

# Asylum

**I. Asylum vs. migration:** asylum is granted to people fleeing persecution or serious harm in their own country and who are therefore in need of international protection. Asylum is a fundamental right; granting it is an international obligation.

Migration is defined as the movement of people from one place to another whereby the decision to migrate is taken freely by the individual concerned, for reasons of personal convenience and without intervention of an external compelling factor.

**II. Background and general objectives:** the creation of a European Asylum System (CEAS) was decided on the basis of guidelines agreed by the Tampere European Council (1999) which called on Member States to move towards an asylum system based on the application of the 1951 Geneva Convention, the objective of which was that *"any claim be treated under the same circumstances, regardless of the Member State in which the claim is filed"*.

## Developments since the Amsterdam Treaty:

- With the entry into force of the Amsterdam Treaty, in May 1999, asylum policy - which was previously a matter for intergovernmental cooperation - became a **Community competence**. The purpose is to harmonise national legal frameworks on the basis of **common minimum standards**, the Council, acting unanimously **after the simple consultation of the European Parliament**, on a proposal from the Commission or the Member States. The Treaty provides for a "Passerelle clause" which was to be activated from 1 May 2004 to enable the transition to **qualified majority voting and co-decision with the European Parliament** in this area by a decision taken unanimously by the Council.
- After the entry into force of the Nice Treaty (2003), the European Council decided, in 2004, to use the Passerelle Clause to move to Qualified Majority Voting on asylum and immigration issues in the Council. **The codecision procedure applies to these measures since 1 January 2005** on the basis of [Council Decision 2004/927/EC](#).
- The Treaty on the Functioning of the European Union (Article 78 TFEU) marks a new step with the development of the **EU's common asylum policy**. It replaces the aim of adopting "minimum standards" by the adoption of "a common European asylum system" with a "uniform status" and "common procedures". Asylum policy is subject to the ordinary legislative procedure under which the Council decides by qualified majority and the **European Parliament exercises full co-legislative powers**.

**"First-phase" instruments:** during the first phase of the CEAS (1999-2005), the aim was to harmonise Member States' legal frameworks on the basis of common minimum standards. A number of measures were adopted in this respect:

- the **"Reception" Directive** (January 2003) on minimum standards for the reception of asylum seekers which guarantees minimum standards, in particular in respect of accommodation, education and health;
- the **"Dublin II" Regulation** (February 2003) which is based on the same principles as the Dublin Convention of 16 June 1990 and provides the means for determining the Member State responsible for examining an asylum application, as well as the **"EURODAC" system** for the comparison of fingerprints applicants for asylum in the European Union;
- the **"Qualification" Directive** (April 2004) on minimum standards regarding the conditions to be fulfilled by third-country nationals or stateless persons to qualify as refugees;
- the **"Procedure" Directive** (December 2005) setting the minimum standards for granting and withdrawing refugee status in the EU; this Directive lays down the main duties and obligations to be fulfilled by asylum seekers in order to be granted refugee status.

In September 2000, the [European Refugee Fund](#) was established. It is responsible for organising the partitioning of Community funds between the Member States in proportion to the number of asylum requests received, and refugees and displaced persons received. The **"Directive on Temporary Protection"**, adopted in July 2001, introduces a specific form of protection in the event of a mass influx of displaced persons from third countries and ensures a balance of effort between Member States. Lastly, the [Family Reunification Directive](#) (September 2003) also applies to refugees.

**The Hague Programme:** after the completion of this first stage, the harmonising scope of which remained limited, the Hague Programme, adopted by EU Heads of State and Government in November 2004, provides for the establishment **by 2010**, of a Common European Asylum System. This would involve a common procedure and a uniform status, as well as a strengthening of partnerships with third countries in order to help them to improve their asylum systems, fight illegal immigration and set in place programmes to assist repatriation.

