



COMMISSION OF THE EUROPEAN COMMUNITIES

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**REPORT FROM THE COMMISSION TO THE COUNCIL AND TO THE
EUROPEAN PARLIAMENT**

**ON THE APPLICATION OF DIRECTIVE 2003/9/EC OF 27 JANUARY 2003
LAYING DOWN MINIMUM STANDARDS FOR THE RECEPTION OF ASYLUM
SEEKERS**

1. INTRODUCTION

On 27 January 2003, the Council adopted Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers.¹ It is applicable to all Member States except Ireland and Denmark² and was designed to harmonise the laws of the Member States concerning the reception conditions applicable to asylum seekers, thus contributing to the establishment of an EU-wide level playing field in the area of asylum and to reduce secondary movements. The Directive is one of the "building blocks" of the first phase of the Common European Asylum System, as provided for in the 1999 Tampere and 2004 Hague Programmes.³

The present report, which fulfils the obligation laid on the Commission by Article 25 of the Directive, aims to give an overview of the transposition and application of the Directive by Member States and to identify possible problematic issues. Its findings have contributed to the preparation of the Green Paper on the Future of Asylum Policy.

The report was prepared on the basis of two studies conducted to gather the necessary information on the state of implementation and application of the Directive.⁴

For those Member States (BE, EL, DE, AT) which had not adopted the necessary transposing legislation at the time of preparation of the report (end 2006), the information was gathered on the basis of available draft legislation.

2. MONITORING OF TRANSPOSITION

Member States had to transpose the Directive by 6 February 2005.

The Commission Services actively assisted the Member States in the process by holding regular meetings with national experts.

Following expiry of the deadline for transposition, infringement procedures were opened against all Member States, which failed to communicate or to fully communicate their transposition measures. Subsequently, in accordance with Article 226 of the Treaty, the Commission addressed 19 letters of formal notice and 10 reasoned opinions. The decision to bring the cases before the Court of Justice was taken against 6 Member States. Three cases were withdrawn, one was settled⁵ and two are still pending.⁶

¹ OJ L 31, 6.2.2003, p.18.

² For the purpose of the report, "Member States" means the Member States bound by the Directive.

³ Presidency Conclusions of the Tampere European Council, October 1999; Annex 1 to the Presidency Conclusions of the Brussels European Council, November 2004.

⁴ EMN "Reception Systems, their Capacities and the Social Situation of Asylum Applicants within the Reception System in the EU Member States", May 2006 - study contracted to the Academic Network for Legal Studies on Immigration and Asylum in Europe "Odysseus".

⁵ Case against Austria, where Austria was found guilty of failing to fulfil its Treaty obligations.

⁶ Cases against Greece and Germany

3. IMPLEMENTATION OF SPECIFIC PROVISIONS

3.1. Scope of application

Under Articles 2(c) and 3, the Directive is applicable to asylum seekers from the time of filing their applications for international protection under the Geneva Convention until the final decision on their application.

Virtually no problems were detected with regard to whom the Directive should apply. Moreover, the vast majority of Member States opted also to apply the Directive to persons applying for subsidiary protection.

It should be noted that the main reason why subsidiary protection was not included in the Directive was that at the time of its adoption, such a concept was not yet part of the EU asylum *acquis*. However, with the adoption of the Qualification Directive⁷ the concept of subsidiary protection has become an integral part of the EU legislative framework on asylum which should be reflected in all asylum instruments

Minor difficulties were detected with regard to the application of the Directive in time. Some Member States whose procedures are divided into numerous stages do not apply the Directive, for example, to persons at the admissibility stage (ES, NL). Others only apply the Directive to applicants who have already registered or hold a particular ID card (EL, UK, CY). Some Member States also limit the applicability of the Directive during the period to determine which Member State is responsible for processing the asylum claim under the Dublin Regulation⁸ (AT, FR, ES).

All Member States comply with the rule whereby the Directive is applicable until the final decision (i.e. a decision which can no longer be challenged under national law) is adopted.

However, serious problems exist in terms of the applicability of the Directive in all premises hosting asylum seekers. As many as seven Member States (UK, BE, IT, NL, PL, LU, CY)⁹ do not apply the Directive in detention centres. Other Member States (e.g. AT) do not apply it in transit zones.

