



Analysis

The second phase of the Common European Asylum System: A brave new world – or lipstick on a pig?

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Several years ago, the EU set itself the deadline of 2010 – later postponed to 2012 - for completing the second phase of the Common European Asylum System (CEAS). Near the end of March 2013, the European Parliament (EP) and the Council (the Member States' interior ministers) finally agreed upon the texts of the two remaining legislative measures to this end. No further EU measures on asylum (other than a revision of the current European Refugee Fund) are currently under discussion or planned for the time being. So the recently agreed rules will likely govern the issue of asylum in the EU for a number of years to come.

The objectives of the second phase of the Common European Asylum System were set out in the policy plan on asylum published by the Commission in 2008 (see the links below). This policy plan began by pointing out some key general trends. In particular, a 'critical flaw' of the first phase of the Common European Asylum System was the wide difference in Member States' recognition rates, ie the percentage of persons from the same country of origin whose claim for refugee status was accepted or not. This divergence created 'secondary movements' (ie movements of asylum-seekers between Member States) and 'goes against the principle of providing equal access to protection across the EU'. Also, an increasing number of applicants were given 'subsidiary protection', ie a form of protection other than refugee status, and it was necessary to take account of this when developing the second phase legislation.

As for the content of the Common European Asylum System, the objective of creating the system was first agreed back in 1999, at the European Council (ie summit meeting) in Tampere, Finland. It was then agreed that there should be a 'uniform status of asylum' which would be 'valid throughout the Union'. Since the entry into force of the Treaty of Lisbon in 2009, these objectives are now a legally binding part of the EU Treaties (Article 78 of the Treaty on the Functioning of the European Union). The most recent multi-year Justice and Home Affairs programme, agreed in 2009 (the 'Stockholm programme') states that:

The European Council remains committed to the objective of establishing a common area of protection and solidarity based on a common asylum procedure and a uniform status for those granted international protection. While [the] CEAS should be based on high protection standards, due regard should also be given to fair and effective procedures capable of preventing abuse. It is crucial that individuals, regardless of the Member State in which their application for asylum is lodged, are offered an equivalent level of treatment as regards reception conditions, and the same level as regards procedural arrangements and status determination. The objective should be that similar cases should be treated alike and result in the same outcome.

Furthermore:

There are still significant differences between national provisions and their application. In order to achieve a higher degree of harmonisation, the establishment of CEAS, should remain a key policy objective for the Union. Common rules, as well as a better and more coherent application of them, should prevent or reduce secondary movements within the Union, and increase mutual trust between Member States.

With the recent agreement in principle on all of the remaining legislative proposals, it is time to assess whether the second phase of the Common European Asylum System will achieve the objective of ensuring common standards based on a high degree of protection.

Overview

There are five main measures making up the first phase of the Common European Asylum System, and all of them are being updated as part of the second phase of the system. The state of play of these five measures is as follows:

- a) The **qualification Directive** (defining the criteria to be a refugee, or to obtain subsidiary protection, in the EU, and the content of that status); the first-phase Directive from 2004 was replaced already in 2011, by Directive 2011/95 (Member States have to apply this Directive by December 2013);
- b) The **reception conditions Directive** (setting out the treatment of asylum-seekers as regards education, welfare etc); the first-phase Directive from 2003 will be replaced by a Directive which was agreed between the EP and Council in 2012, but which has not yet been formally adopted; Member States will have two years to apply the new Directive;
- c) The **Dublin Regulation** (determining which single Member State is responsible for each asylum-seeker's application for asylum); the first-phase Regulation from 2003 will be replaced by a Regulation which was agreed between the EP and Council in 2012, but which has not yet been formally adopted; the new Regulation will apply six months after its adoption;
- d) The **Eurodac Regulation** (supporting the application of the Dublin Regulation, by setting up a database of fingerprints of asylum-seekers and others); the first-phase Regulation from 2000 will be replaced by a Regulation which was agreed between the EP and Council in March 2013, but now needs to be formally adopted; the new Regulation will apply two years after its adoption; and

e) The **asylum procedures Directive** (setting out the procedural rules which apply to each asylum-seeker's application); the first-phase Regulation from 2005 will be replaced by a Directive which was agreed between the EP and Council in March 2013, and which now has to be formally adopted; the new Directive will apply two years after its adoption (with an extra three years to apply the new rules setting deadlines to agree on asylum applications).

Also, there are three other related measures:

a) an amendment to the EU's **long-term residents' Directive**, to allow refugees and persons with subsidiary protection to claim this status; this legislation was adopted already in 2011, and Member States must apply it by May 2013;

b) an amendment to the EU's **refugee fund**, to allow for more spending on resettlement of refugees (ie moving obvious refugees straight to the EU from camps in countries of transit, for instance Syrians in Turkey); and

c) a Regulation establishing a **European asylum support office**, which was adopted back in 2010.