In 2007, consultations with interested parties in the context of the Commission's [Green Paper](#) show the need to introduce a common level of protection that is higher and more uniform throughout the EU and to thus ensure greater solidarity between the Member States. Parliament, for its part, in its [resolution of 2 September 2008](#), makes a clear call to strengthen asylum seekers' rights and, in parallel, establish a genuinely harmonised asylum system.

**A second phase of global and integrated CEAS:** in 2008, the Commission proposes a [Policy Plan on Asylum](#) which called for a reform of the common asylum system so that, **as of 2012**, there would be: (i) a fair and efficient **common asylum procedure**; (ii) **uniform status** for both asylum and subsidiary protection, which share most rights and obligations, while allowing for justified differences in treatment; (iii) **increased practical cooperation** in order to jointly assess Country of Origin Information; and (iv) better defined **responsibility** for granting refugee status according to the criteria of the Dublin II Regulation and strengthening solidarity between Member States faced with disproportionate numbers of applications due to their geographic or strategic location.

This approach is fully in line with the Council's 2008 [European Pact on Immigration and Asylum](#) and the [Stockholm Programme](#) adopted by the European Council in December 2009, which has the dual aim of ensuring the efficient regulation of immigration and a more coherent European asylum law based on high levels of protection.

**Legislative packages:** following evaluation reports drawn up by the Commission, as well as contributions received from various stakeholders in response to the Green Paper, a number of deficiencies were identified relating to the efficiency of the system in place in the first phase of the CEAS, as well as to the level of protection offered to applicants. Therefore, in December 2008, the Commission presents the first "legislative package", consisting of recast proposals for the [Dublin II](#) and [EURODAC Regulations](#) and the **"Reception" Directive**, followed in October 2009, by a second package consisting of proposals to revise the **"Qualification Directive"** (2011/95/EU), adopted in December 2011, and the **"Procedures Directive"**.

To these texts should be added Regulation (EU) No 439/2010 establishing a [European Asylum Support Office](#) which seeks to strengthen practical cooperation between Member States in regard to asylum and to provide support to Member States whose asylum and reception conditions are under **particular pressure**, as well as the various successors to the European Refugee Fund, the most recent of which is under examination (the new **"Asylum and Migration" Fund** for the period 2014-2020).

Lastly, the adoption of [Directive 2011/51/EU of the European Parliament and of the Council](#) (May 2011) which amends Directive 2003/109/EC on long-term residents with a view to the extension of its scope to beneficiaries of international protection deserves mention.

In June 2011, the Commission presents amended proposals for the "Reception" Directive and for the "Procedures" Directive. The objective is to revitalise the interinstitutional debate which, until that moment, had proven to be very difficult, by using its right of initiative to give further impetus to the work of the co-legislators towards achieving a true Common European Asylum System.

### III. Main issues in regard to the legislative initiatives in the process of adoption:

**Rights conferred by the recast of the CEAS:** overall, the recast of the European asylum system has sought to clarify the majority of the rights of asylum seekers, with a view to ensuring greater consistency in the amended texts. Of particular note are:

