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BRIEFING NOTE

Policy Department C
Citizens' Rights and Constitutional Affairs

MINIMUM STANDARDS FOR THE RECEPTION OF APPLICANTS FOR ASYLUM IN THE MEMBER STATES - ASSESSMENT (SUMMARY) OF THE IMPLEMENTATION OF THE 2003 DIRECTIVE AND PROPOSALS FOR A COMMON EUROPEAN SYSTEM OF ASYLUM (CEAS)

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MINIMUM STANDARDS FOR THE RECEPTION OF APPLICANTS FOR ASYLUM IN THE MEMBER STATES - ASSESSMENT (SUMMARY) OF THE IMPLEMENTATION OF THE 2003 DIRECTIVE AND PROPOSALS FOR A COMMON EUROPEAN SYSTEM OF ASYLUM (CEAS)

BRIEFING NOTE

Abstract:
The note recalls the results of the evaluation of the implementation of the directive made by the EU Commission. It points out areas where differences in the legislation of the Member States, divergent practices or difficulties can be observed, notably the question of the applicability of the directive to detention centres, transit zones and border procedures, to applicants for subsidiary protection, and to Dublin II cases.

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BRIEFING NOTE NO. 3

Minimum Standards for the Reception of Applicants for Asylum in the Member States– Assessment (Summary) of the Implementation of the 2003 Directive and Proposals for a Common European System of Asylum (CEAS)

Date of implementation: 6 February 2005

I. Assessment of the Implementation of the Reception Conditions Directive (RCD) – General Remarks

The implementation of the Directive has been evaluated by the European Commission in 2006 (Report from the Commission to the Council and the European Parliament, COM (2007) 745 final of 26 November 2007). A further evaluation has been undertaken by the Odysseus Academic Network for the European Commission. The study has not yet been published by the European Commission. The Commission's report comes to the conclusion that overall the Directive has been transposed satisfactorily in the majority of Member States. The Report notes, however, a few horizontal issues of incorrect transposition or misapplication of the Directive which are partly due to the very particular situation of some EU Member States facing a large influx of asylum seekers (Malta), partly due to the vagueness and lack of clarity of the Directive's provisions, and partly due to the simple absence of adjusting the national systems to the reception conditions system established by the Directive.

The Commission also notes that contrary to what was predicted following adoption of the Directive the previous standards of assistance to asylum seekers have not been lowered. Even the well-known political compromise on access to employment has led to an expansion of the right of asylum seekers in no less than ten Member States. Generally speaking, the Directive had substantially higher impact in the new EU Member States than in the old Member States. There was only a minor impact in about one-third of the Member States while the transposition of the Directive has led to the adoption of more favourable provisions in at least ten Member States. Whether the results would have been different in the absence of a stand-still clause may be questionable since it seems that political factors may have been more important to prevent a lowering of standards. In any case, in the process of establishing uniform status the usefulness of standstill-clauses and maintenance of more favourite conditions will have to be reconsidered. "Higher" national standards have two significant disadvantages. First, they prevent the reduction of standards which – due to the experience

from the application of the Directive – may prove to be necessary. Second, they may run counter to the very purpose of a common European asylum system to prevent secondary movements and to establish a uniform status.

Obviously, the Directive did only to a limited extent establish a harmonization of reception conditions for asylum seekers throughout the EU. The Directive allows a wide amount of discretion and flexibility in a large number of areas. It is fair to say that the Commission's conclusion that on the whole the Directive has been transposed satisfactorily is due to the fact that the Directive has only approximated the national standards of the Member States to a certain extent. Sometimes the divergences are the result of a deliberate flexibility, sometimes the result of unclear wordings or the use of dilatory formulas disguising that the real consensus could not be achieved (in German legal theory "dilatorischer Formelkompromiss").

