

Valletta Harbour, 27 October 2022
EUAA/ED/2022/350

For the attention of: Ms Emily O'Reilly The European Ombudsman,

Subject: Strategic initiative SI/4/2022/MHZ on how the European Union Agency for Asylum complies with its fundamental rights obligations and ensures accountability for potential fundamental rights violations

Dear Ms O'Reilly,

I have received your letter dated 11 July 2022, whereby you informed the Agency that you had decided to launch an own-initiative inquiry to verify that the EUAA has sufficiently anticipated challenges relating to accountability and its fundamental rights obligations deriving from its expanded mandate. In this context, you invited the Agency to reply to sixteen questions pertaining to, *inter alia*, the monitoring mechanism, the Agency's engagement with non-EU countries (including the way in which the Agency collects information about countries of origin), the EUAA complaints mechanism and the new function of the Fundamental Rights Officer, - mostly constituting novel aspects under the Agency's mandate, introduced by the Regulation 2021/2303, which entered into force at the beginning of this year. The EUAA welcomes the opportunity to be able to provide the requested information on these specific aspects, in a spirit of loyal and transparent cooperation. You may find the respective responses to your questions in the annex to this letter.

On a more general note, I would also like to take this opportunity to underline that the Agency is fully aware of the fact that its enhanced mandate comes with extended fundamental rights obligations on its part and has therefore been sparing no efforts to set up the institutional framework necessary for its implementation since before entry into force of the EUAA Regulation.

To that effect, it launched already in 2021 an "EUAA Transition Programme", with the overall aim to prepare and equip the Agency for the transition to and implementation of the EUAA Regulation. Under this programme, a number of thematic projects have been launched addressing specific areas of the Agency's new mandate. Of particular relevance is the 'EUAA Project – Fundamental Rights', launched by the Agency on 28 August 2021, with the aim to perform a legal analysis of the provisions of the EUAA Regulation dealing with fundamental rights, with particular reference to the Fundamental Rights Officer, the 'Complaints Mechanism' and the Consultative Forum of the Agency, and to identify the sequence of actions to be undertaken prior to and following the entry into force of the EUAA Regulation, in order to ensure timely compliance with the relevant provisions of that Regulation. The deliverables foreseen under these three main objectives of the Project included actions such as the preparation of a legal opinion on the establishment and functioning of the Fundamental Rights Officer or identifying relevant internal and external stakeholders with whom consultations needed to be held in the process leading to the setting up of the complaints mechanism.

Despite the unforeseen challenges faced by the Agency in this delicate period of transition, such as the need to respond to multiple requests for support by the Member States following the invasion of Ukraine in February of this year, the Agency is progressing in its preparations to establish the framework for compliance with fundamental rights and other related obligations. It has, for example, launched the selection process for the critical position of its Fundamental Rights Officer, as well as a call for expressions of interest in view of reconstituting the Consultative Forum in line with the new legislative framework.

Let me conclude by stressing that the Agency is committed to the principle of transparency and therefore supports the Ombudsman's intention to make Agency's replies available to interested stakeholders via publication on the Ombudsman's website, with no restrictions.

I look forward to receiving your observations on the Agency's efforts towards complying with its fundamental rights obligations and remain available to provide any further clarifications and to cooperate for the purposes of the present inquiry.

Yours sincerely,

Nina Gregori
Executive Director



Enclosures

(1) Replies to the questions from the European Ombudsman



Annex 1 – Replies to the questions from the European Ombudsman

1) Has the European Union Agency for Asylum already drafted a proposal on the procedure for monitoring the operational and technical application of EU legal obligations by the Member States?

The Agency has set up an internal project team with the aim of identifying the most effective and efficient way for the EUAA to implement the new monitoring function, taking into account the principle of proportionality. Stakeholder consultations with the main actors involved in the future monitoring mechanism (Member States, European Commission, UNHCR) will be held in the course of 2023, in order to finalise the draft methodology and programme ahead of the first Management Board meeting of 2024. However, the so-called “sunrise clause” in Article 73 (2) of the EUAA Regulation provides that Article 14 and Article 15 (1), (2) and (3) of the same Regulation shall apply from 31 December 2023, and that Article 15(4) to (8) and Article 22 shall apply from the date on which Regulation (EU) No 604/2013 (the Dublin III Regulation) is replaced, or from 31 December 2023, whichever is the earliest. For this reason, while preparations are ongoing to ensure swift adoption of the monitoring programme by the Management Board after this date, the formal proposal on the procedure has not yet been finalised.

2) Has the Agency considered including, as part of this monitoring, unannounced on-site visits by expert teams to ensure meaningful qualitative and quantitative assessment?

Unannounced on-site visits are indeed believed to be an information gathering measure which could enhance meaningful qualitative and quantitative assessment in the context of the monitoring activities of the Agency.

The EUAA Regulation however appears to exclude the possibility of unannounced site visits by expert teams in the context of a monitoring exercise. This can be surmised from Article 14(7) of the Regulation, which requires that “the Executive Director **shall notify the Member States concerned sufficiently in advance of any such visit**. In the case of short-term visits, the Executive Director shall notify the Member State concerned 72 hours in advance.”¹.

In spite of these limitations, the Agency is committed to ensuring that meaningful monitoring measures are put in place within the framework established by the EUAA Regulation. In this context, use could be made of the option of “short-term visits” as cited above, in which case the notification to the Member State must only be made 72 hours in advance. While this does not amount to an unannounced on-site visit, it does effectively set a very short timeframe for notifying the Member State, so that it could be assumed that the visit would still be able to reveal the procedural and technical application of the CEAS.

