

Asylum: granting and withdrawing refugee status, minimum standards on procedures, Common European Asylum System

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The Commission presents a report on Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status pursuant to Article 42 and gives an overview of the transposition and implementation of the Directive in Member States, including possible problematic issues.

To recall, this Directive is one of five asylum instruments which laid the foundations for a Common European Asylum System (CEAS), based on the conclusions of the 1999 Tampere European Council and in line with the Hague Programme. It applies to all Member States except Denmark.

The report is based on an analysis of transposition measures notified to the Commission, consultations with Government experts, NGOs, asylum lawyers and UNHCR, etc. For those Member States which had not notified complete transposition measures at the time of preparation of the report, relevant information was gathered on the basis of legislation in force and, where relevant, draft legislation.

The report confirms that some of the Directive's optional provisions and derogation clauses have contributed to the proliferation of divergent arrangements across the EU, and that procedural guarantees vary considerably between Member States. This is notably the case with respect to the following provisions:

Accelerated procedures: Member States are given discretion to *prioritise* or *accelerate* any examination and, in addition, procedures may also be expedited on 16 specific grounds. The circumstances falling under these grounds may also be taken into account when rejecting an application as manifestly unfounded. Relevant national arrangements are consequently highly divergent. In some Member States, an examination may be accelerated where a specific ground applies. The number of grounds set out in national law varies significantly, and some depart from the Directive's wording. Furthermore, the various time limits applicable for completing the accelerated procedure range from 48 hours to 3 months. No time limits are established in certain Member States whilst in others they are fixed for completing certain stages of the procedure. Accelerated procedures may be conducted without offering the person the opportunity of a personal interview, attract shorter time limits for lodging appeals, or deprive appeals of automatic suspensive effect.

Safe country of origin: the Court of Justice has annulled the Directive's rules on procedures for the adoption and amendment of a minimum common list of safe countries of origin. As regards national designation, no SCO notion exists in three Member States. Wide divergences are identified between Member States which have SCO procedures in place. A number of Member States may rely on stand-still clauses, hence applying less rigorous criteria for the national designation, and the UK makes use of the possibility of designating part of a country as safe, or a country or part of a country as safe for a specified group of persons. While national laws generally provide for a list of SCO, they have been actually adopted only in several Member States, and the contents of these lists vary significantly.

Safe third country: a third country which is safe and able to offer protection in line with the 1951 Convention and with which the person has a connection. Certain Member States have not transposed this notion, whilst other Member States rarely apply it in practice. As regards material criteria for applying the

concept to a third country, national rules, in general, either follow or essentially reflect the Directive's wording. Several problems are reported, for example -the applicable legislation does not provide that a third country must respect the principle of non-*refoulement*, or that an emphasis is placed on the third country's participation in refugee and human rights treaties rather than on the treatment of a person in accordance with the Directive's specific criteria.

The safe third country notion may only be applied where *a connection* with a third country, which makes it reasonable for a person to go there, is established. National measures lack detailed rules in that respect. No relevant rules are laid down in certain States and in others national rules require the authorities to establish a connection without specifying the applicable criteria. Member States may either designate safe third countries and/or apply the notion on a case by case basis. Member States' approaches vary and generally lack necessary details with respect to an individual examination of safety for a particular person. It is the Commission's view that the persons concerned must be informed of and have an effective opportunity to rebut the application of the notion before a first instance decision is taken.

Personal interviews: the Directive requires Member States to conduct personal interviews under conditions which allow applicants to present their claims in a comprehensive manner. While this standard is of relevance to those applicants who due to their gender, age and/or consequences of trauma may be in need of additional support, the Directive does not explicitly set guarantees for applicants with special needs, such as gender-sensitive interviews. Some Member States, however, have put in place relevant arrangements, such as the provision of an interpreter and/or interviewer of a same sex and provision of information about gender related elements of refugee status determination. The requirement to prepare the interview report and make it available to the applicant is generally reflected in law. Practices are, however, highly divergent with some Member States producing a report others making a transcript and some providing for audio and/or visual recording. While some Member States allow the applicant the possibility to provide his/her comments on the interview document, this is not a standard practice in all Member States. The accuracy of records therefore varies. Divergent practices are reported with regard to access to the report.

Legal assistance: the right to consult a legal advisor is formally recognized across the EU, but Member States are divided as regards the provision of free legal assistance. Some stick to the Directive's wording, hence making it available only at the appeal stage. Others, however, go beyond this standard granting either legal aid or free legal advice already in first instance procedures. As regards the appeal stage, most Member States grant legal aid for both the first tier proceedings and for onward appeals. While some do not apply a merits test before granting legal aid, other Member States do this and national systems vary considerably as regards the applicable threshold, appeal stages and authorities in charge.

Access to an effective remedy: the directive requires Member States to ensure access to an effective remedy before a court or tribunal, to lay down relevant procedural rules and time limits, and to provide for arrangements regarding the right to remain pending the outcome of the appeal. In the majority of Member States, a court acts as the first tier appellate body. Time limits for lodging appeals vary significantly, and many Member States have reduced them for certain decisions. The general time limit varies ranges from 8 days to 60 days. The reduced time limits range from 2 days to 20 days.

The principle of automatic suspensive effect applies to all appeals lodged with the first tier appellate body in 6 Member States. In others, applicable exceptions are widely divergent and concern decisions, amongst others, not to further examine a subsequent application, a refusal to reopen the examination decisions taken in border procedures, inadmissibility decisions. In the majority of Member States, the first tier appeal authority has jurisdiction to review both facts and points of law. However, this does not apply to a significant minority. The Court of Justice has dealt with only one request for a preliminary ruling with respect to this Directive. This situation may change given the entry into force of the Lisbon Treaty which enables national courts of all instances to seek interpretative guidelines from the Court, hence contributing to more consistent application of the Directive.

Conclusion: important disparities subsist, and a number of cases of incomplete and/or incorrect transposition and flaws in the implementation of the Directive have also been identified. The cumulative effect of these deficiencies may make procedures susceptible to administrative error. It is noteworthy, in this regard, that a significant share of first instance decisions is overturned on appeal. The report shows that the objective of creating a level playing field with respect to fair and efficient asylum procedures has not been fully achieved. Procedural divergences caused by the often vague and ambiguous standards could only be addressed by legislative amendment. Accordingly, the Commission adopted on 21 October 2009 a proposal to recast the Directive in order to remedy the deficiencies identified.