



European Asylum and Immigration Policy[1]

Developments in 2010

Executive Summary

1. The most important recent development in relation to the long-term future of EU asylum and immigration policy took place on 1st December 2009, when the Lisbon European Reform Treaty (now renamed the Treaty on the Functioning of the European Union or TFEU) entered into force. The TFEU fully preserves the UK and Irish opt-outs from asylum and immigration policy. However, decisions by the UK on whether or not to opt into new Commission proposals in these areas are now more problematic, given the TFEU's extension of Qualified Majority Voting to all legislation adopted in these areas. This means the UK and Ireland have to decide on whether or not to opt into new legislation without any guarantee that the eventual outcome will be what they want. The TFEU also gives the European Court of Justice (ECJ) full jurisdiction over challenges to Member States' implementation of EU asylum and immigration law without cases first having to go first to the highest national courts. Furthermore, the incorporation of the Charter of Fundamental Rights (CFR) allows the ECJ to rule that Member States have improperly implemented EU law in any policy area, if it breaches provisions of the CFR. (The first example of this came in their controversial judgement that UK insurers could not offer lower premiums to women drivers).

2. The European Commission continued through 2010 to pursue the three goals it had set (and which the Member States in the Council had endorsed) in 2008 – the creation of a European Common Asylum System (ECAS); making it easier for Member States to bring in particular categories of legal immigrant to meet shortages in their domestic workforces; and to support Member States' efforts to combat illegal immigration. None of the Commission's five legislative proposals to create ECAS had been adopted by the end of the year. Member States had particular difficulties with the Commission's proposals for an amended Reception Conditions Directive for Asylum Seekers, which were criticised as damaging for both the costs and efficiency of their processing of asylum applications. There were also strong objections to the Commission's proposal to amend the Dublin Mechanism (which allows Member States to transfer asylum seekers back to the first EU Member State which they had entered) by introducing a power for the Commission itself to suspend such transfers to help Member States which were unable to cope with the volume of asylum applications they were receiving. In December 2010 the Commission promised to introduce revised proposals on these two Directives to take account of Member States' concerns. The UK will have the right to decide whether or not to opt into these revised proposals when they appear

3. As regards facilitating legal immigration, the only new legislation adopted in 2010 was an amended version of a Directive on the rights and obligations of Long-term Residents in Member States, which covers inter alia their rights to move into and reside in other Member States. The Commission tabled proposals for two new Directives regarding Seasonal Workers and Intra-Corporate Transfers. The Council has completed its first reading of these two Directives. It also continued to work on the Single Permit Directive, which aims to create a single permit for work and residence for all categories of workers. However, the European Parliament rejected this proposal in December.

4. As regards, illegal immigration, the Council has established a common position on Commission proposals to establish a European Asylum Support Office and to strengthen the operations of the European Agency for the Management of Operational Cooperation at the External Borders of the EU (FRONTEX) first established in 2004.

5. Towards the end of the year serious concerns arose about the ability of the Greek authorities to cope with the huge number of illegal immigrants entering across the Greece - Turkey border (estimated to be 100,000 in 2010) and the asylum applications they presented. Since October FRONTEX has deployed 175 armed border control specialists to the area to help the Greek authorities cope and these will stay until March. However, at the end of December the Greek government announced plans to erect a 128 mile wall along its Turkish border as a barrier to the immigrants. Greece's treatment of these immigrants and the handling of their applications has been criticised by the UN, Amnesty International and Human Rights Watch. A number of Member States, including the UK and Netherlands, have already stopped using their right under the Dublin Regulation to send asylum applicants back to Greece. Early in 2011 the European Court of Human Rights in Strasbourg ruled in effect that under present conditions other Member States should not send asylum applicants back to Greece. These developments could present a serious threat to the Dublin Mechanism and, unless the Greek difficulties are satisfactorily resolved, might also affect the EU's policy of open borders between Member States. The willingness of the Schengen Member States to remove frontier controls depends on effective controls on illegal immigration at the external frontiers and a strong Dublin mechanism for assigning responsibility for handling asylum applications. These developments could affect the content of the Commission's promised new proposals on the Dublin Mechanism.