The revised Dublin and Eurodac rules will apply to all Member States, plus the associated countries (Norway, Iceland, Switzerland and Liechtenstein). The rules on the refugee fund and the asylum support office apply to all Member States except Denmark, and the associated countries are negotiating a treaty with the EU to participate in the asylum support office. The second-phase Directives on qualification, procedures and reception conditions (and the extension of the long-term residents' Directive) will apply to all Member States except the UK, Ireland and Denmark. However, the UK and Ireland remain bound by the first-phase qualification and procedures Directives, and the UK remains bound by the first-phase reception conditions Directive.

The five key measures will be examined in turn.

Qualification Directive

The main changes to this Directive were threefold: (a) amendments to the general rules on qualification for international protection status (ie either refugee or subsidiary protection status); (b) amendments making it easier to qualify for refugee status in particular; (c) better standards for those who obtain subsidiary protection. Most of these improvements were due to the EP's support, although the EP also failed to obtain some of the amendments it wanted.

As regards the first category of changes (the general rules on qualification), the amendments concern: (a) the definition of 'family members' (widened to drop the requirement that children must be dependent, and to add the category of parents of unmarried minor children); (b) a tighter definition of 'actors of protection' (ie the circumstances in which persons can be considered protected from persecution or serious harm in their country of origin, by the state or some other entity); and (c) a stricter rule regarding the 'internal flight alternative' (ie the idea that persons facing persecution or serious harm could have obtained protection somewhere else in their own country).

As regards the second category of changes (qualification for refugee status), the changes: (a) strengthen the possibility to argue that a person was persecuted on grounds of her gender; (b) allow refugee status to be retained if the person concerned was traumatised, even if circumstances in the country of origin improve dramatically; and (c) provide for refugee status where the authorities fail

to protect against persecution by private parties, on one of the grounds set out in the Geneva Convention.

Finally, as regards the content of subsidiary protection status, the revised Directive removes most of the previous possibilities to provide for a lesser status for persons with subsidiary protection as compared to refugees, as regards travel documents (to a large extent), employment, health care, integration schemes and the status of their family members. However, Member States can still discriminate against persons with subsidiary protection as compared to refugees as regards residence permits (although the gap in treatment is reduced) and social welfare. The revised directive also improved the standards for both refugees and persons with subsidiary protection as regards recognition of qualifications and access to housing.

While the standards in this Directive have increased, and there is a greater degree of harmonisation because some options for Member States (in particular as regards the internal flight alternative and the treatment of persons with subsidiary protection) have been removed, the Directive still falls short of best practice as regards the definition of international protection. In particular, there could be further improvement as regards the rules on actors of protection, the definition of subsidiary protection, aspects of the refugee definition (ie the Directive still states that persecution of persons forming part of a 'particular social group' occurs when such groups share an 'innate characteristic' *and* (rather than *or*) have a 'distinct identity' in the country of origin) and the rules on exclusion from and revocation of status.

Reception conditions Directive

The main changes in this Directive concern its extension in scope to applicants for subsidiary protection (although most Member States applied the 2003 Directive to such applicants already), modest improvements concerning access to education and employment and (most significantly) detailed new rules on detention of asylum-seekers.

In particular, there is a limited extension of the definition of 'family members', matching the changes to the qualification Directive, although this change has limited impact as regards reception conditions. Also, the revised Directive expressly applies to territorial waters and transit zones, although that was probably the case for the 2003 Directive also. A new clause (which the EP insisted upon) bans documentation requirements for obtaining benefits, but only (as the Council's behest) if those requirements are 'unnecessary and disproportionate'. Asylum-seekers will be entitled to access to employment if they have waited nine months for a first-instance decision, rather than twelve months at present; but the EP and Commission had wanted only a six-month wait, and most of the other restrictions on access to employment in the 2003 Directive remain. The rules on access to education drop a possible one-year wait for access in the current rules, provide for preparatory classes and require Member States to offer alternative arrangements if access to the education system is not possible due to the particular situation of the minor.

As for social welfare, the revised Directive only adds one new clause, specifying that the level of support provided by means of social assistance allowances or vouchers must be calculated on the same basis as for nationals, but expressly permitting asylum-seekers to be treated less generously than a Member State's own citizens. The rules on housing are amended to specify that Member States should take particular measures to prevent sexual assault and harassment, and that dependent adults with special reception needs 'shall...as far as possible' be accommodated with

their family members. Health care must now also be provided to persons with ‘serious mental disorders’. The threshold for withdrawing reception conditions entirely is now higher in most cases, as is the threshold for reducing reception conditions due to a late application (and it is no longer possible to withdraw reception conditions in the latter case). Even where benefits are reduced or withdrawn, Member States must ensure health care and a dignified standard of living (the 2003 Directive only required that emergency health care be ensured as a minimum).

There is now a longer list of vulnerable persons whose particular situation must be taken into account, and a new requirement to establish whether a vulnerable person has special reception needs – although there is no express requirement to establish whether a person is vulnerable in the first place. Some more detailed rules on the position of minors in general and unaccompanied minors in particular have been added. The right of appeal is supplemented by new rules on legal aid, although Member States retain a wide range of possibilities to restrict it.

