Opinion of the European Economic and Social Committee on the ‘Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person’


(2009/C 317/22)

Rapporteur: Ms LE NOUAIL-MARLIÈRE

On 1 April 2009, the Council decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the

Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)


The Section for Employment, Social Affairs and Citizenship, which was responsible for preparing the Committee’s work on the subject, adopted its opinion on 25 June 2009. The rapporteur was Ms Le Nouail-Marlière.

At its 455th plenary session, held on 15 and 16 July 2009 (meeting of 16 July), the European Economic and Social Committee adopted the following opinion by 154 votes to six, with seven abstentions.

1. Conclusions

1.1 The Committee welcomes the Commission’s plans for developing the ‘Dublin II’ regulation, in that it should make the system more effective and ensure that the procedure is applied properly and that the rights of anyone needing international protection are upheld. It should also respond to the situations experienced by those Member States that are lacking in reception capacity and are thus unable to ensure the necessary level of protection.

1.2 The EESC welcomes and supports the bid to secure real access to the asylum application procedure and the obligation on every responsible Member State to make a complete evaluation of the protection needs of asylum seekers transferred to its territory.

1.3 The Committee notes the progress made in the Commission proposal when it comes to securing higher protection standards, in particular by means of improved information for asylum seekers on progress in the procedure for examining their requests. Certain doubts remain however regarding linguistic matters and the language in which information on the status of their request or transfer is provided. Indeed, since the information constitutes notification and brings with it rights of appeal and deadlines, persons seeking international protection should always be notified in their mother tongue or a language they acknowledge understanding, even if it involves using an accredited interpreter or legal translation, and a defence counsel should be appointed automatically by the courts or chosen by the applicant himself.

1.4 Persons seeking international protection should have automatic access to free legal defence and assistance.

1.5 The Committee welcomes the inclusion of the humanitarian clauses under discretionary clauses but would wish the implementation framework to be specified so that these discretionary and sovereignty clauses cannot be transformed to work against the interests and protection of asylum seekers.

1.6 The Committee emphasises the need always to examine the situation of each applicant individually, also when determining which Member State is responsible for the exhaustive examination of the application, and to consider subsidiary protection if and only if the conditions for the first convention status (refugee) are not met.

1.7 The Committee reiterates its recommendation to Member States and the European Union not to use lists of so-called safe third countries until the establishment of a common list, used by all Member States, and submitted to human rights NGOs, the European Parliament, and national parliaments, especially at the stage of determining which Member State is responsible for examining the application.

1.8 The Committee regrets that the detention of asylum seekers has not been declared an unacceptable practice unless and only unless this has been ordered by a court of law.

1.9 In accordance with the case-law of the European Court of Human Rights, the Committee would like appeals to be systematically considered to have suspensive effect in cases of forced return or so-called voluntary return.
1.10 The Committee advocates putting the experience of human rights NGOs to good use by giving them access to persons seeking international protection and giving asylum seekers access to assistance, and allowing Member States to harness their expertise, possibly involving them in training programmes for officials responsible for adjudicating asylum and protection claims, also during the crucial stage of determining the Member State responsible, and to take the local dimension into account in order to enable local and regional authorities to obtain assistance and support from the competent NGOs.

1.11 The Committee recommends that Member States step up their activities against criminals engaged in human trafficking; ratify international instruments to combat crime, including the two Additional Protocols to the United Nations Convention against Transnational Organised Crime; strike from their lists of safe third countries, countries that have failed to ratify these instruments and the Geneva Convention for the protection of refugees; and also ensure the protection and exemption from prosecution of victims of human trafficking through greater respect for their right to international protection when they seek asylum or protection, and to do so as soon as public officials have knowledge of the situation; and to ensure that they are trained accordingly.

1.12 Confidentiality and management of personal data

— The EESC welcomes proposals to ensure greater data security in Eurodac (COM(2008) 823-3), including the insertion of obligations for each Member State to put in place a security plan designed physically to protect data, to deny access for unauthorised persons and to prevent, inter alia, the unauthorised use, reading, copying or input of data (1). The particular vulnerability of asylum seekers to dangers which could result from the publication of data demand high standards of confidentiality and security.

— Other provisions aimed at ensuring the ‘more efficient management of deletions’ are also supported by the Committee, on the grounds that they will ensure that sensitive information is not retained in the database longer than necessary, notably after the issuance of a residence permit or the individual’s departure from the Member States.

1.13 Protection of refugees in neighbouring third countries of the EU

The Committee urges the EU not to delegate the case-by-case examination of asylum cases to countries that have not ratified the international Convention for the protection of refugees (2); or its additional protocol (3).

