



**ECRE Comments on the Commission Proposal for a
Regulation on the European Union Agency for
Asylum and repealing Regulation (EU) No 439/2010
COM(2016) 271**

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Summary of views

ECRE submits the following key observations and recommendations on the Commission proposal for a Regulation establishing a European Union Agency on Asylum:

1. The duty to cooperate in good faith and exchange of information with the new EU Agency on Asylum laid down in **Article 3** should be applicable to all activities of the Agency and be further strengthened by requiring the Executive Director to report on Member States' compliance with the duty to cooperate and exchange information in Article 46 and as part of the Agency's Annual Activity report required under **Article 65(1)**.
2. The Regulation should establish a clear obligation in **Article 7(7)** for experts participating in the asylum support teams and the asylum intervention pool, including as part of migration management support teams to have received specialist training from the Agency before they can take up their tasks in the host Member State.
3. An Independent Expert Panel, consisting of academic country-specific experts, the judiciary, expert NGOs and UNHCR, should be established. This Independent Expert Panel should advise the Agency and the Executive Director on matters of methodology, review the quality of COI reports and other COI products of the Agency and review and provide advice to the Executive Director prior to the adoption and revision of common analysis of country of origin information.
4. In order to avoid any inconsistent or conflicting guidance being provided to Member States by different actors, the primacy of the UNHCR eligibility guidelines over the Agency's common analysis on a specific country of origin should clearly be established in **Articles 10(1)** and **Recital 11**.
5. The Regulation must ensure that the information gathered by the Agency meets the necessary requirements of objectivity and impartiality by taking into account the variety of sources, including from expert non-governmental organisations, UNHCR and European and International human rights bodies. Explicit references to such sources must be introduced in particular in **Article 4(2)** relating to the Agency's analysis on the situation of asylum in the Union and third countries and **Article 13(2)(a)** relating to the mechanism for monitoring and assessing the asylum and reception systems.
6. In line with data protection principles of purpose limitation, proportionality and necessity, the proposed competence under **Article 31(1)(e)** to process personal data for the purpose of analysing information on the situation of asylum should be deleted, while the possibility to process personal data should be strictly limited to nationality, age and gender for the purpose of case sampling.
7. 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. Consequently, **Article 35(3)** should be deleted.
8. **Article 48** on the Consultative Forum should clarify its role as one of advising rather than assisting the Agency in order to emphasise its consultative nature and empower it to establish its own working methods.

Introduction

The European Asylum Support Office (EASO), established by Regulation (EU) No 439/2010, was set up as an Agency intended to strengthen practical cooperation among Member States and to provide or coordinate operational support to Member States.¹ This is clearly expressed by the Agency's baseline: "support is our mission". However, beyond the provision of practical support to Member States' asylum systems, including in situations of sudden or disproportionate pressure due to large numbers of asylum seekers arriving, EASO's mandate also foresees a role for the Agency as a "European centre of expertise in the area of asylum".² Through the collection and analysis of information with regard to the implementation of standards laid down in the EU asylum *acquis* both by asylum administrations and the judiciary, it is set to provide:

"[S]cientific and technical assistance in regard to the policy and legislation of the Union having a direct and indirect impact and aims to be a reference point by virtue of its independence, the scientific and technical quality of the assistance it provides and the information it disseminates and the transparency of its operating procedures and methods."³

Nevertheless, as an Agency it is destined to work closely with the Member States' asylum authorities and the European Commission.

Although the EASO Regulation explicitly excludes any direct or indirect competence of EASO in relation to individual decision-making, which remains entirely with the Member States' asylum authorities, it already provides the Agency with important tools which have the potential of influencing and steering the individual decision-making practice of Member States to a considerable degree. Ever since it became operational, EASO has prioritised the development of its activities and tools in the areas of training and country of origin information (COI), with a view to enhancing convergence of individual decision-making between EU Member States. This translated not only in the publication of multiple COI products, including EASO reports on the human rights situation in key countries of origin of persons seeking international protection in the EU,⁴ but also in the development of a publicly accessible COI portal⁵ and the development of networks of COI experts of Member States for specific countries of origin. As far as training is concerned, EASO has developed and updated a comprehensive set of training modules on international refugee and EU asylum law through which it claims to have trained over 8,000 asylum officials in the EU since 2012.⁶

EASO's increasing work in the area of training and country of origin information, combined with its practical support to Member States facing particular pressure through the deployment of asylum support teams consisting of national experts from Member States has expanded its interference with the daily operations of national asylum authorities. This has also resulted in a series of pilot projects on joint processing of asylum applications, which were initially limited to purely technical and case-management support before the interview stage, but were later expanded to include the personal interview and recommendations for decisions on the individual case to the asylum authority of the

¹ Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office (hereafter 'EASO Regulation'), OJ 2010 L132/11.

² Recital 13 EASO Regulation.

³ See Article 2(4) EASO Regulation.

⁴ Most recent publications include EASO, *Country of Origin Information Report, Afghanistan Security Situation*, January 2016 and *Country of Origin Information Report, Somalia Security Situation*, February 2016, available at: <https://goo.gl/ARHDYS>.

⁵ A beta version of the COI portal was made publicly accessible only recently. For the time being, the COI portal coordinated by EASO only provides selected COI authored by national asylum authorities, EASO and other EU institutions, such as the European External Action Service. The COI portal is available at: <https://coi.easo.europa.eu/>.

⁶ See EASO training webpage available at: <https://goo.gl/yG7oFZ>.

host Member State.⁷ Currently, EASO's activities in Greece as part of the implementation of the "EU-Turkey statement"⁸ and the "hotspot" approach have gone beyond the testing phase and include the coordination of far-reaching engagement by asylum officials from other EU Member States posted in Greece in the individual assessment of the admissibility of asylum applications lodged in Greece.⁹

Six years of operational experience have revealed the intrinsic weaknesses and strengths of EASO's mandate and governance structure laid down in the EASO Regulation.¹⁰ While it has indeed contributed to establishing a greater factual knowledge base on the development of asylum in the European Union and provided useful and important tools to enhance overall quality of Member States' asylum systems, the Agency keeps struggling with its dual role as a service provider to Member States and an independent centre of expertise on asylum. Moreover, EASO's role in facilitating and coordinating practical cooperation between Member States' asylum authorities has been predominantly limited to exchanging expertise and knowledge between national experts without a visible competence to draw conclusions and provide any binding guidance on the interpretation and application of key concepts of EU asylum law and international refugee law. This may be one of the reasons why the Agency's activities so far have had modest impact on the convergence of individual decision-making in practice, commonly acknowledged as one of the key problems for the Common European Asylum System (CEAS).¹¹ For the Agency to be able to play its role as a catalyst of further harmonisation of asylum law and policy in the EU, a further extension of its mandate and the tools at its disposal to foster cooperation between EU Member States in order to achieve higher convergence between EU Member States seems necessary. However, as argued throughout this document, such extension will also require specific guarantees to ensure that enhanced cooperation and harmonisation serves the purpose of establishing a resilient CEAS based on high standards of protection.

Key features and broader context of the Commission proposal

The Commission proposal for a Regulation on the European Union Agency for Asylum forms part of a first batch of 3 proposals aiming at a fundamental reform of the legal framework of the CEAS, the other two proposals recasting the Eurodac Regulation and Dublin III Regulation.¹² The key objective of the proposal is to boost the role of EASO in the functioning of the CEAS by "transforming it into a centre of expertise in its own right", increasing its resources to enable it to provide operational and technical assistance to Member States, supporting the fair distribution of asylum applicants, monitoring and assessing the implementation of the CEAS and the reception capacity of asylum and

⁷ See e.g. EASO, *Newsletter March 2016*, available at: <https://goo.gl/AEe3SK>.

⁸ European Council, *EU-Turkey statement*, 18 March 2016, available at: <http://goo.gl/reBVOt>.

⁹ For a description of EASO's support to Greece with regard to provision of information and registration as well as the implementation of the admissibility procedure including conducting personal interviews and recommendations for decisions by deployed experts from other Member States see EASO, *EASO Hotspot Operating Plan to Greece – Amendment No 2* -, EASO/COS/2016/391, available at <https://goo.gl/d21VJm>.

¹⁰ Both an internal and external evaluation of EASO have been carried out. See European Commission, *Commission Staff Working Document on the internal Evaluation of the European Asylum Support Office (EASO)*, SWD(2014) 122 final, Brussels, 27 March 2014 and Ernst & Young, *European Asylum Support Office. Independent External Evaluation of EASO's activities covering the period from February 2011 to June 2014*, Final Report, December 2015. It should be noted that both evaluations do not cover important new operational activities coordinated by EASO including advanced forms of joint processing, launched after June 2014 such as in Greece in the context of the implementation of the EU-Turkey Statement.