As regards detention, the Directive starts by reiterating the rule (already in the asylum procedures Directive) that asylum-seekers cannot be detained solely because of their applications for asylum. It then sets out a general rule and a specific list of grounds for detention; there must be rules concerning alternatives to detention. While there is no explicit time limit on detention, it must be ‘as short as possible’ and can only be justified as long as the grounds for detention are applicable, and the relevant administrative procedures carried out with ‘due diligence’. There must be a speedy judicial review of detention, and asylum-seekers must be informed of the reasons for detention and the procedures for challenging it. Also, there must also be later reviews of detention if it is prolonged, and legal aid must be available (subject to restrictions) to challenge it. There are specific rules on detention conditions. Finally, minors can only be detained ‘as a last resort’, and unaccompanied minors can only be detained in ‘exceptional’ cases.

The EP had a modest impact improving the standards in this Directive, in particular as regards cutting back the grounds for detention and improving detention conditions, shortening the wait for access to employment, and limiting the possibilities to reduce or withdraw reception conditions. But overall the revised Directive does not improve the reception conditions for asylum seekers very significantly, and while Member States face some restrictions as regards the detention of asylum-seekers, they still retain a great degree of discretion. Put simply, Member States will retain many possibilities to detain asylum-seekers, provide them with low levels of benefits, delay their access to employment and (due to limits on legal aid) make it difficult in practice to challenge any of these decisions.

Dublin Regulation

The application of the EU rules on responsibility for asylum applications has been particularly controversial, because of the impact of these rules on transferring such responsibility away from northern and western Member States – which are the preferred destinations of most asylum-seekers – and toward the southern and eastern Member States, which have less experience and greater difficulty managing relatively large numbers of asylum-seekers. The economic difficulties facing Greece in particular have meant that it has proven impossible in practice for that Member State to meet its basic EU law and human rights obligations as regards asylum-seekers, according to judgments of both the European Court of Human Rights and the EU Court of Justice.

Despite this, a radical reform of the Dublin rules was never seriously considered. The Commission's proposal for a second-phase Dublin Regulation left the responsibility rules essentially unchanged and instead suggested a series of amendments with two main objectives: enhancing the efficiency of the system and improving the level of protection for asylum-seekers within it. To some extent, these two objectives conflict with each other, and indeed, it proved much easier for Member States to agree to improve the efficiency of the system than to raise the standards of protection for asylum-seekers within it.

As regards efficiency, first of all the Dublin rules have been extended to cover persons who only apply for subsidiary protection; this parallels the changes made to other legislation in the second phase of the CEAS. Also, a new rule expressly states that if an asylum-seeker has applied for asylum in one Member State and later applies in another one, the former Member State (if it is responsible for the application) cannot treat the initial application as having been withdrawn, pursuant to the asylum procedures directive (Article 18(2)). The new rules also clarify which Member State has to prove that the Dublin rules no longer apply because the asylum-seeker left the entire EU for a period of three months (or obtained a residence document from another Member State), and what happens if a new application is made after such a departure (Articles 19(2) and (3) and 20(4)). There is a shorter deadline (two months, instead of three) to request another Member State to take responsibility for an asylum-seeker in the event of a 'hit' in the Eurodac system (Article 21(1)), and deadlines for the first time to request another Member State to take back an asylum-seeker from the second Member State (Article 23(2) and 24(2)). If a person has been transferred to another Member State in error or an appeal against a Dublin transfer is successful, the person concerned must be accepted back (Article 29(3)). There are new rules allocating costs (Article 30) and providing for the exchange of information before a transfer is carried out (Articles 31 and 32). The existing rules on information sharing (Article 34(5) and (9)) and cooperation between national authorities (Article 36(2) to (4)) have been clarified, and there are now requirements relating to the publication of lists of competent authorities, as well as training their staff (Article 35(2) and (3)). Finally, there are new rules on data security (Article 38), confidentiality (Article 39), penalties (Article 40) and statistics (Article 47), and the necessary rules on transitional issues (Article 41), the procedures for adopting implementing and delegating acts (Articles 44 and 45) and repeal (Article 48).

As for protection standards, there were four main issues: legal safeguards, family reunion, vulnerable persons and suspension of transfers. First of all, as regards legal safeguards, the revised Regulation will improve the rules concerning information for asylum-seekers, in particular (at the EP's behest) requiring them to be informed about the right to request suspension of transfers and the possibility that the responsibility criteria might be trumped by human rights concerns (Article 4). There will also be a new provision requiring a personal interview (Article 5). The rules on detention (Article 28; entirely new as compared to the first-phase Regulation) will first of all ban detention of asylum-seekers purely because the Regulation was applicable (Article 28(1)). The asylum-seeker can only be detained if there is a 'significant risk of absconding', and further conditions are satisfied (Article 28(2); see also the definition of 'risk of absconding' in Article 2(n)), and time limits linked to the Dublin procedure will apply (Article 28(3)). Otherwise the various guarantees for detainees and rules on detention conditions in the reception conditions Directive (see above) will apply (Article 28(4)). On this issue, the EP convinced the Council to include: the precise obligation to comply with the detention standards in the EU's reception conditions Directive; the detailed time limits on detention in Dublin cases; and more limited grounds for detention (ie, a 'significant' risk of absconding must be 'established', along with a definition of 'risk of absconding').