2. Introduction and gist of the proposal

2.1 The Common European Asylum System (CEAS) has developed in two separate phases. The first of these began at the Tampere European Council (1999), following the entry into force of the Treaty of Amsterdam, which gave an EU dimension to immigration and asylum policies. This first phase ended in 2005.

2.2 The first phase involved developing a number of asylum directives and laid the foundations for a certain amount of cooperation between Member States.

2.3 The second phase of building the CEAS began with the Hague Programme (adopted in November 2004), which sets 2010 as the deadline for achieving its main objectives, by adopting instruments and measures aimed at greater harmonisation and an improvement in CEAS protection standards.

2.4 As a preliminary to the adoption of new initiatives, in 2007 the Commission produced a Green Paper (4), which was submitted to the various European institutions, to the Member States and to civil society (5). The Commission then used this as a basis for its policy plan on asylum. The latter lists the measures that the Commission intends to take in order to implement the second phase of the CEAS.

2.5 Council Regulation (EC) No 343/2003 of 18 February 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 (hereafter referred to as the Dublin Regulation (6)), the subject of the Commission’s proposed recast, was the focus of a Committee opinion (7).

2.6 The main aim of the proposal is to increase the system’s efficiency and to ensure higher standards of protection for persons falling under the Dublin procedure. The latter governs the process of determining which Member State is responsible for the individual examination of a request for asylum, subsidiary protection or international protection within the meaning of the 1965 Geneva Convention, the 1967 New York Protocol and the Council directives on ‘reception’ (2003/9/EC of 27 January 2003) and ‘qualification’ (2004/83/EC of 29 April 2004), which are also in the process of being recast. In parallel, the proposal also aims to find better ways of addressing situations of particular pressure on Member States’ reception facilities.

(4) See the EESC opinion of 20 March 2002 on the Proposal for a Regulation of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national, Rapporteur: Mr Sharma (OJ C 125, 27.5.2002).

3. General comments

3.1 The proposal, which ties into with a package of measures announced as part of the policy plan on asylum implementing the CEAS (9), is one element in the harmonisation that the Committee has been hoping for and takes into account the loopholes highlighted during the Green Paper consultation on the future system. Nevertheless, it clearly does not review the principle whereby responsibility for examining the asylum application lies with the Member State that played the key role regarding entry or residence, apart from in exceptional cases. The Commission itself proposes more substantial changes but does not give a timetable (see Summary of the Impact Assessment SEC (2008) 2962/2963-2, third paragraph of the chapter on monitoring and evaluation), planning to base determination of responsibility on the place where a request is made (see COM(2008) 820, Explanatory Memorandum, Paragraph 3 of Point 2: Consultation of interested parties).

3.2 The Committee notes that the stance taken by the Commission appears to be that defended by the majority of the Member States. It recalls however that its own firmly stated position on this issue since 2001 has been that asylum seekers should be able to choose the country they wish to apply to, ‘taking account of the cultural and social factors (…) which are crucial for faster integration’ (10). It would also note that with regard to the future CEAS (10) its stance has the support of numerous civil society organisations and also of the UNHCR.

3.3 Reservations regarding this principle aside, the Committee approves of the fact that a new procedure is planned in order to suspend Dublin transfers when the responsible Member State concerned would be subject to additional pressure.

3.4 The Committee notes that these measures reflect the intention to implement better legal and procedural safeguards with a view to upholding the fundamental rights of asylum seekers.

3.5 The Committee regrets that the detention of asylum seekers has not been declared an unacceptable practice – except where it has been legally established that the asylum seeker has fraudulent or criminal intentions. Detention is envisaged only for so-called ‘exceptional’ cases, but the criteria leave the Member States concerned with excessive leeway and oblige those defending asylum seekers to go through many lengthy procedures.

3.6 The EESC approves of the confirmation of the principle of the right to appeal against any decision, particularly those that would lead to a ‘transfer’. It believes that these appeals should be considered to have ‘suspendable’ effect so as to ensure that they are fully effective in securing rights, in accordance with the case-law of the European Court of Human Rights.

(9) See in particular:
— the EESC Opinion of 20 March 2002 on the Proposal for a Council Regulation 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 [Dublin II], (COM(2001) 447 final), rapporteur: Mr Sharma (OJ C 125, 27.5.2002, pp. 28–31).
4. Specific comments

4.1 On the recitals:

4.1.1 On the family unit (12): the joint treatment of requests from members of a single family should not only aim to ensure that ‘the members of one family are not separated’, but also aim to secure family reunification for people seeking international protection, while upholding the autonomous rights of each asylum seeker, and particularly those of women.