In addition, it is also worth noting that the Agency will deploy Liaison Officers to the Member States, in accordance with Article 7 of the EUAA Regulation. Such Officers will, according to paragraph 4 of this Article, among others, “(b) support the collection of information referred to in Article 5 and any other information required by the Agency”, “(c) contribute to promoting the application of Union law on asylum, including with regard to respect for fundamental rights”, and “(f) regularly provide reports to

¹ Pursuant to Article 14(5) of the Regulation, short notice visits are only possible in the context of monitoring exercises carried out pursuant to Article 15(2), i.e. when the Agency’s information analysis on the situation of asylum raises serious concerns regarding the functioning of a Member State’s asylum or reception system.





the Executive Director on the situation of asylum in the Member State concerned and its capacity to manage its asylum and reception systems effectively". The same paragraph specifically mentions that "[w]here the reports referred to in point (f) of the first subparagraph raise concerns about one or more aspects relevant for the Member State concerned, the Executive Director shall inform that Member State without delay. Those reports shall be taken into account for the purposes of the monitoring mechanism referred to in Article 14 and shall be transmitted to the Member State concerned".

More precise modalities for the contribution of the Liaison Officers to this process will need to be considered as part of the process for the development of the monitoring methodology to be adopted by the Management Board in the beginning of 2024.

3) Are detention practices, legal assistance and resettlement included as topics for assessment?

According to Article 14 (1) of the EUAA Regulation, *"The Agency, in close cooperation with the Commission, shall establish a monitoring mechanism for the purpose of monitoring the operational and technical application of the CEAS in order to prevent or identify possible shortcomings in the asylum and reception systems of Member States and to assess their capacity and preparedness to manage situations of disproportionate pressure so as to enhance the efficiency of those systems."* With regards specifically to the topics for assessment, Article 14 (3) provides that *"the monitoring shall cover the operational and technical application of all aspects of the CEAS".*

While certain topics are specifically mentioned in Article 14 (3) of the EUAA Regulation, the Agency understands its monitoring mandate as covering *all aspects of the CEAS*, and, in line with this provision, shall aim to assess all relevant aspects of operational and technical application of the CEAS.

As such, the topics mentioned above, i.e. detention practices (within the asylum context), legal assistance and resettlement, are understood as being an integral part of the CEAS and will therefore be included as topics for assessment. For example, detention practices must respect Articles 8 to 11 of the 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 protection² (hereinafter the "Reception Directive"), as well as Articles 8 and 26 of the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection³ (recast, hereinafter the "Procedures Directive") and Article 15 of the Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals⁴ (hereinafter the "Return Directive"). Similarly, legal assistance provided to asylum seekers is enshrined in Articles 20 to 23 of the Procedures Directive.

With regards to resettlement, while there is currently no legal obligation enshrined in the CEAS in this respect, the EUAA understands this topic as part of the CEAS in line with several recommendations

². OJ L 180/61, 29.6.2013, p. 96.

³. OJ L 180/61, 29.6.2013, p. 60.

⁴. OJ L 348, 24.12.2008, p. 98.





issued by the Commission⁵ and conclusions of the Council⁶ in this regard, which will be taken into account for the purpose of the monitoring mechanism. Moreover, the Commission's New Pact on Migration and Asylum includes the proposal already submitted in 2016 for a Union Resettlement Framework Regulation. The proposal is currently at first reading stage in Council. If it is adopted by the co-legislators, it would become legally binding and would therefore clearly fall within the scope of the CEAS and, as regards its operational and technical application by the Member States, also within the scope of the monitoring mechanism.

4) Beyond information provided by national authorities, on what information will the Agency rely for its assessment? Could the assessment systematically incorporate the views, experiences and assessments of national ombudsmen and other human rights monitoring bodies, which often have direct roles vis-a-vis asylum seekers and refugees?

In the absence of a more elaborated methodology at this stage, we refer to the EUAA Regulation, where Article 14 (4) indicates the monitoring may be carried out, in particular, on the basis of information provided by the Member State concerned, the EUAA's own information analysis on the situation of asylum (Article 5), and case sampling. Furthermore, the monitoring may take into account information available from relevant intergovernmental organisations or bodies, in particular the UNHCR, and other relevant organisations on the basis of their expertise.

On this basis, national ombudsmen and other human rights monitoring bodies could be sources of information for the monitoring, based on their relevance and level of expertise.

5) Does the Agency foresee a possibility for individuals present on the territory of the Member State under assessment (either EU citizens or non-EU nationals) to submit complaints to the Agency or its liaison officer about non-compliance with EU asylum law by the Member State in question? If yes, could the Agency take inspiration from the Commission's rules on interacting with EU citizens who complain about infringements of EU law?

It should be noted at the outset that the monitoring mechanism as established by the EUAA Regulation is limited to the *"operational and technical application of the CEAS"*. The aim of this mechanism is to *"prevent or identify possible shortcomings in the asylum and reception systems of Member States"* and *"assess their capacity and preparedness to manage situations of disproportionate pressure so as to enhance the efficiency of those systems"*. In this context, the EUAA Regulation does not foresee a specific role for individual complaints in the context of the monitoring mechanism in its Articles 14 and 15, thereby clearly indicating that the purpose of the mechanism is not to provide individual redress, nor to address individual instances of bad application.

