



## Analysis:

# The EU Directive on Reception Conditions: A weak compromise

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## Introduction

As part of the project to create a 'Common European Asylum System', the EU adopted legislation between 2003 and 2005 on four key issues: the definition (ie, 'qualification') for refugee status; asylum procedures; reception conditions for asylum-seekers (dealing with issues like their welfare and employment); and responsibility for asylum-seekers (ie the 'Dublin' rules, which in principle require asylum-seekers to apply in one Member State only, which is determined by those rules).

These measures were considered to form the 'first phase' of the Common European Asylum System, and the EU's Hague Programme, which set out an agenda for the development of EU Justice and Home Affairs Law from 2005-2010, set the objective of adopting legislation establishing the second phase of the Common European Asylum System by 2010. This deadline was later extended to 2012, but obviously even this later deadline will soon expire.

The European Commission then tabled in 2008 and 2009 proposals to revise all of the four key measures referred to above. The European Parliament (EP) and the Council agreed in mid-2011 on the revision of the Qualification Directive, which was then officially adopted in November 2011. However, the Council had difficulty agreeing on how to revise the other rules, so in June 2011 the Commission tabled amended proposals for the Directives on reception conditions and asylum procedures, in order to restart discussions.

In the June 2011 Statewatch analysis of these proposals, it was argued that taken as a whole, the amended proposals would not require Member States to raise their standards very much, and so the second phase of the Common European Asylum System would therefore look a lot like the first phase.

Subsequently, the Member States' representatives to the EU (known as 'Coreper') agreed a text in March 2012 as a basis for negotiations with the EP, which enjoys joint decision-making power in accordance with the EU's 'ordinary legislative procedure' (previously known as the 'co-decision procedure') over EU asylum legislation. In the Statewatch analyses of February 2012 and March 2012, it was argued that the version of the Directive about to be agreed (and which was subsequently agreed) by Coreper would not raise standards in any discernible way as compared to the current rules: the Member States had hit 'rock bottom', although it remained to be seen whether the EP could convince the Council (made up of Member States' interior ministers) to raise those standards at all.

In July 2012, the EP and Council agreed a deal on the revision of this legislation. To what extent has the EP been successful in raising standards?

### The reception conditions Directive

The current EU rules on this subject are set out in Directive 2003/9 (the '2003 Directive'), which applies to all Member States except Denmark and Ireland. The UK has opted out of the 2008 proposal (as revised in 2011, and now agreed) to amend these rules, but the 2003 Directive will continue to apply to the UK regardless.

As pointed out in the June 2011, February 2012 and March 2012 Statewatch analyses, the text of the new Directive as agreed in Coreper would have amended the 2003 Directive as regards: the extension of the scope of the Directive to applicants for subsidiary protection; a limited extension of the definition of 'family members'; a confirmation that the Directive applies to territorial waters and transit zones; rules on detention of asylum-seekers for the first time, although these were quite flawed; and improved rules on access to education. By the time of the March 2012 agreement though, there were no significant changes to the 2003 Directive left as regards access to employment for asylum-seekers, social welfare, reduction of benefits, vulnerable persons and appeals.

In order to determine the effect of the EP's involvement, the final agreed version of the Directive (the fourth column in the attached document) can be compared to the Council's/Coreper's agreed text (the third column) and the EP's preferred text (the second column). The first column indicates the original Commission proposal (as revised in 2011). The bold, underlined and deleted text in the first column indicates how the Commission's proposal would have amended the 2003 Directive, while the bold, underlined and deleted text in the third and fourth columns indicates how the Council's text and the final text (respectively) differ from the Commission's proposal.

First of all, the EP has secured some changes to the preamble, which is significant because the EU's Court of Justice often refers to the preamble to legislation (including as regards EU immigration and asylum law) to interpret that legislation. The changes here concern:

- a) preamble clause 8 - the final text returns to the Commission's proposal and states that the Directive applies in all facilities and all stages as regards

housing of asylum-seekers; an addition to this text made by the Council is also kept (this states that the Directive applies as long as persons remain on the territory as asylum-seekers)