¹¹ Achieving greater convergence is one of the five priorities identified by the Commission in addressing the structural shortcomings of the Common European Asylum System. See European Commission, *Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe*, COM(2016) 197, Brussels, 6 April 2016.

¹² See European Commission, *Proposal for 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)* (hereafter "Dublin IV proposal"), COM(2016) 270, 4 May 2016 and *Proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' (recast)* (hereafter "recast Eurodac proposal"), COM(2016) 272, 4 May 2016.

reception systems and enabling convergence in decision-making on asylum applications. Despite its name change, the Commission proposal does not present a fundamental overhaul of EASO's mandate, although some changes may have far-reaching consequences for the future of asylum law and policy in the European Union. It clearly designs the new Agency, much more so than the current EASO, as the driving operational and analytical force to achieve a higher level of harmonisation across the EU, which is perhaps most convincingly illustrated by the envisaged incremental increase of its staff to 500 and its overall budget from €16m in 2016 to over €52.000m by 2019.¹³

Since it was established, ECRE has constructively yet critically engaged with EASO, in particular but not exclusively through its involvement in the Consultative Forum. ECRE welcomes the move towards a better-resourced Agency in the field of asylum as a necessary tool to address the current structural flaws and deficiencies in the CEAS which often deprive asylum seekers from access to key fundamental rights safeguards and improve the protection standards in the EU.¹⁴ However, whereas its competence and resources may be enlarged, the new EU Agency on Asylum will essentially remain an instrument facilitating and implementing asylum policies shaped in other legislative and policy instruments.

In this regard, ECRE remains extremely worried about key aspects of the broader reform of the CEAS as included in the abovementioned proposals recasting the Eurodac and Dublin III Regulation and the plans for the further reform of the Asylum Procedures, Reception Conditions and Qualification Directives revealed by the Commission in its 6 April 2016 Communication.¹⁵ The proposed emphasis on the mainstreaming of safe country concepts as the new centrepieces of the CEAS, its short-sighted punitive approach to addressing secondary movements and retracting on acquired protection standards for beneficiaries of international protection under EU law forecast a "race to the bottom" in terms of refugee protection within the EU and a clear move towards an increasing externalisation of the EU's protection obligations to third countries. The ability of the new Agency to contribute to the establishment of a system that is true to the Tampere and Stockholm promises of a CEAS,¹⁶ based on high standards of protection, is necessarily constrained and determined by the standards defined in a new legal framework currently being shaped.

ECRE's views expressed in this paper must be read against this background and together with its comments on the Commission proposals recasting the Eurodac Regulation and Dublin III Regulation, as well as forthcoming proposals on the reform of the asylum Directives. ECRE's comments concentrate mainly on the new Agency's competences in the field of information collection and analysis on the situation of asylum, monitoring of the implementation of the EU asylum *acquis* and country of origin information, its proposed role in situations of disproportionate pressure on the asylum and asylum system, cooperation with third countries, and the role of the Consultative Forum.

¹³ See European Commission, Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 (hereafter 'proposal on an EU Agency for Asylum', COM (2016) 271 final, Brussels, 4 May 2016, p. 71-72.

¹⁴ For an in-depth NGO analysis of the functioning of the CEAS, see AIDA, *Common asylum system at a turning point: Refugees caught in Europe's solidarity crisis*, Annual Report 2014/2015, available at: <http://goo.gl/DBIYnO>. For a thematic comparative overview and assessment of reception conditions see AIDA, *Wrong counts and closing doors: The reception of refugees and asylum seekers in Europe*, March 2016, available at: <http://goo.gl/hqhEzU>.

¹⁵ See above, footnote 11.

¹⁶ European Council, *Tampere European Council 15 and 16 October 1999: Presidency Conclusions; The Stockholm Programme: An open and secure Europe serving and protecting citizens*, OJ 2010 C115/1.

Analysis of key provisions

1. Information collection and analysis on the situation on asylum, and training

The collection and analysis of information on the situation of asylum in the EU remains a core activity for the new Agency. Highlighting the importance of reliable and comprehensive information in order to fulfil its role as a centre of expertise, **Article 3** introduces a duty on the national asylum and immigration authorities and services as well as on the Agency to cooperate in good faith and to exchange information. By inserting this new obligation on the Agency and the Member States' authorities, the proposal aims to address EASO's dependence on the information and expertise provided by Member States, a key problem acknowledged by the Commission in the Explanatory Memorandum.¹⁷

The proposed duty of cooperation and information exchange in Article 3, establishes an important principle¹⁸ but should, in ECRE's view, be further reinforced in order to maximise its impact. Firstly, by placing the provision in Chapter II, the proposal seems to limit its scope mainly to the collection of information on the situation of asylum in the Union and third countries with a view to strengthening risk analysis, the Agency's databases concerning the implementation of EU asylum law instruments, its role in supporting the Dublin system and training. However, the provision of accurate and up-to-date information on the functioning of the asylum system, in particular information that is not in the public domain and is only available from the authorities, is equally indispensable with a view to the Agency's other core tasks such as the new monitoring and assessment mechanism of Member States' asylum systems¹⁹ and the planning of its operational and technical assistance to Member States through the deployment of asylum support teams within or outside the framework of migration management support teams.²⁰ In order to **clarify its general application to all activities within the new Agency's mandate**, Article 3 should be moved to chapter I introducing the subject matter and scope and the tasks of the Agency.

Secondly, the duty to cooperate in good faith and exchange information will serve little purpose if it cannot be enforced in practice. It is acknowledged that identifying a lack of good faith on behalf of Member States' asylum or immigration authorities and services may prove to be challenging in practice. However, where a **lack of good faith is systematically established** by the Agency, for instance through information provided *post facto* by UNHCR or NGOs, this should be **reported by the Executive Director to the Management Board and the European institutions, including as part of the EU Asylum Agency's annual activity report**.²¹

More particularly, the timeliness of information provision should be further clarified as a central component of the duty to cooperate in good faith. **Recital 7** explains that the Agency and Member States must "act in good faith and have a timely and accurate exchange of information", as well as respect the technical and methodological specifications of the Migration Statistics Regulation when providing statistical data.²² This reference is crucial against the backdrop of **many Member States' systematic failure to comply with their duties vis-à-vis the provision of asylum and immigration statistics** under that Regulation.²³ Through an explicitly strengthened role in timely and

¹⁷ See proposal on an EU Agency for Asylum, Explanatory Memorandum, p. 2.

¹⁸ Which could also be seen as a concrete expression of the Member States' obligation of sincere cooperation, enshrined in Article 4(3) Treaty on European Union in the asylum field.

¹⁹ See Article 13 of the Commission proposal (discussed below)

²⁰ See Articles 17 and 21 of the Commission proposal discussed in section 4 below.

²¹ See Article 65 of the proposal on an EU Agency for Asylum.

²² Regulation (EC) No 862/2007 of 11 July 2007 on Community statistics on migration and international protection, OJ 2007 L199/23.

²³ For a critical analysis, see ECRE, *Asylum Statistics in the European Union: A Need for Numbers*, AIDA Legal Briefing No 2, August 2015. On the Dublin Regulation more specifically, whereas Article 4(4) of the Migration Statistics Regulation requires annual data to be provided to Eurostat within 3 months of the end

accurate information, the new Agency can possess helpful tools in monitoring Member States' compliance with their information provision obligations, with a view to enabling an up-to-date analysis of the situation of asylum in the EU.

ECRE recommends to include Article 3 on the duty to cooperate in good faith and exchange information in Chapter I to extend its scope to all the activities of the Agency.

ECRE recommends the insertion of an Article 3(4) and a related addition to Article 46(5):

Article 3(4): *Where it is established that a Member State's asylum authorities, national immigration and asylum services and other national services systematically fail to comply with the duty to cooperate in good faith, including to provide timely and accurate information in accordance with Regulation (EC) No 862/2007, the Executive Director shall submit a report to the Management Board and the European Commission and include such information in the annual activity report on the situation of asylum in the Union under Article 65.*

Article 46(5)(oo): *submitting reports on compliance with the duty to cooperate in good faith to the Management Board and the European Commission in accordance with Article 3(4);*

With regard to information analysis on the situation of asylum, **Article 4(2)** specifies that such analysis shall be based on information provided by institutional actors at EU level and national governments, as well as UNHCR and "other international organisations". ECRE recommends to strengthen the wording of the first sentence of Article 4(2) by explicitly referring to the information collected and provided by **expert national and international non-governmental organisations in the field of asylum**, as is already explicitly referred to with regard to the Agency's role in gathering information on countries of origin.²⁴ NGOs play an essential role in depicting the realities of forced displacement and the state of play of protection systems within and outside the EU as they are able to present a perspective from the field through their daily work with asylum seekers and refugees that is not readily available to governmental and institutional actors.²⁵ In order to be able to provide the real picture of the state of play of the CEAS and the situation in third countries, information from non-governmental organisations must be taken into account throughout all activities of the Agency relating to information gathering, documentation and analysis.