In this context, it should also be noted that recital 20 of the EUAA Regulation specifies that the Agency is to monitor the operational and technical application of the CEAS *"without prejudice to the*

⁵. Commission Recommendation (EU) 2020/1364 of 23 September 2020 on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways, C/2020/6467 OJ L 317, 1.10.2020, p. 13–22 and Commission Recommendation (EU) 2017/1803 of 3 October 2017 on enhancing legal pathways for persons in need of international protection (notified under document C(2017) 6504) C/2017/6504, OJ L 259, 7.10.2017, p. 21–24.

⁶. Council Conclusions on resettling through multilateral and national schemes 20 000 persons in clear need of international protection





Commission's responsibility as guardian of the Treaties". This special role of the Commission is also taken into account in Articles 14 and 15 of the Regulation, which provide that the monitoring mechanism is to be set up by the Agency "in close cooperation with the Commission", and that the common methodology and the monitoring programme are to be established by the Management Board "in consultation with the Commission". This should result in a clear delimitation of roles between the Agency and the Commission, preserving the latter's role and tasks as guardian of the Treaties under its enforcement policy, wherein individuals clearly have a role in bringing forward complaints.

Finally, Article 15 of the EUAA Regulation also provides that the programme of the monitoring mechanism is to clearly indicate which Member States are to be monitored in a particular year, and that each Member State is to be monitored at least once every 5 years. A monitoring exercise outside this programme can be initiated only by the Agency on its own initiative in consultation with the Commission or at the request of the Commission if the information analysis on the situation of asylum referred to in Article 5 raises serious concerns regarding the functioning of a Member State's asylum or reception system. In the context of this programming cycle, establishing an individual complaints mechanism would create a disproportionate administrative burden on the Agency to record and keep information obtained from individuals about specific Member States for up to 5 years, and to reply to them within set timeframes. Moreover, the information submitted by individuals might no longer be relevant/accurate by the time a monitoring exercise is launched.

For the reasons stated above, the adoption by the Agency of rules such as those established by the Commission to interact with EU citizens are not deemed to be proportionate or to provide substantial added value in the context of the monitoring mechanism.

Nevertheless, the Agency is committed to ensure that all relevant information is gathered in order to ensure efficient and substantial monitoring within its mandate. For this purpose, the Agency intends to set up a channel whereby expressions of concern may be received from individuals and whereby information which gives rise to serious concern within the mandate of the Agency would be given appropriate follow-up by the Agency. Any such information could also potentially be used in the framework of a monitoring exercise if deemed useful. Whereas the technicalities of such a channel are still being developed, any correspondence of this nature with individuals would be handled, like any other exchanges with members of the public, in accordance with the Code of Good Administrative Behaviour.

A mechanism for individual redress is provided on the other hand under the complaints mechanism set up by Article 50 of the Regulation, whereby the Agency's fundamental rights officer receives and handles complaints in writing by any person "*who is **directly affected** by the **actions of an expert participating in an asylum support team**, and who considers that his or her fundamental rights have been violated due to those actions, or any party representing such a person*". Therefore, this mechanism is unrelated to the monitoring mechanism set up by Articles 14 and 15 of the Regulation and is limited in its scope to acts of experts deployed within asylum support teams in the context of the Agency's operational and technical assistance activities. It should also be noted that in accordance with recital 45 of the Regulation, the complaints mechanism should not constitute a mechanism for challenging any decision of a national authority on individual applications for international protection.





6) How will the Agency ensure the impartiality of its analysis concerning countries of origin?

The EUAA has a publicly available [Country of Origin Information \(COI\) Report Methodology](#) which highlights “objectivity and neutrality” as first guiding principle. All information on third countries provided by the Agency is produced in accordance with this methodology. There is a standard quality check of all products in the form of a peer review to ensure that a report meets the principles and quality standards set out in the EASO COI report methodology. Such peer review involves EUAA and national researchers but may also include external experts selected on the basis of their proven expertise in COI methodology, knowledge of the country of origin or specific topics. Such experts may include NGOs, academics, and international bodies.

There are different types of analysis of COI foreseen in the EUAA Regulation. As regards “common analysis on the situation in countries of origin and guidance notes” (Article 11), more commonly referred to as country guidance, the EUAA’s role is to coordinate efforts among Member States to develop a common analysis on the situation in specific countries of origin to foster convergence in national decision practices. In practice, it is a Country Guidance Network composed of senior-level policy experts from Member States who establish the common analysis based on EUAA country of origin information, whereby the EUAA plays a facilitating role. While consultations are organised with UNHCR and the European Commission, the decision to adopt the common analysis and guidance notes lies with the EUAA Management Board. The country guidance notes are publicly available on the EUAA website.

In contrast, Article 12 foresees a direct role for the Agency in providing information and analysis on safe countries of origin and safe third countries. The same article mentions that the general principles that apply to country of origin information (Article 9) are also applicable when providing information and analysis on safe countries of origin and safe third countries, which means the above-mentioned Methodology is also applicable here.

7) Has the Agency considered setting up a panel of independent experts to contribute to this analysis?

Independent experts and civil society organisations already contribute substantially as sources of country-of-origin information (COI), whereby external experts are systematically invited to participate in relevant workshops, meetings and conferences.

In this context, it is again important to make a distinction between EUAA COI reports, which are produced by the EUAA, and the common analysis on the situation in countries of origin and guidance notes, in which the EUAA’s role is to coordinate efforts among Member States to develop a common analysis on the situation in specific countries of origin to foster convergence in national decision practices.

With regards to COI reports, selected external experts and relevant civil society organisations specialised in COI are being involved in the production processes. Depending on capacity needs, the Agency engages external experts for the drafting of (parts of) COI reports, but also for the quality review of such reports. Consultations with external experts and civil society organisations specialised in COI have also been organised when updating the Agency’s COI Report methodology and other methodological guidelines (e.g. the [COI Research Guide on LGBTIQ](#)).





