

MOVING ON WITH THE EU ASYLUM AGENCY

ECRE'S UPDATE ON DEVELOPMENTS RELATED TO THE EUAA AND ITS RECOMMENDATIONS TO THE CO-LEGISLATORS FOR THE CONCLUSION OF THE NEGOTIATIONS ON THE EUAA REGULATION

I. INTRODUCTION

In September 2020, the European Commission presented a *New Pact on Migration and Asylum*. Even though the Communication on a New Pact on Migration and Asylum was presented together with a set of legislative proposals, the Commission did not throw the 2016 proposals overboard. In its Communication, the Commission clarified that the previous proposals to reform the Common European Asylum System (CEAS) remain valid, unless explicitly revoked or amended, and that the new Pact maintains as far as possible the compromises reached between the European Parliament and the Council. This is where the file on the new EU Asylum Agency (EUAA) is to be found: negotiations will continue based on the 2016 proposal and the interinstitutional agreement that was reached between the European Parliament and the Council on 27 June 2017, meaning that the 2018 amended proposal, on which no political agreement was reached, will not be taken into account.

Two linked issues arise. First, process: will the EUAA file move forward or will the “package” approach prevail, meaning that nothing is agreed until everything is agreed? Recent events indicate that certain Member States will not allow the EUAA proposal to advance without progress on all files. Indeed, the outgoing German Presidency had hoped that it would broker an agreement among the Member States on the EUAA but its *Presidency Progress Report*, shows that has not happened. It will be up to the Portuguese Presidency to achieve further progress on this file. Second, content: will the co-legislators agree on an agency with a stronger protection-oriented mandate, based on a long-term vision?

Here, ECRE presents its adapted recommendations for the EUAA based on research it carried out on the operations of EASO, and drawing on its Comments on the 2016 proposal and previous policy note on the role of the EUAA. ECRE proposes separating the EUAA debate from the rest of the proposals in order to allow the EUAA to reach its full potential and also to ensure that the role of the EUAA is not adapted based on a more restrictive vision of limiting asylum in Europe.

II. ANALYSIS

A key objective of the 2016 proposal was to boost the role of EASO in the CEAS by “transforming it into a centre of expertise in its own right”. Its resources would be increased in order to enable it to provide operational and technical assistance to Member States; to support the fair distribution of asylum applicants; to monitor and assess the implementation of the CEAS and the asylum and reception systems; and to enable convergence in decision-making on asylum applications. Despite its name change and the stronger role envisaged, the Commission proposal did not however represent a fundamental overhaul of EASO’s mandate.

ECRE welcomed the move towards a better-resourced Agency as a necessary tool to address the structural flaws and deficiencies in the CEAS. However, whereas its competence and resources may be enlarged, ECRE has expressed its concern that the new EUAA would essentially remain an instrument facilitating and implementing asylum policies set out in other legislative and policy instruments, and which may have objectives other than the better functioning of asylum systems in Europe.

1. INCREASING THE INDEPENDENCE OF THE EUAA

Under the 2016 proposal the composition of the EUAA Management Board remains unchanged compared to EASO’s, meaning that it shall be composed of one representative from each Member State and two representatives of the Commission. The Management Board also includes one representative of UNHCR, but without the right to vote. Given the composition of the Management Board, and the national interests they represent, and the tendency of the Commission to follow Member States’ wishes in this area of policy, the EUAA is not an independent agency. While it may not be politically or legally feasible to be more independent – in the manner of the Fundamental Rights Agency (FRA), for example, where the management board is largely composed of independent experts appointed by each Member State – there are ways to improve the independence of the EUAA even within its current governance structure.

Establishment of an independent Expert Panel for COI

The Commission proposal entrusts the new Agency with broader competences in the area of country of origin information (COI), for reasons including to address the significant disparities between the Member States regarding recognition rates and outcomes of asylum procedures. Reliable and up-to-date COI is essential for quality decision-making and the establishment of any robust status determination process and it is central to the credibility of asylum procedures. To foster convergence in applying the assessment criteria established in the Qualification Directive, the Agency shall also coordinate efforts among Member States to engage in and develop a common analysis, by providing guidance on the situation in specific countries of origin. Member States are to take this common analysis into account in their decision-making “without prejudice to their competence for deciding on individual applications”. Some concerns regarding the COI process can be raised.