MAIN REPORT

Background

(a) What has been agreed so far

6. The development of EU policy and legislation on asylum and immigration between the adoption of the Treaty of Amsterdam in 1997 up to the end of 2009 is described in detail in [Briefing Papers 4.11](#) and [4.12](#) on the Migration Watch web-site. [Briefing paper 4.10](#) assesses the likely impact of the Lisbon European Reform Treaty on asylum and immigration policy. The Lisbon Treaty (now renamed the Treaty on the Functioning of the European Union (the TFEU)) came into force on 1st December 2009 after its adoption by all Member States. Paragraphs 26 to 27 below summarise the main effects of the TFEU on asylum and immigration and their consequences for the UK's exercise of its right to opt into or opt out of individual legislative proposals in these two areas.

7. By 2004 ([see Briefing Paper 4.11](#)), the EU had adopted a package of measures, based on minimum standards, dealing with the reception and treatment of asylum seekers, the qualifications and criteria for deciding whether to grant asylum status and an agreed method (consisting of the Dublin Regulation and the EURODAC fingerprint system) for determining which Member State should be responsible for assessing individual asylum applications. The Dublin Regulation was based on the principle that, except where an asylum seeker had particular links with a Member State, their application should be assessed by the Member State in which they had first entered the EU. The UK decided to opt into all these measures.

8. Up to 2009 ([see Briefing Paper 4.12](#)), only three relatively minor pieces of legislation had been adopted in relation to legal immigration, governing the admission of third country nationals for studies and pupil exchanges, for scientific research and for "highly qualified employment" (the so-called "Blue Card" Directive). The UK opted out of all these Directives.

9. On illegal immigration the EU adopted legislation requiring Member States to impose minimum criminal sanctions on various offences connected with illegal immigration and a Directive prohibiting EU employers

from employing illegal immigrants under penalty of “dissuasive” financial and criminal sanctions. (The UK opted out of this Directive also). A second major plank in the EU’s approach to illegal immigration is a harmonised approach to returning illegal immigrants to their countries of origin or transit. The EU has successfully negotiated a number of Readmission Agreements with neighbouring countries. The Council in 2008 also adopted a Directive setting out harmonised procedural requirements for repatriating illegal immigrants in a humane manner. The UK and Ireland opted out of this Directive, in the UK’s case because of concerns about restrictions put on the use of detention. Finally, in 2004 the EU established FRONTEX, which was tasked with coordinating operations policing the EU’s external borders, particularly in Member States faced with difficulties in immigration “hot spots”, but also acting as a centre of information and risk analysis. The UK government strongly supports and cooperates with FRONTEX, but cannot be a full member of it, because of our non-membership of the Schengen Area, our request for full membership having been turned down by both Council of Ministers and the ECJ.

(b) The Second phase of legislation

(i) Asylum

10. Beginning in 2008 the Commission put forward five proposals to move towards a uniform common policy on asylum known as the European Common Asylum Area (ECAS). This goal had been endorsed at a meeting of the EU Heads of State and Government (the European Council) in The Hague in December 2004 and has subsequently been set as the objective of EU asylum policy in the TFEU. The five proposals provide for:-

- An amended Directive on minimum standards for the reception of asylum seekers and applicants for international protection;
- An amended Dublin Regulation establishing the criteria and mechanisms for examining an asylum application lodged in one of the Member States;
- An amended EURODAC Regulation (the system for enabling Member States to use a common database of fingerprints to check whether an applicant for asylum had first entered the EU through another Member State;
- An amended Asylum Qualification Directive;
- An amended Long Term Residents Directive.

11. The first three of these proposals are described in some detail in the [Briefing Paper 4.11](#) on the Migration Watch website; the last two are summarised below. The five proposals would make three main changes to the earlier legislation, which they would replace. First, the scope of the Dublin and EURODAC regulations would be extended to cover other immigrants seeking international protection against forms of persecution not covered by the narrower definition of asylum seekers. Although the treatment of applicants for international protection was covered in some Directives in the first round of EU legislation, e.g. the Qualifications Directive ([see Briefing Paper 4.11](#)), such applicants could not be transferred to other Member States under the Dublin Regulation. Second, (and more controversially), the Commission proposed to give itself the power to suspend the transfer of asylum seekers/applicants for international protection to a particular Member State either if it judged that the government concerned was not complying with their obligations towards the applicants under the Reception Conditions or Qualifications Directives or if the Member State could not cope with the numbers of immigrants entering their territories.