The other key legal safeguard is the right to appeal. The first-phase Regulation states that the asylum-seeker must be notified of the decision; there 'may' be an appeal or review that shall not suspend transfers unless national law provides for it. However, the new Regulation provides for more details on notification (Article 26), as well as a 'right to an effective remedy...before a court or tribunal' (Article 27). There must be at least some limited suspensive effect of this challenge, and there are brief rules on legal aid. All of these provisions were significantly weakened by the Council, but then modestly improved by the EP.

As regards the rules on family reunion, in common with other second phase legislation, the definition of 'family members' will now include children even if they are not dependent on their parents (Art. 2(g); the Dublin rules already defined the parents of unmarried minor children as 'family members'). This point is important because the criteria for allocating responsibility include (as before) allocation of responsibility to a Member State where a family member has refugee status or has applied for asylum, if there is no first-instance decision yet (Articles 9 and 10); these rules will now be extended to cover cases where the family member has subsidiary protection or has applied for that status. Also the existing tie-break clause which allocates responsibility where family members have been scattered into different Member States will be extended to cover unmarried minor siblings (Article 11). A key question as regards family reunion was whether the *most recent* application for asylum should be decisive as regards the operation of the family reunion clauses, as the Commission had proposed. The final text provides instead that Member States must 'take into consideration' evidence concerning the presence of family members (or relatives or relations; a 'relative' is defined in Art. 2(h) as an adult aunt, uncle or grandparent, but a 'relation' is not defined) before transferring the applicant; it is not clear what practical effect this clause has (Article 7(3)).

As for the rules on vulnerable persons, there is a new clause setting out specific protections concerning children (Article 6). A more controversial issue (as with the asylum procedures Directive) was the position of unaccompanied minors. Under the first-phase Regulation, the Member State responsible for dealing with an unaccompanied minor's application is the State where his or her family member is legally present; in the absence of a family member, the Member State where the unaccompanied minor lodged his or her application for asylum is responsible. The latter rule does not clearly indicate whether it applies to the minor's first application or the most recent application, and this issue is pending before the Court of Justice (Case C-648/11 MA); an Advocate-General's opinion from February 2013 (not binding on the Court) argues that the most recent application should be decisive. Also, the 'humanitarian clause' in the first-phase Regulation states that if there is a relative or relatives in a Member State who can look after an unaccompanied minor, the Member States 'shall if possible' reunite the minor with that relative or those relatives, unless this is not in the minor's best interests.

Under the second-phase Regulation (Article 8), the main rule for responsibility for unaccompanied minors is extended to cover cases where a sibling is legally present, or where the unaccompanied minor is married but his or her spouse is not legally present in *any* Member State (Article 8(1)). The next rule amends the previous 'humanitarian' rule: the Member State responsible for an unaccompanied minor is the State where a relative who is legally present can take care of him or her (Article 8(2)). While this rule deletes the previous 'if possible' condition, otherwise it is *more restrictive* than the previous rule, since it requires that the relative be legally present and because the new Regulation has a precise definition of 'relative' (aunts, uncles or grand-parents) that is narrower than the open definition in the previous rules (see the Court of Justice judgment in case C-

245/11 K, which assumes that a mother-in-law could be a 'relative' under the previous humanitarian clause). There is a 'tie-break' clause in the event that the family members, siblings or relatives are scattered between different Member States (Article 6(3)). Finally, in the absence of any family members, siblings or relatives, the default rule remains as before: the Member State where the unaccompanied minor lodged his or her application for asylum. The question of whether this refers to the most recent or first application remains open (Member States rejected an initial deal with the EP which would have referred to the most recent application), although a non-binding declaration states that the Commission will propose an amendment to the Regulation in the event that the Court of Justice rules that the *first* application is decisive.

Another difficult question was how to amend the clause in the first-phase Regulation on dependent relatives. This clause states that in cases of dependency due to serious illness, severe handicap, a new-born child, pregnancy, or old age, Member States 'shall normally bring together' asylum-seekers and their relatives, if the family tie existed in the country of origin. Under the second-phase Regulation (Article 16), the persons in question would be more precisely defined as a child, sibling or parent, and the persons concerned would have to be legally resident. Both of these changes are more restrictive than the previous rules, as evidenced by a judgment of the Court of Justice (Case C-245/11 K) which accepted that a mother-in-law was covered by them.

Finally, as regards the suspension of transfers, the EP convinced the Council to insert text into the Regulation that reflects exactly the Court of Justice's rulings (Article 3(2)). But there will not be a formal procedure for suspending transfers as the Commission had proposed, although the EP did obtain some changes in the new rules for an early warning procedure (Article 33) which substitutes for a suspension process, as regards stronger obligations for Member States, an express reference to human rights and a bigger role for the EP.