As the Directive does not allow for exceptions as far as its applicability in certain facilities for asylum seekers is concerned, its provisions apply to all types of premises, including detention centres.

⁷ Directive 2004/83/EC of 29 April 2004, on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ L 304, 30.9.2004).

⁸ Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50, 25.2.2003, p. 1.

⁹ The situation of Spain, Greece and Portugal is not clear.

3.2. Procedural rules

3.2.1. Information

Article 5 requires Member States to provide asylum seekers with written information in a language they can understand on their benefits and obligations under the Directive and on the organisations providing legal or any other kind of assistance.

Asylum seekers are duly informed in the vast majority of Member States. Only a few Member States have not fully (DE) or only partly (AT) transposed this provision into their laws.

Some problems were detected in some Member States (CY, SI, DE and MT), where the information given on organisations providing assistance to asylum seekers does not seem to be sufficient.

The information is provided by all Member States within 15 days of the date of asylum application. The number of languages in which the information is available varies by Member State - from 3 (MT) to 34 (AT).

Access to information in several languages is essential to ensure effective access of asylum seekers to rights guaranteed to them by the Directive. **Therefore Member States are encouraged to make use of financial assistance under European Refugee Fund¹⁰ in order to increase the number of languages in which the information is made available.**

3.2.2. Documentation

Article 6 obliges Member States to issue asylum seekers with a document stating their name and status within three days of their asylum application.

Many Member States do not comply with this deadline. Some have not introduced any provisions of this kind in their legislation (DE, NL, HU, EL, ES). Others have introduced a clear deadline in the legislation but do not comply with it in practice (IT, SE, UK, FR).

All Member States issue appropriate documentation to non-detained asylum seekers. However, both the form and the content of the document vary considerably. In particular, many Member States issue documents which do not specify identity, which, while permitted by the Directive, causes many practical problems (e.g. problems with opening a bank account). A harmonised model the documents delivered to asylum seekers, which would specify their identity, would help to overcome such practical problems.

Virtually all Member States do not issue documents to detained asylum seekers as authorised by the Directive (exceptions being NL, CY, IT).

In most Member States the documents are valid throughout the whole procedure and in those where the validity is limited (from 2 months to 1 year) the renewal procedure does not create any problems.

¹⁰ Council Decision of 2 December 2004 establishing the European Refugee Fund for the period 2005 to 2005, OJ L381 of 28.12.2004, p. 52.

3.2.3. *Procedure for withdrawal of reception conditions*

If, pursuant to Article 16(1)-(3), a decision is taken to withdraw reception conditions, the Directive contains certain procedural rules (Article 16(4)), including the right to appeal against a negative decision and the right to free legal assistance during the appeal (Article 21).

No major problems were found as regards guaranteeing the individual, impartial and independent nature of withdrawal decisions.

Certain deficiencies are noted regarding the possibility of appeals against certain negative decisions. While all Member States grant this possibility for detention decisions, some make no provision for appeals against decisions affecting individual freedom of movement (AT, UK, SK), withdrawing or reducing reception conditions (HU, SI) or against any decision other than detention (ES, MT). Further problems consist of poorly justified or orally notified withdrawal decisions (NL, SI). All these situations are at variance with Article 21(1).

Only two Member States (CY, EL) make no provision for free access to legal assistance during an appeal. Some Member States grant this only to asylum seekers who cannot cover expenses or to those whose appeal procedures might be successful (e.g. NL, DE). Finally, practical problems with effective access to legal assistance were reported in certain other Member States (LV, HU, AT, EE).

3.3. **Material reception conditions and family unity**

3.3.1. *Form*

Articles 13 and 14 oblige Member States to provide asylum seekers with material reception conditions (i.e. housing, food, clothing, etc.), but leave a wide margin of discretion with regard to the form.

