order for the asylum seeker to make a truly informed choice. The asylum seeker's informed decision to remain in the Member State of first arrival should at all times be respected as well.¹¹⁷

While this model may be the most feasible politically and legally in the short to medium term, a number of important practical and legal obstacles may nevertheless undermine both its effectiveness and fairness. A major difficulty is that national experts from other EU Member States would be required to perform core aspects of the decision-making process in the context of a national procedure and in a language with which they are unfamiliar.¹¹⁸ In particular, the language of the national procedure may be a problem in itself in many Member States, especially where joint processing includes an active role of experts from other Member States in conducting interviews and preparing decisions. This may, in certain circumstances require additional resources for interpretation or translation to ensure that the record of the interview or the recommendation for a decision by the member of the asylum support team is translated into the national language. Where local interpreters are used that do not speak the same language as the interviewer, double interpretation may be required, which may undermine the accuracy of the translation and consequently the final written report or transcript of the interview.

Moreover, should national legislation allow the interview to be conducted in another language than the language of the procedure, this may seriously complicate the work of legal representatives who may not speak the language used by the member of the asylum support team.¹¹⁹ As in most cases little or no documentary evidence is available, the personal interview is the only opportunity for the asylum seeker to substantiate the application for international protection. The obstacles mentioned above not only negatively impact on the accuracy of the asylum interview and the written report or transcript, but consequently also on the quality and efficiency of the appeal stage, which highly depends on the quality of the first instance decision.

¹¹⁶ See Article 24 to 26 Temporary Protection Directive.

¹¹⁷ Moreover, EU Member States should commit to respond positively in such situations to requests from the Member State hosting the joint processing operation based on Article 17(2) recast Dublin Regulation to bring together any family relations on humanitarian grounds as an additional solidarity measure. This should of course always be conditional on the informed consent of the asylum seeker concerned.

¹¹⁸ Already in the context of Asylum Support Teams deployed in Greece, where the members of the asylum support teams do not engage in key functions such as interviews, this is causing problems as the induction of external experts in the functioning of the system in Greece is time-consuming. This is further exacerbated by the regular replacement of members of the asylum support teams with new colleagues causing loss of time for all parties involved

¹¹⁹ The problems encountered by lawyers in Belgium illustrate the complexity of the use of various languages in the asylum procedure as reported in UNHCR's study on the implementation of the Asylum Procedures Directive. "In accordance with Article 51/4 of the 1980 Aliens' Act, the examination of the asylum application is in either Dutch or French. Due to logistical reasons, or due to the fact that for some languages, no interpreter is available who can translate into Dutch, personal interviews in the 'Dutch procedure' are conducted in the language of the applicant and either French or English. Although the interpreter translates into English or French, the case manager will have to write the report of the interview in Dutch. However, due to the translations (from one of the languages the applicant speaks, possibly not the preferred language, to English or French, and not the mother tongue of the case manager), important elements in the applicants' statements may be missed or lost. Moreover, not all lawyers speak French very well, which can make it difficult for a lawyer to fully understand what is said during the interview and check the report of the personal interview with his/her own notes. This might have an effect on the lawyers' ability to present and defend his/her clients' rights. Lawyers interviewed by UNHCR thought this to be especially problematic." See UNHCR, *Detailed research on Key Asylum Procedures Directive Provisions*, March 2010, at p. 119.

These obstacles are even more problematic where remote processing techniques such as video-conferencing were used, for instance, to overcome resource and funding restrictions. Experiences with interpretation through video-conferencing have not always been positive so far¹²⁰.

Nevertheless, this model could be considered if proper guarantees are in place to overcome the obstacles identified above and maintains its proper focus of ensuring that States comply with their obligations under the Geneva Refugee Convention and other relevant human rights treaties. Therefore, this model should be conditional on a prominent role of UNHCR in operational terms and independent and proper evaluation. ECRE's preferred option would be for the joint processing activities to be supervised by the local UNHCR office in the Member State where joint processing takes place. This would not only allow UNHCR to play its role as the Supervisory Authority under the Geneva Convention and be in line with Declaration 17 to the Amsterdam Treaty. It would also contribute to addressing the legal and practical problems identified above as UNHCR could more easily and effectively deploy local staff, who would be familiar with the national asylum procedure. This would obviously require the allocation of sufficient resources to UNHCR in order to allow the recruitment of additional local staff. Emergency funding under the new Asylum and Migration Fund should be made available for that purpose.

A theoretical third option: decision-making by seconded national experts on the territory of another Member State

It is obvious that the legal and practical obstacles identified above would be the same in a joint processing model that would allow seconded national experts to take individual decisions on asylum applications lodged on the territory of another Member State, either within or outside of the framework of Asylum Support Teams. This would, in addition raise complex legal questions with regard to the applicable national asylum procedure and the legal basis for the individual decision; ensuring access to an effective remedy against such decisions in practice and require fundamental revision of the provisions in the EASO Regulation relating to the deployment of Asylum Support Teams. In light of these obstacles and the potential for fundamentally undermining asylum seekers' access to a fair asylum procedure, ECRE considers such an option unrealistic and undesirable both in the medium and long term.

Model 2: Decision making by a single EU Asylum Authority

A second model would constitute the ultimate form of joint processing and would include the creation of an EU Asylum Authority competent to take individual decisions on asylum applications lodged in one of the EU Member States. In this model, asylum applications lodged in one of the EU Member States would be examined according to an EU asylum procedure, which would be identical in all EU Member States and on the basis of EU eligibility criteria.¹²¹ Within this model, various options are possible as to where asylum applications would be processed and asylum seekers accommodated during the asylum procedure. ECRE would not support systems that involve the forced transfer of asylum seekers to strategically placed, centralised and closed joint processing centres as was suggested in the past, as this is likely to be costly, cause further harm to asylum seekers and refugees who are already particularly vulnerable and delay their integration. Rather, the establishment of decentralised branches of the single EU Asylum Authority in every EU Member State should be considered, as ECRE

¹²⁰ On the problems caused by the interpreter not being physically present during the interview in Hungary, see Hungarian Helsinki Committee, *Practices in Interviewing Immigrants: Legal Implications. Report on Hungary*, March 2011, p. 9. On the possibility of video-conferencing hampering the correct reading of body language used by the asylum seeker, which is often an important aspect of community interpretation see Finnish Immigration Service and Refugee Advice Centre, *Interpretation in the Asylum Process. Guide for Interpreters*, Helsinki, 2010, at p. 16.

¹²¹ This would require further revision of the eligibility criteria laid down in the recast Qualification Directive where necessary to ensure full compliance with the Refugee Convention and international human rights law. An ECRE information note on the recast Qualification Directive is forthcoming.

has already suggested.¹²² Two options could be explored with regard to the appeal stage. One option would be that the EU asylum procedure maintains competence of national appeal courts to examine appeals against the negative decisions on asylum applications taken by the national branch of the single EU Asylum Authority.¹²³ A second option would be to establish an appeal system at EU level on the basis of Article 257 TFEU according to which the European Parliament and the Council “may establish specialised courts attached to the General Court to hear and determine at first instance certain classes of action or proceedings brought in specific areas”.¹²⁴ However, in view of the required effectiveness and accessibility of the remedy, in law and in practice, in accordance with Article 47 of the EU Charter of Fundamental Rights and Article 13 ECHR,¹²⁵ it would be preferable to further explore the creation of national branches of an EU Asylum Court established on the basis of Article 257 TFEU.

