



Analysis

EU Immigration and Asylum Law in 2012: The Year of Living Ineffectually

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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. In the event, it has largely failed to meet this deadline. Moreover, almost no other EU immigration legislation was formally adopted in 2012.

While it is likely that a large number of measures in this field will be adopted in 2013 instead, the EU political institutions' ineffectiveness at agreeing and/or adopting legislation on these issues during 2012 is nonetheless remarkable. In particular, although the two Council Presidencies of 2012 (Denmark and Cyprus) each proved to be effective at negotiating agreements within the Council, they either failed to reach agreements with the European Parliament (especially Denmark) and/or to ensure that any agreements which were reached with the EP were officially adopted (especially Cyprus).

The following analysis provides an overview of the legislation in this area which was either agreed (but not yet adopted) during 2012, or which was still under discussion as of the end of the year, with a more in-depth analysis of the current state of play of negotiations on one key measure - the proposed asylum procedures directive.

Visas and Borders

1. Regulation amending Borders Code regulation (COM (2011) 118, 10 Mar. 2011)

The EP and Council completed negotiations on this proposal in June 2012, except that the EP objected to one clause on the registration of third-country nationals. The EP finally waived its objection to this clause in Dec. 2012, but the legislation is not yet adopted. For the agreed text and analysis, see the links below.

2. Regulation on Schengen evaluation process (COM (2010) 624, 16 Nov. 2010; revised: COM (2011) 559, 16 Sep. 2011)

3. Regulation amending borders code (COM (2011) 560, 16 Sep. 2011)

The Council and EP each defined their positions on these proposals in 2012, but seem a long way from agreement, since the EP objects both to the adoption of the evaluation Regulation as a non-legislative act (cutting out any formal role for the EP in its adoption) and the large role for Member States (rather than the Council or the Commission) in deciding upon the reimposition of internal border checks in the second proposal. For the text under discussion and analysis, see the links below.

4. Regulation amending visa list (COM (2011) 290, 24 May 2011)

The EP and the Council apparently completed negotiations on this proposal in Dec. 2012, but at the last minute it was removed (for unknown reasons) from the agendas of Coreper (the body comprising Member States' representatives to the EU) and the relevant EP committee. For the agreed text and analysis, see the links below.

5. Regulation establishing Eurosur (COM (2011) 873, 12 Dec. 2011)

Negotiations between the Council and EP only began in late 2012.

6. Regulation amending visa list Regulation (COM (2012) 650, 7 Nov. 2012)

This proposal is too recent for the Council and EP to have failed to adopt it yet.

Legal Migration

1. Directive on seasonal workers (COM (2010) 378, 10 July 2010)

The Council finally defined its position near the end of 2012, so negotiations with the EP can start in 2013.

2. Directive on intra-corporate transferees (COM (2010) 379, 10 July 2010)

Although the Council defined its position on this proposal in May 2012, the Cypriot presidency apparently put little or no effort into negotiations with the EP.

Funding proposals

1. Regulation amending [asylum and migration funding legislation](#) (COM (2012) 526, 20 Sep. 2012)

2. Regulation amending borders fund (COM (2012) 527, 20 Sep. 2012)

The Council and the EP have both agreed to support these proposals (which would reduce the co-financing obligations for Member States with financial problems,

and so help them to participate in EU funding programmes in 2013) without amendment. So they will presumably be adopted early in 2013 unless the Council or EP changes its position or delays the formal steps in the process.

3. Regulation establishing the asylum and migration Fund (COM (2011) 751, 15 Nov. 2011)

4. Regulation laying down general provisions on the Asylum and Migration Fund and on the instrument for financial support for police cooperation, preventing and combating crime, and crisis management (COM (2011) 752, 15 Nov. 2011)

5. Regulation establishing, as part of the Internal Security Fund, the instrument for financial support for external borders and visa (COM (2011) 750, 15 Nov. 2011)

The EP and the Council defined their positions in 2012 on these proposals, but adoption of each measure is dependent not only on negotiation of the details of each of them, but also upon an overall agreement on the long-term EU budget.

Asylum

1. Directive on reception conditions for asylum-seekers (COM (2008) 815, 3 Dec. 2008; revised: COM (2011) 320, 1 June 2011)

While the EP and the Council completed negotiations in July 2012, the Cypriot Presidency waited (for no known reason) until the end of Dec. 2012 to suggest that the Council adopt its first-reading position. For unknown reasons, the Council did not do so.

2. Regulation on responsibility for asylum applications (COM (2008) 820, 3 Dec. 2008)

The EP and the Council completed negotiations on the main part of the proposal in July 2012, and then on some technical issues in Nov. 2012. Again, the Cypriot Presidency suggested at the end of Dec. 2012 that the Council adopt its first-reading position, but for unknown reasons, the Council did not do so.

3. Regulation on Eurodac (COM (2008) 825, 3 Dec. 2008; amended version COM (2009) 342, 10 Sep. 2009; second amended version COM (2010) 555, 11 Oct. 2010; latest amended version, COM (2012) 254, 30 May 2012)

The EP did not adopt its position until Dec. 2012 - conceding on the key issue of law enforcement access to this database - and this meant that negotiations could not be concluded in 2012.