Overall, it is striking that there was no significant attempt to rethink the fundamentals of the Dublin system, even though it has led to significant human rights abuses. The Commission's proposal to suspend the application of the system in such cases would not have fixed the underlying illness, but only treated the symptoms – but even that proposal was rejected by the Council. Instead, it fell to the courts to attempt to treat these symptoms, and the revised Regulation will merely codify their case law. The alternative approach of ameliorating the application of the rules by strengthening the rules on family reunion and vulnerable persons was also largely rejected by the Council. Apart from the rules on family reunion with persons who have received or requested subsidiary protection (which anyway follow from the widening of the Regulation's scope) the new rule on taking evidence of family relationships into account is ambiguous and in some respects the rules on responsibility for unaccompanied minors and dependent relatives are worse than the previous Regulation. While the improved rules on information for asylum-seekers and legal safeguards are welcome and the rules on detention are better than nothing, they cannot compensate for the failure either to rethink the fundamentals of the Dublin system or at least to disapply it for much wider categories of family members or vulnerable persons. Any significant change in the Dublin rules will therefore remain – as with the first-phase Regulation – in the hands of the courts.

Eurodac Regulation

The current Eurodac Regulation sets out an obligation to take the fingerprints of all asylum-seekers and persons who cross external borders without authorisation. Those fingerprints must then be compared with those of all subsequent asylum-seekers to see if there is a match. The sole purpose of the system is to facilitate the application of the Dublin rules, since one of the grounds for assigning responsibility for an asylum application is whether the asylum-seeker has crossed the external borders of a particular Member State without authorisation.

The principal change between the first-phase and second-phase Eurodac Regulation is that access to the database will be extended to national law enforcement agencies and Europol, the EU's policing agency (Articles 1(2), 6, 7, 19-22, 33 and 36), even though this change was criticised by the European Data Protection Supervisor (EDPS), and risks stigmatising asylum-seekers and persons who have crossed an external border without authorisation (ie the two groups of persons whose fingerprints are kept in the Eurodac system). Also, as with other second-phase measures, this law will be extended to cover applicants for subsidiary protection.

Uncontroversial changes to the law include: a new 72-hour deadline to send the fingerprints to the Eurodac system; a new provision (Article 10) on additional information concerning asylum-seekers, to make sure that the correct person is sent to another Member State following a fingerprint match; rules on involvement of the EDPS (Articles 31 and 32); a ban on transmitting Eurodac data to third states in most cases (Article 35); consequential amendments to the EU legislation establishing an agency for managing JHA IT systems (Article 38); publication of information on authorities using Eurodac (Article 43); transitional rules (Article 44); and repeal of the prior legislation (Article 45).

In one respect, data protection standards will be enhanced, because fingerprint data on persons caught crossing external borders without authorisation will only be kept in future for 18 months, rather than two years as at present (Article 16). This was a compromise between on the one hand, the Council, which sought to maintain the two year limit so that police authorities would have more data available, and on the other hand, the EP and the Commission, which had sought to reduce the time limit to one year, to match the time limit in the Dublin rules for responsibility for asylum-seekers who cross external borders without authorisation. While this change in rules is an improvement, in light of the main purpose of the Eurodac system (to facilitate application of the Dublin rules) any retention of data beyond one year remains deeply unprincipled.

In another respect, standards will be worse. Under the current rules, the fingerprint data of recognised refugees are blocked. The Commission and Council both wanted to make such data available for asylum and law enforcement purposes. The EP wanted to keep blocking this data, but ultimately caved in and accepted a compromise, which limits access for law enforcement purposes to three years after the person's refugee status (or subsidiary protection status) is recognised (Article 18). This time period matches the three-year period of validity for a refugee's residence permit, as set out in the qualification directive. This change is questionable on asylum grounds, since it is contrary to the logic of extending the long-term residents' Directive to give refugees and persons with subsidiary protection the right to move between Member States. It is even more questionable on law enforcement grounds, since it assumes that even persons whose refugee or subsidiary protection status has been recognised are more likely to be potential criminals.

The EP also managed to have an impact on certain other issues, namely:

- a) a requirement to use the 'most secure' technology (Article 4(1));
- b) the exclusion of access for security agencies (Article 5(1));
- c) the independence of the verifying authorities, which check the law enforcement authorities' and Europol's requests for information (Articles 6(1) and 7(1));
- d) retaining an obligation to collect statistics quarterly, rather than monthly as the Council and Commission had wanted (Article 8(1)), along with the obligation to make statistics public (Article 8(2));
- e) an additional requirement to check the Visa Information System before checking Eurodac (Article 20);
- f) more information for asylum-seekers about the system (Article 29(1)), and rules on recording complaints (Article 29(9));
- g) rules on audits of data processing (Article 32(1a));
- h) rules limiting law enforcement authority use of the data to the purpose of a specific case (Article 33(3)), and creating a record of their searches (Article 33(4));
- i) logging the reasons why other sources of data were not used first (Article 36(2));
- j) strengthening the rules on review of the legislation (Article 40), including a specific requirement to examine the effect on fundamental rights and indirect discrimination against the persons covered by the Regulation (Article 40(5)); and
- k) stronger rules on publication of the information concerning law enforcement authorities' access to information (Article 43(4a)).