- **the right to obtain clear and understandable information:** the Commission has tried to strengthen as far as possible in the various legislative instruments the measures relating to the provision of information to asylum seekers, in terms of improved content and form, as well as timing. For its part, Parliament's amendment that asylum seekers should be informed in a **language that they understand or are reasonably supposed to understand** has been retained. This point is included in the final text of the recast of the "Qualification" Directive adopted in 2011;
- **the right to an individual interview:** in the context of the [political agreement reached on 21 November 2012](#) on the recast of the Dublin II Regulation, a provision for the organisation of a **compulsory and individual interview** is introduced so as to allow the asylum seeker to provide the necessary relevant information for the correct identification of the State responsible. Parliament's amendment that this interview should take place in a **language that the asylum seeker understands**, eventually with the assistance of an interpreter is incorporated in the text;
- **the right to legal aid and representation:** in the text of the recast of the "Reception" Directive, as well as of the Dublin II Regulation, new provisions are introduced so that, in the event of detention, asylum seekers can **benefit from free legal assistance and representation**. During the negotiations, Council contested the fact that Member States should make provision for free legal assistance and representation if the appeal presents **no tangible prospect of success**. However, it was finally agreed that such a prospect of success is to be evaluated by a competent authority, a court or a tribunal. As for the recast of the "Procedures" Directive, [the new 2011 amended proposal](#) takes into account the debates between Member States and with the European Parliament and stipulates the form of legal support, in particular the involvement of non-governmental organisations, Member State government civil servants and specialised services. This provision is currently under negotiation;
- **the need for the appropriate training of personnel:** the new "Qualification" Directive contains stricter provisions regarding the training of personnel responsible for asylum seekers in the Member States. Personnel in charge of unaccompanied minors, in particular, must receive appropriate training concerning their needs. As far as the recast of the "Procedures" Directive is concerned, in the political negotiations currently under way, Parliament is insisting that any interview on the admissibility and on the content of a request must always be undertaken by personnel with the appropriate training, and that such personnel must, above all, be prepared to take into account **the issues of gender and sexual orientation of asylum seekers**;
- **asylum seekers' effective right to seek a remedy:** the political agreement reached in November 2012 on the recast of the Dublin II Regulation includes the principle of the suspensive effect of appeals in respect of **decisions for the transfer of asylum seekers where their safety cannot be ensured**. During the negotiations, Parliament's amendment that asylum seekers should also have the right to ask to **remain in this territory pending the outcome of their appeal** was taken up. The agreement on the new "Reception" Directive also provides for a comprehensive **judicial review** of first instance decisions and stipulates that the notion of effective remedy should require the review of both facts and points of law. The **right to appeal against detention measures** is also guaranteed *ex officio* and/or at the request of the asylum seeker;
- **the laying down of material reception conditions (including housing, food and clothing, in kind or as a financial allowances):** in its position at first reading on the recast of the "Reception" Directive (May 2009), Parliament had considered that financial assistance could be a significant pull factor for potential asylum seekers. The approach recommended by Parliament was retained in the [Commission's 2011 amended proposal](#) which provides that any financial assistance granted should be determined on the basis of relevant reference points that are measurable by Member States. The [political agreement reached in September 2012](#) on this Directive provides for the possibility for the Member States to limit or, in exceptional and duly justified cases, to withdraw access to such benefits (e.g. when an application is lodged too late);
- **the provision of minimum standards of healthcare:** the proposal to recast the "Reception" Directive includes provisions for extended health care coverage, so that beneficiaries would have access to both physical and **mental** healthcare. It should be noted that the revised proposal of 2011 does not mention **the equal treatment with that of residents of the host Member State as regards access to healthcare**.

**Family members, vulnerable persons, torture victims and applicants with particular needs:** new provisions are introduced to clarify the scope of application of the European asylum system:

**(a) family members and dependents:** with a view to strengthening the right to **family unity**, the proposal to revise the Dublin II Regulation envisages:

(i) extending the right to family reunification to include family members who are beneficiaries of subsidiary protection and who reside in another Member State; (ii) making compulsory the reunification of dependent relatives and of **unaccompanied minors with relatives who can take care of them, including in another Member State**. The Parliament/Council compromise reached in November 2012 on this issue clarifies the notion of "relatives", to avoid conflicting interpretations. The agreement also provides that the presence of a family member of the unaccompanied minor or a close relative in another Member State could constitute a **mandatory criterion for responsibility**.