The above-mentioned regular involvement and consultations of external experts and relevant civil society organisations will soon also be strengthened in the form of a permanent Thematic working group on COI as part of the Consultative Forum.

As regards the common analysis (Article 11), as explained in the reply to the preceding question, the process is Member State-led and the Agency's role is to facilitate cooperation in this respect.

It should also be noted that the EUAA regularly organises stakeholder surveys on COI and country guidance and plans to organise an external evaluation of the use of its COI and country guidance products, which provides another opportunity for different stakeholders, including independent experts, to provide feedback on these products.

In light of the above, and particularly of the regular involvement of independent experts in the drafting of COI reports and in the coordination of country guidance, as well as the enhanced and more permanent involvement such experts will enjoy as part of the Consultative Forum, the Agency does not see a need or added value for a separate panel of independent experts, which is also not foreseen in the EUAA Regulation.

8) How will the Agency cooperate with its Consultative Forum in this respect?

In line with Article 50(3) of the EUAA Regulation a thematic consultation group on Country of Origin Information (COI) will be set up as part of the Consultative Forum.

This initiative builds further on existing cooperation between the EUAA and selected civil society organisations specialised in COI. Indeed, already under the former EASO Regulation, members of the Consultative Group were regularly invited to conferences and briefed on important developments on this topic in the context of side meetings specifically organised for this purpose. Their informal involvement ensured that they were up to date and able to issue recommendations on methodology and other related aspects. Moreover, several members of the Consultative Forum are involved in the production process of COI reports.

At this stage, the provisions relating to the Consultative Forum in the EUAA Regulation are yet to be fully implemented. On 23 June 2022, the Management Board adopted MB Decision No 111 establishing the Consultative Forum under the EUAA and setting out the rules regarding its composition and conditions for transmitting information thereto. Pursuant to Article 3 of MB Decision No 111, the EUAA opened a call for expressions of interest from relevant civil society organisations and bodies to become members of the EUAA Consultative Forum. Following the expiry of the deadline set in the call for expression of interest (on 15 September 2022) the Agency reviewed the expressions of interests received within the deadline and the Consultative Forum under the EUAA will soon be reconstituted on this basis with its new members⁷. Civil society organisations may still apply after the expiry of the deadline but are advised that their expression of interest will be processed with some delay towards the end of 2022.

Once the Consultative Forum will be reconstituted, it will be invited to also provide its input on specific ways in which they want to cooperate with the Agency with regard to COI reports and common country guidance. Given that the Consultative Forum is composed of civil society organisations and competent bodies operating in the field of asylum policy at local, regional, national, Union or international level, such input will be provided in an independent capacity.

⁷ The list of member organisations is published on the EUAA website:
https://euaa.europa.eu/sites/default/files/2022-10/EUAA_CF_Members.pdf





9) How does the Agency interpret its task of facilitating operational cooperation between Member States and non-EU countries including with regard to the protection of fundamental rights (preamble point 38 and Article 35 of Regulation 2021/2303)?

Article 35(1) provides that “[...] the Agency shall facilitate and encourage operational cooperation between Member States and third countries, within the framework of the Union’s external policy, including with regard to the protection of fundamental rights, and in cooperation with the EEAS [...]”.

It therefore bears noting at the outset that the reference to fundamental rights is understood as a condition, alongside the conditions referring to the Union’s external policy and cooperation with the EEAS. Therefore, this provision is not interpreted as meaning that the Agency has the general task of facilitating cooperation in relation to the protection of fundamental rights. That would be too broad an interpretation considering that the Agency’s mandate relates to asylum and reception and not fundamental rights more broadly.

This reading would seem to be supported by recital 38 where the reference to facilitating operational cooperation relates to the activities in the Agency’s mandate and the respect for fundamental rights by the Agency is set out as a general requirement for all cooperation with third countries.

In fact, in all of its activities, including cooperation with third countries and including in ‘facilitating operational cooperation between Member States and non-EU countries’, the Agency must act in accordance with fundamental rights. As also stated in Article 35(1) of the Regulation, the Agency shall promote and comply with the norms and standards which form part of Union law.

When it comes to support to third countries under Article 35(2) of the Regulation, the activities implemented by the Agency aim at supporting the countries concerned to meet the standards that apply in the Common European Asylum System (CEAS). This is done in coordination with the Member States, the European Commission, the European External Action Service and EU delegations, as well as other stakeholders such as relevant international organisation. In this regard, by assisting them to align with, or approach, the CEAS, the Agency is therefore also assisting them to respect fundamental rights insofar as they relate to asylum. The right to asylum enshrined in Article 18 of the Charter is perhaps the most obvious, although other fundamental rights could also be indirectly linked (e.g. right to respect for private and family life). Whether the Agency provides its training, coaching on the use of the Agency’s tools and guides, assistance with developing SOPs and reviewing draft legislation etc., the reference point is always the CEAS and the Agency’s materials which are developed in relation to the CEAS.

The possibility of facilitating operational cooperation between Member States and non-EU countries, which is foreseen in Article 35(1) of the Regulation, was also envisaged in the EASO Regulation. However, the first time this provision has really been used is in the context of the Agency’s current support to the programme whereby persons displaced from Ukraine to Moldova are being transferred to volunteering Member States. Following a request from the European Commission and Member States to support this endeavour and having regard to other limitations in the EUAA Regulation, the Agency is supporting the information provision relating to the transfer programme on the ground in Moldova.