Whereas information gathered by the EU Asylum Agency and the future European Border and Coast Guard will certainly overlap and is closely interlinked, and cooperation between both agencies in this area is certainly useful, their distinctive mandates and roles should be preserved. In this regard, ECRE questions the relevance of the requirement in Article 4(2) for the Asylum Agency to "rely on the risk analysis carried out by that Agency [Frontex] so as to ensure the highest level of consistency and convergence in the information provided by both Agencies." It should be noted that the current Frontex' risk analysis concerns the risks affecting security at the external borders based on a set of common indicators such as refusals of entry, detections of irregular stay, return decisions and effective returns.²⁶ Asylum-related aspects only play a marginal role in **the current Frontex risk analysis which therefore does not allow for a reliable analysis of the root causes of refugee movements, as this is not its key objective**. In fact, currently Frontex' risk analysis increasingly relies on data collected by EASO as regards asylum applications for instance.²⁷ As a result, in

of the reference year, 2015 statistics for as many as 14 Member States were still missing by 13 June 2016.

²⁴ Article 8(2)(a) of the proposal on an EU Agency for Asylum, also discussed below.

²⁵ This has been consistently acknowledged by EASO. See for instance, EASO, *Annual General Report 2014*, p. 27.

²⁶ For further details on Frontex risk analysis methodology, see Frontex, *Annual Risk Analysis for 2016*, p. 10-11.

²⁷ See Frontex, *Annual Risk Analysis 2015*, p. 9.

ECRE's view, the requirement to rely on the Frontex' or the future European Border and Coast Guard's risk analysis is unnecessary and should be deleted.

ECRE recommends to amend Article 4(2) as follows:

Article 4(2): "The Agency shall base its analysis on information provided, in particular, by Member States, relevant Union institutions and agencies, the European External Action Service as well as UNHCR, other international organisations **and non-governmental organisations**.
[delete second sentence].

Article 7 sets out the tasks of the Agency in the area of training and introduces an obligation for Member States to integrate the training curriculum established and developed by the Agency in the training of staff of national services and authorities responsible for asylum matters. Whereas the terminology used in **Article 7(4)** is confusing as it refers both to the European asylum curriculum and the common core curriculum, it usefully strengthens obligations of Member States under the recast Asylum Procedures Directive to ensure that staff of the first instance asylum authority are sufficiently trained.²⁸ The mainstreaming of the European asylum curriculum is useful to further harmonise training requirements for staff of asylum authorities and ECRE welcomes its mandatory use by national administrations, provided the quality of the training material produced by the Agency is ensured and monitored through the **continued involvement of UNHCR and academic and non-governmental experts**. In light of the considerable time-investment from such external actors in the development and updating of training material, the **necessary financial resources should be foreseen in the Agency's budget to secure their involvement**. Moreover, the expanded role of the Agency in supporting and coordinating activities in the area of resettlement and the envisaged common framework for resettlement at EU level will inevitably increase the training needs at the national level in this area. Therefore, ECRE recommends adding resettlement to the list of specific or thematic training activities in **Article 7(5)**.

The increasing deployment of Member States' experts through asylum support teams and their enhanced role in the individual decision-making process of the host Member States makes training requirements even more crucial than is currently the case, in particular where they are deployed in the framework of migration management support teams. In this regard, Article 7(7) should be strengthened in order to establish a clear obligation for experts participating in the asylum support teams and the asylum intervention pool to have received **specialist training from the Agency before they can take up their tasks in the host Member State**.

In ECRE's view, the wording used in the current EASO Regulation presents a clearer obligation as it requires that the "Support Office shall provide experts who are part of the Asylum Intervention Pool referred to in Article 15 with specialist training relevant to their duties and functions".²⁹ Moreover, a sufficient level of knowledge of English as the working language in such operations coordinated by the Agency is indispensable and should be introduced as a mandatory requirement for deployment.

ECRE recommends to amend Article 7 as follows:

Article 7(5): add (h) resettlement, including with regard to selection missions, the provision of pre-departure information and post arrival support.

²⁸ See Article 4(3) Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (hereafter 'recast Asylum Procedures Directive'), OJ 2103 L180/60.

²⁹ See Article (6)(6) EASO Regulation.

Article 7(7): “The Agency *shall provide* the experts who participate in the asylum support teams and the asylum intervention pool with the specialist training relevant to their duties and functions prior to their participation in the operational activities organised by the Agency. *[maintain text]*”

2. Assessment of the situation in countries of origin and guidance on its application in asylum procedures

The Commission proposal entrusts the new Agency with broader competences in the area of country of origin information as an instrument to more effectively address the significant disparities between the Member States as regards recognition rates and outcomes of asylum procedures, as well as the protection statuses granted. Reliable and up-to-date country of origin information is essential for quality decision-making and the establishment of any robust status determination process and is central to the credibility of asylum procedures. In the context of the further reform of the CEAS and the increased level of harmonisation envisaged, maintaining the Agency’s role at the mere level of gathering and analysing country of origin information without having any tools of streamlining the application of those findings in individual cases decided by national asylum authorities seems not an option. A common and uniform interpretation of eligibility criteria throughout the EU will be needed in order to take a meaningful step towards more convergence in individual decision-making. In this regard, the new competence for the Agency laid down in **Article 10** to develop common analysis providing guidance on the situation in specific countries of origin, its endorsement by the Management Board and the Member States’ obligation to take that common analysis into account when examining applications for international protection seems to be a logical step from a harmonisation viewpoint.

Yet, entrusting an EU Agency with the power to impose guidance on the way in which country of origin information needs to be interpreted and applied in individual cases also raises questions from an international protection perspective. Firstly, as it is the case with EASO, the **new EU Asylum Agency lacks 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).³⁰ Given the composition of the Management Board and the national interests they represent, an endorsement or lack thereof by the Management Board of the common analysis on the situation in specific countries of origin may be inspired by domestic political considerations rather than protection considerations. In this regard, in order to enhance the objective and independent nature of the Agency’s work in the area of country of origin information, its internal procedure for adopting such common analysis should present the necessary guarantees to ensure its objectivity and impartiality. In the proposed design of the EU Asylum Agency, this is best guaranteed by maintaining the final responsibility with the Executive Director. This is supported by the fact that, according to the current EASO Regulation as well as the proposed Regulation, the Executive Director is independent in the performance of his or her duties and shall not seek nor take any instructions from any government, institution, person or any other body.³¹

Secondly, the possibility for the Agency to develop common analysis and the obligation on Member States to take such analysis into account in the processing of asylum applications could potentially **undermine the authority of UNHCR eligibility guidelines on specific countries of origin**. These guidelines promote the accurate interpretation and application of criteria for refugee status in line with **UNHCR’s supervisory responsibility**, as contained in paragraph 8 of its Statute in conjunction with Article 35 of the 1951 Convention and Article II of its 1967 Protocol and based on its longstanding expertise in matters of eligibility and refugee status determination. Similar to what is envisaged under

³⁰ According to its mission statement, the CGRS’ task is “to offer protection to persons who are likely to suffer persecution or serious harm if they return to their country of origin”. Available at <http://www.cgra.be/en/about-the-cgrs>.

³¹ See Article 46(2) proposal on an EU Agency for Asylum and Article 31(1) and (2) EASO Regulation.

Article 10 of the proposal, the UNHCR eligibility guidelines are issued at the global level to assist decision-makers, including UNHCR staff, governments and private practitioners, in assessing the international protection needs of asylum seekers. These guidelines present detailed analysis of international protection needs and include recommendations as to how asylum applications relate not only to criteria and principles of international refugee law laid down in the 1951 Refugee Convention but also regional instruments such as 1969 OAU Convention, the Cartagena Declaration and the EU Qualification Directive.³² In order to avoid any inconsistent or conflicting guidance being provided to Member States by different actors, **the primacy of the UNHCR eligibility guidelines over the Agency's common analysis on a specific country of origin should clearly be established in the Regulation.**

Thirdly, in the interest of ensuring impartiality and objectivity of the Agency's work on country of origin information in general, a peer review system by a **panel of independent experts on COI** should be set up.³³ This independent expert panel would have the task of providing advice to the Agency on matters of methodology, have a formal role in reviewing the Agency's COI reports and assessing its sources prior to publication so as to ensure that they meet the highest standard of quality. The Panel should be consulted by the Executive Director prior to final approval of common analysis on the situation in specific countries of origin. It should also have a formal role in evaluating the use of the Agency's COI reports and common analysis guidance 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 the judiciary, expert NGOs and UNHCR following a public call for expression of interest.