To make progress on the way to a more effective European asylum system it is not sufficient to identify different practices and submit proposals of directives of a second generation. It is necessary to identify the objectives of a harmonization of reception conditions. The European Commission speaks of the "objective of creating a level playing field in the area of reception conditions" (COM (2007) 745 final, p. 10). It is not very clear what is meant by this term. If the main objective is to prevent secondary movements within the European Union induced by different reception conditions, those reception conditions should be more clearly identified which may, in effect, have an influence upon secondary movements and therefore need a larger degree of harmonization.

In the following areas major differences in the reception conditions and divergent practices or difficulties in the application of the Directive can be observed:

1. applicability of the Directive to detention centres, to accommodation at the border and to transit zones;
2. applicability of the Directive to applicants for subsidiary protection;
3. applicability of the Directive to Dublin-II cases;
4. level and form of reception conditions – access to health care etc.;
5. free movement rights;
6. access to employment;

7. treatment of particularly vulnerable persons, in particular gender and child-specific persecution cases and victims of torture;
8. prevention of fraud and abuse – reduction of social benefits.

II. Major Issues

1. Applicability of the Directive to Detention Centres, Transit Zones and Border Procedures

The Report of the European Commission notes that serious problems exist in terms of the applicability of the Directive in all premises hosting asylum seekers. Many Member States do not apply the Directive in detention centres. Other Member States do not apply it in transit zones. Although the Commission's Report rightly states that the Directive does not allow for exceptions as far as its applicability in certain facilities for asylum seekers is concerned, the legal situation may not be that clear. The Directive is subject to interpretation as far as its applicability to the initial phases of the asylum procedures is concerned. The controversial question regarding the applicability of the Directive to closed centres, in which asylum seekers are detained, is also not explicitly addressed. It is clear that some of the provisions of the Directive cannot be applied to asylum seekers held in detention. Article 14 para. 8, whereby Member States may exceptionally set modalities for material reception conditions different from those provided for in this Article for a reasonable period which shall be as short as possible while the asylum seeker is in detention or confined to border posts leaves the question regarding the applicability of the Directive to closed centres open. Some of the ambiguities and difficulties clearly are also due to the fact that the Directive on Reception Conditions and the Directive on Asylum Procedures are containing provisions on the same subject which may be subject to different interpretation. The two Directives were adopted at an interval of almost three years. Therefore, it would be useful to clarify the relationship of the two Directives and review potential divergences.

Proposal:

Reformulation of the two Directives; elimination of contradictions and clarification of the scope of application in detention centres, transit zones and border procedures.

2. Applicability of the Directive to Applicants for Subsidiary Protection

The vast majority of Member States made use of the option to apply the Directive to persons applying for subsidiary protection. Since there is no convincing reason anymore to

differentiate with the adoption of the Qualification Directive between refugee status and subsidiary protection, the Reception Conditions Directive should be made mandatory in order to create the necessary conditions for establishing a single procedure.

Proposal:

Extention of the applicability of the Reception Conditions Directive to persons applying for subsidiary protection.

3. Applicability of the Reception Conditions Directive to Dublin-II Cases

In some Member States the Reception Conditions Directive is not applied in Dublin-II cases. Sometimes, differences are made between the first stage in which the responsible Member State is determined when an asylum application is introduced for the first time (France, Spain). In other Member States asylum seekers who are to be transferred to another responsible Member State will be detained and therefore are not entitled to the benefits under the Reception Conditions Directive. The Directive does not contain a specific rule on applicability on Dublin-II cases. However, reductions may be justified on the basis of Art. 16 para. 1a of the Directive. It seems questionable whether the complaints by NGOs and ECRE (see ECRE Report on the Application of the Dublin-II Regulation, March 2006, p. 8; UNHCR, Discussion Paper on Dublin-II Regulation, 2006, p. 51 f.) against the application of the Reception Conditions Directive does sufficiently take into account the different situations of an “ordinary” asylum seeker waiting for his/her asylum procedure and applicants expecting a transfer to a different EU Member State responsible for processing the asylum application. It may also be necessary to distinguish the different scenarios which can arise and which may require different treatment. Therefore, applicants in a Dublin-II procedure should be exclusively dealt with by the Dublin-II Regulation.