Accommodation is provided **in kind** in the majority of Member States. The most common form is collective housing. Only a few Member States (UK, BE, IT, SE) provide individual housing. The type of accommodation varies in some Member States according to the stage of the procedure (AT, FI, SI, NL, PL, CZ, SK). Very rarely, financial allowances are granted to cover accommodation needs: France, Italy, Spain and Slovenia – lack of accommodation places; Belgium and Portugal – according to the stage of the procedure; Cyprus – as a principle. **Food** is provided in kind in the majority of Member States (with the exceptions of EE, LV, UK, FI, SE). Although the way the **clothing needs** of asylum seekers are covered varies considerably, the Member States that grant financial assistance to this end are still in the minority (AT, FI, LU, NL, PL, UK, ES, SE, PT, CY, sometimes BE and AT).

Additionally, even if essential material needs are provided in kind, asylum seekers are nearly always (except in Slovenia) granted financial allowances to cover certain other expenses.

3.3.2. *Sufficiency and family unity*

Under Articles 13 and 14, material reception conditions should be sufficient to ensure the subsistence and health of applicants. Articles 8 and 14(2) also oblige Member States to maintain the family unity of asylum seekers for whom housing is provided.

No major problems were detected where material reception conditions are provided in kind and in reception centres.

The number of accommodation places for asylum seekers matches needs in the vast majority of cases. As required by the Directive, where housing is provided for asylum seekers, most Member States guarantee the family unity of applicants. Only in two Member States (IT, DE) is this made conditional on certain procedural requirements being met by applicants, which might be at odds with the Directive.

Some Member States, however, still have shortages of available places for their asylum seekers (i.e. CY, IT, FR). Further problems were found with regard to clothes for asylum seekers (SI, SK, LT, PL, CZ, LV, CY, NL) or the generally low level of reception conditions (LT, EL).

The adequacy of reception conditions provided to asylum seekers in detention, although in general different from the conditions afforded to non-detained asylum seekers for obvious reasons, may be questioned only in a few Member States (HU, LT, SI, EL, BE, IT, MT).

The main problems concerning application of the Directive were discovered in Member States where asylum seekers are given financial allowances. These allowances are very often too low to cover subsistence (CY, FR, EE, AT, PT, SI). The amounts are only rarely commensurate with the minimum social support granted to nationals, and even when they are, they might still not be sufficient, as asylum seekers lack family and/or other informal kinds of support.

3.3.3. Cases of withdrawal of reception conditions

Articles 16(1)-(3) specify the situations in which reception conditions granted to asylum seekers may be reduced or withdrawn (e.g. non-compliance with reporting duties, undue benefits from material reception conditions).

Some Member States withdraw reception conditions in situations not authorised by the Directive (FI, DE, NL and some regions of AT).

Only a few Member States choose, under Article 16(2), to refuse the reception conditions for asylum seekers not submitting their applications as soon as possible (EL, MT, CY, UK). In the latter case, however, use of the provision was seriously limited by the judgment of the House of Lords concerning compliance with Article 3 of the European Convention on Human Rights.¹¹

3.4. Rights

3.4.1. Free movement and residence

Article 7 grants asylum seekers the right to free movement within the Member States in which they apply for asylum and to choose their residence. This right might be limited for a number of reasons (public interest or order, swift processing of application).

¹¹ Opinions of the Lords of Appeal for Judgment in the Cause Regina v. Secretary of State for the Home Department of 3 November 2005, [2005] UKHL 66.

Non-detained asylum seekers

Given the broad discretion of Member States in limiting the right to free movement and residence, no substantial problems in application of the pertinent provisions were reported.

The majority of Member States grant the *right to free movement* for their entire territory. A few member States (CZ, AT, LT) reserve the right to limit free movement for public order reasons. Two Member States (DE, AT) regularly restrict the free movement of asylum seekers to one district. In certain other Member States free movement is restricted in practice as asylum seekers have to report to or stay in their accommodation centres at certain times (NL, SK, SI, HU, LT, EE, CZ).

Some Member States do not allow asylum seekers to choose their place of *residence* (AT, DE, LU, NL, EL). Others allow this under certain conditions or at a certain stage of the asylum procedure. A few Member States give asylum seekers a free choice, which very often is the only way of offsetting the lack of capacity in reception centres (e.g. FR, CY). Some Member States also use the provision to make reception conditions dependent on place of residence (PL, FI, EE, LT).

