


Policy Department C
Citizens' Rights and Constitutional Affairs



**PROPOSAL FOR A REGULATION ESTABLISHING A
EUROPEAN ASYLUM SUPPORT OFFICE,
COM (2009) 66 FINAL**

CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS



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**Directorate-General Internal Policies
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BRIEFING NOTE

Abstract:

The note offers an assessment of the functions and tasks of the support office in particular as regards the problem of disparities in the interpretation of asylum directives, the practical cooperation between the administrations and the collection and exchange of information. It specifically addresses the question of asylum support teams. The note underlines as well some organizational issues. .

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I. Introductory Remarks

The following comments relate primarily to some general issues which arise throughout the proposal rather than with regard to specific provisions of the proposed regulation. However, some specific comments and suggestions are made with regard to specific recitals or articles of the proposed regulations.

The establishment of an asylum support office is clearly an essential element of a Common European Asylum System (CEAS). There is obviously a need for better coordination and cooperation between EU Member States in asylum matters, particularly in applying the different directives and regulations in asylum matters, adopted in the last ten years. Most of these directives are now under scrutiny for a revision due to their deliberate or undeliberate gaps and unclearities. Unfortunately it is not clear whether this important task which requires the assistance of Member States as well as of the legal community (questions of interpretation of the Geneva Convention and the European Convention of Human Rights) is properly included into a description of EASO's purposes and tasks (Chapter 1 and 2). The recital speaks of "great disparities between one Member State and another in the granting of protection and the forms that protection takes", but does not sufficiently identify the reasons for such disparities and the ways to tackle them. The proposal as well occasionally speaks of identifying and pooling of good practice in asylum matters between Member States (Art. 3). The overall emphasis, however, is clearly upon Chapter 3 and 2 Sec. 2 referring to support for Member States under particular pressure. The focus upon this task, besides some other tasks like collecting information and support for training, amounts to a somewhat unbalanced description of the issues that may arise with respect to the cooperation and coordination of asylum matters between states. There is no mentioning for instance to support activities for return of rejected asylum seekers which may be a much more urgent issue than providing information on handling and management of asylum cases.

The proposal as well does raise some basic issues with regard to its function as a community body with a separate legal personality and with regard to its organizational structure. The EASO proposal is by far the most expensive solution (see Impact Assessment Report p. 59). In my view this is partly caused by a too expanded task description with regard to some tasks while neglecting other tasks as well as by its somewhat inflated organizational structure.

Particular questions arise with regard to EASO's description of functions and tasks (II) and the organizational structure (III).

II. Functions and Tasks of EASO

1. Disparities in the Interpretation of Asylum Directives

Recital No. 1 refers to the "great disparities between one Member State and another in the granting of protection and the forms of protection taken." The Commission does refer in this context in the Impact Assessment to different recognition rates, which, however, may have very different reasons and cannot be easily connected to divergent interpretations. Nevertheless, divergent interpretations on, for instance, the conditions for granting subsidiary protection may be an important reason for different recognition rates and numbers. It is not very clear how EASO is going to tackle the problem of intentional or unintentional gaps and inclarities in the wording of the Directive's provisions and their systematic incoherences. There is not much in Art. 2 (description of purposes) nor in any other provision which would lend support to a "clearing house" function of EASO. The organizational structure also does not lend support for such a function. Although issues of interpretation of community law may of course be brought before the European Court, one might consider as a better solution the establishment of an independent expert group acting on request of the Managing Board (MB) and entrusted with providing recommendations for either suggesting amendments of secondary legislation or suggesting a common interpretation of a provision of the Directive or identifying a scope of discrecion. This would also have the advantage of indicating political options rather than trying to solve disputes by replacing one vague formulation by another (see for instance ECJ, judgement of 17 February 2009, Case C-456/07 in the case of Elgafaji).

Solution:

Amending Art. 2 and adding in Sec. 1 a provision on the establishment of an expert group, consisting of ten independent experts (judges, practitioners etc.).

2. Practical Cooperation Between the Administrations (Recital No. 4 and Art. 3-7).

The need for more practical cooperation is convincingly described in the Impact Assessment and regulated in Sec. 1. Article 3 entrusts the office with the tasks of coordinating all activities and identifying and pooling of good practices. This could be interpreted as limiting the rights

of Member States to engage in cooperation in asylum matters outside EASO. This is probably not intended.

Suggestion:

The term “all” should be deleted.

The provision in Sec. 1 on support for practical cooperation between Member States on asylum does only mention a limited number of areas in which practical administrative cooperation may be encouraged and promoted by activities of the office. An area which is not mentioned, for instance, concerns support for member states organizing return of rejected asylum seekers and cooperation with states of origin on travel documents etc. Article 7 rightly mentions the support for the external dimensions of asylum policy. However, the description of tasks in Art. 7 is limited. Article 7 does for instance speak of cooperation on “technical matters”. Does this imply that EASO’s mandate does not embrace assistance in case of “legal” matters rather than “technical” matters?

3. Collection and Exchange of Information (Recital No. 5 and Art. 4)

Country of origin-information (COI) is an important part of asylum-related information which must be collected and exchanged by EASO. Why information, however, should be restricted to COI rather than for instance information as well on safety of third countries, remains unclear, since the Asylum Procedures Directive explicitly refers as well to the safety of third country concept.