It is important to note that the Agency’s role as per this provision is to ‘facilitate and encourage’ such operational cooperation between Member States and the third countries. It is therefore a different scenario from that relating to the Member States where the Agency itself provides operational support,





for instance with registration, vulnerability screening, asylum interviews, etc. Nevertheless, the obligation for the Agency's activities to respect fundamental rights would also apply here.

Finally, the roles of the Fundamental Rights Officer must also be underlined. In line with Article 49 (3) of the EUAA Regulation, the Fundamental Rights Officer shall be responsible for ensuring the Agency's compliance with fundamental rights in all of its activities and promoting respect by the Agency of fundamental rights. This responsibility applies also to the activities carried out by the Agency in accordance with Article 35 of the EUAA Regulation, including to facilitate operational cooperation between Member States and third countries, and to the Agency's activities carried out on the territory of third countries. This will therefore be another safeguard to ensure the Agency's compliance with fundamental rights.

10) What methodology will the Agency apply to assess the human rights situation in non-EU countries and under what circumstances would it deem that the situation in a country is such that it cannot deploy a liaison officer to that country?

The Agency is developing an 'Internal Guidance for the Deployment of Liaison Officers to third countries', which provides instructions on how to deploy liaison officers to third countries in compliance with the EUAA Regulation and in line with the External Cooperation Strategy. This guidance includes instructions relating to the requirement imposed by the Regulation (Recital 39 and Article 36 (1) EUAA Regulation), for the Agency to only deploy Liaison officers to third countries whose migration and asylum management practices comply with non-derogable human rights standards. An annex to the guidance sets out the methodology which will be used to do this assessment.

In order to draft this methodology, consultations were held with the European Commission, other Agencies and international organisations. The EUAA Management Board has also been consulted on certain aspects so far. The current draft is being further reviewed internally and will again be shared with the Management Board.

While underlining that the methodology is still in draft form, it may be noted that this draft envisages that the assessment would be carried out against a list of non-derogable human rights that has been identified in relation to the migration and asylum management practices. The Agency would make this assessment, on the basis of quantitative and qualitative criteria, which are developed in detail in the methodology.

As part of the quantitative assessment, the Agency would identify whether the third country has signed certain international treaties and conventions aimed at upholding human rights standards. As part of the qualitative assessment, the Agency would assess whether the practices correspond to the formal declarations. To this aim, the Agency would consult reports from trustworthy sources and may hold further consultations with external stakeholders to obtain the information needed to make the assessment. These may include the Consultative Forum, the European Commission, the EEAS, EU Delegations, the EU Special Representative for Human Rights, the Council of Europe, and other EU Agencies or International Organisations that are operational in the third country.

Due to his/her specific expertise, a role is also envisaged for the Fundamental Rights Officer in the course of this assessment, once he/she has taken up duties.





Moreover, in line with Article 49(3) EUAA Regulation, the Fundamental Rights Officer shall be responsible for ensuring the Agency's compliance with fundamental rights in all of its activities and promoting respect by the Agency of fundamental rights. This responsibility applies to the activities carried out by the Agency in accordance with Article 36(1) of the EUAA Regulation, on the deployment of liaison officers to third countries.

Any concrete proposal for the deployment of a liaison officer to a third country must be submitted by the Agency for approval by its Management Board. The Agency's assessment of compliance of migration and asylum practices with non-derogable human rights standards would therefore be shared with the Management Board, which will ultimately approve or otherwise the proposed deployment in accordance with the Regulation.

Whereas the assessment will be done before any deployment takes place, it may also be repeated whenever there are reasons to believe that the situation in the third country has changed to such extent that a re-assessment is necessary.

11) When does the Agency anticipate that the fundamental rights officer will become operational?

The appointment of the Agency's fundamental rights officer is one of the objectives of the Fundamental Rights Project which was launched under the EUAA Transition Programme in 2021.

The EUAA Regulation provides, in Article 49(1), that "The Management Board shall appoint a fundamental rights officer from a selection of candidates proposed by the Executive Director." It also provides, in the second paragraph of the same article, that "The fundamental rights officer shall be independent in the performance of his or her duties and shall report directly to the Management Board."

The selection process for the post of fundamental rights officer, therefore required the adoption of a specific Management Board decision on the approval and publication of the vacancy notice for the post of fundamental rights officer and the applicable recruitment process, including the composition of the Selection Committee. This was necessary to properly take into account the fact that the powers conferred by the Staff Regulations on the appointing authority and by the Conditions of Employment of Other Servants of the EU (CEOS) on the authority empowered to conclude contracts of employment (AECE) with respect to the fundamental rights officer are conferred to the Management Board. In addition, this approach aimed also to devise the recruitment process in a way which preserved the fundamental rights officer's independence vis-à-vis the Executive Director of the Agency.

Considering the importance of the post and the *sui generis* nature of the recruitment and selection process (requiring deviations from the Agency's standard operating procedure for the recruitment of staff), the Agency therefore undertook extensive consultations with all concerned internal and external stakeholders (in particular the Commission's Directorate-General for Migration and Home affairs, on the one hand, and the Directorate-General for Human Resources and Security, on the other hand) to ensure that:

- the Vacancy Notice adequately reflects the job requirements and essential and advantageous selection criteria for the post, with an emphasis *inter alia* on its independence and expertise in fundamental rights issues;
- the selection procedure is conducted in a regular manner and in compliance with all applicable substantive and procedural rules, in order to avoid any potential annulment of the process



requiring it to be relaunched, thereby causing considerable delays in the appointment of the fundamental rights officer;

- a selection committee is appointed composed of members of the appropriate grade and experience including also external stakeholders.