In some Member States, asylum seekers are free to leave their place of residence without any authorisation or subject to a purely formal request, which is normally accepted (CY, FR, PT, LU, MT, PL, SE, BE, EE, IT, HU). Other Member States have introduced more rigorous systems of control based on limited days of absence, reporting obligation or virtually no possibility of leaving save in exceptional circumstances.

Detained asylum seekers

Detention is foreseen by all Member States on numerous grounds (from exceptional circumstances – Germany –to the general practice of detention of all asylum seekers illegally entering the Member State except for those with special needs – Malta). Similarly, the length of detention varies from 7 days (PT) to 12 months (MT, HU) or even an undefined period (UK, FI).

However, given that according to the Directive detention is an exception to the general rule of free movement, which might be used only when "it proves necessary", automatic detention without any evaluation of the situation of the person in question is contrary to the Directive. Furthermore, the length of detention, except in duly justified cases (e.g. public order), which prevents detained asylum seekers from enjoying the rights guaranteed under the Directive, is also contrary to its provisions.

3.4.2. *Access to accommodation centres*

Asylum seekers are entitled to contact UNHCR, their legal advisers and NGOs.

No particular problems were reported with regard to the application of Article 14(2). UNHCR, legal advisers and NGOs generally have good access to all accommodation centres (including detention) and contacts with asylum seekers. Some Member States grant access to accommodation centres prior to special authorisation (especially for NGOs).

3.4.3. *Access to health care and employment*

Asylum seekers are also entitled to conditional access to the labour market and health care.

Access to at least emergency *health care*, as provided for by Article 15, is guaranteed by all Member States, including for asylum seekers in detention. A large number of Member States have broadened access to health care, sometimes granting the same access as for nationals (CZ, NL, PL).

Due to the considerable flexibility of Article 11, no major problems were found with regard to the respect of the rules on the access of asylum seekers to labour markets.

Half of the Member States restrict this to a maximum authorised period, i.e. to one year (CZ, EE, DE, FR, HU, LV, MT, PL, SK, SI, UK, CY). Nine Member States (EL, PT, AT, FI, SE, IT, ES, NL, LU) authorise access after shorter periods, from immediately – Greece – to 9 months – Luxembourg. Only Lithuania violates the Directive and does not provide for this possibility at all.

Detained asylum seekers, for obvious reasons, have virtually no access to the labour market. This might not be consistent with the Directive in Member States where detention can exceed 12 months (FI, UK).

Very often, Member States require asylum seekers to apply for work permits (AT, BE, EE, DE, HU, LV, MT, NL, PL, SK, SI, SE, ES, LU, FR, UK), and limit labour market access to certain sectors of the economy (CY) and the amount of authorised (sometimes quite restrictively) working time (NL, FR, AT).

Additional limitations imposed on those asylum seekers who have already been granted access to labour market, such as the necessity of a work permit, might considerably hinder such access in practice.

3.4.4. *Access to education*

Under Article 10, minor asylum seekers or children of asylum seekers (including those in detention) have the right to access to education at the latest within 3 months of the application for asylum.

Non-detained minors

While access to primary schools is not a problem, secondary education is often dependent on places available or decisions of local authorities (AT, SI, FI, HU). In a few Member States, minors might be granted access to schooling only at particular times in the school year, which might in practice cause delays (PL, FR).

Detained minors

Contrary to the provisions of the Directive, many Member States deny detained minors access to education or make it impossible or very limited in practice (AT, BE, FI, FR, HU, IT, PL, SK, SI, UK, NL). Only in a few Member States is this right recognised or special classes organised in detention centres (LV, CZ, LT, SE).

3.5. Asylum seekers with special needs

3.5.1. Identification

As special needs of vulnerable asylum seekers must be addressed, Member States are obliged to identify them (Article 17).

Certain deficiencies in transposition were already found in the definition of vulnerable groups. Although the majority of Member States recognise such persons by listing all the groups mentioned in the Directive or by using an open clause, some do not cover the full list in Article 17(1) or do not address persons with special needs at all (SK, FR, HU, LT, MT, PL, LV, EE and some regions of AT).

Furthermore, in some Member States (UK, DE, AT, BE, LU, EL, IT, SK, SI) no identification procedure is in place. Despite the fact that it is not literally an obligation, there might be serious doubts as to how and whether persons with special needs are actually identified in Member States with no such tool.

