



## MOVING FURTHER TOWARD A COMMON EUROPEAN ASYLUM SYSTEM

UNHCR's statement on the EU asylum legislative package  
June 2013

Amended EU legislation on asylum has been adopted after long and complex negotiations. UNHCR welcomes this achievement, which represents an important step forward towards the establishment of a Common European Asylum System (CEAS).

The Treaty on the Functioning of the EU (TFEU) requires the Union to adopt measures on asylum in accordance with the 1951 Refugee Convention, providing inter alia for a **uniform status** of asylum **valid throughout the Union**, a uniform status of subsidiary protection, and **common procedures** for the granting and withdrawing of those statuses.

Although further measures may be required to achieve these goals, the reformed legislation has the potential significantly to contribute to harmonizing asylum systems in the Union. The recast 'asylum package', including the recast Asylum Procedures and Reception Directives and the Dublin and Eurodac Regulations, along with the Qualification Directive adopted in 2011, has the potential to improve protection standards and practice across the Union. Correctly enacted in national law and implemented in accordance with the international protection principles governing the CEAS, the recast provisions could lead to the timely identification and recognition of persons in need of international protection. This could lead to resource savings, through more efficient asylum systems that would operate at a high standard of quality.

The Council and Parliament have made considerable efforts in seeking to reconcile obligations under international and European refugee and human rights law, jurisprudence and procedural guarantees on the one hand, with the need to manage effectively and practically the pressures on modern asylum systems on the other. In some cases, the negotiating parties had to strike difficult compromises to reach agreement. As a consequence, some opportunities were missed to fill gaps and clarify overly broad, complex and problematic provisions. Some new articles have been introduced which raise difficult questions of interpretation and of principle, including Article 25 (6) of the Asylum Procedures Directive on the applicability of border procedures to unaccompanied minors. Such provisions are likely to require interpretive guidance from the European Court of Justice to define their implications.

With adoption of the recast EU measures, Member States will now begin the process of amending national law to reflect the negotiated changes. UNHCR, as part of its ongoing collaboration with governments and in the exercise of its supervisory function concerning the 1951 Convention, offers its support to Member States and other stakeholders to assist the transposition process. As implementation of the new rules proceeds, the

European Commission will have a critical role in monitoring national laws and practice to ensure they comply with the *acquis*. The European Asylum Support Office (EASO) will also carry a vital responsibility to support effective implementation, including through coordination of practical cooperation on training, quality and the operation of the new Early Warning and Preparedness mechanism under the Dublin Regulation. UNHCR reiterates its commitment to work closely with national authorities and EU bodies and civil society to seek positive outcomes to this critical transposition and implementation phase.

Among some provisions with the potential to improve existing frameworks and practice, UNHCR welcomes the following elements of the recast legislation:

- **“Frontloading” resources and quality.** Several new provisions in the Asylum Procedures Directive seek to ensure good **quality decisions** at first instance by defining several important features related to the initial phase of examination of a claim. Provisions which should strengthen this first instance process include clearer **definitions**; mandatory **training** requirements for the determining authority, taking into consideration training developed by the European Asylum Support Office (the European Asylum Curriculum); a mandatory **personal interview** in all cases (including to determine admissibility); an obligation to produce a detailed **report** of the personal interview; requirements for qualified case officers; **gender- and gender identity-sensitive procedures**. Furthermore, there are reduced possibilities for use of **accelerated procedures**, confined to well-defined cases; and importantly, specified and reasonable time limits to examine a claim, required both in general procedures (which should normally be completed in 6 months) and accelerated procedures. UNHCR considers that these provisions have the potential to enhance the quality and timeliness of decisions, which are less likely to be overturned at second instance, and may thus reduce the number of appeals. In addition, a shorter procedure can be expected to reduce the cost of the reception conditions. As such, “frontloading” the asylum process may save resources for Member States and produce more efficient and fairer decisions for asylum-seekers.
- **Further regulation of detention.** With the entry into force of the recast Reception Conditions Directive, **systematic detention** of asylum-seekers will no longer be possible, including for the purpose of Dublin transfers. The new, mandatory provisions introduce several important guarantees and procedural safeguards, which generally match international standards. These include the requirement that any detention be both **necessary and proportionate**, which must be satisfied on an individual basis before resorting to detention; the recognition that detention is an exceptional measure that can only be justified for a legitimate purpose on six **defined grounds**; the requirement to establish **alternatives to detention**; a stipulation that the period of detention be as short as possible; a right to **speedy judicial review** of the legality of detention; **written information** on reasons for detention and on procedures to challenge detention; and an obligation for written detention orders stating the factual and legal reasons justifying detention. The recast also demands appropriate **conditions in detention**, including UNHCR access to detention facilities; and crucially, limits the use of detention to exceptional circumstances for vulnerable persons and unaccompanied minors.
- **Access to the labor market for asylum-seekers.** In case claims for international protection are not decided within six months, asylum-seekers shall have access to

the labor market no later than nine months following the date when their applications were lodged.