**(b) minors, unaccompanied minors and the best interest of the child:** the various recasts of the common asylum system texts focus particular attention on minors and unaccompanied minors:

- **rights of minors:** at the current stage of the revision procedure, both the Parliament and the Council have sought to clarify the definition of and the rights bestowed by minor status (a third-country national or stateless person below the age of 18 years). The text of the political agreement reached in November 2012 reinforces the concept of the **best interests of the child**. Particular attention has been paid to concepts such as his/her wellbeing and social development, his/her ethnic, religious, cultural and linguistic background and, more generally, to the opinion of the child depending on his/her age and degree of maturity. In particular, Parliament has ensured that a detailed description of the factors for assessing the child's best interests is included in the final text;
- **rights of unaccompanied minors:** in the context of the revision of the "Reception" Directive, Members requested that a guardian be appointed to advise and protect the child and to ensure that all decisions are taken in the child's best interests. If the interests of this guardian were to come into conflict with those of the child, this person shall be **ineligible to become a guardian**. This point has not been included in the Commission's amended proposal. However, the political agreement on the revision of the Dublin II does lay down specific procedural safeguards for unaccompanied minors on account of their **particular vulnerability** (in terms of an individual interview by appropriately trained

personnel, legal aid, as well as assistance in finding members of their family). Parliament's amendment extending the possibility for unaccompanied minors to reunite, in addition to family members, with legally present siblings, aunts/uncles and grandparents (the last two categories on the basis of individual examination of their capacity to take care of the minor) has been taken up.

**(c) applicants with special needs/vulnerable persons/torture victims:** whether in the context of the recasts of the "Reception", the "Procedures" or the "Qualification" Directives, the Commission has sought to ensure that the system for the reception of "vulnerable" persons and persons with special needs (victims of human trafficking, torture or degrading treatment, persons with mental health problems, minors...) is more equitable and responsive to their specific needs. The revised provisions include extended levels of protection in stipulating conditions of "belonging to a social group", and particularly to "gender identity" and "sexual orientation" as recognised motives for persecution. Parliament has also sought to strengthen the aspect of "special needs" in calling for differentiated treatment at the time of the individual interview or access to specific forms of healthcare and successfully managed to ensure the introduction of a provision of a special reception need for applicants with serious mental health disorders. Parliament had also requested that victims of torture be guided towards care centres appropriate to their situation. [The Parliament/Council compromise on the "Reception" Directive](#) takes into account the evaluation of specific needs of vulnerable persons **but without this necessarily resulting in a differentiated administrative procedure**. Measures addressing their needs shall be **integrated in existing national procedures**.

**The following provisions were subject to detailed discussions:**

**(a) the question of detention:** given the frequent resort to detention by Member States in the field of asylum in recent years, as well as the development of case law in the **European Court of Human Rights**, the Commission proposed addressing rigorously the issue of detention to avoid that it is arbitrary and to ensure that fundamental rights are respected in all instances. In the context of the Commission's proposal for a revision of the Dublin II Regulation, a new provision stipulates that a person should not be **held in detention for the sole reason that he/she is seeking international protection**.

In the course of the interinstitutional discussions on the "Reception" Directive, the provisions regarding detention were debated at length and were among the most controversial issues at stake. The 2003 Directive did not lay down any detention ground, thus completely leaving such a matter to the Member States's intervention. In its proposal for the recast of the 2003 Directive, the Commission provided a list of cases where an asylum seeker may be placed in detention, meaning that detention would be authorised to: (i) verify his/her identity; (ii) verify the facts underlying the asylum request; (iii) decide on his/her right to enter the territory; and (iv) protect national security and public order. Following political negotiations, the final text of the agreement reached at the end of 2012 provides for two new grounds for detention, namely **to prepare the asylum seekers' return to their country of origin** if the Member State can justify that there are justifiable reasons to believe that the application for international protection was made with the sole purpose of delaying or preventing his/her return; and, in the context of **a transfer to another Member State**, in accordance with the Dublin II Regulation. The new list of detention grounds consolidates, to a very large extent, the current practices in Member States and satisfies the Council's request to include a ground addressing abuses of the asylum procedure by irregular migrants.

In parallel, in the agreed text of the Dublin II Regulation, a single ground for detention is included, in the case of significant risk that an applicant may abscond, but such risk shall be based on objective rules to be detailed in national legislation and the duration of detention is subject to strict limitations.