4. Proposal to amend Directive 2005/85 on asylum procedures (COM (2009) 554, 21 Oct. 2009; revised: COM (2011) 319, 1 June 2011)

The EP and the Council aimed to complete negotiations in Dec. 2012, but did not do so for unknown reasons. The following analysis looks at the outstanding issues as of the end of the year.

Analysis - asylum procedures negotiations

As noted in the previous Statewatch analysis on this issue (see the links below), there were a number of important issues still outstanding in these negotiations by early December 2012. On December 17, 2012, Coreper was asked to agree a final list of compromises on some of these issues. It is not known whether (a) Coreper failed to agree on this list of compromises, or (b) Coreper did agree, but the proposed deal was not acceptable to the EP.

The issues which would be addressed by the compromise are:

- a) a safeguard relating to the use of lists of 'super-safe third countries' (Article 39);
- b) the time limits for deciding on asylum applications - with absolute deadlines of either 18 or 21 months depending on the circumstances (Article 31);
- c) a revised text on interviews of asylum-seekers (Article 17);
- d) special rules on vulnerable persons (ie torture victims and unaccompanied minors - Arts. 24 and 25, discussed further below);
- e) rules on access to the opinions of human rights organisations (Article 10);
- f) rules on searches (Article 13);
- g) rules on interviews by persons of the same sex (Article 15); and
- h) issues related to the implied withdrawal of applications (Art. 28);

This proposed agreement leaves out several issues which had previously divided the EP and the Council, namely:

- a) the issue of extradition to asylum-seekers' countries of origin (Art. 9(2));
- b) the EP's proposed ban on detention of minors (Art. 26a);
- c) whether the list of possible accelerated procedures should be exhaustive or not (Art. 31(5));
- d) ruling out certain grounds for accelerated procedures (Art. 31(8));
- e) the list of possible grounds for manifestly unfounded procedures (Art. 32(2)); if the existence of the concepts of 'safe country of origin', and so-called 'super-safe third country' (Arts. 36, 37 and 39);
- f) the rules on defining 'safe third countries' (Art. 38);
- g) the exceptions to the right to remain following a repeat application (Art. 41);
- h) several issues relating to asylum-seekers' status during an appeal, including the right to stay on the territory (Art. 46);
- i) whether certain decisions must be 'reasoned' (Art. 4(2)(b)); and
- j) information to applicants (Art. 8(1)).

As for the special rules on vulnerable persons - the most difficult issue in the negotiations - the draft Council compromise would first of all have exempted torture victims from the special rules related to accelerated or manifestly unfounded procedures (where there is a much more cursory consideration of an application for asylum, and possibly as a consequence limited rights of appeal and a greater likelihood of detention), unless the Member State concerned had granted the applicant free legal aid to present his or her asylum claim already. Secondly, it would have exempted unaccompanied minors from the special rules on accelerated or border procedures (again, in the latter case there is also a much

more cursory consideration of an application for asylum). But this latter exception would not apply to: persons coming from supposed 'safe countries of origin' or supposed 'safe third countries' (although not from the supposed 'super-safe third countries'), or those whose application was manifestly unfounded.

In technical terms, the latter exception makes no sense at all, since under the Directive, an application can only be manifestly unfounded if it meets one of the conditions to be accelerated - and unaccompanied minors are meant to be exempted from the rules on accelerated claims. In other words, the Council's proposed compromise would mean in effect that unaccompanied minors would be exempted from the rules on accelerated claims - unless they were *covered* by the rules on accelerated claims.

Obviously the EP ought not to accept such a meaningless compromise, and ought furthermore to press further on many of the key points that the Council's draft compromise does not address, notably the existence (or at least the further curtailing of) the special rules relating to safe third countries, super-safe third countries, and safe countries of origin.

More broadly, the EP obviously failed to use its leverage, when voting for law enforcement access to the Eurodac Regulation, to trade-off such an important concession against Council concessions in the asylum procedures negotiations, or at least for a firm commitment for the Council to adopt the recast reception conditions and Dublin rules by the end of the year.

Sources:

Previous state-of-play on Common European Asylum procedure negotiations - <http://www.statewatch.org/analyses/no-206-asylum-procedures.pdf>

Proposed compromise deal on procedures directive - [Council doc. 17698/12]: <http://www.statewatch.org/news/2012/dec/eu-council-asylum-procedures-trilogue-17698-12.pdf>

Recast Dublin Regulation, ready for adoption - <http://register.consilium.europa.eu/pdf/en/12/st15/st15605.en12.pdf>

Recast reception condition directive, ready for adoption - <http://register.consilium.europa.eu/pdf/en/12/st14/st14654.en12.pdf>

Visa list regulation and analysis of deal - <http://www.statewatch.org/analyses/no-208-visa-lists.pdf>

Borders code amendments and analysis of deal and proposals: <http://www.statewatch.org/analyses/no-180-schengen-border-code.pdf>

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