Theoretically at least, an EU asylum procedure run by one EU Asylum Authority with a possibility to appeal before an EU Asylum Court offering all guarantees of an effective remedy as required under the case-law of the ECHR and the CJEU may be the most efficient way to achieve consistent quality and enhanced convergence of decision-making throughout the EU. If such a system were to operate on the basis of high protection standards, it would probably also address a number of the human rights concerns with regard to the current Dublin Regulation. However, whether the current EU Treaty provides a legal basis for an agency or other EU body competent to take individual decisions on asylum applications is uncertain. Article 78 TFEU requires the adoption of measures for a CEAS comprising a uniform status of asylum, valid throughout the Union, a uniform status of subsidiary protection for third country nationals and common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status. The provision lays out specific objectives with regard to the level of harmonisation required but it does not explicitly provide for a possibility of achieving this through conferring the competence to decide on individual asylum applications to an EU body or institution, while asylum remains an area of shared competence between the Union and the Member States in the TEU.¹²⁶ The existing EU asylum acquis explicitly leaves such competence with the national authorities and the Commission proposals recasting the first phase asylum instruments do not include any possibility of centralized decision-making. No such legal basis seems to be provided by Article 74 TFEU either.¹²⁷ Article 80 TFEU creates a strengthened duty on Member States to take the necessary solidarity and responsibility-sharing measures where necessary, but whether it is sufficient, be it in combination with Article 78 TFEU, to create competence to take individual decisions at EU level in this field remains equally unclear.

¹²² See ECRE, *The Way Forward – Asylum Systems*, pp. 36-37.

¹²³ However, some authors consider the creation of a specialised court in the field of asylum not to be effective in enhancing convergence of decision-making as it cannot interfere with the role of the CJEU in ensuring uniform interpretation of EU law through the preliminary reference procedure. See European Parliament, *Setting up a Common European Asylum System: Report on the application of existing instruments and proposals for the new system. Study* (hereafter ‘Common European Asylum System Study’), PE 425.622, 2010, pp. 455-457.

¹²⁴ The Article furthermore states that “[d]ecisions given by specialised courts may be subject to a right of appeal on points of law only or, when provided for in the regulation establishing the specialised court, a right of appeal also on matters of fact, before the General Court”.

¹²⁵ The ECtHR has on several occasions emphasised that the remedy required by Article 13 ECHR must be effective in practice as well as in law. See e.g. ECtHR, Application No 51564/99, *Conka v. Belgium*, Judgment of 5 February 2002, par. 46 and ECtHR, Application No 9152/09, *I.M. c. France*, Judgment of 2 February 2012 (French only). The principle of effective judicial protection is a general principle of EU law and implies the right to an effective remedy which requires actual access to a remedy before a court or tribunal able to “review the merits of the reasons which led the competent administrative authority to hold the application for international protection to be unfounded or made in bad faith”. See CJEU, Case C-69/10, *Brahim Samba Diouf v. Ministre du Travail, de l’Emploi et de l’Immigration*, Judgment of 28 July 2011, par. 61 and CJEU, Case C-506/04, *Graham J. Wilson v. Ordre des avocats du barreau de Luxembourg*, Judgment of 19 September 2006, par. 60-62.

¹²⁶ See Article 4(2)(j) TEU.

¹²⁷ This Article requires the Council to “adopt measures to ensure administrative cooperation between the relevant departments of the Member States in the areas covered by this Title, as well as between those departments and the Commission.” As it is strictly limited to administrative cooperation it does not provide a sufficient legal basis for conferring the power of individual decision-making in this field to the Union level. As mentioned above, the EASO Regulation, which uses Article 74 as its legal basis, explicitly excludes any competence for the Agency in this field and emphasizes its coordinating and supporting role, thus further confirming the fundamental division of tasks between the national and EU level.

In view of the uncertainty about the existence of a legal basis for centralized EU decision-making powers in Title V of the TFEU, the possibility of using Article 352 TFEU as a legal basis could be further explored. This so-called flexibility provision allows the Union to take action where the Treaties have not provided the necessary powers to attain one of the objectives set out in the Treaties.¹²⁸ The Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. If it could be argued that attaining the objective of a CEAS, as defined in Article 78 and 80 TFEU and in the Stockholm Programme, requires conferring the power to take decisions on individual asylum applications to the Union level and that this would be in compliance with the principles of subsidiarity and proportionality, Article 352 TFEU could potentially provide such legal basis.¹²⁹

However, even if a legal basis could be found in the Lisbon Treaty for pursuing this model of joint processing, this would still leave a number of complex legal and political questions. A key question concerns the nature, composition and governance of such a single EU Authority. One option could be to fundamentally revise EASO's mandate to include such a competence. EU Regulatory Agencies, such as EASO, can be given the power to "take individual decisions in specific areas where a defined technical expertise is required, under clearly and precisely defined conditions".¹³⁰ However, this is only possible where this does not result in granting those agencies "genuine discretionary power",¹³¹ whereas examining an asylum application arguably implies some degree of discretion in the assessment of statements and credibility issues. Alternatively the creation of an EU Commissioner for Refugees as an independent body, following the rationale behind the creation of bodies such as the European Ombudsman, could be considered. Other questions relate to whom the EU Asylum Authority would be accountable to and what the legal status of the decisions taken by the EU Asylum Authority would be on the territory of the Member State hosting the asylum seeker concerned. Whatever option chosen, ensuring a key role for UNHCR within such single EU Authority in an advisory capacity allowing for proper monitoring of compliance of the decision-making practice of such entity with the Geneva Refugee Convention and other human rights treaties, would be crucial.

Concluding observation on joint processing

Even if the second model is legally possible, it is in any case unlikely that it would materialize in the short to medium term, in view of the current lack of political support for such an approach. Nevertheless, the model of centralised EU decision-making should be revisited if the current protection gaps and disparities remain between EU Member States' decision-making practices in the long term.¹³² Pending further clarity about the legal feasibility of the second model, ECRE believes that the only feasible option in the short to medium term would be a controlled pilot testing the implications of the first model of joint processing as described above with regard to a specific caseload. Various caseloads could be considered and identified for such a project on the basis of the particular vulnerability of the group concerned such as asylum seekers rescued at sea, unaccompanied children or victims of torture stranded in Greece or other countries lacking specific facilities and procedural guarantees for certain

¹²⁸ On the interpretation of Article 352 TFEU and its predecessor Article 308 TEC see D. Chalmers, G. Davies and G. Monti, *European Union Law*, Second Edition, Cambridge University Press, 2010, p. 214-219

¹²⁹ Declaration 41 to the Lisbon Treaty states "that the reference in Article 352(1) of the Treaty on the Functioning of the European Union to objectives of the Union refers to the objectives as set out in Article 3(2) and (3) of the Treaty on European Union". According to Article 3(2) TEU, "The Union shall offer its citizens an area of freedom, security and justice...", which means that Article 352 TFEU could be used if the other conditions in this provision are fulfilled. However, this must be read together with Declaration 42 to the Lisbon Treaty in which it is underlined that Article 352 TFEU, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Union powers beyond the general framework created by the provisions of the Treaties as a whole and, in particular, by those that define the tasks and the activities of the Union. See Declarations annexed to the final act of the intergovernmental conference which adopted Treaty of Lisbon, signed on 13 December 2007, OJ 2008 C 115/335.