- b) preamble clause 14 - the final text drops most of the Commission proposal (favoured by the EP) on the identification of persons with special reception needs, but at least it refers to 'persons' with such needs (instead of 'groups', as the Council had wanted)
- c) preamble clause 15 - the EP convinced the Council to add a reference to the international legal obligations of Member States. However, the Council got its way as regards the removal of an express reference to not imposing penalties on asylum-seekers who were forced to breach immigration law in order to escape persecution
- d) preamble clause 15a (new) - the EP's proposal for a new clause on time limits for detention of asylum-seekers was agreed, with an added sentence about reasonable time limits for detention
- e) preamble clause 15a (new) - the Council's proposal for a new clause (with the same number) was also agreed; this concerns the possibility of detaining asylum-seekers on grounds other than those relating to asylum
- f) preamble clause 17a (new) - a shorter (and weaker) version of the EP's proposal for a clause on alternatives to detention was agreed
- g) preamble clause 18a (new) - a shorter version of the EP's proposed clause on housing and extended family was accepted
- h) preamble clause 19 - the EP did not convince the Council to drop its changes, which break the link between labour market access of asylum-seekers and the time limit (in other proposed EU legislation) to decide on an asylum application
- i) preamble clause 20 - the EP did not convince the Council to adopt its amendments as regards living standards for asylum-seekers, although different additional text was added
- j) preamble clause 27a (new) - the EP agreed on the Council's text as regards Member States' obligations to inform the Commission in more detail about the transposition of the Directive

As for the main text of the Directive:

- a) Article 2 - the EP could not convince the Council to adopt the Commission's proposed wide definition of family members, or to adopt the EP's proposal to add dependent adults with special needs to the scope of this definition. However, the EP did convince the Council to add references to these family members in other specific provisions of the Directive (see further below)

- b) Article 6.6 - the EP convince the Council to add the clause proposed by the Commission banning documentation requirements for obtaining benefits - but as a compromise, the new Directive will not ban all such requirements, but only those which are 'unnecessary and disproportionate'
- c) Article 8.3 - as regards grounds for detention, the EP accepted the addition by the Council of a limitation on the ground for detention in order to determine the elements of an asylum application (adding the words, 'in particular when there is a risk of absconding'); the EP also accepted a new ground for detention not proposed by the Commission, concerning cases where the person is detained for the purposes of expulsion, but it obtained limits on the use of that clause (it can only apply if the Returns Directive is applicable, and if the Member State can show that the person concerned only applied for asylum in order to delay the expulsion, in particular demonstrating that there was no chance to apply for asylum before); the EP convinced the Council to drop another possible ground for detention - following apprehension for an illegal stay
- d) Article 8.4 - the EP did not convince the Council that Member States should report on their grounds for detention, but it did convince the Council that some provision for alternatives to detention should always be available
- e) Article 9 - as regards detention procedures, the EP did not convince the Council to provide for more precise rules on time limits for detention (although see preamble clause 15a), to require automatic review of detention or to limit administrative authorities' use of detention; it did convince the Council that information for detainees had to be in writing (although it did not convince the Council that detainees should be told their maximum length of detention). As regards legal aid, the EP only managed to convince the Council that legal advisers had to be free of any conflict
- f) Article 10 - as regards detention conditions, the EP did not convince the Council to prohibit detaining asylum-seekers in prisons, although it did convince the Council to provide that 'as far as possible' asylum-seekers should be kept separately from other immigration detainees, and to specify that in either case, the detention conditions in this Directive should apply. The rules on independent visits with detainees were also improved
- g) Article 11 - as regards detention of vulnerable persons, the EP could not convince the Council to accept the Commission's proposal (or the EP's attempt to improve it) which would have banned detention of such persons if detention would harm their health. Nor did the EP convince the Council to maintain the *prima facie* ban on detaining children, although the Council did agree to a few words restricting such detention. As for unaccompanied minors, the Council agreed that their detention should only occur in 'exceptional' cases, whereas the EP had wanted to ban their detention (the Commission had proposed to limit it to 'particularly exceptional' cases, whereas the Council had planned to limit it to 'particular cases' only)