First, as for EASO, the EUAA will lack a clear protection mandate – unlike some of the first instance asylum authorities in the EU such as the Belgian Commissioner-General for Refugees and Stateless Persons (CGRS) or the French Office for the Protection of Refugees and Stateless Persons (OFPRA). Given the composition of the Management Board, an endorsement or lack thereof by the Management Board of the common analysis may be inspired by domestic political rather than protection considerations. In order to enhance the objective and independent nature of the Agency’s work in the area of COI, its internal procedure for adopting such common analysis and guidance should include guarantees to ensure its objectivity and impartiality. This is best achieved by the final responsibility remaining with the Executive Director, as she/he is independent in the performance of his/her duties and shall not seek nor take any instructions from any government, institution, person or any other body.

In the interest of ensuring objectivity and impartiality in the Agency’s work on COI in general, peer review by a formal panel of independent experts should be set up. The independent COI expert panel would provide advice to the Agency on methodology and have a formal role in reviewing the Agency’s COI reports and assessing its sources prior to publication. It should also have a formal role in evaluating the use of the Agency’s COI reports and guidance in individual decision-making on asylum applications.

Expert panel members should be appointed by the Executive Director and include academic country experts, representatives of the judiciary, expert NGOs and UNHCR, to be selected following a public call for expression of interest. These experts should also participate in the Country Guidance Network Meetings on the update of common analysis and guidance on main countries, where they could present their views and provide feedback on the deliberations.

Consultative Forum: further develop constructive engagement

The establishment of the EUAA provides an opportunity to further develop the Consultative Forum for interaction with civil society. ECRE notes the broader role of the Forum compared to that in the current EASO Regulation. In addition to being a platform for exchange of information and sharing of knowledge, the 2016 proposal also envisaged that the Forum would “assist” the Executive Director and the Management Board in matters related to asylum. This wording leaves scope for ambiguity. In line with ECRE’s recommendation, amendments from both the EP and Council clarified that the Consultative Forum shall “advise”, rather than “assist” the Executive Director and the Management Board. The 2016 proposal also foresees that its composition and working methods are decided upon by the Management Board, upon proposal by the Executive Director. In ECRE’s view, in order to secure its independence and exclude any interference, the Consultative Forum should decide on its own working methods. The outcome of the technical discussion between the Council and the EP has already proposed changes to its wording such that the “Consultative Forum shall, after consulting the Management Board and the Executive Director, define its working methods including thematic or geographic-focused working groups as deemed necessary and useful”, thereby supporting the independence of the Consultative Forum.

2. A COMPREHENSIVE MONITORING AND ASSESSMENT MECHANISM

The EUAA is entrusted with a bigger role in monitoring and assessment of the CEAS. The proposal envisages a specific monitoring mechanism on the implementation of all aspects of the CEAS, on compliance with operational standards, and on the capacities of Member States and their financial resources, including of judicial systems. The proposed mechanism could be an important tool to ensure a permanent fitness check for the CEAS, allowing the EUAA to *prevent* rather than remedy deficiencies in Member States’ asylum systems. Unannounced on-site visits by expert teams and evaluation of samples of individual decisions are also indispensable methods to ensure qualitative and quantitative assessment. The 2017 agreement did however water down the monitoring mechanism to the “monitoring of the operational and technical application of the CEAS with a view to assisting Member States to enhance the efficiency of their asylum and reception systems”.

ECRE believes that the proposed monitoring and assessment mechanism as foreseen in the 2016 proposal should be maintained and further strengthened by covering detention practices and legal assistance. Furthermore, while the EP accepted not including asylum applicants, researchers and academics, and the Consultative Forum as sources of information, ECRE reiterates its view that the experiences and assessments of non-governmental actors and those directly affected should be systematically incorporated. Failure to include these sources would inevitably result in the mechanism missing crucial information.