¹³⁰ COM(2008)135 final, *Communication from the Commission to the European Parliament and the Council. European Agencies – The way forward*, Brussels, 11 March 2008, p.5.

¹³¹ *Idem*.

¹³² In case a new multi-annual framework in the area of freedom, security and justice is adopted the time-frame for revisiting such option could be by the end of the new 5 year programme.

categories of asylum seekers. In order to avoid discriminatory treatment joint processing should apply to all asylum seekers constituting a particular caseload. The decision on where to initiate a pilot project should be made following a thorough evaluation of possible risks and benefits and in consultation with relevant stakeholders.

Within the context of the EU, the overall objective of joint processing must be to increase the quality of decision-making and facilitate access to protection in the EU for those fleeing persecution and other serious human rights violations. It must, therefore, ensure the full range of procedural guarantees as established under international human rights law and the EU asylum acquis and should not be used where it undermines the protection of the fundamental rights of asylum seekers. Mere efficiency arguments can never suffice as a basis for launching any model of joint processing.

Recommendation

Any joint processing must serve the objective of increasing the quality of decision-making in the CEAS and facilitating access to protection in the EU. Mere efficiency arguments can never suffice as a basis for launching any model of joint processing.

Recommendation

Any model of joint processing within the EU should guarantee the full range of safeguards under international human rights law and the EU asylum acquis to ensure that the right to asylum is respected in practice. ECRE opposes any model of joint processing that includes detention of asylum seekers or forced relocation of asylum seekers or beneficiaries of international protection.

Recommendation

Provided that sufficient guarantees are provided to ensure full respect of the right to asylum, the first model of joint processing should be tested within a controlled pilot on a narrowly defined specific caseload such as asylum seekers rescued at sea or unaccompanied children in Greece or another discrete caseload from a Member State facing capacity issues. This should be made conditional on a prominent operational role for UNHCR in Asylum Support Teams and independent evaluation of its impact on the fundamental rights of asylum seekers. The decision on where to initiate a pilot should be made following a thorough evaluation of possible risks and benefits and in consultation with relevant stakeholders.

Recommendation

The establishment of an EU Asylum Authority with decentralised branches in all EU Member States must be further explored as a long term option and as a tool to ensure greater convergence of decision-making, representing a high level of protection across the EU. On the basis of Declaration 17 to the TEU, UNHCR should have a formalised advisory role to the EU Asylum Authority while consultation with NGOs should be organised both at national and EU level.

4.3. Sharing people: relocation of beneficiaries of international protection and asylum seekers within the EU

Possible ways of physically distributing asylum seekers or those granted international protection across the EU as a concrete means of responsibility-sharing have been discussed both within academic circles and to a certain extent in the European institutions.¹³³ Since the

¹³³ See for instance European Parliament, *What System of Burden-Sharing between Member States for the reception of asylum seekers? Study*, 2010 (hereinafter 'Burden-sharing Study'); E. Thielemann, *The Future of the Common European Asylum System: In Need of a More Comprehensive Burden-Sharing Approach*, European Policy Analysis, February 2008, Issue 1.

initiation of pilot projects on relocation of beneficiaries of international protection from Malta to other EU Member States, the focus of the debate has been on the potential of intra-EU relocation of recognised refugees and persons granted subsidiary protection. However, recently, attempts have been made within the European Parliament to re-launch the idea of establishing a comprehensive system for a more even distribution of asylum seekers across the EU. The discussion on EU dispersal mechanisms of asylum seekers and beneficiaries of international protection has close links to debates on both joint processing and the free movement of beneficiaries of international protection. This section discusses and elaborates ECRE's views on these three themes. It should be emphasised that any discussion on physical relocation must be guided first and foremost by the concern to increase the protection of asylum seekers and refugees in Europe and the overall fairness of the system. Any system that is exclusively pursuing efficiency objectives in this field is bound to fail as has been convincingly illustrated by the current Dublin system, which is not sufficiently taking into account human rights concerns or the preferences of asylum seekers themselves.¹³⁴

4.3.1. Intra-EU relocation of beneficiaries of international protection

Experience with intra-EU relocation of persons granted international protection is relatively recent and so far limited to Malta. All initiatives were taken in response to repeated calls from the Maltese government for concrete solidarity from other EU Member States. Due to its small size and geographical location Malta argues that it has hosted disproportionately high numbers of asylum applications and that it needs support from other Member States in order to deal with these numbers. In addition to financial solidarity through the ERF, it was argued that physical relocation of persons out of Malta was necessary to alleviate the pressure on Maltese society.

The most comprehensive project so far is the 2010 EUREMA (EU Relocation Malta) project which involved 10 EU Member States that have committed, to varying degrees, to relocate beneficiaries of international protection from Malta. The numbers involved remain very small. Under EUREMA, France and Germany committed to relocate 100 persons each while the other eight Member States committed to relocate six to eight persons.¹³⁵ As part of the EU's response to the developments in North Africa and in the context of the extension of the EUREMA project, a Ministerial pledging conference was organized on 12 May 2011 in which EU Member States made pledges for 300 places for relocation of beneficiaries of international protection from Malta and 700 resettlement places for refugees stranded in North Africa.¹³⁶ According to the Maltese Government, Germany alone pledged 150 places.¹³⁷

It is acknowledged that intra-EU relocation of persons granted international protection status in Malta offers an opportunity for the individuals concerned to improve their situation and creates new long term perspectives for them. It is further noted that many of the operational weaknesses that have been identified with regard to the intra-EU relocation projects with Malta

¹³⁴ In its study commissioned by the European Parliament on the CEAS, the Odysseus network concludes that the Dublin system is ineffective and highlights that perceived unfairness of the system pushes asylum seekers to undertake evasive action such as going underground which ultimately undermines the functioning of the Dublin system and is detrimental to the central protection goals of the CEAS. See European Parliament, *Common European Asylum System Study*, pp. 157-162. On the flawed application of the Dublin II Regulation see also European Network for Technical Co-operation on the Application of the Dublin II Regulation, *The Dublin II Regulation. Lives on Hold. Comparative Report*, forthcoming (February 2013).

¹³⁵ Slovenia (10), Slovakia (10), Hungary (10), Poland (6), Romania (7), UK (10), Luxemburg (6) and Portugal (6). See France Terre d'Asile, *L'Observatoire de l'Intégration des réfugiés*, N° 42, Septembre 2010, at p.2.