12 Third, the amendments to the Reception Conditions and Qualification Directives aim to require Member States to follow uniform standards in the living standards of asylum/international protection applicants and in how their applications are processed, which are in some cases set at a higher level than those in the first generation Directives. The Commission justifies this approach on general human rights grounds, but also because they believe that the differences of interpretation adopted by Member States in implementing the first generation Directives create incentives for “secondary movements” by immigrants seeking access to

the Member States offering the most favourable treatment.

13. In addition to these five legislative proposals governing Member States' operation of asylum procedures the Commission also put forward in 2009 a proposal to establish a European Asylum Support Office (EASO) to provide help and advice to Member States facing difficulties in handling large numbers of asylum/international protection seekers.

14. The UK has opted into the proposals to amend the Dublin and EURODAC Regulations and into the Regulation setting up EASO but opted out of the new Reception Conditions Directive, the Long-Term Residents Directive and the Qualifications Directive. The decision to opt out of the Reception Conditions Directive was because the UK government considered that the Commission's proposals on the use of detention of applicants were too restrictive and that their proposals on the level of social security provision for applicants were too generous.

15. The UK opted out of the original Long Term Residents Directive (2004), which dealt only with the rights of already settled economic migrants. The new Directive grants both asylum seekers and applicants for other forms of international protection entitlement to long-term residents' status after 5 years, so that they will enjoy the same rights as other long-term third-country residents, including the right of free movement into other Member States and, under certain conditions, equal treatment with EU citizens in a wide range of economic and social areas. The new Qualifications Directive updates the minimum standards for the criteria determining the qualifications and status of applicants for asylum/other international protection and some of their entitlements for support. The main reasons put forward are to streamline Member States' screening applications (making it easier to reject abusive or ungrounded claims) and to incorporate changes made in human rights law by both the ECJ and the ECHR. The proposal also removes the previous discretion allowed to Member States to grant lower levels of social benefits to applicants for other forms of international protection. Access to education for both categories of applicant without available documentation of prior education is also made easier.

16. The Council of Ministers made relatively slow progress on all these proposals during 2010. The state of play at the end of the year was summarised in a Common Statement issued in December by Belgium with the support of the next four Presidencies (Hungary, Poland, Denmark and Cyprus). Only one of the five legislative proposals for the creation of the ECAS –viz the amended version of the Long Term Residents was adopted by the Council and the EP. The Council of Ministers also reached a "common position" at its first reading on acceptance of the Commission's proposal to establish the EASO, which is now under consideration by the EP. The Belgian Presidency also claim that on the Dublin and EURODAC Regulations and the Qualification Directive they had "been able to clarify to a large extent the Council position which allows for the discussions with the European Parliament to start in the first half of 2011."

17. The Belgian Presidency's Common Statement, however, makes it clear that there remain two major obstacles to an agreement on the whole ECAS package. First, a number of Member States had expressed concerns about the impact of the Reception Conditions Directive on the cost and efficiency of their asylum procedures. Second, there was significant opposition from Member States to introducing a suspension mechanism on the lines proposed by the Commission into the Dublin Regulation. The Belgian Presidency's Common Statement appears to divide Member States into two groups – those who were opposed to any suspension mechanism and those who believe that a compromise would have to be found.

18. In response to these problems the Commission announced at the November Council of Justice and Home Affairs Ministers that they were ready to make two moves to meet Member States' concerns on these two issues by putting forward:-

- An amended proposal of the Reception Conditions Directive in the first half of 2011, which would "offer an answer to the Member States' legitimate concerns regarding the costs and efficiency without lowering the level of protection" [i.e. of the asylum/international protection seekers];

- A presentation of a new “emergency” mechanism within the Dublin Regulation, which should accommodate Member States’ “wish to safeguard a strong Dublin system..... [and] allow the Council to have a greater influence on the decision”, with the period of any suspension being restricted in time and the new mechanism only being activated when a Member State is compliant with all EU asylum legislation and is facing extreme pressure due to unforeseen circumstances.

19. It is arguable that the Commission’s promise to amend its proposal on the suspension mechanism may need to be revisited as a result of events in Greece and in the European Court of Human Rights in December 2010 and January 2011. In the last quarter of 2010 serious concerns arose about the ability of the Greek authorities to cope with the huge number of illegal immigrants entering across the Greece – Turkey border (estimated to be 100,000 in 2010) and properly handle the asylum applications they presented. Since October FRONTEX has deployed 175 armed border control specialists to the area to help the Greek authorities cope and these will stay until March 2011. At the end of December the Greek government announced plans to erect a 128 mile long wall along its Turkish border as a barrier to immigrants.