ECRE recommends to establish an Independent Expert Panel on Country of Origin Information to advise the Agency and the Executive Director on matters of methodology, review the quality of COI reports and other COI products of the Agency and provide advice to the Executive Director prior to the adoption and revision of common analysis. The Independent Expert Panel should consist of academic country-specific experts, representatives of the judiciary, expert NGOs and UNHCR, and be appointed by the Executive Director, following a public call for expression of interest.

ECRE recommends the following amendments to Article 10 and Recital 11:

Article 10(1): [maintain text] The Agency shall ensure that such common analysis takes fully into account the most recent UNHCR eligibility guidelines relating to the specific country of origin concerned.

Article 10(2): The Executive Director shall, after consulting **the Independent Expert Panel on Country of Origin Information, decide on the endorsement of the common analysis as providing guidance on the situation in specific countries of origin. In such case,** Member States shall be required to take that common analysis into account when examining applications for international protection, without prejudice to their competence for deciding on individual applications.

Article 10(3): The Agency shall ensure that the common analysis is kept constantly under review and updated **as** necessary. Any such revision shall require prior consultation of the **Independent Expert Panel on Country of Origin Information** by the **Executive Director.**

³² See for instance UNHCR, *UNHCR Eligibility Guidelines for assessing the international protection needs of asylum-seekers from Afghanistan*, 19 April 2016.

³³ 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/>.

Recital 11: Add: *Such common analysis shall be developed in full respect and in accordance with the most recent UNHCR's eligibility guidelines relating to the country of origin concerned. Where the common analysis and UNHCR eligibility criteria contain conflicting guidance, the latter shall be taken into account by Member States when examining applications for international protection in accordance with UNHCR's supervisory responsibility as contained in paragraph 8 of its Statute in conjunction with Article 35 of the 1951 Convention and Article II of its 1967 Protocol.*

Finally, in line with EASO's current practice and in order to ensure full equality of arms between the applicant for international protection and asylum authorities in the assessment of their application, the Regulation should consolidate the portal on country of origin as a publicly accessible tool. Furthermore, all information should be presented in a clear, concise, unequivocal and retrievable manner. When a source is protected, description of the source should be provided. In principle all information included in the common portal should be publicly accessible, while access to confidential information held by the COI portal that is relevant to an individual case should be subject to general transparency rules as regards documents held by the Agency in accordance with Article 58.

ECRE recommends amending Article 8(2)(b) as follows: manage and further develop a portal for gathering information on countries of origin *which is publicly accessible*.

3. Monitoring and assessment of Member States' performance

ECRE welcomes the enhanced competences of the new Agency to monitor and assess the operation and functioning of the CEAS in practice at the national level. The structural failures and shortcomings of the CEAS and the numerous human rights violations it entails are first and foremost a result of Member States' non-compliance with standards set in EU law. This has been evidenced not only by UNHCR and expert non-governmental organisations but also by the Commission and EASO. The recent surge of infringement procedures launched by the Commission against a considerable number of Member States for non-communication of transposition measures of the recast legislative acts, as well as incorrect application of EU asylum law, is another clear indication of the growing divide between the standards set in EU law and their implementation in practice.³⁴ Possibilities for EASO to thoroughly monitor and assess the preparedness of Member States' asylum and reception systems under its current mandate and in the context of the early warning and preparedness mechanism foreseen in the recast Dublin Regulation have proven to be very limited.³⁵ In this regard, the proposed mechanism in **Article 13** is an essential tool to enhancing the Agency's monitoring capacity at EU level, as it establishes an ambitious and comprehensive approach, encompassing nearly all aspects of Member States' asylum systems as well as a variety of tools including not only more traditional reporting methods but also the use of on-site visits and case-sampling techniques as per **Article 13(2)** and **Recital 14**. These should allow for much needed and targeted analysis of Member States' individual decision-making practice and contingency planning to deal with situations of disproportionate pressure.

However, as it is the case with the information analysis on the situation of asylum in **Article 4** discussed above, ECRE regrets that the Commission proposal seems to allude to such mechanism being based exclusively or predominantly on information provided by Member States without integrating relevant information from non-governmental actors and UNHCR. It is acknowledged that in

³⁴ The Commission has adopted a total of 58 decisions (letters of formal notice and reasoned opinions) related to the transposition of, and compliance with the EU asylum acquis between 23 September and beginning of February 2016. See European Commission, *Communication on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration*, 10 February 2016, at p. 21.

³⁵ So far Article 33 recast Dublin Regulation was never used.

particular the numerical data with regard to recognition rates, number of reception places, staff numbers, equipment or overall financial resources are predominantly owned and collected by the national authorities, although often in a very incomplete and non-transparent way.³⁶ However, non-governmental organisations, in particular but not exclusively when they provide legal assistance or reception accommodation or integration-related services such as language courses or interpretation, are operational partners in the asylum system and therefore privileged first witnesses of good and bad practices in national asylum systems. They are therefore very well placed to assess the operational aspects of Member States' asylum systems, as well as the quality of procedures, reception facilities and protection statuses granted. **Failing to systematically incorporate the views and assessments of non-governmental actors in the asylum systems of Member States in the monitoring and assessment mechanism would inevitably undermine its credibility and would ignore crucial information and result in incomplete assessments of the CEAS.** Therefore, ECRE strongly recommends including an explicit requirement to incorporate the views and information from non-governmental actors at the national and European level on the implementation of the CEAS standards in practice in the monitoring and assessment mechanism.

Furthermore, whereas **Article 13(1)(a)** of the proposal refers to the implementation of all aspects of the CEAS and suggests a comprehensive approach, **detention, access to legal assistance and resettlement are not explicitly mentioned.** Since the adoption of the recast Reception Conditions Directive and the recast Dublin Regulation, the EU asylum *acquis* includes detailed provisions on detention of asylum seekers,³⁷ whereas ECRE and other non-governmental organisations have documented an increased use of detention, including in the context of Dublin procedures, in a number of EU Member States.³⁸ Worryingly, the systematic detention of those applying for international protection at the EU's external borders is now being mainstreamed as an inherent part of the "hotspot" approach developed in Greece and Italy.

Nevertheless, detailed data collection at EU level on *inter alia* the duration and scale of detention of asylum seekers and the specific grounds used by Member States is lacking. EASO currently collects information relating to the detention of asylum seekers in the context of its internal early warning and preparedness mechanism and its Information and Documentation System (IDS),³⁹ but this is currently not made public, while the lack of reporting obligations for Member States on detention under the recast Reception Conditions Directive further hampers the collection of comparable and reliable data on the use of asylum detention in the EU.⁴⁰ In light of its devastating impact on the well-being of asylum seekers and migrants, detention of asylum seekers should be explicitly mentioned in the list of topics the monitoring and assessment mechanism pay particular attention to. The same should be provided for asylum seekers' access to quality legal assistance, a key feature of any robust asylum system, but which is lacking in practice in many Member States.⁴¹

Moreover, in light of the envisaged prominent role of resettlement in the design of the CEAS, including through increased competences of the Agency in this field and the announced horizontal instrument

³⁶ For further analysis on the gaps in statistical data collection, see ECRE, *Asylum Statistics in the European Union: A Need for Numbers*, AIDA Legal Briefing No 2, August 2015.

³⁷ Articles 8-11 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ 2013 L180/96; Article 28 Dublin III Regulation.

³⁸ See e.g. AIDA, *Common asylum system at a turning point: Refugees caught in Europe's solidarity crisis*, Annual Report 2014/2015; ECRE, *The Legality of Detention of Asylum Seekers under the Dublin III Regulation*, AIDA Legal Briefing No 1, June 2015.

³⁹ See the IDS website at: <https://www.easo.europa.eu/information-analysis/ids>.

⁴⁰ For a discussion of the gaps in reporting obligations under the recast Reception Conditions Directive, see ECRE, *Information Note on Directive 2013/33/EU*, July 2015, 37-38.