¹³⁶ Commission, Statement by Cecilia Malmström, EU Commissioner in charge of Home Affairs, on the results of the Ministerial Pledging Conference, 12 May 2011, MEMO 11/295, Brussels, 13 May 2011.

¹³⁷ Department of Information Malta, Press Release, Speech by the Hon. Carmelo Mifsud Bonnici, Minister for Justice and Home Affairs, at the intra-EU Re-allocation from Malta EUREMA Final Conference – St Julian's – Tuesday 28 June 2011, PR 1243, 28 June 2011. In 2011, 1,850 asylum applications were submitted in Malta. 1,862 applications were processed in 2011 by the office of the Maltese Commissioner with 68 persons granted refugee status, 811 persons granted subsidiary protection and 707 asylum applications rejected. By the end of 2011, about 1,800 individuals were living in open centers and 600 persons were held in detention. An estimated 2,500 sub-Saharan migrants and refugees were living in the community at that time. See UNHCR Malta, *2011 Malta Fact Sheet*, available at

http://www.unhcr.org/mt/index.php?option=com_content&view=article&id=487&Itemid=110.

could be addressed in practice in future initiatives.¹³⁸ Relocation activities could be coordinated by EASO and the selection criteria and procedures used by the receiving Member States could be harmonized.

However, in ECRE's view, it is questionable whether intra-EU relocation is the most efficient and appropriate tool at the disposal of EU Member States to enhance solidarity and achieve fairer responsibility-sharing. In particular as long as the numbers of beneficiaries of international protection involved remain as low as they are today, the extent to which such projects can effectively alleviate the pressure on the asylum system of the Member State in need of intra-EU relocation will be limited, if not insignificant. Substantially higher numbers would be required to make a real impact, but this is unlikely to happen as long as intra-EU relocation is implemented on a strictly voluntary basis from the Member States' side. Unless the current approach is radically changed, intra-EU relocation projects will mainly have symbolical value as a solidarity measure and may serve political purposes in the Member States concerned rather than effectively contributing to fairer responsibility-sharing.

Moreover, systematic use of intra-EU relocation risks resulting in responsibility-shifting if this is not accompanied by clear conditions and criteria with regard to the treatment of asylum seekers and beneficiaries of international protection in the country concerned. The EU and its Member States should be careful not to create disincentives for Member States concerned from sufficiently investing in their national protection system and ensuring that it fully complies with their human rights obligations towards those granted international protection, who remain in that Member State. Member States may otherwise be tempted to design their national asylum policy with the main objective of ensuring that as many persons granted international protection will leave their territory as soon as possible, thus discouraging in particular the development of sufficiently resourced integration programmes.

Finally, the promotion of intra-EU relocation of beneficiaries of international protection at a time when EU Member States' efforts in resettlement globally as a durable solution remain relatively poor, must be handled with care. In ECRE's view, priority at EU level should be given to increasing the EU Member States' efforts in resettling persons in need of protection from countries outside the EU. Intra-EU relocation should, under no circumstances, prevent the EU from assuming greater responsibility for the world's refugees and show concrete solidarity with those countries hosting large refugee populations, in often very difficult circumstances. It is paramount that intra-EU relocation must be strictly separated from the Joint EU Resettlement programme and national resettlement engagements. Under no circumstances should persons relocated within the EU be considered as resettlement cases or financed as such under the future Asylum and Migration Fund. This should be closely monitored by the Commission.

The Commission has announced a proposal for a voluntary, permanent scheme that would allow Member States to request assistance through relocation of beneficiaries of international protection, including in an emergency. At the same time, it was stated that such a proposal, limited to the beneficiaries of international protection, i.e. not including asylum seekers, is subject to further impact assessment.¹³⁹ A more coordinated approach to relocation schemes is to be preferred over the current ad hoc approach, limited to one EU Member State. However, ECRE believes that further evaluation is needed of the added value of the internal relocation

¹³⁸ This concerns mainly the complex bureaucratic procedures used by some Member States, the lack of measures to prepare the beneficiaries of international protection concerned for their integration in the Member State of destination and the variety of criteria used by different Member States of destination for the selection of beneficiaries of intra-EU relocation. See European Commission, Directorate-General Home Affairs, *Study on the Feasibility of establishing a Mechanism for the Relocation of Beneficiaries of International Protection* (hereinafter 'Feasibility Study on Relocation of Beneficiaries of International Protection'), Final report, July 2010, 13-18; IOM, *Handbook on lessons learned, Pilot Project for intra-EU Reallocation from Malta – EUREMA*, 2011 and EASO, *EASO fact finding report on intra-EU relocation activities from Malta*, July 2012. See also JRS Malta, *Statement on the pilot relocation project for Malta*, 13 July 2009, available at: http://www.irseurope.org/news_releases/EC_pproject_Malta.htm.

¹³⁹ See European Commission, *Communication on intra-EU solidarity in the field of asylum*, at p. 8.

of beneficiaries of international protection as a solidarity tool as compared to other tools, in particular as long as it is based on the voluntary participation of other EU Member States.

If such a permanent system is considered useful and necessary, it should include the necessary safeguards to ensure that it does not result in mere responsibility-shifting and that the fundamental rights of beneficiaries of international protection under EU law and international refugee law are fully respected. Relocation of beneficiaries of international protection requires guarantees for the individuals concerned with regard to the transfer of their protection status. The Commission Communication dealing with these issues planned for 2014 should provide further guidance and inform any Commission proposal on a mechanism for intra-EU relocation.¹⁴⁰ Moreover, intra-EU relocation should always be based on the principle that any commitment from EU Member States to relocate beneficiaries of international protection is made conditional on the commitment of the “requesting” Member State to address protection gaps in its asylum system that have been identified by the Commission or EASO through its monitoring activities. Any EU mechanism should be linked to the Early Warning System as suggested by ECRE and should offer guarantees as regards transparency and democratic control by the European Parliament.

Finally, such a mechanism should be based on the informed consent of the beneficiaries of international protection concerned and must be carried out in close cooperation with local authorities, UNHCR and NGOs in both sending and receiving countries in order to facilitate their preparation and integration in the new host country as much as possible. It should prioritise the relocation of the most vulnerable beneficiaries of international protection, such as victims of torture or unaccompanied and separated children, whose special needs require immediate relocation to another EU Member State. The selection criteria as well as the procedure to be followed should be established in close consultation with UNHCR and relevant NGOs in the requesting Member State. The criteria should be made public, candidates should be fully informed about the legal implications of consenting to relocation and those refused for relocation should receive a written decision stating the reasons. The possibility of go-and-see visits should be offered.

Recommendation

If the EU and Member States continue to engage in intra-EU relocation of beneficiaries of international protection any project or mechanism should be premised on the following key principles:

- Intra-EU relocation must be clearly kept separate from resettlement programmes.
- Intra-EU relocation should always be conditional on the informed consent of the person concerned and should prioritise the most vulnerable beneficiaries of international protection where the places for relocation are limited.
- EU Member States should not engage in the relocation of beneficiaries of international protection without making this conditional on concrete commitments from the “sending Member State” to uphold and maintain the quality of the asylum system and address the protection gaps making internal relocation a necessity for specific categories.
- Intra-EU relocation should be developed in close cooperation with UNHCR and NGOs in both receiving and sending EU Member States.