It was also necessary to clarify whether nationals of the associated countries were eligible to apply for the post.

These consultations, and in particular the need to address to the largest extent possible all, questions and concerns raised, meant that the original timetable for the publication of the Vacancy Notice and the launch of the selection process took slightly more time than initially expected.

The Management Board adopted Decision No 113 on the approval and publication of the vacancy notice for the post of Fundamental Rights Officer and the applicable recruitment process, including the composition of the Selection Committee, on 12 July 2022. The Vacancy Notice was published on the 14 July, thereby launching the selection process, with a deadline for applications set for 1 September 2022.

In order to ensure that the successful candidate for the position of FRO is chosen in a timely manner, the Agency has now set an ambitious internal timetable for the completion of the next steps of the selection process.

Once the selection procedure is completed, the Executive Director must submit, in accordance with Article 49(1) of the EUAA Regulation, a list of candidates to the Management Board of the Agency, which will appoint the fundamental rights officer by means of a separate Management Board Decision.

The current indicative target date for the fundamental rights officer to become operational is therefore March/April 2023, although this will depend on certain factors which are not entirely within the control of the Agency, such as the lapse of time between the acceptance of the job offer by the selected candidate and their taking up duties at the Agency's HQ in Malta.

12) Where there are alleged fundamental rights violations by experts on the Asylum Support Teams who are not staff members of the Agency or national authorities, how will this be investigated?

In accordance with Article 51(2) of the EUAA Regulation on the complaints mechanism, complaints concerning potential violations of fundamental rights may only be submitted against actions of an expert participating in an asylum support team ('AST'), the composition of which is clearly defined by the Regulation, and in particular Article 19 thereof.

To that effect, ASTs consist of experts from the Agency's own staff, experts from Member States, experts seconded by Member States to the Agency or other experts not employed by the Agency (such as temporary agency workers (interims), external remunerated experts and contractor personnel). The Agency makes use of such other experts as necessary for its operational needs and subject to the conditions in the EUAA Regulation, while recourse to those categories is also clearly referenced in the Operational Plans concluded by the EUAA with the Member States (see e.g. Section 6.3. of the recent Operational Plans as available on the Agency's website⁸).

Each of those categories is governed by a distinct legal framework, laid down directly in the EUAA Regulation and the Agency's governance acts (such as the Staff Regulations and internal implementing

⁸ <https://euaa.europa.eu/operations/member-states-operations>



rules) or in the contractual relationship the Agency has established with either the contractor providing the personnel or the individual expert themselves.

In accordance with Article 51(4) of the EUAA Regulation, when the Agency receives a complaint against an act of an expert participating in an AST, the FRO must first review the admissibility of the complaint. If the complaint is deemed admissible, it will then be handled in accordance with the respective applicable legal framework. Consequently, investigations into alleged fundamental rights violations by other experts not employed by the Agency must be governed by and be compliant with the rules and principles provided for in the dedicated legal framework (e.g. contract with the service provider). The Fundamental Rights Officer will be consulted on these rules, as soon as possible following his or her appointment, together with the implementing rules for the complaints mechanism. The relevant contracts will in particular need to include provisions to ensure the cooperation of the experts as well as their employers (where applicable) in any investigations, and more importantly follow-up by the Agency or by the experts' employers including effective, dissuasive and proportionate sanctions in cases of verified violations of fundamental rights.

In respect to the potential violations of fundamental rights by personnel who are active in close cooperation with the Agency, i.e. in the operational area, the Agency does not, in accordance with its founding Regulation, dispose of a legal basis allowing it to conduct further investigations concerning such persons, whereby the national law of the Member State shall remain applicable. Such complaints would, according to the rules laid down in Article 51 of the EUAA Regulation be considered inadmissible.

However, taking due note of the EUAA's obligation under Article 57(1) of the EUAA Regulation, to guarantee the protection of fundamental rights in the performance of its tasks, the Agency will consider potential means by which it might be able to express concern over complaints pertaining to alleged violations of fundamental rights by officials of the host Member State that were brought to its attention and proper ways of channelling them to the said authorities. The Agency intends to cooperate closely on this matter with the Fundamental Rights Officer once he or she is appointed, as necessary.

13) When does the Agency expect to adopt the Fundamental Rights Strategy, as required under Regulation 2021/2303?

According to Article 57(3) of the EUAA Regulation, "*The Agency shall, on a proposal of the fundamental rights officer, adopt and implement a fundamental rights strategy to ensure respect for fundamental rights in all the Agency's activities.*". The consultation of the Fundamental Rights Officer on the fundamental rights strategy has also been foreseen as one of his or her tasks in line with Article 49(5) of the EUAA Regulation. Moreover, in accordance with Article 50(6) of the EUAA Regulation, the Consultative Forum must also be consulted *inter alia* on the preparation and adoption of the Strategy.

Therefore, the process for the preparation and adoption of the Strategy can only be initiated once the Fundamental Rights Officer and the Consultative Forum in its new composition are both established and operational.

To that effect, the Agency has launched the selection and recruitment process for the Fundamental Rights Officer, who is indicatively expected to take up duties in March/April 2023. In the meantime, the Agency is working towards reconstituting the Consultative Forum in its new composition in accordance with the EUAA Regulation. For that reason, and pursuant to Article 3 of Management Board Decision No 111 of 23 June 2022 on the establishment and composition of the Consultative Forum and on the conditions for transmitting information thereto, it has **launched a call for expressions of interest from relevant civil society organisations** and bodies to become members of the EUAA Consultative Forum.