Overall, the key change made as regards the Eurodac legislation – giving access to Eurodac data to law enforcement bodies – risks stigmatising large categories of foreign citizens, including those whose refugee and subsidiary protection status has been recognised. The reduction in the time period for access to fingerprints of those who cross the border is welcome as far as it goes, but given the main focus of Eurodac as a system for facilitating access to the Dublin rules, any storage period for fingerprints beyond the one-year time period necessary for that purpose remains profoundly unprincipled.

Asylum procedures Directive

As with the first-phase of the Common European Asylum System, the procedures Directive was the last measure to be negotiated. The first phase Directive was highly criticised for setting particularly low standards. To what extent will the new Directive improve the situation?

Compared to the first-phase measure, the second-phase measure will make the following main changes:

- a) extension in its scope (as with the other second-phase measures) to applications for subsidiary protection, although in fact most Member States already applied the directive to such applications (Article 3);
- b) new provisions on training of authorities, and fewer options for alternative authorities to make asylum decisions (Article 4);
- c) there are new rules on access to the asylum procedure, for instance providing for a 3-day time limit for registering an application in most cases, and defining when an application must be considered as 'lodged' (Article 6);
- d) greater possibilities for asylum applications by or on behalf of children (Article 7(3) and (4));
- e) there is a new provision on information on claiming asylum at the border, although (at the Council's behest) such information need only be given if the potential asylum-seeker requests it (Article 8); the EP improved this clause by insisting that counsellors' access to the asylum-seekers could not be severely limited or made impossible;
- f) extradition to a third country can only take place if the asylum-seeker would not thereby face *refoulement* (ie a threat to life or freedom, or a risk of torture et al), although the Council would not accept the proposal that extradition to the country of origin would be ruled out (Article 9);
- g) Member States must examine a claim for refugee status before examining a claim for subsidiary protection status (new Article 10(2)); the EP convinced the Council to require that information should be obtained from human rights sources (Article 10(3)(b)); the authorities must seek expert advice on cultural or religious issues, among others (Article 10(3)(d); the EP did not convince the Council to refer to sexual orientation issues); there is an obligation to translate documents (Article 10(5));
- h) an exception from the obligation to give reasons for decisions has been deleted (Article 11);
- i) there are further guarantees for asylum-seekers as regards information about the consequences of withdrawal of an application, wider access to legal advisers or counsellors and access to the information considered when the decision was taken (Article 12(1)); similarly lawyers must have access to information before a decision is taken, not just following an appeal (Article 23(1));
- j) asylum-seekers have more precise obligations to cooperate regarding their application (Article 13(1); the EP gave up its efforts to improve this rule); searches of applicants must be carried out by persons of the same sex, taking account of dignity and integrity (Article 13(2)(d); the EP defended and improved this clause);
- k) interviews on the substance of the application must be carried out by personnel of the authority which decides on it (Article 14(1); the EP did not convince the Council that the same rule should apply to interviews on admissibility), subject to an exception if there are large numbers of applicants (the EP convinced the Council to ensure that in this case the

interviewers would be adequately trained); each dependent adult should have the chance of a separate interview;

l) several of the exceptions to the obligation to hold a personal interview have been dropped (Article 14(2));

m) interviewers and interpreters should be of the same sex as the asylum-seeker where possible if he or she requests, unless there is no good reason for the request (Article 15(3)(b) and (c)); interviewers cannot wear a uniform and must carry out interviews with children in an appropriate manner (Article 15(3)(d) and (e));

n) there is a new clause on the content of a personal interview (Article 16) and improved provisions on the recording of interviews (Article 17), in particular now ensuring that the applicant can see the transcript or summary of the interview before a decision is made;

o) there is a new clause on medical screening (Article 18), which was weakened by the Council but then improved by the EP;

p) a new clause provides for free legal and procedural information at first instance (Article 19), but this does not extend to access to a lawyer and the Council rejected an EP amendment which would have extended this rule to cover drawing up procedural documents;

q) the rules on legal aid in appeals procedures (Article 20) do not change the previous rules, except to provide for an optional new exception where a person is not allowed to remain on the territory following a repeat application (Article 21(2), referring to Article 41(2)(c));

r) access to a lawyer at the applicant's cost is expressly available at all stages of the procedure (Article 22(1));

s) the possible exception to access to information by lawyers has been curtailed (Article 23(1)(b)); the possible exception to lawyers' right to visit detained clients has been dropped (Article 23(2)); and asylum-seekers have the right to bring lawyers to the personal interview (Article 23(3)), although at the Council's behest, the lawyers can be limited to speaking at the end of the interview;