3. ACCOUNTABILITY OF THE AGENCY

No participation of third country officials in practical cooperation activities

The Commission proposal envisages greater focus on cooperation with third countries. Such cooperation may concern a variety of activities, ranging from the coordination of resettlement activities and capacity building of third countries’ asylum and reception systems to the ill-defined “facilitation of operational cooperation between Member States and third countries”. If it remains part of the EUAA’s role, in resettlement activities, consistency with UNHCR resettlement priorities must be ensured. Close cooperation with UNHCR and expert NGOs on pre-departure cultural orientation and post-arrival integration assistance is key.

Inviting third country officials as observers in operational and technical support activities coordinated by the Agency raises major ethical and legal questions of compatibility with principles of confidentiality and non-disclosure of information to the alleged actor of persecution as laid down in the EU asylum *acquis*. In order not to compromise an applicant’s trust in the asylum process and to avoid any unlawful sharing of information, ECRE believes that the Regulation should prohibit any presence of third-country officials, including as observers, in operational and technical activities that may lead to the disclosure of any information regarding

individual applications for international protection to alleged actors of persecution or serious harm. There have been proposals from both the EP and the Council to delete these provisions and ECRE strongly recommends that these deletions take place.

Complaints mechanism and sufficiently resourced Fundamental Rights Officer

The proposed mandate of the EUAA marks a further step in conferring powers to the Agency that have direct bearing on Member States' decision-making processes on individual applications for international protection. The proposed Regulation provides a legal basis for asylum support teams to engage not only in the registration but also in the examination of applications beyond an initial analysis. Increased operational activity and presence on the ground increase the likelihood of the Agency's actions having an impact on the fundamental rights of individuals and therefore triggering its accountability for human rights violations. The involvement of EASO on the ground shows positive effects when the focus is strengthening local asylum systems in response to their needs. However, the overall impact on the quality of asylum procedures is mixed as the quality of decisions fell in some cases, with examples being admissibility assessments in Greece and eligibility assessments in Cyprus and Greece. An individual complaints mechanism and a sufficiently resourced Fundamental Rights Officer would assist the Agency in systematically promoting and monitoring respect for fundamental rights in all its operational activities. It would also provide applicants affected by such activities with an additional tool to express any grievances that may arise and get redress in case of improper treatment by EUAA-deployed staff or national experts. Besides such a complaints mechanism, the EUAA should also continuously engage in monitoring, evaluating and adapting its activities in order to increase its impact and ensure compliance with fundamental rights.

III. RECOMMENDATIONS

- » Finalise as soon as possible the transformation of the EASO into the EUAA on the basis of the 2017 inter-institutional agreement and disregarding the amended proposal of September 2018.
- » Improve the independence of the EU Asylum Agency - within its current government structure - through the formal involvement of external experts in COI and COI-related products, attributing certain final decisions to the Executive Director (instead of the Management Board), and ensuring sufficient independence of the Consultative Forum.
- » Include in the EUAA Regulation a Fundamental Rights Officer position reporting to the Management Board and Consultative Forum and an individual complaints mechanism relating to the Agency's operational activities.
- » Maintain the monitoring and assessment mechanism, which is an essential element of the proposal. In practice, it should be expanded to cover detention, legal assistance and resettlement. It must systematically include information and assessments carried out by NGOs, UNHCR and relevant international or European human rights monitoring bodies, as well as consulting asylum-seekers directly.
- » Prohibit in the Regulation the presence of third-country officials, including as observers, in operational and technical activities that may lead to the disclosure of any information regarding individual applications for international protection to alleged actors of persecution or serious harm.
- » Establish an Independent Expert Panel on COI to advise the Agency and the Executive Director on matters of methodology, to review the quality of COI reports and other products, and to review and provide advice to the Executive Director prior to the adoption and revision of the common analysis providing guidance on the situation in specific countries of origin. The Independent Expert Panel should consist of academic country experts, representatives of the judiciary, expert NGOs and UNHCR, and be appointed by the Executive Director, following a public call for expression of interest.