⁴¹ For an analysis see for instance AIDA, *Common asylum system at a turning point*, p. 95-96.

framing the EU's policy on resettlement,⁴² setting common rules not only on admission and distribution, but also on the status to be accorded to resettled persons, this should also be covered by the monitoring and assessment mechanism in addition to the general requirement for the Agency to monitor resettlement to Member States under Article 35(4).⁴³

ECRE recommends the following amendments to Article 13 and Recital 14:

Article 13(1)(a): monitor the implementation and assess all aspects of the CEAS in Member States, in particular the Dublin system, reception conditions, **detention of asylum seekers**, asylum procedures, **including legal assistance**, the application of criteria determining protection needs and the nature and quality of protection afforded to persons in need of international protection by Member States, including as regards the respect of fundamental rights, child protection safeguards and the needs of vulnerable persons **as well as resettlement**;

Article 13(2a): *In addition to information provided by Member States, the Agency shall base its assessment on information and assessments provided by non-governmental organisations at national or European level, UNHCR and relevant international or European human rights monitoring bodies.*

Recital 14: *[maintain text]* The monitoring and assessment should be comprehensive and should be based, in particular, on information provided by Member States, **non-governmental organisations at national or European level, UNHCR and relevant international and European human rights treaty monitoring bodies under the United Nations and the Council of Europe**, information analysis on the situation of asylum developed by the Agency, on-site visits and case sampling. *[maintain text]*

In addition, the possibility in **Article 14(1)** for the Agency to initiate monitoring exercises, including on-site visits, for the assessment of the asylum or reception system of a Member State whenever there are serious concerns on its functioning, has the potential to contribute to more in-depth and consistent assessments of the gaps and needs in specific countries as is currently the case. This would certainly contribute to preventing crisis situations within the EU Member States and to avoiding hardship for asylum seekers and refugees in such countries. Also, the composition of the expert teams responsible for such monitoring exercise, comprising the Agency's own staff and Commission representatives, contributes to ensuring impartial and independent assessments. However, in ECRE's view, such assessment should not be limited to a purely quantitative assessment of available human and financial resources. It should also include an assessment of whether the necessary safeguards are in place to ensure that asylum seekers and refugees' fundamental rights under international refugee law, the EU Charter of Fundamental Rights and EU asylum law are respected in practice. Therefore, monitoring visits as envisaged in Article 14(2) should include consultations of expert national NGOs as well as UNHCR local offices in order to ensure a balanced assessment of the reality on the ground. Moreover, in order to ensure that the report resulting from the monitoring exercise provides a comprehensive analysis based on all available sources, the report referred to in Article 14(2) should be based not only on information provided by Member States but also information provided by such expert national and international NGOs as well as local UNHCR offices.

⁴² See European Commission, *Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe*, p. 15.

⁴³ The new Agency's overall tasks and involvement in resettlement is discussed below.

ECRE recommends to amend Article 14(2) as follows:

Article 14(2): [maintain text]. The team of experts shall be responsible for drawing up a report based on the findings of on-site visits and information provided by Member States **as well as expert non governmental organisations and UNHCR.**

4. Operational assistance to asylum systems under disproportionate pressure

Building on the increasing role of EASO in the context of the “hotspot” approach developed in Italy and Greece since October 2015, the Commission proposal expands the competences of the EU Asylum Agency in the area of operational and technical assistance considerably compared to the EASO Regulation. As per **Article 16(3)** of the proposal, the new Agency is entrusted with the organisation and coordination of a long list of operational activities that have a direct bearing on the examination of individual asylum applications, ranging from “assisting with the registration and identification of third-country nationals” and providing interpretation services to facilitating “the examination of applications for international protection that are under examination by the competent national authorities.” According to **Article 17(1)**, as is the case under the EASO Regulation, such technical and operational assistance is provided through the deployment of asylum support teams. However, in contrast to the asylum support teams under the EASO Regulation, **Article 17(2)** of the Commission proposal explicitly includes Agency staff in the composition of the asylum support teams.⁴⁴ As these asylum support teams may engage in the actual examination of applications for international protection, albeit to an unspecified degree, the operational involvement of Agency staff in asylum support teams requires further clarification in the Regulation as to the respective roles of the various members of such teams.

In particular, when operating in the framework of migration management support teams, including in hotspot areas, the technical and operational “reinforcement” which can be provided by the experts of the asylum support teams or experts from the asylum intervention pools is far-reaching. Under **Article 21(2)** of the Commission proposal, such experts may be entrusted with: (1) the screening of third-country nationals (including registration, identification and, where requested by Member States, fingerprinting); (2) the provision of information on asylum procedures, including to potential applicants; and (3) the registration of asylum applications, and “where requested by Member States, the examination of such applications”. As the proposal omits to clarify the respective roles of the experts of the asylum support teams, which may include Agency’s own staff, the latter in particular implies that **the Agency may theoretically also be entrusted with the substantial examination of applications for international protection** on the territory of the Member State hosting the migration management support team. Although this would still leave the responsibility for taking the decision on the individual case formally with the national authorities of the Member State concerned, it is clearly stretching the competences of the Agency’s staff as well as of experts from other Member States even further in determining the outcome of the asylum application. This raises questions as to what extent the Agency’s mandate is not already *de facto* entering into the assessment of individual asylum applications, which **Recital 16** still claims to exclude.

Therefore, the Commission proposal further **extends the involvement of experts from other Member States in the status determination procedures for which host Member States formally have to assume full responsibility**, while the outcome of the individual assessment in reality is increasingly dictated by other Member States’ experts of experts from the Asylum Agency, who are

⁴⁴ The wording used in Article 17(2) suggests that asylum support teams potentially be composed either of Agency’s own staff exclusively, Member States experts exclusively or experts seconded by Member States to the Agency exclusively. However, this would not be consistent with the set up of Asylum Support Teams in the other paragraphs of the provision and hence this may be an editorial mistake.

not accountable to the host Member State.⁴⁵ The involvement of the Agency's own staff in the examination of individual asylum applications raises questions from an efficiency and quality perspective, in particular where they lack any practical experience in assessing and examining asylum applications. Therefore, the preamble should specify that involvement of the Agency's own staff in such activities is conditional not only to the specialist and thematic training as required under Article 7(3) of the Commission proposal but also to relevant experience as a caseworker in a national asylum administration or as a protection officer in refugee status determination procedures conducted by UNHCR. Moreover, any action undertaken by the members of the asylum support or the migration management support teams must be in compliance with the EU Charter of Fundamental Rights, in particular the right to asylum as laid down in its Article 18.

ECRE recommends to add a Recital 16a as follows:

Recital 16a: *Experts deployed in asylum support teams must have successfully concluded the thematic and specialist training relevant to their duties and functions prior to their participation in the operational activities. Experts from the Agency's own staff should be involved in the examination of applications of international protection only where they can demonstrate relevant experience as a caseworker in a national asylum administration of at least 1 year or as a UNHCR protection officer. Any activity undertaken by members of the asylum support teams or migration management support teams must fully comply with the EU Charter of Fundamental Rights, in particular Article 18 on the right to asylum.*

With regard to other tasks of the asylum support teams or experts from the asylum intervention pool, there is a clearer division of tasks between the various actors in the asylum system of the Member State hosting asylum support teams. However, recent experience in Greece shows that the multiplication of national and international actors involved in the asylum system, including with regard to the provision of information or registration, has certainly not contributed to a more transparent process from the perspective of those seeking international protection. On the contrary, NGO reports on the asylum system in Greece have demonstrated that, notwithstanding the development of various information tools, including by EASO, asylum seekers are generally ill-informed about their rights and

⁴⁵ Current involvement of asylum experts in the admissibility assessment of asylum applications lodged in the newly established border procedure in the hotspots in Greece raises questions of accountability and procedural fairness. The lack of clarity on the exact role of Member States' experts in the asylum procedure and the instructions they receive, the COI used and the fact that interview reports are drafted in English instead of Greek as required under Greek administrative law combined with gaps in the availability of legal assistance in the hotspots contribute to a considerably opaque process which does not guarantee in practice asylum seekers access to a fair examination of their asylum application. Furthermore, direct or indirect interferences by the European Commission as well as the Council with the decision-making practice of the Greek Asylum Service, including through imposing a specific interpretation of the safe third country concept vis-à-vis Turkey, further raise fundamental questions as to the impartiality of the involvement of other Member States' experts in the asylum process in Greece and therefore their credibility from an access to justice perspective. See European Commission, Letter to the Secretary-General for Population and Social Cohesion, Brussels, 5 May 2016, available at <http://statewatch.org/news/2016/may/eu-com-greece-turkey-asylum-letter-5-5-16.pdf>. Justice and Home Affairs Ministers at their meeting of 20 May 2016 shared the Commission's analysis that all measures had been taken to allow Greece to declare on the basis of individual assessments an application for asylum inadmissible in accordance with Article 33(2)(b) or (c) of the Asylum Procedures Directive for both Syrian and non-Syrian applicants for asylum arriving on the Greek islands after 20 March 2016. See European Commission, *Second Report on the progress made in the implementation of the EU-Turkey Statement*, Brussels, 16 June 2016, p. 5. See also Council of the European Union, *Outcome of the Justice and Home Affairs Council meeting of 20 May 2016*, 9183/16.

obligations during the asylum procedure and are often very confused about the respective roles and responsibilities of national administrations and EU agencies such as EASO and Frontex.⁴⁶

Therefore, in ECRE's view **further streamlining of respective roles of various actors the provision of information** to asylum seekers is needed. In this regard, ECRE supports the current wording in **Article 16(3)** of the Commission proposal, limiting the role of the Agency to "assistance" with the provision of information on the international protection procedure. In ECRE's view this is to be interpreted as excluding an active role for the Agency in the actual delivery of information to individual asylum seekers, as this should remain the task of the national authorities in order not to create any misconceptions or false expectations about the role of the Agency or seconded or guest officers from other Member States. However, given the central role of the Agency in the operation of relocation procedures and its liaison function between Member States in this activity, it should be entrusted with the primary responsibility of informing and assisting applicants or potential applicants for international protection eligible for relocation.