4.3.2. Free movement

The free movement of persons granted protection within the EU has long been advocated by ECRE as a key aspect of a CEAS. While free movement within the EU mainly enhances the

¹⁴⁰ See COM(2010) 171 final, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Delivering an area of freedom, security and justice for Europe's citizens. Action Plan Implementing the Stockholm Programme*, Brussels, 24 April 2010, p. 55

integration of the persons concerned into European societies, it may also contribute to alleviating pressures on certain Member States where persons granted international protection effectively take up residence in another Member State.¹⁴¹ In 2011, the Long Term Residence Directive was finally amended to include beneficiaries of international protection into its scope.¹⁴² Beneficiaries of international protection who are long term-residents enjoy, under the conditions laid down in the Long Term Residence Directive, equality of treatment with citizens of the Member State of residence with regard to a number of socio-economic rights as well as a right to move to another EU Member State and reside there for the purpose of employed or self-employed activity, studies or vocational training or other purposes.¹⁴³ However, at the same time, the Long Term Residence Directive maintains important obstacles for beneficiaries of international protection to make effective use of the right to free movement under the directive in practice in the short term.¹⁴⁴ In addition to stable resources and integration requirements, the directive allows Member States not to take into account the entire duration of the asylum procedure, for the calculation of the period of five years legal residence which is required in order to obtain long term residence status.¹⁴⁵ This causes further delays for persons granted international protection in effectively exercising their right to free movement and fails to take into account, in the case of refugees, the declaratory nature of their status. It is also likely to add to the reasons identified by the Commission for the limited use of the Long Term Residence Directive by other third country nationals so far.¹⁴⁶

ECRE believes that, in the long term, a right to free movement and residence anywhere in the EU should be attached to the uniform status of asylum and subsidiary protection required under Article 78 TFEU.¹⁴⁷ Beneficiaries of international protection should be able to move, reside and work within the EU immediately after status has been granted. This means that the Long Term Residence Directive should be further amended to delete the requirement of five years legal residence before long term residence status can be obtained in the case of beneficiaries of international protection. Mutual recognition of protection statuses granted by EU Member States in combination with clear rules governing the transfer of protection status to another EU Member State would further facilitate free movement by providing more legal certainty to the beneficiaries of international protection concerned. The transfer of protection status is as such not covered by the Long Term Residence Directive¹⁴⁸ and although the amended Long Term Residence Directive includes provisions relating to the protection of beneficiaries of international protection from refoulement after having moved to another EU Member State,¹⁴⁹ important protection-related questions remain. These include the implications

¹⁴¹ Although the Commission does not consider it to be a solidarity tool, it acknowledges a possible positive effect in easing the pressure on certain Member States. See European Commission, *Communication on intra-EU solidarity in the field of asylum*, at p. 8.

¹⁴² See Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending the Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection (hereinafter, 'Long Term Residence Directive'), OJ 2011 L 132/1.

¹⁴³ Including access to the labour market and self-employed activities, education and vocational training, recognition of professional diplomas and qualifications. Access to social rights under the same conditions as nationals or legally residing third country nationals has also been strengthened in the recast Qualification Directive.

¹⁴⁴ As is the case for other third-country nationals, beneficiaries of international protection must have stable and regular resources as well as sickness insurance in the Member State of residence to obtain long term residence status and may be subjected to integration conditions. They may also be subjected to the same requirements in the second Member State where they wish to take up residence under the directive, whereby integration conditions may no longer be imposed by the second Member State if this was a requirement for obtaining long term residence status in the first Member State. See Articles 4 and 15 Long Term Residence Directive.

¹⁴⁵ Only half of that period must be taken into account if the asylum procedure lasted less than 18 months, the whole period must be taken into account when the asylum procedure exceeded 18 months. See Article 1(3)(b) Long Term Residence Directive.

¹⁴⁶ According to the Commission "[I]n 2009, around four fifths of these third-country nationals having LTR status were living in four Member States: EE (187 400), AT (166 600), CZ (49 200) and IT (45 200). In FR and DE, only 2,000 third-country residents had acquired the LTR permit. Moreover, the available data indicates that only small numbers of LTR third-country nationals have made use of this new avenue for mobility within the EU so far (fewer than fifty per Member State)". See COM(2011) 585 final, p. 10.

¹⁴⁷ See ECRE, *The Way Forward – Asylum Systems*, p. 34. Whether this is possible for beneficiaries of subsidiary protection under the current Article 78 TFEU, which does not require explicitly a uniform status "valid throughout the Union", is uncertain.

¹⁴⁸ See recital 9 of the amended Long Term Residence Directive excluding transfer of responsibility for protection of beneficiaries of international protection from its scope.

¹⁴⁹ Such as the obligation to explicitly mention that the fact that the person is a beneficiary of international protection in the long term resident's EU residence permit and the obligation to only expel such person back to the Member State that granted

of the possible loss of international protection status in the first Member State before protection status has been transferred as well as the lack of an international agreement on the transfer of protection of beneficiaries of subsidiary protection.¹⁵⁰ Future EU rules on the transfer of international protection status must be the same for refugees and beneficiaries of international protection in line with the approximation of both statuses under EU law, ensure transfer of the entire content of the protection status granted in the first Member State and provide maximum guarantees that protection status is transferred in parallel with the exercise of free movement rights. A system of mutual recognition of protection statuses granted on the basis of the Qualification Directive would reduce the need for complex EU legislation on this issue and compensate for the current asymmetry in EU law whereby only negative decisions on asylum applications are mutually recognised.

In the short to medium term, Member States must facilitate access to free movement rights as much as possible by refraining from imposing integration requirements to beneficiaries of international protection to obtain long term residence status or take up residence on that basis in a second Member State. In addition, Member States should always take into account the entire duration of the asylum procedure when calculating the period of five years of legal and continuous residence on the territory as required under Article 4(1) of the Directive. The duration of the Dublin procedure should also be taken into account, including the period that the person who was granted international protection spent on the territory of another Member State under such procedure.¹⁵¹ Finally, ECRE reminds States that expedited naturalization proceedings for beneficiaries of international protection constitute another avenue to encourage free movement as a tool contributing to responsibility-sharing. Once they have obtained the nationality of an EU Member State, former beneficiaries of international protection are entitled to free movement rights as EU citizens under the conditions laid down in the EU citizens rights Directive.¹⁵² ECRE encourages EU Member States to further revise nationality legislation with a view to introducing shorter and more flexible residency requirements for beneficiaries of international protection before being eligible for nationality of the host Member State and reduce costs of naturalisation proceedings.¹⁵³

international protection where he or she still enjoys such protection in case the Member State of second residence decides to expel the long term resident. See amendments to Article 8 and 12 Long Term Residence Directive.

¹⁵⁰ Whereas the 1980 European Agreement on Transfer of Responsibility for Refugees concluded in the framework of the Council of Europe deals explicitly with transfers of protection status for refugees. On the implications of the amended long term residence directive and its relation to transfer of protection status under EU law see S. Peers, "Transfer of International Protection and European Union Law", *IJRL* Vol. 24 No. 3, pp. 527-560.