Proposal:

Clarification of the rights and duties of persons subject to measures under Dublin II in the Dublin Regulation.

4. Level and Form of Material Reception Conditions – Access to Health Care etc.

Article 13 and 14 leave a wide margin of discretion with regard to the form and level of housing, food, clothing etc. In particular, there are substantial differences with regard to the form of accommodation (collective housing, individual housing) and the type of accommodation. Also Member States have different practices with regard to the amount of financial allowances granted to cover additional needs. Most Member States provide

accommodation and food in kind. Major problems were discovered by the European Commission in Member States where asylum seekers are given financial allowances since these financial allowances were considered as too low to cover subsistence. There are also reports about problems regarding access to health care; however, frequently there are misunderstanding by NGOs complaining on the basis of their own standards, in particular regarding mental health care.

It is questionable whether further harmonization is really needed for the purpose of an Common European Asylum System (CEAS). Different practices on provision of material reception conditions may be the result of different legal concepts going beyond the scope of applicability of the Reception Conditions Directive and may also be due to different social and geographical conditions. It is doubtful to what extent differences in accommodation are an essential element for influencing an asylum seeker's choice of a reception country. Further harmonization may also prevent the development of better practices by prescribing uniform rules which may turn out to be unpractical or even counter-productive.

Proposal:

No attempt to "full" harmonization, but examination to what extent accommodation conditions and other reception conditions must be uniform throughout the European Union. Reduction of the content of the Directive and elimination of superfluous provisions. Introduction of flexibility clauses.

5. Free Movement Rights

There is a broad discretion under Art. 7 to restrict the right of free movement for asylum seekers. A majority of Member States do not limit the right to free movement or only under special public order reasons. However, other Member States restrict free movement to districts or do not allow asylum seekers to choose their place of residence. The biggest difference, however, results from the different practices on detention which is foreseen by all Member States on numerous grounds (ranging from Germany, which does not allow detention of asylum seekers unless for the purpose of securing deportation to the general practice of detaining all asylum seekers illegally entering a Member State, except for those with special needs).

While there are very good reasons to restrict free movement of asylum seekers to a specified place of residence or a region in order to enable a quick processing of an asylum claim,

detention should only be admissible on specific grounds due to the severe limitation of an asylum seeker's fundamental rights. Therefore, a test of necessity and prohibition of automatic detention should be included as a legislative amendment. It may be noted, however, that in the case Saadi v. UK of 11 July 2006, the European Court of Human Rights has accepted that a state has a broader discretion to decide whether to detain potential immigrants than is the case for other interferences with the right to liberty. Accordingly, there is no requirement in Art. 5 para. 1f of the ECHR that the detention of a person to prevent his effecting an unauthorized entry into the country, be reasonable considered necessary (see also Hailbronner, European Journal of Migration and Law, vol. 9 (2007), p. 159).

A survey of the recent practice in transposition of the Reception Conditions Directive may indicate a need for a differentiated approach concerning restrictions to the right of free movement, access to employment, choice of accommodation etc. Some Member States distinguish with regard to the level and form of reception conditions according to the stage of an asylum procedure, or to the length of time passed.

In Germany, asylum seekers are obliged to remain in a reception centre during the first few weeks of their stay. The Netherlands report a sophisticated system where distinctions are made between orientation and integration centres. During the orientation phase, information and activities take account of the temporary nature of the stay. Those who are granted refugee status are entitled to private housing in a municipality. Applicants who are given a negative decision in the first instance are transferred to a return centre where the idea of voluntary return is promoted. Although it is noted that there may be conflicts with the Directive, one should probably consider whether the differentiation does not make sense with regard to the different objectives of accommodating asylum seekers.