4.1.2 The EESC strongly supports the proposal that any Member State should be able to derogate from the responsibility criteria, particularly for humanitarian reasons (14).

4.1.3 The right of appeal with regard to transfers to the Member State responsible (16, 17) should be qualified as having suspensive effect, so as not to risk contradicting its purpose (11).

4.1.4 In line with the Geneva Convention, asylum seekers should be placed in detention (18) only under ‘exceptional circumstances’. However, these exceptional circumstances are not clearly defined in the recitals of the proposed text. The Committee is of view that it should be possible to place an asylum seeker in detention only if their request is made after they have been notified that a removal order has been served.

4.2 On subject matter and definitions (Chapter I, Articles 1 and 2)

4.2.1 The Committee would question the relevance of having included ‘risk of absconding’ (Article 2 (l)) in the series of definitions, whereas this concept is used later in the text of the recast of the regulation for the purposes of determining ‘detention’ cases. At all events, there is a need to restrict the number of ‘objective criteria defined by law’ pointing to the risk that a person concerned by a transfer decision is liable to abscond: at the same time, it should be specified that these grounds must be decided by a competent court of law in compliance with the right to a defence, as set out in the Convention for the Protection of Human Rights and Fundamental Freedoms.

4.3 On general principles and safeguards (Chapter II, Articles 3 to 6)

The right to information

4.3.1 Asylum seekers should be informed of their right to ‘challenge a transfer decision’ and be given access to information on the means of doing that; they should not simply be informed that the possibility exists (Article 4 (1)(e)).

4.3.2 The Committee considers that stating simply that information should be ‘provided in writing in a language that the applicant is reasonably supposed to understand’ gives discretionary power to the authorities’ representatives, whereas there is no guarantee that they have sufficient linguistic skills to exercise it (Article 4.2). It should be specified that the information must be given in a language that the person concerned acknowledges understanding.

Guarantees for minors

4.3.3 Whereas the ‘best interests of the child’ must govern all procedures (Article 6 (1)), it should be stated expressly that this is in line with Article 3 (1) of the International Convention on the Rights of the Child, so as to make this consideration legally irrevocable in a court of law.

Dependent relatives (Article 11 (1))

4.3.4 In the interests of consistency, the expression ‘asylum seeker’ should be replaced by ‘applicant for international protection’.

4.3.5 The fact that the applicant’s desire must be expressed ‘in writing’ could restrict applicants’ capacity to express themselves, going against the spirit of the text. It would be more correct to specify that this request may be made in any form that enables the authorities to register it (in writing, in an interview or on a questionnaire).

4.3.6 The Committee agrees that any ‘decision [by the Member State requested to take charge] refusing the request shall state the reasons on which it is based’ (Article 17 (2) paragraph 3). It believes that it should also be specified that in the absence of a response within a time limit of two months, the requested Member State should become responsible for examining the application.

On discretionary clauses (Chapter IV, Article 17)

4.3.7 The Committee urges Member States to make the request to take back the person concerned (Article 23(2)) as soon as possible, and always within the deadline recommended by the Commission (two months for Eurodac cases and three months for others).

On procedures for taking charge and taking back (Chapter VI, Articles 20 to 31)

4.3.8 If the intention is for the applicant to have as much information as possible and that they should understand this information, it is not enough to provide notification in ‘a language which the person is reasonably supposed to understand’ (Article 25 (1)). As is the case for Article 4 (2), the Committee would like it to be specified that notification should be made in a language that the applicant acknowledges understanding.

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It should be specified that appeals have suspensive effect (Articles 25 (2) and 26 (1)), as mentioned above (in relation to recitals 16 and 17):

4.3.9 It seems contradictory to promote the right to an appeal (with suspensive effect) for an applicant concerned by a transfer decision, while at the same time stating that the person concerned may not be authorised to remain in the country pending the outcome of his or her appeal or request for a review (Articles 26 (3) and 26(4)).

4.3.10 In order to support the principle enshrined in the Geneva Convention, according to which States may not hold people in detention simply because they have requested international protection (Article 27 (1)), the Committee would suggest that Article 27 (3) should be placed before Article 27 (2) in order to highlight alternatives to detention.

4.3.11 The Committee approves the explicit statement to the effect that the detention of minors may only be considered if they are accompanied (Article 27 (10)).


The President
of the European Economic and Social Committee
Mario Sepi