¹⁵¹ Whereas in principle residence on the territory of the Member State granting long term residence status is required, Article 4(3) Long Term Residence Directive allows Member States to take into account periods of absence from the territory up to 10 months for the calculation of the 5 years of residence.

¹⁵² See Directive 2004/38/EC of the European Parliament and of the Council of 24 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, *OJ* 2004 L 158/77.

¹⁵³ Contracting Parties are required under Article 34 of the 1951 Refugee Convention to facilitate as far as possible the naturalisation of refugees.

Recommendation

In the short term, Member States should already refrain from applying provisions in the Long Term Residence Directive that delay access to long term residence status for beneficiaries of international protection or constitute practical obstacles to effectively making use of free movement rights under the Directive. Member States should always take into account the entire duration of the asylum procedure when calculating the period of five years of legal and continuous residence on the territory as required under Article 4(1) of the Directive.

Recommendation

In the long term beneficiaries of international protection should be granted free movement rights immediately after recognition. The Long Term Residence Directive should be further amended to this effect, abolishing the requirement for beneficiaries of international protection to have five years of legal residence in the Member State which granted international protection.

4.3.3. An EU Distribution Key for asylum seekers?

A system of physical distribution of asylum seekers between Member States on the basis of a quota system has been suggested at various occasions as another way of achieving a more even distribution of the responsibilities among EU Member States. In particular, the German system of redistributing asylum seekers is often quoted as a model that could be applied at EU level.¹⁵⁴

According to this model, asylum seekers arriving in Germany are distributed across the 16 Federal States (Länder) for initial reception on the basis of their capacity to host asylum seekers. This is determined on the basis of a specific formula, known as the Königsteiner Schlüssel, which establishes a certain percentage for each Federal State on the basis of their respective tax revenue and population.¹⁵⁵ Asylum seekers applying at the border and admitted to the territory and the procedure as well as those applying in country are referred to the nearest initial reception centre where the responsible reception centre will be determined. Three factors are taken into account: capacity of the reception centre where the asylum seeker first presented himself, the percentage of the Federal State concerned (quota fulfilled or not), the competence of the branch office of the Bundesamt (Federal Asylum and Immigration Office) to deal with applications from the asylum seekers' country of origin. Technically, the allocation of the asylum seeker to one of the Federal States' reception centres is carried out by a central authority on the basis of the EASY computer system (Erstaufnahme Asyl - First asylum reception).

As the distribution key takes into account both the economic resources and the total population of the respective Länder, it results in the wealthier Länder receiving a proportionately higher number of asylum seekers. However, at the same time the system has been criticized for not sufficiently taking into account the particular circumstances of the asylum seeker and for undermining their fundamental rights.¹⁵⁶ Firstly, the specific needs and preferences of asylum seekers are hardly taken into consideration when determining the responsible Land. For instance, except for members of the nuclear family, the presence of other relatives or refugee communities is not a factor in allocating the asylum seeker to a particular Land. In addition,

¹⁵⁴ See for example the proposal of German MEP Nadia Hirsch for the application of a European Distribution Key for asylum seekers in the EU based on the Königsteiner Schlüssel. See <http://www.europahirsch.eu/politisch/ausschusse/ausschuss-burgerliche-freiheiten-justiz-inneres/asylpaket/europaischer-verteilungsschlüssel-fur-asylsuchende/>

¹⁵⁵ For the distribution quota for 2012 see the website of the German Federal Office for Migration and Refugees: <http://www.bamf.de/EN/Migration/AsylFluechtlinge/Asylverfahren/Verteilung/Verteilung-node.html>

¹⁵⁶ See on the incompatibility of the German system with Article 26 1951 Refugee Convention on free movement rights of refugees P. McDonough, Revisiting Germany's Residenzpflicht in light of modern E.U. Asylum Law, Michigan Journal of International Law, Vol. 30, Number 2, Winter 2009, pp. 515-546.

accommodation centres are often located in very remote areas, without access to integration and language courses. This also results in asylum seekers being isolated from their communities, cut off from work opportunities as well as leisure activities which further hampers their integration and aggravates existing mental health problems.¹⁵⁷ Secondly, asylum seekers are not only under an obligation to register in an administrative district of the Land determined on the basis of the EASY system, they also must remain there for the duration of the procedure. They have, in principle, no right to free movement between the various Länder and can only leave their own region or district upon explicit permission of the competent authorities of the Land concerned. Asylum seekers travelling to other districts or Länder without such permission can be penalised.

Dispersal schemes for the reception of asylum seekers are also being applied in other EU Member States. In the UK, for instance, a compulsory dispersal mechanism is administered at regional level. It is based on the principle that in each of the six regions the number of asylum seekers per inhabitant should be limited, taking into account the financial resources of the region concerned but also the social impact of the presence of asylum seekers. Sweden, on the other hand, applies a model that is based on the free choice of the municipality by the asylum seeker. The authorities only intervene where the asylum seeker does not make a choice. In the latter case, the competent authority proposes a municipality to the asylum seeker based on an assessment of the person's education and vocational background. The aim is to find in consultation with the asylum seeker an appropriate region predominantly based on the person's chances on the labour market as asylum seekers have access to the labour market during the asylum procedure under certain conditions.¹⁵⁸

The debate on a possible EU distribution key for asylum seekers raises a number of complex questions with regard to its practical and legal implications for Member States and asylum seekers. A fundamental issue concerns which criteria will be used to determine the quota per Member State. Will these criteria relate exclusively to quantifiable factors such as GDP, population size, reception capacity etc. indicating the capacity of a Member State of receiving asylum seekers on its territory?¹⁵⁹ Or will also factors such as the quality of decision-making, integration possibilities, specific needs of the asylum seekers and presence of family members and other relatives be taken into account? This is also related to the level of harmonization of asylum policies and practices across the EU as if a mandatory EU distribution key were to be used today it would obviously result in the same human rights violations as is currently the case under the Dublin Regulation. At the same time, it is questionable whether such a system would be cost-effective, in particular if it were to function as a system of mandatory allocation of asylum seekers to a particular Member State as this would not only involve travel and administrative costs but also costs related to enforcing the decision, where asylum seekers would not want to comply out of free will.¹⁶⁰ Any system implying mandatory relocation to a specific Member State would also have to provide for an effective remedy for the asylum seeker concerned to challenge such decision in accordance with Article 47 EU Charter of Fundamental Rights and Article 13 ECHR. Another key question concerns which body or institution would operate the EU distribution Key at the EU level? As it would require power to take an enforceable decision on an individual asylum seeker, this would be beyond EASO's

¹⁵⁷ See C. Boswell, "Burden-Sharing in the European Union: Lessons from the German and UK Experience", *Journal of Refugee Studies* Vol. 16, No 3, 2003, p. 326.

¹⁵⁸ European Parliament, *Burden-sharing Study*, p. 53-54.