t) a new clause on applicants who need special procedural guarantees (Article 24) requires Member States to assess whether a person needs such guarantees. The key point, which was a crucial issue in negotiations, is that for victims of torture, rape or other serious forms of violence, if the Member State has not provided adequate support as regards the rules on accelerated procedures or border procedures (which provide for quicker decisions on applications, and are at least implicitly linked to limited rights of appeal and possibly detention), those special rules cannot apply;

u) a revised clause on unaccompanied minors (Article 25) contains new provisions on the role of their representatives (augmented by the EP) and on their lawyer's role during interviews (Article 25(1)), eliminates several exceptions to the obligation to appoint a representative (Article 25(2)), adds a new rule on information in the case of withdrawal of protection (Article 25(4)), and adds some detail (augmented by the EP) on the use of medical screening to determine age (Article 25(5)). The most controversial issue here was

the exemption of unaccompanied minors from some restrictions in the Directive (Article 25(6)). The Commission had suggested excluding them from the rules concerning restrictions on legal aid, accelerated procedures (along with manifestly unfounded procedures), safe third countries and border procedures. The Council rejected any exceptions for them. The EP insisted on some exceptions being made. The final deal exempts them from the rules on accelerated procedures and border procedures, unless they are from a safe country of origin, have made a repeat application or are a security or public order risk, or (in the case of border procedures), there are 'reasonable grounds' to assume that they are from a 'safe third country' as defined in the Directive, or (subject to further conditions) they have used false documents or destroyed their travel documents. Also, Member States may: apply the 'safe third country' rule only if it is in the minor's best interests; may apply the other rules on inadmissibility (see below) or on manifestly unfounded procedures (which makes little sense, since the latter rules can only apply where the rules on accelerated procedures apply); apply a legal aid merits test only if the minor's lawyer has legal qualifications; and apply the exceptions to the right to remain on the territory (Article 46(6)), if they apply the special safeguards for border procedures in all cases (Article 46(7)), 'subject to' the further exceptions to the right to stay applicable to repeat applications (Article 41);

v) the rules on detention (Article 26) have been amended to refer to the rules on this issue in the reception conditions directive (see above); the EP dropped its demand to exempt minors from detention (proposed Article 26a);

w) the rules on implied withdrawal of applications have been amended to ensure that there must be an adequate examination before such a withdrawal is implied (Article 28(1)), but the Council rejected the Commission's proposal that a personal interview must have been held and the EP's suggestion for further safeguards; there is also a new right to make a new application in such cases (Article 28(2)), but the Council insisted on the possibility to limit the number of times such a new application could be made, and the institutions compromised on a nine-month time limit to make them (the EP and Commission wanted a year, the Council wanted six months); these rules are now without prejudice to the Dublin Regulation (Article 28(3));

x) the UNHCR now has the express power to contact asylum-seekers at the border (Article 29);

y) there is now a time limit of six months to decide on asylum applications, although in various circumstances this can be extended up to 18 or 21 months (Article 31(2) and (3));

z) the list of circumstances in which Member States can accelerate proceedings has been cut from fifteen to nine, and these circumstances can now also justify use of a special border procedure (Article 31(6)); it is not clear whether this list (like the present list) is non-exhaustive – if so, then the reduction in the list of circumstances is irrelevant; Member States must also provide a deadline to decide on such cases (Article 31(7)); the proposed safeguard against use of this procedure after irregular entry et al has been dropped;

aa) the list of inadmissible cases is now expressly non-exhaustive (Article 33); the list now includes repeat applications but no longer includes cases where someone has an equivalent status or has applied for such status;

bb) there is a new rule providing for an interview before an admissibility decision (Article 34);

cc) asylum-seekers can now challenge the assumption that a country is a 'first country of asylum' for them (Article 35);

dd) Member States may no longer designate part of a country as a 'safe country of origin', or continue to apply pre-existing national rules on this issue which set out lower standards, and there must be a regular review of such lists (Article 37); the previous possibility to have EU-wide lists (already struck down by the Court of Justice) has been deleted;

ee) the rules on 'safe third countries' (Article 38) have been amended to specify that there must be no risk of serious harm in such countries, and to permit asylum-seekers to challenge such assumptions;

ff) the rules on 'super-safe third countries' (Article 39) have been amended to specify asylum-seekers can challenge such assumptions, and to require Member States to report their lists to the Commission; the idea of an EU-wide list (already struck down by the Court of Justice) has been dropped, but Member States are now given freedom to add more States to their national lists;

gg) the rules on repeat applications (Article 40) have been amended to classify such procedures as a form of inadmissibility rule, rather than a sui generis procedure, and a new clause maintains the previous possibility of refusing the right to stay in some repeat application cases (Article 41); Member States may no longer lay down special time limits in such cases (Article 42);

hh) the possibility of most exceptions to the basic rules on border procedures have been dropped (Article 43), and such procedures are now classified as a form of admissibility or accelerated procedure;

