Revised rules for treatment of asylum-seekers

After a stalemate in negotiations on the second phase of the Common European Asylum System, agreement has now been found on updates to four key instruments. The amendments to the Reception Conditions Directive and the draft Dublin III Regulation have largely been welcomed, but commentators and stakeholders point to some persistent shortcomings.

Common European Asylum System

Asylum-seekers are treated differently across the EU because of divergences in Member States' (MS) rules and practices in the field of asylum. The creation of a Common European Asylum System (CEAS) is intended to remedy this situation. Five key acts have formed the first bloc of rules: the Dublin II Regulation, EURODAC Regulation, Asylum Procedures Directive, Reception Conditions Directive, and Qualification Directive. During the first phase of the CEAS only common minimum standards could be adopted, but the Lisbon Treaty provides the legal basis for a common asylum policy (Article 78 TFEU). In the second phase of the CEAS, these five key instruments are being amended. The Qualification Directive was amended in 2011. Recently, the European Parliament (EP) and the Council have reached political agreements on the amendment of the four remaining instruments.

Reception Conditions Directive

The 2003 Reception Conditions Directive (RCD) sets the minimum reception standards applicable to asylum-seekers across the EU pending examination of their application. The Directive contains amongst others provisions on access to the labour market, food, housing, and financial aid. In 2008 the Commission proposed a revised version of the RCD, aimed at harmonising divergent national practices, in order to ensure that asylum-seekers enjoy an equivalent standard of reception conditions in all MS. Denmark, Ireland and the United Kingdom would not be bound by the new Directive, but the UK will continue to apply the 2003 rules.

In 2011, due to stalemate in the negotiations, the Commission tabled a new, amended proposal. The early second reading agreement reached in September 2012 now needs plenary approval (rapporteur Antonio Masip Hidalgo, S&D, Spain).

Commentators credit the EP with achievements in negotiation such as banning of "unnecessary and disproportionate" documentation requirements for asylum-seekers to obtain benefits. Furthermore, asylum-seekers would be granted access to employment after having waited nine months for a first-instance decision, instead of the 12 months at present. Access to education would not be postponed for more than three months and healthcare and a dignified standard of living would, under the amended Directive, be guaranteed even where material reception conditions in general were reduced or withdrawn. The application of the RCD to persons awaiting a 'Dublin transfer' to the MS in charge of the asylum application is also included in the preamble to the revised RCD.

The most controversial element of the RCD is detention of asylum-seekers. Parliament's efforts to ensure that detention should be "as short as possible" and only as long as the grounds for detention persist have paid off. Moreover, in future, asylum-seekers would be informed in writing about the reasons for their detention and the ways to challenge it. Furthermore, detained asylum-seekers must have prompt access to rapid judicial review.

However, the detention provisions have also been criticised by some academics and NGOs. Amnesty International points out that under the RCD an asylum-seeker may be detained in order to "determine or verify his identity or nationality". According to them this goes beyond what is allowed under the UN High Commissioner for Refugees (UNHCR) guidelines on detention of asylum-seekers, which mention the verification of identity only in cases where identity may be undetermined or in dispute. The European Council on Refugees & Exiles (ECRE) bemoans that asylum-seekers can be kept in prisons if no specialised detention facilities are available, albeit
separate from ordinary prisoners. ProAsyl points to the risk of stigmatisation of asylum-seekers as potential criminals. The lack of precise time limits for the detention of asylum-seekers has been criticised by Statewatch. MS' discretion on imposing restrictions on the legal aid granted to asylum-seekers is also seen by some as a shortcoming of the new RCD.

Most commentators agree that Parliament has ensured that minor asylum-seekers can only be detained as a last resort, and that unaccompanied minors cannot be kept in prison, or together with adults. However, many criticise that detention of unaccompanied minors and other vulnerable persons remains possible, although only in exceptional circumstances.

**Dublin III Regulation**

The Dublin II Regulation establishes the criteria for determining which MS is responsible for examining an application for international protection. By default this is the first MS that the applicant entered. The Regulation seeks to avoid the phenomenon of "refugees in orbit" (asylum-seekers for which no MS takes responsibility) and to prevent multiple asylum applications and asylum shopping.

As a consequence of the Dublin rules, the EU's external borders, and in particular MS on the EU's southern and eastern borders, are most heavily affected by asylum applications (in proportion to population). This has led many to criticise the Dublin rules for placing responsibility for asylum-seekers on MS particularly hard hit by the economic crisis. The overload on some MS' asylum systems is said to lead to violations of asylum-seekers' human rights, with NGOs repeatedly denouncing illegal detention and ill treatment of asylum-seekers particularly in Greece and Hungary, but also in Malta, Italy and Germany. Many stakeholders and academics bemoan that asylum-seekers are automatically transferred to the MS responsible under the Dublin regime. There is no examination of the risks which asylum-seekers may face in the destination MS due to the principle of mutual trust in the quality and efficiency of MS' asylum systems.

This 'presumption of the safe country' in favour of the destination MS has been challenged both by the European Court of Human Rights and by the Court of Justice of the EU. The latter held that this presumption is rebutted when there are systematic deficiencies in asylum procedures and in the reception conditions of asylum-seekers.

The 2008 Commission proposal for a Dublin III Regulation envisaged a possible suspension of the Dublin rules in such cases. However, the Council refused to agree to a suspension clause and instead argued for an "early-warning mechanism" to prevent pressure on MS' asylum systems.

The early-warning mechanism is seen by many as insufficient since it does not provide an immediate response to shortcomings in the protection of the fundamental rights of asylum-seekers. Conversely the suspension mechanism has been criticised for needing documented cases of human rights violations or even judicial decisions before the suspension clause can be invoked. Some warn that the suspension mechanism could work as a "reward" for MS which do not comply with EU asylum legislation.

The EP has sought to amend the Dublin system by ensuring better solidarity and burden-sharing among MS, combining both the preventive and the suspension approaches. Although there would be no formal procedure for suspending transfers as the Commission had proposed, the EP is seen to have achieved the inclusion of an express reference to human rights as well as an important role for Parliament within the early warning procedures. The Regulation would also introduce more precise deadlines for requesting another MS to take back an asylum-seeker.

Moreover, Parliament is credited with having introduced an obligation to inform asylum-seekers of the possibility of suspending the transfer due to human rights concerns and to meet the detention standards set by the RCD. In addition, asylum-seekers may not be detained just because the Regulation is applicable but only if there is a "significant risk of absconding".

The trilogue agreement reached with the Council at the end of 2012, now awaits confirmation at second reading in plenary (rapporteur Cecilia Wikström, ALDE, Sweden).