¹⁵⁹ The European Parliament Resolution on intra-EU Solidarity suggests that the feasibility of an EU system for relocating asylum seekers should be explored taking into account "objectively verifiable criteria such as Member States' GDP, population and surface area and asylum seekers' best interest and integration prospects". See European Parliament, *Resolution on enhanced intra-EU solidarity in the field of asylum*, P7_TA-PROV(2012)0310, 11 September 2012.

¹⁶⁰ The recent EP study on burden-sharing came to the conclusion that only physical relocation of asylum seekers will make a significant contribution to a more equitable distribution of asylum costs across Member States. However, the study also pointed to the fact that such relocation will only be cost-effective if it is based on a voluntary relocation of asylum seekers. As soon as a system imposes an obligation on asylum seekers to remain within a specific Member State or to go to a specific Member State for the processing of the asylum application, the costs increase. This is because a variety of measures need to be taken to enforce such allocation decision, such as detention, administrative costs related to deciding where the asylum seeker needs to go, travel costs etc.. See European Parliament, *Burden-sharing Study*, p. 146.

current mandate, while arguably this would neither be within the competence of any of the EU institutions under the Lisbon Treaty.¹⁶¹ At the practical level it raises the question in which Member State the decision would be issued to the asylum seeker in such system and whether it would require setting up EU reception centres where asylum seekers would have to wait for the decision on the Member State responsible for receiving them.

In light of the range of legal, political and practical questions it raises, ECRE considers a systematic mandatory dispersal of asylum seekers across the territory of EU Member States, unrealistic and undesirable in light of the risk of undermining the fundamental rights of asylum seekers affected by such system. Moreover, an EU Distribution Key along the German Koningsteiner Schlüssel would require that equally high standards of protection are applied in all EU Member States and that asylum seekers have the same chance of finding protection in the EU regardless of the Member State finally responsible for examining their application. Furthermore, such a system would in ECRE's view be extremely difficult, if not impossible to implement in practice in light of its scale and financial implications.

Recommendation

ECRE considers that a system of EU-wide physical distribution of asylum seekers is unrealistic, risks undermining asylum seekers' access to protection and is likely to be not cost-effective. While there is a need to ensure a more equitable distribution of costs related to asylum, this should not be achieved through the mandatory physical relocation of asylum seekers within the EU.

Recommendation

Instead of moving asylum seekers around the EU, EU institutions should invest in sharing more effectively financial resources and expertise with a view to improving quality of decision making combined with enhanced free movement rights for those granted international protection as discussed in the previous sections of this chapter. This would not only be less intrusive on the fundamental rights of the asylum seekers concerned, but also be more cost-effective.

¹⁶¹ See above for the discussion on EU competence in the context of the second model of joint processing.

Conclusion

In this paper ECRE has identified a number of concrete steps EU Member States and EU institutions can take to enhance solidarity within the EU in the field of asylum. While some of the recommendations made in this paper can be implemented in the medium to short term within the existing political and legal framework, others are more forward looking and long term. The current debate on solidarity and responsibility-sharing and the extent to which concrete progress can be made is crucial for the future of the CEAS as a model of refugee protection. In ECRE's view, solidarity and responsibility-sharing tools and mechanisms must, in the first place, serve the objective of increasing quality of asylum systems with a view to ensuring the full respect for the right to asylum in the EU. A well-resourced EASO that is given the necessary "space" by its political masters to establish itself as a truly independent centre of expertise and support could allow it to become one of the a key actors in achieving this aim. The permanent health and quality check of the CEAS through a reinforced Early Warning Mechanism is thereby seen as a key tool for identifying the protection gaps and weaknesses in the system and the solidarity measures necessary for improving and maintaining quality of asylum systems and thus better protecting asylum seeker's fundamental rights. Further strengthening practical cooperation in the field of training and COI as well as mainstreaming quality assessment and assurance mechanisms in the CEAS will significantly contribute to improving protection standards in the EU in the short term. Other tools such as joint processing as well as intra-EU relocation mechanisms require a more cautious approach as a range of questions remain unanswered, including with regard to the human rights impact of such mechanisms. Nevertheless, the reality today is that asylum seekers arriving in the EU may find themselves confronted with dysfunctional asylum systems and serious violations of their fundamental rights. It is therefore worth exploring to what extent joint processing may assist in effectively addressing the protection gaps in the CEAS. In ECRE's view, if the path of joint processing were to be chosen by the EU institutions and Member States, this could best be started with a controlled pilot limited to a specific caseload and coupled with independent evaluation of its practical feasibility and human rights impact. Finally, free movement rights of beneficiaries of international protection should be further enhanced as this will in addition to contributing to their integration into European societies also have positive side-effects in alleviating pressures on certain Member States.

ANNEX: List of Recommendations

EASO as a key actor in responsibility-sharing

Recommendation

EU Member States must fully support and consolidate the development of EASO as an independent European centre of expertise that aims to secure the institution of asylum in the EU in accordance with international refugee and human rights law and the objectives of the Stockholm Programme.

Recommendation

As a key instrument to enhance solidarity in the field of asylum, EASO must be properly resourced to reflect the importance and variety of its tasks and its role as a key player in enhancing solidarity and quality in the CEAS.

Recommendation

EASO must further increase transparency concerning the functioning of its main governing body, the Management Board, including through making agendas of Management Board meetings publicly accessible. Summaries of the main outcomes and conclusions of meetings of expert working groups and working parties organized by EASO must also be made public.

Recommendation

EASO must make full use of the wealth of expertise and experience NGOs have acquired through their work with asylum seekers. EASO must further invest in developing efficient tools and structures to deepen the dialogue with civil society, including an e-platform for consultation. Direct interaction with the Management Board must be established in particular with regard to the feedback and suggestions provided by the Consultative Forum under Article 51 EASO Regulation.

Recommendation

EASO must establish a transparent procedure to verify which relevant experts from NGOs, academia and the judiciary can be involved in working parties and other expert meetings organized by EASO. Dates and topics of such meetings must be shared sufficiently in advance with Consultative Forum members and be made publicly available *inter alia* through a permanently updated annual consultation calendar as envisaged in the Consultative Forum Operational Plan.

Recommendation

The Fundamental Rights Agency must systematically monitor and assess EASO's work in the area of practical cooperation and support to Member States subject to particular pressure as to their compliance with the EU Charter on Fundamental Rights. Such assessments and specific recommendations to EASO should be included in the annual report on EASO's activities.

Recommendation

EASO's expertise in the field of asylum must be systematically integrated in any border control operation carried out by Frontex to ensure that experts with specific asylum-related expertise are used in the identification of persons with international protection needs in mixed migration flows. This must be explicitly consolidated in Frontex' common operational procedures for border guards for joint Frontex operations.