ii) Member States may now provide that international protection lapses if a person gains EU citizenship (Article 45(4));

jj) there is a new right to an effective remedy if a Member State rejects an application for refugee status, and gives subsidiary protection status instead, unless (as before) the two forms of status are in practice identical (Article 46(2), although the Commission's proposal that the person concerned retain benefits during the appeal has been dropped); the degree of judicial review of the remedy is further specified (Article 46(3)); time limits for appeals must be reasonable and not make appeals impossible or excessively difficult (Article 46(4); the EP's suggestions for minimum times were dropped); and there is now a right in principle to remain in principle during the appeal (Article 46(5)), subject to certain exceptions (Article 46(6)), which are themselves governed by a minimum safeguard in general (Article 46(8)) and further safeguards as regards border procedures (Article 46(7));

kk) finally, there is a new rule on cooperation between Member States, including (at the EP's behest) an obligation to inform the Commission about the use of certain exceptions (Article 49); the Commission need report on the Directive in future only every five years, rather than every two years, although (at the EP's behest) it must specifically report on the use of recording interviews (Article 50); and Member States have three years extra to apply the new rules on deadlines to decide on applications (Article 51(2); these rules only apply to applications made after that point: see Article 52).

The revised Directive definitely provides for certain improvements, as regards access to the procedure, the standards during the administrative decision-making (including deadlines), the extent of judicial review, the right to stay on the territory, the standards in special procedures, reductions in the number of exceptions and reduction of the complexity of the system (except as regards the exceptions relating to victims of torture et al and unaccompanied minors, which are respectively highly unclear and virtually unreadable; one might question whether). However, Member States still retain a good deal of flexibility to set fairly low standards as regards the special procedures and in a couple of respects (as regards new listings of 'super-safe third countries' and a new exception from the right to legal aid) standards have been lowered. The important question of whether the list of accelerated proceedings is exhaustive or not is not clearly answered, and there is no improvement at all as regards the rules on legal aid (quite the reverse). Certainly many more improvements to this Directive could and should have been made.

Overall assessment

The new asylum legislation did not address the crucial underlying issue of access to the territory, which is the subject of EU legislation on border control and irregular immigration that still does not directly address that point.

Certainly the new legislation addresses fully the issue of subsidiary protection (as mentioned in the Commission's original policy plan), although there is as yet no EU law which addresses the position of the important (and vulnerable) groups of people who are given purely national forms of protection by each Member State. While overall refugees and persons with subsidiary protection (or applying for each form of status) are now treated the same way (and the relationship between the two forms of status is now expressly dealt with properly), there are still unjustified differences as regards access to social welfare, validity of residence permits and family reunion.

The new legislation is not, as might have been hoped, very coherent. The right of refugees and persons with subsidiary protection who become long-term residents to move between Member States is undercut by the absence of rules on the 'transfer of protection' at EU level (there is a Council of Europe Convention on this issue, but only a few Member States have ratified it), and contradicted by the changes regarding Eurodac, ie giving access to the fingerprints of such persons (although the three-year limit on the use of Eurodac data for law enforcement purposes after a person gains protection status will normally mean that the Eurodac data will be unavailable for that purpose once the person concerned gains long-term resident status, since there is a five-year wait for such status). Similarly it is contradictory that the law enforcement authorities have access to the data on subsidiary protection beneficiaries for three years even though their first residence permit is valid for only one year (as a minimum): the EU is trying to have its cake and eat it too.

Also the new time-limit for giving access to employment for asylum-seekers (9 months) bears no relation to the new time limit (in principle) to make a decision on applications (6 months). At a more fundamental level it is profoundly contradictory simultaneously to strengthen the rights of refugees and asylum-seekers while risking their stigmatisation as assumed criminals pursuant to the changes in the Eurodac rules.

Another fundamental issue not addressed (and probably exacerbated) by the new legislation is the failure to implement it properly in practice – with problems and divergences on this front evidenced by the case law of the ECHR and the Court of Justice, Commission reports and NGO reports. This should have been ameliorated somewhat by the increased jurisdiction for the Court of Justice on asylum matters following the Treaty of Lisbon, but the increase in its case load has only been modest and reportedly a number of Member States' authorities and courts are finding way to refuse to implement the Court's judgments properly. In order to reduce divergences in application of the EU rules and ensure their correct implementation it will probably be necessary to take further steps, not only to adopt further legislation harmonising standards but to think of new methods of ensuring its implementation, for example a vigorous enforcement policy by the Commission, the creation of a common asylum court or joint processing of applications.

Taken as a whole, the second-phase legislation provides for very limited improvements as regards reception conditions, modest improvements as regards procedures and qualification, no real improvement as regards the Dublin rules and a significant reduction in standards as regards Eurodac. On balance the overall scoreboard is modestly positive, but as regards the Dublin rules in particular there have only been cosmetic changes to the previous objectionable legislation. This legislation in particular deserves the description of being merely 'lipstick on a pig'.

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