ECRE recommends to amend Article 21(2)(c) as follows:

Article 21(2)(c): The provision of information on *[deleted text]* relocation and specific assistance to applicants or potential applicants that could be eligible for relocation;

Finally, the procedure for deploying asylum support teams now includes a specific obligation on the Executive Director to suspend or terminate the deployment of the asylum support teams if the conditions to carry out the operational and technical measures are no longer fulfilled or if the operational plan is not respected by the host Member State. This provision, which mirrors a similar obligation on the Executive Director of Frontex under the existing Frontex Regulation,⁴⁷ replicated in the recently adopted Regulation establishing a European Border and Coast Guard,⁴⁸ reflects the increased operational competences and therefore also responsibilities of the Agency for their proper implementation. However, **Article 20(6)** of the Commission proposal remains limited to non-fulfilment of the operational and technical requirements or non-compliance with the operational plan. In ECRE's view, as it is the case for operations coordinated by Frontex or the new European Border and Coast Guard, the Executive Director should **suspend or terminate the deployment of asylum support teams in case of serious and persistent fundamental rights violations or where international protection obligations are compromised in practice**. In order to avoid the EU Asylum Agency as well as the deployed experts from being complicit to the infringement of EU asylum law or breaches of the EU Charter or obligations under international law, it should have the possibility to suspend or terminate all or part of its activities.

ECRE recommends to amend Article 20(6) as follows:

Article 20(6): The Executive Director shall, after informing the host Member State, suspend or terminate, ***in whole or in part***, the deployment of the asylum support teams if the conditions to carry out the operational and technical measures are no longer fulfilled, if the operational plan is not respected by the host Member State ***or if he or she considers that there are violations of fundamental rights or international protection obligations that are of a serious nature or are likely to persist***.

⁴⁶ For an analysis, see AIRE Centre and ECRE, *With Greece: Recommendations for refugee protection*, July 2016.

⁴⁷ See Article 3(2) Frontex Regulation.

⁴⁸ For a discussion on Article 24 of the Commission proposal for a Regulation establishing a European Border and Coast Guard Agency, see Amnesty, ECRE and ICJ, *Joint Briefing on the European Border and Coast Guard Regulation*, April 2016, available at: <http://goo.gl/YDNptF>.

5. Data protection

The new provisions on data protection, the purposes of processing personal data and the processing of personal data collected in the context of operational and technical assistance provided by the Agency reflect its expanded remit and competences. ECRE acknowledges the need for detailed provisions on the processing and storage of personal data by the EU Asylum Agency, since it will have increasing access to personal data of applicants for international protection through the activities of the asylum support teams, in particular where they intervene on registration and identification and fingerprinting, the examination of individual applications and relocation.

Nevertheless, in line with the data protection principles of **purpose limitation, proportionality and necessity**, the nature of the EU Agency's competences calls for a very strict and narrow interpretation of lawful purposes for the Agency to process personal data from applicants for international protection. Firstly, **Article 32(1)** of the Commission proposal does not include a clear definition of "personal data" except for an exhaustive list of data the Agency may "use" and which includes name, date of birth, gender, nationality, profession or education, fingerprints and digitised photograph of third-country nationals. Whereas the "processing" of personal data is not necessarily the same as the use of personal data, ECRE opposes such an extensive list, were this to be considered as the definition of personal data for the purpose of this Regulation. As flagged elsewhere, to comply with the EU Charter of Fundamental Rights, EU law must strike a fair balance between the aim of securing the objective of enabling the EU Agency to perform its tasks and the fundamental rights to privacy and data protection of the individuals affected by the collection of information.⁴⁹ Consequently, given the variety of tasks entrusted to the EU Agency in the Commission proposal with different degrees of relevance of processing of personal data, this requires the Regulation to strictly define which type of personal data may be processed by the Agency for each lawful purpose. For instance, while it may be proportionate and necessary to make use of the data relating to profession or education and fingerprints when performing its tasks relating to relocation procedures, this would not be the case for the purpose of case-sampling as explained below.

Secondly, ECRE considers the exhaustive list of purposes in **Article 31(1)** of the Commission proposal too extensive and questions the necessity of the EU Asylum Agency's power to process personal data, in particular for the purposes mentioned in Article 31(1)(b) and (d), at least in its current broad formulation. While ECRE is supportive of the possibility for the new EU Asylum Agency to enter into sophisticated forms of monitoring and analysing Member State practice, such as through the use of case-sampling, this can and should be conducted on the basis of anonymised files.⁵⁰ There is **no objective justification as to why the EU Agency would require access to all personal data of the applicants** concerned to carry out case-sampling activities, as general indications about the nationality, sex and age of the case would be sufficient for meaningful examination. In this regard, ECRE also questions the utility of entrusting the EU Asylum Agency with broadly defined powers to process personal data for such purposes, in particular since case-sampling is not likely to be carried out systematically and on a monthly basis.⁵¹ Rather the Regulation should state the principle that the Agency can only process and collect data relating to nationality, age and gender for the specific purpose of case-sampling in the framework of the monitoring and assessment mechanism as discussed above, on the basis of depersonalised data and for a specific time-period.

ECRE expresses the same concerns with regard to the necessity and proportionality of processing personal data for the purpose of "analysing information on the situation of asylum in accordance with

⁴⁹ See ECRE, *Comments on the Commission Proposal to recast the Eurodac Regulation*, July 2016.

⁵⁰ As is also explicitly provided in Article 5(2) of the Commission proposal recasting the Eurodac Regulation.

⁵¹ According to **Article 32(3)** of the Commission proposal, personal data must be deleted as soon as they have served the legitimate purpose as defined in Article 31(1) and in any case cannot be stored for longer than 30 days.

Article 4”as per **Article 31(1)(e)**. In ECRE’s view, as this type of analysis is primarily concerned with overall trends relating to asylum within and outside the EU, the processing of personal data for such purpose would not meet the legal requirements of necessity and proportionality.

ECRE recommends to delete Article 31(1)(e) and restrict the processing of personal data strictly to nationality, age and gender with regard to Article 31(1)(b).

Furthermore, while it is clear from the wording of **Article 32(1)** that the Agency would primarily be using – and presumably also processing – information that has been collected and transmitted to it by the Member States in accordance with their obligations *inter alia* under the recast Eurodac Regulation and Dublin Regulation, it does allow for the collection of personal data by its own staff. Here too, specific justification is lacking as to why it is necessary for the EU Agency staff to separately collect personal data which are already mandatorily collected by Member States under the proposed recast Eurodac Regulation such as fingerprints, name, date of birth and gender. In the absence of such justification and in light of the risks this entails for violation of data protection rights of the individuals concerned, ECRE recommends to delete the possibility for the Agency’s own staff members to collect and transmit personal data to the Agency and reserve this competence to Member States’ authorities, protected by data protection safeguards in relevant legislation.

ECRE recommends to delete the words “or by its own staff” in Article 32(1).

Finally, notwithstanding the enhanced competences of the EU Agency to use, process and share personal data on applicants for international protection, including with Member States and other EU Agencies such as the European Border and Coast Guard, Europol and Eurojust, the Commission proposal lacks any detailed regulation on the right of the individuals concerned to be informed of the purpose of processing and collecting their personal data, the recipient of their personal data and the right to an effective remedy to challenge any wrongful use of their personal data. Since the relevant safeguards enshrined in the General Data Protection Regulation are not applicable, as activities relating to asylum, border control and immigration are excluded from its scope,⁵² this leaves a serious gap in the fundamental rights protection of the individuals concerned.