A Permanent Health and Quality Check of the CEAS through a comprehensive Early Warning Mechanism

Recommendation

A meaningful and comprehensive Early Warning Mechanism (EWM) must be established, capable of identifying current and potential protection and resource gaps in the asylum systems of EU Member States in a timely manner and on the basis of accurate and up-to-date information obtained from all available and relevant sources. Such a system must allow for a permanent health and quality check of the CEAS and be based on the following principles:

- The EWM must serve the purpose of improving protection standards and quality of all its aspects and not merely of ensuring the functioning of the Dublin Regulation.
- It must guarantee rigorous and comprehensive monitoring of all aspects of the Member States' asylum systems, including quality of reception conditions, asylum procedures and individual decision-making. Monitoring must include regular spot checks by Quality Assessment Teams.
- Guarantees must be in place to ensure that information gathered and processed in the mechanism is based on a variety of sources, including information provided by expert non-governmental organisations and practitioners and resulting from human rights monitoring carried out by the Committee for the Prevention of Torture, the Human Rights Commissioner of the Council and Europe and the UN Universal Periodic Review.
- Identification of future risks or existing protection gaps through the EWM must trigger immediate action and establish an obligation for Member States to set up targeted action plans in coordination with the Commission and supported by EASO.
- Information processed through the EWM, assessments and recommendations made by EASO and the Commission and the resulting action plans must be publicly available.

Recommendation

EU-level quality assessment of representative samples of individual decisions, reception accommodation and reception conditions and safeguards against arbitrary detention and detention conditions must be an integral part of the Early Warning Mechanism. Independent Quality Assessment Teams must be established within EASO with a leading role for UNHCR and additionally comprising independent experts, including academics and specialist NGOs. The key findings of quality assessment activities must be made public, including in the EASO Annual Report on Asylum.

Recommendation

As regards detention, the role of Quality Assessment Teams must complement monitoring activities of the Committee on the Prevention of Torture and focus on the quality of procedural safeguards against arbitrary detention and impact of detention on the quality of decision-making on asylum applications and on the health of the asylum seekers concerned.

Recommendation

The Commission must allocate sufficient resources to monitoring Member States' asylum policies and practice and enforcing compliance with EU asylum legislation as guardian of the Treaty. Priority areas must include *inter alia* the operation of the Dublin Regulation, detention of asylum seekers, safeguards for particularly vulnerable asylum seekers such as

unaccompanied children and victims of torture, access to the labour market and access to free legal assistance and representation.

Sharing responsibility and enhancing solidarity to improve quality and fundamental rights protection in the CEAS

Sharing money

Recommendation

Programming of the future Asylum and Migration Fund must also be informed by the results of the in-depth monitoring of national asylum systems through the Early Warning Mechanism. Programming must include an effective opportunity for non-governmental organisations to provide timely input on funding priorities at the national level based on their specific expertise at the various stages of implementation of the Fund, including policy dialogues and the mid-term review of the Fund.

Sharing expertise – Training

Recommendation

The involvement of external experts, including NGOs, in train-the-trainer sessions organised by EASO must be encouraged as a means to further broaden the perspective of the trainees.

Recommendation

Translation of EAC modules into the national language must be encouraged and where necessary sufficient resources must be secured in the national policy dialogues in the framework of the Asylum and Migration Fund.

Recommendation

A training manual on the role of interpreters in the asylum interview must be developed by EASO as well as guidelines relating to the use and content of a code of conduct for interpreters.

Sharing expertise – COI

Recommendation

An independent expert panel must be established to ensure an independent review of EASO COI reports and assist EASO on issues of methodology and monitoring the impact of EASO COI reports on decision-making practice in EU Member States with regard to the country of origin concerned.

Recommendation

EASO's COI portal must be accessible to asylum seekers and legal representatives, in particular with regard to information drawn from the portal used to substantiate a negative decision to ensure full equality of arms in national asylum procedures. Wherever asylum authorities make use of information in the COI portal, it should be explicitly mentioned in the individual decisions stating the reasons for refusing international protection.

Sharing expertise – Joint Processing

Recommendation

Any joint processing must serve the objective of increasing the quality of decision-making in the CEAS and facilitating access to protection in the EU. Mere efficiency arguments can never suffice as a basis for launching any model of joint processing.

Recommendation

Any model of joint processing within the EU should guarantee the full range of safeguards under international human rights law and the EU asylum acquis to ensure that the right to asylum is respected in practice. ECRE opposes any model of joint processing that includes detention of asylum seekers or forced relocation of asylum seekers or beneficiaries of international protection.

Recommendation

Provided that sufficient guarantees are provided to ensure full respect of the right to asylum, the first model of joint processing should be tested within a controlled pilot on a narrowly defined specific caseload such as asylum seekers rescued at sea or unaccompanied children in Greece or another discrete caseload from a Member State facing capacity issues. This should be made conditional on a prominent operational role for UNHCR in Asylum Support Teams and independent evaluation of its impact on the fundamental rights of asylum seekers. The decision on where to initiate a pilot should be made following a thorough evaluation of possible risks and benefits and in consultation with relevant stakeholders.

Recommendation

The establishment of an EU Asylum Authority with decentralised branches in all EU Member States must be further explored as a long term option and as a tool to ensure greater convergence of decision-making, representing a high level of protection across the EU. On the basis of Declaration 17 to the TEU, UNHCR should have a formalised advisory role to the EU Asylum Authority while consultation with NGOs should be organised both at national and EU level.

Sharing People: relocation of beneficiaries of international protection and asylum seekers within the EU

Recommendation

If the EU and Member States continue to engage in intra-EU relocation of beneficiaries of international protection any project or mechanism should be premised on the following key principles:

- Intra-EU relocation must be clearly kept separate from resettlement programmes.
- Intra-EU relocation should always be conditional on the informed consent of the person concerned and should prioritise the most vulnerable beneficiaries of international protection where the places for relocation are limited.
- EU Member States should not engage in the relocation of beneficiaries of international protection without making this conditional on concrete commitments from the “sending Member State” to uphold and maintain the quality of the asylum system and address the protection gaps making internal relocation a necessity for specific categories.
- Intra-EU relocation should be developed in close cooperation with UNHCR and NGOs in both receiving and sending EU Member States.

Recommendation

In the short term, Member States should already refrain from applying provisions in the Long Term Residence Directive that delay access to long term residence status for beneficiaries of international protection or constitute practical obstacles to effectively making use of free movement rights under the Directive. Member States should always take into account the entire duration of the asylum procedure when calculating the period of five years of legal and continuous residence on the territory as required under Article 4(1) of the Directive.

Recommendation

In the long term beneficiaries of international protection should be granted free movement rights immediately after recognition. The Long Term Residence Directive should be further amended to this effect, abolishing the requirement for beneficiaries of international protection to have five years of legal residence in the Member State which granted international protection.

Recommendation

ECRE considers that a system of EU-wide physical distribution of asylum seekers is unrealistic, risks undermining asylum seekers' access to protection and is likely to be not cost-effective. While there is a need to ensure a more equitable distribution of costs related to asylum, this should not be achieved through the mandatory physical relocation of asylum seekers within the EU.

Recommendation

Instead of moving asylum seekers around the EU, EU institutions should invest in sharing more effectively financial resources and expertise with a view to improving quality of decision making combined with enhanced free movement rights for those granted international protection as discussed in the previous sections of this chapter. This would not only be less intrusive on the fundamental rights of the asylum seekers concerned, but also be more cost-effective.