Articles 4 and 11 should include in somewhat more precise terms the need to establish cooperation with the existing national data collection systems of EU Member States. Rather than building up its own data portal one should think about a connection of the existing data banks in the EU Member States and how they may be used in order to establish a European data exchange in asylum-related matters. The proposal is not altogether clear as to the relationship of EASO with existing offices with large data banks like OFPRA or the German Bundesamt in Nuremberg. Article 11 as well in a somewhat unclear manner authorizes the office to “*create factual, legal and case law data bases on national, European and international asylum instruments*”. At least partly such data bases do already exist and it

should first be explored to what extension this function could be fulfilled by connecting data bases.

4. Deployment of Asylum Support Teams (Recital No. 12 and Art. 13-21)

Chapter 3 contains a very detailed description of asylum intervention pools and employment procedures including operating plans by the Executive Director etc. It is doubtful whether the concept of external asylum support teams, particularly if organized in such a highly formalised and bureaucratic procedure will efficiently contribute to the problem of a particular pressure situation. External experts will usually not be very familiar with the domestic law and practices. The local asylum authorities normally have a much better knowledge of the background and profiles of asylum seekers as external experts providing expertise about “handling and management of asylum cases”. Therefore, objections described in the Impact Assessment Report against expert groups in general (p. 33) apply equally to asylum support teams.

Relocation and international redistribution in an ad hoc situation based upon a general distribution scheme is probably far from being acceptable by the Member States. However, as long as there are no serious attempts being made to discuss the issue of distribution of burden, it might be more economical to provide additional material support (money, technical equipment, support in return of rejected asylum seekers) rather than sending external support teams.

Recital No. 6 assigns the task to EASO to support the “implementation of solidarity mechanisms to promote, on a voluntary and coordinated basis, a better relocation of beneficiaries of international protection from such Member States to others, while ensuring that asylum systems are not abused”. To my knowledge, no such solidarity mechanisms do exist. Therefore, the recital is based upon a non-existing assumption.

In particular, Art. 10 mentions coordinating action to support Member States subject to pressure, including setting up an early warning system of any influx of applicants for international protection and coordinating action to help Member States under pressure to carry out an initial analysis of asylum applications under examination by competent national authorities. At least the second suggestion is very unclear if not misleading. It seems to

indicate the introduction of a pre-screening procedure which has been discussed for many decades and been finally rejected. This would inevitably lead to a prolongation of asylum procedure.

Suggestion:

Initial analysis of asylum application before proper asylum procedure should be deleted.

5. Supporting Intra-Community Transfers (Art. 5)

Article 5 refers in a somewhat unclear way to EU Member States that are faced with asylum pressures due to their “demographic” situation. I wonder what the mentioning of the term “demographic” means in this context. Does it mean that the decrease in population in most EU Member States should provide a reason for the assumption of disproportionate pressure?

III. Organizational Issues - Bodies of the Office (Chapter 5)

The organizational structure of EASO is modelled according to the regular structure of international organizations. There is a Management Board as the typical Member State body existing of Member State’s representatives. The Executive Committee (EC) is acting as an organ of the MB under the orders of the MB, appointed from among the members of the MB with the Commission as an ex officio member. The functions of the EC indicate the subordinate character of the Committee since it is issuing opinions to the MB and advising the Executive Director. The main executive function is entrusted to the Executive Director with also the legal representative (Art. 29). In my opinion the reproduction of the structure of international organizations is not particularly well suited for an efficient fulfilment of the tasks of EASO. The EASO is primarily an organ for organizing the coordination and cooperation between Member States. Therefore, Member States must have a predominant role in the fulfilment of EASO’s tasks. On the other hand, the EASO need not to be construed as an international organization but rather as a body with executive functions. The functions of the MB described in Art. 27 could as well be fulfilled by the Council in its existing form.

If the institution of MB is unavoidable, the Executive Committee should be more clearly defined in its tasks and responsibilities. One could think of composition based upon the

criteria of representation of the largest number of asylum seekers as well as the geographic position – for instance external border states.

The Executive Director equals the Director General of international organizations. It is not very clear, however, in what relationship the Executive Director is to the Commission or MB. Article 29 prescribes the independence in the performance of duties. The provision, however, is without prejudice to the powers of the Commission or the MB. While it is relatively clear what are the powers of the MB, it is by no means clear what are the powers of the Commission in this context.

The proposal also provides for working parties and consultative forums. While it is clear that there is a need for using the expertise from competent Member States authorities operating in the field of asylum, it is by no means clear why there is a need of establishing as a specific body a “consultative forum”. There are many ways of exchange and consulting. In my view, Art. 32 should be deleted and it should be left to the Office in what way consultation procedures are organized. With regard to Art. 31 the wording is too restricted by limiting the setting up of working groups to experts from Member State authorities. There should be the possibility of setting up working groups also composed of experts who are not from Member State authorities but from, for instance, from the legal science including legal experts from non Member State authorities.

1. Cooperation with UNHCR

Contracting EU Member States under Art. 35 of the Geneva Convention are obliged to cooperation with UNHCR. The specific supervisory role of UNHCR as the guardian of the Geneva Convention is somehow distorted in my view when UNHCR becomes part of the organizational structure and is directly involved in EASO (see Recital No. 9). UNCHR therefore may be ill advised to insist on its direct involvement in EASO.

Solution:

Deletion of second sentence of Recital No. 2 and removing all references to UNHCR in Art. 30 No. 8 and Art. 23 No. 4 (membership in the MB).

2. Access to the Office Documents (Recital No. 20)

Article 42 provides for open access to all EASO documents. I wonder whether this provision has been fully considered. There may be need for keeping some exchange of correspondence and Member States' communications confidential due to the need to protect international relations of EU Member States. Open access to documents may lead to a very formal communication structure which does not really reflect the discussion and exchange of information between Member States in asylum matters.