- **More extensive guarantees for vulnerable people.** These include the establishment of identification mechanisms, better representation for unaccompanied children as well as specific procedural and reception guarantees.
- **Early warning, preparedness and crisis management.** This new mechanism, expressed in the Dublin Regulation, has two functions: (a) ongoing monitoring of the asylum situation in all Member States and (b) provision of a framework for a structured, sequential course of action to address deficiencies. This mechanism could help to identify emerging problems or particular pressures, and provides a basis to remedy problems or gaps. UNHCR, based on its expertise and presence across Member States, is well-equipped to contribute to the process of information-gathering and development and implementation of response plans, as well as monitoring their implementation. UNHCR has nevertheless cautioned that this mechanism alone will not avert nor solve all of the challenges facing EU Member States' asylum systems. These challenges also demand, among other things, systematic approaches to building and maintaining quality, including through appropriate implementation of the recast provisions.
- **Better application of the Dublin criteria.** Among new obligations in the Dublin Regulation, **an interview** is required in each case for applicants subject to Dublin, to facilitate the process of establishing the responsible Member State. Whereas in practice to date, the criterion relating to first country of irregular entry has been applied most frequently, the requirement for a mandatory interview has the potential to ensure that a proper analysis of other applicable criteria is made, including those related to family unity. **Suspensive effect of appeals** against a transfer decision (automatic, or upon request) has the potential to ensure the correct application of the Dublin criteria, according to the hierarchy established by the Regulation, before a transfer is made.
- **Approximation of rights between subsidiary protection beneficiaries and refugees.** Among the key changes effected by the amended Qualification Directive of December 2011, many entitlements have been approximated, so that beneficiaries of subsidiary protection enjoy rights and benefits similar to those granted to refugees.
- **Criteria for international protection.** The recast Qualification Directive added a requirement to the rules on **Internal Protection** under which the applicant must be able to "safely and legally travel to and gain admittance" to part of the country of origin where s/he can reasonably be expected to settle. UNHCR supports this provision, which is now in line with UNHCR's own guidelines on internal flight or relocation alternative.<sup>1</sup>In addition, **Gender Identity** has been added to the reasons for persecution, alongside previous recognition of sexual orientation, also reflecting UNHCR guidance.<sup>2</sup> At the same time, the provision on non-state actors who are

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<sup>1</sup> UNHCR, *Guidelines on international protection no. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*. See <http://www.refworld.org/pdfid/50348afc2.pdf>

<sup>2</sup> *ibid*

deemed to be able to provide protection lacks legal clarity, and may lead to difficulties if applied broadly.

- [Suspensive effect of appeals](#) in line with international refugee law and with the jurisprudence of the European Courts. The recast Asylum Procedures Directive recognizes - in general – an automatic right to remain in the territory of the concerned Member State for asylum-seekers appealing against negative decisions. In some circumstances, the suspensive effect of appeal is not automatic. However, the possibility remains to request a court or tribunal for a right to stay pending the second instance decision. In UNHCR's view this is a provision that, implemented correctly, should ensure that applicants for international protection are not sent back to persecution or serious harm.
- [Access to EURODAC data](#). While access for law enforcement authorities to the EURODAC database has been agreed, some important guarantees have been included. These include a prohibition on sharing of EURODAC data relating to individuals with third countries; limitations on database searches to cases where there is a substantiated suspicion that a person who has committed a crime has also sought asylum; and the provision of information to persons whose fingerprints are registered on the purposes for which the data are used in EURODAC.

As highlighted by recent research, including reports from UNHCR, the EU legislation on asylum has not been applied consistently throughout the Union to date. This divergent State practice can be attributed at least in part to provisions that are optional, unclear, or affording extensive discretion to Member States. The recast legislation should improve this situation by restricting the scope of some optional provisions, clarifying certain rules and reinforcing monitoring mechanisms, including through a new Early Warning and Preparedness mechanism under the Dublin Regulation.

Recognizing the achievement that adoption of the recast laws represents, UNHCR notes that some of the recast provisions may present challenges of interpretation and implementation. A focus on the protection objectives underlying the CEAS and on high-quality asylum systems will be needed to ensure that the letter and spirit of the Treaties and the 1951 Convention will be respected. In this regard, UNHCR encourages Member States to take advantage of the transposition process to apply more favourable standards that are in line with international law where appropriate.

UNHCR - Bureau for Europe - June 2013