- h) Article 15 - as regards access to employment for asylum-seekers, the EP and Council split the difference between a 6-month waiting period (supported by the EP and Commission) and a 12-month period (supported by the Council, and as set out in the 2003 Directive), so the new Directive will provide for a 9-month maximum waiting period. However, the EP did accept the Council's demand to keep most of the existing conditions restricting that access (for instance, asylum-seekers will only have access if there is no first-instance decision on their claim within the 9-month period).
- i) Article 17.5 - as regards social welfare, the EP caved in and accepted the Council's text
- j) Article 18.4a - the EP convinced the Council to add a new clause on housing dependent adult applicants with their family members - in lieu of a wider definition of family members
- k) Article 19.1 - as regards health care, the EP and Council compromised and the Directive will refer to 'serious mental disorders' (the EP had wanted to refer to all 'mental disorders'; the Council wanted to make no reference at all)
- l) Article 20 - the Council refused to discuss the EP proposal to have a new clause on torture victims
- m) Article 20.1 - as regards withdrawal of benefits in certain cases, the EP and Council compromised, allowing the possible withdrawal in 'exceptional and duly justified cases' (the EP had wanted to ban withdrawal, the Council would have allowed it with no such special threshold)
- n) Article 20.2 - as regards reduced benefits for late applicants, where the EP had supported the Commission's proposal to abolish this possibility (appearing in the 2003 Directive) entirely, and the Council had wanted to allow it, there was a compromise: a Member State must demonstrate that the asylum-seeker had not applied as soon as 'reasonably practicable' for asylum, 'for no justifiable reason'
- o) Article 20.5 - on the core benefits which must be provided even in the event of withdrawal of benefits (currently the 2003 Directive provides that only emergency health care must be provided), the EP and Council compromised: (all) health care and ensuring a 'dignified standard of living' must be provided (the Council wanted to refer to health care only, the EP also wanted to add subsistence)
- p) Article 21 - the EP convinced the Council to add a reference to female genital mutilation, as regards the definition of vulnerable persons

- q) Article 22 - on the issue of identification of vulnerable persons and their needs, the Commission (supported by the EP) had proposed a process to identify if a person was vulnerable and if so, what their needs were. The Council's text had dropped the requirement to identify whether a person was vulnerable or not, and required instead only an assessment of whether a vulnerable person had special needs. The final text leaves this point ambiguous. Leaving aside a bizarre and apparently irrelevant fight, which the EP eventually won, about the deletion of the word 'concerned' from Article 22.1 (this was the last issue agreed between the EP and the Council), there is still no express requirement to check whether a person is vulnerable. But (unlike in the Council's text) the final Article 22.1 does not state that such assessments only place for persons who are vulnerable, and a new Article 22.3, added in the final text, states that only vulnerable persons can have special needs. So it could be argued that in order to assess whether a person has special needs, it is first of all necessary to assess whether he or she is a vulnerable person. Obviously, though, it would have been better to make this point clear expressly.
- r) Article 23.2 - the EP convinced the Council to make some reference to the background of children when assessing the best interests of the child
- s) Article 23.5 - the EP convinced the Council to add a reference to lodging with siblings, in lieu of a wider definition of 'family members'
- t) Article 24 - as regards unaccompanied minors, the EP convinced the Council to add provisions concerning their representatives (concerning conflicts of interest, limited changes of representative and information for the minor)
- u) Article 26 - the EP only obtained very limited changes to the text as regards legal aid (see Article 26.4.b)

## Assessment

What did the EP accomplish overall? There will likely be some reduction in the detention of asylum-seekers, although many possibilities for detention will remain and there are no firm time limits on detention. There is still considerable scope for detention of children, and the possibility to derogate from the rules on female asylum-seekers' safety and the privacy of detained families remains. The question of whether Member States need to assess whether asylum-seekers are vulnerable remains ambiguous. There is no significant change in the social welfare rules concerning asylum-seekers, although this will be compensated for by some limited improvement in the rules concerning their access to employment. The possibility to reduce or withdraw benefits entirely, or to restrict access to them by means of documentation requirements, will not be as great as the Council had wanted - although it will still be greater than the Commission and EP had wanted. And since the EP caved in as regards the Council's restrictive position on legal aid, the effective ability of asylum-seekers to challenge their detention and decisions withdrawing or restricting their benefits will inevitably be restricted in practice.

While the final agreed text is undeniably an improvement upon both the 2003 Directive and the Council's version of the new Directive, it is still a missed opportunity to ensure that asylum-seekers in the EU are fully treated with dignity and fairness in all respects while waiting for a decision on their application, given the many possibilities which remain for Member States to detain them, provide them with low levels of benefits, delay their access to employment and make it difficult to challenge any of these decisions.

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## Sources

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