Proposal:

Introduction of rules on the reasons for detaining asylum seekers, reformulation of the Directive in order to allow a differentiated regime on accommodation according to the different stages of procedure.

6. Access to Employment

Article 11 provides for considerable flexibility with regard to the access to employment. Half of the Member States restrict access to a maximum authorized period. Other Member States require asylum seekers to apply for work permits and limit labour market access to certain

sectors of economy and/or require a work permit. Limitations imposed by EU Member States are not contrary to the Directive in so far as they do not detract from the substance from the right to work. However, access to employment may be a considerable factor in preventing secondary movement of asylum seekers between Member States, although it should also be taken into account that the possibility of finding work on the black labour market may even be of larger practical importance than official work permits. In any case, restrictions will promote the underground employment which should be avoided as a general aim of the European system. However, it is not to be expected that Member States will easily come to a consensus on the issue of whether access to employment may be a substantial pull-factor for uncontrolled migration movements. Therefore, it seems advisable to enact uniform rules concerning access to the labour market while providing at the same time for flexibility in changes of the time period required in order to work according to changing conditions.

Proposal:

Introduction of uniform rules on access to the labour market; flexibility to react to changing factual circumstance (large inflow) under EU-supervision.

7. Treatment of Particularly Vulnerable Persons, in Particular Victims of Torture and Gender and Child-Specific Persecution

A substantial number of EU Member States including those receiving large numbers of asylum seekers did not provide for specific procedures to identify asylum seekers with special needs. NGOs and the European Commission have criticised the lack of identification of the special needs of the persons since it would lead to the likelihood of not sufficiently taking into account the needs of these persons. The provisions of the Directive, however, are not altogether clear with regard to the obligation to introduce a specific procedure for identification (Art. 17). Identification of vulnerable asylum seekers is considered as an essential element of the Directive without which the provisions of the Directive would loose any meaning (see Report of the European Commission, p. 9). Most Member States, however, take the view that the special needs of vulnerable persons are taken into account by general provisions including international treaties on the rights of children etc. It is suggested to introduce a formal system identifying these persons in order to make progress towards an effective transposition of the Directive's conditions. There is definitely a need for more effective procedures in order to find out whether an asylum seeker is entitled to special treatment. However, it seems questionable to me whether there should be a general formal identification procedure. Progress could be made by obliging Member States by including into

the reception formalities questions giving information about special vulnerability. In addition, medial screens (which most Member States impose on asylum seekers in practice) may specifically include the existence of indications requiring special treatment.

Proposal:

Obligatory inquiry during the general application procedure and/or during a medical check to certify whether the applicant belongs to a category of particularly vulnerable persons.

8. Prevention of Fraud and Abuse

The Directive does authorize under certain conditions (Art. 16) reduction or withdrawal of reception conditions. While para. 2 has not played a substantial role (where an asylum seeker has failed to demonstrate that the asylum claim was made as soon as reasonably practicable after arrival) the other clauses (para. 1a and b) have been used to a different extent by Member States. Although in general they do not seem to have played a substantial role given the limited number of court decisions, it seems desirable to establish a certain uniformity in the sanctions that may be taken against asylum seekers violating their duties during the asylum procedure or failing to cooperate with the asylum authorities. In Germany, a law provides for a possibility to limit welfare benefits when an asylum applicant prolongues his/her stay on German territory if he/she prevents the execution measures terminating the residence. Generally, there should be a concept of sanctions to be taken in case of fraud or violation of duties of an asylum seeker.

In addition, in a coherent system the concept of reception conditions must somehow be interlinked with a concept of return in case an asylum seeker has failed to show a claim for international protection.

Proposal:

Introduction of set of rules on co-operation of an asylum seeker and a regime of sanctions in case of fraud or violation of duties. Linkage of certain sanctions with accommodation restrictions and preparatory return measures.