20. Greece’s treatment of these immigrants and its handling of their applications has been criticised by the UN, Amnesty International and Human Rights Watch. A number of Member States, including the UK and Netherlands, have stopped using their right under the Dublin Regulation to send asylum applicants back to Greece. Early in 2011 the European Court of Human Rights (ECHR) in Strasbourg ruled in a case brought against Belgium that under present conditions Belgium should not send asylum applicants back to Greece. The ECHR’s judgement was based on criticisms of both the conditions under which asylum seekers were detained and the way in which their applications were handled by the Greek authorities. Press reports indicate that there are some 960 similar applications to the ECHR’s seeking to prevent other Member States, including the UK and the Netherlands from returning asylum seekers to Greece. In effect, the ECHR’s judgement appears to have imposed a suspension mechanism on the operation of the Dublin Regulation without any of the preconditions or restrictions envisaged in the Commission’s statement to the Council in November.

21. The UK government will have a second opportunity to decide whether to opt-in or out of the Commission’s revised proposals on the Dublin Regulation and the Reception Conditions Directive when these emerge. As was pointed out in paragraphs 91 – 98 of [Briefing Paper 4.11](#), there may be a problem if the UK wishes to opt out of the Reception Conditions Directive, but to opt into the revised Dublin Regulation, because the revised version of the Regulation now under discussion contains cross-references to the provisions in the revised Reception Conditions Directive (the limitations on the use of detention and the improved subsistence conditions), which led the UK to opt out of the latter. It is unclear whether the UK obtained any assurances on this point in last year’s negotiations.

Second Phase of Legislation (continued)

(ii) Illegal Immigration

22. During the second half of 2010 progress was made in negotiations on the Commission’s proposals to amend the FRONTEX Regulation and the Immigration Liaison Officers’ file. The original FRONTEX Regulation had already been amended in 2007 to allow the Agency to create and deploy Rapid Border Intervention Teams, since used for the first time in Greece last year (see paragraph 19 above). The latest proposal makes it easier for FRONTEX to acquire the equipment and manpower it needs, strengthens its role in planning and leading joint operations, and empowers it to offer technical assistance to third countries through deploying its own liaison officers. ***The UK and Ireland cannot opt into this Regulation, because they are not members of the Schengen Area.*** The UK remains supportive of any measures, which strengthen frontier controls on illegal immigration within the Schengen countries and participates in certain parts of the Schengen system, including its IT system. The EU had created a

network of Member States' immigration liaison officers in third countries through a Regulation adopted in 2004. The Commission's new proposal aims to promote better use of the information collected by this network.

Second Phase of Legislation (continued)

(iii) Legal Immigration

23. As noted in [Briefing Paper 4.12](#) on [Migration Watches website](#), one of the policy aims pursued by the Commission since 2005 has been to make it easier for Member States to admit certain categories of immigrant workers where these have particular skills or otherwise enable employers to fill gaps in the labour force. The reasons offered by the Commission for this policy are to promote the dynamism of the EU economy and to help those Member States facing large falls in the ratio of the working population to the inactive population. As well as facilitating the entry of selected groups of workers, the legislation also requires Member States to limit any discrimination in working conditions etc against immigrant workers compared with EU nationals. ***The UK has so far opted out of all the proposals put forward in this area, including the so-called "Blue Card" Directive for highly qualified workers adopted in 2009.***

24. During 2010 the Commission put forward two new draft Directives, which aim to facilitate the entry of Intra Corporate Transferees and Seasonal Workers. The Corporate Transferees Directive is justified on the grounds that it enabling multi-national companies to bring in specialised staff will help improve the dynamism of the EU economy. In the case of Seasonal Workers, apart from the fact that the need for immigrant seasonal workers is widespread throughout the EU, the Commission argues that EU legislation will help to reduce both the use of illegal immigrants and illegal overstaying by legal immigrants. In addition the Directive aims to prevent immigrant seasonal workers getting worse working conditions than EU nationals. The main condition imposed on the admission of these two categories of workers is that the length of their initial contracts has to be restricted to a maximum of 3 years for intra-corporate transferees and six months for seasonal workers. The intra corporate transferees also have to demonstrate that they have the right qualifications and have worked within the relevant company group for a at least the previous 12 months.