Therefore, Article 32 should be further amended to guarantee the right of the individuals affected by the processing of personal data by the EU Asylum Agency to be informed of the exact purpose of the data processing and collection and the recipient of their personal data. The Regulation must also guarantee the right of any individual concerned to challenge any wrongful or inappropriate use of the personal data by the Agency before a court or tribunal in accordance with Article 47 of the EU Charter of Fundamental Rights.

ECRE recommends to add a new Article 32(4) as follows:

Article 32(4): The Member State which has transmitted personal data in accordance with paragraph 1 shall inform the applicant of such transmission and his or her right to, in accordance with the laws, regulations and procedures of that State, bring an action or, if appropriate, a complaint before the competent authorities or courts of the State, against wrongful use or processing of such data.

⁵² Article 2(2)(b) Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), OJ 2016 L119/1.

6. Cooperation with third countries

Under its current mandate, EASO's engagement with third countries has been limited, the priority being its support to Member States' asylum systems, training and information gathering and analysis. The Commission proposal on the EU Asylum Agency implies greater focus on cooperation with third countries. Three types of activities are envisaged in this domain for the Agency: (1) to facilitate operational cooperation between Member States and third countries; (2) to directly cooperate with authorities of third countries with a view to promoting Union standards on asylum, capacity building for those countries' asylum and reception systems; and (3) to coordinate actions on resettlement taken by Member States or by the Union, ranging from information exchange to supporting Member States with capacity building on resettlement.

Article 35(1) requires the Agency and the Member States to promote "and comply with norms and standards equivalent to those set by Union legislation, including when carrying out activities on the territory of those third countries". The requirement of equivalent standards is justified with regard to EU asylum legal instruments such as the recast Reception Conditions Directive and the recast Asylum Procedures Directive, explicitly limiting their geographical scope to the territory of the EU Member States. However, it should be noted that one of the core EU asylum legal instruments, the recast Qualification Directive currently does not include such limitation and that the EU Charter of Fundamental Rights applies extra-territorially, whenever a situation is governed by EU law.⁵³ According to Article 51 EU Charter, the Charter applies whenever the institutions, bodies, offices and agencies exercise their powers and when Member States 'are implementing EU law'.⁵⁴ In this regard, ECRE recommends adding a specific reference to the need to comply with the EU Charter in Article 35(1).

Accordingly, whenever Agencies or Member States engage in activities on the territory of third countries that come within the realm of EU asylum law, they are bound by the EU Charter provisions, including the right to asylum, the prohibition of *refoulement* and access to an effective remedy. In this regard, it should be noted that the proposal does not define the type of activities to be carried out extraterritorially, except for the coordination of exchange of information or other action between Member States and a third country in the field of resettlement.⁵⁵ However, by lack of any definition, the reference to 'activities' in Article 35 could potentially relate to any type of activity within the Agency's mandate, including those involving far-reaching engagement with the examination of individual asylum applications.

As this would raise complex legal issues of accountability for possible human rights violations resulting from such activities as well as the applicable legal standards ECRE recommends restricting in recital 24 the type of activities the Agency and the Member States may engage in on the territory of third countries to those listed in Article 35(2) and 35(4).

Article 35(5) entrusts the Agency with the task of participating in the implementation of international agreements concluded by the Union with third countries, within the framework of the external relations policy of the Union. ECRE recommends further clarification of the Agency's role in the implementation of such agreements, in particular where this concerns Mobility Partnership agreements or future Migration Compacts envisaged under the new partnership framework for cooperation with third countries in the area of migration and asylum presented by the Commission.⁵⁶ Furthermore, once

⁵⁴ See V. Moreno-Lax & C. Costello, "The Extraterritorial Application of the Charter: From Territoriality to Facticity, the Effectiveness Model" in S. Peers et al (eds), *Commentary on the EU Charter of Fundamental Rights*, Oxford, Hart Publishing, 2014, 1680.

⁵⁵ See Article 35(4) proposal on an EU Agency for Asylum.

⁵⁶ See European Commission, *Communication on establishing a New Partnership Framework for cooperation with third countries under the European Agenda on Migration*, COM(2016) 385; Strasbourg, 7

operational, the necessary measures will have to be taken to ensure full coherence and coordination of the Agency's cooperation with third countries with other EU capacity building activities carried out by Member States, the European External Action Service (EEAS) and the various Commission departments in the area of migration and asylum (DG HOME, DEVCO and ECHO), under external cooperation and neighbourhood policy and other actions launched under the European Agenda on Migration such as the Valetta Action Plan and the Trust Funds.

ECRE recommends to amend Article 35(1) as follows:

Article 35(1): *[maintain text]*. The Agency and the Member States shall promote and comply with norms and standards equivalent to those set by Union legislation, **as well as with the EU Charter of Fundamental Rights**, when carrying out activities on the territory of those third countries.

Recital 24: *[maintain text]*. In their cooperation with third countries, the Agency and the Member States should comply with norms and standards at least equivalent to those set by Union legislation, **as well as with the EU Charter of Fundamental Rights**, also when cooperation with third countries takes place on the territory of those countries. ***Such cooperation should be strictly limited to the promotion of Union standards on asylum, assisting third countries as regards expertise and capacity building for their own asylum and reception systems, implementing regional development and protection programmes and the exchange of information on resettlement between Member States and a third country, while ensuring confidentiality of information relating to individual resettlement cases. The Agency's role in the implementation of international agreements concluded by the Union with third countries, such as Mobility Partnership Agreements within the framework of the external relations policy of the Union and regarding matters covered by this Regulation, shall be clearly defined.***

In light of current policy developments to strengthen resettlement in Europe, a greater role for the EU Asylum Agency in this field can contribute to support capacities, especially for emerging resettlement states, increase the numbers by pooling efforts and resources together, and enhance the quality of resettlement. The new EU Agency can play an important role in operationalising the future EU resettlement framework and developing tools for the implementation of specific *ad hoc* initiatives. Support and coordination could take the form of pooling of resources and the organisation of joint selection missions for Member States, as well the development of guidance documents, standard operating procedures and tools for resettlement processing. Moreover, as mentioned above, with the aim of enhancing capacities and quality in this area, resettlement should be an integral part of the Agency's support to Member States in the field of training under **Article 7** as well as of the monitoring and assessment mechanism under **Article 13** of the proposal.

However, in ECRE's view, compliance with and primacy of UNHCR guidelines on resettlement with regard to any action coordinated or initiated by the new Agency in the areas of resettlement should be explicitly ensured in the Regulation establishing the EU Asylum Agency in order to ensure full consistency of the Agency's actions with the priorities and guidelines set by UNHCR at global level. Where necessary and relevant, the Agency should also be able to support Member States in the post-arrival phase of resettlement, always in close cooperation with non-governmental organisations and UNHCR.

Under **Article 35(4)** it is foreseen that the Agency may also, subject to the agreement of the third country and in agreement with the Commission, coordinate any such exchange of information or other action on resettlement between Member States and a third country.

June 2016. The new partnership framework approach was immediately endorsed by the June 2016 European Council. See European Council Conclusions, Brussels, 28 June 2016, p. 1.

While this may facilitate and speed up processes, for example in terms of security checks, it may also pose certain risks to the selection of persons awaiting resettlement, for example in cases where a refugee might be rejected by a Member State and is eventually resubmitted for resettlement to another Member State. ECRE emphasises the importance of safeguarding at all times the confidentiality of information of the individual, as per UNHCR Confidentiality Guidelines, in the context of information exchange.⁵⁷ Sharing information with a third country should always be conducted in the framework of established practice, as defined in the UNHCR Resettlement Handbook,⁵⁸ without jeopardising the eligibility and selection of refugees for resettlement.

Finally, given the critically important operational role of non-governmental organisations and UNHCR in resettlement processes, the EU Asylum Agency's activities in this field should by definition involve these actors. In this regard, **Article 35(4)** of the Commission proposal should explicitly refer to both expert non-governmental organisations and UNHCR to consolidate the essentially tripartite nature of resettlement. Moreover, support and coordination of resettlement should encompass the entire process and should not be limited to pre-departure actions such as selection missions and the provision of pre-departure information to refugees.