Identification of vulnerable asylum seekers is a core element without which the provisions of the Directive aimed at special treatment of these persons will lose any meaning.

3.5.2. Needs of vulnerable asylum seekers

Addressing the needs of vulnerable persons has been identified as one of the main deficiency in the application of the Directive.

Vulnerable asylum seeker must be provided with adequate rehabilitation services (minor victims of abuse, neglect, exploitation, etc.), legal representation (unaccompanied minors) or necessary treatment (victims of any act of violence) – see Articles 17-20.

While special housing needs are in principle addressed, adequate access to health care has its limitations, e.g. no effective access to medical care, lack of specific care (in particular for victims of torture and violence) and insufficient cost cover.

Although minors are generally hosted with their parents or other relatives, a number of deficiencies were detected concerning minors with special needs. In some cases no specific legal provisions have been adopted (EE, FR, HU, LV, LU). A number of other Member States have practical problems, making effective access to special arrangements for minors more difficult, e.g. undervaluation of needs, lack of specialised human resources.

Unaccompanied minors are guaranteed legal representation by virtually all Member States. They are generally hosted with foster families or in special centres; tracing of their family members is also legally or practically ensured. Only three Member States (DE, SE, PT) choose to host unaccompanied minors aged over 16 in accommodation for adults.

Serious problems might arise in Member States which do not exclude the detention of asylum seekers with special needs. Most of them authorise the detention of minors and many of them even authorise the detention of unaccompanied minors. As the level of reception conditions in detention inevitably drops, it is hard to imagine how the special needs of vulnerable persons (especially minors) might be met. Even if some Member States have

made the necessary arrangements in this respect, they do not address all groups of persons with special needs.

Given their particular situation, detention of vulnerable asylum seekers should be considered only as a last resort, in duly justified case. In any event, detention should not jeopardise their access to the rights guaranteed to them by the Directive (i.e. access to adequate health care, necessary treatment and rehabilitation, education for minors). Furthermore with regard to minors, the decision of their detention must also take into account the best interest of the child.

Moreover, as far as unaccompanied minors are concerned, Article 19(2) clearly states that they should be placed with adult relatives, foster family, in accommodation centres with special provisions for minors or in other accommodation suitable for minors. Detention of these asylum seekers may therefore only take place in full respect of this provision and only if the detention itself proves to be in the best interest of the child.

3.6. Functioning of the reception conditions system

3.6.1. Staff and resources

Article 24 requires staff dealing with asylum seekers to receive appropriate training and Member States to allocate adequate resources to the reception of asylum seekers.

Some doubts might be expressed as to the level of both human and material resources allocated to implement reception conditions systems in three Member States (IT, CY, MT).

The issue of staff training is normally addressed either through legal provisions or in practice. Some problems exist, however, with regard to the subject matter of training courses. The focus of training is very often on women and minors. Only a few Member States provide training concerning victims of torture. In some cases a lack of qualified staff (EE, EL, LT) and language training (EE, EL, PL) was detected.

The principle of confidentiality of staff was broadly implemented as regards the employees of both public administrations and other stakeholders involved. Certain shortcomings can be highlighted in this respect where entire centres are run by private entities, such as NGOs.

4. CONCLUSIONS

Overall, the Directive has been transposed satisfactorily in the majority of Member States. Only a few horizontal issues of incorrect transposition or misapplication of the Directive are highlighted. The Commission will examine and pursue all cases where problems of application were identified.

Contrary to what was predicted following adoption of the Directive, it appears that Member States have not lowered their previous standards of assistance to asylum seekers. However, the present report has clearly shown that the wide discretion allowed by the Directive in a number of areas, notably in regard to access to employment, health care, level and form of material reception conditions, free movement rights and needs of vulnerable persons, undermines the objective of creating a level playing field in the area of reception conditions.

How to find adequate responses to these issues goes beyond the object of the present report, as it requires a wide political reflection on the level of ambition of the Common European Asylum System. These questions are therefore addressed by the Green Paper on the future of Asylum Policy which the Commission has recently published.

Before proposing amendments to the Directive, the Commission considers it therefore necessary to wait for the results of the public consultation on the Green Paper.