25. The Belgian Presidency's end-year Common Statement reports that the Council reached a common position on its first reading of these two proposals. Work also continued on the Commission's revised 2009 proposal for a Single Work and Residence Permit, covering all categories of worker, the earlier history of which is covered in [Briefing Paper 4.12](#). However, in December 2010 the EP rejected this proposal entirely. The UK opted out of all three of these Directives.

Impact of the entry into force of the TFEU

26. The likely impact of the TFEU on the development of EU policy on asylum and immigration is described in detail in [Briefing Paper 4.10](#). In brief, the TFEU fully preserves the UK and Irish opt-outs from asylum and immigration legislation proposals and indeed extends them to cover all new legislation put forward under the EU's extensive powers on police cooperation and criminal and civil law as part of the "The Area of Freedom, Justice and Home Affairs". However, HMG's decisions on whether or not to opt into new legislation new Commission proposals in all these areas will now be more problematic, because the TFEU extends Qualified Majority Voting to all such legislation, including amendments to earlier legislation. This means that the UK and Ireland will have to decide on whether or not to opt into new legislation without any guarantee that they will get what they want.

27. The TFEU makes two other changes relevant to asylum and immigration. First, it gives the ECJ full jurisdiction over challenges to EU legislation or Member States' implementation of it without the cases having to go to the highest national courts first. Second, the incorporation of the Charter of Fundamental Rights (CFR) allows the ECJ to rule that Member States have improperly implemented EU law in any

policy area, if it breaches provisions of the CFR. The first example of the broad way in which the ECJ is prepared to apply the CFR came in their recent controversial judgement that UK insurers can no longer offer lower premiums to women for their car insurance on the grounds that this breaches the CFR provisions that there should be no discrimination on grounds of gender.

Overall Assessment

28. As noted above, there was slow progress in the EU's negotiations on the second phase of legislation to create a Common European Asylum System and to facilitate legal immigration of selected groups of workers.

29. The UK's main interest in these negotiations, as shown by HMG's decisions to opt into or out of the Commission's proposals, is to maintain its participation in the Dublin Mechanism, including EURODAC. The UK benefits from the current Dublin Mechanism, because it enables the immigration authorities to send back some asylum applicants to the EU Member State in which they first set foot in EU territory. The proposed amended version would extend the power to send back applicants for other forms of international protection, who have come from another Member State.

30. The negotiations on the revised Dublin Mechanism have, however, been complicated by the recent ECHR ruling relating to deficiencies in the Greek authorities' treatment of asylum applicants and their applications, which currently prevents Member States from sending back asylum applicants, who first entered EU territory through Greece, to the Greek authorities. The EU can and probably will resolve this problem by putting pressure on and helping Greece to clean up its act. But the likely consequence is that any revised Dublin Mechanism will have to contain a suspension clause of a kind which the UK and some other Member States have been resisting in order to deal with any future situations similar to that which has arisen in Greece. Pressure may also increase for a more general "sharing-out" of the refugee burden both because of the Greek problem and because of the possible consequences of this year's events in North Africa.

31. ***The UK opted out of the proposed revision of the Reception Conditions Directive***, because it wished to retain its current detention system and levels of social care payment. As noted in paragraph 21 above ([see also Briefing Paper 4.11](#)), the UK could face a problem, because the proposed amendments in the Dublin Mechanism Regulation contain cross-references to the provisions in the Reception Conditions Directive to which the UK objects. The UK would therefore seem to need to get a Qualified Majority of other Member States to agree to delete these cross-references if it is to protect these policies.

32. The situation on these two areas of difficulty should become clearer when the Commission presents its revised proposals both on the suspension clause in the Dublin Mechanism and on the Reception Conditions Directive.

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6 March, 2011

NOTES

- 1 This report was prepared for Migrationwatch by a consultant, Mr Geoffrey Fitchew, who was formerly a senior Treasury official, working on European and international financial questions and later Director General for Financial Institutions and Company Law in the European Commission (1986 to 1993). Subsequently, he was Head of the European Secretariat in the Cabinet Office, dealing with all aspects of European policy. He is strongly in favour of Britain's continued membership of the EU, but was a supporter of the campaign against Britain adopting the Euro. He also supported the campaign for a referendum on the Lisbon Treaty.