A specific provision of the "Reception" Directive is dedicated to the **detention of vulnerable people**: Member States shall ensure that such asylum seekers benefit from particular attention and numerous legal and procedural guarantees are provided for (in particular, for persons suffering from mental health problems).

As regards the **detention of unaccompanied minors**, the Commission's amended proposal provides that unaccompanied minors may be detained, even if only in particularly exceptional circumstances. Despite efforts by the Parliament to avoid the adoption of this provision, in the final text agreed, **unaccompanied minors may also be kept in detention**, even if only in exceptional circumstances and never in prison accommodation.

In regard to the guarantees given to asylum seekers detained in closed centres, Parliament has managed to ensure that free legal assistance and representation is provided to them in specific cases but with new restrictions (e.g. the possibility, for the Member States, to demand the reimbursement of certain legal costs).

**(b) access to the labour market:** the 2003 "Reception" Directive did not provide for any specific deadline for the opening of the labour market to asylum seekers. Based on the principle that making access to employment easier would facilitate the integration of asylum seekers and their **financial self-sufficiency**, the Commission envisaged, in its proposal to recast the existing "Reception" Directive, the opening of the labour market **after a maximum period of six months** after the lodging of the asylum application (each Member State being free to lay down the conditions of access to their own labour market). Parliament gave its full support to this approach. Following interinstitutional discussions, the Commission's 2011 amended proposal however extends this period by **a further six months** in view of Member States' demands for greater flexibility on the matter. The political agreement, finally reached in September 2012, changes this deadline to **nine months** from the lodging of the application, the objective being to encourage asylum seekers' capacity to provide for their own needs. The Member States would, however, remain free, as previously, to decide their national conditions to access, including a labour market test, and to give priority to **EU citizens and nationals of the European Economic Area and also to legally resident third-country nationals** for reasons of labour market policies.

**(c) the solidarity mechanism between Member States:** with the gradual implementation of the Dublin Regulation, certain Member States, mainly due to their geographic situation, found themselves in a situation where their reception capacities were placed under proportionally more **pressure** than others. To address this situation, the proposal to recast the Dublin II Regulation provided for, in the event of particular pressure being suffered by certain Member States, the possibility for **the transfer of asylum seekers** to States with limited reception capacity to be suspended even if these countries were legally responsible for the asylum requests. This procedure would also have been applied in the event of a fear, supported by several judgments of the Court of Justice of the EU, **of transfers towards Member States where the asylum seekers would not benefit from adequate standards of protection**. Financial assistance from the [European Refugee Fund](#) could thus have been mobilised to assist the Member States that no longer transferred their asylum seekers under the terms of the Dublin II Regulation.

In its position at first reading (May 2009), Parliament supported this mechanism and called on the Commission to propose binding measures, to be adopted by means of the codecision procedure, to establish this solidarity at technical level (in particular, the **reintegration** of applicants for international protection to other Member States and the active mobilisation of the European Asylum Support Office). However, the Council did not retain the mechanism for the temporary suspension of transfers, preferring instead a **mechanism for early warning, preparedness and crisis management**.

The political agreement, reached with Parliament in November 2012, envisages the establishment of this mechanism which seeks to anticipate and **prevent asylum crises** by evaluating the practical functioning of national asylum systems, **rather than managing the consequences of such crises** after they have occurred. Member States that so require may qualify for assistance. Parliament did, however, manage to ensure that a clear reference to solidarity among Member States under pressure is provided for in this context.

**d) implementation of legislation:** the conditions of application of certain provisions of the revised Dublin II Regulation have been the subject of debate. Under the compromise reached on the comitology issues, the Commission shall have power to adopt **delegated acts** to establish additional non-essential rules regarding: (a) the identification of family members of **unaccompanied minors**; and (b) **dependents** (e.g. criteria for establishing the existence of proven family links). To facilitate the identification of family members of unaccompanied minors, the agreement provides for a cooperation procedure between Member States to exchange information on this issue which shall be governed by implementing acts. The text also provides for the **use of implementing acts with respect to provisions relating to the transfer of asylum seekers** (model of *laissez-passer*, exchange of information).