The Forum is expected to become operational in its new composition before the end of the current year.

Consequently, the adoption of the EUAA Fundamental Rights Strategy by the Agency is expected to be take place in the following year, without prejudice to the timelines governing the establishment of the function of the Fundamental Rights Officer and the Consultative Forum.

14) Where Agency-led ‘asylum support teams’ participate in EU ‘migration management support teams’, will they have a dedicated code of conduct? If so, when does the Agency expect to adopt this code and will it differ from the code of conduct applied by the European Border and Coast Guard Agency (Frontex) for all participants in its operations?

The EASO Regulation, unlike the EUAA Regulation, did not explicitly include a provision requiring the adoption of a code of conduct for experts participating in asylum support teams (ASTs). Nevertheless, EASO had already adopted a Code of Conduct for persons participating in EASO operational support activities⁹, which is included in the pre-deployment training of all experts who form part of the ASTs. The Executive Director of the Agency had also adopted a Decision laying down a standard operating procedure for following reports of violations of the Code of Conduct¹⁰.

In accordance with Article 7 of Decision No 96 of the Management Board of 19 January 2022 on the transition to the European Union Agency for Asylum, “*the Agency’s transition from the former EASO to the EUAA shall not have any impact as such on any existing internal legal acts concluded under Regulation (EU) 439/2010.*” The existing Code of Conduct and underlying standard operating procedure therefore remain in force until the adoption of a new Code of Conduct under Article 58 of the EUAA Regulation.

All deployed Member State experts must sign a form declaring that they have familiarised themselves with the provisions of the Code and that violations of the Code may constitute grounds for the termination of their deployment. On the other hand, contracts with deployed external remunerated experts provide that violations of the Code will be deemed to amount to a contractual breach and may result in the suspension or termination of their deployment¹¹.

The EUAA Regulation however provides that both the fundamental rights officer and the Consultative Forum are to be consulted on the code of conduct. As a consequence, while the Agency is aware of the need to adopt a new code of conduct in the sense of the EUAA Regulation, such a code of conduct cannot be adopted until the fundamental rights officer has taken up duties, which is likely to occur in the first quarter of 2023. This timeframe will also ensure that by the time the Consultative Forum is consulted on the new code of conduct, it will have been re-constituted in its new membership in accordance with the provisions of Article 50 of the Regulation¹².

⁹ https://euaa.europa.eu/sites/default/files/2022-06/code_of_conduct_20220617.pdf

¹⁰ Decision of the Executive Director of the European Asylum Support Office on the procedure of following reports of violations of EASO Code of Conduct for Persons Participating in EASO Operational Support Activities, EASO/SOP/03_O.

¹¹ See Article 4 of Annex I of the model contract for external expert’s services (https://euaa.europa.eu/sites/default/files/2022-03/annex_3_model_contract.pdf)

¹² In this regard, it should be noted that the Management Board of the Agency has already adopted Decision No 111 of 23 June 2022 on the establishment and composition of the Consultative Forum and on the conditions for transmitting information thereto. Pursuant to Article 3 of the MB Decision No 111, the Agency subsequently launched a call for expressions of interest from relevant civil society organisations and bodies to become members of the EUAA Consultative Forum. In





Once the new code of conduct is adopted, it will be applicable to all experts participating in asylum support teams deployed in the context of the Agency's operational and technical support activities, including those undertaken as part of Migration Management Support Teams (MMSTs).

In view of the approach described above and the opportunity to incorporate any specific new requirements in the new code of conduct, the Agency does not currently see a need for a dedicated code of conduct applicable specifically to experts deployed as part of MMSTs. However, internal discussions on the development of the new Code of Conduct are still at a very early stage. Should it result, following consultations with all concerned internal and external stakeholders (including the fundamental rights officer and the Consultative Forum), that specific considerations relating to the respect of fundamental rights would justify the adoption of such a dedicated code of conduct, the Agency commits itself to seriously consider this option. Aspects related to specific cooperation needs between experts deployed by the two Agencies, in particular where they operate alongside each other on the ground, could also be addressed in standard operating procedures (SOPs).

15) Is the Agency aware of suggestions made by the European Ombudsman to Frontex, concerning its complaints mechanism? If so, has the Agency taken these into account in reflections on drafting its own implementing rules?

Yes, the Agency is fully aware of the recommendations made by the European Ombudsman to Frontex with regard to its complaints mechanism, which have been given the utmost attention in the ongoing process of preparation of its own complaints mechanism under Article 49 of the EUAA Regulation.

Indeed, one of the objectives of the fundamental rights project launched under the EUAA Transition Programme as mentioned above concerns the setting up of the EUAA complaints mechanism, in cooperation with its fundamental rights officer, who will be consulted following his or her appointment. As part of its preparatory work for the establishment of the mechanism and the development of the implementing rules, the Agency is conducting desk research as well as a number of preliminary consultations with internal and external stakeholders - including the Ombudsman – on specific topics related to their mandate and relevant for the establishment of the complaints mechanism.

Given the similarities and close link between the fields of activity of EUAA and Frontex, as well as the corresponding provisions in their founding regulations relating to their respective complaints mechanisms, it was deemed appropriate that the first such consultation would take place with Frontex. For this purpose, a delegation from the EUAA's Legal Services Unit visited Frontex HQ in Warsaw in July to discuss the latter's already established complaints mechanism, and in particular the process leading to its establishment and subsequent revisions, with a special focus on the Ombudsman's recommendations in that context. Meetings took place with Frontex's fundamental rights officer, the Legal and Procurement Unit and the Operational Response Division. A virtual meeting was also held with one of the co-chairs of Frontex's consultative forum.