ECRE recommends to amend Article 35(4) as follows:

Article 35(4): *The Agency shall coordinate actions on resettlement taken by the Member States or by the Union, including the exchange of information, **in full compliance with the standards and guidance set by UNHCR**, so as to meet the international protection needs of refugees in third countries and show solidarity with their host countries. [maintain text]. **The confidentiality of information relating to individual resettlement cases shall be guaranteed at all times. Any exchange of information shall be carried out in full compliance with the relevant rules established in the UNHCR Resettlement Handbook, without jeopardising eligibility and selection of refugees for resettlement. Any Agency activity in the field of resettlement shall be carried out in close cooperation with UNHCR and expert non-governmental organisations and include support for resettled refugees on the territory of Member States post arrival as relevant and necessary.***

Article 35(3) allows the EU Asylum Agency to invite officials from third countries to observe the operational and technical measures listed in **Article 16(3)** which relate to the core activities of the Agency. As discussed above, the Commission proposal provides for active involvement of the experts deployed by the Agency in the examination of individual asylum applications, including in the context of migration management support teams deployed in hotspots and in close cooperation with the European Border and Coast Guard. In this regard, the presence of third-country officials on the territory of a Member State to observe operational measures coordinated by the Agency raises fundamental questions from an international protection perspective. This is in particular the case where compatriots of these third-country officials are among those applying for international protection in the Member State hosting the operational activity. The presence of representatives of the alleged persecutors may not only undermine the international protection applicant's trust in the fairness of the asylum procedure, but it may also have safety implications for him or herself and/or family members in the country of origin.

EU asylum law already prohibits asylum authorities from disclosing information regarding individual asylum applications or the fact that such an application is made to the alleged actors of persecution or serious harm, nor does it allow to obtain any information from the alleged actor in a manner that

⁵⁷ UNHCR, Confidentiality Guidelines, 1 August 2001 (Internal).

⁵⁸ See UNHCR, UNHCR Resettlement Handbook, Geneva, Revised Edition, July 2011. Available at <http://www.unhcr.org/46f7c0ee2.pdf>.

informs such actor of the fact that an application has been made.⁵⁹ This prohibition could be violated *a fortiori* by inviting representatives of the country of origin to observe activities affecting asylum seekers from those countries, while in certain cases the presence of officials from other third countries may raise confidentiality concerns. In ECRE's view, any presence of third-country officials, including as observers, should be prohibited 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 in line with Article 30 of the recast Asylum Procedures Directive. Given the fact that all of the activities listed in Article 16(3) could result, directly or indirectly, in unintended disclosure of such information, it appears impossible in practice to arrange observatory participation of third-country officials in such measures in a manner compliant with Member States' obligations under EU asylum and international refugee law.

ECRE recommends to delete Article 35(3).

7. The Consultative Forum

Experiences of civil society organisations with the Consultative Forum in the framework of the EASO Regulation have been mixed so far. Both civil society organisations and the new Agency have been on a learning curve in establishing fruitful and workable relationships. Several initiatives have developed allowing for various degrees of input from and consultation of civil society organisations relating to the activities of the Agency. Learning from those experiences, the opportunity of the establishment of the new EU Asylum Agency should be seized to create the structure and conditions for constructive and meaningful engagement between the new EU Asylum Agency and non-governmental actors on an equal basis, and acknowledging their specific expertise in the asylum field. In this regard, the proposal should take into account that **targeted consultations on specific topics of expert NGOs**, such as in the field of training modules developed by EASO or specific quality and analytical tools with regard to asylum seeking and refugee children, **have been considered to be most fruitful and to the mutual benefit of the Agency and non-governmental actors**. In this regard, ECRE welcomes the explicit reference in **Article 48(3)** to thematic or geographic-focused consultation groups as one of the working methods of the Consultative Forum as this would indeed allow for more targeted exchanges.

ECRE notes the broadened definition of the role of the Consultative Forum compared to the current EASO Regulation.⁶⁰ In addition to being a platform for exchange of information and sharing of knowledge as per **Article 48(2)**, the Consultative Forum will also “assist the Executive Director and the Management Board in matters related to asylum, in accordance with specific needs in areas identified as a priority for the Agency” according to **Article 48(4)**. The wording seems to be copied from the corresponding provision on the Consultative Forum in the Commission proposal establishing a European Border and Coast Guard.⁶¹ However, in the context of the latter Regulation, the Consultative Forum has the specific task of assisting the governing bodies of that Agency “in fundamental right matters”. The limitation of the European Border and Coast Guard Consultative Forum's task to fundamental rights matters is also further qualified as one of consultation on the Fundamental Rights Strategy, Codes of Conduct and common core curricula of the Agency, and

⁵⁹ See Article 30 recast Asylum Procedures Directive.

⁶⁰ See Article 51 EASO Regulation.

⁶¹ See Article 70 European Commission, *Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC*, COM(2015) 671, 15 December 2015. The current Frontex Regulation uses identical terminology: see Article 26a of 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 (consolidated version) OJ 2004R2007 – EN – 17.07.2014 – 004.001.

therefore excludes any interpretation of “assistance” as referring to any operational involvement in the activities of the Agency.

The wording used in **Article 48(4)** of the Commission proposal on the EU Agency leaves more scope for ambiguity as it could be read as including an obligation to engage in operational activities, which could potentially undermine the Consultative Forum’s role as an independent advisory and consultative body. Whereas it would obviously be perfectly legitimate for individual members of the Consultative Forum to engage in such activities if they wish so, this should not be an option for the Consultative Forum, which is not a body of the Agency. Therefore, ECRE recommends to clarify that the Consultative Forum shall **advise, rather than assist the Executive Director and the Management Board**. In this regard, ECRE also recommends to delete the reference to the Consultative Forum assisting the Executive Director and the Management Board “in matters covered by this Regulation” for reasons of internal consistency.

According to **Article 48(3)**, the 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 with the governance bodies of the Agency, the Consultative Forum should be able to decide on its own working methods, while, given the variety of the Agency’s task and the diversity of the NGO landscape in Europe, membership of the Consultative Forum should be open to all civil society organisations with relevant expertise in the area of asylum. In ECRE’s view, the current criteria set by EASO for participation in special meetings or consultations (relevance, knowledge and expertise, availability for activities of the Consultative Forum, degree of involvement at national and European level and affiliation with networks and relationship of the organisation with already existing activities of the Agency)⁶² could be used as selection criteria for membership of the Consultative Forum.

ECRE recommends the following amendments to Article 48 and Recital 25:

Article 48(2): [maintain text]. It shall ensure a close dialogue between the Agency and relevant organisations or bodies as referred to in paragraph 1 [**delete text**].

Article 48(3): On a proposal by the Executive Director, the Management Board shall decide on the composition of the Consultative Forum on the basis of knowledge and expertise and relevance to the Agency’s activities as well as on the modalities of transmission of information to the Consultative Forum. The Consultative Forum shall decide on its working methods, including thematic or geographic-focused working groups as deemed necessary and useful.

Article 48(4): The Consultative Forum shall **advise** the Executive Director and the Management Board in matters related to asylum, in accordance with specific needs in areas identified as a priority for the Agency’s work.

Recital 25: [maintain text]. The Consultative Forum should **advise** the Executive Director and the Management Board in matters covered by this Regulation. **Membership of the Consultative Forum shall be open to all relevant civil society organisations and relevant competent bodies in the field of asylum at local, national, European and international level. The Consultative Forum shall establish its own working methods, which shall be communicated to the Executive Director and the Management Board.**

⁶² Organisations’ applications for membership of the Consultative Forum are assessed against those criteria in the existing registration form.

Conclusion

Despite changing its name, the Commission proposal for a Regulation establishing an EU Agency on Asylum predominantly builds on the current activities and main functions of the European Asylum Support Office and therefore does not constitute a major overhaul of the latter's mandate and key objectives. This is perhaps best illustrated by the continued exclusion of any direct competence relating to taking decisions on individual applications for international protection made in one of the EU Member States and the further expansion of its operational competences, supported by a gradual expansion of its resources dedicated to the technical and operational activities of the Agency.

Nevertheless, the proposed expansion of the Agency's competence in the area of country of origin information, including a potentially far-reaching role in providing mandatory guidance to Member States on the use of country-specific information in individual cases and assisting the Commission in the designation of safe countries of origin and safe third countries, is likely to further boost the impact of the Agency on the outcome of individual asylum applications lodged in the EU Member States considerably. Moreover, while the right of the new EU Asylum Agency to intervene in a Member State under disproportionate pressure may be less straightforward in the field of asylum as it is the case in the recently agreed European Coast and Border Guard Regulation, it does allow for the Agency to coordinate forms of joint processing which *de facto* seem to be only one step short of the creation of an EU authority entrusted with decision-making power on individual cases at the EU level.

Expanding competences of the Agency necessary to enhance convergence of decision-making between Member States seems a necessary and logical step from a harmonisation perspective. However, ECRE calls on EU institutions to ensure that the Agency's activities also serve the purpose of increasing quality of decision-making and establishing a high level of protection across the EU in line with international refugee law standards. As analysed in this paper, this requires additional safeguards relating in particular to the provisions on country of origin information and the role of UNHCR eligibility guidelines, the systematic inclusion of information and expertise available from non governmental organisations in its monitoring and assessment mechanism and cooperation with third countries.