**IV. State of play and next steps:** although the deadline set by the European Council - i.e. the end of 2012 - to establish a common European asylum system has not been met, most of the texts have, however, been adopted or will be in the near future.

- the **"Qualification" Directive** was adopted and will enter into force (22 December 2013 for the most pertinent provisions).
- the recast of the **"Reception" Directive** and the **Dublin II Regulation** are at the stage of **political agreement** between the European Parliament and the Council. For these two texts, Parliament's Committee on Civil Liberties, Justice and Home Affairs has indicated to the Council that it will recommend to plenary to **adopt at second reading, unamended**, Council's position at first reading, once the latter has been adopted;
- the negotiations on the revision of the "Procedure" Directive and the Eurodac Regulation have entered their final phase: (i) **with respect to EURODAC**, in May 2012, the Commission issued a new proposal to amend the Regulation which would allow law enforcement authorities access to the EURODAC central fingerprint database for the purposes of the fight against terrorism and organised crime. In October 2012, the Council adopted its negotiating position with Parliament; trilogues started soon after the LIBE Committee adopted, on 19 December 2012, its **position** on this new version of the legislative text; these trilogues are ongoing; (ii) as far as the **"Procedures" Directive** is concerned, recent progress has been made in negotiations with the European Parliament, the objective being to reach agreement on the basis of the Commission's proposal for the amended Directive. In late November 2012, the Council proposed an overall compromise on this Directive on which agreement has not yet been reached. The Irish Presidency is currently negotiating at the JHA Counsellors level a new negotiation mandate for the remaining pending issues with a view to reaching agreement with Parliament. This mandate is likely to be agreed in late February 2013 and is expected to give a new impulse (impetus?) to the political debate.

Lastly, it is worth noting the adoption in March 2012 of [Decision No 281/2012/EU](#) establishing the EU's joint priorities for resettlement for 2013 and new rules on the funding of resettlement of asylum seekers in the Member States in the context of the European Refugee Fund. On this issue, Parliament also underlined in a [resolution](#) adopted in September 2012 the need to make provision in the future for an **EU Distribution Key for the relocation of beneficiaries of international protection among the Member States**. It considers this to be "*one of the most concrete forms of solidarity*" and the most equitable way to contribute to the establishment of a true CEAS.

## Related procedures

Procedure	Symbol	Reference
<a href="#">Internal Security Fund: instrument for financial support for external borders and visa 2014-2020</a>	***I	<a href="#">2011/0365(COD)</a>
<a href="#">Asylum, Migration and Integration Fund (AMIF) 2014-2020</a>	***I	<a href="#">2011/0366(COD)</a>
<a href="#">Asylum, Migration and Integration Fund and Instrument for financial support for police cooperation, preventing and combating crime, and crisis management: general provisions</a>	***I	<a href="#">2011/0367(COD)</a>
<a href="#">Internal Security Fund: instrument for financial support for police cooperation, preventing and combating crime, and crisis management 2014-2020</a>	***I	<a href="#">2011/0368(COD)</a>
<a href="#">Asylum: requests for comparisons with EURODAC data by Member States' law enforcement authorities and Europol for law enforcement purposes</a>	*	<a href="#">2009/0130(CNS)</a>
<a href="#">Common procedures for granting and withdrawing international protection. Recast</a>	***II	<a href="#">2009/0165(COD)</a>
<a href="#">International protection: criteria and mechanisms for determining the Member State responsible for examining an application lodged by a third-country national or a stateless person. Recast</a>	***II	<a href="#">2008/0243(COD)</a>
<a href="#">Asylum: Eurodac system for the comparison of fingerprints of third-country nationals or stateless applicants; requests for comparison with Eurodac data. Recast</a>	***I	<a href="#">2008/0242(COD)</a>