The EUAA commits itself to take utmost account of those recommendations when drafting its own implementing rules, including by ensuring the accessibility of the mechanism (for example through permanent channels for cooperation with civil society organisations), accountability for violations of fundamental rights in the Agency's operations (including cooperation with Member States in this

parallel, UNHCR, the Fundamental Rights Agency and Frontex have been invited to become member to the EUAA Consultative Forum in accordance with the EUAA Regulation and Article 2 of MB Decision No 111. The Agency is planning to organise the first Plenary Meeting of the reconstituted Consultative Forum under the EUAA in the beginning of November.





regard), and proper awareness-raising activities (including the availability of public information material on the site of operations).

At the same time however, the Agency recalls that while it is responsible for setting up the mechanism and therefore for adopting its implementing rules, the implementation of the mechanism is the responsibility of the fundamental rights officer in his or her independent capacity. Some of the Ombudsman's recommendations will therefore need to be implemented by the fundamental rights officer following his or her appointment.

When developing the implementing rules, the Agency will also have to be mindful of certain differences between the relevant provisions in the two Agencies' founding regulations relating to their respective complaints mechanisms, and how these could have an impact on the possibility to fully implement the Ombudsman's recommendations. Anonymous complaints, for example, are clearly to be deemed inadmissible as per Article 51(3) of the EUAA Regulation, and any follow-up to such complaints would therefore need to be given outside the scope of the mechanism. Another relevant difference stems from the fact that the EUAA Regulation does not foresee fundamental rights monitors, contrary to Article 110 of the Frontex Regulation, which could also have practical implications for the extent to which the EUAA can fully implement the Ombudsman's recommendations.

16) Based on what criteria will the Agency decide to suspend or terminate the deployment of asylum support teams (in line with article 19.6(c) of Regulation 2021/2303)? Is the Agency aware of the suggestions made by the European Ombudsman to Frontex concerning transparency around such deliberations and decisions and what information to take into account? If so, has the Agency taken these into account in reflections on drafting its own implementing rules?

The legal basis allowing the Executive Director to suspend or terminate, in whole or in part, the deployment of asylum support teams after informing the host Member State, as well as the conditions for such suspension or termination, have been laid down in Article 18(6) of the EUAA Regulation. More specifically, sub-paragraph (c) of the said provision stipulates that the Executive Director may do so **after consulting the fundamental rights officer**, when he or she **considers that there are violations of fundamental rights** or international protection obligations by the host Member State **that are of a serious nature or are likely to persist**.

The Agency is aware of the recommendations from the European Ombudsman that were issued for the attention of Frontex in *Decision in OI/4/2021/MHZ on how the European Border and Coast Guard Agency (Frontex) complies with its fundamental rights obligations and ensures accountability in relation to its enhanced responsibilities*¹³, and in particular the recommendations relating to the transparency of deliberations and decisions and the sources of information relied on, which are being carefully taken into consideration also in the context of the EUAA and its obligation under Article 18(6)(c). The EUAA is also mindful of the Frontex' Decision of the Executive Director on **Standard Operating Procedure – mechanism to withdraw the financing of, or suspend or terminate**¹⁴, or not launch Frontex activities of 25 January 2022 which defined the **criteria for the Executive Director's decisions based on considerations related to fundamental rights** or international protection obligations. These criteria, based on Article 46(4) of the Frontex Regulation¹⁵, pertain to violations of fundamental rights or

¹³ <https://www.ombudsman.europa.eu/en/decision/en/151369>

¹⁴ <https://prd.frontex.europa.eu/?form-fields%5Bdocument-tag%5D%5B0%5D=659>

¹⁵ Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624





international protection obligations related to the activity concerned that are of a serious nature or are likely to persist, whereby the Frontex SOP offers further definitions and case law on the “serious nature” and “persistence” of the violations concerned.

To this end, the EUAA takes note of the parallels between the provision of Article 46(4) of the Frontex Regulation and that of Article 18(6)(c) of the EUAA Regulation, where both provisions refer to the serious nature of the potential violations and their likelihood to persist as criteria for suspension or termination of operational activities. Therefore, the Agency is carefully following the example of Frontex in order to identify best practices, however also taking into account the specificities of the EUAA that require a customized approach. One such specificity on the side of the EUAA is the absence of the fundamental rights monitors who can be present at the sites where the Agency carries out its operational activities, contrary to the mandate of Frontex, and more in particular Article 110 of the Frontex Regulation.

Moreover, the Agency believes that the role of the Fundamental Rights Officer in the process of assessment of whether the criteria laid down in Article 18(6)(c) are met is of paramount importance. To this end, the Agency intends to propose the adoption, by its Management Board, of a Decision on the functioning and internal organisation and cooperation with the Fundamental Rights Officer, governing the means of internal cooperation and collaboration between the Fundamental Rights Officer, the other internal services of the Agency and its management. This Decision will also address the role of the Fundamental Rights Officer in the procedure leading to the suspension or termination of operational activities of the EUAA under Article 18(6)(c) of the Regulation and the manner in which he or she should be consulted by the Executive Director.

Against this background, it should be noted that the Agency has not yet drawn up draft rules on the implementation of Article 18(6), whereby the Fundamental Rights Officer shall be properly involved in the preparation and adoption of such rules, which might also touch upon the manner in which the FRO will be consulted by the ED in the application of article 18(6)(c). Once in place, the Agency will consider making the rules publicly available, following the example of Frontex.

